No. 19-7

In The
Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* RD LEGAL FUNDING PARTNERS, LP, RD LEGAL FINANCE, LLC, RD LEGAL FUNDING, LLC, AND RONI DERSOVITZ SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The RD Legal *Amici*[2] engage in the business of litigation finance, which includes purchasing receivables from law firms and portions of the future proceeds from plaintiffs' judgments or settlements. Among other things, litigation finance helps protect the rights of the indigent and provides individuals who need or desire access to immediate funds with a means to monetize the expected proceeds from litigation without incurring debt.

In 2017, the Consumer Financial Protection Bureau (the "CFPB") initiated an enforcement proceeding against the RD Legal *Amici* in the Southern District of New York. That proceeding was dismissed by the district court because of the CFPB's unconstitutional structure. Specifically, in granting the RD Legal *Amici*'s motion to dismiss, the Honorable Loretta A. Preska

[1] Pursuant to Supreme Court Rule 37.3, *amici* certify that all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no persons other than *amici* or their counsel made a monetary contribution to its preparation or submission.

[2] RD Legal Funding Partners, LP is a hedge fund that invests in legal financing. RD Legal Finance, LLC is a limited liability company that also engages in legal financing. RD Legal Funding, LLC is the entity that originates the financing transactions entered into by RD Legal Funding Partners, LP, and RD Legal Finance, LLC. Roni Dersovitz is the chief executive officer and managing member of the entity that is the manager of RD Legal Funding Partners, LP. He is also the managing member of RD Legal Finance, LLC, and RD Legal Funding, LLC. These entities and Mr. Dersovitz constitute and are referred to collectively herein as the "RD Legal *Amici*."

held: (1) the structure of the CFPB is unconstitutional—adopting Sections I–IV (but not Section V) of then-Judge Kavanaugh's dissent in *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018); (2) the unconstitutional provisions of Title X could not be severed—adopting Section II of Judge Henderson's dissent in *PHH*, which explained that the severability clause in the Dodd-Frank Wall Street Reform and Consumer Protection Act does not provide "a license to cut out the 'heart' of a statute"; and (3) the CFPB's attempt to ratify its unconstitutional conduct through the actions of interim-director Mick Mulvaney was invalid. *See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784–85 (S.D.N.Y. 2018).

That ruling is currently pending in the Second Circuit Court of Appeals. At the request of the CFPB, however, the Second Circuit adjourned oral argument pending the outcome of this case. Accordingly, the RD Legal *Amici* have a direct and substantial interest in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Title X of Dodd-Frank, known as the "Consumer Financial Protection Act" (the "CFPA"), created the CFPB—a unique entity, without a close counterpart in the long history of federal agencies.

Congress transferred to the CFPB the authority to enforce eighteen preexisting consumer-protection laws previously administered by seven different agencies.[3] 12 U.S.C. § 5481(12). Title X also empowered the CFPB to regulate and prosecute acts by certain "covered persons" it considers "unfair, deceptive, or abusive." 12 U.S.C. § 5531(a).

There are several unique aspects to the CFPB's structure that, coupled with its vast regulatory authority, provide it power that other agencies do not—and should not—have.

First, the CFPB is an "Executive agency as defined in section 105 of title 5," 12 U.S.C. § 5491(a), headed by a single Director who serves a five-year term that may extend indefinitely "until a successor has been appointed and qualified." 12 U.S.C. § 5491(c)(2). The President may remove the Director only "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

Second, the CFPB's funds come indirectly from the U.S. Treasury, but outside of the congressional appropriations process (and without presentment to the President). *See* 12 U.S.C. § 5497(a)(2)(A)(iii); *see also* 12 U.S.C. § 5497(c)(2) (CFPB funds "shall not be construed

[3] Specifically, the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, and select functions of the Department of Housing and Urban Development and the Federal Trade Commission. 12 U.S.C. § 5581(b).

to be Government funds or appropriated monies"); 12 U.S.C. § 5497(a)(2)(C) (CFPB funding "shall not be subject to review by the Committees on Appropriations" in the House or Senate).

Third, regulations promulgated by the CFPB are subject to oversight by the Financial Stability Oversight Council ("FSOC"), which is empowered to "set aside" any such "regulation or provision" that "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. § 5513(a).

The CFPB's single Director removable only for cause, its authority to independently obtain funds from the Federal Reserve outside of congressional oversight and control, and its oversight by the FSOC, each give rise to constitutional problems that warrant finding those provisions of Title X unconstitutional even when considered in isolation from one another. Taken together, these features of Title X render the CFPB *sui generis*—an agency with vast power over vital sectors of our economy, but too insulated from accountability to the political branches, and through them to the People, to pass constitutional muster. *Cf. Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 475 (2001) ("[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred."); *see also* Roberta Romano, *Does Agency Structure Affect Agency Decisionmaking? Implications of the CFPB's Design for Administrative Governance*, 36 Yale J. on Reg. 273, 275, 314 (2019) (compared with other agencies, the CFPB "was structured, by a wide margin, to be the most insulated from congressional control" and "the most independent from political accountability").

Moreover, because Congress intended to create an agency that was not answerable to the President or future congresses when it crafted the CFPB, this Court should not simply redline Title X and edit out the for-cause removal provision (or the other constitutionally defective provisions). Instead, this Court should declare Title X is unconstitutional as written, and leave it to Congress to determine how to cure the constitutional infirmity.

ARGUMENT

A. The Structure of the CFPB Violates Separation of Powers for More Reasons Than Just the For-Cause Removal Provision

The Constitution established three co-equal branches of the federal government, with each branch assigned its own powers. "By diffusing federal powers among three different branches, and by protecting each branch against incursions from the others, the Framers devised a structure of government that promotes both liberty and accountability." *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting); *see also NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (it is a "bedrock principle that 'the constitutional structure of our Government' is designed first and foremost not to look after the interests of the respective branches, but to 'protec[t] individual liberty'" (quoting *Bond v. United Stat*es, 564 U.S. 211, 223 (2011)). "[T]he values of liberty and accountability protected by the separation of powers belong not to any branch of the Government but to the Nation as a whole." *Wellness*, 135 S. Ct. at 1955 (Roberts, C.J., dissenting).

Over more than a century, Congress has created numerous agencies to assist it and the executive branch in carrying out the responsibilities assigned to them by the Constitution. Some of those agencies are generally considered "independent"—that is, designed to afford them some autonomy from the political branches.[4] But all agencies of the federal government must operate within the structure created by the Constitution, and consistent with allocation of powers to and among the three coordinate branches. Federal agencies are not a separate "fourth branch" of government.[5]

The initial inquiry in this case is whether the structure of the CFPB violates those constitutional

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[4] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 772, 774 (2013) (observing "there is no single feature . . . that every agency commonly thought of as independent shares").

[5] *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (agency rulemakings "are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power'"); *Federal Maritime Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 773 (2002) ("[A]gencies, even 'independent' agencies, are more appropriately considered to be part of the Executive Branch.") (Breyer, J., dissenting).

principles. The answer is yes, several times over. Although the CFPB has conceded that the for-cause removal provision in Title X is unconstitutional, that focus ignores two other provisions of Title X that similarly contribute to the CFPB's concentration of power: (1) the guarantee of CFPB funding outside of the congressional appropriations process, and (2) the FSOC's oversight and veto power over CFPB regulations. Those features of Title X, in combination with the removal provision—the unconstitutionality of which is well-addressed by Petitioner and the CFPB and not repeated here (*see* Brief for Petitioner, at 14–34; Brief for Respondent Supporting Petitioner ("Top-Side Brief"), at 10–46)—effectively transform the CFPB into a separate branch of the government that usurps, rather than derives, power from the executive and legislative branches. Title X thus violates separation of powers on multiple grounds, including the following grounds not addressed by the Petitioner and the CFPB.

1. CFPB Funding Is Provided Outside of the Appropriations Process, Is Drawn at the Request of the Director of the CFPB, and Is Guaranteed

When Congress established the mechanisms for the CFPB to obtain regular funding, it chose to insulate the CFPB not just from the executive branch, but also from the legislative branch. Title X requires the Federal Reserve Board of Governors to transfer to the CFPB any amount the Director requests (on an annual or quarterly basis), up to 12% of the Federal Reserve System's own operating expenses. *See* 12 U.S.C. § 5497(a)(2)(A)(iii); *see also* 12 U.S.C. § 289(a)(3)(B) ("[S]urplus funds of the Federal reserve banks . . . shall be transferred to the Board of Governors of the Federal Reserve System for transfer to the Secretary of the Treasury for deposit in the general fund of the Treasury."). Funds requested by the Director "shall be immediately available" to the CFPB, and remain available to the CFPB until expended. 12 U.S.C. § 5497(c)(1). Title X provides the funds transferred to and available to the CFPB, and any other funds it obtains, "shall not be construed to be Government funds or appropriated monies." 12 U.S.C. § 5497(c)(2). The statute further provides that funds the CFPB obtains from the Federal Reserve System "shall not be subject to review by the Committees on Appropriations" in the House or Senate, 12 U.S.C. § 5497(a)(2)(C), and that the CFPB has no "obligation . . . to consult with or obtain the consent or approval of the Director of the Office of Management and Budget ["OMB Director"] with respect to any report, plan, forecast, or other information" and the OMB Director has no "jurisdiction or oversight over the affairs or operations" of the CFPB, 12 U.S.C. § 5497(a)(4)(E). Title X's CFPB funding provisions are constitutionally suspect in several respects.

First, there is the apparent infidelity to the constitutional requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. By its own terms, Title X does not provide "Appropriations made by Law" to the CFPB; indeed, the statute expressly provides the contrary. 12 U.S.C. § 5497(c)(2) (the funds transferred to and available to the CFPB "shall not be construed to be Government funds or appropriated monies"). But it is nevertheless quite clear that Title X does require the Federal Reserve Board to transfer to the CFPB funds that would otherwise be directed to the Treasury. *See* 12 U.S.C. § 5497(a)(2)(A)(iii); 12 U.S.C. § 289(a)(3)(B). This is a violation of the Appropriations Clause.

Second, Title X's funding provisions go too far in insulating the CFPB from accountability to the political branches. Congress's "power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58 (James Madison); *see also United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974). That legislative power serves the "fundamental and comprehensive purpose" of "assur[ing] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 427–28 (1990); Joseph Story, *Commentaries on the Constitution* § 1342 (1833) ("The power to control and direct the appropriations constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public speculation."). Direct funding of the CFPB entirely outside the congressional appropriations process effectively removes the CFPB from oversight by the political branch most directly and immediately accountable to the People. *See* Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1384 (1988) ("If Congress creates spending authority which is open-ended with respect to amount and duration . . . it effectively concedes any role in defining and constraining executive—that is, governmental—action."); Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1736 (2013) ("[S]elf-funding, unlike any other single structural feature of agency independence, effectively severs an agency from an entire branch of government.").

Third, and relatedly, Title X's authorization of *self*-funding by the CFPB appears tantamount to congressional delegation of its own appropriations powers to the agency—which would violate Article I. Again, by its own terms, Title X does not appropriate funds to the CFPB. 12 U.S.C. § 5497(c)(2). Instead, the statute empowers the CFPB to request in the future whatever funds it wants from the Federal Reserve (subject only to a cap, calculated based on the Federal Reserve's own budget), and the Federal Reserve is required by law to immediately comply with the CFPB's funding demand, no questions asked. The funds that the Federal Reserve sends to the CFPB would otherwise end up deposited in the Treasury. 12 U.S.C. § 289(a)(3)(B). This arrangement thus unconstitutionally delegates legislative powers to the CFPB. *See Whitman*, 531 U.S. at 472 ("Article I, § 1, of the Constitution vests '[a]ll legislative Powers herein granted . . . in a Congress of the United States.' This text permits no delegation of those powers."); *Dep't of Transp. v. Association of Am. R.R.s*, 135 S. Ct. 1225, 1237 (2015) ("Congress . . . cannot delegate its 'exclusively legislative' authority at all.") (Alito, J., concurring).

Fourth, the CFPB's funding provisions further disable the President's control over the agency. While Congress plays the central role in appropriations, the Constitution also assigns the President a role through the Presentment Clause. *See* U.S. Const. art. I, § 7, cl. 2. And, in practice, federal budgets are a collaboration between the political branches. Title X reflects this reality when it attempts to shield the CFPB from the work of the OMB. 12 U.S.C. § 5497(a)(4)(E). As the dissenting justices in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) recognized, "the decision as to who controls the agency's budget requests and funding . . . affect[s] the President's power to get something done." *Id.* at 524 (Breyer, J., dissenting).

For each of these reasons, the CFPB's safeguarded and self-directed funding violates the Constitution's separation of powers and further insulates the CFPB from appropriate oversight.

2. Title X Takes Oversight Power Away from the President and Gives It to the FSOC

Title X further detaches the CFPB from the other branches of government by vesting oversight power in the FSOC rather than the President. Pursuant to 12 U.S.C. § 5513(a), the FSOC may "set aside" any CFPB "regulation or provision" that "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." This FSOC veto power over CFPB regulations is unavailable to the President—either directly or through the power of removal.

The FSOC itself is comprised of ten voting members (including the CFPB Director), each serving a term of six years, as well as five non-voting members. 12 U.S.C. § 5321(b). The President lacks the ability to remove some members of the FSOC at will. *See* 12 U.S.C. § 242 (Chair of Federal Reserve Board of Governors); 12 U.S.C. § 4512(b)(2) (Director of the Federal Housing Finance Agency); *Free Enterprise Fund*, 561 U.S. at 487 (Chair of the Securities and Exchange Commission).

As a result, with respect to CFPB regulations, the CFPB Director is more accountable to the FSOC than to the President, and the President's ability to control or influence the FSOC is constrained by an inability to remove some members without cause. Section 5513(a) accordingly creates a framework resembling the double-layer removal problem condemned by the Supreme Court in *Free Enterprise Fund*, 561 U.S. at 492. While not the precise "dual for-cause limitations" found to violate the separation of powers in *Free Enterprise Fund*, the veto power over CFPB regulations vested in the FSOC by Title X further distances the CFPB from presidential oversight, and the resulting "diffusion of power carries with it a diffusion of accountability." *Id.* at 497.

B. The CFPB's Constitutional Defects Cannot Be Cured Through Severing and, Even If They Could, the CFPB's Prior Actions Are Invalid

Having acknowledged, at least in part, the constitutional infirmities of Title X, the CFPB would have the Court sever the offending provisions and otherwise allow the CFPB to carry on as a "fully operative" agency (Top-Side Brief at 46–47)—no doubt intending to attempt to ratify its prior actions taken under an admittedly unconstitutional structure, as it did with the RD Legal *Amici* in the Southern District of New York. But the CFPB's structure cannot be cured by merely severing the unconstitutional provisions, and even if it could, the Court should make clear that the CFPB's prior unconstitutional actions cannot be cured through ratification.

1. The Court Should Not Sever the For-Cause Removal Provision

Given the many undemocratic and unconstitutional features of the CFPB, the proper remedy is not to rewrite Title X by severing the for-cause removal provision. Judges are "expounders of what the law *is*[,]" not "policymakers choosing what the law *should be.*" *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018). "[T]he proper role of the judiciary . . . [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1726 (2017); *see also Free Enterprise Fund*, 561 U.S. at 510 ("[E]ditorial freedom . . . belongs to the Legislature, not the Judiciary."). While Dodd-Frank includes a severability clause, *see* 12 U.S.C. § 5302, that clause is located almost 600 pages from Title X. Moreover, "severability will rarely turn on the presence or absence of such a clause," *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968), but rather on "legislative intent," *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006), and here it is clear that severing the for-cause removal provision would result in a CFPB at odds with Congress's intent to create an agency insulated from the executive and legislative branches.

The original legislation that culminated in Title X called for a Consumer Financial Protection *Agency* to be led by a single director, appointed by the President, selected from a five-member board comprised of the head of the "agency responsible for chartering and regulating national banks" and four presidential appointees, who would be removable "for inefficiency, neglect of duty, or malfeasance in office." H.R. 3126, 111th Cong., § 112 (as introduced, July 8, 2009). The bill was amended twice in committee: first, to replace the agency's name and structure with a five-member Consumer Financial Protection *Commission*, and second, to delay the creation of the five-member commission for an interim period, during which the agency would be led by a single director. H.R. Rep. No. 111-367, at 101 (2009). The bill that passed the House included this "initial structure" and "subsequent structure." *See* H.R. 4173, 111th Cong., § 4101 (as passed by House, Dec. 11, 2009); *see also* 155 Cong. Rec. H. 14418 (Dec. 9, 2009) (statement of Rep. Waxman) ("Under the agreement we have reached, the agency will start off with a single director who can take early leadership in establishing the agency and getting it off the ground. After a period of 2 years, the agency will continue operations with the leadership from a bipartisan commission."). The director was to have been removable "for cause," and the commissioners "only for inefficiency, neglect of duty, or malfeasance in office." H.R. 4173, 111th Cong., §§ 4102, 4103. The competing Senate bill called for a single director with no board or commission; the Director was to be removable "for inefficiency, neglect of duty, or malfeasance in office." S. 3217, 111th Cong., § 1011(c)(3) (as introduced, April 14, 2010). The Senate took up H.R. 4173 and passed it after substituting the text of its competitor bill. The version of H.R. 4173 that became law created a permanent director position with no provision for a commission, all while retaining the "for-cause" removal standard from the Senate bill. Pub. L. No. 111-203, § 1011(b), 124 Stat. 1376, 1964 (2010) (codified at 12 U.S.C. § 5491(b)).

The statutory history of Title X offers no assurance that Congress would have adopted a leadership structure for the CFPB in a form other than the unconstitutional one actually enacted. And absent clear legislative intent, this Court may not simply convert the CFPB to an agency with a single director removable at will, particularly when there were other paths

Congress considered and plausibly might have taken.[6] *Cf. United States v. Booker*, 543 U.S. 220, 249 (2005) ("Congress likely would not have intended the Act as so modified to stand.").

Moreover, unlike in *Free Enterprise Fund* and other cases where an unconstitutional provision can be readily severed with confidence that Congress would have enacted the statute as is except for the provision in question, here there are two other sets of problematic provisions, each designed to ensure that the CFPB would operate independent of the executive and legislative branches, which also would need to be excised from the statute—the funding provisions of Title X and the FSOC veto power over CFPB regulations. While it is hardly self-evident that Congress would have enacted Title X without the FSOC control over CFPB regulations, it is obvious that the statute cannot stand on its own without its funding provisions. Congress specifically sought to finance the operations of the CFPB without authorizing or appropriating funds. There is not a scintilla of support for the notion that Congress would have enacted Title X without these provisions—which, if severed, would have the effect of rendering the CFPB inoperative because it would have no lawfully allocated money to conduct its affairs. And, even if those provisions might survive constitutional

[6] Would Congress have adopted instead a multi-member leadership structure, with the members removable only for cause? A single director who could be removed by the President at will? Or perhaps there were insufficient votes in Congress to enact the CFPB in any form other than the one actually acted upon.

scrutiny to avoid the severing inquiry, severing only the for-cause removal provision would disrupt the independence of the CFPB that Congress clearly intended—transforming the agency from one free from oversight by the executive *and* legislative branches, to one overseen by the executive but still free from oversight by the legislative branch.

The unconstitutional portions of Title X "were obviously meant to work together" with the remainder of the statute, *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018), and therefore cannot be severed. *See also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (unaffected portions of law that are "incapable of functioning independently" cannot be severed.). When the Supreme Court found a key provision of the Bankruptcy Act of 1978 unconstitutional, it refused to sever that provision on the grounds that "it is for Congress to determine the proper manner of restructuring the [statute] to conform to the requirements of [the Constitution] in the way that will best effectuate the legislative purpose." *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co*., 458 U.S. 50, 87 n.40 (1982) (plurality); *id*. at 91–92 (concurring opinion agreeing the statute's unconstitutional assignment of certain powers to bankruptcy judges was not severable).

In sum, because Section 5491(c)(3) is "at the heart of Title X" and "severing [S]ection 5491(c)(3) would yield an executive agency entirely at odds with the legislative design," *PHH Corp.*, 881 F.3d at 160 (Henderson, J., dissenting), this Court should not sever

Section 5491(c)(3) and instead should hold Title X unconstitutional as written.

2. Even If the Offending Provisions Could Be Severed, the CFPB's Prior Actions Are Invalid and Cannot Be Ratified

The CFPB now concedes that, since its creation, it has exercised the massive executive authority required to "implement[ ] and enforc[e] federal consumer financial law" (Top-Side Brief at 48) pursuant to a structure that is unconstitutional. Even if the Court were to sever the offending provisions of Title X, the CFPB ignores the implications of its unconstitutional structure: because an agency with a structural constitutional defect lacks the authority to take executive action, any exercise of executive power by the agency is void. *See FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). This principle applies not only to Petitioner, but also to the RD Legal *Amici* and others who are currently subjected to the CFPB's illegitimate exercise of power, and the CFPB may not—as it has tried in the past—rectify the problem through ratification. *See RD Legal*, 332 F. Supp. 3d at 785 (rejecting the CFPB's attempt to use ratification doctrine to avoid constitutional challenge by the RD Legal *Amici*).

The ratification doctrine arises out of principles of agency law. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (analyzing whether the Solicitor General could retroactively authorize filing of certiorari petition, and noting that "[t]he question is at least presumptively governed by principles of agency law, and in particular the doctrine of ratification"). "Ratification is the affirmance of a prior act done by another, whereby the act is given effect *as if done by an agent acting with actual authority*." Restatement (Third) of Agency § 4.01 (2006) (emphasis added); *see also GDG Acquisitions LLC v. Gov't of Belize*, 849 F.3d 1299, 1310 (11th Cir. 2017) ("[T]he doctrine of ratification starts with the assumption that the agent did not have actual authority at the time he acted.").

The ratification doctrine thus *presupposes* that a principal has the power to authorize an agent to act on its behalf, and is designed to address situations where the agent did not have such authorization from the principal at the time the agent acted. *See Marsh v. Fulton Cty.*, 77 U.S. (10 Wall.) 676, 684 (1870) (ratification "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally"). As one court described:

> Ratification results when a principal affirms a previous unauthorized act by his agent. The effect of ratification is to give the principal's agent the authority to perform the unauthorized act as of the time the agent performed the unauthorized act. In essence, ratification by a principal of his agent's unauthorized act is equivalent to the agent having that particular authority from the beginning.

In re Packer Ave. Assocs. v. Johnstone, 1 B.R. 286, 292 (Bankr. E.D. Pa. 1979) (citation omitted); *see also GDG Acquisitions*, 849 F.3d at 1310 ("It is precisely on account of the principal's subsequent consent that the prior unauthorized act 'is given effect as if done by an agent acting with actual authority.' ") (quoting Restatement (Third) of Agency § 4.01(1)).

The ratification doctrine, which deals with an agent's authority to act on behalf of its principal, has no relevance here because the structure and authority exercised by the principal (the CFPB) itself is unconstitutional, not the authority of its agent (the Director). *See Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) ("[R]atification occurs when a principal sanctions the prior actions of its purported agent.") (citation omitted).

Moreover, even if the ratification doctrine were relevant, its requirements cannot be satisfied. For a ratification to be effective "it is essential that the party ratifying [*i.e.*, the principal] should be able . . . to do the act ratified at the time the act was done." *NRA Political Victory Fund*, 513 at 98 (citation and emphasis omitted). But the CFPB lacked authority to take any action—including issuing a CID to Petitioner and initiating an enforcement action against the RD Legal *Amici*—while it was unconstitutionally structured. *See NRA Political Victory Fund*, 6 F.3d at 822 (holding an unconstitutionally structured agency "lacks authority to bring [an] enforcement action"). Because the CFPB could not "do the act ratified at the time the act was done," a Director no longer subject to the at-will removal provision may not ratify any of the CFPB's prior acts in the future. *NRA Political Victory Fund*, 513 U.S. at 98; *see also Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir.

1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start."). Ratification thus cannot cure the acts the CFPB undertook as an unconstitutionally structured agency.

CONCLUSION

For the aforementioned reasons, the RD Legal *Amici* respectfully request that the Court find that the CFPB's structure is unconstitutional and decline to sever the unconstitutional provisions from the remainder of Title X.

Respectfully submitted,

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