No. 24-185

IN THE
Supreme Court of the United States

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST, ET AL., *Petitioners,*

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL., *Respondents.*

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution and Statutes

INTEREST OF THE *AMICUS CURIAE*[1]

The Separation of Powers Clinic is housed within the Separation of Powers Institute at The Catholic University of America's Columbus School of Law. The Institute and Clinic were established during the 2024–25 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs in cases implicating separation of powers, including an amicus brief on behalf of Members of Congress in *Consumers' Research v. CPSC*, No. 23-1323, which involves questions about agencies led by officials shielded from full presidential oversight by removal protections.

Petitioners' case is important to *amicus* because it addresses the proper remedies for removal-protection violations. In particular, *amicus* contends that the Third Circuit's holding that litigants must demonstrate all-but-uncontested evidence of prejudice to receive a judicial remedy for harm from an illegal removal protection is broader than, and

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

inconsistent with, this Court's decision in *Collins v. Yellen*, 594 U.S. 220 (2021).

SUMMARY OF THE ARGUMENT

Separation of powers is "basic and vital" to preserving and securing liberty and the proper functioning of the federal government. *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933); *see Bond v. United States*, 564 U.S. 211, 221 (2011). The Court should grant the Petition because it raises an important separation of powers issue that otherwise will have longstanding detrimental consequences.

The Third Circuit misread *Collins* as establishing a nearly insurmountable barrier for prevailing on challenges to unconstitutional officer removal protections. This conclusion sits in tension with *Collins* itself. More, it would essentially foreclose all future challenges to constitutional structural violations on removal grounds because it extends the principle of *Collins* beyond retrospective harm, creating a hurdle to challenging even *ongoing* actions initiated by unconstitutionally serving officers. Courts have long possessed equitable power to remedy ongoing constitutional violations even where they may lack power to provide certain remedies for past violations. The Court should grant review to consider the tension between this longstanding principle and the Third Circuit's decision below.

ARGUMENT

I. The Third Circuit's Requirement of "But-For" Evidence of Prejudice Extends Beyond *Collins* and Effectively Forecloses Challenges Seeking Prospective or Retrospective Relief.

This Court's review is warranted to address the Third Circuit's requirement that challengers demonstrate but-for proof that the CFPB's lawsuit would not have been initiated absent the Director's unconstitutional removal protection provisions. This is not merely an erroneous decision in a case likely to be unique and limited in its impact, but instead effectively would foreclose the likelihood of relief in future challenges to all sorts of removal protections, even when the challengers assert prospective harm, despite a long tradition of courts providing relief against ongoing constitutional violations.

A. The CFPB Director's Then-Existing Removal Restrictions Directly Implicate Separation of Powers.

The power to remove executive officers is "in its nature an executive power." *Myers v. United States*, 272 U.S. 52, 161 (1926). Because the President cannot exercise the entirety of the executive power by himself, he has subordinate officers to assist. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 213 (2020). To carry out his constitutional duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, the President must be able to direct those officers in their execution of executive power, under threat of removal if necessary, *see Seila Law*, 591 U.S. at 213–

14. Restrictions on the President's power to remove Article II officers therefore may trench upon the President's constitutional duties if they interfere with the presidential duty to supervise and exercise executive authority, and courts typically view such restrictions with skepticism. *See id.* at 228 ("[T]he President's removal power is the rule, not the exception.").

This Court has already held that the CFPB exercises "quintessentially executive power[s]," including "promulgate binding rules," "issu[ing] final decisions awarding legal and equitable relief in administrative adjudications," and "seek[ing] daunting monetary penalties against private parties on behalf of the United States in federal court." *Id.* at 218–19. Thus, the Court held that the Director of the CFPB must be answerable to the President via at-will removal. *Id.* at 205.

Petitioners' case raises the question of whether any meaningful remedy results from actions initiated by executive officials, such as the CFPB Director, during the time when they were not fully accountable to the President. As demonstrated next, the Third Circuit's decision below effectively forecloses any such relief, even for ongoing harms felt by Petitioners.

B. The Third Circuit's Test for Prejudice Overreads *Collins* and Would Effectively Preclude Relief for Prospective and Retrospective Harms.

Petitioners seek what amounts to prospective relief against the ongoing efforts by the CFPB to

obtain extensive and forward-looking remedies against Petitioners—efforts that were initiated by the then-unconstitutionally-insulated CFPB Director and continue to this day. *See* CA3.App.401 (CFPB seeking to "permanently enjoin" Petitioners).

Completely foreclosing a remedy for removal-protection challenges seeking *prospective* relief is inconsistent with the historic availability of injunctive relief against ongoing constitutional violations. *See*, *e.g.*, *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). This "negative injunction remedy" is a "'standard tool of equity' that federal courts have authority to entertain under their traditional equitable jurisdiction." *Whole Woman's Health v. Jackson*, 595 U.S. 30, 53 (2021) (Thomas, J., concurring in part) (citation omitted). And this power generally extends "to violations of federal law by federal officials." *Armstrong*, 575 U.S. at 327.

Thus, although courts lack "power to create remedies previously unknown to equity jurisprudence," *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999), the negative injunction has roots in American equity dating back to the Judiciary Act of 1789, *see* § 11, 1 Stat. 78; *Whole Woman's Health*, 595 U.S. at 53 (Thomas, J., concurring in part), which itself "reflects a long history of judicial review of illegal executive action, tracing back to England," *Armstrong*, 575 U.S. at 327.

Petitioners demonstrated how the removal protections at issue here easily could have played a role in their case, Pet.17, yet the Third Circuit refused

to provide any remedy—or even remand the case for further factual development—absent concrete evidence that the removal protections were the "but-for" cause of the CFPB's decision to sue Petitioners. Pet.App.35a. The Third Circuit wanted evidence like statements by the President expressly acknowledging his desire to remove the relevant official while admitting a lack of statutory authority to do so. Pet.App.19a. But such evidence will presumably never exist because Presidents typically do not telegraph their own impotence to oversee the executive branch. Cutting off the possibility of relief is problematic given the historical tradition of equitable relief in at least some circumstances. As explained next, the Third Circuit misread *Collins* as imposing this heightened burden.

The Third Circuit's Interpretation of* Collins *Is Inconsistent with Prior Removal Restriction Cases, Including* Collins *Itself. *Collins* provided several clear-cut examples where a party would demonstrate harm from an improper removal restriction. 594 U.S. at 259–60. But interpreting *Collins* to require such clear-cut evidence to be definitively established even to warrant remand or reconsideration is ultimately inconsistent with *Collins* itself, where the Court remanded to the Fifth Circuit to determine whether there was sufficient evidence of harm, as "[t]he *possibility* that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect [of inflicting compensable harm] *cannot be ruled out*." *Id.* (emphases added).

If concrete "but-for" evidence were required, *Collins* would have ended right there (or never been decided at all) because the challengers had provided only sparse evidence of prejudice at that point in the proceedings. Similar to the judgment in *Collins*, here the better course would be to remand so the record can be fully developed about what kind of impact the relevant removal restrictions might have had on the agency's actions. Yet the Third Circuit refused even that limited relief.

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

First, the Third Circuit made no distinction between retrospective and prospective relief, even though *Collins* itself distinguished the two. This Court remanded for consideration of *retrospective* relief while noting there was no possibility of *prospective* relief in that particular case, given intervening agency actions. *Id.* at 244. The Solicitor General's own brief in *Collins* likewise noted that retrospective and prospective relief are distinct in this context. *See* Reply & Resp. Br. of the U.S. at 28 & n.*, *Collins*, 2020 WL 6322317 (Oct. 23, 2020) (arguing that "equitable principles bar[red plaintiffs'] belated attempt to unravel a multibillion-dollar contract agreed to by Treasury" (a form of retrospective relief), but this rationale did "not undercut" the portion of the lower-court "judgment awarding a declaration that FHFA's structure violates the Constitution" (a form of prospective relief)).

This should have cautioned the Third Circuit against applying *Collins* to cases that also seek prospective relief, as Petitioners do here.

Second, in *Collins*, the Court seems to have drawn a distinction between officials who had taken a first-hand role in "*adopt[ing]*" the challenged action, and those subsequent officials who merely "supervised the implementation" of the challenged action. *Id.* at 257, 260 (emphasis in original). Although *Collins* did not elaborate on this possible distinction, it could be that removal powers are more likely to play a role where an official initiates an action, thereby identifying him as the person responsible for setting in motion the subsequent chain of events—and accordingly the person most responsible if the President is displeased with those actions.

Here, Petitioners note that Director Cordray, insulated at that time by removal protections, initiated this lawsuit, Pet.17, and apparently that is typically a Director-level decision, *see CFPB v. Nat'l Collegiate Master Student Loan Trust*, No. 1:17-cv-1323 (D. Del. July 17, 2020), ECF No. 308-1 (new CFPB Director purporting to ratify decision to bring suit). That makes it unlike the scenario addressed in *Collins*.

Third, the decision below will have an especially pernicious effect for those agencies with multi-layered removal protections, e.g., where an ALJ can be removed only for cause by a superior official who himself can be removed only for cause. Would challengers need particularized evidence that the President wanted to remove *each* official in the chain,

down to the specific ALJ who decided the case—and that the absence of but-for evidence at any one link would be sufficient to preclude any remedy? This would make multi-layered removal protections *more* likely to survive a challenge, which contradicts *Free Enterprise Fund*'s holding that multi-layer removal-protection schemes are particularly suspect. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484, 500 (2010). And the government would also be incentivized to create and maintain such labyrinthine structures precisely to avoid the prospect of challengers obtaining any remedy.

The Third Circuit's Decision Will Disincentivize Removal Protection Challenges. Relatedly, the Third Circuit lost sight of this Court's oft-stated goal of "creat[ing] incentives to raise" challenges to unconstitutional provisions. *Lucia v. SEC*, 585 U.S. 237, 251 n.5 (2018); *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991). When relief is effectively foreclosed by an evidentiary threshold rarely satisfied, and where the court even refuses to remand the matter to develop the record (as here), parties will presumably stop bringing such challenges.

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

be incentivized to create more such provisions across the bureaucracy.

The Court should grant certiorari to address this important issue, which has effects well beyond the specific example of the CFPB. *See, e.g.*, Pet.13–15, 20–21 (discussing circuit split and ongoing nature of the disputes over *Collins* in various contexts).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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