No. 20-1203

IN THE

Supreme Court of the United States

MOOSE JOOCE, ET AL.,

Petitioners,

v.

FOOD & DRUG ADMINISTRATION, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF *AMICI CURIAE* SENATOR RAND PAUL, SENATOR RON JOHNSON AND REPRESENTATIVE JIM BAIRD SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution and Statutes

Federal Regulations

Other Authorities

STATEMENT OF INTEREST[1]

Amici curiae are U.S. Senator Rand Paul (KY), U.S. Senator Ron Johnson (WI) and U.S. Representative Jim Baird (IN-04). *Amici* are committed to protecting the Constitution's structural guarantees like the Appointments Clause. The principal aim of the Appointments Clause is to ensure accountability for those individuals who wield significant power over the lives of American citizens. It does so by providing a carefully wrought nominations and confirmation process for "Officers of the United States." *Amici* believe that the court below disregarded these longstanding protections. *Amici* therefore urge this Court to grant the petition and reverse the decision below.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel have made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Federal agencies conduct the bulk of American lawmaking today. Indeed, for every law that Congress passes, a federal agency issues roughly 28 regulations. This Court has held that Congress may delegate its lawmaking power so long as it provides an "intelligible principle" to guide the agency. *See J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). But that scheme assumes politically appointed agency heads who are accountable to the President will exercise that delegated authority. In reality, however, those agency heads subdelegate much of their power to tenure-protected career staff. As a result, these employees routinely issue binding rules and regulations but escape nearly all accountability for those decisions.

Subdelegation across federal agencies is rampant. At the Food and Drug Administration, for example, an astonishing 98 percent of rules were issued by career employees from 2001 to 2017. *See* Angela C. Erickson & Thomas Berry, *But Who Rules the Rulemakers?: A Study of Illegally Issued Regulations at HHS* 3 (2019), bit.ly/2POEAt6. That arrangement undermines the accountability the Appointments Clause was designed to ensure. Under the Appointments Clause, the President has power of appointment over principal officers, and "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. That

scheme promotes "clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones." *Lucia v. SEC*, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring).

This case demonstrates how the administrative state continues to avoid accountability to any branch of government despite this Court's precedents mandating strict compliance with the Appointments Clause. The D.C. Circuit was able to avoid passing upon a flagrant violation of the Appointments Clause by relying on the "ratification" doctrine, which allows agencies to avoid judicial review by simply ratifying decisions of unappointed career employees wielding significant governmental power. This judicially created doctrine—like the judicially created nonstatutory exhaustion doctrine—ensures that serious issues of structural constitutional law will evade review by the judiciary despite this Court's repeated attempts "to create 'incentives to raise Appointments Clause challenges.'" *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up) (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)). Individuals whose rights have been impaired by an agency employee acting without lawful authority have a right to a day in court. Eliminating the ratification doctrine in constitutional challenges would not remedy all the problems posed by the administrative state overnight. But it would ensure that courts have one less avenue to avoid their fundamental judicial duty to pass upon properly presented structural constitutional issues.

ARGUMENT

I. Employees insulated from removal may not exercise the rulemaking power.

A. An alarming number of regulations are issued each year by tenure-protected employees who lack adequate accountability.

"It has long been the case that there are far more regulations than laws." Clyde Wayne Crews Jr., *Mapping Washington's Lawlessness: An Inventory of Regulatory Dark Matter* 1 (2017), bit.ly/2PpnKkk. In 2019 alone, Congress passed 105 statutes, while federal agencies promulgated nearly 3,000 rules and regulations. Clyde Wayne Crews Jr., *The 2020 Unconstitutionality Index: 28 Federal Rules and Regulations for Every Law Congress Passes*, Forbes (Jan. 1, 2020), bit.ly/39bFEyq (Crews 2020). Although this Court has allowed the delegation of power so long as Congress provides an "intelligible principle" to guide the agency, *see J.W. Hampton*, 276 U.S. at 409, that scheme assumes that "politically-appointed agency heads," who are accountable to the President, "are the main arbiters of delegated authority," Jennifer Nou, *Subdelegating Powers*, 117 Colum. L. Rev. 473, 475 (2017). But, in reality, "much of that power is subdelegated within the agency" to tenure-protected career staff. *Id.* Indeed, scholars have recognized that "[a]gency subdelegation of this nature is a more pervasive phenomenon than commonly recognized." *Id.* at 477.

This subdelegation has become so commonplace that some agency heads learn about agency actions

in the news. *See id.* A former SEC Commissioner, for example, advised incoming commissioners that:

> From time to time, you might read in a newspaper about a "Commission action," and you will have no idea what it is about. So you'll ask yourself, am I having a "senior moment?" Am I suffering from amnesia? Probably not. In all likelihood, the staff had taken action pursuant to the more than 376 separate rules where the Commission previously granted delegated authority to the SEC staff.

Luis A. Aguilar, *Commissioner Aguilar's (Hopefully) Helpful Tips for New SEC Commissioners*, SEC (Nov. 30, 2015), bit.ly/3lQYxvF. Other agencies similarly boast hundreds of subdelegations. *See* Nou, *supra*, 477-78 (noting that, among others, "the EPA recorded over 500 subdelegations by its own count" and the FCC "devotes significant parts of the Code of Federal Regulations (CFR) to hundreds of delegated authorities").

A recent, first-of-its-kind study shows just how pervasive subdelegation is within a single agency. *See* Erickson & Berry, *supra*, 3. Between 2001 and 2017, the Department of Health and Human Services issued roughly 3,000 rules. *Id.* at 2. More than 2,000 of those rules were signed by a career employee. *Id.* at 3. The problem was particularly pervasive in the Food and Drug Administration, where an astonishing 98 percent of rules (approximately 1,860)

"were issued by career employees who have no constitutional authority to do so." *Id.* These actions were not "limited to the most minor rules, such as typos fixes or other small changes." *Hearing on Federally Incurred Cost of Regulatory Changes and How Such Changes are Made Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 116th Cong. 2 (2019) (testimony of Thomas Berry, Pacific Legal Found.) (Berry Testimony). Instead, the vast majority were substantive rules. *Id.* And according to the FDA itself, approximately 20 of the more than 2,000 substantive rules have a combined cost of $17.7 billion against benefits $3.2 billion less than cost. *Id.* at 3.[2]

"In the real world, subdelegation matters." Nou, *supra*, 478. Agency actions touch every facet of life from taxes to toothpaste, heightening the damage done by allowing tenure-protected career officials rather than constitutional officers—who are "in the chain of command to the President"—to issue rules, binding the public and affecting everyday life. Neomi Rao, *Administrative Collusion: How Delegation*

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[2] Of course, HHS is not the only agency to adopt rules through career employees rather than appointed officials. *See, e.g.*, Complaint, *Tahirih Justice Center v. Gaynor*, No. 1:21-cv-00124 (D.D.C 2021) (challenging a U.S. Immigration and Customs Enforcement rule about asylum procedures and withholding of removal after the Acting DHS Secretary purported to delegate authority to sign the rule to another official).

Diminishes the Collective Congress, 90 N.Y.U. L. Rev. 1463, 1494 (2015). Not only do those officials escape the "responsibility" that comes with nomination by the President or a head of department, but they also lack the "security" of a Senate confirmation. Berry Testimony, *supra*, 5 (quoting 2 The Records of the Federal Convention of 1787, at 539 (Max Farrand ed., 1911)). Such a scheme undermines the accountability our Constitution promises, leaving the public little recourse for regulatory overreach. This lack of oversight combined with the significant growth of regulatory costs and spending leaves the federal regulatory machine "on autopilot." *Id.* at 28 (testimony of James Broughel, Senior Research Fellow, Mercatus Ctr. at George Mason Univ.).

Notably, in light of this litigation, HHS recently changed its policy allowing junior officials to issue rules. *See* Dep't of Health and Human Services, *HHS Statement on Regulatory Process* (2020), bit.ly/39n9Zdt. In September 2020, the Department announced that "[a]ll rules will now be signed by the Secretary and by the head of the agency involved." *Id.* The Secretary specifically acknowledged that agency heads "have recognized that questions around delegations of rulemaking power can create litigation risk" and that this change would "prevent[] potential future abuse of authority." *Id.* But since this change is "only prospective in effect," for many regulated parties, the damage is already done. *Id.* Moreover, there is no indication that other agencies have or will follow suit.

The Executive Branch also attempted more systematic changes to address subdelegation. Executive Order 13,979 recognized that "agencies have chosen to blur the[] lines of democratic accountability by allowing career officials to authorize, approve, and serve as the final word on regulations. ... transfer[ing] the power to set rules governing Americans' daily lives from the President, acting through his executive subordinates, to officials insulated from the accountability that national elections bring." Ensuring Democratic Accountability in Agency Rulemaking, Exec. Order No. 13,979, 86 Fed. Reg. 6,813 (Jan. 18, 2021). To this end, President Trump ensured that no regulatory action could be either initiated or approved by an employee rather than an officer of the United States. *Id.* ("[T]he head of each agency shall [] require that agency rules ... must be signed by a senior appointee; and [] require that only senior appointees may initiate the rulemaking process.").

This reform, however, was short-lived. A recent Executive Order repealed Executive Order 13,979 and reopened the floodgates by once more allowing (and likely emboldening) non-officers to both initiate and approve regulatory actions—and to have such actions ratified should anyone have the temerity to challenge the arrangement. Revocation of Certain Presidential Actions, Exec. Order No. 14,018, 86 Fed. Reg. 11,855 (Feb. 24, 2021). Once again, career federal employees have a free hand to exercise the significant regulatory powers Congress could vest only in officers of the United States.

B. This dangerous trend flouts the Appointments Clause and the accountability it ensures.

"The principal concern of the Framers regarding the Appointments Clause ... was to ensure accountability." John McGinnis, *Appointments Clause in The Heritage Guide to the Constitution*, 270 (2d ed. 2014). The Clause gives the President power of appointment over principal officers, and "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, §2, cl. 2. In the Framers' view, "making single actors responsible for appointment choices would give those actors the motivation to select highly qualified officers because they would face the blame if a government appointment did not pan out." Jennifer Mascott, *Who Are 'Officers of the United States'?*, 70 Stan. L. Rev. 443, 456 (2018); *see also Lucia*, 138 S. Ct. at 2056 (Thomas, J., concurring). As for the President, "[t]he blame of a bad nomination would fall upon [him] singly and absolutely." The Federalist No. 77 (A. Hamilton). Moreover, a presidentially appointed official would "be the choice, though a remote choice, of the people themselves." The Federalist No. 39 (J. Madison).

Today, those promises of accountably ring hollow. Every day, tenure-protected career employees or low-to-mid level political officials issue rules and regulations but escape nearly all accountability for those decisions. This case demonstrates as much.

The HHS Secretary delegated his power to regulate the manufacture, sale, and distribution of "tobacco products" under 21 U.S.C. §387a(a) to the Commissioner of Food and Drugs. Pet. 5. The Commissioner then subdelegated that power to the FDA's Associate Commissioner for Policy—a career employee. *Id.* Exercising that authority, the Associate Commissioner issued a rule "deeming" various vaping products as "tobacco products" even though they contain no tobacco. *Id.* That designation imposed huge costs on Petitioners, threatening the viability of their business. *See id.* at 7.

This Court has previously held that only "Officers of the United States" may issue final rules. *Buckley v. Valeo*, 424 U.S. 1, 140-41 (1976). That is because rulemaking "represents the performance of a significant governmental duty exercised pursuant to a public law." *Id.* This makes sense, since "Officers of the United States" are subject to the carefully wrought appointments process. Mere employees, by contrast, are exempt from this process because they, ostensibly, do not wield significant government authority. But subdelegation makes this arrangement a fiction.[3]

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[3] There is strong evidence that, as an original matter, only principal officers may exercise the rulemaking power. *See* Mascott, *supra*, 450. Indeed, "research on the historical meaning of the term 'officer' ... strongly supports the view that inferior officers were not anticipated to wield such a final and unreviewable power." Berry Testimony, *supra*, 8. Ratification,

In cases like this one, unaccountable, tenure-protected employees are exercising the significant authorities—like issuing rules—of an "Officer of the United States." Not only does this raise serious constitutional concerns but it also strips the American people of the ability to hold accountable individuals who wield significant power over their lives. Career employees lack political accountability to Congress by escaping the confirmation process. And they lack accountability to the American people by eluding any practical prospect of removal, as most career employees cannot be removed for the exercise of policy discretion; they may be removed only for cause. *See* 5 U.S.C. §§7541, *et seq*. Indeed, "[t]he president has never nominated—let alone likely even heard of—the FDA's associate commissioner for policy." Berry Testimony, *supra*, 5; *see also id.* ("When decisions are made by low-level employees, the public is deprived of the ability to trace such blame to the top.").

Finally, this scheme also undermines Congress's authority to structure agencies, regulate the Executive Branch, and vest particular officers with the power to issue regulations. *Cf. In re Aiken Cty.*, 725 F.3d 255, 259 (D.C. Cir. 2013) (Kavanaugh, J.) ("Under Article II of the Constitution and relevant Supreme Court precedents, the President must

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however, virtually ensures that courts will never have the opportunity to pass on this important structural constitutional question.

follow statutory mandates so long as there is appropriated money available and the President has no constitutional objection to the statute."). Congress's legislative power includes the power to structure agencies and vest particular officers with particular powers. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1236 (2014) ("If Congress can validly assign duties under its legislative authority in the Necessary and Proper Clause, then it must have some legal effect other than creating an optional tool for the President. For Congress's assignment to be more than advisory, the designated officer must undertake the statutory duty, even though the President retains the authority to direct the execution of that duty as he sees fit."); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 69 (1994) ("[T]he Take Care Clause … obliges the President to follow the full range of laws that Congress enacts, both (a) laws regulating conduct outside the executive branch, and (b) laws regulating execution by regulating conduct within the executive branch."). Without authorization from Congress, an officer's delegation of statutorily vested regulatory power to an employee hollows out Congress's long-recognized authority to structure Executive Branch agencies.

At bottom, "the unelected personnel of federal agencies ... not elected members of Congress, do the bulk of lawmaking in America." Crews 2020, *supra*. But that scheme is feasible only where the officials exercising power "remain in the chain of command to the President." Rao, *Administrative Collusion*, *supra*,

1494. With subdelegations of significant authority on the rise, however, that is no longer the case. The Court's intervention is needed to stem this dangerous tide.

II. Doctrines like ratification allow separation of powers challenges to evade judicial review.

A. This Court has sought to ensure that structural constitutional challenges are adjudicated on the merits.

"Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *See Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). The Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). This structural constitution is under unprecedented threat from the "inexorable presence" of an administrative state that "wields vast power and touches almost every aspect of daily life." *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010); *Freytag v. Comm'r*, 501 U.S. 868, 885 (1991). One key component of the separation of powers is the Appointments Clause, which denies Congress and the Executive exclusive power to appoint executive branch officials. U.S. Const art. II, §2; *see also* Johnathan Turley, *Recess Appointments in the Age of Regulation*, 93 B.U. L. Rev. 1523, 1529 (2013). Thus, adjudicating separation of powers challenges is imperative to maintaining individual liberties. And,

beyond that, separation of powers challenges implicate the "strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962).

This Court has never shied away from adjudicating separation of powers challenges. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020); *Lucia*, 138 S. Ct. at 2044; *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43 (2015); *Stern v. Marshall*, 564 U.S. 462 (2011); *Free Enter. Fund*, 561 U.S. at 496; *Mistretta v. United States*, 488 U.S. 361 (1989); *Glidden*, 370 U.S. 530. Indeed, this Court has not only accepted separation of powers challenges—particularly as they relate to the Appointments Clause—it has encouraged them. *Lucia*, 138 S. Ct. at 2055 n.5 ("[O]ur Appointments Clause remedies are designed ... to create 'incentives to raise Appointments Clause challenges.'") (cleaned up) (quoting *Ryder*, 515 U.S. at 183). And this Court has exercised jurisdiction over Appointments Clause challenges, even if those challenges were not raised in courts below. *See Freytag*, 501 U.S. at 878-79 (including Appointments Clause challenges in a category of "constitutional objections that could be considered on appeal whether or not they were ruled upon below…") (citing *Glidden*, 370 U.S. at 536).

B. The ratification doctrine is often used by federal courts to evade their duty to consider separation of powers issues.

Despite this Court's clear directions to lower courts to decide important separation of powers

questions on the merits, judge-made doctrines like ratification and exhaustion have allowed lower courts to avoid serious separation of powers issues over which they have jurisdiction. *See* Pet. App. A-5 (noting that the D.C. Circuit has "*repeatedly* recognized that ratification can remedy a defect arising from the decision of an *improperly* appointed official") (emphasis added).

Ratification occurs "when a principal sanctions the prior actions of its purported agent." Pet. App. A-5 (quoting *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212, 219 (D.C. Cir. 1998)). The Appointments Clause requires "Officers of the United States" to be appointed by the President, with the "Advice and Consent of the Senate." U.S. Const. art. II, §2, cl. 2. This requirement is the "default manner of appointment," with the sole exception applying to inferior officers. Pet. App. A-4 (quoting *Edmond v. United States*, 520 U.S. 651, 660 (1997)). Despite these clear requirements, the ratification doctrine allows individuals who have not been appointed pursuant to the Constitution to exert powers equivalent to "Officers of the United States." *See supra*, section I.B.

Worse still, the ratification doctrine allows courts to avoid reviewing such individuals' actions and provides agencies with a simple mechanism to insulate unconstitutional acts from judicial review. This practice subverts the rationale underlying the Appointments Clause to "maintain[] clear lines of accountability—encouraging good appointments and giving the public someone to blame for bad ones."

Lucia, 138 S. Ct. at 2056 (Thomas, J., concurring). And courts cannot point to any source of law—statutory or constitutional—for the ratification doctrine. It is purely a judicial creation whose only discernable rationale is to allow courts to avoid passing upon difficult questions. Pet. App. A-5 (citing *Wilkes-Barrie Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371, 429 (D.C. Cir. 2017); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015)). The D.C. Circuit's reliance on this artificial doctrine ignores this Court's emphasis on correcting structural constitutional violations, particularly in the appointments and removal context.

Ratification is thus a close cousin of the nonstatutory exhaustion doctrines that this Court has repeatedly criticized. *See Sims v. Apfel*, 530 U.S. 103, 109 (2000). Nonstatutory exhaustion allows courts to refuse to pass upon a separation of powers challenge because it was not raised below—despite the absence of statutory (or regulatory) exhaustion requirements. Courts continue to apply the nonstatutory exhaustion doctrine to "certain claims involving 'exercise of the agency's discretionary power…or special expertise.'" *Cirko ex rel Cirko v. Comm'r of Soc. Sec.*, 948 F.3d 148, 153 (3d Cir. 2020) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). But several courts have correctly recognized that nonstatutory exhaustion is "generally inappropriate" for "Appointments Clause challenges, which implicate both individual constitutional rights and the structural imperative of separation of powers." *Cirko*, 948 F.3d at 153 (citing *Glidden*, 370

U.S. at 536-37). However, as with ratification, the D.C. Circuit continues to rely on nonstatutory exhaustion to avoid passing on serious separation of powers questions within its jurisdiction and implicating private rights.

For example, in *Fleming v. Department of Agriculture*, the D.C. Circuit declared itself "powerless" to determine whether USDA Administrative Law Judges' dual for-cause removal protections and appointment procedure complied with the Constitution and this Court's recent separation of powers precedents. *Fleming v. United States Dep't of Agriculture*, 987 F.3d 1093, 1097 (D.C. Cir. 2021). In doing so, the D.C. Circuit denied the appellants—"horse trainers who have the temerity to challenge the constitutionality of government procedures"—a chance to challenge the constitutional legitimacy of the process by which the government imposed substantial penalties including monetary sanctions and temporary disqualification from the industry.[4] *Id.* at 1113 (Rao, J., concurring in part and

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[4] The *Fleming* majority attempted to portray the exhaustion requirements at issue as based in statute. As Judge Rao demonstrated, however, the relevant statute only required exhaustion of available *procedures*, not *issues*. *Fleming*, 987 F.3d at 1106 (Rao, J., concurring in part and dissenting in part). The D.C. Circuit would have been well within its jurisdiction to reach the merits of the constitutional claims, particularly because structural constitutional challenges are "an exception to [the] general principles of exhaustion." *Id.* at 1109 (Rao, J. concurring in part and dissenting in part). Instead, the *Fleming* majority employed exhaustion to "bend[] over backward to avoid

dissenting in part); *see also Carr v. Comm'r, SSA*, 961 F.3d 1267, 1273 (10th Cir. 2020), *cert. granted sub nom. Carr v. Saul*, 141 S. Ct. 813 (2020) (applying nonstatutory exhaustion to avoid reaching Appointments Clause issue).

The nonstatutory exhaustion and ratification doctrines should be abandoned in Appointments Clause and other constitutional challenges. Both clip the wings of this Court's precedents that seek to ensure adjudication on the merits of important separation of powers challenges. Both can mire separation of powers challenges in administrative shell games. *See Fleming*, 987 F.3d at 1104 (Rao, J., concurring in part and dissenting in part) ("The court refuses to act before the agency, while the agency refuses to act before the court—trapping petitioners in an administrative-judicial hall of mirrors."). And both are judicial creations that allow courts to avoid performing their fundamental judicial duty to adjudicate separation of powers claims within their jurisdiction and brought by parties with Article III standing. *Id.* (Rao., J., concurring in part and dissenting in part) ("It abdicates our judicial responsibility to duck a properly presented and serious constitutional challenge to the structure of administrative adjudication.").

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the constitutional challenge." *Id.* at 1106 (Rao, J., concurring in part and dissenting in part).

Moreover, this Court must repudiate the ratification doctrine to close off another route to circumvent its precedents. If the Court holds in *Carr v. Saul*, 141 S. Ct. 813, that agencies cannot rely upon nonstatutory exhaustion to avoid judicial review of Appointments Clause challenges, agencies will naturally turn to the ratification doctrine to achieve the same result. Thus, agencies will be able to sidestep yet another of this Court's attempts to incentivize Appointments Clause challenges by allowing employees to wield significant governmental power and then simply ratifying those unconstitutional acts. Indeed, agencies and courts have increasingly looked to ratification as the next frontier to avoid responsibility for violating the separation of powers. *See, e.g.*, *Carr*, 961 F.3d at 1273 (recognizing agency interest in "internal error-correction," i.e. ratification); *see also Social Security Ruling 19-1p; Titles II and XVI: Effect of the Decision in* Lucia v. Securities and Exchange Commission (SEC) *On Cases Pending at the Appeals Council*, 84 Fed. Reg. 9582 (Mar. 15, 2019) (treating ratification as sufficient to cure separation of powers concerns). To prevent the continuing circumvention by agencies and lower federal courts of cases like *Free Enterprise Fund* and *Lucia*, the Court must repudiate both ratification and nonstatutory exhaustion in the constitutional context. Nonstatutory exhaustion and ratification have risen together and they should fall together.

Agencies naturally seek to avoid judicial review and accountability through doctrines like exhaustion and ratification. The federal judiciary should not

facilitate these practices. Rather, the adjudication of separation of powers challenges should be limited only by constitutional and statutory restraints—not judicially created mechanisms to duck the fundamental duty to say what the law is in cases meeting Article III's requirements. *Cf. Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) ("Federal courts, it was early and famously said, have 'no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.' Jurisdiction existing, this Court has cautioned, a federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'").

Simply put, the "administrative state [that] wields vast power and touches almost every aspect of daily life," *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting), continues to grow in size, power, and unaccountability, *see, e.g.*, Crews 2020, *supra*. And this Court's attempts to foster democratically accountable decisionmaking by vigorous enforcement of the separation of powers and incentivization of structural constitutional challenges has been evaded through doctrines such as ratification. Ratification highlights one important aspect of this problem—the growing power wielded not only by agencies generally, but the burying of significant decisions in the unaccountable agency bureaucracy to avoid the clear lines of accountability promised by the Appointments Clause.

The D.C. Circuit's continued use of nonstatutory exhaustion and ratification have created easy paths for agencies to insulate unconstitutional

decisionmaking. When it comes to the D.C. Circuit and administrative law issues, the issue takes on even greater importance because, absent express action from this Court, agencies are most responsive to the D.C. Circuit's marching orders. *Cf.* Antonin Scalia, Vermont Yankee: *The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 371 ("As a practical matter, the D.C. Circuit is something of a resident manager, and the Supreme Court an absentee landlord."). Lower federal courts need a clear reminder of their duty—especially when core private rights to life, liberty, and property are increasingly under threat from an administrative state increasingly unaccountable to the people.

CONCLUSION

For the foregoing reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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