No. 22-714

IN THE
# Supreme Court of the United States

HARRY C. CALCUTT, III,

*Petitioner,*

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

*Respondent.*

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

**BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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## INTEREST OF THE *AMICUS CURIAE*[1]

The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State, located within the Antonin Scalia Law School at George Mason University, was established during the 2021–22 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs at the Supreme Court and lower courts in cases implicating separation of powers, including in *Axon Enterprise, Inc. v. FTC*, No. 21-86, which involves questions about the proper remedies for parties subject to action by agencies led by officials shielded by removal protections found to present unconstitutional constraints on the President's vested Article II authority over the Executive Branch.

Petitioner's case is important to *amicus* because it addresses the proper remedies for removal-protection violations and involves questions about the proper allocation of power between the judiciary and executive agencies. In particular, *amicus* contends that the Sixth Circuit's holding that litigants must

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

demonstrate concrete, all-but-uncontested evidence of prejudice to receive a judicial remedy for harm from an illegal removal protection is broader than, and inconsistent with, the Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021). *Amicus* also argues that the Sixth Circuit's refusal to remand this case to the Federal Deposit Insurance Corporation for reconsideration under the proper legal standards violated *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) ("*Chenery I*").

## SUMMARY OF THE ARGUMENT

Separation of powers is "basic and vital" to preserving and securing liberty and the proper functioning of the federal government. *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *see Bond v. United States*, 564 U.S. 211, 221 (2011). The Court should grant the Petition because the Sixth Circuit's erroneous resolution of several important separation of powers issues otherwise will have longstanding detrimental consequences on the balance of power between Congress, the judiciary, and the executive.

*First*, the Sixth Circuit misread *Collins* as establishing a nearly insurmountable barrier for prevailing on challenges to unconstitutional officer removal protections. This conclusion sits in tension with *Collins* itself. More, it would essentially foreclose all future challenges to constitutional structural violations on removal grounds because it extends the principle of *Collins* beyond retrospective harm, creating a hurdle to challenging even *ongoing* actions by unconstitutionally serving officers. Courts have long possessed equitable power to remedy ongoing

constitutional violations even where they may lack power to provide certain remedies for past violations. The Court should grant review to consider the tension between this longstanding principle and the Sixth Circuit's decision below.

*Second*, by refusing to remand to the Federal Deposit Insurance Corporation ("FDIC") and preserving the agency's action at all costs, the Sixth Circuit violated the core doctrine of *Chenery I*, which prohibits courts from doing the agency's job of providing reasons and legal justification for agency actions.

## ARGUMENT

### I. The Sixth Circuit's Requirement for "Concrete" Prejudice Extends Beyond *Collins* and Effectively Forecloses Challenges Seeking Prospective or Retrospective Relief.

This Court's review is warranted to address the Sixth Circuit's requirement that challengers demonstrate concrete evidence of prejudice resulting from unconstitutional removal protection provisions. This is not merely an erroneous decision in a case likely to be unique and limited in its impact, but instead effectively would foreclose the likelihood of relief in future challenges to removal protections for prospective as well as retrospective harm, despite a

long tradition of courts providing relief against ongoing constitutional violations.

### A. The FDIC's Stratified Removal Restrictions Directly Implicate Separation of Powers.

The power to remove executive officers is "in its nature an executive power." *Myers v. United States*, 272 U.S. 52, 161 (1926). Because the President cannot exercise the entirety of the executive power by himself, he has subordinate officers to assist. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). To carry out his constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, the President must be able to direct those officers in their execution of executive power, under threat of removal if necessary, *see Seila Law*, 140 S. Ct. at 2197. Restrictions on the President's power to remove Article II officers therefore may trench upon the President's constitutional duties if they interfere with the presidential duty to supervise and exercise executive authority, and courts typically view such restrictions with skepticism. *See id.* at 2206 ("[T]he President's removal power is the rule, not the exception.").

The FDIC exercises "quintessentially executive power[s]," *id.* at 2200; as this case demonstrates, the FDIC can undertake enforcement actions to bar individuals from the banking industry and impose civil penalties, including seeking the imposition of civil penalties on regulated parties by a federal court, *see* 12 U.S.C. § 1818(e), (i)(2). Nor is there any doubt that FDIC officials, including those involved in this

case, enjoy removal protections. As the Sixth Circuit noted, FDIC administrative law judges ("ALJs") apparently enjoy at least four layers of removal protections, *see* Pet.App.39a, which fully insulate them from presidential accountability and oversight, *see Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 495 (2010) (holding that even one "added layer" of removal protection "makes a difference"). At the FDIC, the "chain of dependence between those who govern and those who endow them with power" is broken not just once but at nearly every link. *Collins*, 141 S. Ct. at 1797 (Gorsuch, J., concurring in part).

### B. The Sixth Circuit's Requirement for "Concrete" Prejudice Overreads *Collins* and Would Effectively Preclude Relief for Prospective and Retrospective Harms.

Petitioner seeks prospective relief because the FDIC imposed an "Industrywide Prohibition" that is not just ongoing in nature but also subject to revision in the future. Completely foreclosing a remedy for removal-protection challenges seeking *prospective* relief is inconsistent with the historic availability of injunctive relief against ongoing constitutional violations. *See, e.g., Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). This "negative injunction remedy" is a "'standard tool of equity' that federal courts have authority to entertain under their traditional equitable jurisdiction." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part) (citation omitted). And this

power generally extends "to violations of federal law by federal officials." *Armstrong*, 575 U.S. at 327.

Thus, although courts lack "power to create remedies previously unknown to equity jurisprudence," *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999), the negative injunction has roots in American equity dating back to the Judiciary Act of 1789, *see* § 11, 1 Stat. 78; *Whole Woman's Health*, 142 S. Ct. at 540 (Thomas, J., concurring in part), which itself "reflects a long history of judicial review of illegal executive action, tracing back to England," *Armstrong*, 575 U.S. at 327.

Petitioner demonstrated how the removal protections at issue here easily could have played a role in his case, yet the Sixth Circuit refused to provide any remedy absent "concrete" evidence that the removal protections had prejudiced Petitioner, such as statements expressly acknowledging the President's desire to remove the relevant officials while admitting a lack of statutory authority to do so. Pet.App.36a. As Petitioner explains, such evidence will rarely exist because Presidents typically do not publicly announce their own impotence to oversee the executive branch. Pet.25. Cutting off the possibility of relief in almost all cases is problematic given the historical tradition of equitable relief in at least some circumstances. As explained next, the Sixth Circuit misread *Collins* as imposing this heightened burden.

***The Sixth Circuit's Interpretation of* Collins *Is Inconsistent with Prior Removal Restriction Cases, Including* Collins *Itself.*** *Collins* provided

several clear-cut examples where a party would demonstrate harm from an improper removal restriction. 141 S. Ct. at 1789. But interpreting *Collins* to require such clear-cut evidence to be definitively established even to warrant remand or reconsideration is ultimately inconsistent with *Collins* itself, where the Court remanded to the Fifth Circuit to determine whether there was sufficient evidence of harm, as "[t]he *possibility* that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect [of inflicting compensable harm] *cannot be ruled out*." 141 S. Ct. at 1789 (emphases added). If concrete evidence were required, the case would have ended right there because the challengers had provided only sparse evidence of prejudice. Similar to the judgment in *Collins*, here the better course would be to remand so the record can be fully developed about what kind of impact the relevant removal restrictions might have had on the agency's actions.

***The Sixth Circuit Materially Expanded* Collins.** The Sixth Circuit's decision below not only misinterpreted *Collins* but also significantly expanded its reach.

*First*, consider the pernicious effect of the FDIC's multi-layered removal protections. Would Petitioner need particularized evidence that the President wanted to remove *each* official in the chain, down to the specific ALJ who decided the case? This would make multi-layered removal protections *more* likely to survive a challenge, which contradicts *Free Enterprise*. And the government would be incentivized

to create and maintain such labyrinthine structures precisely to avoid invalidation.

*Second*, the Sixth Circuit interpreted *Collins* as treating retrospective and prospective relief the same for purposes of harm, which let it sidestep the fact that Petitioner seeks prospective relief in part. Pet.App.34a (the "distinction does not matter here"). But *Collins* itself distinguished the two and remanded for consideration of *retrospective* relief while noting there was no possibility of *prospective* relief, given intervening agency actions. 141 S. Ct. at 1779–80. This should have cautioned against expanding *Collins* to cases seeking prospective relief.

*Third*, in *Collins*, the Court seems to have drawn a distinction between officials who had taken a first-hand role in "*adopt[ing]*" the challenged action, and those subsequent officials who merely "supervised the implementation" of the challenged action. *Id.* at 1787, 1789 (emphasis in original). Although *Collins* did not elaborate on this possible distinction, it could be that removal powers are more likely to play a role where an official initiates an action, thereby identifying him as the person responsible for setting in motion the subsequent chain of events—and accordingly the person most responsible if the President is displeased with those actions. Here, FDIC officials with improper removal protections both adopted *and* implemented (i.e., initiated and adjudicated) the enforcement action against Petitioner, Pet.App.99a, making it unlike the scenario addressed in *Collins*.

***The Sixth Circuit's Decision Will Disincentivize Removal Protection Challenges.***

The Sixth Circuit lost sight of this Court's oft-stated goal of "creat[ing] incentives to raise" challenges to unconstitutional provisions. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018); *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991). When relief is effectively foreclosed by an evidentiary threshold rarely satisfied, and where the court even refuses to remand the matter to the agency to develop the record (as here), parties will presumably stop bringing such challenges.

The effects of this stagnation of law will extend far beyond any one dispute. Secure in the knowledge that removal protections are essentially unchallengeable, even where the officers enjoying those protections are engaged in ongoing activity causing potential prospective harm, officers will be even less accountable to the President, and Congress may even be incentivized to create more such provisions across the bureaucracy.

The Court should grant certiorari to address this important issue.

## II. By Trying to Fix the FDIC's Errors, the Sixth Circuit Violated *Chenery I*.

The Sixth Circuit's decision not to remand this case to the FDIC independently warrants review and perhaps even summary reversal. Despite identifying substantial legal errors in the FDIC's decision, the Sixth Circuit undertook to supplement the agency's reasoning and its record and to apply the correct legal standards to the administrative record in the agency's place in an attempt to affirm the agency decision at all costs. Pet.App.72a–73a.

*Chenery I* imposed a balance between the judiciary and executive agencies by holding that courts cannot affirm an arbitrary or illegal agency decision by conjuring bases that the agency itself did not provide. *Chenery I*, 318 U.S. at 95. The lawfulness of an agency's action turns not only on the existence of legal authority for the agency to constitutionally take the relevant act but also the agency's provision of reasonable and lawful justifications for the act. *Id.* ("[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained."). Thus, when an agency's decision rests on legal errors, the proper course is for the court to pronounce the correct legal standard and then remand for the agency to apply that standard and provide a legally sound explanation for its action on remand.[2]

Some scholars have argued that *Chenery*'s remand rule serves separation of powers by forcing agencies to explain their actions in more detail, helping to avoid broad delegation concerns. *See* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 958–59, 991–92 (2007). Other scholars have argued that the "remand rule exists" to ensure that agencies, not courts, are providing the lawful basis

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[2] Exceptions to this remand rule are narrow and typically involve scenarios where the agency either would have no discretion to exercise upon remand or *already* properly exercised its discretionary powers (for example, by issuing a legally sound alternative holding). *See Morgan Stanley Cap. Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cnty., Wash.*, 554 U.S. 527, 544–45 (2008).

and justifications for their own actions. Christopher J. Walker, *The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue*, 82 Geo. Wash. L. Rev. 1553, 1564 (2014) (quoting *Chenery I*, 318 U.S. at 88).

Either way, affirming an agency decision on other grounds is not a matter of exercising judicial discretion. Rather, *Chenery I* acknowledged that such an option is altogether missing from the judicial toolbox—recognizing that the Executive Branch is responsible for carrying out enacted statutes and must bear responsibility for establishing the legal basis and supportive reasoning for its actions in executing the law. A "judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." *Chenery I*, 318 U.S. at 95.

By declining to remand to the FDIC despite identifying serious legal errors in its judgment, and by instead taking it upon itself to provide reasoned support for the agency's administrative record, the Sixth Circuit sidestepped the important concerns identified above, stood in place of the agency in taking policy action, and violated *Chenery I*'s balance between the judiciary and executive agencies. This error was so egregious that the FDIC took the unusual step of *agreeing*—at both the Sixth Circuit *en banc* stage and now before this Court during the stay proceedings—that the case should have been remanded to the agency.

If the Sixth Circuit's decision were to stand and govern practice moving forward, agencies would be able to assure themselves of judicial victory so long as a circuit panel could scour the record for any substantial evidence to support the agency's ultimate outcome, regardless of the agency's flawed legal interpretations along the way, and regardless of whether the agency's ultimate decision rested on executive discretion, as here. And this ratchet operates in only one direction: in favor of the agency.

The Court should grant the Petition and nip this flawed outgrowth in the bud.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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