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

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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Introduction

The Appointments Clause preserves the Constitution's separation of powers by limiting the diffusion of significant executive authority to officers appointed through a democratically accountable process. *Edmond v. United States*, 520 U.S. 651, 659 (1997); *Ryder v. United States*, 515 U.S. 177, 182 (1995). *See* Br. of Amici Curiae Sen. Rand Paul, et al., 9. The D.C. Circuit has disabled this critical structural protection by devising—and readily accepting the government's increasingly questionable deployment of—the ratification defense, pursuant to which high-ranking officials can "rubberstamp"[1] constitutionally defective executive action. This accountability- and review-thwarting theory finds no support in this Court's case law, which instead has emphasized that anyone who raises a timely Appointments Clause claim "is entitled to a decision on the merits of the question and whatever relief may be appropriate," while rejecting purported exceptions that "would create a disincentive to raise Appointments Clause challenges." *Ryder*, 515 U.S. at 182–83.

In its boldest yet application of the ratification defense, the D.C. Circuit held below that even parties who raise a timely Appointments Clause challenge to an agency's legislative rulemaking are still precluded from obtaining review of the merits of their constitutional claim, simply because the agency head, in response to the parties' lawsuit, signed a one-paragraph unpublished declaration during his last

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[1] *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117–18 (D.C. Cir. 2015) (quoting *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996)).

week in office[2] purporting to ratify that rulemaking. Pet. App. A-6 to A-8, F-1. The government would stretch the defense even further, arguing that all Appointments-Clause-violating actions are insulated from challenge so long as agency heads include within routine internal memoranda a boilerplate sentence purporting to ratify any and all illegal action taken by their subordinates. *See* Resp. 19–20; Pet. App. G-16.

The D.C. Circuit's ratification defense is pernicious. More than simply conflicting with decisions of this Court and the Ninth Circuit, it effectively nullifies the Appointments Clause, rendering that important constitutional safeguard useless against agency efforts to wrest executive power from the People's control. This Court's review is merited.

Argument

I.

The Decision Below Conflicts With Decisions of This Court and of the Ninth Circuit

The government first contends that the D.C. Circuit's ratification defense, successfully employed below, does not conflict with *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), or like decisions from the Ninth Circuit, Resp. 13–15, because former FDA Commissioner Scott Gottlieb's authority to issue a Deeming Rule was not governed by any statutory "time limits" or "fixed deadline," *id.* at 13. But this

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[2] *See* U.S. Food & Drug Admin., FDA Leadership: 1907 to Today: Scott Gottlieb M.D., https://www.fda.gov/about-fda/fda-leadership-1907-today/scott-gottlieb.

argument unjustifiably limits *NRA Political Victory Fund* to its facts, just as the D.C. Circuit has improperly done. Correctly read, *NRA Political Victory Fund* stands for the broader proposition that an official cannot ratify an act if, at the time of ratification, the official lacks the power to do the act *simpliciter*. Pet. 16–18, 22–23.

The Ninth Circuit takes Petitioners' view of *NRA Political Victory Fund*. Pet. 21–23. The government argues to the contrary that the Ninth Circuit "expressly" agrees with the D.C. Circuit's timing-based reading. Resp. 14–15. But that characterization simply cannot be squared with how the Ninth Circuit has applied *NRA Political Victory Fund*. For example, in *Consumer Financial Protection Bureau v. Seila Law, LLC*, No. 17-56324, 2021 WL 2035701 (9th Cir. May 14, 2021), the respondent-appellant advanced two arguments against the Bureau's purported ratifications, one based on the Bureau's lack of constitutional authority to ratify, the other based on a statute of limitations. *Id.* at *8. If the government were correct that the Ninth Circuit follows the D.C. Circuit's approach exactly, the Ninth Circuit would have dismissed the former objection out of hand. Instead, it addressed and resolved both objections on the merits. *Id.* at *8–*9.

Perhaps sensing the implausibility of its reading of *NRA Political Victory Fund*, the government hastens to add that the parties' disagreement over how to interpret that ruling is irrelevant because the Tobacco Control Act "has no restrictions—temporal or otherwise—that limited Commissioner Gottlieb's power to issue the deeming rule." Resp. 14. But the Tobacco Control Act is not the only restriction on the

FDA Commissioner's power to issue rules. Some of the most significant limitations come from the Administrative Procedure Act, which requires agency rule-makers—the FDA Commissioner included—to support all rulemakings with reasoned analysis that follows a full review of the available and relevant evidence.[3] *See* Pet. 11–12, 20.

Compliance with this basic administrative law principle does not impermissibly "conflate the question of ratification with arbitrary-and-capricious review." Resp. 16. Rather, such compliance is mandated by the common law principles of ratification, a point ably shown by this Court's decision in *Marsh v. Fulton County*, 77 U.S. (10 Wall.) 676 (1870). There, plaintiff bondholders sued to collect on bonds issued by the county. *Id.* at 681. The county argued in defense that the county clerk had illegally sold the bonds because the county's electorate did not have an opportunity to approve their sale. The bondholders replied that, even if such a vote had been required originally, the bonds were ratified by subsequent actions of the county's board of supervisors treating the bonds as legal. *Id.* The Court ruled for the county, explaining that because the county's board of supervisors "could not make a subscription in the first instance without [the electorate's] authorization," the board "could not . . . ratify a subscription without a vote of the county." *Id.*

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[3] For this reason, the D.C. Circuit's ratification case law conflicts with *Lucia v. SEC*, 138 S. Ct. 2044 (2018), which teaches that the remedy for an Appointments Clause violation should reflect the administrative significance and formality of the challenged agency action. Br. of the Cato Inst. & Reason Found. as Amici Curiae 5–7.

at 684. As with municipal bonds, so with agency action: if an officer's attempted validation of an otherwise defective rulemaking would not satisfy the APA outside of the ratification context, then it follows under *Marsh* that the officer's APA-deficient affirmance cannot ratify the rulemaking.

Contrary to the government's view, Petitioners do not urge "a significant addition to the ratification principles articulated by this Court" through an imagined demand that ratifying officials "essentially reopen the rulemaking process" and "repeat the entire administrative process." Resp. 15–16. For, rather than a return to the regulatory starting-line, Petitioners seek only a redo of the final dash, *i.e.*, a decision from a constitutionally competent officer as to whether the Deeming Rule should be issued, one that openly acknowledges and takes into account all of the relevant evidence the decision-maker has available to him, as well as one that explains why such evidence supports the decision being made. *Cf.* Br. Amici Curiae of 36 Nat'l & State Elec. Nicotine Delivery Sys. Prod. Advocacy Ass'ns, Apps. D–E (identifying over two dozen vaping studies that Commissioner Gottlieb's ratification ignored). Of course, such an effort would be pointless—as well as inconsistent with *NRA Political Victory Fund* and the common law understanding of ratification—if the ratifying official could simply presume that the decision to be ratified is already valid. *See* Pet. 18–20. That, however, is precisely the question-begging approach which the D.C. Circuit employed below when it tested the adequacy of Commissioner Gottlieb's ratification. *See* Pet. App. A-7.

Rather than a "misapprehen[sion of] the nature of ratification," Resp. 17, Petitioners' view faithfully adheres to the common law rules of ratification, just as *NRA Political Victory Fund* requires. To be sure, ratification is an affirmance, "not a new action." Resp. 17. But however cast, ratification "cannot . . . stand upon a higher ground, than an original authority." Joseph Story, Commentaries on the Law of Agency § 242, at 303 (8th rev. ed., N. St. John Green ed. 1874). Yet that is exactly what the D.C. Circuit's ratification defense purports to effect, by exempting ratification from the otherwise normally applicable constraints of rulemaking. Indeed, were the government correct that an official's affirmance is governed only by the state of things at the time of the original action and not also at the time of ratification, this Court's focus in *NRA Political Victory Fund* on whether the Solicitor General's "'after-the-fact' authorization relates back," 513 U.S. at 98, would be nonsensical.

If anything, it is the government which is guilty of misperceiving how ratification is supposed to operate. Asserting that the purpose of ratification is to rectify all unauthorized actions by an agent, "whether stemming from an Appointments Clause defect or some other cause," Resp. 17, the government concludes that there is nothing inconsistent between ratification and the remedying of an Appointments Clause violation. But ratification cannot heal *every* action taken without authority. *See* Restatement (Second) of Agency § 84(2) (the general rule is that an "act which, when done, the purported or intended principal could not have authorized, he cannot ratify"). Rather, ratification's curative power is limited to those circumstances where a valid principal-agent relationship *could exist*. Pet. 20–21.

But an Appointments Clause challenge contests this very proposition. Hence, ratification—and *a fortiori* the D.C. Circuit's profligate use of it—cannot be reconciled with the Appointments Clause or this Court's cases enforcing it.

II.

This Case Presents an Appropriate Vehicle to Address the Propriety of Ratification as Applied to Appointments Clause Claims

The government suggests that this case suffers from several vehicle problems. But none of the reasons that the government advances for that criticism convinces.

To begin with, the government contends that Commissioner Gottlieb's failure to take account of new evidence when he ratified the Deeming Rule is neither here nor there for Petitioners' case. The government cites the preamble to the original Deeming Rule, which explains that, notwithstanding the potential health benefits of vaping and the unsettled state of the science, the Rule's regulatory approach is warranted. Resp. 18–19. But it is a basic principle of administrative law—even in the D.C. Circuit—that an agency cannot avoid an otherwise merited remand simply by asserting that it will likely end up making the same decision. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419–20 (1971) (remand cannot be avoided by litigation affidavits containing post hoc rationalizations). *Cf. Advocates for Highway & Auto Safety v. Fed. Highway Admin.*, 28 F.3d 1288, 1292 (D.C. Cir. 1994) ("The touchstone of our inquiry is thus the agency's open-mindedness . . . . We therefore place the burden on the

agency to make a compelling showing that the defects of its earlier [action] were cured by the later one.").

The government also contests the merits of Petitioners' Appointments Clause claim, asserting that the Associate Commissioner for Policy is a validly appointed inferior officer.[4] Resp. 8–10. But as the government itself recognizes, Resp. 19, no court below reached the merits of Petitioners' Appointments Clause arguments. Rather, the D.C. Circuit and the district court assumed *arguendo* that the Associate Commissioner's issuance of the Deeming Rule violated the Appointments Clause, Pet. App. A-5 to A-6, B-10, both of course still ruling against Petitioners thanks to the ratification defense, Pet. App. A-8, B-18. It is thus on this basis that the case comes to the Court and it is in this posture that the Court should decide the questions presented, leaving the government's merits arguments to be addressed in the first instance on remand. And even were the Court otherwise inclined, the government's vehicle argument would fare no better, for its brash confidence in the strength of its merits position is not only misplaced but also

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[4] Naturally, Petitioners contest that conclusion. *See* Appellants' Opening Br., Doc. No. 1840563, at 57–58 (filed Apr. 29, 2020) (the Associate Commissioner for Policy cannot be a valid inferior officer because Congress has not vested the Secretary of Health and Human Services with any general authority to appoint inferior officers). Moreover, even if true, Petitioners could still prevail on their Appointments Clause claim, which also alleges that regulations as consequential as the Deeming Rule may be issued only by officers who have been appointed by the President with the advice and consent of the Senate. *See id.* at 56–57. *Cf. Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (overturning "limits on the President's removal authority [for] principal officers who, acting alone, wield *significant* executive power") (emphasis added).

belied by the mighty efforts it took to prevent the lower courts from addressing those merits—including two ratifications, Pet. App. F-1, G-16, and an unsuccessful failure-to-exhaust objection, Pet. App. B-8 to B-10, not to mention two administrative reform efforts attempting to correct FDA's aberrant rulemaking practice, *see* Pet. 5 n.3, 24 n.19.

Finally, the government cites former FDA Commissioner Robert Califf's ratification as a supposedly independent ground to affirm the judgment. Resp. 19–20. But if the answer to Petitioners' first question presented is negative, and ratification cannot validate a regulation issued in violation of the Appointments Clause, then necessarily Commissioner Califf's purported affirmance must fall along with Commissioner Gottlieb's. Yet even if the Court were to decline to adopt such a categorical rule, Commissioner Califf's ratification would still be infirm for other reasons, not the least being that his boilerplate affirmance likely fails even under the D.C. Circuit's lax standards. *See* Appellants' Opening Br., Doc. No. 1840563, at 35–38 (filed Apr. 29, 2020). In any event, because the D.C. Circuit explicitly assumed without deciding that Commissioner Califf's ratification was inadequate, Pet. App. A-5 to A-6, this Court's review should likewise proceed on that basis.

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Ultimately, the government's vehicle arguments founder not just because the issues here are well presented, but also because they are exceedingly important and urgent. Over the last several decades, this Court has regularly granted review of

Appointments Clause challenges[5] to ensure that the Clause continues to serve its key role of maintaining the separation of powers, promoting democratic accountability, and protecting individual liberty. *See Freytag v. Comm'r*, 501 U.S. 868 (1991); *Weiss v. United States*, 510 U.S. 163 (1994); *Ryder*, 515 U.S. 177 (1995); *Edmond*, 520 U.S. 651 (1997); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 510–13 (2010); *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649 (2020); *United States v. Arthrex, Inc.*, 141 S. Ct. 549 (2020) (No. 19-1434) (granting cert.).

The D.C. Circuit has taken a different path, assiduously undermining the Court's Appointments Clause jurisprudence by creating and expanding the ratification defense:

- *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708–09 (D.C. Cir. 1996) (for the first time, using ratification to uphold an agency's enforcement action commenced when the agency's structure violated the Appointments Clause, *see FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993))

[5] The Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), was its "first treatment of the basic requirements of the Appointments Clause since *Auffmordt v. Hedden*, 137 U.S. 310 (1890), and its first decision finding a violation of that Clause." Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 86 (2007) (citation omitted).

- *Doolin Sec. Sav. Bank, F.S.B. v. Off. of Thrift Supervision*, 139 F.3d 203, 212–14 (D.C. Cir. 1998) (using ratification to uphold an agency's cease-and-desist order, the procedure for which had been initiated by an official allegedly acting under an unconstitutional appointment)
- *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117–18 (D.C. Cir. 2015) (using ratification to uphold a ratemaking determination based on a record compiled by adjudicators holding their offices in violation of the Appointments Clause)
- *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371–72 (D.C. Cir. 2017) (upholding an officer's ratification of his own prior decisions taken when he served under an unconstitutional recess appointment, to avoid application of this Court's ruling in *Noel Canning*)
- *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 13 (D.C. Cir. 2019) (for the first time, using ratification to decline to review whether a legislative rulemaking violated the Appointments Clause, and declining to apply exceptions to mootness to address the merits of such a claim because a valid ratification supposedly resolves the claim on the merits)

- Pet. App. A-6 to A-8 (upholding the Deeming Rule based on a litigation-prompted, single-paragraph ratification, despite FDA's two-decade track record of violating the Appointments Clause, *cf.* Angela C. Erickson & Thomas Berry, *But Who Rules the Rulemakers?* 2–3, 35 (2019))

The result is that, while this Court has reinvigorated the Appointments Clause as a meaningful check on unaccountable executive power, the D.C. Circuit has undermined this precedent by giving free rein to executive officials to breezily validate otherwise Clause-violating action. This "Appointments-Clause-free zone" which the D.C. Circuit has established allows officials to (i) skirt public responsibility for their ratifications, (ii) ignore the normal procedural and substantive safeguards governing the ratified actions, and (iii) cling to agency practices that systematically result in unconstitutional action. The ratification defense thus inevitably leads lower courts to shirk their responsibility to (a) vigorously enforce the separation of powers and (b) give litigants meaningful incentives to contest agency transgressions of that separation. Pet. 23–27; Br. of Amici Curiae Sen. Rand Paul, et al., 14–21; Br. of the Cato Inst. & Reason Found. as Amici Curiae 7–8. The propriety of the ratification defense therefore merits this Court's review.

Conclusion

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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