No. 19-432

IN THE
Supreme Court of the United States

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

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition For A Writ Of Certiorari Before Judgment To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONERS

This case—and only this case—presents the key practical issues relating to the constitutionality of the CFPB that the government would prefer the Court not take up. When a defendant timely raises the agency's unconstitutionality as a defense to an enforcement action, is that defendant entitled to relief? Can the government deprive that defendant of a remedy by purporting to ratify the invalid proceedings initiated by the concededly unconstitutional agency?

These questions lie at the root of this dispute over the CFPB and of separation-of-powers litigation in general. These ultimate issues, which go to what it means to "win" a structural claim against the government, are the "primary and overarching remedies" issues (CFPB Br. 11), not severance. Severance tells us nothing about the proper remedy for parties who are *currently* subject to invalid CFPB enforcement actions. If such parties receive no meaningful remedy when their rights are violated by unconstitutional entities, then no "rational litigant" would ever bring a structural challenge. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014). That is why this Court has emphasized that separation-of-powers remedies must be designed "to create incentives" to raise the challenges in the first place. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (alterations omitted).

The CFPB, however, would prefer for this Court to issue a constitutional ruling on the merits and address only the severability question. If the CFPB had its way, this Court would sever the for-cause removal provision—thereby dramatically expanding the Executive Branch's power—but its ruling would have no

curative effect for defendants in the midst of unlawful enforcement actions. Indeed, the CFPB never denies that a "victory" on the merits for petitioner in *Seila Law LLC* v. *CFPB*, No. 19-7 (cert. granted Oct. 18, 2019), would not be case-dispositive. Nor does it deny that its intention would be to argue on remand that this Court's constitutional ruling changes nothing, because the Ninth Circuit should reinstate the very same judgment on alternative grounds. Even assuming the removal restriction is severable, a litigant who brings a successful separation-of-powers claim is entitled to dismissal of the action.

That outcome honors the judicial obligation under Article III to award a remedy to the prevailing party in the case at bar. Even if a Director removable by the President at will can lawfully act going forward, that does *nothing* to wipe away the taint of the prior proceeding initiated and conducted by the previous, admittedly unconstitutional agency.

The CFPB does not dispute that the remedial questions presented in this petition are important; instead, it argues (at 11) that granting the petition here "would not add to the Court's consideration" of the issue. But the CFPB's persistent efforts to prevent the remedial issue's resolution demonstrates otherwise. As Texas, Arkansas, Indiana, Kansas, Louisiana, Nebraska, Ohio, Oklahoma, South Carolina, Utah, and West Virginia have informed this Court, the ratification issue is "an important and necessary" component of resolving the CFPB's constitutionality. States *Amici* Br. 6. There is immense confusion over this point in the lower courts, and "[i]t is extremely unlikely that any further circuit-court ruling will aid this Court's consideration" of that remedial question. *Id.* at 22. "Delay," which is what the CFPB is urging,

"will serve only to prolong confusion in the multi-billion-dollar market in consumer financial products." *Id*. at 6.

The CFPB concedes (at 16 n.2) that there are at least 19 currently pending CFPB enforcement actions, not to mention other invalid CFPB actions, and cases concerning the acts of the Federal Housing Finance Agency or any other unconstitutionally structured agency. All of these proceedings will continue to be haunted by this remedial question if the Court does not resolve it now.

Petitioners are prepared to brief this case on an expedited basis to enable this Court to resolve it concurrently with *Seila Law*.[1]

I. THIS CASE PRESENTS THE ONLY OPPORTUNITY FOR THE COURT TO CONSIDER THE FULL REMEDIAL CONSEQUENCES OF THE CFPB'S UNCONSTITUTIONALITY.

This case presents a crucial companion issue to the merits question that the Court will resolve in *Seila Law*: May a defendant to an enforcement action brought by an unconstitutionally structured agency raise the agency's invalidity as a defense? Or can that proceeding be ratified, thereby depriving the defendant of any relief? As demonstrated at length in the opening petition—and as the CFPB conspicuously fails to contest—this issue is of paramount importance. And as the CFPB has affirmatively argued, *see* U.S. Br. 18-19, *Seila Law LLC* v. *CFPB*, No. 19-7 ("U.S. *Seila Law* Br."), the issue is *not* presented in

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[1] Petitioners are willing to file their opening brief within 14 days of the petition's grant, so that the CFPB may retain the full time to file its response brief, and the case may still be argued together with *Seila Law*.

Seila Law. Thus, even if this Court finds the CFPB unconstitutionally structured and severs the CFPB's for-cause removal provision, the CFPB on remand would argue that it makes no difference at all. Instead, the CFPB would contend that the Ninth Circuit should reinstate the same judgment on the alternative grounds that the proceedings had been ratified.

It is no wonder, therefore, that the CFPB is eager to prevent the Court from reaching this crucial question. If the Court rules for the CFPB on the constitutional and severance questions without addressing remedy, the Executive Branch would broadly expand its powers, without any governmental actor having to account for the years of invalid actions undertaken by the unconstitutionally structured CFPB, including the one against All American. That is why, in its *Seila Law* brief, the CFPB urged this Court to "decline[] to address" the "ratification" issue. *See* U.S. *Seila Law* Br. 18-19. And it is why the CFPB again attempts to block this issue from Supreme Court review here.

As a broad coalition of states supporting All American's petition have explained, however, the Court should resolve this issue now. States *Amici* Br. 6, 21. And granting this petition alongside *Seila Law* is the only way to ensure that a ruling severing the for-cause removal provision is case-dispositive. As the states put it, All American's petition alone would "allow[] 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." *Id.* at 6. Texas, Arkansas, Indiana, Kansas, Louisiana, Nebraska,

Ohio, Oklahoma, South Carolina, Utah, and West Virginia all agree that "[t]his is an important and necessary follow-on question" to the ones presented in *Seila Law*, and "any further delay in definitively resolving the issues presented" in this petition "will prolong a period of regulatory confusion." *Id.* at 6, 21. "Until this Court determines" whether the CFPB's "past actions can continue in effect, both regulators and the regulated will remain uncertain regarding their scope of permissible action," "[f]urther litigation will inevitably result," and "effective regulation of consumer financial products will be hampered at both the federal and state levels." *Id.* at 21-22.

This remedial question is pivotal to the very viability of separation-of-powers litigation. As this Court has repeatedly emphasized, remedies for separation-of-powers violations must be "designed" to "create incentives" for litigants to raise the challenges in the first place. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted). As commentators have recognized, "[i]f the right or norm's value is lower than the cost of asserting the claim or if the remedy does little to advance the litigant's related interests, the rational litigant will not bother to assert that interest." Barnett, *supra*, at 509. The CFPB never denies any of this.

This Court should have the full "remedial question" associated with the CFPB's unconstitutionality before it. *United States* v. *Booker*, 543 U.S. 220, 263 (2005). The Court should therefore grant this case to allow it to rule on the appropriate remedy, as it did in *United States* v. *Fanfan*, 542 U.S. 956 (2004).

II. THIS QUESTION IS RIPE FOR REVIEW.

The CFPB does not contest that this question is of paramount importance, or that it cannot be addressed in the context of the *Seila Law* case standing alone. The CFPB also does not deny that—in the event this Court severs the for-cause removal provision—it intends to exploit the lingering uncertainty by urging the Ninth Circuit on remand to reinstate its prior judgment on the alternative ground of ratification. Instead, the CFPB (at 12) urges this Court to decline to address the issue "at this time." But the question is teed up for review now, and the CFPB's arguments to the contrary are unavailing.

The CFPB (at 11) first makes the curious argument that the "primary and overarching remedies question" is actually the severance issue. But severance is not "literally" a remedy, because "[r]emedies operate with respect to specific parties, not on legal rules in the abstract." *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). The true *remedial* question is what *relief* courts will grant to parties that have raised the CFPB's unconstitutionality as a defense in pending enforcement actions. Should the district court below grant All American's motion for judgment on the pleadings if the CFPB is unconstitutionally structured? Will the district court in *Seila Law* set aside the civil investigative demand? These questions are at the heart of a score of enforcement actions initiated by the CFPB, and can be answered now if this Court grants All American's petition.

Next, the CFPB (at 7) asserts that no court has analyzed the issue "thoroughly" enough to warrant this Court's review. But eleven states, situated in six

different federal circuits, disagree. As the states correctly note, "there is considerable confusion in this area," as the Fifth Circuit's "splintered decision" in *Collins* v. *Mnuchin* "demonstrates." States *Amici* Br. 20. And the numerous separate opinions in that case "thoroughly canvassed the core legal issues." *Id*. at 6. A majority of that court held that violations of Article II involving "[r]estrictions on removal" do not result in the invalidation of past agency actions. 938 F.3d 553, 593 (5th Cir. 2019) (Haynes, J., joined by Stewart, C.J., Dennis, Owen, Southwick, Graves, Higginson, Costa, Duncan, JJ.). Seven other judges, meanwhile, would have held that an unconstitutionally structured agency's past actions must be invalidated. *Id.* at 626 (Willett, J., joined by Jones, Smith, Elrod, Ho, Engelhardt, and Oldham, JJ., dissenting in part) ("When a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside.").

The CFPB (at 13 n.1) also argues that the district court below did not reject its ratification argument, even though the court held that "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity," Pet. App. 6a. But in fact, both the CFPB and petitioners raised all of the relevant arguments supporting and opposing ratification before the district court. *See* Dkts. 231, 232. With the benefit of this briefing, the district court concluded that the case would have to be dismissed if the CFPB were "not a constitutionally authorized entity." Pet. App. 6a. The CFPB (at 13 n.1) makes the irrelevant point that it "did not raise … ratification as a reason to decline to certify" the appeal. But the CFPB never made *any* arguments regarding certification of the appeal, because it never responded to petitioners' motion for certification at all. Finally, the CFPB contends

that "the district court's reference to whether the Bureau is 'a constitutionally authorized entity' is more naturally read to relate to the severability question than the ratification question." *Ibid.* (citation omitted). Not so; the certification briefing did not raise the severance point at all. Instead, that statement by the district court responded to All American's argument that certifying the appeal would "materially advance" the litigation because the CFPB, if unconstitutional, "lacks authority to bring an enforcement action." Dkt. 239, at 7 (quoting *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993)). The district court was responding to the parties' dueling contentions about whether the ratification was valid or not.

The CFPB (at 14) then mischaracterizes *CFPB* v. *RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018) as not involving the ratification question at all, but addressing only severance. That is false. The *RD Legal* opinion included an *entire section* entitled "CFPB's Notice of Ratification," recounting the CFPB's arguments on ratification, and rejecting all of them. *Id.* at 784. That court concluded that ratification was impossible because the constitutional defect "concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *Id.* at 785. Accordingly, the court correctly held that, under the D.C. Circuit's decision in *NRA Political Victory Fund*, "the CFPB 'lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers,' and thus the CFPB's claims are dismissed." *Ibid.* (quoting 6 F.3d at 822).

The CFPB's attempts (at 18) to distinguish this Court's ruling in *Norton* v. *Shelby County*, 118 U.S. 425 (1886) also fail. That Court expressly held that "a

ratification can only be made when the party ratifying possesses the power to perform the act ratified." *Id.* at 451; *see also FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) ("It is essential that the party ratifying should be able … to do the act ratified … at the time the ratification was made.") (emphasis omitted). That is one of the two essential requirements for a valid ratification; the other is that the party ratifying must have had the authority "to do the act ratified at the time the act was done." *Ibid*. Here, the CFPB has satisfied neither requirement. *See* Pet. 23. And, as petitioners argued in their petition, *id.* at 22-23, an unconstitutional agency can *never* satisfy the second requirement. "An unconstitutional act is not a law," and is "as inoperative as though it had never been passed." *Norton*, 118 U.S. at 442. Thus, acts undertaken by an unconstitutional and void agency cannot be ratified, and the only course a court can take is to dismiss the action. *See Ringling* v. *City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911) ("An unconstitutional law is null and void, and proceedings had under it afford no basis for subsequent ratification or retroactive validation.") (citing *Norton*, 118 U.S. at 442). Because "[a]n unconstitutional law is void, and is as no law," the district court here "acquired no jurisdiction" over this case in the first place. *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879). The only remedy to address the CFPB's structural flaws is dismissal.

The CFPB (at 15) contests this point by noting that the D.C. Circuit in *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), allowed an enforcement action brought by a structurally invalid agency to be ratified. But the D.C. Circuit's scantily reasoned opinion in *Legi-Tech*—which never even mentions this Court's principal ratification decision, *NRA Political Victory Fund*—only adds to the confusion among lower courts.

Moreover, even *Legi-Tech* confirmed that the proper remedy for a defendant that raises an agency's unconstitutional structure as a defense is "judgment for the defendant." *Id.* at 706 n.2. And the CFPB's purported ratification here would fail even under *Legi-Tech*: The limited presence of an Acting Director did not "reconstitute[]" the CFPB, as the FEC had been reconstituted in *Legi-Tech*, *id.* at 706. In fact, that attempted ratification did *nothing* to change the CFPB's structure. *See RD Legal*, 332 F. Supp. 3d at 785 ("[T]he constitutional issues presented by the structure of the CFPB are not cured by the appointment of Mr. Mulvaney"; rather, "the relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact.").

The CFPB's final argument highlights exactly why this Court should grant this petition now. The CFPB argues (at 19) that the Court should not address the remedial question because the fact that petitioners have been subjected to invalid proceedings brought by an unconstitutional agency for *years* is *not* the most "worrisome" thing. Instead, the CFPB contends, petitioners' injuries can be fully remedied by severance alone. *Ibid.* If accepted, that argument would obliterate separation-of-powers litigation altogether. On the CFPB's theory, although the challengers in *Morrison* v. *Olson* had "moved to quash the [independent counsel's] subpoenas" on the theory that the independent counsel "had no authority" to issue them, 487 U.S. 654, 668 (1988), they never could have received that remedy; they only could have received severance, and the subpoenas would have continued to be enforced.

At bottom, the CFPB's position is that litigants may not raise separation-of-powers violations as defenses at all, because if they do, it won't change the outcome of the case. That is not and should not be the law. Myriad courts recognize that there is "no[] doubt that" defendants "may raise separation of powers as a defense." *United States* v. *Cisneros*, 169 F.3d 763, 769 (D.C. Cir. 1999) (citing *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990)). If this Court does not confirm this core principle of law, the CFPB will seek to undermine it on remand and moving forward in pending enforcement proceedings across the country.

III. PETITIONERS ARE PREPARED TO EXPEDITE THIS CASE.

Petitioners are prepared to expedite briefing in this case to allow it to be heard together with *Seila Law*. Petitioners respectfully suggest a briefing schedule in which the opening brief is filed 14 days after the petition is granted. This would allow the CFPB to have the full 30 days to respond, and still enable this Court to schedule this case, as well as *Seila Law*, for argument as early as February.

CONCLUSION

The petition for a writ of certiorari before judgment should be granted.

Respectfully submitted.

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