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*

REPLY BRIEF OF PETITIONER

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
RYAN T. SCARBOROUGH
KIMBERLY J. BROECKER
CLAIRE R. CAHILL
ROHIT P. ASIRVATHAM
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
sharris@wc.com

TABLE OF CONTENTS

I. The No-Remand Ruling Undisputedly Calls for Review 2
II. The Sixth Circuit's Misinterpretation of *Collins* Warrants Review 6
CONCLUSION 12

TABLE OF AUTHORITIES

Page

Cases:

Axon Enters., Inc. v. FTC, No. 21-86, slip op. (U.S. Apr. 14, 2023) 9, 11
CFPB v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174 (2d Cir. 2023) 10, 11
Collins v. Yellen, 141 S. Ct. 1761 (2021).......... 2, 6, 7, 8, 9
Free Enter. Fund v. PCAOB, 561 U.S. 477 (2010) .. 9, 10
Gonzales v. Thomas, 547 U.S. 183 (2006) 2
INS v. Orlando Ventura, 537 U.S. 12 (2002).................. 2
Lorenzo v. SEC, 872 F.3d 578 (D.C. Cir. 2017) 5
Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 8
SEC v. Chenery, 318 U.S. 80 (1943)................................ 1
Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020) 7, 10

Statutes and Regulations:

12 U.S.C. § 1818(e)(1)(A) 3
12 C.F.R. § 308.162.. 5

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*

REPLY BRIEF OF PETITIONER

To its credit, the government (at 15) agrees this Court should summarily reverse the judgment below for defying "settled principles of administrative law" under *SEC v. Chenery*, 318 U.S. 80 (1943). The government (at 15) rightly deems the Sixth Circuit's refusal to remand to the agency an "anomalous" "outlier" at odds with "other circuits." Indeed, the decision below risks "fundamentally alter[ing] review of federal agency actions within the Sixth Circuit." Chamber Br. 17.

But while the government (at 11, 23) urges summary reversal on *Chenery* grounds, the government seeks to dodge scrutiny of the Sixth Circuit's evisceration of separation-of-powers remedies. The decision below categorically barred constitutional challenges to removal restrictions unless challengers brandish "concrete" proof

of prejudice—even when, as here, parties seek prospective relief. Pet.App.36a; *see* U.S. Br. 18. If this Court intervenes, the Court should also make clear that the Sixth Circuit's holding plainly misread *Collins v. Yellen*, 141 S. Ct. 1761 (2021), which endorsed the mere "possibility" of a different result as enough to warrant *retrospective* relief. *Id.* at 1789.

The government tellingly does not dispute that the Sixth Circuit's concrete-proof-of-prejudice standard will be "impossible" to satisfy "in the overwhelming majority of cases," Chamber Br. 1, or that courts have already invoked *Calcutt* 15 times to pretermit challenges before reaching the merits, Pet. 28 & n.1. "Review is essential to prevent the neutering of this critical element of our constitutional system." Chamber Br. 3; *see* AFPF Br. 10-16; Mason SOP Clinic Br. 6-9; NCLA Br. 11-13. All this Court need reiterate is that concrete proof of prejudice is not required, at least when parties seek prospective relief. Thus, if the Court summarily reverses the judgment below, it should kill two birds with one stone by correcting the Sixth Circuit's dual misinterpretations of administrative law and separation-of-powers remedies.

I. The No-Remand Ruling Undisputedly Calls for Review

The government correctly urges this Court to "summarily reverse the judgment below," just as the Court has twice done under similar circumstances. U.S. Br. 11-13, 24 (citing *INS v. Orlando Ventura*, 537 U.S. 12 (2002) (per curiam) and *Gonzales v. Thomas*, 547 U.S. 183 (2006) (per curiam)). As the government concedes, the Sixth Circuit's refusal to remand to the agency after identifying myriad legal flaws in the agency's analysis flouted "fundamental principles of administrative law," *id.* at 11 (cleaned up), and splits with "[o]ther courts of appeals," *id.* at 12. Left uncorrected, the Sixth Circuit's no-remand ruling "will metastasize … far beyond the facts and context of this

case" and warp countless administrative-law cases. AFPF Br. 8-9; *see* AABD Br. 9-12; Chamber Br. 15-17; Mason SOP Clinic Br. 12; WLF Br. 12-13.

1. While both parties agree that the Sixth Circuit's misunderstanding of *Chenery* warrants summary reversal, they disagree on the scope of the required remand. The government (at 13-14) agrees that on remand, the FDIC must apply the right causation standard and determine what, if any, harms Mr. Calcutt proximately caused. *See* Pet.App.61a-63a; Pet. 11, 15. And the government (at 14-15) agrees the FDIC must redo its determination of appropriate penalties and exclude harms that do not legally qualify, including $2 million in investigative, auditing, and legal expenses that the FDIC improperly counted below. Pet.App.64a-65a, 66a-67a; Pet. 11-12, 15-16.

But, contrary to the government's contentions (at 14 n.1), the FDIC must also revisit whether Mr. Calcutt engaged in an "unsafe or unsound practice" under 12 U.S.C. § 1818(e)(1)(A). Pet. 10-11, 15. The Sixth Circuit rejected the FDIC's interpretation below "that the statute does not require a finding of a threat to bank stability in order to find 'unsafe or unsound' practice." Pet.App.54a. The Sixth Circuit explained: The FDIC's "reading contradicts the analyses of our sister circuits." Pet.App.54a. The court added: "[T]he decisions the agency cites in support of its interpretation are not convincing." Pet.App.54a-55a. Thus, on remand, the agency must find that Mr. Calcutt's conduct threatened his bank's stability before penalizing that conduct. And the agency would be hard-pressed to make that missing finding; the loan Mr. Calcutt approved amounted to ~1% of the bank's core capital, *see* C.A. A006, 009-010, and actually improved the bank's stability, *see* C.A. A555-556.

The government (at 14 n.1) resists a remand on this issue because the Sixth Circuit "held that the result would be the same" even had the agency required an abnormal threat to bank stability. That response replicates the Sixth Circuit's misinterpretation of *Chenery*. Once the Sixth Circuit recognized that the FDIC misread the statutory "unsafe and unsound practice" requirement, the court should have remanded for the agency to decide whether the abnormal-risk standard was satisfied. Under the black-letter administrative-law principles the government (at 11-12) elsewhere touts, the Sixth Circuit erred by plumbing the record itself for purported evidence of abnormal risk.

The government also dismisses the FDIC's misinterpretation of an "unsafe or unsound practice" because the Sixth Circuit upheld "the Board's separate conclusion that the petitioner had breached his fiduciary duties, which independently satisfies the [statutory] misconduct element." U.S. Br. 14 n.1 (citation omitted). But there was nothing "separate" about that fiduciary-duty holding. There too, Mr. Calcutt argued that breaching fiduciary duties requires abnormally risky conduct, prompting the Sixth Circuit to acknowledge the "overlap in analysis of breach of fiduciary duties and unsafe or unsound practices." Pet.App.57a-58a. Yet, there too, the Sixth Circuit rejected Mr. Calcutt's argument that the agency failed to find the requisite risk "for the same reason as his unsafe-or-unsound claim: The record presents substantial evidence to support a finding of financial risk," Pet.App.58a—even though the agency never made that finding. Thus, the fiduciary-duty holding doubled down on the Sixth Circuit's pervasive violations of the ordinary-remand rule.

2. The government (at 23) apparently envisions a remand without further factfinding. But it is mystifying

how the agency could, for instance, resolve proximate causation without factfinding on what bank losses derived from Mr. Calcutt's alleged misconduct, versus other causes (like the Great Recession). Indeed, the loans the ALJ relied on "were underwater in the aftermath of the Great Recession *before* Calcutt committed most of the identified misconduct." Pet.App.122a (Murphy, J., dissenting). The agency must also reopen the record to consider Mr. Calcutt's exemplary work in the two years since the FDIC's initial order. FDIC regulations mandate that, in imposing penalties, the agency "shall … consider[]" whether the individual's "continued service" in the industry poses risks, 12 C.F.R. § 308.162, and the agency cannot ignore recent years of evidence.

At minimum, the Court should clarify that any remand is no mere formality, lest the agency persist in enforcement actions that risk "chilling and deterring" the nation's bank directors in "their exercise of reasonable business judgment." AABD Br. 18; *cf. Lorenzo v. SEC*, 872 F.3d 578, 602 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("I hope that the SEC on remand pays attention, comes to its senses, and (at a minimum) dramatically scales back the sanctions in this case."); AFPF Br. 7-8. For nine-plus years, the FDIC has pursued the death penalty of administrative sanctions: a lifetime professional ban and enormous monetary penalties. That whole time, Mr. Calcutt has continued running a thriving bank, and the agency's case continues to crumble. If—as Mr. Calcutt has steadfastly maintained—his alleged misconduct is not actionable, or caused, at most, "a tiny fraction of" the previously-attributed harms, the agency should surely "reconsider its 'draconian' sanction." *See* Pet.App.126a (Murphy, J., dissenting) (citation omitted); AABD Br. 7-9.

II. The Sixth Circuit's Misinterpretation of *Collins* Warrants Review

If this Court corrects the Sixth Circuit's *Chenery* error, the Court should also rectify the Sixth Circuit's dangerously incorrect separation-of-powers holding. The Sixth Circuit held that courts should reject challenges to restrictions on the President's ability to remove subordinates unless challengers first adduce "concrete" proof that the agency would have acted differently absent the removal restrictions. Pet.App.36a. That "proof-of-a-different-outcome requirement" defies *Collins*, is "impossible to satisfy," and "effectively eliminate[s] any incentive for parties to assert these separation-of-powers challenges," thereby greenlighting "rogue officers flying below the President's radar to make decisions inconsistent with the President's policies" and undermining democratic accountability. Chamber Br. 3; *see* AFPF Br. 12-13; Mason SOP Clinic Br. 9; NCLA Br. 12.

1. The decision below flouts *Collins* and nullifies separation-of-powers remedies by requiring challengers to show "concrete" harm from removal restrictions, even when seeking prospective relief. Like the Sixth Circuit, the government (at 16) reads *Collins* as invariably requiring challengers to make an "affirmative showing" that removal restrictions imposed concrete harm. And the government identifies just two sufficient showings: (1) proof that a lower-court decision blocked the President from removing a subordinate at will, or (2) a "public" presidential statement that the President would have removed a subordinate if a statutory for-cause-removal restriction did not stand in the way. U.S. Br. 16-17 (citing *Collins*, 141 S. Ct. at 1789).

Tellingly, the government does not dispute that this prejudice standard is nearly insurmountable. *See* Chamber Br. 6; Mason SOP Clinic Br. 6; NCLA Br. 12-13. But

Collins cannot be read to perennially insulate agencies' constitutionally dubious removal restrictions from judicial scrutiny. Indeed, under the Sixth Circuit's and government's reading, *Collins* itself was wrongly reasoned. The challengers there adduced no concrete proof of prejudice. Nor did the challengers in *Seila Law.* Yet, in both cases, the Court reached the merits of the separation-of-powers challenges, then remanded remedial questions. *Collins*, 141 S. Ct. at 1783, 1789; *Seila Law LLC v. CFPB,* 140 S. Ct. 2183, 2197, 2211 (2020). *Collins* even directed lower courts to allow the parties to develop their contentions regarding prejudice. 141 S. Ct. at 1789.

The government never squares those outcomes, let alone *Collins*'s rationale for a remand: that the "*possibility* that the unconstitutional restriction on the President's power to remove a director of the FHFA could have … an effect [could not] be *ruled out*." *Id.* (emphases added). That language is antithetical to requiring concrete proof of prejudice. Nor does the government explain why *Collins* described what the government identifies as two purportedly exclusive methods of showing prejudice as mere "example[s]" that would "clearly" show harm, while "less clear-cut" showings might still suffice. *Id.* Given that *Collins* itself refutes the Sixth Circuit's and government's reading, this Court should clarify that *Collins* does not require challengers to adduce concrete proof of prejudice, at least when seeking prospective relief. Alternatively, the Court should allow Mr. Calcutt to develop a record on prejudice before the agency on remand. Pet. 27-28.

Rather than defending its reading, the government objects that a "possibility of prejudice" standard for vacating government action would contravene "usual remedial principles" and "put the plaintiffs 'in a better position' than if no constitutional violation had occurred."

U.S. Br. at 18 (quoting *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring in part)). Were this Court to summarily reverse, the Court could simply reject the Sixth Circuit's misreading and avoid further exegesis of *Collins*'s reference to "possibility" of prejudice. Regardless, a possibility-of-prejudice standard is hardly unusual or unfair. Parties challenge agencies' failure to conform to procedural requirements even when they "cannot establish with any certainty" that the violations were prejudicial. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). And vacatur when the government fails to prove that an evidentiary error at trial was harmless beyond a reasonable doubt too risks putting the criminal defendant in a better position than if the constitutional error had never occurred. Meanwhile, the government's position upends traditional remedial principles by barring remedies entirely.

The government dismisses Mr. Calcutt's prejudice allegations as "vague and generalized," targeting "the allegation that insulated officers are inherently less likely to strive to discern and hew to the President's preferences." U.S. Br. 17 (cleaned up). But Mr. Calcutt also offered other allegations: The Board's composition would likely have changed absent the removal provisions, since non-tenure-protected principal officers ordinarily resign when new administrations begin. Pet. 27. Or a fully accountable Board might have afforded him fresh ALJ proceedings after the agency recognized that his initial ALJ was unconstitutionally appointed. *Id.* Anyway, under the government's and Sixth Circuit's view, only concrete proof counts, eliminating even highly particularized allegations.

The government (at 21) contends that remanding to the agency for further factual development on prejudice would be futile. But it would be bizarre to reserve relief

only for challengers who object to agency action under judicial-review schemes that happen to route challenges to district courts first, not from agencies straight to courts of appeals. Pet. 27-28. If it is impossible for challengers to ever get an agency to produce evidence relevant to prejudice, that just reinforces the untenability of the government's prejudice standard.

The government (at 19-20) similarly resists the notion that *Collins* left open whether challengers or the government bears the burden to show prejudice. The government says this Court's cases do "not preclude courts from placing the burden to prove harm on the challenger." U.S. Br. 19 (cleaned up). But the Court has never displaced the background rule that the *government* bears the burden to show that its constitutional errors are harmless. Pet. 26; WLF Br. 15-16. And *Seila Law* and *Collins* both remanded for further evaluation of the *government's* claim of harmless error. Pet. 26.

The government (at 19) also interprets *Collins* as a one-size-fits-all holding applicable to claims for prospective and retrospective relief alike. But *Collins* repeatedly emphasized its holding was limited to retrospective relief. 141 S. Ct. at 1787-88. And this Court's precedents have consistently distinguished retrospective and prospective relief. Forward-looking "equitable relief 'has long been recognized as the proper means for preventing entities from acting unconstitutionally.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010) (citation omitted); *see* Chamber Br. 12; Mason SOP Clinic Br. 5-6. "Being subjected to unconstitutional agency authority" on a going-forward basis imposes a concrete, "here-and-now" injury that warrants relief and requires no additional proof of prejudice. *See Axon Enters., Inc. v. FTC*, No. 21-86, slip op. at 13, 17 (U.S. Apr. 14, 2023) (cleaned up). Thus, when it comes to prospective relief, challengers are "entitled" to

"relief sufficient to ensure" that any rules they are subject to will "be enforced only by a constitutional agency accountable to the Executive." *Free Enter. Fund*, 561 U.S. at 513. The government (at 19 n.2) denies that Mr. Calcutt seeks prospective relief. But there is no other way to describe relief from ongoing supervision and regulation by an unlawfully structured agency and an injunction-like professional ban that the agency can revise at will. Pet. 25; Chamber Br. 13; Mason SOP Clinic Br. 5.

2. Faced with a judgment that rests on two holdings that independently vitiate this Court's precedents, this Court should address both and deny the government a free pass on a separation-of-powers holding that is already wreaking havoc across circuits. The Sixth Circuit below staked out the most extreme position to date by requiring concrete proof of prejudice. That holding "emboldens agencies to forge ahead indefinitely with business as usual, knowing that even if their adjudicative structures or processes contravene the Constitution, they are effectively immune from challenge or judicial scrutiny." NCLA Br. 12; *see* Mason SOP Clinic Br. 9; AFPF Br. 3. And that holding is undisputedly stifling separation-of-power challenges. Fifteen opinions have already cited the decision below to nip removal challenges in the bud, and the snowballing consequences of that chilling effect alone warrant this Court's intervention. Pet. 28 & n.1; *see* Chamber Br. 6; NCLA Br. 11-13; Mason SOP Clinic Br. 9; Pet. 30-31. Indeed, since this petition was filed, the Second Circuit also relied on *Calcutt* to reject separation-of-powers challenges. *CFPB v. L. Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179 (2d Cir. 2023).

Moreover, "lower courts are divided over how to interpret *Collins* and are issuing decisions, based on *Collins*, deterring litigants from bringing separation-of-powers challenges." Chamber Br. 9. The government (at

20-23) denies any daylight between circuits. Lower courts disagree. As the Second Circuit just noted, since "*Seila Law* and *Collins*, courts have disagreed as to how one could make [the requisite] showing." *L. Offs. of Crystal Moroney*, 63 F.4th at 179.

The government (at 15-16, 22) observes that this Court denied review of a similar question in *Community Financial Services Ass'n of America, Ltd. v. CFPB*, *cert. denied*, No. 22-663 (Feb. 27, 2023). But the Court granted review over whether an Appropriations Clause violation would justify vacating a rule—a question the court below answered by invoking *Collins*. No. 22-448 (Feb 27, 2023). Since then, the Second Circuit has weighed in, citing the decision below to reject a separation-of-powers challenge and noting ongoing confusion over the proper standard. *See L. Offs. of Crystal Moroney*, 63 F.4th at 179-81.

Finally, the government (at 23) labels this petition an "unsuitable vehicle" for addressing separation-of-powers remedies because the Sixth Circuit's blatant *Chenery* errors independently warrant vacating the judgment below. But the Sixth Circuit's misinterpretation of *Collins* now exposes Mr. Calcutt to more constitutional harm. Because the panel refused to adjudicate the merits of Mr. Calcutt's removal challenges, Mr. Calcutt must yet again suffer the prospect of proceedings before an unconstitutionally structured agency—an injury that "is impossible to remedy" later. *Axon*, slip op. at 13; *see* AFPF Br. 14-15 & n.15. Meanwhile, the agency will apparently continue its 9-year, Ahab-esque odyssey to expel Mr. Calcutt from the banking industry by re-initiating in-house proceedings tilted in the agency's favor. AFPF Br. 1-4. Then the agency on appeal may again evade judicial review of its unconstitutional structure just by pointing to a lack of smoking-gun proof that removal restrictions affected its

decision. Only this Court's intervention can break the cycle and stop lower courts from misreading *Collins* as a perverse coup de grace for separation-of-powers challenges.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or grant plenary review of both questions presented.

Respectfully submitted,

LISA S. BLATT
SARAH M. HARRIS
Counsel of Record
RYAN T. SCARBOROUGH
KIMBERLY J. BROECKER
CLAIRE R. CAHILL
ROHIT P. ASIRVATHAM
WILLIAMS & CONNOLLY LLP
680 Maine Avenue SW
Washington, DC 20024
(202) 434-5000
sharris@wc.com

APRIL 19, 2023

Counsel for Petitioner