No. 19-432

In the Supreme Court of the United States

ALL AMERICAN CHECK CASHING, INC.,
ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE STATES OF TEXAS, ARKANSAS, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OHIO, OKLAHOMA, SOUTH CAROLINA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the structure of the Consumer Financial Protection Bureau violates the separation of powers.

2. Whether a successful separation-of-powers challenger who is subject to an enforcement action by an unconstitutionally structured agency is entitled to meaningful relief, such as dismissal of the action, due to the agency's constitutional defect.

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INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Arkansas, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia.[1] As this Court has long recognized, States have "special solicitude" to challenge unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Such solicitude is necessary because States, whose law may be preempted by federal agencies run amok, stand in a unique position to guard "the public interest in protecting separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

In this case, the Consumer Financial Protection Bureau (CFPB) has wielded its unchecked power to bring an enforcement action against All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael Gray (collectively, "All American"), alleging abusive or deceptive practices in connection with check-cashing services All American provided. An acting director, purporting to be removable for cause, then sought to paper over his predecessor's unconstitutional action simply by notifying the court below that he had "ratified" the decision to proceed.

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

States enforce robust consumer protections designed to prevent practices such as those at issue in this case. Indeed, Mississippi has severely sanctioned All American for its conduct. If Congress wishes to permit federal agencies to assist or preempt States in protecting consumers, it must do so in a manner consistent with Article II of the Constitution. For the reasons set out below, the CFPB's structure violates the Constitution whether its director was (at any given point) temporary or permanent. The CFPB thus had no authority to bring or to continue the enforcement action.

SUMMARY OF ARGUMENT

I. The "ultimate purpose" of our Constitution's separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). That is why 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 case calls upon the Court to vindicate that principle by striking down the unlawful action of an administrative agency built around a single unaccountable and unchecked administrator.

That agency—the CFPB—was created in 2010 under the Dodd-Frank Act. The Act "transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies." Brief for the Respondent at 2, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 (2019) [hereinafter "*Seila* BFR"]. Unlike the federal agencies the CFPB replaced, however, the CFPB is headed neither by a group of commissioners nor by an individual who is removable at will by the President. Instead, the CFPB is headed by a single director, who is appointed by the President, with the advice and consent of the Senate, to a five-year term. 12 U.S.C. § 5491(b), (c). He may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

The CFPB's structure is virtually unprecedented. To date, "[n]o independent agency exercising substantial executive authority" that has come before this Court "has ever been headed by *a single person*." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 7, 165 (D.C. Cir. 2018) (en banc) (Kavanagh, J., dissenting) (emphasis in original). Amici are aware of only one other federal agency with a similar structure: the Federal Housing Finance Agency ("FHFA"), which was created shortly before the CFPB. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008). Like the CFPB, FHFA is headed by a single director, who serves a five-year term and is removable only for cause. 12 U.S.C. § 4512(a), (b). Unlike the CFPB, however, at least one circuit court has recognized that FHFA's structure impermissibly "infringes Article II." *Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc). A splintered majority of the en banc Fifth Circuit reasoned that such limits on the President's removal power "do[] not fit within the recognized exception for independent agencies," *id.*, whether they are applied to a permanent or temporary director, *id.* at 588-89.

The Fifth Circuit's interpretation of Article II was correct and should be applied to the CFPB. As one member of this Court has noted, the directors of the CFPB and FHFA "possess[] more unilateral authority—that is authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." *PHH Corp.*, 881 F.3d at 165-66 (Kavanaugh, J., dissenting). Indeed, "other than the President," these directors enjoy "more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166.

Not even the United States or the CFPB still maintains that such a structure is constitutional. *Seila* BFR at 11.[2] And with good reason: The Constitution forbids entrusting concentrated, unchecked authority to a sole, unaccountable administrator charged with overseeing an agency that wields executive power. This Court has permitted multi-member commissions on the basis that such a structure poses less of a threat to individual liberty than a single-headed commission. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935); *see also* 51 Cong. Rec. 10,376 (1914) (Federal Trade Commission "would have precedents and traditions and a continuous policy and would be free from the effect of . . . changing

[2] *See also* En Banc Supplemental Brief of Defendant-Appellees Federal Housing Finance Agency and Joseph M. Otting at 3, *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (declining to defend FHFA); Letter from Director Kathleen L. Kraninger, CFPB, to Hon. Mitch McConnell, Majority Leader, U.S. Senate, Sept. 17, 2019.

incumbency."). An agency built around a sole administrator, by contrast, is unchecked by the constraints of group decisionmaking among members appointed by different presidents. *PHH Corp.*, 881 F.3d at 166, 178 (Kavanaugh, J., dissenting) (citing 5 SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATIONS, S. DOC. NO. 95-91, at 35 (1977)).[3] A single director thus "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does." *Id.* at 166.

In this case, the CFPB has brought that unchecked power to bear on All American for allegedly unlawful trade practices. Pet. App. 44a. It has done so free from any executive oversight. Amici take no position on the propriety or legality of the business practices targeted by the CFPB except to note that Mississippi has already required All American to close the majority of its stores and pay nearly $900,000 in fines to settle an earlier state enforcement action. Pet. 7; Pet. App. 33a. Regardless of the merits of the CFPB's additional claims, the agency lacks power to litigate them. Because the CFPB's structure renders it unconstitutional, any enforcement action it takes is invalid.

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[3] *Collins*, 938 F.3d at 599-607 (Oldham, J., concurring) (tracing history of presidential removal powers to the founding period); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1026 (2006) (arguing that the first Congress "assumed [that] the President enjoyed a preexisting removal power" and that "majorities in the House and Senate affirmed" that assumption "on three separate occasions").

II. This case allows the Court to resolve the lingering question of whether the appropriate remedy for Congress's impermissible attempt to impinge on the President's removal power changes simply because an actor who claims to be removable at will purports to ratify the decision of an otherwise unconstitutional agency. This is an important and necessary follow-on question: the CFPB, which interacts with all facets of the economy, has for nearly two years been run by individuals who claim to be removable by the President.[4] During that time, these individuals have taken numerous acts that have either ratified or enforced actions taken by their predecessor who claimed *not* to be so removable. Clarification is necessary regarding what legal effect (if any) should be given to these directors' decisions. The Fifth Circuit has not yet ruled on All American's appeal raising this question, but it has thoroughly canvassed the core legal issues in the context of the FHFA. *See generally Collins*, 938 F.3d 553. Delay will serve only to prolong confusion in the multi-billion-dollar market in consumer financial products.

ARGUMENT

The CFPB has the power to "seek to implement and, where applicable, enforce Federal consumer financial law" as a means of ensuring that "all consumers have access to markets for consumer financial products and

[4] Richard Cordray resigned from office in November 2017. He was replaced first by Acting Director Mick Mulvaney and then by Director Kathy Kraninger, each of whom has claimed to be removable at will, albeit for different reasons. *See* Pet. App. 20a; Kraninger, *supra* n. 2, at 2.

services" and that the markets for such products and services are "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB may also prescribe rules implementing consumer-protection laws; conduct investigations of market actors; and enforce consumer-protection laws in administrative proceedings in federal court. *See, e.g.*, *id.* §§ 5511(c), 5562-64. The Court should grant certiorari and hold that (1) the Constitution does not permit Congress to consolidate such sweeping executive powers in an administrative agency headed by a sole director whom the President may remove only for cause, and (2) the appropriate remedy does not change simply because the action at issue was ratified by a director (or acting director) who claimed to be removable at will.

I. The CFPB's Structure Violates the Constitution's Separation of Powers.

The Constitution vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3. Precedent provides that removal restrictions such as those applicable to the CFPB are permissible only for multi-member commissions—not for those headed by a single director.

A. The President must retain the power to remove at will individuals who wield executive power.

Article II bestows "[t]he executive power" in a single, unitary executive. It makes "emphatically clear from start to finish" that "the president would be personally responsible for his branch." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability." *Printz v. United States*, 521 U.S. 898, 922 (1997). This unitary executive further promotes "[d]ecision, activity, secre[c]y, and d[i]spatch" in ways that a "greater number" cannot. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1414, at 283 (1833).

Of course, as a practical matter, the President cannot carry out the full scope of "the executive power" on his own. This limitation is why, "as part of his executive power," the President "select[s] those who [are] to act for him under his direction in the execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Selecting assistants and deputies lies at the heart of "the executive power," which necessarily includes "the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (remarks of James Madison)).

The President's essential power to select administrative officials necessarily includes the power to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see also PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) ("To supervise and direct executive officers, the President must be able to remove those officers at will."); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1215 (2014) ("The text and structure of Article II provide the President with the power to control subordinates within the executive branch.").

Since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund*, 561 U.S. at 483; *cf.* Prakash, *supra* n.3, at 1067 ("After a great deal of high-level debate leading to the Decision of 1789, Congress decided that the President had a constitutional right to remove" principal officers.). This view "soon became the 'settled and well understood construction of the Constitution.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) (citing *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.") (quotation marks omitted)).[5] That risk, in turn, would intolerably impinge on the President's duty to execute the law. *Id.* And it would upend the chain of command upon which the Executive Branch relies to function properly. *See Free Enter. Fund*, 561 U.S. at 513-14. Put simply,

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[5] *See also* Motion for Leave to File Brief Out of Time and Brief of Amicus Curiae U.S. House of Representatives at 6, *Seila Law v. Consumer Fin. Prot. Bureau*, No. 19-7 (Oct. 4, 2019) (filed by divided Bipartisan Legal Advisory Group) [hereinafter "*Seila* House Br."] (conceding that the structure of the CFPB was designed so that the director could be "depended upon to maintain an attitude of independence against the [President's] will") (quotation marks omitted).

"[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484.

The Court recognized this common-sense understanding in *Myers*, when it struck down as unconstitutional a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The Court held: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. If the President lacked the exclusive power of removal, he could not "'take care that the laws be faithfully executed.'" *Id.* at 164.

This Court has repeatedly reaffirmed the *Myers* rule to the present day. It did so most recently in *Free Enterprise Fund*, reiterating that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting THE FEDERALIST No. 70, at 478 (Alexander Hamilton) (J. Cooke ed. 1961)); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (Agencies "have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.").

B. Congress may restrict the President's removal power only as to independent, multi-headed commissions.

There is only one narrow exception to the general rule in *Myers*. In 1935, this Court held that Congress could create "independent" agencies headed by commissions or boards whose members were not removable at will and would operate free of the President's supervision and direction. *Humphrey's Ex'r*, 295 U.S. at 625, 631-32.

Humphrey's Executor concerned President Franklin Roosevelt's dispute with a commissioner of the Federal Trade Commission. President Roosevelt attempted to fire the commissioner, but the commissioner contested his removal, claiming that he was protected against firing by the FTC's for-cause removal provision. *Id.* at 621-22. Before this Court, the Roosevelt Administration relied in "chief" on *Myers* and its articulation of the Article II executive power. *Id.* at 626.

This Court rejected that argument and held that Article II did not forbid Congress to create an independent agency "wholly disconnected from the executive department." *Id.* at 630. The Court deferred to the FTC's "nonpartisan" nature and its charge to "act with entire impartiality" while "exercis[ing] the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (quotation marks omitted). Where those two features are present, this Court held, Congress may validly limit the President's power to remove the commissioners. *Id.* at 628-30.

Predictably, following *Humphrey's Executor,* independent agencies came to populate all corners of the federal government. These agencies "play[] a significant role in the U.S. Government" and "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting). Several of these agencies affect the daily lives of countless Americans in significant ways, including the Federal Reserve Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the National Labor Relations Board, the Consumer Product Safety Commission, and many others. *Id.* at 173.

Importantly, those independent agencies share the two features recognized in *Humphrey's Executor*: (1) leadership composed of multiple members who (2) are appointed at staggered terms. As this Court observed in *Humphrey's Executor*, the FTC had five members with staggered terms, and no more than three of them could be of the same political party. 295 U.S. at 619-20. The Court thus held that the Commission was a "body of experts" deliberately "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Those features have come to be regarded as the *Humphrey's Executor* exception to the general rule announced in *Myers*. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (upholding the removal provisions of the three-member War Claims Commission); *see also Free Enter. Fund*, 561 U.S. at 483 ("In *Humphrey's Executor* . . ., we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

There are two reasons why the Constitution may tolerate limits on the President's power to remove the heads of independent agencies headed by multiple members serving staggered terms. *First*, "[i]n the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head." *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). That is, "[t]he multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.*; *see also Collins*, 938 F.3d at 587-88. That basic structure makes it harder for the independent agency to impinge on individual freedom. *PHH Corp.*, 881 F.3d at 183. It further discourages arbitrary, unsound agency actions driven by the whims of one individual. *Id.* Each commissioner or board member, in other words, acts as a check on the others through the process of "deliberative decision making." Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013).

Second, multi-member independent agencies have a historical tradition since *Humphrey's Executor*. *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting); *see also id.* at 178 (citing, *e.g.*, *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting)); *Collins*, 938 F.3d at 600-04 (Oldham, J., concurring). In separation of powers cases, "historical practice matters." *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting). For example, in *National Labor Relations Board v. Noel Canning*, this Court relied on "[l]ong settled and established practice" to reach "a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." 573 U.S. 513, 524 (2014) (quotation marks omitted).

In sum, only independent agencies with several directors serving staggered terms can possibly fall within the *Humphrey's Executor* exception to the *Myers* rule.[6]

C. The CFPB's structure unconstitutionally vests unchecked power in a single director removable only for cause.

As the United States has now conceded, this Court's precedent makes clear that "the structure of the [CFPB], including the for-cause restriction on the removal of its single director, violates the constitutional separation of powers." *Seila* BFR at 7.

Unlike the multi-member boards approved in *Humphrey's Executor* and its progeny, the CFPB is headed by a single director. 12 U.S.C. § 5491(b). He serves a term of five years and may be fired only for

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[6] The CFPB's few remaining defenders assert that these cases "allow[] Congress to provide limited protection against removal" whenever it decides that an officer should "perform their duties without executive leave" and "free from executive control." *Seila* House Br. 7-8 (quotation marks omitted). Such a rule is without limit and should be rejected as irreconcilable with *Myers*, *Noel Canning*, and *Free Enterprise Fund.*

"inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c). And he wields "unmistakably executive responsibilities," including "criminal investigation and prosecution." *PHH Corp.*, 881 F.3d at 80 (majority op.).

The director wields that executive power over *nineteen* different federal consumer-protection statutes. 12 U.S.C. § 5512 (b)(1). He may examine and investigate individuals and entities to assess their compliance with those statutes. *Id.* §§ 5514(b), 5515(b), 5516(c). He may issue "civil investigative demand[s]." *Id.* § 5562(c). He may institute enforcement actions and conduct "adjudication proceedings." *Id.* § 5563(a). And he may (as he did in this case) sue in state or federal court to enforce consumer-protection laws. *Id.* § 5564.

Those facts reveal the fundamental flaw in the position advocated by the CFPB's defenders that this case is controlled by *Morrison*. *Seila* House Br. at 7. As the Court explained in *Free Enterprise Fund*, it "considered the status of inferior officers in *Morrison*," including whether Congress may limit an agency head's ability to terminate an inferior officer at will. 561 U.S. at 494. The Court concluded that Congress may do so in light of the inferior officer's "limited jurisdiction and tenure and lack[] [of] policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. But the Court said nothing about whether Congress may also limit the President's ability to remove a principal officer who has "all but exclusive power to make and enforce rules" under nineteen federal statutes, *PHH Corp.*, 881 F. 3d at 153 (Henderson, J., dissenting), on topics "covering everything from home finance to student loans to credit cards to banking practices," *id.* at 165 (Kavanaugh, J., dissenting). *Cf. Free Enter. Fund*, 561 U.S. at 494-95 (limiting *Morrison* to its facts).

Instead, the extent of the CFPB's ability to set and enforce federal economic policy demonstrates why this case is controlled by the Court's original *Myers* rule. *Myers* provides that the President's subordinates must be removable at will. *Humphrey's Executor* creates a narrow exception for multi-director independent agencies with directors serving staggered terms. Because the CFPB has a sole director, appointed for a term of five years and removable only for cause, its structure violates Article II by preventing the President from carrying out the executive power.

D. Ratification by a temporary director does not cure this intolerable concentration of power.

This analysis does not change simply because the CFPB, as it did in this case, attempts to ratify its own past decisions through the fiat of an acting director. The CFPB notified the Court on February 5, 2018, that Acting Director Mulvaney had ratified the decision to proceed with this action. Pet. App. 20a-21a. The CFPB asserted that under the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. §§ 3345-3349d, Director Mulvaney was removable at will, Pet. App. 20a, and thus his ratification cured any constitutional deficiencies in the case, *id.*

While the Fifth Circuit has yet to rule on the effect of this purported ratification on All American's constitutional injury, it correctly rejected very similar arguments in *Collins*, 938 F.3d at 588-89. Specifically, the highly splintered Fifth Circuit made two relevant rulings. *First*, the majority announcing *Collins*' merits holding stated that under the FVRA, an acting director of an administrative agency is not necessarily removable at will. *Id.* at 589. Instead, absent language to the contrary in the agency's enabling act—which does not exist here—removal protections follow the office. *Id.* (distinguishing *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996)). *Second*, a different majority announcing the Fifth Circuit's remedial holding concluded that the removal restrictions must be excised because an agency head "could not ratify any previous actions or even continue operating" so long as those restrictions remain in place. *Id.* at 594-95 (Haynes, J. op.). Nevertheless, this remedial majority found that the Executive Branch can signal its ratification of a particular action by (among other things) allowing briefs supporting that action to be filed in court. *Id.*

Applying these two pieces of *Collins*, Acting Director Mulvaney's purported ratification of this and other acts was both ineffective and legally irrelevant. As an initial matter, under the merits-majority in *Collins*, he was *not* removable during his tenure because the removal protections given to the CFPB's director applied to him (even if he was unlikely to enforce them). *Id.* at 588-89. Thus, under the remedial-majority, he could not ratify any out-of-court actions by the agency. *Id.* at 594-95. This rule is consistent with this Court's prior precedent. *See* Pet. at 22-23 (summarizing prior cases). Yet, under the remainder of the Fifth Circuit's rule, the Executive perhaps could have ratified the CFPB's (now-repudiated) defense of its own constitutionality by allowing the agency to file briefs before the Fifth Circuit. Such an outcome makes little sense, and it should be rejected as doing nothing either to protect individual liberty or to "create incentives to raise Appointments Clause challenges." *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044, 2055 n. 5 (2018) (cleaned up) (explaining the considerations driving remedies in appointments-clause jurisprudence).[7]

II. This Case Is an Appropriate Vehicle to Decide the Questions Presented.

This Court should grant review in this case to definitively resolve the lingering question of whether the appropriate remedy for Congress's impermissible attempt to impinge on the President's removal power changes simply because an actor who claims to be removable at will purports to ratify the decision of an otherwise unconstitutional agency.

First, as this Court recognized in granting review in *Seila*, questions regarding the legality of the CFPB are of vital importance. This Court has heldthat, the "[s]eparation of powers was designed to implement a fundamental insight: Concentration of powers in the hand of a single branch is a threat to liberty." *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also, e.g.*, *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting) ("No political truth is certainly of greater intrinsic value, or is stamped with the authority of more

[7] A similar rule would apply to any purported ratification by Director Kraninger before this Court's ruling on *Seila* because she is still legally insulated even if she is likely to accept a termination decision by the President.

enlightened patrons of liberty." (quoting THE FEDERALIST No. 47, at 301 (James Madison) (C. Rossiter ed. 1961))) (alterations omitted); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring) ("[T]he Constitution diffuses power the better to secure liberty.").

The threat to liberty posed by the CFPB is uniquely acute. In a supposed effort to protect consumers, the Dodd-Frank Act deliberately stripped power that had been spread across "seven different federal regulators" as well as their state-law counterparts. *See* S. REP. 111-176, at 10 (2010) (asserting a purpose to reduce "fragmentation" and supposed "regulatory arbitrage between federal regulators and the [S]tates"); *id.* at 16-17 (discussing history of state regulation of areas relating to consumer financial products). Rather than shift that power to an existing Department overseen by a cabinet Secretary, however, Congress chose a "single-Director design" to "imbue the agency" with what certain of its members considered the "requisite initiative and decisiveness to do the job" it had in mind, free from presidential influence. *Seila* House Br. at 4. The result is that the Act concentrated enormous policy-setting authority in the hands of a bureaucrat who need not seek the approval either of the electorate or an elected official.

The United States has conceded for nearly a year that this concentration of power poses a threat to our constitutional system and should be invalidated. *Seila* BFR at 7 (citing Brief for the Respondent in Opposition at 10, *State Nat'l Bank of Big Spring v. Mnuchin*, 139 S. Ct. 916 (2019)). Nevertheless, first Acting Director Mulvaney and then Director Kraninger have continued to effectuate and enforce various agency actions begun by former Director Cordray. *See, e.g.*, *Enforcement Actions*, CFPB, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ (last visited October 23, 2019) (listing subset of enforcement actions made public, including federal complaint filed on October 1).

Whether an appropriately removable CFPB director (or acting director) can ratify the otherwise unconstitutional actions of a predecessor is itself an important question requiring this Court's attention. As the Fifth Circuit's splintered decision demonstrates, there is considerable confusion in this area. *Compare Collins*, 938 F.3d at 594-95 (Haynes, J. op.) (concluding that the Executive had ratified Net Worth Sweep even if the FHFA could not), *with id.* at 608 (Oldham, J. op.) (concluding that the only appropriate remedy is to invalidate Net Worth Sweep), *and id.* at 628 (Willett, J. op.) (same for different reasons); *see also Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018) ("The Court agrees with Defendants that the CFPB's Ratification does not address accurately the constitutional issue raised in this case, which concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf."). Ratification has, at times, been permitted to address third-party reliance when technical defects render an officer's appointment invalid. *See Norton v. Shelby County*, 118 U.S. 425, 443 (1896). And Directors Mulvaney and Kraninger have relied on this principle in conducting the daily business of the agency. Kraninger, *supra* n. 2, at 2; Pet. App. 20a-21a.

This Court has, however, refused to extend that principle to cases where the office itself never existed because the statutory provision creating it was invalid. *Norton*, 118 U.S. at 443; *see also United States v. Eaton*, 169 U.S. 331, 335 (1898). If the Court is to change this understanding, it should do so (if possible) at the same time it decides the legality of the CFPB's structure to avoid further proliferation of litigation. As the Fifth Circuit bluntly noted, sending cases like this back to the trial courts without clear guidance on the question of remedy "would cast one of the most financially consequential agencies into chaos." *See Collins*, 938 F.3d at 595.

Second, any further delay in definitively resolving the issues presented in this case will prolong a period of regulatory confusion without appreciable benefit to this Court. Due to its sprawling mandate, the CFPB interacts directly with innumerable participants in American economic life from law firms such as the petitioner in *Seila* to financial-services providers like All American to individual consumers. For example, in addition to its rulemaking activity, the CFPB has received more than 1.9 million complaints and obtained more than $13.2 billion in relief from enforcement actions during its lifespan. CFPB, http://www.consumerfinance.gov/ (last visited October 23, 2018). That number grows every day. These economic actors need to understand the rules of the road if the multi-billion-dollar market in consumer financial products is to function. They also need to know whether the current director can, with the stroke of a pen, approve everything her predecessors did.

Until this Court definitively decides those questions, effective regulation of consumer financial products will be hampered at both the federal and state levels. The CFPB is the only federal entity with a current statutory mandate to propound regulations and enforce policy under nineteen separate federal statutes relating to consumer financial products. Moreover, to the extent that the CFPB has acted within the scope of a valid congressional mandate, its rules have preempted inconsistent state law. *Cf., e.g.*, *New York v. Fed. Energy Regulatory Comm'n*, 535 U.S. 1, 17-18 (2002). Until this Court determines not only whether the CFPB has a permissible statutory mandate but also whether its past actions can continue in effect, both regulators and the regulated will remain uncertain regarding their scope of permissible action. Further litigation will inevitably result.

At the same time, this is not a case in which the Court will appreciably benefit from further development of the law in lower courts. As the Ninth Circuit correctly noted, the arguments involved in this constitutional debate have been "thoroughly canvassed." *Consumer Fin. Prot. Bureau v. Seila Law*, 923 F.3d 680, 682 (9th Cir. 2019); *see generally Collins*, 938 F.3d at 553-629 (addressing hundreds of pages of briefing and reinstating portions of the 53-page panel opinion). It is extremely unlikely that any further circuit-court ruling will aid this Court's consideration of these issues.

* * *

The Court should grant review and hold that the appropriate remedy for Congress's impermissible effort to insulate federal economic policy does not change simply because the action at issue was ratified by an acting director who claimed to be removable at will.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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