No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) and its progeny required the Sixth Circuit to remand the case to the agency after determining that the agency had applied the wrong legal standards.

2. Whether *Collins v. Yellen*, 141 S. Ct. 1761 (2021) requires separation-of-powers challengers to offer concrete proof of prejudice as a prerequisite to courts resolving separation-of-powers challenges to removal restrictions on the merits.

PARTIES TO THE PROCEEDING

Petitioner, Harry C. Calcutt, III, was the petitioner in the court of appeals.

Respondent, Federal Deposit Insurance Corporation, was the respondent in the court of appeals.

TABLE OF CONTENTS

QUESTIONS PRESENTED I
PARTIES TO THE PROCEEDING II
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT 2
A. Factual Background 5
B. FDIC Enforcement Proceedings 8
C. Proceedings Below 10
REASONS FOR GRANTING THE PETITION 14
I. The Sixth Circuit's No-Remand Ruling Warrants This Court's Review 14
A. The Sixth Circuit's No-Remand Ruling Is Egregiously Wrong 15
B. The Sixth Circuit's No-Remand Ruling Conflicts with Every Other Circuit's Precedents 19
C. The Remand Issue is Important, Constantly Recurs, and Justifies Review 22
II. The Sixth Circuit's Proof-of-Prejudice Requirement for Separation-of-Powers Challenges Also Warrants Review 24
A. The Decision Below Misinterprets *Collins* to Effectively Bar Separation-of-Powers Challenges 24
B. The Sixth Circuit's Holding Will Have Far-Reaching Consequences 30
CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases:

Bd. of Govs., FRS v. Mcorp Fin., Inc.,
502 U.S. 32 (1991) 31
Bhatti v. FHFA, 15 F.4th 848 (8th Cir. 2021) 29
Biestek v. Berryhill, 139 S. Ct. 1148 (2019) 18
BizCapital Bus. & Indus. Dev. Corp. v. Comptroller of Currency, 467 F.3d 871 (5th Cir. 2006) 20
Bowsher v. Synar, 478 714 (1986) 26
Chapman v. California, 386 U.S. 18 (1967) 26
Citizens to Preserve Overton Park, Inc. v. Volpe,
401 U.S. 402 (1971) 27
Cmty. Fin. Servs. Assoc. of Am. v. CFPB,
51 F.4th 616 (2022) 28
Collins v. Lew,
2022 WL 17170955 (S.D. Tex. Nov. 21, 2022) 28
Collins v. Yellen,
141 S. Ct. 1761 (2021) 4, 13-14, 24-29
Collins v. Yellen, 27 F.4th 1068 (5th Cir. 2022) 29
Crawford v. Kijakazi,
2022 WL 4477705 (W.D.N.C. Sept. 26, 2022) 28
De la Fuente v. FDIC,
332 F.3d 1208 (9th Cir. 2003) 21
Doolittle v. Nat'l Credit Union Ass'n,
992 F.2d 1531 (11th Cir. 1993) 21
FEC v. Akins, 524 U.S. 11 (1998) 18
Fed. Power Comm'n. v. Idaho Power Co.,
344 U.S. 17 (1952) 16
Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014) .. 20
Free Enter. Fund v. PCAOB,
561 U.S. 477 (2010) 5, 25
Freytag v. Comm'r, 501 U.S. 868 (1991) 30

Page

Cases—continued:

Fritog v. Kijakazi,
2022 WL 4464849 (W.D.N.C. Sept. 26, 2022) 28
Golan v. Saada, 142 S. Ct. 1880 (2022) 17
Gonzales v. Thomas,
547 U.S. 183 (2006) (per curiam)............... 16-17, 23
Gui Cun Liu v. Ashcroft,
372 F.3d 529 (3d Cir. 2004) 20
Gurung v. Barr, 929 F.3d 56 (2d Cir. 2019)............... 20
INS v. Orlando Ventura,
537 U.S. 12 (2002) (per curiam)....................... 17, 23
Integrity Advance, LLC v. CFPB, 48 F.4th 1161
(10th Cir. 2022) 29
Jarkesy v. SEC, 34 F.4d 446, 464 (5th Cir. 2022)...... 13
Julie P. v. Comm'r,
2022 WL 2352454 (S.D. Ohio June 30, 2022) 28
Karen H. v. Comm'r,
2022 WL 3151894 (S.D. Ohio Aug. 8, 2022) 28
Kaufman v. Kijakazi,
32 F.4th 843 (9th Cir. 2022) 29
Kelli H. v. Comm'r,
2022 WL 2816269 (S.D. Ohio July 19, 2022) 28
Lisa C. v. Comm'r,
2022 WL 3040081 (S.D. Ohio Aug. 2, 2022) 28
Lorenzo v. SEC,
872 F.3d 578 (D.C. Cir. 2017) 22, 30
Lucia v. SEC, 138 S. Ct. 2044 (2018)............................ 9
Mast v. Comm'r,
2022 WL 17717413 (N.D. Ohio Oct. 12, 2022)...... 28
Me. Med. Ctr. v. Burwell,
841 F.3d 10 (1st Cir. 2016)................................19-20
Miami Tribe of Okla. v. United States,
656 F.3d 1129 (10th Cir. 2011) 20-21

Page

Cases—continued:

Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., 554 U.S. 527 (2008) 17, 18
Natalie S. v. Comm'r, 2022 WL 3593098 (S.D. Ohio Aug. 23, 2022) 28
Negusie v. Holder, 555 U.S. 511 (2009) 19
NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969) 18-19
Osmani v. Garland, 24 F.4th 617 (7th Cir. 2022) 20
Overstreet v. Comm'r, 2022 WL 15524729 (N.D. Ohio Oct. 11, 2022) 28
Palavra v. INS, 287 F.3d 690 (8th Cir. 2022) 20
Perez v. Cuccinelli, 949 F.3d 865 (4th Cir. 2020) 20
Port of Portland v. United States, 408 U.S. 811 (1972) 18
PPG Indus., Inc. v. United States, 52 F.3d 363 (D.C. Cir. 1995) 20
Roland v. Comm'r, 2022 WL 17081339 (N.D. Ohio Nov. 18, 2022) 28
Roliff v. Comm'r, 2022 WL 17718327 (N.D. Ohio Oct. 31, 2022) 28
SEC v. Chenery Corp., 318 U.S. 80 (1943) 2-4, 14, 16, 19, 22, 23
SEC v. Chenery Corp., 332 U.S. 194 (1947) 16
Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) 23, 25
Sharon M. v. Comm'r, 2022 WL 2948946 (S.D. Ohio July 26, 2022) 28
Smith v. Berryhill, 139 S. Ct. 1765 (2019) 16
Sure- Tan, Inc. v. NLRB, 467 U.S. 883 (1984) 17
United States v. Schwarzbaum, 24 F.4th 1355 (11th Cir. 2022) 21

Page

Cases—continued:

United Video, Inc. v. FCC,
890 F.2d 1173 (D.C. Cir. 1989) 18, 22

Statutes and Regulations:

5 U.S.C.
§ 706(2)(B) 30
§ 706(2)(E) 17
§ 1202(d) 6
§ 7521(a) 6
12 U.S.C.
§ 242 6
§ 1752a(c) 6
§ 1812(a)(1) 5
§ 1812(c) 5
§ 1815 5
§ 1817 5
§ 1818 5
§ 1818 note 6
§ 1818(i)(1) 30
§ 1818(i)(2) 9
§ 1818(a)-(b), (e), (i) 6
§ 1818(e) 6
§ 1818(e)(1) 9, 19
§ 1818(e)(1)(A) 10
§ 1818(e)(1)(A)(ii) 15
§ 1818(e)(1)(B) 11
§ 1818(e)(7)(B) 25
§ 1818(n) 5
§ 1820(b) 5
28 U.S.C. § 1254(1) 2

Page

Statutes and Regulations—continued:

12 C.F.R.
§§ 308.1-308.41 5
§ 308.5 5
§ 308.38 5

Miscellaneous:

FDIC Formal & Informal Enf't Actions Manual
(June 2022) 6, 25

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harry C. Calcutt, III, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet.App.1a-126a) is available at 37 F.4th 293. The decisions of the Federal Deposit Insurance Corporation Board (Pet.App.129a-186a) and the Administrative Law Judge (Pet.App.187a-448a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 15, 2022. On October 21, 2022, Justice Kavanaugh extended the time for filing a petition for a writ

of certiorari until January 30, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

In administrative law as elsewhere, with great power comes great responsibility. Agencies can impose career-ending bans and ruinous monetary penalties through in-house agency proceedings. To wield their immense authority, agencies must follow the law and operate within our constitutional structure.

Yet in this case, the Federal Deposit Insurance Corporation (FDIC) imposed a $125,000 penalty and a lifetime ban on petitioner—the death penalty of administrative sanctions—in an order that the Sixth Circuit acknowledged is riddled with serious errors. Not only that, the FDIC arrived at that decision through a process defying basic constitutional principles of accountability to the President. Even the government agrees that the proper step forward is a remand for the agency to redo its analysis. But the Sixth Circuit, in a 2-1 decision, remarkably refused to remand and took it upon itself to scour the record to find alternate grounds for affirmance.

This case manifestly satisfies this Court's criteria for review and may even warrant summary reversal, as underscored by this Court's recall of the Sixth Circuit's mandate and grant of a stay pending the disposition of this petition. No. 22A255, Order Granting Application for Stay (Sept. 29, 2022). The Sixth Circuit's decision opens a clear circuit split and defies this Court's precedents.

First, this Court has long held that *agencies* must adequately justify their decisions under the correct legal standards. When agencies misinterpret the law, courts cannot simply redo the analysis themselves. *SEC v. Chenery Corp.* (*Chenery I*), 318 U.S. 80, 94 (1943). Thus, when an agency order rests on legal error, every other

circuit vacates and remands for the agency to apply the right legal rule to the facts.

But the Sixth Circuit assumed for itself the power to apply the right legal standard and step into the agency's shoes to decide whether the original penalty should still be imposed. Pet.App.70a-73a. The majority thus upheld an FDIC order barring petitioner Harry Calcutt from the banking industry for life despite faulting the FDIC's prolific legal errors, based on the majority's own view of the record. Even the government now condemns that result.

As Judge Murphy's dissent observed, the majority's "inexplicable" no-remand approach defies a long line of this Court's *Chenery* precedents, splits with other circuits, and perversely rewards slipshod agency decision-making. Pet.App.125a-126a. As the government acknowledges, this Court has summarily reversed courts of appeals for similarly rushing to judgment and preemptively filling in the agency's blanks. FDIC Stay Resp. 13. And, as the government concedes, other circuits apply the opposite approach and would have remanded this case. FDIC Stay Resp. 13-14. The Sixth Circuit's decision below "invite[s] the FDIC and other agencies to cite it as the administrative law equivalent of a 'the dog-ate-my-homework' excuse to justify sloppy agency decisions." Ams. For Prosperity Reh'g Br. 2, C.A. Dkt. 73. Indeed, the government recognized the decision below was incorrect and agreed a stay and a recall of the mandate were warranted. FDIC Stay Resp. 12-16.

Second, the decision below defies another seminal separation-of-powers rule: that the President must retain control over removal of executive decisionmakers. That rule is particularly important for many independent agencies like the FDIC, where the President is restricted in his ability to remove the agency's heads at will. Moreover,

the FDIC's administrative-law judges—its frontline adjudicators in career-threatening enforcement proceedings—are unaccountable to anyone because they are insulated by at least four layers of tenure protections.

Yet, the Sixth Circuit's decision effectively forecloses constitutional challenges to the structure of independent agencies by requiring challengers to prove that the President's inability to remove subordinates inflicted "concrete" prejudice—an all-but-insurmountable standard. Pet.App.36a. That far-reaching holding gravely misinterprets this Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), and would give unconstitutionally structured agencies a perpetual free pass.

This Court should correct the Sixth Circuit's misreading of *Collins* no matter what. That ruling is already dismantling separation-of-powers challenges and will chill suits going forward. Even if the Court were to reverse the panel's defiance of *Chenery*, the fight over separation-of-powers remedies will continue if the FDIC reimposes penalties on Mr. Calcutt. And, unlike the FTC and SEC, the FDIC's judicial-review provision expressly bars pre-enforcement challenges to the FDIC's structure—so remedial questions are inescapable. Remands should not reward bad behavior. Agencies should not get to force litigants to suffer through repeated, expensive proceedings in front of unconstitutionally structured agencies, then claim litigants can never challenge the agency's underlying constitutional defects.

Only this Court's intervention can restore uniformity and ensure fidelity to this Court's precedents on these two questions of paramount importance to administrative law and separation of powers. The Sixth Circuit's decision cries out for plenary review or even summary reversal.

A. Factual Background

1. The FDIC is an independent agency headed by a five-member Board. The FDIC's Board comprises three presidentially appointed and Senate-confirmed members, plus the Director of the Consumer Financial Protection Bureau and the Comptroller of the Currency. 12 U.S.C. § 1812(a)(1). The Board's three appointed members serve fixed-length terms, *id.* § 1812(c), which courts have treated as precluding presidential removal except for cause. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 487 (2010) (assuming for-cause removal for fixed-term SEC Commissioners).

The FDIC wields significant authority over the nation's banks, including by providing deposit insurance and examining insured banks for safety and soundness. 12 U.S.C. §§ 1815, 1817, 1818. The FDIC can investigate banks' compliance with laws and regulations. *Id.* §§ 1817, 1820(b), 1818(n). The FDIC also exercises wide-ranging enforcement authority over banks and bankers, and may issue cease and desist orders, assess civil money penalties, impose removal and prohibition orders, and terminate federal deposit insurance. *Id.* § 1818. To initiate such enforcement proceedings, the Board acts like a prosecutor, issuing a complaint following an enforcement investigation (here, the "Notice of Intention to Remove from Office and Prohibit from Further Participation").

Once enforcement proceedings begin, parties proceed before an administrative law judge (ALJ). *See* 12 C.F.R. § 308.5. FDIC ALJs are inferior officers of the United States with sweeping authority to conduct enforcement proceedings. The ALJs have "all powers necessary to conduct [a] proceeding" similar to a civil trial, including discovery. *Id.*; *see id.* §§ 308.1-308.41. After presiding over an adversarial hearing, ALJs recommend findings of fact and conclusions of law. *Id.* § 308.38.

The FDIC shares its two ALJs with three other agencies—the Office of the Comptroller, Federal Reserve, and National Credit Union Administration (NCUA). The ALJ-sharing arrangement proceeds through the Office of Financial Institution Adjudication (OFIA), an interagency body that oversees these ALJs. *See* 12 U.S.C. § 1818 note. All four agencies must sign off on removing ALJs. *See* Pet.App.9a.

These ALJs are removable only for cause. *See* 5 U.S.C. § 7521(a). Most actors who must sign off on an ALJ's removal are removable only for cause, too. Start with the agencies that must initiate removal: Three of the FDIC's five Board members have been deemed removable only for cause; Federal Reserve Governors are removable only for cause, 12 U.S.C. § 242; and NCUA members serve fixed terms equated with for-cause removal, *id.* § 1752a(c). Plus, the members of the MSPB—the agency that must ultimately find "good cause" to remove ALJs—are also removable "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

After the ALJ decision, the case returns to the Board, which can render final decisions awarding both legal and equitable relief. *See* 12 U.S.C. § 1818(a)-(b), (e), (i). The Board enjoys case-by-case discretion over sanctions ranging from cease-and-desist orders to monetary penalties. Most severe, the Board may bar a banker from the industry. *Id.* § 1818(e); FDIC Formal & Informal Enf't Actions Manual 6-1 to 6-4, 6-12 (June 2022).

2. Mr. Calcutt has enjoyed a 30-year banking career. From 2000 to 2013, he was CEO of Northwestern Bank, a highly regarded Michigan community bank. Pet.App.209a-210a. In 2014, a competitor bought Northwestern at a substantial premium, reflecting Northwestern's secure management and goodwill. Ex. J to Pet'r's

Mot. to Stay, at 3, C.A., Dkt. 7. Mr. Calcutt is now Chairman of State Savings Bank, a profitable and well-capitalized community bank, and its holding company, CS Bancorp. *Id.* at 1.

In August 2013, the FDIC issued a Notice of Intent to permanently bar Mr. Calcutt from the industry based on his alleged mishandling of a troubled lending relationship at Northwestern during the Great Recession. Pet.App.17a. Northwestern had extended loans to the Nielson Entities, a group of family-owned businesses with oil and real estate interests. Pet.App.10a. By 2009, the Nielson Entities owed Northwestern about $38 million—a fraction of Northwestern's $800 million lending portfolio and about half of its core capital (i.e., the bank's best, most available capital to cover defaults). Pet.App.10a. Then, the Nielsons informed Northwestern that they could not cover debt payments due to the Great Recession, and in September 2009, ceased repaying all loans. Pet.App.12a.

Northwestern attempted to salvage the situation by engaging in the "Bedrock Transaction," under which Northwestern would renew the Nielsons' loans for one year and disburse a new $760,000 loan to a Nielson Entity to fund debt service for several months. Pet.App.12a-13a. In return, the Nielsons offered additional collateral and to bring all past-due loans current by paying $600,000 cash that another Nielson Entity had pledged as collateral for other loans. Pet.App.13a.

Northwestern's senior management testified that they believed the Transaction was in Northwestern's best interest. Pet.App.231a-232a, 294a-295a. And Mr. Calcutt—who approved the Transaction alongside other senior managers—testified that he believed that it provided "time in [the] hope that [the Nielsons] would . . . pay off some of the[] loans" when the economy improved "or sell

off the underlying collateral . . . and use the proceeds to pay the loan[s] off." C.A. A576.

The Transaction stabilized the lending relationship for the next year, with the Nielsons reducing their outstanding loan balance by almost $1.5 million. C.A. A607-08, A615-16. But the Nielson Entities were unwilling to repay their loans when some matured in September 2010, prompting another default. Pet.App.15a. Northwestern and the Nielsons tried to negotiate a global restructuring. C.A. A139-40. In December 2010, Northwestern agreed to accept $690,000 of additional cash from a Nielson entity to bring past-due loans current and fund debt service through January 2011. Pet.App.15a. Again, Mr. Calcutt and senior management believed receiving this cash was in Northwestern's best interests. Pet.App.298a-299a. Ultimately, the sides could not agree on a restructuring, and Northwestern pursued collection efforts. C.A. A139-40.

B. FDIC Enforcement Proceedings

1. In August 2011, FDIC examiner Anne Miessner began investigating Northwestern following a highly unusual submission to the agency from Cori Nielson, a Nielson Entities manager. Pet.App.15a-17a. Nielson eventually told Miessner that she wanted "a fresh face to talk to at the bank," because Mr. Calcutt and his subordinates had rebuffed Nielson's demands for loan concessions. C.A. A604. Miessner coordinated her investigation with Nielson in a manner that another FDIC examiner agreed was "shocking." C.A. A529.

The FDIC's Notice of Intent alleged that Mr. Calcutt and two others mishandled the Nielson lending relationship because the Bedrock Transaction did not comply with Northwestern's internal procedures for loan approval and Northwestern's board was not fully aware of the nature of

the Transaction when the loan was disbursed. C.A. A052-084. Mr. Calcutt disputed those findings.

2. In 2015, an ALJ adjudicated the dispute. But that ALJ was unconstitutionally appointed under *Lucia v. SEC*, 138 S. Ct. 2044 (2018), so a different ALJ heard the case in 2019. Pet.App.18a. Over Mr. Calcutt's objection, the new ALJ relied on the record created before the first ALJ, despite an FDIC Order prohibiting such reliance without the parties' consent. Pet.App.18a-19a. The new ALJ also refused to allow Mr. Calcutt to cross-examine key FDIC witnesses about their irregular conduct and apparent bias and ruled against Mr. Calcutt. Pet.App.455a-485a.

The ALJ concluded that Mr. Calcutt caused Northwestern to suffer financial loss, but did not connect any specific misconduct with an effect. Nor did the ALJ consider intervening events such as the Great Recession that may have independently caused Northwestern's losses. The ALJ similarly did not explain why various specific harms were attributable to Mr. Calcutt's actions.

3. On December 15, 2020, the Board issued an order expelling Mr. Calcutt from the banking industry and imposing a $125,000 penalty. Pet.App.21a. Statutorily, the Board "may" exercise its discretion to issue such orders only if a banker (1) willfully engaged in an "unsafe or unsound practice" or breached a fiduciary duty; (2) "by reason of" which; (3) the bank "suffered or will probably suffer financial loss," or other harms ensued. 12 U.S.C. § 1818(e)(1). Monetary penalties demand similar findings. *Id.* § 1818(i)(2). The Board deemed these elements satisfied as follows:

Unsafe/unsound practice: The Board centered its "unsafe or unsound practice" assessment on a single, imprudent act—Mr. Calcutt's approval (along with other

senior managers) of a $760,000 stopgap loan (the so-called Bedrock Transaction). Pet.App.150a-154a. But the Board never found that transaction abnormally risky to Northwestern's stability. The Board also found that Mr. Calcutt breached fiduciary duties based on that same act. Pet.App.155a-159a.

By reason of: The Board held that "an individual respondent need not be the proximate cause of the harm to be held liable." Pet.App.61a. The Board also did not analyze but-for causation. The Board thus did not assess whether Northwestern would have suffered losses regardless of the Bedrock Transaction, given the Nielson Entities' failure to pay loans *before* that Transaction.

Statutory harms: The Board held Mr. Calcutt liable for over $8 million in harms. That included $2 million in fees the bank paid to accountants and lawyers and $6.443 million in *all* Nielson-related losses, which—with the exception of a $30,000 write-off on the Bedrock Transaction—pre-dated any alleged misconduct. The Board also counted Mr. Calcutt's portion of a dividend that the bank's holding company paid shareholders. Pet.App.64a-66a.

C. Proceedings Below

1. On December 16, 2020, Mr. Calcutt filed a petition for review in the Sixth Circuit and sought an emergency stay of the FDIC's order, which that court granted. C.A. Dkts. 6, 7; Dkt. 14-2, at 3. On June 10, 2022, the Sixth Circuit upheld the Board's order in a 2-1 decision and vacated the stay. Pet.App.1a-126a.

a. The majority and dissent agreed that the FDIC's statutory analysis was "riddled with legal error." Pet.App.126a (Murphy, J., dissenting); *see* Pet.App.52a-73a. To start, the panel reasoned that the FDIC misinterpreted what conduct qualifies as an "unsafe or unsound practice" under 12 U.S.C. § 1818(e)(1)(A), Pet.App.53a-

56a. The majority explained that "courts have generally treated the phrase" 'unsafe or unsound practice' as requiring, *inter alia*, "an abnormal risk of financial loss or damage on a banking institution." Pet.App.54a. The majority deemed FDIC's contrary contention that "the statute does not require a finding of a threat to bank stability" contrary to "the analyses of our sister circuits" and dismissed the FDIC's authorities as "not convincing." Pet.App.54a. And the majority emphasized that the FDIC's breach of fiduciary duty claim "overlap[ped]" with the unsafe-or-unsound-practice claim. Pet.App.58a.

The panel further held that the FDIC applied the wrong causation standard by disclaiming any need to show proximate causation. Pet.App.61a-62a. The panel held that the statutory requirement that the bank's loss occur by reason of" misconduct plainly mandated proximate causation under this Court's precedents. Pet.App.61a-63a. And, as a matter of law, the panel held, Mr. Calcutt could not have proximately caused the lion's share of the alleged harms. For instance, Mr. Calcutt could not have proximately caused all $6.443 million in charge-offs on the Nielsons' loans. Pet.App.66a. Those loans "were underwater in the aftermath of the Great Recession *before* Calcutt committed most of the identified misconduct." Pet.App.122a-123a (Murphy, J., dissenting). "The Bank probably would have incurred *some* loss no matter what Calcutt did." Pet.App.66a.

Finally, the panel held that the FDIC improperly counted harms that did not qualify as a matter of law under 12 U.S.C. § 1818(e)(1)(B). Pet.App.64a-65a, 66a-67a. Specifically, the agency counted $2 million in investigative, auditing, and legal expenses—but "professional fees are not a loss unless they are coupled with other 'non-neutral indicia of loss.'" Pet.App.65a. And the FDIC errone-

ously counted the "mere release of the $1.2 million in collateral," which "does not qualify" as a statutory harm *per se*. Pet.App.66a-67a.

But at every turn, instead of remanding for the agency to apply the correct legal standards to the factual record in this case, the majority drew its own legal conclusions based on the record. As to abnormal risk and breaches of fiduciary duty, the panel decided for itself that Mr. Calcutt's conduct posed an abnormal financial risk. Pet.App.55a-56a. As to proximate causation, the panel found harmless error based on its own view of the record, citing Mr. Calcutt's participation "in negotiating and approving the Bedrock Transaction" and non-transparency in that Transaction. Pet.App. 63a, 64a, 68a, 69a-70a. And, as to statutory harms, the panel's take on the record was that the FDIC could count a $30,000 charge-off on a loan, some unspecified part of the $6.443 million in losses from the Nielson loans, and some unspecified amount of the dividend Mr. Calcutt received from the Bank's holding company. Pet.App.70a. The majority thus employed its own assessment of certain record evidence—including what the majority recognized as "connection[s]" that the agency "did not explicitly draw," Pet.App.56a—to dismiss the Board's errors as harmless.

On top of all that, the panel decided for itself that the same draconian penalties—a lifetime ban from the industry and $125,000 fine—were warranted even after holding that Mr. Calcutt did not cause many harms that the FDIC had relied upon. Pet.App.74a. Thus, despite acknowledging that the Board's sanctions were "discretionary" and rested upon defective findings, the majority did not remand for the agency to revisit Mr. Calcutt's lifetime ban. Pet.App.73a.

Judge Murphy dissented, reasoning that the majority's failure to remand violates "basic administrative-law

principles." Pet.App.125a. He explained: "When an agency's decision rests on a collapsed legal foundation . . . [w]e must let the agency apply the proper law in the first instance." Pet.App.125a. That was particularly so, Judge Murphy added, when agency error calls into question the appropriateness of discretionary sanctions. Pet.App.126a. So, Judge Murphy would have "remand[ed] for the FDIC—the fact finder—to apply the correct [legal standard] in the first instance." Pet.App.125a.

b. The panel also rejected Mr. Calcutt's constitutional challenges to the Board's and ALJ's for-cause-removal protections. Mr. Calcutt argued that the President's inability to remove a majority of the Board's members at will unconstitutionally restricts the President's supervision of principal officers. Mr. Calcutt also argued that FDIC ALJs' extraordinary, multi-layer protections from removal violate Article II by thwarting constitutionally required presidential supervision and control.

But the panel interpreted *Collins v. Yellen*, 141 S. Ct. 1761 (2021), to bar such separation-of-powers challenges unless plaintiffs can show specific, "concrete" harm from the unconstitutional removal restrictions. Pet.App.36a. The majority also expressed "doubt" that insulating ALJs from removal is unconstitutional. Pet.App.40a. *But see Jarkesy v. SEC*, 34 F.4d 446, 464 (5th Cir. 2022) (declaring ALJ tenure protections unconstitutional). Judge Murphy would have found no prejudice on different grounds. Pet.App.97a.

2. Mr. Calcutt petitioned for panel or en banc rehearing. The FDIC's response brief agreed that rehearing was warranted because "the panel erred" in not remanding the case back to the Board to reconsider "whether prohibition is warranted," and that prevailing authority "appears to favor remand." C.A. Dkt. 99 at 3-4. Yet the Sixth

Circuit denied rehearing, with Judge Murphy dissenting. Pet.App.128a.

Mr. Calcutt subsequently asked the FDIC to voluntarily stay or reconsider the prohibition order. The FDIC refused. Mr. Calcutt then requested the Sixth Circuit to stay the mandate pending this Court's resolution of this petition. The panel, again in a 2-1 decision over Judge Murphy's dissenting vote, denied the request. Pet.App.127a.

3. Before this Court, Mr. Calcutt filed an application for a stay and recall of the Sixth Circuit's mandate pending a petition for a writ of certiorari. No. 22A255, Application for Stay and to Recall Mandate (Sept. 22, 2022). The government agreed that the application should be granted based on the Sixth Circuit's clear violation of *Chenery*, and noted that this Court has twice in the last twenty years "reversed lower-court decisions that failed to apply the ordinary remand rule." FDIC Stay Resp 1, 13. The government agreed there was "a reasonable probability that this Court will grant review and a fair prospect that it will hold that the Sixth Circuit erred by declining to apply the ordinary remand rule." *Id.* at 15.

On September 29, 2022, Justice Kavanaugh granted Mr. Calcutt's application and ordered that the Sixth Circuit's mandate be recalled and stayed pending the disposition of this petition for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

II. The Sixth Circuit's No-Remand Ruling Warrants This Court's Review

As the government has conceded, this Court's precedents bar courts from taking the Sixth Circuit's path here: affirming legally erroneous agency decisions based on the court's own application of the correct legal rule to record facts. *See* FDIC Stay Resp. 12-13. Instead, as every other

circuit recognizes, courts must remand to the agency. The panel's no-remand holding makes the Sixth Circuit an outlier and rewards egregious agency errors while wresting away agencies' discretionary authority to ameliorate penalties on remand.

A. The Sixth Circuit's No-Remand Ruling Is Egregiously Wrong

1. The panel unanimously agreed that legal errors pervaded the FDIC's discretionary decision to impose a lifetime industry ban and six-figure penalty. Yet the majority refused to remand, instead embarking on its own application of corrected legal standards to ferret out record facts that might support the agency's judgment on other grounds.

To start, the FDIC failed to inquire whether statutory misconduct presented "abnormal financial risk" to the bank and thus qualified as an "unsafe or unsound practice." 12 U.S.C. § 1818(e)(1)(A)(ii); Pet.App.54a-55a. Yet the majority found Mr. Calcutt's actions abnormally risky based on its own assessment of the record and conclusions about banking risks. Pet.App.55a-56a.

Further, the Sixth Circuit held that the FDIC ignored statutory causation requirements by failing entirely to require a showing of proximate cause in Mr. Calcutt's case. Pet.App.61a-63a. Yet, rather than let the agency make "notoriously difficult" judgments about whether Mr. Calcutt proximately caused qualifying harms, Pet.App.62a, the majority did its own review. Pet.App.63a, 64a, 68a, 69a-70a.

The Sixth Circuit also faulted the FDIC for relying on millions of dollars in harms that do not legally qualify as "effects" under the statute—and thus should never have factored into the agency's sanctions determination. Pet.App.64a-65a, 66a-67a. But the majority then deemed

Mr. Calcutt responsible for a fraction of identified harms and assumed that because the agency still had statutory authority to impose the same penalties, the agency would necessarily do so. Pet.App.70a-73a.

In short, the Sixth Circuit substituted its own front-line judgments of the facts and the appropriateness of discretionary penalties for the agency's. The FDIC misinterpreted relevant legal standards, and thus failed to engage in factfinding that would support imposing sanctions. But the panel nonetheless refused to remand for the agency to apply the correct legal standards, engage in additional factfinding, and exercise its own discretion about what penalties to impose.

2. As Judge Murphy's dissent observed, Pet.App.125a-126a, and the government now concedes, FDIC Stay Resp. 15-16, the Sixth Circuit's approach contravenes this Court's bedrock administrative-law precedents. The longstanding *Chenery* rule generally prohibits courts from affirming agencies' discretionary decisions where the agency has "misconceived the law." *Chenery I*, 318 U.S. at 94. Once the agency's "error" is "laid bare," the "function of the reviewing court ends." *Fed. Power Comm'n. v. Idaho Power Co.*, 344 U.S. 17, 20 (1952). Courts must then remand for the agency to apply correct legal principles to the record; courts may not themselves rehabilitate the decision "by substituting what [they] consider[] to be a more adequate or proper basis," as the Sixth Circuit did here. *SEC v. Chenery Corp. (Chenery II)*, 332 U.S. 194, 196 (1947); *accord Smith v. Berryhill*, 139 S. Ct. 1765, 1779 (2019). A "judicial judgment cannot be made to do service for an administrative judgment." *Chenery I*, 318 U.S. at 88.

So clear is the rule that courts must remand rather than "decid[e] whether the facts as found fall within a stat-

utory term" that this Court has summarily reversed contrary rulings repeatedly. *See Gonzales v. Thomas*, 547 U.S. 183, 185-87 (2006) (per curiam). When the Ninth Circuit undertook its own inquiry into whether an asylum applicant satisfied the legal standard for showing changed home-country conditions, the Supreme Court held that the court's refusal to remand flouted "every consideration that classically supports the law's ordinary remand requirement." *INS v. Orlando Ventura*, 537 U.S. 12, 13, 17-18 (2002) (per curiam). And when the Ninth Circuit similarly resolved "in the first instance" another legal question the "agency ha[d] not yet considered"—whether "facts as found" meant a "particular family" qualified for protection under the asylum statute—the Court summarily reversed again. *Gonzales*, 547 U.S. at 184-87.

Moreover, remands are required when, as here, the agency commits legal errors while reaching a "discretionary judgment." *E.g., Sure- Tan, Inc. v. NLRB*, 467 U.S. 883, 905-06 (1984); *cf. Golan v. Saada*, 142 S. Ct. 1880, 1895-96 (2022). In the government's words, the Sixth Circuit "erred in sustaining the Board's removal and prohibition order based on a narrower set of harmful effects than the Board itself found." FDIC Stay Resp. 16; *see also* FDIC Reh'g Resp. Br. 4, C.A. Dkt. 99 (citing, e.g., *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 554 U.S. 527, 544 (2008)). Thus, the government *agreed* that "there is a reasonable probability that this Court will grant review and a fair prospect that it will hold that the Sixth Circuit erred by declining to apply the ordinary remand rule." FDIC Stay Resp. 15.

3. This Court's precedents reject the Sixth Circuit majority's grounds for refusing to remand. The panel majority reasoned that the Administrative Procedure Act's "substantial-evidence standard of review," 5 U.S.C. § 706(2)(E), requires courts to uphold agencies' orders if

they might survive on proper legal grounds. Pet.App.70a-72a. But this Court already has held that courts must remand even if "it does not necessarily follow" from an agency's legal errors that the underlying decision "was incorrect." *Port of Portland v. United States*, 408 U.S. 811, 842 (1972); *accord FEC v. Akins*, 524 U.S. 11, 25 (1998). The substantial-evidence rule merely "governs … review of the agency's factual findings," and does not empower courts to apply the "correct legal view" to facts. Pet.App.125a (Murphy, J., dissenting); *see Biestek v. Berryhill*, 139 S. Ct. 1148, 1154 (2019) ("'substantial evidence' … describe[s] how courts are to review agency factfinding").

The Sixth Circuit also considered a remand futile because, in its view, the agency *could* make the same findings under the proper legal standards. Pet.App.67a, 71a, 73a (looking to what "the FDIC could have concluded from the record"). But, as the government has recognized, futility "analysis does not apply when an agency's determination about whether to impose a sanction is discretionary." FDIC Stay Resp. 14. This Court deems remands futile only if the governing law "required" a certain result, not if the law would merely permit the agency to reach the same conclusion. *Morgan Stanley*, 554 U.S. at 544-45. The Sixth Circuit's citations confirm this. Take *United Video, Inc. v. FCC*, where the FCC's reasoning why a statute did not prohibit its rule was incorrect. 890 F.2d 1173, 1190 n.15 (D.C. Cir. 1989) (cited at Pet.App.73a). The D.C. Circuit declined to remand because the statute could never be read to prohibit the FCC's rule. *Id.* But the D.C. Circuit recognized that remands remain imperative where, as here, an order reflects discretionary judgments that only the agency can make. *Id.* at 1190. Likewise, remands remain essential where, as here, the agency applied the "wrong standards

to the adjudication of a complex factual situation." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969).

Finally, the Sixth Circuit majority held that, because the Federal Deposit Insurance Act authorized the agency's draconian sanction, there was no need to ask if the agency would exercise its discretion the same way on remand. Pet.App.71a. But Congress gave the FDIC discretion over removal and prohibition orders, providing that the agency "may" impose such orders when the statutory requirements are satisfied. 12 U.S.C. § 1818(e)(1). And as the government has now conceded, assuming that the agency would reimpose the same sanction simply because it "might have" done so," *Chenery I*, 318 U.S. at 94, usurps the authority Congress vested in the agency to calibrate discretionary enforcement decisions. FDIC Stay Resp. 16; *see Negusie v. Holder*, 555 U.S. 511, 523-24 (2009); Pet.App.126a (Murphy, J., dissenting).

B. The Sixth Circuit's No-Remand Ruling Conflicts with Every Other Circuit's Precedents

The Sixth Circuit's decision also creates a stark circuit split. "Other courts of appeals have applied the ordinary remand rule in circumstances akin to those here." FDIC Stay Resp. 13. And "[t]he majority's no-remand rule is not limited to the FDIC. If permitted to stand, [the panel's] novel approach would fundamentally alter review of federal agency actions within [the Sixth] Circuit and create a conflict with every other Circuit." Chamber Reh'g Br. 7, C.A. Dkt. 94. A sampling:

- The D.C., First, and Fourth Circuits hold: "[W]hen a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." *Me. Med. Ctr.*

v. Burwell, 841 F.3d 10, 16 (1st Cir. 2016) (quoting *PPG Indus., Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995)); *Perez v. Cuccinelli*, 949 F.3d 865, 873 (4th Cir. 2020) (same); *see Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec.*, 769 F.3d 1127, 1139 (D.C. Cir. 2014).

- In the Second Circuit, when an agency "has based its decision in part on a legal error," the court's "job is generally *not* to decide whether the agency could have reached the same result based on the remaining evidence." *Gurung v. Barr*, 929 F.3d 56, 62 (2d Cir. 2019).
- In the Third Circuit, where a court "ha[s] made a legal determination … that fundamentally upsets the balancing of facts and evidence upon which an agency's decision is based," it is "obliged to remand to the agency." *Gui Cun Liu v. Ashcroft*, 372 F.3d 529, 534 (3d Cir. 2004) (Alito, J.).
- In the Fifth and Seventh Circuits, "[w]hen an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and, after doing so to remand the case." *BizCapital Bus. & Indus. Dev. Corp. v. Comptroller of Currency*, 467 F.3d 871, 874 (5th Cir. 2006) (citation omitted); *accord Osmani v. Garland*, 24 F.4th 617, 621 (7th Cir. 2022).
- In the Eighth Circuit, if "an agency decides a case on a ground believed by an appellate court to be wrong, the case has to be remanded to the agency." *Palavra v. INS*, 287 F.3d 690, 693 (8th Cir. 2022).
- In the Tenth Circuit, when "an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed by that body, and, after doing so to remand the case

> to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law." *Miami Tribe of Okla. v. United States*, 656 F.3d 1129, 1138 (10th Cir. 2011) (quotation marks omitted).

Sharpening the split, the panel's decision breaks from other circuits' decisions in the agency-enforcement context. *See* FDIC Stay Resp. 13-14. The Ninth, Eleventh, and D.C. Circuits hold that if an agency's discretionary penalty rests in part on legal errors, courts must remand so the agency can decide whether the original penalty remains appropriate.

The contrast between the Sixth Circuit and others is acute. In identical circumstances, the Ninth Circuit refused to affirm an FDIC lifetime ban after the agency erroneously counted some misconduct. *De la Fuente v. FDIC*, 332 F.3d 1208 (9th Cir. 2003); FDIC Stay Resp. 13-14. Unlike the Sixth Circuit, the Ninth Circuit considered it irrelevant that independent types of misconduct "standing alone" might still have supported the Board's decision. *Id.* at 1226. Because the agency might "decline to reimpose" its "extraordinary" removal sanction "in the absence" of certain misconduct, the Ninth Circuit insisted that the agency consider whether the lifetime-ban sanction "remains deserved." *Id.* at 1219, 1226-27.

The Eleventh Circuit likewise vacated and remanded a banking agency's lifetime-ban penalty after holding that it had improperly classified certain conduct as unlawful. That court would "not assume" that the agency "would issue the same severe sanction" of removal "without all the violations upon which it previously relied." *Doolittle v. Nat'l Credit Union Ass'n*, 992 F.2d 1531, 1538 (11th Cir. 1993); FDIC Stay Resp. 14; *accord United States v. Schwarzbaum*, 24 F.4th 1355, 1366-67 (11th Cir. 2022).

Similarly, the D.C. Circuit vacated and remanded an SEC lifetime-suspension order that relied "in part" on an improper theory of liability. *Lorenzo v. SEC*, 872 F.3d 578, 595-96 (D.C. Cir. 2017), *aff'd*, 139 S. Ct. 1094 (2019). Because there could be "no assurance that the Commission would have imposed the same level of penalties in the absence of its" faulty liability finding, the D.C. Circuit held it "must remand to enable" the agency "to reassess the appropriate penalties." *Id.* (citation omitted). And, as the FDIC acknowledged in conceding that remand appeared warranted, the D.C. Circuit has long held that "[t]he purpose of [*SEC v.*] *Chenery* is to insure that courts do not trespass on agency discretion." FDIC Reh'g Br. 4 (quoting *United Video*, 890 F.2d at 1190).

C. The Remand Issue is Important, Constantly Recurs, and Justifies Review

This Court's intervention is imperative to prevent the Sixth Circuit's no-remand approach from distorting administrative law and producing inequitable outcomes based on geography. The availability of agency remands is a fundamental issue that arises in virtually every challenge to administrative action, from immigration to SEC enforcement proceedings.

Absent this Court's intervention, parties challenging agency action face disparate rules based solely on the circuit where they are able to seek judicial review. In the Sixth Circuit, courts will take their own stab at weighing the record in the first instance and can assume that agencies will always pick the most severe penalties. Everywhere else, when an agency's order is infected with legal error, challengers will get a chance to argue for lesser penalties and different outcomes on remand. The Sixth Circuit's approach "would deprive regulated parties of the reasonable expectation that an administrative agency's action would stand or fall based on the agency's stated

reasons" as well as "the opportunity to make arguments to [the] regulator in the first instance." Chamber Reh'g Br. 5-6, C.A. Dkt. 94. Parties to the Sixth Circuit's anomalous approach would have to constantly seek this Court's intervention just to obtain remands they would obtain anywhere else.

The majority's no-remand approach also threatens the separation of powers. When Congress validly vests discretionary enforcement decisions in an agency, courts usurp executive power by making their own decisions about appropriate penalties. *Cf. Chenery I*, 318 U.S. at 88; *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200-01 (2020); *see* Pet.App.126a (Murphy, J., dissenting). Worse, the majority imposes a one-way ratchet: so long as a statute technically authorizes the harsher penalty, petitioners will never get a reprieve.

Meanwhile, the majority's "good-enough-for-government-work" approach, Pet.App.126a (Murphy, J., dissenting), encourages slipshod agency decision-making. No matter what the agency error, the Sixth Circuit would sustain the agency's bottom line so long as the court can discern some record support under the right legal standard. The panel's holding thus "rolls out the red carpet for agency abuse, overreach, and regulatory ping pong in a host of contexts." Ams. for Prosperity Reh'g Br. 1, C.A. Dkt. 73.

Only this Court's intervention will avert those harms. And this Court has repeatedly summarily reversed under similar circumstances. *See Gonzales*, 547 U.S. at 185-87; *Orlando Ventura*, 537 U.S. at 17-18; *supra* 16-17; FDIC Stay Resp. 13. This Court should either grant plenary review or summarily reverse here too.

III. The Sixth Circuit's Proof-of-Prejudice Requirement for Separation-of-Powers Challenges Also Warrants Review

The Sixth Circuit's separation-of-powers holding also justifies this Court's intervention. The FDIC's structure raises serious separation-of-powers concerns. Yet the Sixth Circuit misread *Collins* to automatically reject standalone constitutional challenges to restrictions on the President's ability to remove subordinates absent "concrete" proof that removal restrictions cause prejudice—proof that will virtually never exist. Pet.App.36a. Allowing that misreading of this Court's precedent to stand risks rendering separation-of-powers challenges to removal restrictions a dead letter. If nothing else, whether the Court grants plenary review or summarily reverses due to the Sixth Circuit's refusal to remand, the Court should also address the panel's misreading of *Collins*. Otherwise, litigants in petitioner's shoes may never obtain judicial review of serious separation-of-powers challenges on the merits.

A. The Decision Below Misinterprets *Collins* to Effectively Bar Separation-of-Powers Challenges

1. *Collins v. Yellen* does not hold that parties challenging removal restrictions must prove that agency decisions would have come out differently in an alternative universe where officials were removable at will. *Collins* declared unconstitutional the for-cause removal restrictions insulating the Federal Housing Finance Agency's Director. 141 S. Ct. at 1783-84. Turning to remedies, *Collins* emphasized the case's unusual posture, observing that the challengers "no longer have a live claim for prospective relief" because the agency revoked the complained-of-action. *Id.* at 1787. So "the only remaining remedial question concern[ed] retrospective relief," *id.*, which *Collins* held depends on whether the removal restrictions "inflicted harm." *Id.* at 1789. On that score, the

challengers adduced no concrete proof, but alleged "the President might have replaced one of the confirmed Directors who supervised the implementation of" the challenged action, or that "a confirmed Director might have altered his behavior." *Id.* *Collins* remanded for lower courts to consider prejudice given those arguments. *Id.*

But the decision below transforms *Collins* into the death knell of separation-of-powers challenges to removal restrictions. The Sixth Circuit requires "concrete" proof of prejudice, not just a possibility of prejudice. Pet.App.36a. No matter the type of case—whether the matter involves an issue likely to hit the President's desk or not—the Sixth Circuit gives the same answer. Unless the challenger presents concrete proof that the outcome would have been different absent removal restrictions, every such challenge is doomed at the outset. How challengers can obtain such elusive proof without trampling executive privilege is anyone's guess. Presidents seldom announce that they want to fire subordinates, yet cannot due to removal restrictions.

That holding disregards limitations on *Collins*'s reach. *Collins* only addressed *retrospective* remedies for "compensable" harms. *Id.* at 1787-89. But Mr. Calcutt and many other litigants in his shoes seek redress for *prospective*, ongoing harm from an injunction-like order that agencies can revise at any time. 12 U.S.C. § 1818(e)(7)(B); *see* Enforcement Manual 6-5. That distinction is critical, because for prospective relief for ongoing constitutional violations, this Court has never required plaintiffs to "show that the challenged act would not have been taken if the responsible official had been subject to the President's control." *Seila Law*, 140 S. Ct. at 2196. Ongoing separation-of-powers violations impose a "'here-and-now' injury that can be remedied by a court." *Free Enter.*

Fund v, PCAOB, 561 U.S. 477, 513 (2010) (quoting *Bowsher v. Synar,* 478 714, 727 n.5 (1986)). The decision below incorrectly elided that distinction, reasoning that *Collins* discussed "harm" generally. Pet.App.34a-35a. But *Collins* referred to "compensable harm" because "the only remaining remedial question" there "concern[ed] retrospective relief" for contract claims. 141 S. Ct at 1787-89.

Further, the Sixth Circuit misread *Collins* and placed the burden to prove harm on the challenger. Pet.App.35a. But the ordinary rule is that the government must show that constitutional errors are harmless. *See, e.g.*, *Chapman v. California*, 386 U.S. 18, 24 (1967). In keeping with that standard, *Collins* remanded the case because the "*federal parties* dispute[d]" prejudice—not because the *challengers* had failed to meet some burden. 141 S. Ct. at 1789 (emphasis added). That result also comports with *Seila Law*, where the Court remanded "so that the lower courts could" further investigate "*the Government['s] claim[]*" that the constitutional error was harmless. *Id.* at 1788 (emphasis added).

On top of that, the Sixth Circuit applied the wrong substantive standard, requiring concrete proof that an agency decision would have come out differently but for the removal restriction. Pet.App.36a. Under that standard, the panel dismissed Mr. Calcutt's specific allegations of harm as too "vague" to justify relief. Pet.App.37a. But under *Collins*, what matters is whether "the *possibility* that the unconstitutional restriction" caused harm "can[] be *ruled out*." 141 S. Ct. at 1789 (emphasis added). The challengers in *Collins* themselves lacked concrete proof of prejudice. *See* 141 S. Ct. at 1789. Yet *Collins* first invalidated the restriction on the President's ability to remove the FHFA Director absent cause, and considered the remedies issue to be live on remand. *Id.* at 1784-88.

So too here, absent removal restrictions, "the President might have replaced" Board members who oversaw the enforcement proceeding. *Id.* at 1789. Non-tenure-protected principal officers customarily resign when a new administration begins; Board members did not. Thus, the Board comprised officers who were unconstitutionally shielded from removals that otherwise would have occurred. At a minimum, the tenure-protected appointees "might have altered [their] behavior." *Id.* Insulated officers are inherently less likely to strive to discern and hew to the President's preferences. And here, a fully accountable Board might well have remedied the agency's conceded constitutional violations with respect to its invalidly appointed ALJs by ordering fresh proceedings, not the halfway measures this Board imposed. *Supra* p. 9.

Worse, if challengers must show that more-accountable ALJs would have reached different conclusions, it is hard to fathom when courts will ever remedy blatantly unconstitutional multi-layered insulation of ALJs from removal. If the agency can always claim no harm, no foul by pointing to the Board's review or the purported lack of presidential interest in ALJ decisions, agencies will get a free pass to perpetuate constitutional violations.

At the very least, this Court should reiterate that concrete proof of prejudice is not required to justify a remand to further develop the record regarding prejudice. Courts regularly permit discovery in administrative law cases when necessary for "effective judicial review." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971). The panel below suggested that remand was inappropriate because the case would have been sent "to an agency rather than another court." Pet.App.37a-38a. But *Collins* did not bizarrely suggest that further development is only appropriate in challenges to agency actions that were able to come up through district court, leaving

challengers who had to go straight to a court of appeals in the lurch.

2. This Court's review is all the more warranted because courts are in disarray over how to interpret *Collins* and are increasingly deterring litigants from bringing separation-of-powers challenges. Since the panel's decision, 14 opinions have cited the decision below in rejecting removal-based challenges outright.[1]

Most notably, the Fifth Circuit, citing *Calcutt*, now imposes "three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, *and* (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor." *Cmty. Fin.*, 51 F.4th at 631-32 (emphasis added) (petition (22-448) and cross-petition

[1] *Cmty. Fin. Servs. Assoc. of Am. v. CFPB*, 51 F.4th 616, 631-32 (2022); *Collins v. Lew*, 2022 WL 17170955, at *4 (S.D. Tex. Nov. 21, 2022); *Roland v. Comm'r*, 2022 WL 17081339, at *9 (N.D. Ohio Nov. 18, 2022); *Roliff v. Comm'r*, 2022 WL 17718327, at *7 (N.D. Ohio Oct. 31, 2022); *Mast v. Comm'r*, 2022 WL 17717413, at *7 (N.D. Ohio Oct. 12, 2022); *Overstreet v. Comm'r*, 2022 WL 15524729, at *9 (N.D. Ohio Oct. 11, 2022); *Fritog v. Kijakazi*, 2022 WL 4464849, at *2-*3 (W.D.N.C. Sept. 26, 2022); *Crawford v. Kijakazi*, 2022 WL 4477705, at *3-*4 (W.D.N.C. Sept. 26, 2022); *Natalie S. v. Comm'r*, 2022 WL 3593098, at *15 (S.D. Ohio Aug. 23, 2022); *Sharon M. v. Comm'r*, 2022 WL 2948946, at *10 (S.D. Ohio July 26, 2022); *Kelli H. v. Comm'r*, 2022 WL 2816269, at *10 (S.D. Ohio July 19, 2022); *Julie P. v. Comm'r*, 2022 WL 2352454, at *10 (S.D. Ohio June 30, 2022); *Karen H. v. Comm'r*, 2022 WL 3151894, at *4-*5 (S.D. Ohio Aug. 8, 2022); *Lisa C. v. Comm'r*, 2022 WL 3040081, at *4-*5 (S.D. Ohio Aug. 2, 2022).

(22-663) for certiorari pending). This Court should step in now, before the decision below cascades further.

The panel's requirement of concrete proof of prejudice also creates serious tension with other courts' decisions. The Eighth Circuit followed *Collins*'s lead by resolving the merits of a removal challenge, then remanding for further proceedings even without concrete evidence of prejudice. *Bhatti v. FHFA*, 15 F.4th 848, 854 (8th Cir. 2021). Unlike the panel below, the Eighth Circuit deemed sufficient petitioners' allegations that President Trump "would have removed and replaced" the Director during the customary process of "select[ing] new leadership for virtually every non-independent federal agency at the outset of his Administration." Suppl. Br. of Pls. Appellants 6-7, No. 18-2506 (Aug. 10, 2021); *accord Collins v. Yellen*, 27 F.4th 1068, 1069 (5th Cir. 2022).

Similarly, in the Ninth Circuit, Mr. Calcutt's allegations—that absent the removal restrictions the Board's composition would have been different and he would have gotten a fresh ALJ hearing—presumably would have cleared the bar as "a plausible theory to show that the removal provision caused [the challenger] any harm." *Kaufman v. Kijakazi*, 32 F.4th 843, 849-50 (9th Cir. 2022). And the Tenth Circuit has concluded that "*Collins* left open an avenue of relief for potential injuries stemming from the actions of an unconstitutionally structured agency"—an avenue the decision below effectively closes. *Integrity Advance, LLP v. CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022). The viability of removal challenges should not turn on the happenstance of where a given challenge can be brought.

B. The Sixth Circuit's Holding Will Have Far-Reaching Consequences

Whether parties challenging removal restrictions must conclusively establish prejudice from the removal restriction before courts will entertain their constitutional claims is a question of surpassing significance. This Court's intervention is imperative to ensure that such challenges can be brought in all circuits and to resolve uncertainty as to what types of allegations of prejudice will allow substantial constitutional challenges to proceed.

This Court has long emphasized the importance of encouraging challengers to bring separation-of-powers challenges. *E.g., Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). Likewise, the APA—which governs challenges like Mr. Calcutt's—rests on the premise that courts "shall … hold unlawful and set aside agency action … found to be … contrary to constitutional right." 5 U.S.C. § 706(2)(B). Meaningful judicial review is particularly important in the context of "[a]dministrative adjudication[s] of individual disputes," like this one, which are in "some tension with Article III," "the Due Process Clause," and "the Seventh Amendment right to a jury trial." *Lorenzo*, 872 F.3d at 602 (Kavanaugh, J., dissenting).

But the Sixth Circuit's prejudice-first, no-merits-later approach "will effectively insulate from juridical correction virtually every unconstitutional removal restriction." Chamber Reh'g Br. 7, C.A. Dkt. 94. Unless petitioners brandish smoking-gun proof that the President would have removed the relevant official absent the removal restriction—proof that virtually never exists—the Sixth Circuit would never resolve the constitutionality of removal restrictions in standalone challenges. Even blatantly unconstitutional removal restrictions can evade review so long as the government can fault challengers for failing to conclusively establish prejudice.

This result is particularly untenable in the context of FDIC adjudications, where Congress has barred pre-enforcement review. Unlike judicial-review statutes governing agencies like the FTC and SEC, the FDIC's judicial-review statute expressly denies district courts "jurisdiction to review and enjoin the Board's ongoing administrative proceedings." *See Bd. of Govs., FRS v. Mcorp Fin., Inc.*, 502 U.S. 32, 44 (1991) (citing 12 U.S.C. § 1818(i)(1)).

The upshot is that "[a]dministrative targets subjected to quasi-criminal prosecution" before unconstitutionally structured agencies will almost never be able to raise their challenges in the Sixth Circuit. NCLA Reh'g Br. 8, C.A. Dkt. 96. And such situations arise frequently. Left undisturbed, the decision below threatens "longstanding detrimental consequences on the balance of power between Congress, the judiciary, and the executive." George Mason SOP Clinic Reh'g Br. 2, C.A. Dkt. 97.

This case provides an ideal vehicle for addressing the issue. Because the Sixth Circuit started and ended with remedies, this case presents a clean opportunity for the Court to focus on *Collins*'s remedial questions. And the stark results of the Sixth Circuit's rule—effectively foreclosing judicial review of unconstitutionally insulated officers—alone would warrant this Court's review. At a minimum, if this Court addresses the Sixth Circuit's *Chenery* ruling, the Court should also address the separation-of-powers remedy ruling.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari. In the alternative, the Court should summarily reverse the decision below.

Respectfully submitted,

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