No. 24-

IN THE

Supreme Court of the United States

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, 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 Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in order to obtain judicial relief, a party challenging governmental action taken by an individual who remained in office against the President's wishes due to an unconstitutional removal restriction must show that a hypothetical replacement officer would have taken a different action.

PARTIES TO THE PROCEEDING

Petitioners—Community Financial Services Association of America, Limited (CFSA) and Consumer Service Alliance of Texas—were plaintiffs in the district court and appellants in the court of appeals.

Respondents—the Consumer Financial Protection Bureau (CFPB or Bureau) and the Acting Director of the Bureau in his official capacity (currently, Russell Vought)—were defendants in the district court and appellees in the court of appeals.

RULE 29.6 STATEMENT

Neither CFSA nor Consumer Service Alliance of Texas has a parent corporation. Neither is publicly held, and no publicly held corporation holds 10% or more of either's stock.

STATEMENT OF RELATED PROCEEDINGS

United States District Court (W.D. Texas):

- *CFSA v. CFPB*, No. 18-cv-295 (Aug., 31, 2021) (order denying plaintiffs' motion for summary judgment and granting defendants' cross-motion for summary judgment; order entering judgment).

United States Court of Appeals (5th Cir.):

- *CFSA v. CFPB*, No. 21-50826 (Oct. 19, 2022) (affirming in part, reversing in part, and rendering judgment for plaintiffs).
- *CFSA v. CFPB*, No. 21-50826 (June 19, 2024) (reinstating judgment and rendering judgment for defendants).

United States Supreme Court:

CFPB v. CFSA, No. 22-448 (Feb. 21, 2023) (granting petition).

CFSA v. CFPB, No. 22-663 (Feb. 27, 2023) (denying cross-petition).

CFPB v. CFSA, No. 22-448 (May 16, 2024) (reversing and remanding).

CFPB v. CFSA, No. 22-448 (June 17, 2024) (issuing judgment).

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INTRODUCTION

Last Term, this Court reversed a Fifth Circuit judgment that had vacated a CFPB lending rule (the Rule) on the theory that the Bureau's funding statute violated the Appropriations Clause. *CFPB v. CFSA*, 601 U.S. 416 (2024). But while the Court rejected that reading of the Appropriations Clause, the Rule remains tainted by an *undisputed* constitutional violation. In 2010, Congress purported to insulate the CFPB Director from removal by the President, but this Court held in 2020 that the statutory removal restriction violates Article II. *Seila Law LLC v. CFPB*, 591 U.S. 197, 205 (2020). Yet back in 2017, that provision is what allowed Director Cordray to remain in office against President Trump's wishes and promulgate the Rule. The Rule is thus directly attributable to, and tainted by, the unconstitutional statute, which enabled Cordray to exercise the powers of the Director's office that he no longer lawfully possessed. Vacatur is the proper remedy in such circumstances, as this Court's decision in *Collins v. Yellen*, 594 U.S. 220 (2021), made clear.

Despite acknowledging this constitutional defect, the Fifth Circuit refused to provide a remedy. Instead, it demanded that petitioners (the lenders) supply evidence that, in a world where Cordray had been removable, President Trump's *hypothetical replacement* for him in 2017 would have acted differently with respect to the Rule. This counterfactual standard is at odds not only with *Collins* itself, but also with the decisions of other circuits, which ask only for evidence that the action at issue was taken by an officer whom the President wanted to remove but could not due to the statute.

As a result, in the Fifth Circuit and the courts that follow its counterfactual approach, it is virtually impossible for private parties to obtain relief for violations of a vital aspect of the separation of powers. Yet when presented with an opportunity to correct its mistake on remand, the Fifth Circuit refused, leaving an intractable circuit split that only this Court can correct.

This petition presents an excellent opportunity to do so. While this Court denied the lenders' cross-petition raising the question presented the last time around, it did so to limit its attention to the Appropriations Clause issue without foreclosing a future challenge to the Fifth Circuit's removal holding. As the Court was aware, a reversal of the Fifth Circuit's judgment would still leave the lenders with an opportunity on remand to seek en banc review of the removal holding and file another petition for certiorari if necessary. And that is exactly what happened, resulting in a petition that cleanly presents the removal question in the context of a final judgment and in a case with which this Court is familiar. Plus, unlike other cases implicating the question presented, this one involves a conventional APA challenge to a regulation that has never gone into effect, meaning the appropriate remedy would cause little disruption on the ground. So if this Court wants to clear up "the confusion in the lower courts about how to show concrete harm" under *Collins*, granting this petition would be a good place to start. Eli Nachmany, *Remedies and Incentives in Presidential Removal Cases*, 133 YALE L.J.F. 305, 329 (2023).

OPINIONS BELOW

The Fifth Circuit's opinion on remand (Pet. App. 1a-2a) is reported at 104 F.4th 930. Its original opinion (Pet. App. 5a-50a) is reported at 51 F.4th 616. The order of the district court (Pet. App. 51a-81a) is reported at 558 F. Supp. 3d 350.

JURISDICTION

On remand, the Fifth Circuit reinstated its judgment on June 19, 2024, and denied rehearing en banc on November 12, 2024. On January 16, 2025, Justice Alito extended the time to file this petition until March 12, 2025. No. 24A696. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The appendix (Pet. App. 82a-109a) reproduces Article II of the U.S. Constitution; the Bureau's purported authority to promulgate the Rule, 12 U.S.C. § 5531; and the Rule's primary operative text, 12 C.F.R. §§ 1041.2-1041.3, 1041.7-1041.8.

STATEMENT OF THE CASE

A. Legal Background

1. In the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), Congress established the CFPB to serve "as an independent financial regulator" tasked with "implementing and enforcing a large body of financial consumer protection laws." *Seila Law*, 591 U.S. at 206 (cleaned up). In addition to placing 18 existing statutes under the CFPB's domain, Congress authorized the agency to enforce a new proscription on "any unfair, deceptive, or abusive act or practice" by certain members of the consumer-finance sector.

Id. (quoting 12 U.S.C. § 5536(a)(1)(B)). With the "sole responsibility to administer 19 separate consumer-protection statutes," the CFPB's reach extends to "everything from credit cards and car payments to mortgages and student loans." *Id.* at 219.

Congress also gave the CFPB "potent enforcement powers." *Id.* at 206. It can "issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court." *Id.* It can "seek restitution, disgorgement, and injunctive relief, as well as civil penalties." *Id.* And it can bring that "coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties." *Id.* at 219-20.

Despite "vesting the Bureau with sweeping authority," Congress took unprecedented steps to shield it "from the influence of the political branches." *CFSA*, 601 U.S. at 422. To "limit[] Congress' control" over the CFPB in the future, it gave the agency "a standing source of funding outside the ordinary annual appropriations process." *Id.* And to "insulate the Bureau from the President's control, Congress put a single Director with a 5-year term at the Bureau's helm and made the Director removable only for inefficiency, neglect, or malfeasance"—a removal restriction later held unconstitutional in *Seila Law*. *Id.*; *see* 12 U.S.C. § 5491(b)(1), (c)(3).

2. In July 2016, Director Cordray, President Obama's Senate-confirmed CFPB head, invoked the Act's new prohibition on "unfair" or "abusive" conduct to propose a regulation focusing generally on payday loans and other short-term, small-dollar consumer loans offered by non-bank lenders. 81 Fed. Reg.

47,864 (July 22, 2016) (the Rule). Before the proposed regulation could be finalized, President Trump was sworn into office in January 2017.

As Cordray himself would later explain, "the threat that [he] would be fired as soon as President Trump took office loomed over everything." Richard Cordray, *Watchdog: How Protecting Consumers Can Save Our Families, Our Economy, and Our Democracy* 185 (2020). And that was especially true for what Cordray described as his "last big fight"—"the payday lending rule." *Id.* at 198. He even "prepare[d] a lawsuit to contest the firing." *Id.* at 185.

But "President Trump was advised to hold off on firing Cordray because the Supreme Court had not yet weighed in on [the] 'for cause' provision." Kate Berry, *In Tell-All, Ex-CFPB Chief Cordray Claims Trump Nearly Fired Him*, AM. BANKER (Feb. 27, 2020). Although a D.C. Circuit panel had held in October 2016 that the removal restriction was unconstitutional, the Bureau had sought rehearing en banc the following month. *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (Kavanaugh, J.); *see PHH Corp v. CFPB*, No. 15-1177 (D.C. Cir. Nov. 18, 2016). That "pending request … made it harder to fire" Cordray following the change in administrations, especially once the D.C. Circuit granted the Bureau's rehearing petition less than a month into President Trump's first term. Cordray, *supra*, at 187; *see PHH Corp.*, No. 15-117 (D.C. Cir. Feb. 16, 2017). Eventually, the President and Cordray "negotiated a temporary truce to await … legal …events." Cordray, *supra*, at 187.

Before the en banc D.C. Circuit could rule, Cordray finalized the Rule and then resigned. 82 Fed. Reg. 54,472 (Nov. 17, 2017). The Rule imposed two primary prohibitions on covered lenders. Its underwriting provisions banned making certain loans without reasonably determining that consumers have the ability to satisfy the repayment terms. *Id.* at 54,874-77. And its payment provisions banned continuing to make preauthorized attempts to withdraw loan repayments from a consumer's bank account after two consecutive attempts failed due to insufficient funds (absent renewed consumer authorization). 12 C.F.R. §§ 1041.7-1041.8.

B. Procedural History

1. In April 2018, the lenders, two associations of regulated entities, filed a suit seeking vacatur of the Rule on statutory and constitutional grounds. Pet. App. 51a. The lenders argued, among other things, that the Rule should be vacated because it was issued by Director Cordray while he was unconstitutionally insulated from removal by President Trump and that it was promulgated using funds spent in violation of the Appropriations Clause. *Id.* Around that time, the CFPB, then run by Acting Director Mulvaney following Cordray's resignation, announced its intent to reconsider the Rule. *Id.* The district court stayed both the litigation and the Rule's compliance date. *Id.*

In July 2020, the CFPB, by that point headed by Senate-confirmed Director Kraninger, rescinded the Rule's underwriting provisions. 85 Fed. Reg. 44,382 (July 22, 2020). She nevertheless purported to ratify the Rule's payment provisions in response to *Seila Law*. 85 Fed. Reg. 41,905 (July 13, 2020).

In 2021, the district court granted summary judgment to the Bureau. Pet. App. 71a-80a. The court agreed that the Rule was issued by Director Cordray while he was unlawfully shielded from removal, but held that the Rule was not void given the remedies holding in *Collins*. *Id.* at 72a-73a. It also rejected the lenders' Appropriations Clause challenge. *Id.* at 71a.

2. The Fifth Circuit stayed the Rule's "compliance date until 286 days after resolution of the appeal." C.A. Order (Oct. 14, 2021). It later affirmed some of the district court's rulings, but reversed the judgment and vacated the Rule. Pet. App. 31a-50a.

Although the Fifth Circuit agreed that the Rule had been "promulgated by a director who was unconstitutionally shielded from removal," it held that the lenders could not "obtain a remedy" for that violation. *Id.* at 22a-23a. The court read *Collins* to require the lenders to "demonstrate" not just that "President Trump would have removed Cordray" in the absence of the removal statute, but also that "the Bureau would have acted differently as to the rule" under Cordray's hypothetical replacement. *Id.* at 27a. Finding that the lenders could not make the latter showing, the court saw no need to address whether Kraninger's purported "ratification" of the payment provisions was legitimate. *Id.* Instead, it declined to vacate the Rule based on its reading of *Collins*. *Id.*

The court nevertheless went on to vacate the Rule on the theory that it was "the product of the Bureau's unconstitutional funding scheme." *Id.* at 50a. And because the Bureau had no "means to promulgate the rule" "without its unconstitutional funding," the remedy under *Collins* was vacatur. *Id.* at 49a-50a.

3. The Bureau sought this Court's review of the Appropriations Clause ruling. In an abundance of caution, the lenders cross-petitioned to ensure that the Court could review two antecedent grounds for vacating the Rule: (1) that the Rule was tainted by the removal restriction; and (2) the Rule exceeded the CFPB's statutory authority. Cross-Pet. at 2-4, *CFSA v. CFPB*, 143 S. Ct. 981 (2023) (No. 22-663). As the lenders explained, if the Court were to grant the petition, principles of constitutional avoidance would call for addressing those alternative arguments first, and resolving either in the lenders' favor could eliminate the need to address the Appropriations Clause at all. *Id.* at 2, 12. The lenders emphasized, however, that this Court should just deny both petitions outright. *Id.* at 2, 4, 12. The Bureau opposed, warning that a grant of the cross-petition would only "complicate the litigation." BIO at 28, 143 S. Ct. 978 (2023) (No. 22-663).

This Court granted the Bureau's petition, denied the lenders' cross-petition, and reversed the Fifth Circuit. 601 U.S. at 435; 143 S. Ct. 981 (2023); 143 S. Ct. 978 (2023). On the merits, the Court made clear that it was resolving only "the narrow question whether" the Bureau's "funding mechanism complies with the Appropriations Clause." 601 U.S. at 421. And it answered that question in the affirmative, holding that a funding statute "need only identify a source of public funds and authorize the expenditure of those funds for designated purposes to satisfy the Appropriations Clause." *Id.* at 426. Because the Bureau's funding statute had those "requisite features," this Court reversed and remanded to the Fifth Circuit. *Id.* at 435.

4. On remand, the Fifth Circuit reinstated its judgment affirming the district court's ruling as to the non-Appropriations-Clause challenges to the Rule. Pet. App. 1a-2a. The lenders sought rehearing en banc on July 3, 2024. After calling for a response, the Fifth Circuit denied rehearing on November 12, 2024. *Id.* at 3a-4a. It then modified its stay order to provide that its "stay of the compliance date expires on March 30, 2025." C.A. Order (Nov. 25, 2024).

REASONS FOR GRANTING THE PETITION

Ordinarily, when the government concedes a constitutional violation, a court will order some relief to the party who identified it. Not so in the Fifth Circuit, at least when an unconstitutional removal statute is involved. Unlike other circuits, which sensibly read *Collins* to hold that a challenger need only show that the President would have fired the relevant officer but for the removal restriction, the Fifth Circuit insists on proof of a counterfactual. In that court, a litigant must somehow show that in the alternate universe in which the President had fired the officer, the officer's replacement would have done something differently. The Fifth Circuit never identified a way that anyone could carry that burden, and the lenders are unaware of one. The result is an effective bar on relief for private parties seeking to vindicate a core aspect of the separation of powers.

If this Court meant to adopt such a dramatic change in *Collins*, it presumably would have said so clearly and the circuits would have quickly fallen in line. Instead, they have fractured over how to satisfy the *Collins* inquiry. At this point, only this Court can provide a measure of clarity. This is the case to do so.

I. THE CIRCUITS ARE DIVIDED OVER THE QUESTION PRESENTED.

In *Collins*, this Court addressed when a party is entitled to a remedy for agency action taken by an executive officer who is unconstitutionally shielded from removal. The key inquiry, the Court explained, is whether the removal restriction "inflict[ed] compensable harm." 594 U.S. at 259. "In the wake of *Seila Law* and *Collins*," however, "courts have disagreed as to how one could make such a showing." *CFPB v. Law Offs. of Crystal Moroney, P.C.*, 63 F.4th 174, 179 (2d Cir. 2023). Broadly speaking, the circuits fall into three blocs when it comes to the steps necessary to secure relief under *Collins*. Some just ask whether the President would have removed the officer in the absence of the statute. Others inquire more generally as to whether the agency action would not have occurred but for the removal restriction. And the rest, including the Fifth Circuit, insist on a showing that the President would have removed the officer had the restriction not stood in his way, *and* that the officer's hypothetical replacement would have taken a different action in his place. In light of "the confusion in the lower courts about how to show concrete harm," this Court's "further guidance on the nature of the evidentiary burden" has become necessary. Nachmany, *supra*, at 329.

A. The Removal Circuits.

Unlike the court below, one set of circuits reads *Collins* to only require proof that the challenged action was taken by an officer that the President wanted to remove. That showing, demanding in itself, is all that is necessary to secure relief.

Ninth Circuit. The Ninth Circuit appears to have been the first court of appeals to hold that a party can show that an "unconstitutional removal provision *actually harmed*" him by proving that "the President would have removed the agency's head but for the provision." *Kaufmann v. Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022). And it has reaffirmed that rule in a case involving the CFPB specifically: a litigant can "demonstrate harm by showing that the challenged action was taken by a Director whom the President wished to remove but could not because of the statute." *CFPB v. CashCall, Inc.*, 35 F.4th 734, 743 (9th Cir. 2022) (citing *Kaufmann*, 32 F.4th at 849). To be sure, the Ninth Circuit did not address whether Cordray qualified as such an officer in that case because "[n]o one" had made that argument, as the Bureau had brought the enforcement action while President Obama was in office. *Id.*; *see id.* at 740. But the court made clear that if Cordray did fit that description, that would be "a reason to regard" the Bureau's action as void." *Id.* at 742-43.

Tenth Circuit. The Tenth Circuit has come to the same conclusion, noting that *"Collins* left open an avenue for relief" if the challenger could show that "the President had wanted to remove the director but was stopped … by heeding a statute disallowing it." *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022). It reiterated that rule last year, explaining that *Collins* just made clear that "plaintiffs who succeed in a constitutional challenge to a removal provision are not automatically entitled to relief." *Leachco, Inc. v. CPSC*, 103 F.4th 748, 757 (10th Cir. 2024), *cert denied*, No. 24-156, 2025 WL 76435 (U.S. Jan. 13, 2025). Instead, "they must show

that the removal provision caused some harm to them beyond the mere existence of the unconstitutional provision." *Id.* And they can do that by merely establishing "that the President would have removed" the officer "but for this statutory protection." *Id.* at 757 n.8. If the President "chose not to" fire him "because of the limitations under the removal provision," that alone would show "that the unconstitutional removal provision actually affected the agency's conduct against the plaintiff." *Id.* at 756.

B. The But-For Circuits.

Another camp has addressed the issue at a higher level of generality. Specifically, the Second, Third, and Sixth Circuits use a "but-for causation" test. *Moroney*, 63 F.3d at 180. As the Second Circuit put it, "to void an agency action due to an unconstitutional removal protection, a party must show that the agency action would not have been taken *but for* the President's inability to remove the agency head." *Id.*

As in other areas of the law, this but-for-cause test does not demand a tight connection between the removal statute and the challenged action. *See, e.g.*, *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004) (contrasting "'but for' causal relationship" with "'a reasonably close causal relationship'"); *see also Bostock v. Clayton Cnty.*, 590 U.S. 644, 656 (2020) (noting "but-for causation" can "be a sweeping standard"). In the Third Circuit's words, it can be shown by "'any link whatsoever" between the removal restriction and the agency action. *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th 599, 615 (3d Cir. 2024), *cert denied*, No. 24-185, 2024 WL 5112295 (U.S. Dec. 16, 2024).

While these courts have not spoken as clearly as the Ninth and Tenth Circuits, their approach appears to lead to the same result. In *Rop v. FHFA*, 50 F.4th 562 (6th Cir. 2022), for instance, the challengers pointed to a letter from then-former President Trump stating that he would have removed the relevant FHFA Director but for "the unconstitutional restriction" on his authority to do so. 50 F.4th at 575. In light of that statement, the Sixth Circuit reversed the district court's dismissal of the complaint and remanded so that it could reconsider its holding that the plaintiffs' "alleged injuries were not connected to the removal restriction" under *Collins*. *Id.* at 576.

That makes sense. Where, as here, the President would otherwise have fired the officer, the relevant "agency action" by definition "would not have been taken" by that officer "*but for* the President's inability to remove" him. *Moroney*, 63 F.3d at 180. It is irrelevant whether a replacement officer would have taken the same action, as no one denies when it comes to an officer improperly shielded from removal by court order. *See Collins*, 594 U.S. at 259-60 (explaining that if "the President had attempted to remove a Director but was prevented from doing so by a lower court decision … , the statutory provision would clearly cause harm"). A but-for test should therefore lead to the same approach as the one used by the Ninth and Tenth Circuits, as a thwarted desire to remove an officer provides "a link" between the removal restriction and the relevant agency action. *Nat'l Collegiate Master Student Loan Tr.*, 96 F.4th at 615; *see Moroney*, 63 F.4th at 180 (asking whether "removal protection affected" challenged action at all); *Rop*, 50 F.4th at 576 (similar).

C. The Nexus Circuits.

In the Fifth and Eighth Circuits, by contrast, evidence that the President would have removed the relevant officer but for the statute is not enough to satisfy *Collins*. For this bloc, the challenger must go on to show that the officer's hypothetical replacement would have done things differently.

Fifth Circuit. The Fifth Circuit has paved the way for the nexus test. In this case, it held that it is "not enough" to show "that the unconstitutional removal provision prevented the President from removing [an officer] he wished to replace." Pet. App. 26a. Rather, to prevail, a litigant must *also* establish "a nexus between the desire to remove and the challenged actions taken by the insulated actor." *Id.*

The Fifth Circuit has gone on to apply that nexus rule in the remand from *Collins* itself. Confronted with the same letter that resulted in a remand by the Sixth Circuit in *Rop*, the Fifth Circuit agreed that "President Trump had 'a substantiated desire to remove'" the relevant FHFA Director "and 'a perceived inability' to do so because of [the] removal restriction." *Collins v. Dep't of the Treasury*, 83 F.4th 970, 983 (5th Cir. 2023). But applying its decision in this case, the Fifth Circuit held that showing was insufficient because the challengers had failed "plausibly to allege 'a nexus between the desire to remove'" and the challenged actions. *Id.* While a showing of the President's intentions apparently would have been enough in the Second, Third, Sixth, Ninth and Tenth Circuits, it resulted a dismissal of the challenge at the pleadings stage in the Fifth. *Id.* at 985.

Eighth Circuit. The Eighth Circuit has followed suit. Faced with "nearly identical facts as" the Fifth Circuit in *Collins*, "including the same Trump letter," the Eighth Circuit sided with the Fifth rather than the Sixth. *Bhatti v. FHFA*, 97 F.4th 556, 560 (8th Cir. 2024). Adopting the nexus approach, the Eighth Circuit faulted the challengers for not alleging a "nexus" between "the president's inability to remove" the FHFA Director and "the harm claimed by the shareholders." *Id.* at 561. Because the shareholders had "failed to plausibly plead the requisite connection," their complaint had to be dismissed. *Id.*

II. THE DECISION BELOW IS WRONG.

In addition to contributing to a conflict among the circuits, the decision below departs from this Court's precedents. Despite agreeing that the Rule was issued "by a director who was unconstitutionally shielded from removal," Pet. App. 22a, the Fifth Circuit refused to vacate it in the absence of proof that his hypothetical replacement "would have acted differently as to the rule," *id.* at 27a. That novel burden on separation-of-powers claimants—to prove what a *hypothetical* appointee *would have done*—cannot be squared with this Court's precedents.

A. In *Collins*, this Court explained that an unconstitutional removal restriction can "inflict compensable harm" by actually thwarting the President's removal of the officer. 594 U.S. at 259-60. Accordingly, if the President would have removed the officer but was prevented from doing so, then the officer's later action is attributable to the removal restriction, and it should be vacated. *See id.*

The Fifth Circuit nevertheless held that it is "not enough" to show that the removal statute frustrated the President's plans. Pet. App. 26a. Instead, a challenger must also demonstrate "a nexus" between the President's desire to remove the officer and the agency action at issue by proving that the agency "would have acted differently as to" the action following the removal. *Id.* at 27a. Although the court construed *Collins* to require such an inquiry, this "nexus" holding fundamentally misunderstands this Court's precedent. *Id.* at 26a-28a.

Collins itself unambiguously holds that a removal restriction "clearly" inflicts remediable harm if the President otherwise would have removed the officer who took the challenged agency action. 594 U.S. at 259-60. For example, such harm would be "clear-cut" if "the President had attempted to remove" the officer "but was prevented from doing so by a lower court decision." *Id.* at 259. That example alone reveals an impeded removal effort is sufficient to support a remedy; this Court did not say that the challenger also had to show that the unidentified, hypothetical replacement officer would have acted differently.

The Fifth Circuit, however, overread *Collins*'s next example—that remediable harm also would be "clear-cut" if the President had "express[ed] displeasure with actions taken by [the officer] *and* had asserted that he would remove" the officer "if the statute did not stand in the way." *Id.* at 260 (emphasis added). The court of appeals construed the conjunction in that example to mean that there must be "a nexus between the desire to remove and the challenged actions taken by the insulated actor." Pet. App. 26a.

The point of the second example, however, was merely that the President's substantive disagreement with an insulated officer's actions can be *sufficient* evidence that the removal restriction caused harm, even absent a futile attempt to actually remove the officer. The Court obviously was not saying that such evidence is *necessary* even where it is already clear that the President would have removed the officer. That would contradict the first example, which, to repeat, did not require any such evidence.

In short, *Collins* is satisfied where, as here, the challenger demonstrates that the President would have removed the officer in the absence of the invalid removal restriction. 594 U.S. at 259-60. In fact, Justice Gorsuch *criticized* the Court in *Collins* for conditioning vacatur on proof that "the President would have removed … the unconstitutionally insulated official" but for the removal restriction. *Id.* at 279 (Gorsuch, J., concurring in part). In his view, that framework was a "feeble" remedy involving a "guessing game about what might have transpired in another timeline." *Id.* But apparently even it was too strong for the Fifth Circuit.

B. *Collins* aside, the nexus requirement is at odds with this Court's Appointments Clause precedents. When an officer is improperly shielded from removal that otherwise would have occurred, his actions are akin to those of an improperly appointed officer. Both involve the "exercise of power that the actor did not lawfully possess," making vacatur the proper remedy. *Id.* at 258 (majority) (citing *Lucia v. SEC*, 585 U.S. 237, 251 (2018)). It is immaterial that the insulated officer *previously* lawfully held the powers of his office, because he *no longer does* once the President is

unconstitutionally precluded from actually removing him. At that point, he becomes just as much a usurper in office as one who was unlawfully appointed in the first place.

The actions of usurpers are routinely set aside, without requiring any additional showing of whether a *different action* would have been taken if the proper appointment process had been followed—even though that process often would have led to the *same person* holding the office. *See, e.g.*, *Lucia*, 585 U.S. at 251. Once it is shown that the President otherwise would have removed an improperly insulated officer, there is no "difference" from an improperly appointed officer, because "[e]ither way, governmental action is taken by someone erroneously claiming the mantle of executive power—and thus taken with no authority at all." *Collins*, 594 U.S. at 276 (Gorsuch, J., concurring in part).

C. Under the correct understanding of *Collins*, the lenders are entitled to vacatur. All agree Director Cordray issued the Rule while unconstitutionally insulated from removal by President Trump. As the Fifth Circuit recognized, the removal restriction was not held invalid until this Court decided *Seila Law* in 2020, and so the Rule's promulgation in 2017 occurred under the ostensible shield of removal protection. Pet. App. 22a-28a.

The Rule's promulgation also occurred *because* of that protection. In the absence of that statutory impediment, President Trump would have fired Cordray before the Rule's promulgation ten months into his first term. After all, new Presidents of a different political party routinely remove principal

officers appointed by their predecessors when no statutory removal restrictions stand in their way. And with the benefit of *Seila Law*, President Trump recently did just, firing President Biden's CFPB head shortly after taking office for the second time. Tony Romm, *Trump Removes Rohit Chopra as Director of CFPB*, WASH. POST (Feb. 1, 2025).

President Trump would have taken the same approach to Cordray had *Seila Law* been decided before 2017. Indeed, Cordray himself provided a first-hand account of relevant events: how "the threat that [he] would be fired as soon as President Trump took office loomed over everything"; how Cordray "prepare[d] a lawsuit to contest a firing"; and how Cordray's conversations with Gary Cohn, the senior White House official "task[ed]" by the President with "deciding what to do" about removal, resulted in the Trump Administration and Cordray "negotiat[ing] a temporary truce to await" the D.C. Circuit litigation addressing the removal restriction's constitutionality. Cordray, *supra*, at 184-87; *see supra* at 5.

Although the Fifth Circuit suggested Cordray's description of these events—based on his direct interactions with the White House—was insufficient evidence of what the President would have done, the President made his own views crystal clear after Cordray's resignation. Pet. App. 26a-27a. At that point, he tapped Acting Director Mulvaney, who had co-sponsored a bill to *abolish the CFPB*, and who proceeded "dramatically reduce[] the intensity of its enforcement actions." Christina Skinner, *Presidential Pendulums in Finance*, 2020 COLUM. BUS. L. REV. 532, 552 (2020); H.R. 3118, 114th Cong. § 1 (2015).

Indeed, in response to the lenders' evidentiary showing, the Bureau never identified a scintilla of evidence to support the implausible claim that President Trump *voluntarily* retained a controversial holdover from the Obama Administration to keep serving as the second "most powerful official in the entire U.S. Government." *PHH Corp. v. CFPB*, 881 F.3d 75, 171 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Given the lack of any genuine dispute over whether the President would have removed Cordray but for the re,pva; restriction, the lenders were entitled to summary judgment and vacatur under *Collins*. At the very least, they were entitled to an opportunity for discovery, as they had requested if necessary. *See* Fed. R. Civ. P. 56(d); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (permitting discovery in APA case where necessary for "effective judicial review"); Dist. Ct. Dkt. No. 91, at 7.

The Fifth Circuit thus could not properly have affirmed the district court's grant of summary judgment *to the Bureau* on the basis of President Trump's intentions. Instead, the court could only rule for the Bureau by engrafting its "nexus" requirement onto the *Collins* inquiry. Pet. App. 26a. Indeed, the Fifth Circuit has since held that even when the President undeniably has "a substantiated desire to remove" the officer "and a perceived inability' to do so because of [the] removal restriction," the "nexus" test will *still* foreclose relief. *Collins*, 83 F.4th at 983 (cleaned up); *see supra* at 14. This Court should therefore grant review and make clear that the Fifth Circuit's "nexus" test is not a barrier to a remedy for a separation-of-powers violation.

III. THE QUESTION PRESENTED IS IMPORTANT.

In addition to the conflicts it creates, the Fifth Circuit's remedial test also raises an important question. Even on its own terms, *Collins* erects a "very challenging" standard for relief: Cases like this one, where there is evidence that "an officer would have been removed but for a removal protection," are "quite uncommon." *Cochran v. SEC*, 20 F.4th 194, 232-33 (5th Cir. 2021) (en banc) (Oldham, J., concurring), *aff'd sub nom. Axon Enter. v. FTC*, 598 U.S. 175 (2023). After all, the "most probative evidence" of "the President's state of mind" is apt to "be the most sensitive," meaning litigants will likely have to rely on the accounts of others involved, to the extent that they even exist. *Collins*, 594 U.S. at 282 (Gorsuch, J., concurring part). *Collins* therefore already ensures that viable removal-restriction lawsuits will be few and far between.

The addition of a "nexus" requirement will reduce that universe to a null set. There is no practical way for a private litigant to divine and prove both who a hypothetical, non-insulated replacement officer would have been and how he would have acted on the matter at issue—let alone without seeking intrusive discovery from the Executive Branch. *Cf. Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 385 (2004) ("special considerations control" when the Executive Branch's interests in its "autonomy" and the "confidentiality of its communications are impacted").

Given the impossible demands of the "nexus" test, district courts that apply it have spent little time on the remedy for unconstitutional limits on removal. *See, e.g.*, *Arnesen v. Raimondo*, 2024 WL 377820, at

*26 (S.D. Miss. Jan. 31, 2024); *Burgess v. FDIC*, 639 F. Supp. 3d 732, 746 (N.D. Tex. 2022). And with no realistic shot at obtaining relief, fewer litigants will bring separation-of-powers challenges in the first place, even though remedies in this area are supposed to "provide[] a suitable incentive to make such challenges." *Ryder v. United States*, 515 U.S. 177, 186 (1995); *accord Lucia*, 585 U.S. at 251 n.5.

Indeed, as one member of the Fifth Circuit (and the panel below) observed, an understanding of *Collins* that requires proof "that the agency would have acted differently had its Director been subject to at-will removal"—*i.e.*, the nexus test—relegates "structural constitutional provisions to an inferior rank." Don R. Willett & Aaron Gordon, *Rights, Structure, and Remediation, the Collapse of Constitutional Remedies by Aziz Z. Huq, Oxford University Press, 2021*, 131 YALE L.J. 2126, 2150 n.124 (2022). Even though no court would "require someone convicted by a materially interested adjudicator to prove, in order to obtain reversal, that an impartial adjudicator would have acquitted him," the Fifth Circuit insists on proof of agency action from an alternate timeline when a removal restriction is involved. *Id.* (citing *Tumey v. Ohio*, 273 U.S. 510, 535 (1927)). Especially given the critical role that structural constitutional principles play in securing individual liberty, now is the time to ensure that Article II is not given second-class status.

IV. THIS PETITION IS A GOOD VEHICLE.

This petition presents an excellent opportunity for this Court to clarify that *Collins* was never meant to be the death knell of private challenges to removal restrictions. That is so for three reasons.

First, this petition cleanly presents the question presented in the context of a familiar case. The issue has been litigated up and down the Article III hierarchy, and it now arrives at this Court freed of any risk that it will complicate the review of other constitutional questions. *See supra* at 2, 8.

Second, unlike some other cases implicating the question presented, this one involves an ordinary APA challenge to a binding regulation rather than a defense to an enforcement action spanning multiple administrations. For example, this Court recently denied a petition raising a similar question in the context of a CFPB lawsuit pursued "under the leadership of five successive Directors or Acting Directors appointed by three different Presidents," four of whom "were removable at will." BIO at 16, *Nat'l Collegiate Master Student Loan Trust v. CFPB*, 2024 WL 5112295 (No. 24-185) (24-185 BIO); *see Nat'l Collegiate Master Student Loan Trust*, 2024 WL 5112295 (denying petition). Here, by contrast, the Rule carries independent force regardless of the Bureau's day-to-day position, especially in light of the demanding procedural requirements necessary for the Rule's rescission. *See* 5 U.S.C. § 553. This case therefore starkly illustrates the consequences of the Fifth Circuit's "nexus" test.*

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* The prior case also arrived to this Court in an "interlocutory posture," such that if the petitioners prevailed on remand, there may have been "no need for the Court to consider the questions raised." 24-185 BIO at 22; *see CFPB v. Nat'l Collegiate Master Student Loan Tr.*, 2022 WL 548123, at *3 (D. Del. Feb. 11, 2022) (Bibas, J., sitting by designation) (certifying question under § 1292(b) because "one can reasonably disagree about the scope of *Collins*"). No such impediment is presented here.

Finally, this petition offers a chance to provide meaningful relief for an undisputed constitutional violation without sowing practical disruption. *Collins*, by contrast, was a highly unusual case where the private plaintiffs sought to collaterally attack an *intergovernmental agreement* implicating hundreds of billions of dollars that had already been distributed; and they did so even though the agreement itself had been adopted by *properly removable* agency officials and at worst was "implemented" in some unspecified ways by an improperly insulated official. *See* 594 U.S. at 231-35, 257. That convoluted posture raised tricky remedial issues that this Court remanded for further consideration. *See id.* at 257-60.

Here, no such circumstances warrant depriving the lenders of the ordinary vacatur remedy in their conventional APA challenge to a regulation that has never gone into effect. *See supra* at 6-7. Judge-made remedial doctrines should not be distorted to deprive the lenders of any judicial relief despite their concededly being injured by the actions of an executive officer who remained in office solely due to a removal restriction that this Court has *already held* is unconstitutional. Denying relief under such circumstances raises a far "more important question" than the remedial puzzles posed by the "unique context" of *Collins* itself. *Collins*, 594 U.S. at 282 (Gorsuch, J., concurring in part).

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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