No. ____

IN THE

Supreme Court of the United States

NATIONWIDE BIWEEKLY ADMINISTRATION, INC.,
LOAN PAYMENT ADMINISTRATION, LLC,
AND DANIEL S. LIPSKY,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party seeking retrospective relief under *Collins v. Yellen* may prove causation through circumstantial evidence—or must produce direct evidence of presidential removal intent.

2. Whether the stigma-plus doctrine requires the same government actor to impose both stigma and deprivation—or permits claims when the elements are sufficiently connected.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Nationwide Biweekly Administration, Inc. states that it has no parent corporation and no publicly held company owns 10% or more of its stock. Petitioner Loan Payment Administration, LLC is the wholly owned subsidiary of Nationwide Biweekly Administration, Inc. Petitioner Daniel S. Lipsky is the sole shareholder of Nationwide Biweekly Administration, Inc.

LIST OF DIRECTLY RELATED PROCEEDINGS

United States District Court for the Northern District of California

Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc., et al.
Case No. 3:15-cv-02106-RS;

United States Court of Appeals for the Ninth Circuit

First Appeal:
Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc., et al.
Case No. 18-15431 (First Appeal)

United States District Court for the Northern District of California

Remand:
Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc., et al.
Case No. 3:15-cv-02106-RS (Remand)

United States Court of Appeals for the Ninth Circuit

Second Appeal:
Consumer Financial Protection Bureau v. Nationwide Biweekly Administration, Inc., et al.
Case No. 24-5940) (Second Appeal)

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The Court of Appeals' Memorandum decision (Pet.App.1a-10a) is unpublished but available at 2025 WL 3205699, 9th Cir. (Cal.), Nov. 17, 2025. The District Court's Order Supplementing, Modifying, and Reaffirming Prior Findings of Fact and Conclusions of Law Following Remand and Reaffirming Judgment (Pet.App.11a-29a) is unpublished but available at 2024 WL 3991252, N.D. Cal. Aug. 28, 2024. The Court of Appeals' Memorandum decision to remand is unpublished but available at 2023 WL 566112, 9th Cir. (Cal.), Jan. 27, 2023. The District Court's Opinion and Order (Pet.App.30a-66a) is unpublished but available at 2017 WL 3948396, N.D.Cal., Sep. 8, 2017.

JURISDICTION

The Court of Appeals entered judgment on November 17, 2025. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

PERTINENT STATUTES AND RULES

12 U.S.C. §5491(c)(3) provides that the Director of the Consumer Financial Protection Bureau may be removed from office by the President only "for inefficiency, neglect of duty, or malfeasance in office."

12 U.S.C. §5515 grants the Consumer Financial Protection Bureau supervisory authority over banks with assets exceeding $10 billion.

12 U.S.C. §5564 authorizes the Consumer Financial Protection Bureau to bring civil enforcement actions.

The full text of the material statutory provisions is reproduced in the Appendix.

INTRODUCTION

The circuits are divided on what evidence establishes causation under *Collins v. Yellen*, 594 U.S. 220 (2021). The Ninth Circuit Panel here required proof that "President Obama would not have pursued" this investigation. Pet.App.5a. Similarly, the Fifth, Eighth, and Tenth Circuits require proof of presidential intent as a core standard. The Second, Third, and Sixth Circuits, however, permit other types of circumstantial evidence to prove causation of actual harm. Regardless of the standard, in the more than four years since *Collins*, not a single CFPB defendant has obtained retrospective relief under either type of causation standard. *Collins*'s remedial framework is a nullity in practice.

This case presents what no prior *Collins* vehicle offered: the same official, the same company, the same practices—opposite outcomes based solely on the accountability structure. The Ohio Attorney General's consumer protection office spent two years conducting a thorough investigation into Nationwide Biweekly Administration, Inc. ("Nationwide"). However, Richard Cordray, as Ohio Attorney General and accountable to Ohio voters, collaborated with Nationwide on the development of future marketing Do's and Don'ts. This transparent process resulted in an Agreed Entry filed in the state court in

Xenia, Ohio. Following those Do's and Don'ts, however, did not save Nationwide. A few years later, when the same Richard Cordray became CFPB Director, he was insulated from removal and not accountable to the President. In these changed circumstances, Richard Cordray's CFPB sued Nationwide. Same man. Different accountability. Different outcome.

Secondly, the Ninth Circuit Panel demanded testimony from Nationwide's banks on whether the CFPB directly caused the debanking that occurred immediately after the CFPB filed its lawsuit and issued a press release. Pet.App.8a-9a. The banks that terminated Nationwide's accounts, however, were supervised by CFPB. The circuits are divided on stigma-plus due-process claims. The Second Circuit applies a functional connection standard, permitting different actors when stigma and deprivation are "sufficiently proximate." *Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005). The First Circuit has explicitly declined to follow the Second Circuit. *Mead v. Independence Ass'n*, 684 F.3d 226, 234 (1st Cir. 2012); *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 10 (1st Cir. 2011) (requiring the same government actor to impose both stigma and deprivation). This is a textbook circuit split on a pure question of law.

Recently, this Court considered the principle that the government "cannot do indirectly what she is barred from doing directly." *NRA v. Vullo*, 602 U.S. 175, 190 (2024). That principle applies here. Here, the Ninth Circuit Panel demanded testimony from banks that CFPB caused their debanking

(Pet.App.8a-9a), evidence no supervised entity would provide against its regulator.

Both questions present the same problem: courts demanding evidence that constitutional violations make impossible to obtain. Only this Court can resolve these questions.

STATEMENT OF THE CASE

A. The Company

Nationwide Biweekly Administration operated for over 12 years, from its founding as a startup in 2002 through 2015, when the debanking occurred, and operations were suspended. Its Interest Minimizer program helped homeowners pay down mortgages faster by aligning biweekly withdrawals with pay cycles—resulting in 13 annual mortgage payments instead of 12. Pet.App.31a-32a.

Nationwide held licenses in over 40 states, maintained an A+ or A Better Business Bureau rating, and served 135,000 active customers. Trial Tr. 514; Trial Tr. 778; Trial Tr. 1147-50. No state revoked its licenses. Trial Tr. 848-51. No bank terminated its accounts during 12 years of operation.

B. The Ohio Agreed Entry

From 2008-2010, Ohio's Attorney General conducted a two-year investigation of Nationwide, including nine mediation sessions. The process culminated in a 2010 Agreed Entry that was ten pages and nineteen requirements—resolving the same marketing, savings calculations, scripts, processes—issues that would later form the basis of CFPB's 2015 complaint. CA 1756-65; CA 1909-22. Richard Cordray, then Ohio Attorney General, "approved and agreed to" this 2010 court filing. CA 1764. The collaboration was so successful that Nationwide voluntarily adopted a helpful AG suggestion, not mandatory, to defer the fee payable until after services commenced. Trial Tr. 735.

C. The CFPB Enforcement Action

On May 11, 2015, the CFPB announced its lawsuit in a press release. CA 1909-22; CA 1772-74. CFPB sent no warning letter, provided no opportunity to cure, and made no contact to explain its lawsuit filing. D.Ct.Dkt.82 at 13. Mr. Lipsky learned of the lawsuit from the press release.

The press release branded Nationwide as having "lured customers with false promises" through "illegal and deceptive practices"—inflammatory language absent from the formal complaint. CA 1773; CA 1909-22.

D. The Bank Terminations

Within thirty days, all four banking partners—TD Bank, U.S. Bank, Bank of America, and BMO Harris—sent termination notices. Trial Tr. 1136-39. All four were subject to CFPB's supervisory authority under 12 U.S.C. §5515; Trial Tr. 1150.

A recorded call captured a U.S. Bank representative's statement: "CFPB has long arms . . . CFPB is not even regulated by the federal government so it can do whatever it wants." CA 0262-66, 64. TrialExh.244.

Nationwide asked CFPB to issue comfort letters—statements that banks would not face scrutiny for continuing services during litigation. Trial Tr. 1142-46. CFPB declined. *Id.*

By November 2015, all Automated Clearing House ("ACH") access was lost. Trial Tr. 1147-50. Nationwide suspended operations. 160 employees lost their jobs. 135, 000 active customers lost service. *Id.*

E. The Trial

After a bench trial, the district court ruled against CFPB on its leading claim, the fees. Pet.App.42a-43a. The court found Nationwide's interest-savings descriptions "literally true" with "an articulable basis in fact," and "technically correct." Pet.App.26a, 48a, 60a. The district court found Mr. Lipsky "took affirmative steps such as training, quality control, and seeking legal counsel, in an effort to stay on the right side of the line." Pet.App.63a. But after the court found some narrow violations on mini-categories of CFPB's claims, CFPB aggressively pursued the per diem civil penalty. Pet.App.61a-63a, 63a. The court used the lowest-tier. *Id.* Nevertheless, the civil penalty amounted to $7.93 million. *Id.* The court also ordered a permanent injunction but permitted Nationwide to resume operations with modifications. Pet.App.63a-64a. With the debanking, resumption proved impossible.

On Nationwide's stigma-plus counterclaim, the district court excluded expert testimony explaining how regulatory signals operate in banking, then found "no proof" of connection. Pet.App.64a-66a; . Moreover, the district court excluded exhibits regarding Operation Choke Point, a federal government program that used government regulators to signal banks about the debanking of disfavored companies without due process. *Id.* Once such important evidence was excluded, the district court again found “no proof” of the stigma plus constitutional violation. *Id.* The district court dismissed the counterclaim. Pet.App.65a-66a.

F. The Appeals

The first appeal ensued. Pet.App.2a. After *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020) and *Collins*, the Ninth Circuit remanded for consideration of retrospective relief. Pet.App.12a-13a. On remand, Nationwide presented evidence comparing Richard Cordray’s conduct as Ohio Attorney General with his conduct as CFPB Director (among six categories of facts with a but-for-causation analysis). CA 0114-0153; D.Ct.Dkt.396. The district court denied relief as “sheer speculation.” Pet.App.18a.

The district court reaffirmed the judgment for $7.93 million and the permanent injunction, exactly as previously issued. D.Ct.Dkt.413. 331.

The second appeal ensued. The Ninth Circuit Panel affirmed the denial of a *Collins* remedy, holding Nationwide failed to show “that President Obama would not have pursued the specific investigation.” Pet.App.5a. On the counterclaim, the Panel found “no evidence of a connection” between the press release and the debanking in the absence of direct bank testimony about CFPB. Pet.App.8a-9a.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are Divided 3-3 on Whether Circumstantial Evidence Other Than Presidential Intent Satisfies *Collins* Causation.

A. The Split Is Entrenched and Acknowledged.

The conflict is genuine. The Ninth Circuit Panel in this case required Nationwide to show "that President Obama would not have pursued the specific investigation of Nationwide at issue here."[1] Three circuits use this presidential intent standard. The Fifth, Eighth, and Tenth Circuits require direct evidence of presidential intent. C*ollins v. Dept. of the Treasury*, 83 F.4th 970, 982-984, 982 (5th Cir. 2023) (referencing a letter from former President Trump) (citing *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616, 632 (5th Cir. 2022)); *Bhatti v. FHFA*, 97 F.4th 556, 560-561 (8th Cir. 2024) (discussing a post-presidency letter from President Trump); *Leachco, Inc. v. CPSC*, 103 F.4th 748, 757, n. 8 (10th Cir. 2024) ("For example, that the President would have removed one or more commissioners but for this statutory protection.") (citing *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022) ("[T]he President had wanted to remove the director but was stopped… by heeding a statute disallowing it.")).

The Second, Third, and Sixth Circuits permit alternative pathways, such as a standard but-for causation analysis, including circumstantial evidence of behavioral alteration when accountability was

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[1] The Memorandum decision at issue in this petition is not precedent in the Ninth Circuit because it is unpublished.

absent. *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022) ("*Collins* instructs that we must ask whether the FDIC Board's for-cause protections inflicted harm, such as by preventing superior officers from removing Board members when they attempted to do so, or possibly by altering the Board's behavior.") (internal citation omitted); *CFPB v. Law Offices of Crystal Moroney*, 63 F.4th 174, 180 (2d Cir. 2023) ("[A] party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head."); *CFPB v. National Collegiate Master Student Loan Trust et al.,* 96 F.4th 599, 615 (3d Cir. 2024) ("But the mere allegation . . . is insufficient . . . if the [Consumer Financial Protection Act] suggested '*any link whatsoever* between the removal provision and [c]laimant's case,' then the Trusts may be entitled to some relief.") (footnote and internal citation omitted) (emphasis added).

Thus, the 3-3 circuit split material to this petition concerns whether presidential intent must be proven with direct evidence, in some form, either alone or with other evidence, to obtain a remedy. In three circuits, some form of presidential intent is required. In the other three circuits, a different approach makes no such requirement, permitting circumstantial evidence of causation and actual harm. The conflict is genuine and the standard outcome-determinative.

This Court has not granted certiorari in three *Collins* remedy cases over three years: *Calcutt v. FDIC*, 598 U.S. 623, 629 (2023) (*Collins* causation question presented; summary reversal on other grounds); *CFPB v. National Collegiate*, cert. denied, 145 S. Ct. 984 (2024); *Leachco v. CPSC*, cert. denied, 145 S. Ct. 1047 (2025). Each denial left the split unresolved. The Petitioners themselves identified the problem:

> *Calcutt*: "Courts are in disarray over how to interpret *Collins* and are increasingly deterring litigants from bringing separation-of-powers challenges." Petition for Certiorari at 24-29, 28, Case No.22-714;
>
> *National Collegiate*: "The Circuits are divided over how to assess harm under *Collins*." Petition for Certiorari at 13-15, 13, Case No. 24-185;
>
> *Leachco*: "Recurring issues over which the lower courts cannot agree." Petition for Certiorari at 15, 32, Case No. 24-156.

Prior vehicles lacked what this case provides. This case presents a complete trial record and unique before-and-after evidence of behavioral change by the same decision-maker toward the same company under different accountability structures. No prior petition offered that. Four and one-half years of percolation since this Court decided *Collins* has produced only deeper division. The circuits show no sign of convergence. The time to act is now.

Collins held that parties seeking retrospective relief must show the unconstitutional provision "inflicted compensable harm." 594 U.S. at 258–59. The Court offered illustrations, such as evidence that the President attempted removal or that he "express[ed] displeasure with actions taken by a Director and had asserted that he would remove the

Director if the statute did not stand in the way." *Id.* at 259–60. In those cases, this Court said, "the statutory provision would *clearly* cause harm." *Id.* (emphasis added).

But this Court never held the examples were exclusive. The word "clearly" modified the certainty of those scenarios—not the universe of permissible evidence. Lower courts have misread illustration as limitation. As this Court observed in *Collins* itself, correcting a misreading of *Seila Law*: "we said no such thing." 594 U.S. at 258. The same correction is needed now.

Here, the Panel required direct proof that "President Obama would not have pursued" this investigation. Nationwide presented circumstantial evidence of President Obama's intent through his Executive Orders. These orders required agencies to be "transparent," "participatory," and "collaborative," and to prioritize data-driven regulation and minimal burdens. CA 0108-9, Exs. A, H. ¶¶ 2, 4. President Obama also called for "the best, most innovative, and least burdensome tools." 2-ER-0108, Ex. A ¶ 4 President Obama explicitly directed agencies to ensure "transparency" through an "open exchange of ideas." CA 0108, Ex. A, ¶ 2. CFPB ignored these Executive Orders. The Panel dismissed this circumstantial evidence as *per se* insufficient. Pet.App.4a-5a.

This creates a paradox the law does not tolerate. The removal restriction eliminated presidential oversight—but now courts demand proof of presidential intent. When a party's wrongdoing makes proving damages difficult, that party "bears the risk of uncertainty." *Bigelow v. RKO Radio*

Pictures, 327 U.S. 251, 265 (1946). CFPB cannot benefit from an evidentiary void created by its own unconstitutional structure.

This Court has never required direct evidence to establish constitutional causation. Circumstantial evidence suffices. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003). Courts evaluate such evidence through established factors: departures from normal procedures, substantive departures from regular practice, historical background, and the specific sequence of events. *Village of Arlington Heights*, 429 U.S. 252, 266-68 (1977). All are present here. Previously, in Ohio, Cordray engaged in back-and-forth; at CFPB, he filed without a conversation. President Obama's Executive Orders directed transparency and collaboration; CFPB ignored them. The same official treated the same company differently under different accountability structures. CFPB filed suit, issued an inflammatory press release, and four banks terminated within thirty days. Nothing in *Collins* displaced these established principles. The circuits that demand direct presidential evidence invented an exception this Court never adopted.

B. The Same Official Treated the Same Company Differently Under Different Accountability Structures.

From 2008 to 2010, Ohio's Attorney General examined Nationwide's practices. CA 0222-23. Nine mediation sessions. A 10-page Agreed Entry setting forth 19 paragraphs of Do’s and Don’ts was developed through collaboration and agreement in Xenia, Ohio, in the Court of Common Pleas. CA 1756-65. Richard Cordray was the Ohio Attorney

General at the time, and his name appears on the Agreed Entry. As Ohio Attorney General—accountable to voters—Cordray's office spent two years investigating Nationwide, conducted nine mediation sessions, and produced a collaborative Agreed Entry. As CFPB Director, insulated from removal, Cordray sued the same company for the same practices and savings calculations without a single conversation. Change the accountability structure, and Richard Cordray's conduct changes.

The government cannot explain this contrast by pointing to different offices. The statutes are materially identical. Ohio's Consumer Sales Practices Act prohibited "unfair or deceptive" act or practice. Ohio Rev. Code §1345.02. The Consumer Financial Protection Act prohibits "unfair, deceptive, or abusive" act or practice. 12 U.S.C. §5531. The CFPB's claims against Nationwide rested on the same core prohibition against deception that Ohio law employs. As Ohio AG, Cordray chose collaboration, and Nationwide did what he asked. As CFPB Director, he sued Nationwide without a single conversation for the same marketing Do's and Don'ts he previously asked for under identical legal standards. The only variable that changed was accountability. This evidence satisfies the circumstantial-evidence framework established by this Court in *Village of Arlington Heights*.

The behavioral alteration extended beyond this case. Under the unaccountable structure, CFPB published virtually no guidance—its own architect, Elizabeth Warren, described the deliberate strategy as "putting down fence posts on the prairie." CA 0108, Ex. C at ¶7. Regulated entities were told to look to court orders to discover what the law required. CA 0108, Ex. E. After *Seila Law* restored presidential accountability, Director Chopra increased guidance and policy statements. CA 0108, Ex. F. When accountable, CFPB provides guidance. When unaccountable, it litigated first. No prior *Collins* vehicle presented comparable evidence.

C. Whether a Constitutional Remedy Exists Should Not Depend on Geography.

Whether constitutional remedies exist should not depend on forum selection. The Second, Third, and Sixth Circuits permit conventional but-for causation analysis in circumstantial-evidence cases. The Fifth, Eighth, and Tenth Circuits look to presidential intent to remove as a core evidentiary requirement. The same plaintiff, presenting identical evidence, faces categorically different legal standards based solely on geography. That disparity warrants this Court's review.

Without this Court's intervention, lower courts will continue applying incompatible standards indefinitely. The human cost is not theoretical. Mr. Lipsky faces foreclosure on his home. *Smith v. Daniel S. Lipsky et al.*, United States District Court for the Southern District of Ohio, Case No. 1:19-cv-01084 MRB, consolidated with 1:25-cv-00245 MRB. His company has not operated since 2015. 160 employees lost their jobs. 400,000 customers lost their services, 135, 000 of whom were active at that time. Ten years of litigation.

We respectfully request this Court to grant the petition for certiorari for question presented no. 1, regarding a remedy under *Seila Law* and *Collins*.[2] Only this Court can resolve this.

II. The Circuits Are Divided on What Evidence Establishes "Connection" in Stigma-Plus Claims Involving Regulated Intermediaries.

This Court has unanimously held that the government "cannot do indirectly what she is barred from doing directly." *NRA v. Vullo*, 602 U.S. 175, 190 (2024). Justice Sotomayor's opinion for all nine Justices reaffirmed a principle more than 60 years old: the First Amendment prohibits government reliance on the threat of invoking legal sanctions and other means of coercion to achieve suppression through private intermediaries. *Id.* at 180; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). A regulator cannot "coerce private parties in order to punish or suppress" constitutional rights. *Vullo*, 602 U.S. at 180. Intermediary strategies allow regulators to "expand their regulatory jurisdiction to suppress" targets "that they have no direct control over." *Id.* at 198. And intermediaries "will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." *Id.*

That principle applies with equal force to due process claims. Government public statements targeting an individual trigger constitutional protections where the individual will logically suffer reputational harm. *Wisconsin v. Constantineau*, 400 U.S. 433, 436-437 (1971). This Court subsequently

[2] Should this Court decline to grant our petition, we request and recommend that this case be held in abeyance pending consideration of Case No. 24-969, *CFSA v. CFPB*, because that petition for certiorari concerns the standard for a remedy under *Collins* and *Seila Law* (in the context of CFPB-issued rules).

held that reputation alone does not suffice to invoke due process protections—there must be a stigmatizing government act *plus* an alteration of a right or status recognized under law. *Paul v. Davis*, 424 U.S. 693, 701, 708–09 (1976). Both elements are present here.

CFPB wields dual statutory authority: it supervises the nation's largest banks under 12 U.S.C. §5515 and prosecutes companies that depend on those banks for survival under 12 U.S.C. §5564. This combination creates precisely the coercive leverage *Vullo* condemned. CFPB's press release was the stigma. The simultaneous debanking by four CFPB-supervised institutions was the plus. The Panel held that there was "no evidence of a connection." Pet.App.8a-9a. But the statutory supervisory relationship between CFPB and the terminating banks is not disputed. This connection is codified in federal law. The question is whether that relationship, combined with circumstantial evidence of regulatory pressure, suffices to establish the connection. Or, alternatively, does the government actor have to deliver both the stigma and plus elements to establish a claim?

A. The Circuits Are Split on the Evidentiary Showing Required to Prove "Connection."

The circuits are split: must the same government actor impose both stigma and deprivation? The First Circuit says yes. Stigma and the "plus" factor must be "directly attributable" to the same governmental action; where the elements "derive from distinct sources, a party cannot make out a viable procedural due process claim." *URI*

Student Senate v. Town of Narragansett, 631 F.3d 1, 10 (1st Cir. 2011). Applying that rule, the First Circuit has explicitly acknowledged and declined to follow the Second Circuit's contrary approach. *Mead v. Independence Ass'n*, 684 F.3d 226, 234 (1st Cir. 2012). Under this categorical rule, claims are barred whenever different actors supply the elements—regardless of what circumstantial evidence demonstrates their connection. The Second Circuit says no—claims lie when stigma and deprivation are sufficiently connected, regardless of actor identity. *Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005). There is no "rigid requirement" that both the stigma and the plus must come from the same government actor or at the same time. *Id.*

The Ninth Circuit nominally applies a "connection" standard. *Hart v. Parks*, 450 F.3d 1059, 1069-70 (9th Cir. 2006) (recognizing the stigma-plus test can be satisfied by showing injury to reputation was inflicted "in connection with" a deprivation). But the decision below imposed evidentiary requirements that no circumstantial evidence can satisfy when the intermediaries are under the regulator's supervision. The district court demanded "a witness from a banking institution that would be able to say, 'I reviewed this material, and we had a meeting. And we decided that based on this material, we were going to stop our relationships with certain customers.'" Trial Tr. 1167. The Panel affirmed, holding that Operation Choke Point documents—a government operation to debank legitimate businesses without due process—were "irrelevant without evidence that a banking institution had relied on them." Pet.App.9a.

This evidentiary standard converts a "connection" test into a "direct testimony" requirement. Whether framed as the First Circuit's categorical same-actor rule or the Panel's demand for bank witnesses, the result is identical: plaintiffs cannot prove the connection without testimony from intermediaries. Those intermediaries will never provide such testimony if adverse to their regulator. So, logically, the Panel aligns with the First Circuit's same-actor standard.

B. Statutory Supervisory Relationships and Circumstantial Evidence Must Suffice When Direct Testimony Is Structurally Unavailable.

The "connection" between CFPB's press release and the bank terminations does not require testimonial proof from the banks themselves. The connection is established by statute and circumstance. 12 U.S.C. §5515 grants CFPB supervisory authority over TD Bank, U.S. Bank, Bank of America, and BMO Harris—the four institutions that terminated Nationwide's accounts within thirty days of the press release. This statutory relationship is not a disputed fact requiring credibility determinations. It is codified federal law.

The circumstantial evidence is overwhelming. CFPB issued a press release on May 11, 2015, publicly branding Nationwide as having "lured customers with false promises" through "illegal and deceptive practices." CA 1772-74, 73. Within thirty days, all four banking partners sent termination letters. A recorded call captured the U.S. Bank representative's explanation: "CFPB has long arms . . . CFPB is not even regulated by the federal government so it can do whatever it wants." CA 0262-66, 64. TrialExh.244. Nationwide's counsel asked CFPB to issue comfort letters—statements that the banks would not face scrutiny for continuing services during litigation. CFPB declined.

The parallel to *Vullo* is precise. In *Vullo*, a government regulator (DFS Superintendent) pressured regulated entities (insurance companies) to sever ties with a disfavored party (NRA) through implicit regulatory threats. Here, a government regulator, CFPB, pressured regulated entities (banks) to sever ties with a disfavored party (Nationwide) through public stigmatization and supervisory authority. In *Vullo*, the NRA was not directly regulated—it was harmed through government pressure on third parties. Here, Nationwide was harmed through government pressure on its banking partners, who responded by debanking Nationwide. If *Vullo* means anything, it means the government cannot achieve constitutional deprivations through regulated intermediaries while disclaiming responsibility. That principle applies whether the underlying right sounds in the First Amendment or the Due Process Clause.

Under the Second Circuit's standard, this evidence establishes the connection. A "reasonable observer" would see the stigma and deprivation as connected based on their "order of occurrence" (thirty days), their "origin" (CFPB's statutory authority over both enforcement and bank supervision), and the banks' documented understanding of CFPB's regulatory leverage.

The district court, however, excluded expert testimony that would have explained how regulatory signals operate in the banking industry. Brian Kelley, a 35-year banking veteran who served as President and CEO of multiple institutions, would have testified to the mechanism by which a federal enforcement action triggers account terminations by supervised banks—even without explicit direction. CA 0086-91; CA 0989-1027; CA 0939-42. The district court excluded this testimony for lack of foundation because Kelley had not interviewed the specific banks involved. Pet.App.64a-66a, 65a. The district court demanded direct evidence of what happened inside these banks' decision-making processes. *Id.* But expert testimony on industry practices is routinely admitted to help factfinders understand circumstantial evidence. The exclusion was proper only if the Court believed that circumstantial evidence, however compelling, cannot establish a connection without direct proof of bank reliance.

The Panel also held that CFPB's press release "was not wrongful conduct." Pet.App.8a. That holding cannot stand. The press release branded Nationwide as having "lured customers with false promises" through "illegal and deceptive practices"—before any court had weighed any evidence. The word "lured," connoting predatory deception, did not appear in the formal complaint. CA 1773. The district court later found Nationwide's savings descriptions were "literally true," had "an articulable basis in fact," and were "technically correct." Pet.App.26a, 48a, 60a. A government press release that declares a company engaged in "illegal" conduct, when a court later finds the company's statements were literally true, is objectively stigmatizing. The

Panel's contrary conclusion eviscerates the stigma-plus doctrine.

C. Demanding Intermediary Testimony Creates Constitutional Immunity for Regulatory Coercion.

The evidentiary standard applied below makes stigma-plus claims impossible to prove whenever the regulator exercises supervisory authority over the intermediaries who impose the deprivation. That standard should be rejected.

Consider what compliance with the district court's demand would require. A bank officer would need to testify under oath that the bank terminated a customer relationship under pressure from its federal regulator. No rational bank officer will provide this testimony. A bank testifying that it capitulated to regulatory pressure would expose itself to: (1) retaliation during ongoing CFPB examinations; (2) litigation risk from effectively admitting participation in a due-process violation; (3) permanent damage to regulatory relationships; and (4) career consequences for the testifying officer. This Court recognized precisely this dynamic in *Vullo*, explaining that regulated intermediaries "will often be less invested in the speaker's message and thus less likely to risk the regulator's ire." 602 U.S. at 190. The evidentiary standard the courts below demanded is not difficult to meet—it is impossible to meet. And impossibility cannot be the constitutional standard.

Constitutional remedies cannot be rendered illusory by requirements that the constitutional violation itself renders impossible to satisfy. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946). CFPB's dual authority over both Nationwide and Nationwide's banks created the evidentiary void. It cannot benefit from that void.

If permitted by this Court, the framework adopted below is a roadmap for regulatory abuse. A regulator need only stigmatize publicly and let supervised entities deliver the deprivation. Constitutional accountability disappears because proving "connection" requires testimony that the regulatory relationship makes structurally unavailable. Whether through the First Circuit's categorical same-actor rule or the Panel's demand for direct bank testimony, the result is identical: immunity for the government's elimination of disfavored parties through the coercion of regulated intermediaries.

If the government cannot pressure insurers to withdraw coverage from disfavored speakers, it cannot pressure banks to withdraw services from disfavored businesses—and evade accountability by demanding proof that only the pressured intermediaries can provide. *Vullo*, 602 U.S. at 190, 198. The question is what evidence suffices to establish "connection" when the intermediaries who imposed the deprivation are under the regulator's ongoing supervisory authority. Circumstantial evidence—including statutory supervisory relationships, temporal proximity, recorded admissions, and expert testimony on regulatory coercion mechanisms—must suffice. The alternative is constitutional immunity for an entire category of government misconduct.

We respectfully request this Court to grant the petition for certiorari for question presented no. 2, regarding the government's violation of due process, causing stigma plus harm in the form of debanking.

III. This Case Presents Both Questions Cleanly.

A. Both Questions Were Squarely Decided Below.

The constitutional question has been preserved throughout this litigation and was squarely addressed by both courts below. The record is complete. The district court conducted a full bench trial and issued an Opinion and Order. Pet.App.30a-66a. The Ninth Circuit Panel remanded for consideration of *Collins*. The district court addressed *Collins* on a developed record and denied relief. The Panel affirmed. No further factual development is possible. The questions presented are purely legal.

On the *Collins* question, the Panel expressly held that Petitioners' 40 pages describing the CFPB's behavioral alteration, President Obama's Executive Orders, and other but-for counterfactual analyses were insufficient. Pet.App.4a-5a. See D.Ct.Dkt. 396. The Panel would have required direct proof that "President Obama would not have pursued the specific investigation of Nationwide." Pet.App.5a.

On the stigma-plus question, the Panel held there was "no evidence of a connection" between CFPB's press release and the banks' terminations—despite the undisputed statutory supervisory relationship established by 12 U.S.C. §5515. Whether circumstantial evidence of that relationship suffices, or whether plaintiffs must produce direct testimony from supervised intermediaries, is the pure legal question the Court resolved against Petitioners.

Both questions are outcome-determinative. If circumstantial evidence of behavioral alteration satisfies *Collins*, Petitioners are entitled to retrospective relief. If circumstantial evidence of regulatory coercion through supervised intermediaries establishes "connection," Petitioners' Counterclaim should have proceeded.

B. The Record Is Complete and the Facts Undisputed.

Unlike the prior *Collins* petitions this Court denied, this case arises from a final judgment after a full bench trial. The Cordray contrast—same official, same company, same practices and savings calculations, different accountability structure, different outcome—is documented in the record. No prior *Collins* petition presented before-and-after evidence of the same decisionmaker acting differently when accountable versus when insulated. This case does.

The facts underlying the stigma-plus question are equally complete. CFPB does not dispute issuing the press release. It does not dispute that all four banks terminated within thirty days. It does not dispute its supervisory authority under 12 U.S.C. §5515. It does not dispute the refusal of comfort letters. The recorded call is in evidence. The only dispute is legal: whether this circumstantial evidence can establish "connection," or whether Petitioners were required to produce testimony from banks that face ongoing CFPB supervision, or whether the same actor must produce the stigma and the deprivation.

C. No Alternative Grounds Support Affirmance.

The government has not argued mootness, standing, or procedural default. Both questions presented were preserved below. The Panel decided both on the merits. No independent and adequate state grounds exist. The path to reversal is unobstructed.

Nor can ratification cure the constitutional defect. Director Kraninger's 2020 ratification cannot cure harm inflicted in 2015. Nationwide's banks terminated services in 2015. The $128-million-dollar company was forced to cease operations in 2015. In 2015, 160 employees lost their jobs; 135,000 active customers lost their services all at once. By 2020, there was nothing left to ratify—the constitutional injury was complete. Moreover, 12 U.S.C. §5564(g)(1) imposes a three-year statute of limitations. By 2020, CFPB lacked enforcement authority over time-barred claims. Ratification requires present authority to act. *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). An agency cannot ratify what it lacks present authority to do. Otherwise, agencies could immunize years of unconstitutional conduct through post hoc paperwork, thereby eviscerating the *Collins* remedy entirely.

IV. The Decisions Below Are Wrong.

Both decisions share the same fatal flaw: they demand evidence that the constitutional violations made impossible to obtain.

For *Collins*, the Panel ignored 40 pages of circumstantial evidence and but-for causation analysis, including of presidential Executive Orders, behavioral differences in the absence of oversight compared with presidential accountability, and, last but not least, Richard Cordray's actions in Ohio versus in Washington, D.C. Instead, the Panel required proof of presidential intent. But the removal restriction insulated the Director from presidential oversight. The evidence does not exist precisely because of the violation. Nothing in *Collins* or *Seila Law* supports the Panel's imposition of such limitations on a remedy for the constitutional injury Nationwide suffered at the hands of the CFPB in 2015.

For stigma-plus, the Panel required testimony from banks that CFPB regulates, and who were pressured into debanking Nationwide. No supervised entity will testify against its regulator. Demanding such testimony guarantees the connection can never be proven.

Constitutional violations require constitutional remedies. Neither standard can be satisfied by evidence the violation itself makes impossible to obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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