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COMMENT

Illegitimacy Here and Now: How *Axon* Sheds Light on Courts' Reading of *Collins*'s Remedial Conundrum

Alfonso Gamboa[*]

Abstract. This Comment will discuss lower courts' approaches to constitutional removal-protection claims after the Supreme Court's 2021 decision in Collins v. Yellen*. This Comment will argue that some lower courts have overread* Collins *to require an almost insurmountable evidentiary burden, leaving plaintiffs no viable avenue to bring structural constitutional claims, such as removal-protection challenges. Furthermore, this Comment will argue that such an approach is inconsistent not only with the Supreme Court's separation-of-powers precedents but also with the Court's reasoning in the 2023 case* Axon Enterprise, Inc. v. FTC*. Finally, this Comment will argue that the Court's opinion in* Axon *sheds light on the correct approach to Collins and counsels in favor of a narrow reading of that case—limiting its high evidentiary requirement to cases seeking purely retrospective relief and challenging specific agency actions, rather than structural constitutional challenges.*

* J.D. Candidate 2025, Antonin Scalia Law School; B.A. 2019, Stanford University. This Comment won the Antonin G. Scalia Writing Award for 2023-24. The Author dedicates this Comment to his wife, Sally, and son, Augustine, whose support and encouragement made this endeavor possible. The Author would also like to thank Professors Michael Greve and Jennifer Mascott for their thoughtful feedback and Alex Cook, Savannah Griesinger, Jacob Hooper, Jakell Larson, and Peter Tucker for their diligent and thoughtful editing. Lastly, the Author thanks David Thompson for his mentorship and for sparking the Author's interest in these topics.

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Introduction

This Comment is about the role of the Judicial Branch in safeguarding the constitutional structure of government envisioned by the Framers and set forth in the United States Constitution. Refusing to correct constitutional defects in the structuring of federal agencies is an abdication of one of the courts' core responsibilities. Allowing constitutional defects to persist erodes public confidence in the legitimacy of government institutions. When citizens are subject to quasi-criminal law enforcement proceedings before adjudicators whom they perceive as illegitimate (and who, in fact, are constitutionally illegitimate) they suffer real harm. For those citizens' sake, courts have a responsibility to ensure that the federal government is structured in the manner prescribed by the Constitution.

The Supreme Court has often emphasized its duty to ensure the federal government preserves its constitutional structure as a means of protecting the People's liberty. Justice Antonin Scalia emphatically affirmed the "solemn responsibility of the Judicial Branch" to safeguard the constitutional structure of the federal government in his concurring opinion in *NLRB v. Noel Canning*.[1] He pointed out that "the Constitution's core, government-structuring provisions are no less critical to preserving liberty than are the later adopted provisions of the Bill of Rights,"[2] and that the Framers believed "checks and balances were the foundation of a structure of government that would protect liberty."[3] Because of these convictions, "the claims of individuals—not of Government departments—have been the principal source of judicial decisions concerning separation of powers and checks and balances."[4] Therefore, "when questions involving the Constitution's government-structuring provisions are presented in a justiciable case, it is the solemn responsibility of the Judicial Branch 'to say what the law is.'"[5] In short, "policing the 'enduring structure' of constitutional government . . . is 'one of the most vital functions of th[e] Court.'"[6] Yet some lower courts have charted a path that risks turning a blind eye to structural constitutional challenges to officers' removal protections.

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[1] 573 U.S. 513, 571 (2014) (Scalia, J., concurring in the judgment). Justice Scalia's concurrence was joined by Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito.

[2] *Id.* at 570.

[3] *Id.* at 571 (internal quotation marks omitted) (quoting Bowsher v. Synar, 478 U.S. 714, 722 (1986)).

[4] *Id.* (internal quotation marks omitted) (quoting Bond v. United States, 564 U.S. 211, 222 (2011)).

[5] *Id.* (internal quotation marks omitted) (quoting Zivotofsky v. Clinton, 566 U.S. 189, 196 (2012) (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803))).

[6] *Id.* at 572 (Kennedy, J., concurring in the judgment) (quoting Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 468 (1989)).

Imagine the following scenario: The target of an administrative proceeding raises a wholly collateral, structural constitutional claim in an Article III court, arguing that the administrative law judge presiding over her quasi-criminal law enforcement proceeding is unconstitutionally insulated from presidential control via multilayer removal protections.[7] The plaintiff's constitutional claim does not turn on the outcome of the adjudication since the constitutional defect would exist whether the outcome is favorable to the plaintiff or not. The court responds to the plaintiff, claiming that even if the removal protections may be unconstitutional, the court will not reach the merits of the claim because the plaintiff has not shown at the outset that those removal protections harmed *her* specifically.[8] The plaintiff then asks, "how can I show that I have been specifically harmed, beyond the fact that I have been subjected to a proceeding overseen by an adjudicator who is not accountable to the President, as the Constitution requires?" The court responds: "To obtain any relief, the plaintiff must first show that the President of the United States publicly stated he wanted to or tried to remove the adjudicator and was unable." Because there are no recent examples of a President making such a statement or attempting such a removal, the court's response amounts to an insurmountable barrier to the plaintiff bringing even an otherwise meritorious removal-protection challenge. The court declines to hear the claim, leaving the constitutional defect in place. Because the kind of evidence of harm the court is requiring will almost never exist, the removal protections will persist, and the constitutional infirmity will fester.

Partly, the problems highlighted by the scenario above stem from the fact that the Supreme Court has not definitively resolved the question of whether multilayer removal protections for administrative law judges are constitutional, nor has the Court announced the appropriate remedy if parties successfully challenge such removal protections.[9] The hypothetical court in the above scenario adopted the same course that lower courts in multiple federal circuits have adopted, namely, overreading the Supreme Court's opinion in *Collins v. Yellen*[10] to impose a nearly insurmountable evidentiary hurdle to any removal-protection challenges. In effect, reading *Collins* to require such a high evidentiary standard in all cases of structural constitutional challenges forecloses any meaningful judicial review of removal-protection claims. The risk of adopting such a course is

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[7] Whether a plaintiff's claim is "wholly collateral" is one of the *Thunder Basin* factors that the Supreme Court considers in evaluating a statutory review scheme. *See* Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212 (1994); Axon Enter., Inc. v. FTC, 143 S. Ct. 890, 900 (2023).

[8] *Axon*, 143 S. Ct. at 899.

[9] In its opinion in *SEC v. Jarkesy*, 144 S. Ct. 2117 (2024), the Supreme Court declined to address these questions. *Id.* at 2124–25, 2127–28.

[10] 141 S. Ct. 1761 (2021).

allowing the judicial branch to disregard one of its "most vital functions": safeguarding the constitutional structure of the federal government.[11]

This Comment argues that the Supreme Court's 2023 decision in *Axon Enterprise, Inc. v. FTC*[12] counsels in favor of a narrow reading of *Collins*, which does not impose an impossibly high evidentiary burden on *all* removal-protection claims, but only on those which seek solely retrospective relief. Specifically, this Comment argues that the Court's opinion in *Axon* reflects the Court's ongoing commitment to its longstanding goals of incentivizing plaintiffs to bring timely constitutional challenges to agency structures and providing meaningful judicial review of constitutional claims. This Comment does not take a definite position on the constitutionality of multilayer removal protections for administrative law judges since the lower courts are split on that issue. The Supreme Court decided a case presenting that question last term, but did not reach the removal-protections issue in its decision.[13] This Comment also does not argue for a particular remedy for removal-protection claims,[14] as the Court has not announced what the remedy should be in those cases and the appropriate remedy will likely depend on the facts of the individual case. However, this Comment does argue that the Court's opinion in *Axon* counsels in favor of courts first deciding the merits of the constitutional claim and only then considering the appropriate prospective remedy, even if that remedy may seem pyrrhic from the plaintiff's perspective.[15] This approach is not only supported by the Court's opinion in *Axon*, but is also more consistent with the Court's separation-of-powers precedents and avoids the problem of allowing potentially serious constitutional defects to permanently evade judicial review.

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11 *See Noel Canning*, 573 U.S. at 572 (Scalia, J., concurring in the judgment) (quoting Pub. Citizen v. U.S. Dep't of Just., 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment)).

12 143 S. Ct. 890 (2023).

13 *Jarkesy*, 144 S. Ct. at 2124–25, 2127–28.

14 The question of the appropriate remedy in situations where statutory convergences produce an unconstitutional result is a complex one beyond the scope of this Comment. The Justices themselves do not all agree, illustrated by the concurring opinions in *Collins*. *See* 141 S. Ct. at 1789–95 (Thomas, J., concurring); *id.* at 1795–99 (Gorsuch, J., concurring in part); *id.* at 1799–1805 (Kagan, J., concurring in part and concurring in the judgment). Some proposed remedies include vacatur of ongoing proceedings, severance of one of the layers of removal protections, declaratory relief, etc. While severance has been the preferred approach, severability poses its own complex questions. *See* William Baude, *Severability First Principles*, 109 VA. L. REV. 1, 3 (2023); William C. Eisenhauer, Note, *A Responsive Remedy for Unconstitutional Removal Restrictions*, 97 NOTRE DAME L. REV. 2195, 2223, 2225 (2022).

15 The New Civil Liberties Alliance argued that courts should grant even seemingly pyrrhic remedies in removal-protection challenges in an amicus curiae brief on behalf of the petitioner in *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022). Brief of The New Civil Liberties Alliance as *Amici Curiae* in Support of Petitioner at 3, *Calcutt*, 37 F.4th 293 (No. 22-714). This Comment argues for the same thing, but centers on how the Court's opinion in *Axon* supports this conclusion.

This Comment begins in Part I by introducing the Court's jurisprudence regarding the Appointments Clause and removal protections, highlighting the key differences that make removal-protection cases more difficult for courts to address. Part I illustrates these differences by discussing recent separation-of-powers decisions relied on by *Collins*. Part II then discusses *Collins* in depth, paying particular attention to the Court's methodological approach in that case. Next, Part III introduces several recent representative circuit court cases that address removal-protection claims, illustrating the circuit courts' implementation of *Collins*. Finally, Part IV introduces and discusses the Court's 2023 case, *Axon*, and argues that the Court's approach in that case offers insight into the correct application of *Collins*, one that does not impose insurmountable barriers to plaintiffs—as some circuits have—but incentivizes timely removal-protection challenges.

I. The Remedial Challenge of Unconstitutional Combination Claims

Collins, *Axon*, and the lower court cases discussed below all involve structural constitutional challenges to executive agencies; specifically, these cases involve challenges to removal protections for executive officers.[16] These claims are examples of potentially unconstitutional combinations of agencies' structural features.[17] For example, in the removal-protection context, it is often the layering of multiple removal protections that produces the constitutionally suspect insulation from presidential control.[18] These types of claims are different than claims challenging the validity of the appointments of officers. Understanding the difference between the two is key to understanding why structural constitutional challenges that involve impermissible combinations present more challenging remedial questions to courts, and hence, why courts have been tempted to overread *Collins*.[19] To understand the approach the Supreme Court took in *Collins* and the approaches lower courts have taken in subsequent cases, it is helpful to begin with an overview of the unique challenges these kinds of claims present and how

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16 In *Axon*, the underlying constitutional claims made by the petitioners were structural constitutional challenges to removal protections and "the combination of prosecutorial and adjudicatory functions in a single agency." *See* 143 S. Ct. at 897. However, the Court in *Axon* did not address the merits of either constitutional claim. Rather, the question before the Court was whether a federal district court had jurisdiction to hear the plaintiffs' claims before the completion of the administrative proceedings. *Id.* ("Our task today is not to resolve those [constitutional] challenges; rather, it is to decide where they may be heard.").

17 *See* Baude, *supra* note 14, at 41–42.

18 *See id.* at 42.

19 *See id.*

they fit with the Court's separation-of-powers decisions leading up to *Collins*.[20]

A. Free Enterprise Fund*,* Lucia*, and* Seila Law

The Court's separation-of-powers cases have dealt with challenges to both the validity of appointments of executive officers as well as removal protections insulating executive officers from presidential control.[21] However, removal-protection claims differ from Appointments Clause claims in several important respects, and those differences result in difficult and unresolved questions for courts when it comes to determining the appropriate remedy for an unconstitutional removal protection. Unlike constitutional defects in the proper appointment of executive officers for which the Court has provided a clear remedy, removal-protection challenges do not easily lend themselves to a similar per se remedy.[22] To understand the underlying reasons, it is useful to emphasize the key differences the Court has identified in its removal-protections precedents.

1. *Free Enterprise Fund*

In 2010, the Supreme Court decided *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[23] There, the Court addressed whether two layers of removal protection contravened the constitutional separation of powers.[24] Congress created the Public Company Accounting Oversight Board ("Board") when it passed the Sarbanes-Oxley Act in 2002.[25] Congress tasked the Board with enforcing commercial accounting standards, and the Sarbanes-Oxley Act empowered the Securities and Exchange Commission ("SEC") to appoint members of the Board.[26] However, the SEC's power to remove Board members was limited to firing

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[20] While the cases this Comment focuses on are largely removal-protection cases, unconstitutional combinations can take other forms while still raising separation-of-powers issues. *See Axon*, 143 S. Ct. at 897 ("[The] respondent attacks as well the combination of prosecutorial and adjudicatory functions in a single agency.").

[21] *See*, *e.g.,* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); Lucia v. SEC, 138 S. Ct. 2044 (2018).

[22] *See Lucia*, 138 S. Ct. at 2055 (holding that the appropriate remedy was to require a new hearing before the SEC or another constitutionally appointed ALJ).

[23] 561 U.S. 477 (2010).

[24] *Id.* at 492.

[25] *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 101, 116 Stat. 745, 750 (codified at 15 U.S.C. § 7211), *invalidated in part by* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

[26] *See id.* § 101, 116 Stat. at 750–52; 15 U.S.C. § 7211(e)(6), *invalidated by* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010); *see also id.* § 7217(b)–(c).

only "for good cause shown."[27] The issue of multilayer for-cause removal protections arose because the SEC's Commissioners were themselves appointed by the President, with the advice and consent of the Senate, for a five-year term.[28] Because the opposing parties in the case agreed that the SEC Commissioners could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office,"[29] the Court "decide[d] the case with that understanding."[30] The resulting structure combined the tenure protections of the SEC's statute and the Sarbanes-Oxley Act, creating two layers of "for-cause" removal protections between the Board and the President.

The Sarbanes-Oxley Act did not create a toothless committee with purely recommendatory powers but a Board with broad regulatory authority and enforcement powers.[31] When the Board brought an enforcement action against a Nevada accounting firm, the firm raised a constitutional challenge to the Board's removal restrictions and asserted a violation of the separation of powers.[32] Because two layers of removal protection separated the Board from the President, the firm argued, the Board's structure violated the Constitution.[33] A majority of the Supreme Court agreed with the firm and declared that the Board's structure was unconstitutional.[34] Because the Board exercised sweeping executive power, its insulation from presidential control rendered it insufficiently accountable and contravened the separation of powers.[35] With this declaration, the Court announced that the plaintiff prevailed on its claim, but the remedial question still remained.

While the Board's structure was unconstitutional, the Court held the offending removal restrictions were severable from the rest of the statute, thereby allowing the SEC Commissioners *prospectively* to remove Board members at will.[36] However, the Court denied any retrospective relief, opting not to vacate or invalidate any of the Board's past actions.[37] The Court held that because "the Board members ha[d] been validly appointed by the full Commission," the petitioners were "not entitled to broad

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27 *See* 15 U.S.C. § 7211(e)(6), *invalidated by* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010).

28 *See id.* § 7211(e)(5)(A).

29 *See Free Enter.*, 561 U.S. at 487 (internal quotation marks omitted) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 620 (1935)).

30 *See id.* at 487.

31 *See* 15 U.S.C. § 7215(b)(1), (c)(4).

32 *See Free Enter.*, 561 U.S. at 487.

33 *See id.*

34 *See id.* at 492.

35 *See id.*

36 *See id.* at 508.

37 *See id.* at 513.

injunctive relief against the Board's continued operations."[38] In other words, because there was no defect in the validity of the Board members' appointments, the Court held the Board was validly vested with executive power and their actions were valid, despite the unconstitutional removal protections.[39] The Court left the Sarbanes-Oxley Act intact, minus the excised tenure restrictions.[40] While this may have resulted in a less-than-satisfactory remedy from the plaintiffs' perspective—essentially affording the plaintiffs no real relief, as the Court did not award litigation costs or attorney's fees and remanded the matter back to the Board consisting of the same personnel[41]—the Court demonstrated a commitment to ensuring constitutional defects in agency structures would not persist into the future.[42]

2. *Lucia*

The Supreme Court heard another separation-of-powers challenge in its 2018 case *Lucia v. SEC*;[43] however, that case involved a challenge under the Appointments Clause, which is useful to illustrate the differences between the Court's approach to removal-protection claims and Appointments Clause claims. In *Lucia*, plaintiff Raymond Lucia and his investment company were the target of an SEC administrative proceeding accusing them of marketing financial products using deceptive practices.[44] The SEC, although statutorily authorized to preside over the proceeding itself, opted to delegate the task of presiding over the proceeding to an administrative law judge ("ALJ").[45] At the time, the SEC's five ALJs had not been appointed by the Commission proper, but by mere staff members.[46] Because the SEC ALJ presiding over the enforcement proceeding exercised extensive authority, the plaintiff argued that the ALJ was an "Officer[] of the United States," rather than a "mere employee" of the federal

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38 *See Free Enter.*, 561 U.S. at 513.

39 *See id.*

40 *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 519 & n.213 (2014).

41 *See id.*

42 Although questions remain as to whether such remedies will incentivize future plaintiffs to bring these kinds of structural constitutional claims, those questions are beyond the scope of this Comment. Rather, this Comment advocates that lower courts should at least decide the merits of structural constitutional challenges, as the Court did in *Free Enterprise*, to ensure that separation-of-powers violations do not evade judicial review simply for want of a remedy that would fully satisfy plaintiffs.

43 138 S. Ct. 2044 (2018).

44 *See id.* at 2049.

45 *See id.*

46 *See id.*

government, and consequently was not validly appointed according to the Constitution's requirements.[47] The Court, relying on its analysis in *Freytag v. Commissioner*,[48] agreed with the plaintiff and held that the SEC ALJs were "Officers of the United States" who could not be appointed by SEC staff.[49] Instead, the Court held the SEC ALJs were subject to the requirements of the Appointments Clause; thus, the ALJ who presided over Lucia's proceeding was invalidly appointed.[50] All that was then left for the Court to decide was the appropriate remedy.

The Court relied on another precedent, *Ryder v. United States*,[51] to determine the appropriate remedy, which the *Lucia* Court expanded further.[52] In *Ryder*, another Appointments Clause case, the Court held that "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief."[53] The *Ryder* Court held that the "'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official."[54] Yet the *Lucia* Court added a further requirement: The official presiding over the new hearing cannot be the same ALJ who presided before, even if he later received a constitutional appointment.[55] In a partial dissent, Justice Stephen Breyer argued that the additional condition requiring the new hearing to be before a new officer was unnecessary to serve the "structural purposes" of the Appointments Clause.[56] The majority responded that "our Appointments Clause remedies are designed not only to advance those [structural] purposes directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'"[57] The Court in *Lucia* affirmed what it had earlier said in *Ryder*, but even more forcefully.[58] Plaintiffs who bring successful appointments challenges are entitled to per se relief that is intended not only to correct the constitutional defect, but also to "reinforce separation-of-powers norms" and encourage plaintiffs to bring appointments challenges.[59]

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47 *See id.* at 2050.

48 501 U.S. 868 (1991).

49 *See Lucia*, 138 S. Ct. at 2052–53, 2055 (citing *Freytag*, 501 U.S. at 881).

50 See *id.* at 2052–53.

51 515 U.S. 177 (1995).

52 *See Lucia*, 138 S. Ct. at 2055

53 *See id.* (quoting *Ryder*, 515 U.S. at 182–83).

54 *Id.* (quoting *Ryder*, 515 U.S. at 183, 188).

55 *See id.*

56 *See Lucia*, 138 S. Ct. at 2064 (Breyer, J., concurring in the judgment part and dissenting in part).

57 *See id.* at 2055 n.5 (second and third alterations in original) (quoting *Ryder*, 515 U.S. at 183).

58 *See* Eisenhauer, *supra* note 14, at 2215.

59 *See id.* at 2215–16.

The Court in *Lucia* demonstrated a willingness to award plaintiffs per se relief for successful appointments challenges, granting them a new hearing before a different, constitutionally appointed officer.[60] That is something it was not willing to do for the meritorious removal-protection challenge in *Free Enterprise Fund*, where it simply severed the unconstitutional tenure protections from the statute but did not award the plaintiff any additional relief.[61] The Court expanded on its reason for the different approaches in its decision in *Collins* discussed below, but before turning to that case, it is useful to consider another removal-protection case decided one year before *Collins*.

3. *Seila Law*

Following the 2008 financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act"), establishing the Consumer Financial Protection Bureau ("CFPB"), an independent agency tasked with regulating consumer debt products.[62] Congress tasked the CFPB with the administration of eighteen preexisting federal statutes regulating consumer finance, and vested the CFPB with broad enforcement authority.[63] Rather than adopt the traditional leadership structure for a powerful independent regulatory agency, a multimember commission, or board, Congress chose to entrust the CFPB to the leadership of a single director.[64] While the CFPB Director is appointed by the President with the advice and consent of the Senate, the Dodd-Frank Act declared: "The Director serves for a term of five years, during which the President may remove the Director from office only for 'inefficiency, neglect of duty, or malfeasance in office.'"[65]

When the CFPB issued a civil investigative demand to compel a California-based law firm, Seila Law LLC, to produce documents, the law firm refused to comply.[66] The firm asserted to the CFPB that it would not comply with the civil investigative demand because the CFPB's structure—headed by a single Director insulated from removal by the President—violated the separation of powers, therefore rendering the demand invalid.[67] The CFPB then petitioned a district court to enforce the demand.[68] Seila Law persisted in its challenge to the CFPB's structure, and

60 *See Lucia*, 138 S. Ct. at 2055.

61 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513 (2010).

62 *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020).

63 *See id.* at 2193.

64 *See id.*

65 *Id.* (quoting 12 U.S.C. § 5491(c)(1), (3)).

66 *See id.* at 2194.

67 *See id.*

68 *See Seila Law*, 140 S. Ct. at 2194.

the Supreme Court agreed to take up the firm's claim.[69] The Court agreed with the plaintiff and held that the Director's removal restriction was unconstitutional.[70]

Following a pattern that emerged in all three of the cases discussed in this Section, the Court turned to the remedial question last, only after having first decided the merits of the plaintiffs' claims.[71] In this case, the Court held that the offending removal restrictions were severable from the remainder of the Dodd-Frank Act, concluding that Congress's. express inclusion of a severability clause was probative evidence that "Congress . . . preferred a dependent CFPB to *no agency at all*."[72] Having concluded that the removal restrictions were severable, the Court remanded the case to allow the lower courts to determine in the first instance whether the actions of later-appointed directors who claimed to be removable at will and fully accountable to the President ratified the civil investigative demand issued by the unconstitutionally insulated Director.[73] The ratification question had not been fully briefed, nor was the record clear on the underlying facts; therefore, the Court declined to give an answer, but it emphasized that the appropriate remedy regarding the plaintiff's request to have the civil investigative demand set aside as invalid depended on whether later directors had ratified the initial demand.[74] Despite remanding on the ratification question, the Court followed its consistent approach of reaching the merits of plaintiffs' structural constitutional claims first, then deciding whether the offending provisions were severable, and finally determining whether any additional remedy was available for plaintiffs.[75]

In both removal-protections cases highlighted in this Section, the Court ultimately denied the plaintiffs the broad remedies they were seeking. In *Free Enterprise Fund*, the plaintiffs sought injunctive relief against the Board.[76] While holding the plaintiffs' claim was meritorious—the Board members were unconstitutionally insulated from removal—the Court declined to grant the plaintiffs the relief they wanted.[77] Similarly, in *Seila Law* the Court agreed with the plaintiff that the Director's removal protections were unconstitutional; yet rather than set aside the CFPB's demand as the plaintiff requested, the Court remanded the issue to

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69 *See id.* at 2195.

70 *See id.* at 2197.

71 *See id.* at 2207.

72 *See id.* at 2210.

73 *See id.* at 2211.

74 *See Seila Law*, 140 S. Ct. at 2208.

75 *See id.* at 2211. This general outline reflects the Court's approach in the two other separation-of-powers cases already discussed in this Part, *Free Enterprise Fund* and *Lucia*.

76 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 487 (2010).

77 *See* Eisenhauer, *supra* note 14 at 2202.

determine if a later ratification meant the demand could now be validly enforced.[78] Contrast these approaches with the approach of the Court in *Lucia*, an appointments challenge. In the appointments context, the Court was more willing to grant the plaintiff his requested relief, namely, a new hearing before a different, validly appointed official.[79] Back in *Free Enterprise Fund*, the Court had already articulated the reason it believed made the critical difference between removal violations and appointments defects: Because the Board members had been validly appointed, their removal protections, while unlawful, did not entitle the plaintiffs to injunctive relief.[80] The Court in *Free Enterprise Fund* implied that validly appointed officers wield executive authority validly even if they operate with unconstitutional removal protections.[81] Hence, the Court granted only prospective declaratory relief which ensured that going forward, Board members would be removable by the SEC at will.[82] These cases laid the foundation upon which the Court would rest its 2021 decision *Collins v. Yellen*.[83]

II. *Collins v. Yellen*

A. *Case Summary*

In *Collins*, the Supreme Court considered the structure of the Federal Housing Finance Agency ("FHFA"). Congress created the FHFA when it passed the Housing and Economic Recovery Act of 2008 ("Recovery Act") in response to the 2008 financial crisis.[84] That crisis was precipitated by lenders issuing subprime mortgages—essentially mortgages at a high risk of default.[85] Lenders then used "complex financial instruments" to "conceal the underlying risk" of the subprime mortgages to sell those mortgages to two companies who turned them into mortgage-backed securities, and in turn, bore the risks of defaults on those mortgages.[86] The two companies buying the mortgages were the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage

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78 *Seila Law*, 140 S. Ct. at 2211.

79 *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018) (holding appropriate remedy was to require a new hearing before the SEC or another constitutionally appointed ALJ).

80 *See Free Enter.*, 561 U.S. at 513.

81 *See id.*

82 *Id.*

83 *See* 141 S. Ct. 1761, 1770 (2021).

84 *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, sec. 1101, §§ 1311–1312, 122 Stat. 2654, 2661–63 (codified at 12 U.S.C. §§ 4511–4512).

85 Eisenhauer, *supra* note 14, at 2205–06.

86 *Id.*

Corporation ("Freddie Mac").[87] Both are privately owned, government-backed, for-profit companies, and when the housing bubble burst in 2008, both companies suffered severe financial losses.[88] Because of fears that the companies might fail, leading to an even worse collapse of the mortgage market, Congress stepped in by creating the FHFA to regulate "the companies' management and operations."[89] Congress created the FHFA as "an independent agency" and decided that the FHFA would be led by a single director, removable by the President only "for cause."[90]

Congress also authorized the Department of the Treasury ("Treasury") to buy Fannie Mae and Freddie Mac stock.[91] Soon after its formation, the FHFA "placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury."[92] As part of the initial agreement, the Treasury agreed to provide the companies with up to $100 billion in capital in exchange for company stock.[93] The Treasury received one million shares of senior preferred stock in each company, and with that stock came certain entitlements, including: preference in the event of the companies' liquidation; long-term options to purchase up to seventy-nine percent of the companies' common stock; entitlement to a quarterly commitment fee; and entitlement to quarterly cash dividend payments from the companies at a fixed rate.[94] When it became clear that the initial $100 billion capital commitment would not be adequate, the agreement was amended twice, with the Treasury ultimately agreeing to provide the companies with as much funding as necessary through 2012, at which point a cap would once again take effect.[95]

The terms of these first two amendments proved burdensome for the companies, as they drew heavily on the Treasury's capital commitment, resulting in large dividend obligations.[96] Because the companies lacked the cash to meet their dividend obligations to the Treasury, they began to

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87 *Collins*, 141 S. Ct. at 1770.

88 *See* Eisenhauer, *supra* note 14, at 2205–06.

89 *See Collins*, 141 S. Ct. at 1771–72; 12 U.S.C. § 4541(a) (requiring FHFA approval of new products); *id.* § 4513(a)(2)(A) (allowing the FHFA to review and reject any of a companies' acquisitions and controlling-interest transfers if warranted); *id.* § 4518 (allowing the FHFA to cap the companies' executive compensation); *id.* § 4514(a)(2) (giving the FHFA the authority to require written reports on the companies' condition or "any other relevant topics").

90 *See Collins*, 141 S. Ct. at 1770 (internal quotation marks omitted) (quoting 12 U.S.C §§ 4511, 4512(b)(2)).

91 *See* Eisenhauer, *supra* note 14, at 2207.

92 *See Collins*, 141 S. Ct. at 1770.

93 *Id.*

94 *Id.* at 1773.

95 *Id.*

96 *See id.*

draw on the capital commitment to meet their dividend requirements.[97] This cycle of borrowing more money simply to hand it back to the Treasury in the form of dividend payments led the Treasury and the FHFA to amend the agreements for a third time in 2012.[98] Rather than continue requiring quarterly fixed-rate dividend payments tied to the amount the companies had drawn from the Treasury's capital commitment, this third amendment introduced a variable dividend formula tied to the companies' net worth.[99] This change resulted in no dividend obligations in quarters where the companies lost money or their net worth did not exceed a predetermined capital reserve.[100] However, in quarters where the companies performed well and their net worth exceeded the amount of the reserve, the companies were required "to pay *all of the surplus* to Treasury."[101] This new arrangement meant that while the companies were free from the onerous dividend requirements of the initial amended agreements, the companies were also unable to accrue any capital even when they performed well.[102]

After the third amendment, both Fannie Mae's and Freddie Mac's financial situations improved, but under the newly amended agreement their success meant both companies were required to transfer enormous sums to the Treasury.[103] Between 2013 and 2016, the companies' payments to the Treasury "totaled approximately $200 billion," a staggering sum that "is at least $124 billion more than the companies would have had to pay . . . under the fixed-rate dividend formula that previously applied."[104] The third amendment remained in place until 2021, when the Treasury and FHFA amended the agreements a fourth time.[105]

Three of the companies' shareholders sued the FHFA Director in 2016, asserting both a statutory claim, not relevant for the purposes of this Comment, and a constitutional claim alleging that the agency's structure violated the separation of powers because the FHFA's single Director was removable by the President only "for cause."[106] The Supreme Court agreed with the lower courts that the plaintiffs' statutory claim should be dismissed.[107] When the Court turned to the constitutional claim, however, it agreed with plaintiffs and held that the FHFA's Director was

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97 *See id.*

98 *See Collins*, 141 S. Ct. at 1773.

99 *Id.* at 1773–74.

100 *Id.* at 1774.

101 *Id.*

102 *See id.*

103 *Id.*

104 *Collins*, 141 S. Ct. at 1774.

105 *Id.*

106 *Id.* at 1775.

107 *Id.*

unconstitutionally insulated from presidential removal, violating the separation of powers.[108] Because the Court decided the merits of plaintiffs' claims, it first declared the unconstitutional removal protections unenforceable, and consequently ensured future FHFA directors would not be insulated from presidential supervision.[109] The Court further considered the question of whether an acting director was subject to the same tenure protections.[110] While the Court held that confirmed FHFA Directors were insulated by impermissible tenure protections, the Court also held that the Acting Director who led the FHFA at the time of the third amendment's adoption was not similarly insulated, and the President could have removed him at will.[111] The difference proved to be critical to the Court's remedial approach, to which it turned last.

The plaintiff shareholders raised several arguments in support of broad, retrospective, injunctive relief that they argued was necessary to make them whole in light of the unconstitutionality of the Agency's structure.[112] The Court determined that the plaintiffs were not entitled to any prospective remedy, since the third amendment to the stock purchasing agreement was no longer in effect and the current FHFA Director already agreed with the plaintiffs about the unenforceability of the removal protections.[113] The Court's remedial analysis focused entirely on whether the plaintiffs were entitled to any retrospective remedy.[114] The plaintiffs argued that the third amendment should be "completely undone," reasoning that the third amendment was invalid ab initio due to the Directors' removal protections.[115] The Court, however, took the opportunity to rebuff that argument by distinguishing between its Appointments Clause jurisprudence and its removal-protection precedents.[116]

Because "the Acting Director who *adopted* the third amendment was removable at will," the Court held there was no basis for setting the third amendment aside entirely.[117] The Court made clear the only remedial avenue it would consider was whether the "actions that confirmed Directors [took] to *implement* the third amendment" grounded a remedy for the plaintiffs.[118] However, the Court also made clear that despite the

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108 *See id*. at 1783.

109 *See id.* at 1787.

110 *Collins*, 141 S. Ct. at 1783.

111 *See id.*

112 *See id.* at 1787.

113 *See id.* at 1780.

114 *See id.* at 1787.

115 *Id.*

116 *See Collins*, 141 S. Ct. at 1787–88.

117 *See id.* at 1787.

118 *Id.*

unconstitutional removal protections, "[a]ll the officers who headed the FHFA during the time in question were properly *appointed*."[119] Because there was no defect in the appointments of the officers, the Court stated "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void."[120] For the Court, appointment defects undermine the authority of the officer to act at all.[121] Appointments Clause cases "involve[] a Government actor's exercise of power that the actor did not lawfully possess,"[122] and therefore, as mentioned in the discussion of *Lucia*, *supra* Section I.A.2, those cases entitle successful plaintiffs to per se relief.[123] In *Collins*, however, the Court made clear that "the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office, including implementing the third amendment."[124]

Despite the Court's declaration that the confirmed Directors validly exercised their authority even while the unlawful removal restrictions were in place, the Court immediately moved to qualify its statement, and the following portion of the Court's opinion is arguably the portion that has caused the most confusion among the lower courts. In the next paragraph, after having decided that the third amendment need not be "completely undone," Justice Samuel Alito, writing for the Court, went on to say: "That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief."[125] Rather, "it is still possible for an unconstitutional provision to inflict compensable harm."[126] In this case, Justice Alito left open the possibility that plaintiffs might be entitled to some retrospective relief because "the possibility that the unconstitutional restriction on the President's power to remove . . . could have such an effect [of inflicting compensable harm] cannot be ruled out."[127] Justice Alito then provided the following examples of situations where it would be clear that the removal restrictions inflicted "compensable harm":

> Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the

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119 *Id.*

120 *Id.*

121 *See id.*

122 *See Collins*, 141 S. Ct. at 1788.

123 *See* Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018).

124 *See Collins*, 141 S. Ct. at 1788 n.23 (citing Seila L. LLC v. CFPB, 141. S. Ct. 2183, 2207–11 (2020)).

125 *Id.* at 1788.

126 *Id.* at 1789.

127 *Id.*

> Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.[128]

These two examples present "clear-cut" scenarios of "compensable harm," and the Court recognized that "[i]n the present case, the situation is less clear-cut"; nevertheless, the Court insisted the possibility could not be ruled out and ultimately remanded the remedial question to the lower courts to decide in the first instance.[129]

B. *Analysis*

Before turning to cases of circuit courts interpreting and applying the Court's reasoning in *Collins*, it is helpful to consider a few key aspects of the decision, and to highlight the further discussion of the remedial question in the separate opinions of the Justices. First, when read in light of its recent precedents in separation-of-powers cases, the Court's approach remains straightforward despite the complexities of the case itself. Statutory arguments aside, the Court addressed the merits of the plaintiffs' constitutional claims first, and only after having concluded that the FHFA Director's removal protections were unconstitutional did the Court turn to consider what relief the plaintiffs might be entitled to.[130] This is the same order of operations the Court followed in the separation-of-powers precedents already discussed above, regardless of whether the structural constitutional claim was an appointments challenge or a removal-protections challenge. This Comment argues that this merits-first-then-remedies approach is the correct approach and that the Court's recent decision in *Axon* lends strength to this view.

Second, the differing views of the correct remedy for removal-protections claims embodied in the separate writings of Justices Clarence Thomas, Neil Gorsuch, and Elena Kagan in *Collins* illustrate why the lower courts, as discussed in Part III, *infra*, may be reluctant to wade into the remedial quagmire. The resolution of these complex remedial questions is beyond the scope of this Comment, but it is useful to highlight some of the salient theories to better understand what the lower courts were left to contend with following *Collins*. Taking the separate writings in reverse order, Justice Kagan concurred in part and concurred in the judgment in part but wrote separately to expand on her understanding of the Court's remedial analysis.[131] She began by emphasizing that she "join[ed] in full" the majority's remedial analysis, explaining that in her view "[t]he majority's remedial holding limits the damage of the Court's removal

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128 *Id.*

129 *Id.*

130 *See Collins*, 141 S. Ct. at 1787.

131 *Id.* at 1801–02 (Kagan, J., concurring in part and concurring in the judgment in part).

jurisprudence."[132] Specifically, she agreed with the Court's holding that "plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision."[133] This language appears to incorporate a backward-looking view, emphasizing "rewinding" the proceedings complained of. In the context of this case, that makes sense, since the plaintiffs could be entitled only to retrospective relief, if any, because their claims for prospective relief were never on the table.[134] Justice Kagan's primary concern is, seemingly, ensuring that future removal-protection claims will not result in sweeping "undoing" of agency actions that would cause chaos for the functioning of the federal government.[135] The example she gave is the "hundreds of thousands of decisions that the Social Security Administration (SSA) makes each year," which she concluded would likely not need to be undone, even if a plaintiff successfully challenged the provision granting for-cause removal protection to the SSA's single head—a provision which Justice Kagan was willing to wager would be "next on the chopping block."[136]

Justice Gorsuch, on the other hand, dissented from the Court's remedial analysis, arguing that claims for removal violations should be treated the same as claims for appointment defects.[137] To Justice Gorsuch, "it is unclear . . . why this distinction should make a difference."[138] In his view, "Either way, governmental action is taken by someone erroneously claiming the mantle of executive power—and thus taken with no authority at all."[139] In effect, Justice Gorsuch would hold that the challenged actions taken by an actor unconstitutionally insulated from presidential supervision are void.[140] He argued that this is the approach most consistent with the Court's separation-of-powers precedents, which he emphasized are still good law.[141] He questioned the Court's motives for

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132 *Id.* at 1801.

133 *Id.*

134 *See id.* at 1780 (majority opinion) ("[T]he shareholders sought various forms of prospective relief, but because that amendment is no longer in place, the shareholders no longer have any ground for such relief. By contrast, they retain an interest in the retrospective relief they have requested, and that interest saves their constitutional claim from mootness.").

135 *See id.* at 1802 (Kagan, J., concurring in part and concurring in the judgment in part).

136 *See Collins*, 141 S. Ct. at 1802. Justice Kagan's prediction was either prophetic or manifested the outcome she predicted. The Ninth Circuit concluded in *Kaufmann v. Kijakazi*, 32 F.4th 843, 848 (9th Cir. 2022), just what Justice Kagan said, holding the SSA's removal provision unconstitutional and severable, but declined to undo any of the Administration's actions as void. *Id.*

137 *Collins*, 141 S. Ct. at 1795 (Gorsuch, J., concurring in part).

138 *Id.*

139 *Id.*

140 *Id.* at 1799.

141 *Id.*

shying away from traditional remedial principles, speculating that the Court's "retreat" was occasioned "by the prospect [of] a more traditional remedy here [which] could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands."[142] Justice Gorsuch's implied message to lower courts was that they should limit the Court's remedial analysis to the facts of *Collins* and follow "our prior guidance authorizing more meaningful relief in other situations."[143] Ultimately, Justice Gorsuch concluded that "where individuals are burdened by unconstitutional executive action, they are 'entitled to relief.'"[144] Justice Gorsuch's proposed approach is a formalist one that aims at securing more meaningful remedies to plaintiffs who successfully challenge unconstitutional agency structures, an aim seemingly in keeping with the Court's earlier separation-of-powers cases. However, Justice Gorsuch's partial concurrence garnered no additional votes, since here he and the Court's other strict formalist Justice parted ways.[145]

Justice Thomas's concurrence in *Collins* reflects a different formalist theoretical approach than Justice Gorsuch's—one that is less concerned with the practical effects on plaintiffs, and more concerned with the mechanics of constitutional law.[146] As Justice Thomas sees it, removal-protection claims pose a "paradox" for the *Collins* plaintiffs:

> Had the removal provision *not* conflicted with the Constitution, the law would never have unconstitutionally insulated any Director. And while the provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason. So . . . the President always had the legal power to remove the Director in a manner consistent with the Constitution.[147]

Justice Thomas follows to its logical conclusion the legal principle that the majority itself acknowledged in *Collins* that "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)."[148] While stating that he joined the Court's opinion in full, Justice Thomas's concurrence highlighted the "fundamental problem with removal-restriction cases," addressing the majority's statement that, in spite of the legal principle just stated, "it is still possible for an unconstitutional provision to inflict compensable harm."[149] Justice Thomas's theory is more absolute in its

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142 *Id.*

143 *See Collins*, 141 S. Ct. at 1799.

144 *Id.* (quoting Lucia v. SEC, 138 S. Ct. 2044, 2055 (2018)).

145 *See* Baude, *supra* note 14, at 38; Eisenhauer, *supra* note 14, at 2210; Jack Ferguson, Note, *Severability and Standing Puzzles in the Law of Removal Power*, 98 NOTRE DAME L. REV. 1731, 1743 (2023).

146 *See* Eisenhauer, *supra* note 14, at 2210; Ferguson, *supra* note 143, at 1749–50.

147 *Collins*, 141 S. Ct. at 1793 (Thomas, J., concurring).

148 *Id.* at 1788–89 (majority opinion).

149 *See id.* at 1789; *id.* (Thomas, J., concurring).

conclusion that unconstitutional removal protections are always automatically displaced by the Constitution if they are indeed repugnant to it.[150] For Justice Thomas, then, it will never be enough for plaintiffs merely to show "some conflict between the Constitution and a statute"; instead, to obtain meaningful relief, plaintiffs must show that the challenged government *action* was itself unlawful.[151] In Justice Thomas's view, the Court was correct to declare the removal restrictions unconstitutional, but ultimately doubts that the plaintiffs will be entitled to any remedy beyond the declaratory relief.[152]

III. Lower Courts' Application of *Collins*

As this Part shows, the views expressed in the Justices' separate writings in *Collins* shaped the way lower courts interpreted and implemented the *Collins* framework. This Part highlights two cases drawn from the courts of appeals whose reasoning exemplifies the overreading of *Collins* against which this Comment argues. Both cases show lower courts overreading *Collins* and relying on the Court's language there to refuse even declaratory relief to plaintiffs.

A. Calcutt v. Federal Deposit Insurance Corporation

In *Calcutt v. FDIC*,[153] a bank executive petitioned a panel of the U.S. Court of Appeals for the Sixth Circuit for review of an enforcement order issued by an executive agency.[154] The plaintiff raised constitutional challenges to the structure of the Federal Deposit Insurance Corporation ("FDIC").[155] The plaintiff first argued that the FDIC Board is unconstitutionally insulated from removal by the President, and second argued that the FDIC ALJs are unconstitutionally insulated from removal due to multiple layers of tenure protections.[156] The plaintiff in the case had been subject to an order issued by the FDIC imposing civil monetary penalties, removing him from his position at the bank, and permanently barring him from working in the banking industry.[157] The Sixth Circuit ultimately denied his petition for review, allowing the FDIC's order to remain in place,[158] yet their reasoning interpreting the Supreme Court's

150 *See id.* at 1793 (Thomas, J., concurring).

151 *Id.* at 1790.

152 *See id.* at 1795.

153 37 F.4th 293 (6th. Cir. 2022).

154 *Id.* at 300.

155 *Id.*

156 *Id.* at 300, 313.

157 *See id.* at 300.

158 *Id.* at 335–36.

decision in *Collins* led them to deny a decision on the merits of the plaintiff's constitutional claims.[159]

The court first addressed Calcutt's challenge to the FDIC Board's removal protections.[160] The court described the relevant inquiry for evaluating whether an agency's structure violates the separation of powers.[161] The majority detailed a two-step framework derived from the Supreme Court's decision in *Seila Law*, beginning with evaluating whether the agency falls into the exception established in *Humphrey's Executor v. United States*.[162] Immediately after describing the correct framework for evaluating the constitutional challenge, the court announced that it need not proceed with the *Seila Law* inquiry, however, because the Court's decision in *Collins* "instructs that relief from agency proceedings is predicated on a showing of harm, a requirement that forecloses Calcutt from receiving the relief he seeks."[163] The circuit panel's opinion proceeded to discuss the ways in which Calcutt had failed to meet the evidentiary requirements to demonstrate that the allegedly unconstitutional removal protection "inflicted harm," per *Collins*.[164]

The second structural constitutional claim fared no better than the first, as the court declined to seriously consider the merits of the plaintiff's challenge to the FDIC ALJs' multilayer removal protections because "even if we were to accept that the removal protections for the FDIC ALJs posed a constitutional problem, Calcutt is not entitled to relief" without showing he suffered "compensable harm" because of those protections.[165] The key difference, however, and the one the court glossed over, is that in *Collins*, the Supreme Court first considered the merits of the removal challenge, and only after holding the removal protection unconstitutional did the Court turn its attention to the appropriate remedy.[166] Here, by contrast, the court declined to engage in the constitutional inquiry at all because it first determined that the plaintiff had not made the requisite showing of harm the court read *Collins* to require.[167] This reading of *Collins*, if broadly adopted by other courts, would result in the widespread denial of even declaratory relief for otherwise meritorious constitutional claims.

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159 *See Calcutt*, 37 F.4th at 318.

160 *See id.* at 314.

161 *See id.*

162 *See id.* at 313–14 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 624 (1935)).

163 *Id.* at 314.

164 *Id.* at 316 (quoting Collins v. Yellen, 141 S. Ct. 1761, 1789 (2021)).

165 *See Calcutt*, 37 F.4th at 318 (internal quotation marks omitted) (quoting *Collins*, 141 S. Ct. at 1789).

166 *See Collins*, 141 S. Ct. at 1787.

167 *Calcutt*, 37 F.4th at 318.

B. K & R Contractors, LLC v. Keene

Another example of a court overreading *Collins* to decline to decide the merits of valid structural constitutional claims comes from the Fourth Circuit: *K & R Contractors, LLC v. Keene*.[168] Here, the plaintiff coal mining company challenged the constitutionality of the Department of Labor ("DOL") ALJs' multilayer removal protections, among other claims.[169] After providing an account of the Supreme Court's removal-protection precedents, the court recognized that the constitutionality of multilayer tenure protections for ALJs is a complex question on which the courts of appeals have divided.[170] Rather than addressing the difficult constitutional question, the court declared it was "constrained to avoid resolving that constitutional question in this case" because "regardless of how we answer the constitutional question presented by the removal provisions, we would be required to deny the petition because K & R has not asserted any harm resulting from the allegedly unconstitutional statutes."[171] The court went on to cite Justice Alito's two examples in *Collins* as establishing the requirements necessary to show that a removal provision had "inflict[ed] compensable harm."[172]

Here, the court correctly stated that *Collins* provides the requisite evidentiary standard for a plaintiff retrospectively *seeking vacatur* of an agency action.[173] However, holding that the evidentiary standard from *Collins* exempts the court from having to decide the constitutional issue presented simply because declaratory relief is the only available remedy seems to fly in the face of what the Supreme Court did in *Collins* and its other separation-of-powers precedents—almost none of which have provided the broad remedies the plaintiffs were seeking.[174] In essence, the Fourth Circuit's opinion evinces the view that declaratory relief, which often seems pyrrhic from the plaintiff's perspective but still requires courts to grapple with difficult constitutional questions, is not worth the effort. To achieve this result and avoid answering the difficult constitutional question, the court relied on *Collins* to—arguably correctly—decide that the plaintiff was not entitled to the kind of broad

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168 86 F.4th 135 (4th Cir. 2023).

169 *Id.* at 139 (raising also an Appointments Clause challenge).

170 *See id.* at 148 (citing Decker Coal Co. v. Pehringer, 8 F.4th 1123, 1136 (9th Cir. 2021)) (upholding the constitutionality of the combined removal protections as applied to DOL ALJs); Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022) (holding removal restrictions unconstitutional as applied to SEC ALJs); *see also* Fleming v. USDA, 987 F.3d 1093, 1123 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part) (concluding these removal limits are unconstitutional as applied to USDA ALJs).

171 *K & R Contractors*, 86 F.4th at 148–49.

172 *Id.* at 149 (internal quotation marks omitted) (quoting Collins v. Yellen, 141 S. Ct. 1761, 1789 (2021).

173 *See id.*

174 *See id.*

relief it sought, and ultimately denied the plaintiff's petition for review.[175] However, this ignores the fact that the Supreme Court has not denied plaintiffs declaratory relief in its separation-of-powers precedents.[176]

While the Supreme Court's opinion in *Collins* demonstrated that there remain serious doctrinal questions concerning removal violation remedies, the Court has consistently done its part to address these violations of the separation of powers. The Court's own precedents demonstrate its continued commitment to fulfilling its constitutional duty by safeguarding the constitutional structure established by the Framers. The Court's decision in *Collins* may have produced multiple readings by the lower courts, yet this Comment argues the Court signaled in its 2023 decision in *Axon* that federal courts cannot abdicate their responsibility to provide meaningful judicial review to plaintiffs' structural constitutional challenges to executive agencies.[177] The Court's stated motivations and language in *Axon* should guide lower courts to reject a temptation to rely on *Collins* in order to shy away from answering difficult constitutional questions, thus denying plaintiffs even declaratory relief against future subjection to unconstitutionally structured agencies.

IV. *Axon Enterprise, Inc. v. Federal Trade Commission*

During the 2022 Term, the Supreme Court heard another case where plaintiffs sought to challenge the constitutionality of agencies' structures—*Axon Enterprise, Inc. v. FTC*.[178] The Court consolidated the case for argument from two separate challenges filed by respondents in enforcement actions before the SEC and Federal Trade Commission ("FTC"), respectively.[179] Both the plaintiffs' underlying claims challenged the constitutionality of the removal protections of the Agencies' ALJs, and one challenged the combination of prosecutorial and adjudicative functions in a single agency.[180] As the Court recognized, the plaintiffs "challenge[d] the constitutional authority of the agency to proceed," with

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175 *See id.* at 150.

176 *See, e.g.*, Free Enter. Fund v. Pub. Co. Acct. Bd., 561 U.S. 477, 513 (2010); Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2197 (2020).

177 *See* Calcutt v. FDIC, 37 F.4th 293, 318 (6th Cir. 2022); *K & R Contractors*, 86 F.4th at 150; *see also* Kaufmann v. Kijazaki, 32 F.4th 843, 849 (9th Cir. 2022) ("In sum, we sever the removal provision and hold that the President possesses the authority to remove the Commissioner of Social Security at will. The final question, then, is the appropriate remedy for Claimant, whose appeal to the Appeals Council was denied while Commissioner Saul served under an unconstitutional removal provision."); Axon Enter. Inc. v. FTC, 143 S. Ct. 890, 906 (2023); *cf.* Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568, 586 (E.D. Tex. 2022) (holding removal restrictions on Consumer Product Safety Commission unconstitutional and that plaintiffs are entitled to declaratory relief).

178 *Axon*, 143 S. Ct. at 897.

179 *Id.*

180 *See id.*

claims that are "fundamental, even existential."[181] The plaintiffs' claims "maintain in essence that the agencies, as currently structured, are unconstitutional in much of their work."[182]

However, it is worth noting before proceeding further into this discussion that the Court did not address the merits of the plaintiffs' constitutional claims in *Axon*.[183] Rather, the question presented was limited to whether the plaintiffs could bring their structural constitutional claims in federal court even before the agency proceedings became final.[184] For both plaintiffs, the agency enforcement proceedings against them were ongoing, and both plaintiffs brought their structural constitutional claims in federal district court to seek prospective injunctive relief from the proceedings.[185] Because the Court's decision in *Axon* did not directly address the plaintiffs' constitutional claims, the key portions of the Court's opinion for purposes of this Comment are not the discussion of the *Thunder Basin Coal Co. v. Reich*[186] factors to determine whether district courts have jurisdiction over these claims[187] but the Court's characterization of the claims themselves.[188] As the Court pointed out:

> The challenges here, as in *Free Enterprise Fund*, are not to any specific substantive decision—say, to fining a company (*Thunder Basin*) or firing an employee (*Elgin*). Nor are they to the commonplace procedures agencies use to make such a decision. They are instead challenges, again as in *Free Enterprise Fund*, to the structure or very existence of an agency: They charge that an agency is wielding authority unconstitutionally in all or a broad swath of its work.[189]

The ordinary, statutorily prescribed review process would entitle the plaintiffs to appellate review in one of the courts of appeals only after an adverse agency action became final.[190]

However, this review mechanism posed a problem for structural constitutional claims like the ones the plaintiffs sought to bring in district court due to "the interaction between the alleged injury and timing of review."[191] In the plaintiffs' case, review by a court of appeals only after the

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181 *Id.*

182 *Id.*

183 *See id.* ("Our task today is not to resolve those challenges; rather it is to decide where they may be heard.").

184 *See Axon*, 143 S. Ct. at 897.

185 *See id.* ("Seeking to stop the administrative proceedings, [the plaintiffs] instead brought their claims in federal district court.").

186 510 U.S. 200 (1994).

187 *See Axon*, 143 S. Ct. at 902 (citing *Thunder Basin*, 510 U.S. at 212).

188 *See id.*

189 *Id.*

190 *See id.*

191 *Id.* at 903.

conclusion of the proceedings would not adequately address their claims because "the harm [plaintiffs] allege is 'being subjected' to 'unconstitutional agency authority'—a 'proceeding by an unaccountable ALJ.'"[192] The Court here recognized unequivocally that being forced "'to appear in proceedings' before an unconstitutionally insulated ALJ," even if it may seem "a bit abstract," is "a here-and-now injury."[193] What is more, this injury "is impossible to remedy once the proceeding is over, which is when appellate review kicks in."[194] Because the claim is about subjection to unconstitutional agency proceedings, not about the outcome of those proceedings, an appellate court cannot remedy the claim once the proceeding is done.[195] The Court pointed out: "The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker," and "[a] proceeding that has already happened cannot be undone."[196] In order to provide meaningful judicial review, plaintiffs must be able to bring their claims in federal district court because it would be impossible for any court to fashion an appropriate retrospective remedy that was truly responsive to plaintiffs' injury. Here, the plaintiffs "protest[ed] the 'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process."[197] And what was critical was that the plaintiffs protested subjection "irrespective of [the process's] outcome, or of [the] decisions made within it."[198] Therefore, even if the process resulted in a favorable outcome for the plaintiffs, their "here-and-now injury" would remain the same. Ultimately, where plaintiffs raise challenges to the agency's fundamental structure rather than to a particular action by the agency, the Court held that plaintiffs may file these wholly collateral, structural, constitutional challenges directly in federal district court without the need to wait for the administrative proceedings to become final.[199]

The implications of the Court's reasoning here merit exploring. First, the Court is making clear that subjection to an unconstitutionally structured agency's proceedings is a "here-and-now injury" that merits meaningful judicial review.[200] Critically, the Court here draws a distinction between alleging that a particular action by the agency caused harm,

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192 *Id.* (quoting Brief for Petitioner at 36, Axon Enterprise, Inc. v. FTC, 143 S. Ct. 890 (2023) (No. 21-86)) .

193 *Axon*, 143 S. Ct. at 903 (internal quotation marks omitted) (quoting Seila L. LLC v. CPFB, 140 S. Ct. 2193, 2196 (2020)).

194 *Id.*

195 *Id.* at 903–04.

196 *Id.*

197 *Id.* at 904.

198 *See id.*

199 *See Axon*, 143 S. Ct. at 906.

200 *Id.*

versus alleging that merely being subject to any proceedings at all by the unconstitutionally structured agency caused harm.[201] This is distinct from the alleged injury in *Collins*. There, shareholders alleged that a particular action of the agency—adoption of the third amendment to the stock purchasing agreement—caused them harm.[202] The kind of claim brought in *Collins* involved a past agency action that, if the evidentiary requirement of compensable harm could be shown, could be remedied through an undoing of the action (however difficult or impractical that might be). However, the kind of claims brought by the *Axon* plaintiffs could be remedied only prospectively while the proceedings were still ongoing, either via declaratory relief or an injunction barring the unconstitutionally structured agency from continuing to subject the injured party to the proceedings.

The implication is that the Court is indeed concerned about the timing of constitutional claims and constitutional remedies.[203] *Axon* makes clear that plaintiffs with structural constitutional claims currently subject to agency proceedings suffer a "here-and-now injury" that entitles them to "meaningful judicial review."[204] Contrast this approach with the approach taken by the Sixth Circuit in *Calcutt*: The view that *Collins*'s requirement of proof of particularized harm was meant to apply equally to structural constitutional claims seeking retrospective as well as prospective relief becomes untenable.

The Court in *Axon* is emphatic that mere subjection to the unconstitutionally structured agency's proceedings is "a here-and-now injury" that is sufficient to get plaintiffs into district court.[205] What sense would it make if, upon arriving at district court, plaintiffs were required to show positive proof of some additional particularized harm the proceedings caused them beyond being subject to unconstitutional proceedings? That view cannot be right, since the proceedings are ongoing and their ultimate effect on the plaintiff cannot be known. Such a requirement would seem to contradict the Court's reasoning in *Axon*, and it would seem, then, that the real situation for which *Collins* was meant to require additional proof of compensable harm is for claims which challenge and seek vacatur of particular agency *actions*, rather than challenges to the agency's constitutional structure. However, where parties seek relief from subjection to unconstitutionally structured agencies, including mere declaratory relief, the Court's analysis in *Axon* suggests that *Collins*'s requirements should not apply, since subjection to

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201 *See id.* at 904.

202 *See* Collins v. Yellen, 141 S. Ct. 1761, 1770 (2021).

203 *See Axon*, 143 S. Ct. at 903 (discussing the timing of review).

204 *See id.* at 903, 906.

205 *Id.* at 903 (internal quotation marks omitted) (quoting Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2196 (2020)).

an unaccountable authority is itself "a here-and-now injury," however abstract it may seem.[206] Ultimately, the Court's opinion in *Axon* demonstrates that the Court is committed to ensuring that (1) structural constitutional claims are subject to judicial review by the federal courts; (2) federal courts have a duty to address structural constitutional problems like removal restrictions that contravene the separation of powers; and (3) lower courts have a role to play in grappling with these difficult constitutional questions.

Conclusion

Lower courts should not adopt a restrictive reading of *Collins* that would require a plaintiff to make a showing of particularized harm to bring a structural constitutional challenge to an agency. Such a reading would severely curtail parties' incentives to bring such challenges, meaning that agencies operating with unconstitutional features will evade judicial review. Such a result is inconsistent with the Supreme Court's stated intention of encouraging parties to bring constitutional challenges. Instead, courts should limit the Court's approach in *Collins* to its facts or retrospective claims for relief only. Courts' readings of *Collins* should be guided by the Court's language in *Axon* confirming the Court's established practice of regarding subjection to an unconstitutional proceeding as itself a legal injury that courts can and should remedy prospectively. Even in cases where parties seek retrospective relief, courts should not discount the availability of declaratory relief as offering merely a pyrrhic victory to plaintiffs. Rather, they should allow these cases to proceed so the constitutional issues they raise might be subjected to meaningful judicial review.

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206 *See id.* (internal quotation marks omitted) (quoting *Seila Law*, 140 S. Ct. at 2196).