No. 22-714

In the Supreme Court of the United States

HARRY C. CALCUTT, III, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in declining to remand the case to the Federal Deposit Insurance Corporation (FDIC) Board after the court determined that the Board had applied an incorrect legal standard.

2. Whether the court of appeals correctly rejected petitioner's challenge to the tenure and removal protections of the FDIC Board and administrative law judges on the ground that petitioner had not shown that those protections caused him harm.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (6th Cir.):

Calcutt v. *Federal Deposit Ins. Corp.*, No. 20-4304 (June 10, 2022)

United States Supreme Court:

Calcutt v. *Federal Deposit Ins. Corp.*, No. 22A255 (Sept. 29, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-126a) is reported at 37 F.4th 293. The decision of the Board of Directors of the Federal Deposit Insurance Corporation (Pet. App. 129a-186a) is unreported, but is available at 2020 WL 8472520. The recommended decision of the Administrative Law Judge (Pet. App. 187a-446a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2022. A petition for rehearing was denied on September 15, 2022 (Pet. App. 128a). On October 21, 2022, Justice Kavanaugh extended the time within which to file a petition for a writ of certiorari to and including January 30, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Deposit Insurance Corporation (FDIC) insures the deposits of qualifying banks. See 12 U.S.C. 1811(a). The agency is managed by a five-member Board of Directors (Board) that includes the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau (CFPB), and three additional members who "shall be appointed by the President, by and with the advice and consent of the Senate." 12 U.S.C. 1812(a)(1)(C); see 12 U.S.C. 1812(a)(1). Each of the three appointed members "shall be appointed for a term of 6 years." 12 U.S.C. 1812(c)(1). No more than three Board members may be members of the same political party. 12 U.S.C. 1812(a)(2). The parties have litigated this case on the understanding that the appointed Board members serving fixed terms may be removed for cause but are not removable at will by the President. See Pet. 5.

To protect the integrity of insured banks, the FDIC may pursue enforcement actions against "institution-affiliated part[ies]," such as bank officers. 12 U.S.C. 1818(e)(1)(A) and (i)(2). As relevant here, the FDIC "may" issue an order "remov[ing] [a] party from office" or "prohibit[ing] any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution" when the FDIC determines that three prerequisites are met. 12 U.S.C. 1818(e)(1). First, the FDIC must determine that the party committed misconduct, including by "engag[ing] or participat[ing] in any unsafe or unsound practice in connection with any insured depository institution" or by breaching a fiduciary duty. 12 U.S.C. 1818(e)(1)(A)(ii); see 12 U.S.C. 1818(e)(1)(A)(iii). Second, the FDIC must

determine that, "by reason of" the party's misconduct, "such insured * * * institution has suffered or will probably suffer financial loss or other damage" or the party "has received financial gain or other benefit." 12 U.S.C. 1818(e)(1)(B)(i) and (iii). Third, the FDIC must determine that the party's misconduct "involves personal dishonesty" or "demonstrates willful or continuing disregard by such party for the safety or soundness of such * * * institution." 12 U.S.C. 1818(e)(1)(C). The FDIC may also issue civil money penalties if it makes similar determinations. 12 U.S.C. 1818(i)(2).

A party against whom the FDIC initiates an enforcement action is entitled to an adversarial hearing that typically is conducted before an administrative law judge (ALJ) in accordance with the Administrative Procedure Act, 5 U.S.C. 551 *et seq*., 701 *et seq*. 12 U.S.C. 1818(h). FDIC ALJs may be removed only for cause as determined by the Merit Systems Protection Board (MSPB), 5 U.S.C. 7521(a), and MSPB members may be removed only for cause by the President, 5 U.S.C. 1202(d). After an ALJ holds a hearing, she must file a recommended decision and order. 12 C.F.R. 308.38(a). The FDIC Board then reviews the ALJ's recommendation and issues a final decision. 12 C.F.R. 308.40(c). The Board's decision is subject to judicial review in either the D.C. Circuit or the circuit in which the relevant institution is located. 12 U.S.C. 1818(h)(2).

2. Petitioner was the President, CEO, and Chairman of the Board of Directors at Northwestern Bank (the Bank), an FDIC-insured institution. Pet. App. 9a-10a. Petitioner left Northwestern Bank in 2013 and now serves as the Chairman of another bank. *Id.* at 10a.

Around 2009, Northwestern Bank's largest loan relationship (amounting to approximately $38 million in loans) was with a group of companies that were controlled by the Nielson family and were called the Nielson Entities. Pet. App. 10a. The Bank's loans to the Nielson Entities were neither cross-collateralized against one another nor personally guaranteed by the Nielsons. *Id.* at 11a.

In September 2009, facing financial difficulties, the Nielson Entities stopped repaying those loans. Pet. App. 12a. Three months later, the Bank and the Nielson Entities consummated the "Bedrock Transaction." *Id.* at 13a. As part of that transaction, the Bank extended a $760,000 loan to one of the Nielson Entities, Bedrock Holdings, to be used to cover the entities' loan payments through April 2010. *Id.* at 12a-13a. The Bank also released to the Nielson Entities $600,000 of collateral in investment-trading funds and renewed the Nielson Entities' matured loans. *Id.* at 13a. Before entering the Bedrock Transaction, the Bank failed to gather certain required financial information from the Nielson Entities and to perform certain required cash-flow analyses and appraisals. *Ibid.*; see *id.* at 140a. The Bank also failed to seek or obtain timely approval of its Board of Directors, even though the Bank's rules required such approval. *Id.* at 14a, 141a.

Notwithstanding the Bedrock Transaction, the Nielson Entities defaulted again in September 2010. Pet. App. 15a. The Bank released to the entities another $690,000 in secured funds, but the entities defaulted a final time in January 2011. *Ibid.* They have remained in default ever since. *Ibid.*

3. a. In 2013, the FDIC issued a notice of intention to remove petitioner from office, prohibit him from further banking activities, and assess civil money penalties against him. Pet. App. 17a. An ALJ held an eight-day hearing in petitioner's case. *Ibid.* After this Court's decision in *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), the FDIC Board appointed its ALJs, and petitioner's case was reassigned to a new, properly appointed ALJ, who conducted a new seven-day hearing. Pet. App. 18a-20a, 134a. The new ALJ issued a decision recommending that petitioner "be prohibited from banking and assessed a $125,000 [civil money penalty]." *Id.* at 20a; see *id.* at 445a-446a.

b. The FDIC Board accepted the ALJ's findings and issued a final removal and prohibition order and $125,000 civil money penalty. Pet. App. 130a, 183a-185a. The Board first found that "[t]he record clearly establishes [petitioner's] unsafe and unsound practices and breaches of fiduciary duty." *Id.* at 150a. Specifically, the Board found that petitioner had approved the Bedrock Transaction without conducting the proper analyses or obtaining timely Board of Directors approval, *id.* at 151a; had jeopardized the Bank's "safety and soundness" by "failing to properly manage the risks posed by the Nielson borrowing relationship," *id.* at 152a; had "repeatedly concealed material information about the Nielson Loans from the Bank's regulators," including by making "misleading statements to examiners," *id.* at 154a-155a; and had "attempted to shift responsibility for the mishandling of the Nielson Loans onto his subordinates," *id.* at 157a.

Turning to the harmful "[e]ffects" of petitioner's misconduct, the Board stated that petitioner need not

have been "the proximate cause of the harm to be held liable." Pet. App. 159a-160a (emphasis omitted). The Board found "ample evidence" that "the Bank suffered or likely will suffer financial loss or other damages, and that [petitioner] received gain or other financial benefit from his misconduct." *Id.* at 160a. In particular, the Board identified the following as cognizable effects of petitioner's misconduct: a $30,000 charge-off (an amount unlikely to be collected) against the $760,000 loan to Bedrock Holdings, *ibid.*; $6.443 million in losses on other Nielson Loans, *id.* at 161a-162a; certain "investigative and auditing expenses" incurred by the Bank, *id.* at 163a; and a financial benefit for petitioner in the form of inflated dividends paid to the Bank's holding company (of which petitioner was a large shareholder), *id.* at 166a.

Finally, the Board found that petitioner had acted with the requisite culpability, including by "persistently conceal[ing] from both the Bank's Board and its regulatory examiners the true common nature of the Nielson Entities Loan portfolio, problems with that portfolio, and [petitioner's] efforts in dealing with the Nielson Family's decision to stop making payments on the loans." Pet. App. 167a (citation omitted).

4. After staying the FDIC's order pending review, Pet. App. 22a, the Sixth Circuit denied petitioner's petition for review and sustained the order, *id.* at 1a-126a.

a. The court of appeals held that the alleged constitutional infirmity in the statutory provisions governing removal of the FDIC's Board members and ALJs provided no basis for setting aside the Board's order in this case. Pet. App. 24a-42a. As to the Board, the court concluded that, under this Court's decision in *Collins* v.

Yellen, 141 S. Ct. 1761 (2021), petitioner "is not entitled to the relief he seeks, because he has not specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions." Pet. App. 29a. The court held that petitioner could not obtain relief based on the mere "*possibility* that the FDIC would have taken different actions in his case, if the Board" members had been removable at will. *Id.* at 36a. Under *Collins*, the court observed, "a more concrete showing was needed." *Ibid.* The court also declined petitioner's request to remand to the FDIC "for further findings" on harm. *Id.* at 37a. The court emphasized that petitioner had requested a "remand[] to an agency rather than another court," and it questioned "how yet another proceeding before the FDIC would aid in developing the record on this point." *Id.* at 38a.

"[F]or similar reasons," the court of appeals rejected petitioner's request for relief premised on the ALJs' removal protections. Pet. App. 38a. The court explained that, even assuming those protections were unconstitutional, petitioner "is not entitled to relief unless he establishes that those protections 'inflict[ed] compensable harm,' and he has not made this showing." *Ibid.* (citation omitted; brackets in original). The court stated that petitioner had offered only "vague assertions that it 'cannot be ruled out'" that he was harmed by the ALJs' removal protections, "but a generalized allegation is insufficient for affording relief." *Id.* at 39a (citation omitted).

b. The court of appeals then addressed petitioner's statutory arguments. It first determined that the "FDIC Board did not err in determining that [petitioner] engaged in unsafe or unsound practices," Pet. App. 56a,

and breached his fiduciary duties, *id.* at 57a-60a; see 12 U.S.C. 1818(e)(1)(A).

The court of appeals next addressed the Board's findings that certain harmful effects had occurred "by reason of" petitioner's misconduct. 12 U.S.C. 1818(e)(1)(B). The court held that the phrase "'by reason of'" in Section 1818(e)(1)(B) "mandates proximate causation," Pet. App. 61a (citation omitted), and that the Board had failed to apply a proximate-causation standard, *id.* at 61a-63a. The court then considered "the statutory effects identified by the FDIC Board" and determined that "substantial evidence supports the conclusion that some—but not all—of the impacts to the Bank are 'effects' * * * proximately caused by [petitioner's] misconduct." *Id.* at 63a. Specifically, the court concluded that petitioner had proximately caused a $30,000 charge-off on the Bedrock Holdings loan, *id.* at 63a-64a; that investigative and auditing expenses incurred by the Bank were not relevant "effects" under the statute, *id.* at 64a; that "substantial evidence" indicated that petitioner had proximately caused "part" of the Bank's $6.443 million in losses from loans to the Nielson Entities, *id.* at 67a; that "there is substantial evidence that [petitioner's] actions resulted in probable future losses to the Bank," *ibid.*; and that some, but not all, of the dividend payments to the Bank's holding company "occurred 'by reason of' [petitioner's] misconduct," *id.* at 70a; see *ibid.* (summarizing "[c]umulative [e]ffects").

The court of appeals concluded that a remand to the Board was unwarranted, notwithstanding the Board's legal error in evaluating causation. Pet. App. 70a. The court stated that the Board may issue a removal and prohibition order so long as "substantial evidence

supports the FDIC's finding as to *one* effect out of multiple possibilities." *Ibid.* In response to the dissent's invocation of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), the court stated that "[r]emand is unnecessary where an agency's incorrect reasoning was confined to [a] discrete question of law and played no part in its discretionary determination, and [the agency] reaches a conclusion that it was bound to reach." Pet. App. 73a (citation and internal quotation marks omitted).

c. Judge Murphy dissented. Pet. App. 74a-126a. He "agree[d] with" the majority that petitioner was not entitled to relief based on the allegedly unconstitutional restrictions on removal of FDIC Board members and ALJs. *Id.* at 77a. He found no "source of law that requires (or permits) courts to treat the FDIC's *past actions* as void because potentially unconstitutional *statutes* attempted to insulate" the relevant FDIC officers "from the President's removal power." *Id.* at 86a. He therefore "conclude[d] that [petitioner] could not obtain this relief even if he successfully established the statutes' unconstitutionality." *Ibid.*

As to petitioner's statutory claims, Judge Murphy—like the majority—concluded that the FDIC had "misinterpreted the causation element" in Section 1818(e)(1)(B) by failing to assess whether petitioner's misconduct had proximately caused the relevant harmful effects. Pet. App. 118a (Murphy, J., dissenting). In light of that agency error, Judge Murphy would have "remand[ed] for the FDIC—the fact finder—to apply the correct causation rules * * * in the first instance." *Id.* at 125a. He concluded that the majority had "run[] afoul of basic administrative-law principles" by affirming the FDIC's decision based on proximate-cause

determinations that the agency itself had not made. *Ibid.* He also noted, as an additional ground for remand, that the statute "leaves the FDIC with discretion over whether to bar [petitioner]" from banking, so that the FDIC could reconsider its sanction on remand if it "were to find that [petitioner's] conduct caused a tiny fraction of [the relevant] harm." *Id.* at 126a.

5. Petitioner filed a petition for rehearing in the court of appeals. In its response to the petition, the FDIC did "not oppose a panel rehearing for the limited purpose of revising the majority opinion to order a remand for the Board to decide whether the effects properly considered under the panel's legal standard, when viewed alongside the gravity of [petitioner's] misconduct and level of culpability, support prohibition." Gov't C.A. Resp. to Pet. for Reh'g 4. The FDIC did oppose rehearing on petitioner's removal challenges. *Id.* at 4-10. The court of appeals denied petitioner's rehearing petition and his motion to stay the mandate. Pet. App. 127a-128a.

6. Petitioner then filed an application with Justice Kavanaugh seeking a stay of proceedings and recall of the court of appeals' mandate pending a petition for a writ of certiorari. See Stay Appl., No. 22A255 (filed Sept. 22, 2022). In its response to the application, the government agreed that a stay was warranted on the question whether the court of appeals should have remanded to the FDIC Board after determining that the Board had applied the wrong causation standard. See Gov't Resp. to Stay Appl. 12-16. The government maintained that a stay was not warranted on the separate question whether the court of appeals had erred in denying relief based on petitioner's constitutional challenges to

the statutory provisions that address the tenure and removability of FDIC Board members and ALJs. *Id.* at 17-22. Justice Kavanaugh granted petitioner's application. See No. 22A255, 2022 WL 4546340 (Sept. 29, 2022).

ARGUMENT

As to the first question presented, this Court should summarily reverse the judgment below because the court of appeals erred by declining to remand the case to the FDIC Board after it determined that the Board had applied the wrong causation standard. As to the second question presented, review is not warranted. The court of appeals correctly held that petitioner was not entitled to relief on his constitutional challenges to the statutory provisions that address the tenure and removability of FDIC Board members and ALJs. That holding does not conflict with any holding of this Court or another court of appeals. And this case would be an unsuitable vehicle for resolving the second question presented because the Court would have no basis for reaching that question if it agrees with the parties on the first question presented.

1. This Court should summarily reverse the judgment below because the court of appeals erroneously declined to remand to the FDIC Board after it determined that the Board had applied the wrong causation standard.

a. "Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands." *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (per curiam). That ordinary remand rule follows from "[f]undamental principles of administrative law * * * teach[ing] that a federal court generally goes astray if it decides a

question that has been delegated to an agency if that agency has not first had a chance to address the question." *Smith* v. *Berryhill*, 139 S. Ct. 1765, 1779 (2019); see *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *SEC* v. *Chenery Corp.*, 318 U.S. 80, 88, 94-95 (1943).

During the past 21 years, this Court has twice summarily reversed lower-court decisions that failed to apply the ordinary remand rule. In *Orlando Ventura*, the court of appeals resolved a factual issue that the agency had not addressed instead of remanding to the agency for consideration of that issue. 537 U.S. at 15. This Court held that the court of appeals had "committed clear error" by failing to apply the "ordinary remand requirement." *Id.* at 17. In *Gonzales* v. *Thomas*, 547 U.S. 183 (2006) (per curiam), the court of appeals adopted a new legal standard and then applied that standard to the facts rather than remanding for the agency to do so. *Id.* at 184-185. This Court again held that the court of appeals "should have applied the ordinary remand rule." *Id.* at 187 (quoting *Orlando Ventura*, 537 U.S. at 18) (internal quotation marks omitted).

Other courts of appeals have applied the ordinary remand rule in circumstances akin to those here. In *De La Fuente II* v. *FDIC*, 332 F.3d 1208 (2003), the Ninth Circuit rejected certain FDIC liability findings while sustaining others, and then "remand[ed] th[e] matter to the Board for it to consider, in light of this disposition, whether th[e] extraordinary sanction [of a banker's removal and prohibition] remains deserved." *Id.* at 1227. And in *Lorenzo* v. *SEC*, 872 F.3d 578 (2017), aff'd, 139 S. Ct. 1094 (2019), the D.C. Circuit disapproved one SEC "finding of liability" while sustaining others, and then remanded for the SEC to "reassess the appropriate

penalties" because the court "ha[d] no assurance that the Commission would have imposed the same level of penalties in the absence of its [rejected] finding of liability." *Id.* at 595-596; see, *e.g.*, *Utah Envtl. Cong.* v. *Troyer*, 479 F.3d 1269, 1287-1288 (10th Cir. 2007); *Doolittle* v. *National Credit Union Admin.*, 992 F.2d 1531, 1538 (11th Cir. 1993).

To be sure, the ordinary remand rule is not ironclad. Remand is unnecessary where it "would be an idle and useless formality" because no "uncertainty" exists about the "outcome of [the] proceeding" on remand. *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) (plurality opinion). For example, where an agency is legally "*required*" to reach a particular outcome, the agency's "different rationale for the necessary result is no cause" for vacatur and remand. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 544-545 (2008); see *United Video, Inc.* v. *FCC*, 890 F.2d 1173, 1190 & n.15 (D.C. Cir. 1989); 5 U.S.C. 706 ("[A] court shall review the whole record * * * and due account shall be taken of the rule of prejudicial error."). But that analysis does not apply when an agency's determination about whether to impose a sanction is discretionary.

b. The Court should summarily reverse the judgment below based on the court of appeals' failure to apply the ordinary remand rule. The court of appeals held that the FDIC Board had applied the wrong causation standard when determining that certain harmful effects had occurred "by reason of" petitioner's misconduct. Pet. App. 61a (quoting 12 U.S.C. 1818(e)(1)(B)). But instead of remanding for the Board to apply the correct causation standard to the facts, see *Gonzales*, 547 U.S.

at 186-187, the court found it sufficient "that substantial evidence supports the conclusion that some—but not all—of the impacts to the Bank are 'effects' * * * proximately caused by [petitioner's] misconduct," Pet. App. 63a. Because the court concluded that the Board had not made the requisite proximate-cause finding with respect to any of those "effects," the court's determination that substantial evidence supported such a finding was an inadequate basis for affirming the Board's decision.[1]

The court of appeals further erred in sustaining the Board's removal and prohibition order based on a narrower set of harmful effects than the Board itself had found. Pet. App. 71a. Congress has vested the FDIC with discretion over removal and prohibition orders, stating that the FDIC "may" pursue such an order when it determines that the statutory factors are met. 12 U.S.C. 1818(e)(1). While the FDIC on remand could order removal and prohibition in this case based on a narrower set of harmful effects, it would not be legally "*required*" to do so. *Morgan Stanley*, 554 U.S. at 544. Nor does the Board's decision indicate the extent to

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[1] Petitioner suggests (Pet. 15) that the court of appeals also held that the FDIC Board had applied the wrong legal standard when evaluating whether petitioner had committed misconduct under Section 1818(e)(1)(A). That is incorrect. The court simply questioned one argument that the FDIC had made on appeal—that the statute does not require petitioner's conduct to have posed a threat to the bank's financial stability—but held that the result would be the same even if the statute were interpreted "to require a finding of *abnormal* financial risk." Pet. App. 55a; see *id.* at 55a-56a. In any event, the court found no fault with the Board's separate conclusion that petitioner had "breached his fiduciary duties," *id.* at 57a; see *id.* at 57a-60a, which independently satisfies the misconduct element, 12 U.S.C. 1818(e)(1)(A)(iii).

which its removal and prohibition order rested on each of the harmful effects found. For these reasons, in the court of appeals, the FDIC did "not oppose a panel rehearing for the limited purpose of revising the majority opinion to order a remand for the Board to decide whether the effects properly considered under the panel's legal standard, when viewed alongside the gravity of [petitioner's] misconduct and level of culpability, support prohibition." Gov't C.A. Resp. to Pet. for Reh'g 4.

c. Summary reversal, rather than plenary review, is the appropriate way to address the first question presented. The Court followed that path in *Orlando Ventura* and *Gonzales* when courts of appeals had similarly erred in failing to apply the ordinary remand rule. And nothing would be gained from plenary review of the court of appeals' outlier decision, which reflects a misunderstanding of settled principles of administrative law on which the parties and other circuits agree. See Pet. 15-22; *e.g.*, *Lorenzo*, 872 F.3d at 595-596; *De La Fuente*, 332 F.3d at 1227. That is particularly true because the decision below is anomalous even within the Sixth Circuit—not part of a broader trend. Indeed, the court of appeals did not cite any Sixth Circuit precedent supporting its decision here.

2. In contrast, this Court's review is not warranted on the second question presented: whether the court of appeals erred in holding that petitioner was not entitled to relief based on his challenge to the tenure and removal protections afforded to the FDIC Board and ALJs. See Pet. I. This Court recently denied review of a similar question concerning the proper remedial analysis for an asserted removal-power violation. See

Community Fin. Servs. Ass'n of Am., Ltd. v. *CFPB*, cert. denied, No. 22-663 (Feb. 27, 2023) (*CFSA*). The same result should follow here. The court of appeals' holding on the second question presented does not conflict with any decision of this Court or another court of appeals, and this case is an unsuitable vehicle for resolving that question in any event.

a. The court of appeals did not decide whether the statutory provisions that define the tenure and removability of FDIC Board members and ALJs violate constitutional separation-of-powers principles. Rather, the court held only that, regardless of the proper resolution of those questions, petitioner would "not [be] entitled to the relief he seeks, because he has not specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions." Pet. App. 29a; see *id.* at 39a. The dissenting judge likewise concluded that petitioner "could not obtain [vacatur of the Board's decision] even if he successfully established the statutes' unconstitutionality." *Id.* at 86a (Murphy, J., dissenting).

The court of appeals' holding follows directly from this Court's decision in *Collins* v. *Yellen*, 141 S. Ct. 1761 (2021). There, the Court held that a plaintiff seeking relief based on an unconstitutional removal restriction must make an affirmative showing that the restriction "inflict[ed] compensable harm." *Id.* at 1789. The Court identified two ways in which a plaintiff can satisfy that requirement. First, a plaintiff could establish such harm by showing that "the President had attempted to remove [an officer] but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Ibid.* Second, a plaintiff could show that "the President had made a public statement

expressing displeasure with actions taken by [an officer] and had asserted that he would remove the [officer] if the statute did not stand in the way." *Ibid.* In that circumstance, there would be reason to conclude that an officer removable at will "might have altered his behavior in a way that would have benefited" the plaintiff. *Ibid.*

Petitioner has made neither of those showings. As to the first, the President was not "prevented from [removing FDIC Board members and ALJs] by a lower court decision holding that he did not have 'cause' for removal." *Collins*, 141 S. Ct. at 1789. As to the second, petitioner identifies no evidence that the President disapproved of the decisions of the FDIC Board members or ALJ in this case, such that those officials "might have altered [their] behavior in a way that would have benefited" petitioner in the absence of the allegedly unconstitutional removal restrictions. *Ibid.* Instead, petitioner offers only "vague" and "generalized" allegations, Pet. App. 37a, such as the allegation that "[i]nsulated officers are inherently less likely to strive to discern and hew to the President's preferences," Pet. 27. Based on petitioner's failure to show that the challenged removal protections had caused him harm, the court of appeals correctly rejected his removal-power challenge without addressing the merits of his constitutional claim. See, *e.g.*, *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

Petitioner's contrary arguments lack merit. Petitioner primarily contends that the court of appeals

should have deemed a "possibility of prejudice" sufficient under *Collins*. Pet. 25 (citing Pet. App. 36a); see Pet. 26-27. But the court correctly determined that granting relief based on the mere "possibility that harm *might* occur" would "effectively eliminate any need to show that unconstitutional removal protections caused harm," Pet. App. 36a, which is the touchstone of the *Collins* inquiry, 141 S. Ct. at 1789 (framing the relevant question as whether the removal restriction had "inflict[ed] compensable harm"). Indeed, vacating government action based on the mere possibility of harm from an identified constitutional violation "would, contrary to usual remedial principles, put the plaintiffs 'in a better position' than if no constitutional violation had occurred." *Id.* at 1801 (Kagan, J., concurring in part and concurring in the judgment in part) (citation omitted).

Contrary to petitioner's implication, the court of appeals' use of the word "'concrete'" did not depart from the *Collins* standard. Pet. 25 (citation omitted). Rather, the court simply explained that "[t]he *Collins* Court was not deterred from its holding by the very possibility that harm *might* occur; rather, it indicated that a more concrete showing was needed." Pet. App. 36a. That explanation does not suggest that the court applied a heightened "smoking-gun" (Pet. 30) proof requirement. In any event, this Court "reviews judgments, not statements in opinions." *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (citation omitted). Any imprecision in the court of appeals' use of the phrase "more concrete showing," Pet. App. 36a, does not impugn the court's judgment on the removal issue.

Petitioner also contends (Pet. 25) that the decision below conflicts with *Collins* because the court of appeals applied the *Collins* remedial inquiry to a claim seeking "*prospective*" relief. But while the *Collins* Court addressed only the standard for awarding retrospective relief, that was because the administrative action the plaintiffs had challenged there was no longer in place when the case reached this Court, so that the plaintiffs' claim for prospective relief was moot. 141 S. Ct. at 1780. Nothing in *Collins* suggests that the Court would have mandated a different remedial inquiry if the plaintiffs' prospective-relief claim had remained in the case. See *id.* at 1788-1789. And no sound basis exists for finding *Collins*' remedial inquiry to be inapplicable to the challenge at issue here, since that inquiry derives from the "traditional remedial rule[]," Pet. App. 97a (Murphy, J., dissenting), that "there is no reason to regard any of the actions taken by" an improperly insulated official "as void," *Collins*, 141 S. Ct. at 1787.[2]

Finally, this Court's precedent does not preclude courts from "plac[ing] the burden to prove harm on the challenger." Pet. 26. *Collins* simply observed that the plaintiffs "claim[ed] that the unconstitutional removal

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[2] Petitioner views his own removal-power challenge as seeking prospective relief because resolution of that challenge could determine whether he can lawfully participate in banking in the future. See Pet. 25 (characterizing the Board decision at issue here as "an injunction-like order that agencies can revise at any time"). But the dissenting judge below, in agreeing with the majority that petitioner was not entitled to relief on his removal-power claim, appeared to view petitioner as requesting *retrospective* relief. That judge concluded that the purported constitutional defect in the statutes that define the tenure of the relevant FDIC officers could not justify "treat[ing] the FDIC's *past actions* as void." Pet. App. 86a.

provision inflicted harm," while "[t]he federal parties dispute[d] th[at] possibility." 141 S. Ct. at 1789. And in *Seila Law LLC* v. *CFPB*, 140 S. Ct. 2183 (2020), this Court "remand[ed] for the Court of Appeals to consider whether the civil investigative demand was validly ratified." *Id.* at 2211 (plurality opinion). Neither decision suggests that the government must bear the burden of *dis*proving harm from an alleged constitutional violation. Contra Pet. 26.

b. Petitioner also contends (Pet. 29) that the court of appeals' resolution of the second question presented "creates serious tension" with decisions of other circuits. That is incorrect.

Petitioner primarily asserts (Pet. 29) tension with a decision from the Eighth Circuit. But the Eighth Circuit decision that petitioner cites involved the identical challenge to the Federal Housing Finance Agency Director's removal protections that this Court had already resolved in *Collins*. See *Bhatti* v. *Federal Hous. Fin. Agency*, 15 F.4th 848, 853 (8th Cir. 2021). The approach that the Sixth Circuit took in this case—addressing the remedial issue without determining whether any constitutional violation had occurred—therefore was not available to the Eighth Circuit. Instead, based on this Court's controlling decision in *Collins*, the Eighth Circuit noted the unconstitutionality of the Director's removal protections and remanded to the district court for initial consideration of the remedial issue, just as the Court in *Collins* had remanded on that issue. See *Collins*, 141 S. Ct. at 1789; *Bhatti*, 15 F.4th at 853-854. The Eighth Circuit never suggested that a court must invariably resolve the constitutional issue before turning to the remedial one, or that a court of appeals must

invariably remand a remedial issue where a plaintiff simply alleges the possibility of harm.

The Eighth Circuit decision differs from the decision below in another respect as well. In *Bhatti*, the court of appeals remanded for *district-court* factfinding about whether the unconstitutional removal restriction had harmed the plaintiffs. See 15 F.4th at 854. In this case, by contrast, no district court was involved in the earlier proceedings, and petitioner accordingly requested a remand to the Board. Pet. App. 37a; see *id.* at 37a-38a (distinguishing *Bhatti* on this ground). Any such remand would have required the Board members to consider whether the Board (or the agency's ALJs) would have taken different actions if they had viewed themselves as removable at will, and potentially whether the President would have removed the members or the ALJs if he had viewed that option as open to him. The court of appeals understandably concluded that Board consideration of those issues would not "aid in developing the record on this point." *Id.* at 38a.

Petitioner also briefly cites (Pet. 29) the Fifth Circuit's decision in *Collins* v. *Yellen*, 27 F.4th 1068 (2022) (en banc) (per curiam), as conflicting with the Sixth Circuit's decision below. That is incorrect for the same reasons that petitioner's assertion of a conflict with the Eighth Circuit is incorrect. But more importantly, as petitioner elsewhere recognizes (Pet. 28), a subsequent Fifth Circuit decision largely embraced the Sixth Circuit's remedial analysis in this case. See *Community Fin. Servs. Ass'n of Am., Ltd.* v. *CFPB*, 51 F.4th 616, 631-632 (5th Cir. 2022), cert. granted, No. 22-448 (Feb. 27, 2023), and cert. denied, No. 22-663 (Feb. 27, 2023); *id.* at 631 (citing the decision below favorably). And this

Court recently denied review of that aspect of the Fifth Circuit's decision. See *CFSA*, *supra*, No. 22-663.

Petitioner additionally claims (Pet. 29) that the decision below is in tension with decisions of the Ninth and Tenth Circuits addressing the appropriate standard for assessing prejudice in circumstances like these. The cited Ninth and Tenth Circuit decisions held, without remanding, that no remedy was warranted because the challengers had not shown the requisite harm. See *Integrity Advance, LLC* v. *CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022), petition for cert. pending, No. 22-838 (filed Mar. 1, 2023); *Kaufmann* v. *Kijakazi*, 32 F.4th 843, 849-850 (9th Cir. 2022). Those dispositions are consistent with the outcome below.

The Sixth Circuit's prejudice standard is likewise consistent with the standard employed by the Ninth and Tenth Circuits. As noted, the Sixth Circuit asked whether petitioner had "specified the harm that occurred as a result of the allegedly unconstitutional removal restrictions," Pet. App. 29a, and rejected petitioner's allegations of harm as overly "vague" and "generalized," *id.* at 37a. Similarly in *Kaufmann*, the Ninth Circuit explained that "[a] party challenging an agency's past actions must * * * show how the unconstitutional removal provision *actually harmed* the party," and held that the plaintiff there "ha[d] presented neither evidence nor a plausible theory to show that the removal provision caused her any harm." 32 F.4th at 849-850; see *id.* at 850 (rejecting allegation of harm as "not particularized to" plaintiff). Like the Sixth Circuit, the Ninth Circuit found it insufficient that a particular agency official "theoretically might have acted differently" if he were removable at will, explaining that

such "speculation" cannot meet the "burden of showing actual harm." *Id.* at 850.

In *Integrity Advance*, the Tenth Circuit likewise asked whether the plaintiffs had identified any "'compensable harm' resulting from the [agency's] unconstitutional structure," while noting the *Collins* Court's examples of "situations in which the President had wanted to remove the director but was stopped by a lower court decision or by heeding a statute disallowing it." 48 F.4th at 1170. Because the plaintiffs in *Integrity Advance* had not "point[ed] to any such 'compensable harm,'" the Tenth Circuit "f[ound] no avenue of relief available to them under *Collins*." *Ibid.* Thus, the Tenth Circuit's remedial analysis is entirely consistent with the Sixth Circuit's remedial analysis here.

c. Finally, this case is an unsuitable vehicle to consider the proper remedial framework for challenges to agency removal protections. As explained above, the Court should reverse the decision below on the separate and independent ground that the court of appeals erroneously failed to apply the ordinary remand rule. See pp. 11-15, *supra*. If the Court reverses on that ground and orders a remand to the FDIC Board for the Board to apply the correct causation standard to the facts, there will be no basis for the Court to address petitioner's removal challenges. That is particularly true because on remand, the FDIC Board could rule in petitioner's favor, thereby mooting petitioner's removal challenges altogether. And if the Board rules against petitioner on remand, petitioner can seek judicial review, including on the ground that the Board members and/or the ALJ are unconstitutionally insulated from

removal. Accordingly, there is no basis for considering the second question presented at this juncture.

CONCLUSION

The petition for a writ of certiorari should be granted on the first question presented, and the decision below should be summarily reversed. On the second question presented, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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