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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 1

I. The Remedy Question Warrants Review 1

A. The Bureau Misapprehends the Circuit Split on the Assessment of Harm Under *Collins* 2

B. The Bureau Fails to Reconcile the Decision Below with *Collins* 3

C. This Case Is an Ideal Vehicle to Address the Remedial Question 7

II. The Statutory Question Warrants Review 8

A. The Bureau Fails to Defend the Court of Appeals' Expansive Holding 9

B. The Bureau Misjudges the Potential Consequences of Leaving the Decision Below Undisturbed 11

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Bhatti v. FHFA,
15 F.4th 848 (8th Cir. 2021) 2, 3

Calcutt v. FDIC,
37 F.4th 293 (6th Cir. 2022) 6

CFPB v. Nationwide Biweekly Admin., Inc., No. 18-15431, 2023 WL 566112
(9th Cir. Jan. 27, 2023) 2

Collins v. Yellen,
141 S. Ct. 1761 (2021) 1-6

DeVillier v. Texas,
601 U.S. 285 (2024) 8

Free Enter. Fund v. PCAOB,
561 U.S. 477 (2010) 5

Lucia v. SEC,
138 S. Ct. 2044 (2018) 5

Rop v. FHFA,
50 F.4th 562 (6th Cir. 2022) 2, 7

Ryder v. United States,
515 U.S. 177 (1995) 4, 5

Slack Techs., LLC v. Pirani,
598 U.S. 759 (2023) 8

Warner Chappell Music, Inc. v. Nealy,
601 U.S. 366 (2024) 8

Statutes

15 U.S.C. § 1692e 12

15 U.S.C. §1692f 12

15 U.S.C. § 45 12

Other Authorities

CFPB Brief,
PHH Corp. v. CFPB,
No. 15-1177 (D.C. Cir.) (Mar. 31,
2017) 7

Renae Merle, *Richard Cordray is Stepping Down as Head of Consumer Financial Protection Bureau*,
Washington Post (Nov. 15, 2017) 6

Restatement (Third) of Agency § 1.01
(2006) 11

U.S. Brief,
Energy Transfer LP v. NLRB,
No. 24-cv-198 (S.D. Tex. July 12,
2024) 6

U.S. Brief,
Wright v. Comm'r Internal Rev.,
No. 24-10563, 2024 WL 3565471
(11th Cir. July 22, 2024) 6

INTRODUCTION

This case asks whether the target of unaccountable executive power can obtain meaningful judicial relief and whether the CFPB's enforcement authority over actors in consumer-financial markets is subject to meaningful limitation. The Bureau's arguments here—and the government's arguments to lower courts—make clear the Bureau thinks not. Absent this Court's intervention, it may be right.

But this Court has repeatedly held that remedies for separation-of-powers violations must incentivize parties to bear the costs of such challenges. In *Collins v. Yellen*, 141 S. Ct. 1761 (2021)—the Bureau's primary authority—the Court went out of its way not to foreclose retrospective relief for such unaccountable agency actions. And in the CFPA, Congress drew careful limits around the actors within consumer-financial markets that can be subject to the Bureau's expansive enforcement authority.

The Court should not permit the lower courts or the Bureau to nullify those promises. This case presents an ideal vehicle to resolve confusion in the lower courts on the meaning of the *Collins* decision and to address, for the first time, the scope of enforcement authority for an extremely powerful federal agency that appears here to stay. The petition for a writ of certiorari should be granted.

ARGUMENT

I. The Remedy Question Warrants Review.

The circuits are divided on how to assess whether a party is entitled to a remedy for the separation-of-powers violation in this case. Several circuits have

effectively foreclosed any relief. This enforcement action initiated by a Director unconstitutionally insulated from presidential supervision offers the ideal vehicle to clarify this important area of constitutional law. Nothing in the Bureau's response suggests otherwise.

A. The Bureau Misapprehends the Circuit Split on the Assessment of Harm Under *Collins.*

The Bureau insists that the circuits have uniformly applied *Collins* because they have required the party seeking a remedy to demonstrate "some connection" between an unconstitutional removal restriction and "the challenged agency action." Opp.14. True enough. But they are divided on how to assess whether that connection exists—specifically, what opportunity a court must afford a party to establish it. Pet.13-15. The Sixth, Eighth, and Ninth Circuits have each ensured that parties challenging removal restrictions have their day in court. *See Rop v. FHFA*, 50 F.4th 562 (6th Cir. 2022); *Bhatti v. FHFA*, 15 F.4th 848 (8th Cir. 2021); *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 18-15431, 2023 WL 566112, (9th Cir. Jan. 27, 2023). The Third Circuit, by contrast, held definitively that the Trusts suffered no harm before any discovery had taken place, and before the Trusts had even filed a pleading. Pet.App.36a.

The Bureau cannot explain away these divergent approaches by noting that *Collins* was decided while *Rop, Bhatti*, and *Nationwide Biweekly* were on appeal. Contrary to the Bureau's assertion, the conflict is not that those courts remanded cases for "further consideration" while the Third Circuit did not.

Opp.15. The conflict is that those courts mandated consideration at all that the Trusts have been denied. In each case, the party challenging the removal restriction was afforded an opportunity to allege and prove that the restriction caused harm. The district court here never afforded the Trusts that opportunity, and the Third Circuit rejected the idea out of hand.

The "[s]ubsequent developments" on which the Bureau relies only underscore the point. Opp.15. The *Bhatti* plaintiff, the Bureau insists, "failed to plausibly plead" harm, while the Sixth and Ninth Circuits have "declined to remand where … [t]he record is sufficiently clear." *Id.* But the Trusts had not pled anything (they had not even filed an answer) when the district court ruled and there was no "record" beyond the Bureau's own complaints and briefing that accepted those complaints as true. Yet the court below concluded that the Trusts could not, as a matter of law, prove harm. That approach is inconsistent with how other circuits evaluate harm under *Collins*. That conflict warrants review.

B. The Bureau Fails to Reconcile the Decision Below with *Collins*.

The Third Circuit justified its dismissive approach by adopting an impossibly high standard for showing "compensable harm" under *Collins*. Pet.15-19. The Bureau's defense falls flat.

The Bureau emphasizes the court of appeals' conclusion that the Trusts "failed to establish 'any link whatsoever between the removal provision and [this] case.'" Opp.10 (quoting Pet.App.32a-33a). But nothing in *Collins* requires the causal link between the removal provision and the specific agency decision

that the Third Circuit demanded. The *Collins* majority reasoned that harm "would clearly" result if an agency acted against a party while led by an unconstitutionally insulated official who the President wished to remove. 141 S. Ct. at 1789. Demonstrating the President's desire to remove that official is more "than 'a mere allegation that the unconstitutional provision inherently caused … harm.'" Opp.10 (citation omitted). The Third Circuit just ignored it.

The *Collins* rule makes perfect sense. After all, the actions of an unconstitutionally appointed officer are treated as void. *See Ryder v. United States*, 515 U.S. 177, 182 (1995). There is no logical distinction between an unconstitutionally appointed officer and an officer who, although properly appointed, would have been removed but for an unconstitutional removal restriction. Each is a usurper of the office she holds. If actions taken after the office is unconstitutionally obtained are void, so should be actions taken while the office is unconstitutionally retained. Pet.19. The Bureau has no answer to this straightforward syllogism.

The Bureau instead reads into *Collins* an additional requirement drawn from Justice Kagan's partial concurrence: "that the President's inability to remove the relevant officers caused the agency to do something to the plaintiff that it would not otherwise have done." Opp.9-10. Those are the Bureau's words, of course, because nothing of the sort appears in the Court's decision—which the Bureau tacitly concedes through its reliance on Justice Kagan's opinion for three Justices not necessary to the *Collins* majority. Opp.10.

The Trusts do not suggest that *Collins* forecloses but-for causation, only the version applied by the Third Circuit and demanded by the Bureau. This Court has never required that a party prove that a challenged agency action would not have occurred but for the unconstitutional removal restriction. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512 n.12 (2010). For good reason. That is an all-but-impossible standard, and any theoretical prospect of relief under that standard fails to provide any "incentive" to raise a separation-of-powers challenge. *Ryder*, 515 U.S. at 183; *see Lucia v. SEC*, 585 U.S. 237, 251 n.5 (2018).

The Bureau does not deny this. Instead, to remedy the constitutional violation in this case and encourage separation-of-powers challenges in the future, the Bureau relies exclusively on the prospect of a ruling that a removal restriction is unenforceable. *See* Opp.13 (citing the "relief that the Court's ruling in *Seila Law*" provided). But a mere declaration has never been thought to provide a sufficient remedy or incentive. *See Ryder*, *supra*.

And even that relief may not be available under the Bureau's theory. The Bureau relies on the fortuity that *Seila Law* pre-dated the lower court's adoption of an infeasible standard for treating agency action as void. Going forward, if the target of agency action cannot meet that standard—as few, if any, could—then it is not at all clear there would be any basis for seeking a constitutional ruling on the removal restriction. *See Collins*, 141 S. Ct. at 1788 n.24 (standing in *Seila Law* was premised on the plaintiff's allegation that the challenged action was "void").

In *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022), for example, the Sixth Circuit declined to "delve deeply into the *Seila Law* inquiry" with respect to the removal restrictions on the FDIC Board without a "showing of harm" under *Collins*. *Id.* at 314. And in other recent cases concerning removal restrictions, the federal government has urged other courts to deny relief under *Collins*, without ever passing on the merits. *See, e.g.*, U.S. Br. at 18, *Wright v. Comm'r Internal Rev.*, No. 24-10563, 2024 WL 3565471 (11th Cir. July 22, 2024); U.S. Br. at 8, *Energy Transfer LP v. NLRB*, No. 24-cv-198 (S.D. Tex. July 12, 2024).

Finally, the Bureau faults the Trusts for failing to identify "any instance in which a President stated that he would remove the CFPB's Director" if the statute did not stand in the way. Opp.10. As an initial matter, that criticism is premature. The Trusts had neither answered the Bureau's suit nor taken discovery when their motion was denied. They had no opportunity to "allege—let alone demonstrate—such a causal link," Opp.13. *See* pp. 2-3, *supra*.

Even still, the Trusts have offered more than enough for a court to infer both that President Trump wanted to remove Director Cordray and that the CFPA's removal provision stood in his way. *See* Renae Merle, *Richard Cordray is Stepping Down as Head of Consumer Financial Protection Bureau*, Washington Post (Nov. 15, 2017) (recounting "at least two occasions" when President Trump "griped about Cordray in private and wondered what to do about his tenure" and observing that "under the agency's current structure, Trump could only fire Cordray for

cause").* More evidence may follow. In other cases, parties have discovered correspondence revealing a president's thwarted desire to remove an official. *See Rop*, 50 F.4th at 576. At a minimum, the Trusts should be permitted to pursue it.

C. This Case Is an Ideal Vehicle to Address the Remedial Question.

This case offers an ideal opportunity to answer an important constitutional question of ongoing significance. Although actions initiated by former Director Cordray are finally ending, cases challenging for-cause removal provisions will continue as long as Congress continues to test the limits of the separation of powers. The availability of a remedy for such violations was fully considered below and is squarely presented here. Pet.19-21.

Rather than dispute the importance of the question or its preservation, the Bureau makes the confusing argument that this case is an unsuitable vehicle because multiple Directors who were removable-at-will have not dismissed this suit. Opp.16. The suggestion appears to be that, even if this suit was unconstitutionally initiated and should be dismissed, the error was harmless, because "the CFPB ultimately would have filed a timely complaint even if Director Cordray had been removed." Opp.17.

* Whatever the Department of Justice's litigating position when this suit was filed in September 2017, Director Cordray certainly did not believe he was removable-at-will. *See* CFPB Br. at 17 ("[T]he Bureau's structure does not violate Article II[.]"), *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir.) (Mar. 31, 2017).

The government's speculation is not a vehicle argument. Even if well-founded, it would present no obstacle to resolving the question presented. It is also misplaced. There is a fundamental difference between initiating an enforcement action and merely refraining from dismissing it. That subsequent Directors allowed the case to continue is hardly proof that Director Cordray's hypothetical successor would have timely brought it. Indeed, the evidence points strongly in the other direction. Director Cordray's actual successor—Acting Director Mick Mulvaney—timely ratified several pending enforcement actions after he took office. *See* D.Ct.Dkt.348 at 1 & n.1. He could have timely ratified this one, but did not. *Id.*

In a last-ditch effort to avoid review, the Bureau notes the "interlocutory posture of this case." Opp.22-23. But this Court routinely reviews interlocutory orders in federal cases. *See, e.g.*, *DeVillier v. Texas*, 601 U.S. 285 (2024); *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024); *Slack Techs., LLC v. Pirani*, 598 U.S. 759 (2023). It is appropriate where—as here—the very error in the decision below is foreclosing relief at the outset of a case.

II. The Statutory Question Warrants Review.

The statutory question is no less deserving of review. On that question, the court of appeals' decision is not only wrong, it threatens to destabilize the securitization market by dramatically expanding the Bureau's enforcement authority over it. Pet.21-30. The Bureau's response ignores both the breadth of the decision and the potential harm to the market of leaving that decision undisturbed.

A. The Bureau Fails to Defend the Court of Appeals' Expansive Holding.

The text, structure, context, and history of CFPA confirm that passive securitization vehicles are not "covered persons" under the CFPA. The court of appeals' contrary conclusion ignores the ordinary meaning of the term "engage," the statute's careful delineation of the actors within the Bureau's enforcement authority, and Congress's intentional narrowing of that authority through the drafting process. Pet.22-26. The Bureau's attempt to defend that decision fails.

To begin, the Bureau does not even attempt to defend the actual reasoning of the decision below. The Bureau contends that "the court of appeals simply adopted and applied a dictionary definition" to the Trusts' alleged conduct. Opp.21. By the Bureau's telling, the court's application of that definition "does not address the [CFPA's] application to third parties … involved in ancillary activities 'in some distant sense,'" only the Trusts' "own governing documents and core business function[s]." *Id.* (citation omitted).

But that is not a plausible reading of the decision. Although the court of appeals described (and misread) the Trusts' governing documents, it did not confine its decision to those documents. Instead, the decision reads "engage" to reach *anyone* who is "involved" in or "takes part in" an "enterprise or activity." Pet.App.23a-24a. As for the relevance of the Trusts' "core business functions," the Third Circuit expressly declined to rely on the district court's atextual limit on its holding that "engage" was "broad enough to encompass actions taken on a person's behalf by

another, at least where that action is central to his enterprise," Pet.App.45a. *See* Pet.App.19a n.81.

The Third Circuit's expansive interpretation allowed the court to reach the surprising conclusion that passive securitization trusts with no active operations and no employees, officers, or directors are themselves "engaged" in servicing and collecting debt. It also paves the way for the Bureau to claim authority over other ancillary entities in financial markets. If the Court denies review, the Third Circuit's published decision will not be confined to its facts.

The Bureau fares no better in defending the Third Circuit's ultimate conclusion that the Trusts are "covered persons." The Bureau contends that passive securitization trusts can "engage" in providing financial services because "artificial persons can and do act" through their "agents." Opp.18-19 (citing *Board of Comm'rs of Leavenworth Cnty.* v. *Sellew*, 99 U.S. 624, 627 (1879)). But neither the Bureau nor the lower courts provide a sufficient basis for concluding that any entity or person actually engaged in servicing and collecting debt act as agents of the Trusts. No court has ever assessed whether the complaint plausibly alleges an agency relationship.

The failure to engage in this analysis is fatal to the Bureau's argument. After invoking agency principles, the Bureau entirely glosses over the distinction between agency and merely "contracting with third parties." Opp.19. The Bureau points to lawsuits "brought by parties acting on behalf of and for the benefit of" the Trusts, as evidence that the Trusts are engaging in those activities. *Id.* at 18. And they emphasize that the Trusts' governing documents

include among their purposes "providing for" the servicing of student loans. Opp.17.

The economic and practical truth is that the Trusts are neither established for nor capable of acting on behalf of themselves. *See* SIFMA/SFA *Amici* Br. 9 ("Passive securitization trusts have no legal or practical ability to control the functions performed by any other participants in the securitization process."). Instead, the Trusts are removed from anyone alleged to have done anything here—including those collection suits—by multiple, complex agreements that make securitization possible. And the Bureau has failed to demonstrate that those agreements provide the Trusts with the control required for an agency relationship. *See* Restatement (Third) of Agency § 1.01 (2006). In the absence of such showing, the Bureau's argument that the Trusts "engage in" covered-person activity lacks merit.

B. The Bureau Misjudges the Potential Consequences of Leaving the Decision Below Undisturbed.

As leading trade associations for the securities industry and securitization market explain, the decision below "threatens to destabilize a basic building block of the Nation's credit markets—and thereby, the economy." SIFMA/SFA *Amici* Br. 3. Subjecting passive securitization vehicles to enforcement actions for the conduct of third-party servicers is inconsistent with investor expectations, will hinder the creation of new investment vehicles, and ultimately "will harm the very consumers whom the CFPB exists to protect, by driving investors away

and making consumer credit less available and less affordable." *Id.* at 5.

The Bureau dismisses these concerns based on its observation (again) that multiple Directors have declined to abandon the Bureau's position in this case and its unsubstantiated suggestion that this litigation nevertheless "has had no noticeable market effect to date." Opp.22. It asserts that, in any event, passive securitization trusts are subject to other consumer protection statutes, like the Federal Trade Commission Act, 15 U.S.C. § 45, and the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692e, 1692f. Neither assertion should give this Court comfort.

The theory of this case has been fiercely contested since the outset. The case has been dismissed once, with the suggestion by Judge Norieka that passive securitization trusts were an odd fit for the statutory language. *See* CA3.App.371. Even after the case was reassigned and the Trusts' motion to dismiss the Bureau's amended complaint was denied, Judge Bibas certified his order for interlocutory appeal, finding "substantial ground" for disagreement with his statutory holding. CA3.App.14. And, of course, this Court has yet to pass on the question.

Beyond this case, the Bureau identifies no other enforcement action by the Bureau, the Federal Trade Commission, or any other state or federal entity seeking to impose liability on a passive securitization trust for the allegedly unfair acts of third-party servicers. The Court should not permit this case to be first—and the consequences that may follow for a vital part of the U.S. economy—without considering the merits itself.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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