No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a government official has the power to validate the unauthorized actions of other officials is presumptively determined by the law of agency, specifically the doctrine of ratification. According to that common law body of rules, a principal cannot ratify the action of an agent unless the principal had the authority to take the action both originally and at the time of ratification. *Fed. Elec. Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 98–99 (1994).

Although this Court has never done so, the D.C. Circuit applies the doctrine of ratification to uphold government action otherwise unconstitutional under the Appointments Clause. Such ratification will be upheld even if it is a mere "rubberstamp" that does not comport with the procedural and substantive limitations normally applicable to the agency action being ratified. In developing this powerful review-thwarting defense, the D.C. Circuit has, in contrast to the Ninth Circuit Court of Appeals, read this Court's decision in *NRA Political Victory Fund* narrowly to apply only in circumstances where the limitation on a principal's authority to ratify is time-based, as with a statute of limitations.

The questions presented are:

1. May a regulation be ratified if the Appointments Clause prohibited the purported agent's exercise of rulemaking authority?

2. If so, must the ratification comply with the constraints that would normally govern an officer's rulemaking, such as the Administrative Procedure Act's "reasoned decision-making" requirement?

LIST OF ALL PARTIES

The Petitioners are: Moose Jooce; Mountain Vapors; Rustic Vapors; Dutchman Vapors; Jen Hoban d/b/a Masterpiece Vapors; The Plume Room LLC; J.H.T. Vape LLC; Tobacco Harm Reduction 4 Life; and Rave Salon Inc. d/b/a Joosie Vapes.

The Respondents are: Food and Drug Administration; Janet Woodcock, in her official capacity as Acting Commissioner of Food and Drugs; and Norris Cochran, in his official capacity as Acting Secretary of Health and Human Services. Acting Commissioner Woodcock and Acting Secretary Cochran are substituted herein pursuant to Rule 35(3).

CORPORATE DISCLOSURE STATEMENT

No Petitioner has any parent corporation and no publicly held company owns 10% or more of the stock of any Petitioner.

STATEMENT OF RELATED CASES

The proceedings identified below are directly related to the above-captioned case in this Court.

Moose Jooce v. Food & Drug Administration, No. 1:18-cv-00203-CRC, consolidated with 1:18-cv-1615-CRC, 1:19-cv-00372-CRC, 2020 WL 680143 (D.D.C. Feb. 11, 2020).

Moose Jooce v. Food & Drug Administration, No. 20-5048, consolidated with 20-5049, 20-5050 (D.C. Cir. Dec. 1, 2020).

TABLE OF CONTENTS

Appendix

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Petitioners Moose Jooce, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The panel opinion of the D.C. Circuit is reported at 981 F.3d 26, and is reproduced in the Appendix beginning at A-1. The opinion of the D.C. District Court is not published but is available at 2020 WL 680143, and is reproduced in the Appendix beginning at B-1.

JURISDICTION

The date of the decision sought to be reviewed is December 1, 2020. Jurisdiction is conferred under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS AT ISSUE

The pertinent text of the following constitutional, statutory, and regulatory provisions involved in this case is set out in the Appendix.

- U.S. Const. art. II, § 2, cl. 2.
- 21 U.S.C. §§ 387a(b), 387j(a)(2), 387k(b)(2)(A).
- 21 C.F.R. §§ 1100.1, 1100.2.

INTRODUCTION

In their design of the federal government, the Founders ordained a separation of powers enhanced by carefully calibrated checks and balances. *See, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 117–18 (2015) (Thomas, J., concurring in the judgment) ("When the Framers met for the Constitutional Convention, they understood the need for greater checks and balances to reinforce the separation of powers."). An important part of their design is the Appointments Clause, U.S. Const. art. II, § 2, cl. 2, which directs how officers of the United States are to be installed in their governmental positions. *See generally* Theodore Y. Blumoff, *Separation of Powers and the Origins of the Appointments Clause*, 37 Syracuse L. Rev. 1037, 1069 (1987) ("The framers came to Philadelphia mindful of the colonial legacy of monarchical appointment abuses, yet equally fearful of legislative tyranny. [¶] The compromise that the members of the Convention effected [through the Appointments Clause] was an effort to alleviate these . . . concerns . . . ."). *Cf.* The Federalist No. 76, at 510, 513 (A. Hamilton) (J. Cooke ed. 1961) (the Appointments Clause recognizes that "one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular officers," but guards against "a spirit of favoritism in the President" by presumptively requiring Senate confirmation).

Although the separation of powers generally, and the Appointments Clause specifically, support democratically accountable government, *Edmond v. United States*, 520 U.S. 651, 659 (1997), they also provide protection to individual citizens against

arbitrary government power. *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) ("The ultimate purpose of this separation of powers is to protect the liberty and security of the governed."); *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 949 (2017) ("The [Appointments] Clause, like all of the Constitution's structural provisions, 'is designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty.'") (Thomas, J., concurring) (quoting *NLRB v. Noel Canning*, 573 U.S. 513, 571 (2014) (Scalia, J., concurring in judgment)).

But without a judicial remedy, this protection is ineffectual, a mere parchment barrier.

Such has become the fate of the Appointments Clause in the D.C. Circuit, thanks to that court's adoption and zealous employment, exemplified in the decision below, of the rule that agency action, otherwise unconstitutional under the clause, may be perfunctorily cured through a rubberstamp "ratification" by a constitutionally qualified officer. App. A-5 to A-8. *See generally Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117–18 (D.C. Cir. 2015) (ratification is "sufficient to cure the constitutional violation . . . notwithstanding the possibility that the [the ratifying official] may have in fact 'rubberstamp[ed]' the [original] action") (quoting *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 708–09 (D.C. Cir. 1996)).

This ratification—which denies aggrieved citizens the right of judicial review of their constitutional claims against the original agency action—is deemed effective even if it does not align with the procedural and substantive limitations normally applicable to the

agency action being ratified.[1] Moreover, such ratification is effective even if the ratifying federal actor makes no concurrent effort to reform the decision-making procedures that led to the alleged constitutional violation. *Cf.* App. F-1. Further, the ratification is allowed to work its curative magic despite the fact that a valid principal-agent relationship—the customary prerequisite for ratification to operate, Restatement (Second) of Agency § 84 cmt. a (1958)—is necessarily absent if the Appointments Clause forbids the purported agent from exercising authority delegated by the purported principal.

The D.C. Circuit's ratification defense cannot be reconciled with (i) this Court's decisions adopting the common law foundations of and limitations on ratification when testing the validity of official government action, (ii) like decisions of the Ninth Circuit Court of Appeals, or (iii) an appropriately vigorous judicial enforcement of the separation of powers. Review should therefore be granted.

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[1] *See, e.g.*, App. B-16 ("Agency ratifications, which by definition come after a final action has been taken, are not governed by standard APA rules."); *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 46 (D.D.C. 2017) ("Finally, Plaintiffs' contention that Secretary Ross' ratification is insufficient because it lacks the formality of rulemaking—*i.e.*, publication in the Federal Register—is unfounded."); *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016) (declining to impose "formalistic procedural requirements before a ratification is deemed to be effective").

STATEMENT OF THE CASE

The Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (June 22, 2009), authorizes the Secretary of Health and Human Services to regulate the manufacture, sale, and distribution of "tobacco products." 21 U.S.C. § 387a(a). These are defined to include "any . . . tobacco products that the Secretary by regulation deems to be subject to" the Act.[2] *Id.* § 387a(b). This "deeming" power, as well as most other rulemaking authority, the Secretary has delegated to the Commissioner of Food and Drugs. App. B-3 to B-4. Until last year,[3] the Commissioner had sub-delegated this power to issue binding regulations to FDA's Associate Commissioner for Policy, *id.*, a career position within the Senior Executive Service, *see* Government Policy and Supporting Positions 70

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[2] In *Big Time Vapes, Inc. v. FDA*, No. 20-850 (cert. filed Dec. 18, 2020), the petitioners contend that this deeming power violates the non-delegation doctrine.

[3] Shortly before oral argument in the D.C. Circuit, the Secretary of Health and Human Services issued a directive requiring all final rules to be signed by the Secretary as well as the pertinent agency head. *See* HHS Statement on Regulatory Process, Sept. 20, 2020 ("All rules will now be signed by the Secretary and by the head of the agency involved."), https://bit.ly/2NknO3S. The policy change was implemented partly in response to this litigation. *See id.* (noting that agency heads "have recognized that questions around delegations of rulemaking power can create litigation risk," as shown in 2019 when "Commissioner Scott Gottlieb signed and retroactively ratified the 2016 deeming rule around tobacco products, which had originally been signed by a more junior official"). An executive order issued in the waning days of the prior administration made similar reforms throughout the executive branch. *See infra* note 19. That order has just been revoked. Exec. Order on the Revocation of Certain Presidential Actions, § 1, Feb. 24, 2021.

(2016).[4] Exercising that authority in the spring of 2016, Associate Commissioner Leslie Kux issued the "Deeming Rule," through which various vaping products (electronic cigarettes and related equipment) were deemed—despite their not containing or delivering any tobacco—to be "tobacco products." *See Deeming Tobacco Products To Be Subject to the Federal Food, Drug, and Cosmetic Act, as Amended by the Family Smoking Prevention and Tobacco Control Act*, 81 Fed. Reg. 28,973 (May 10, 2016) (amending 21 C.F.R. pts. 1100, 1140, 1143).

Because of that decision, vaping products are subject to the Tobacco Control Act's stringent regulations. These include an arduous pre-marketing approval process, 21 U.S.C. § 387j(a)(2), which FDA itself has estimated could cost hundreds of thousands of dollars for a single vaping product, *see* FDA, Final Regulatory Impact Analysis 87–88 tbls. 11(a) & 11(b) (2016),[5] as well as a rigorous prior restraint on

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[4] The position had once been known as the Assistant Commissioner for Policy. App. B-3 & n.2. During litigation in the district court, FDA created a new political position in the Senior Executive Service—the Principal Associate Commissioner for Policy—whose occupant oversees the Associate Commissioner. *See* Memorandum Re: Delegation of Authority for General Redelegations of Authority from the Commissioner to Other Officers of the Food and Drug Administration § 1(H)(1) (May 2, 2019), Dist. Ct. Doc. No. 40-1 (filed Oct. 21, 2019). FDA nevertheless agreed with Petitioners that "the relevant delegations of authority [remain] those that were in effect at the time of the issuance of the Deeming Rule." Notice of Filing at 2, Dist. Ct. Doc. No. 40.

[5] "FDA considers each [vaping] product with a differing flavoring variant or nicotine strength to be a different product." FDA, Ctr. for Tobacco Prods., Commonly Asked Questions (July 10, 2020), https://bit.ly/3rLfY2s. For a vaping manufacturer like Petitioner

truthful claims about vaping products, such as that they do not contain a particular substance, *see* 21 U.S.C. § 387k(b)(2)(A)(i). Violation of the Act is punishable by substantial monetary penalties and imprisonment. *Id*. § 333.

Petitioners are a collection of mom-and-pop vaping retailers and grassroots policy advocates who object to the Deeming Rule.[6] Not only does the rule threaten the livelihoods of those like Petitioners who work in the vaping industry, Lauren H. Greenberg, Note, *The "Deeming Rule": The FDA's Destruction of the Vaping Industry*, 83 Brooklyn L. Rev. 777, 779 (2018) ("The high fees and burdensome regulatory scheme threaten to put small, previously booming businesses and vapor shops out of business for good."), it also prevents them from sharing truthful information to improve the health of those addicted to actual tobacco products, *see, e.g.*, Decl. of Kimberly Manor ¶¶ 3, 13, 14, Dist. Ct. Doc. No. 26-5 (filed May 2, 2019) (Petitioner Moose Jooce has helped hundreds of customers to quit smoking by sharing the

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The Plume Room, that would mean 800 separate product applications, costing according to FDA's estimates tens if not hundreds of millions of dollars. *See* Decl. of Andrea Ramaglia ¶¶ 9–10, D.C. Cir. Doc. No. 1833124.

[6] Many Petitioners are also considered vaping product "manufacturers," a term that FDA interprets remarkably broadly. *See* FDA, Manufacturing (Oct. 6, 2020), https://bit.ly/3jGRPHx ("If you make, modify, mix, manufacture, fabricate, assemble, process, label, repack, relabel, or import any 'tobacco product,' then you are considered a tobacco product 'manufacturer.'"). *Cf.* Decl. of William Green ¶ 10, D.C. Cir. Doc. No. 1833124 (Petitioner Green used to help customers safely assemble vaping equipment but now no longer does so because such action would make him subject to regulation as a "manufacturer" of vaping products).

harm-reduction benefits of vaping as compared to cigarettes, but it no longer provides that information because of the Deeming Rule's default prohibition on such "modified risk" speech).

To challenge the Deeming Rule, different sets of the Petitioners here filed three separate actions under the Administrative Procedure Act.[7] These lawsuits alleged that the Deeming Rule violates the Appointments Clause,[8] which provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States," except that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. Petitioners argued that Associate Commissioner Kux's issuance of the Deeming Rule violated the Appointments Clause because such a significant regulatory action may be taken only by an officer of the United States, yet Ms. Kux was not properly appointed as an officer.

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[7] *Hoban v. FDA*, No. 18-cv-269 (D. Minn.); *Rave Salon, Inc. v. FDA*, No. 18-cv-237 (N.D. Tex.); *Moose Jooce v. FDA*, No. 18-cv-203 (D.D.C.). The *Hoban* and *Rave Salon* actions were transferred to the United States District Court for the District of Columbia, where they were consolidated with *Moose Jooce*. Each set of Petitioners filed notices of appeal, which the D.C. Circuit consolidated. Doc. No. 1832888.

[8] Petitioners also challenged the Deeming Rule's prior restraint on modified risk speech as a violation of the First Amendment. The district court and the D.C. Circuit held that the claim was foreclosed by the latter's ruling in *Nicopure Labs, LLC v. FDA*, 944 F.3d 267 (D.C. Cir. 2019). App. A-10; App. B-20 to B-22. Petitioners do not seek this Court's review of their First Amendment claim.

Although FDA countered that the Associate Commissioner for Policy is a validly appointed inferior officer competent to issue rules, the agency's primary merits defense was that any Appointments Clause defect in the Deeming Rule had been cured by ratification of the FDA Commissioner, who is an officer of the United States appointed by the President with the advice and consent of the Senate, *see* 21 U.S.C. § 393(d)(1).[9] The agency pointed to two purported ratifications.

The first, issued in September 2016 (a few months after Ms. Kux had signed off on the Deeming Rule), came from FDA Commissioner Robert Califf in the form of a nine-page memorandum concerning delegations within FDA. On the last page, Mr. Califf declared: "I hereby ratify and affirm any actions taken by you or your subordinate(s), which in effect involved the exercise of the authorities delegated herein prior to the effective date of this delegation." App. G-16.

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[9] Although this Court often refers to such officers as "principal officers," that term does not appear in the Appointments Clause. It is used elsewhere in the Constitution but the way in which it is employed suggests that there can be only one "principal" officer in each department of the executive branch. *See* U.S. Const. art. II, § 2, cl. 1 ("The President . . . may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . ."). It does not follow, however, that there are only a handful of non-inferior officers in the federal government. As Madison's notes from the Constitutional Convention confirm, there are really three classes of officers: principal officers, "superior" officers, and inferior (or "minute") officers; and only for the last category may Congress vest their appointments in the President alone, the courts of law, or the heads of departments. Steven G. Calabresi & Gary Lawson, *Why Robert Mueller's Appointment as Special Counsel was Unlawful*, 95 Notre Dame L. Rev. 87, 135–38 (2019).

FDA argued that this lone sentence ratified the Deeming Rule.

The second purported ratification, issued nearly three years after the Deeming Rule had been promulgated and more than a year after Petitioners' lawsuits had been filed, came from Commissioner Scott Gottlieb. Unlike Mr. Califf's single-sentence ratification, Mr. Gottlieb's single-paragraph ratification purported specifically to affirm the Deeming Rule. Acknowledging that the Deeming Rule had been "questioned in litigation," Mr. Gottlieb stated that, to "resolve these questions, I hereby affirm and ratify the Deeming Rule." App. F-1. He claimed that his ratification was "based on my careful review of the rule, my knowledge of its provisions, and my close involvement in policy matters relating to this rule and its implementation, as well as its public health importance." *Id.*

Notably, neither Commissioner Califf's nor Commissioner Gottlieb's purported ratification evinced any desire to abandon FDA's entrenched practice of allowing non-officer civil servants—such as the Associate Commissioner for Policy—to issue rules. *Cf.* Angela C. Erickson & Thomas Berry, *But Who Rules the Rulemakers?* 2–3, 35 (2019) (between 2001 and 2018, 98% of regulations promulgated by FDA, totaling some 1,860 rulemakings, were unconstitutionally issued by non-officer career employees).

The government's ratification defense invoked the longstanding rule in the D.C. Circuit that an Appointments Clause challenge must be dismissed if a constitutionally competent officer affirms the challenged action. Under D.C. Circuit precedent, such

an affirmance will be held to have ratified the prior action if the ratifying official conducts an "independent evaluation of the merits," *Intercollegiate Broad. Sys.*, 796 F.3d at 117, using a "detached and considered judgment," *Doolin Sec. Sav. Bank, FSB v. Off. of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998). Although this sounds like a heavy burden for the government, in practice it is quite the opposite—so long as the ratifying official is not "actually biased," a mere "rubberstamp" affirmance will terminate a plaintiff's constitutional claim. *Legi-Tech*, 75 F.3d at 709.

Petitioners replied to the government's defense by contesting the validity of both purported ratifications. As to Commissioner Califf's affirmance, Petitioners argued that, whatever the shortcomings in the D.C. Circuit's theory of ratification, even that court's lax rules for ratification require more than a mere boilerplate affirmation of all previously unauthorized agency activity. As for Commissioner Gottlieb's affirmance, Petitioners' principal attack was that his ratification was invalid because it did not comport with the substantive requirement of reasoned decision-making that the Administrative Procedure Act generally imposes on agency action. *Cf. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'") (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). A corollary of that requirement is that an agency must consider all available and relevant evidence and then explain why its decision is reasonable in light of such

evidence. *See Butte County v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (citing, inter alia, *State Farm*, 463 U.S. at 43). The Gottlieb ratification violated that corollary, Petitioners argued, because it deliberately ignored a substantial body of material pertaining to the health benefits of vaping that had been produced in the three years since the Deeming Rule's issuance. *See* App. F-1 ("I hereby affirm and ratify the Deeming Rule *as of the date it was published in the Federal Register on May 10, 2016*, including all regulatory analysis certifications contained therein.") (emphasis added).[10]

To explain why Commissioner Gottlieb's ratification was subject to the APA's substantive constraints on rulemaking, Petitioners cited this Court's ruling in *Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88 (1994). The FEC

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[10] Outside of the ratification context, it is not unusual for a government decision-maker to take account of post-decisional information when revisiting the propriety of the original action. *See, e.g.*, *Simmons v. Smith*, 888 F.3d 994, 999 (8th Cir. 2018) (observing that the Park Service had discretion on remand to consider new information pertaining to the boundaries of a scenic river area); *Hillsdale Envtl. Loss Prevention, Inc. v. U.S. Army Corps of Eng'rs*, 702 F.3d 1156, 1167 (10th Cir. 2012) (noting that the Corps on remand could rely on new information to determine whether its assessment of a proposed project's environmental impacts was correct); *Shell Chem. Co. v. EPA*, 826 F.2d 295, 298 (5th Cir. 1987) (remanding an EPA rule to allow the agency to take account of data that had arisen since the rule's promulgation); *Safer Chems., Healthy Families v. U.S. EPA*, 791 Fed. Appx. 653, 656 (9th Cir. 2019) (agreeing that on remand EPA had discretion to consider new information pertaining to risk evaluations of toxic substances). That is presumably what FDA would have done had Petitioners prevailed on their Appointments Clause claim and secured a vacatur and remand of the Deeming Rule.

had brought a civil enforcement action against a political action committee for violating campaign-finance laws. The district court held on the merits for the FEC, but the D.C. Circuit, avoiding the merits, ruled for the PAC on the ground that the Federal Election Campaign Act's allowance for two congressionally appointed non-voting members to serve on the FEC violated the Appointments Clause. *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826–27 (D.C. Cir. 1993). The FEC then sought review in this Court but did not obtain the Solicitor General's required approval. After the time for filing a petition for writ of certiorari had expired, the Solicitor General attempted to ratify the FEC's cert petition. Whether that ratification was valid was, the Court observed, "at least presumptively governed by principles of agency law, and in particular the doctrine of ratification." *NRA Political Victory Fund*, 513 U.S. at 98. The Court then reviewed the common law principles governing ratification, giving special attention to the rule that a ratification is effective only when the principal has the authority to do the thing to be ratified both at the time of the original action and at the time of ratification. *Id.* at 98–99 (citing, inter alia, Restatement (Second) of Agency § 90 (1958)). Because the period for filing a cert petition had run when the Solicitor General attempted to ratify, the cited requirement for ratification could not be satisfied. 513 U.S. at 98 ("His authorization simply came too late in the day to be effective.").

Just as in *NRA Political Victory Fund*, so too here, Petitioners contended. That is, just as the Solicitor General lacked the authority to ratify the FEC's filing at the time of his attempted affirmance, so too did the FDA Commissioner lack the authority to affirm the promulgation of the Deeming Rule at the time of his attempted ratification, because he did not adhere to the APA's command for reasoned decision-making. In other words, the Commissioner simply did not have the authority to issue a Deeming Rule in 2019 that ignored a wealth of new studies[11]—at least one sponsored by FDA itself[12]—bearing directly on the question of whether and how to regulate vaping products.

The district court, however, was of a different mind, holding on summary judgment that both the Califf and Gottlieb ratifications were sufficient because (in part) "[a]gency ratifications . . . are not governed by standard APA rules." App. B-16.

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[11] *See, e.g.*, Peter Hajek, *et al.*, *A Randomized Trial of E-Cigarettes versus Nicotine-Replacement Therapy*, 380 New Eng. J. Med. 629 (2019), https://bit.ly/2ZrfhiF; David T. Levy, *et al.*, *Potential Deaths Averted in USA by Replacing Cigarettes with E-cigarettes*, 27 Tobacco Control 18 (2018), https://bit.ly/3pzMJxO; Lion Shahab, *et al.*, *Nicotine, Carcinogen, and Toxin Exposure in Long-Term E-Cigarette and Nicotine Replacement Therapy Users: A Cross-sectional Study*, 166 Annals of Internal Med. 390 (2017), https://bit.ly/2NFXIbK; Shu-Hong Zhu, *et al.*, *E-cigarette Use and Associated Changes in Population Smoking Cessation: Evidence from US Current Population Surveys*, 2017 BMJ 358, https://bit.ly/3bdzoWY.

[12] *See* Maciej L. Goniewicz, *et al.*, *Comparison of Nicotine and Toxicant Exposure in Users of Electronic Cigarettes and Combustible Cigarettes*, JAMA Network, at 13 (Dec. 14, 2018), https://bit.ly/2x9lv8H.

Petitioners appealed, renewing their argument against the boilerplate Califf ratification as well as their APA-based attack against the Gottlieb ratification. They also added an objection grounded in another common law limitation on ratification discussed in *NRA Political Victory Fund*, *viz.*, a ratification is not valid if it would deprive a third party of a right or defense. *See NRA Political Victory Fund*, 513 U.S. at 98–99. Commissioner Gottlieb's affirmance was infirm under this limitation, Petitioners explained, because it would deprive them of their right to obtain an adjudication of the constitutionality of the Deeming Rule through their already-filed APA cause of action.

The D.C. Circuit nevertheless affirmed the district court's judgment in favor of FDA. The court held that, whatever the validity of the Califf ratification, the Gottlieb ratification was sufficient. Even if the latter had the effect of depriving Petitioners of a right or defense, such objection had already been overruled in *Legi-Tech*, which upheld a ratification even though it had come after the defendant had raised its Appointments Clause challenge in litigation. App. A-6 to A-7. As for Petitioners' APA argument, the court held that the normal rules of administrative decision-making simply do not apply to ratifications. *See* App. A-7 to A-8.

REASONS FOR GRANTING CERTIORARI

I.

The D.C. Circuit's Ratification Defense to Appointments Clause Challenges Conflicts With This Court's Precedent

The D.C. Circuit's ratification defense conflicts in at least two ways with how this Court, most prominently in *NRA Political Victory Fund*, has employed ratification to test the sufficiency of attempts by government officials to affirm otherwise invalid action taken by others.

First, the D.C. Circuit's ratification defense waters down *NRA Political Victory Fund*'s adoption of a key common law limitation on the authority of a principal to ratify—namely, that the principal have the authority to do the act both originally and at the time of ratification. *See NRA Political Victory Fund*, 513 U.S. at 98. The D.C. Circuit narrowly construes this limitation on ratification as presenting purely a question of timing. *Doolin*, 139 F.3d at 213 ("The timing problem posed in *NRA* is not present here. No statute of limitations would have barred [the ratifying official] from reissuing the Notice of Charges himself and starting the administrative proceedings over again."). The court's ratification defense thereby dramatically narrows *NRA Political Victory Fund*'s "power" proviso, according to which a principal may ratify that which he could have done at the time his agent attempted to, *provided* that he has the authority when ratifying to do the original act.[13] *Cf.*

[13] By restricting *NRA Political Victory Fund* to questions of timing, the D.C. Circuit invites the complete erasure of that decision's limitation on the authority to ratify. *See Consumer Fin.*

NRA Political Victory Fund, 513 U.S. at 98 ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.") (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1874)) (emphasis added by *NRA Political Victory Fund*).

This narrowing suggests that the D.C. Circuit is uncomfortable with using common law principles of ratification in the public law context. Yet this Court has never hesitated to apply such principles, or those of agency law generally, to elucidate the legal relationships among government officials.[14] An excellent example is *NRA Political Victory Fund* itself, which used the common law of ratification to measure the validity of the acts of government officials.

Prot. Bureau v. Navient Corp., No. 3:17-CV-101, 2021 WL 134618, at *11-*15 (M.D. Penn. Jan. 13, 2021) (using the doctrine of equitable tolling to reject a statute-of-limitations objection to an agency's ratification).

[14] *See, e.g.*, *United States v. Beebe*, 180 U.S. 343, 354 (1901) ("Where an agent has acted without authority and it is claimed that the principal has thereafter ratified his act, such ratification can only be based upon a full knowledge of all the facts upon which the unauthorized action was taken. This is as true in the case of the government as in that of an individual."); *Pickering v. Lomax*, 145 U.S. 310, 314 (1892) ("[W]e know of no reason why the analogy of the law of principal and agent is not applicable here, *viz.*, that an act in excess of an agent's authority, when performed, becomes binding upon the principal, if subsequently ratified by him. The treaty does not provide how or when the permission of the president shall be obtained, and there is certainly nothing which requires that it shall be given before the deed is delivered."); *Marsh v. Fulton County*, 77 U.S. 676, 684 (1870) (the defendant's board of supervisors "could not, therefore, ratify a subscription without a vote of the county, because they could not make a subscription in the first instance without such authorization").

Nothing in that ruling indicates that the Court viewed the defect in the Solicitor General's attempted ratification as necessarily about timing. Rather, the Court's inquiry was focused on authority; it just so happened that the Solicitor General's lack of authority in that case was the result of the passage of time.[15]

A second way in which the D.C. Circuit's ratification defense departs from *NRA Political Victory Fund* is its misperception of the relevant frame of analysis. Below, the court of appeals was untroubled by the fact that the 2019 Gottlieb ratification was expressly limited to the material contained in the 2016 record and thus deliberately ignored post-2016 evidence bearing directly on the Deeming Rule. The court acknowledged the APA obligation that "administrative officials must consider new evidence in order to make non-arbitrary, reasoned decisions." App. A-7. But that command was supposedly inapplicable because "the rulemaking record closed in 2016 and consequently Commissioner Gottlieb had no such obligation to consider new evidence in 2019." *Id.*

The court's conclusion begs the question. The essential purpose of ratification is to rectify an otherwise *invalid* action. After all, ratification is "a cure for the lack of authorization, or a substitute for authorization," for it "presupposes that there was no

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[15] The "power" of the Solicitor General to request an extension of time in which to file a cert petition was irrelevant because his attempted ratification came more than 60 days after the FEC's petition had come due. *NRA Political Victory Fund*, 513 U.S. at 98. *Cf.* 28 U.S.C. § 2101(c) ("A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.").

authority." 1 Floyd R. Mechem, A Treatise on the Law of Agency § 348, at 261 (2d ed. 1914). Hence, to determine whether a ratification is valid, one must assume that the prior act is deficient and therefore is in need of authorization to be made effective.

For that reason, the Court's ratification analysis in *NRA Political Victory Fund* did not assume that the FEC's cert petition was adequate. Rather, the Court's analysis proceeded on the opposite ground—that the FEC's cert petition had not been validly filed when originally submitted. Only on that basis did the Court then determine whether the Solicitor General's approval of the FEC's otherwise unauthorized petition made the latter authorized and timely. *NRA Political Victory Fund*, 513 U.S. at 98 ("We must determine whether this 'after-the-fact' authorization relates back to the date of the FEC's unauthorized filing so as to make it timely. We conclude that it does not."). A faithful adherence to this analytical approach would have led the D.C. Circuit below to review Commissioner Gottlieb's attempted ratification on the assumption that the Deeming Rule had never been issued, that the rulemaking record therefore had not closed, and accordingly that the Commissioner was obliged to take into account all of the relevant data available to him up to that point.[16] *See generally Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555

[16] This is not to say that every ratification of rulemaking must be accompanied by a fresh review and "rational connection" analysis of all relevant evidence. For example, had Commissioner Califf in September, 2016, competently attempted to ratify the Deeming Rule, he might quite reasonably have assumed, consistent with the APA, that the record assembled as of May, 2016, was still comprehensive.

(9th Cir. 1989) ("The 'whole' administrative record, therefore, consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." (emphasis removed; citation omitted)), *cited in In re United States*, 138 S. Ct. 371, 372 (2017) (Breyer, J., dissenting from grant of stay). That obligation necessarily follows from (i) the substantive requirement of reasoned decision-making that applies to all agency rule-making,[17] and (ii) *NRA Political Victory Fund*'s recognition that substantive constraints on a principal's power to take action are relevant when measuring the validity of the ratification of official acts.[18]

These conflicts between the D.C. Circuit's ratification defense and this Court's employment of ratification also point to a more fundamental problem with using ratification to thwart judicial review of alleged violations of the Appointments Clause. Because it is a species of agency law, ratification requires that the act to be ratified is one not only that the principal could have done in the first instance, but also one that the principal could have authorized an agent to do on the principal's behalf. *See* Restatement

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[17] *See* Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 Tex. L. Rev. 207, 238 (1984) (the "generally applicable scope of substantive review is defined by the APA's command to set aside agency actions that are 'arbitrary, capricious, [or] an abuse of discretion'" and is explicated by the "hard look" approach of *State Farm*, 463 U.S. at 43).

[18] That obligation was all the more critical here given FDA's admission that the scientific justification for the Deeming Rule, even as of 2016, was hardly decisive. *See* 81 Fed. Reg. at 29,010 (acknowledging "the uncertainty regarding the positive or negative impact on public health from [vaping] products").

(Second) of Agency § 84 cmt. a ("*If . . . one can create a power in another to affect his rights by doing an act on his account*, and such an act is purported to be done on his account by the other, or, if an act of service is intended to be done on his account, the act is ratifiable.") (emphasis added). But the very nature of an Appointments Clause claim is to contest the constitutional authority of a government official to take certain action, even if that official purported to act on behalf of a constitutionally competent officer. Put another way, either there is an Appointments Clause violation, in which case there is no valid principal-agent relationship that can sustain a ratification, or there is no Appointments Clause violation, in which case ratification is irrelevant. This irreconcilability between the traditional understanding of ratification, employed in *NRA Political Victory Fund*, and how that doctrine is used by the D.C. Circuit, thus further emphasizes the need for this Court's review.

II.

The D.C. Circuit's Ratification Defense to Appointments Clause Challenges Conflicts With Decisions of the Ninth Circuit

The D.C. Circuit's ratification defense conflicts with decisions by the Ninth Circuit Court of Appeals applying that doctrine.

In *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), the Bureau brought a civil enforcement action against an attorney for alleged unfair and deceptive practices regarding federal mortgage relief. The lawsuit was initiated by the Bureau's director, who had been appointed

without Senate confirmation while the Senate was in a pro-forma recess. Shortly thereafter, this Court held that such recess appointments were invalid. *Noel Canning*, 573 U.S. at 556. The President then properly appointed the same director, who in turn ratified all of the actions that he had taken under his improper recess appointment, including the filing of the action against Gordon. *See Gordon*, 819 F.3d at 1185–86.

Citing this Court's ruling in *NRA Political Victory Fund* as well as the D.C. Circuit's decisions in *Legi-Tech* and *Doolin*, the Ninth Circuit upheld against Gordon's Appointments Clause objection the director's self-ratification. The court acknowledged the now familiar principle that a ratification can be valid only if the principal has the authority to do the act to be ratified at the time of ratification as well as originally. *Gordon*, 819 F.3d at 1191. Although the director was unable to satisfy the latter requirement because of *Noel Canning*, his ratification could still be upheld because (i) the Bureau was at all times authorized to initiate the enforcement action, and (ii) the Bureau could ratify the action's filing through the affirmance of its (properly appointed) director. *Gordon*, 819 F.3d at 1192 ("Because the CFPB had the authority to bring the action at the time Gordon was charged, Cordray's August 2013 ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies.") (citing, inter alia, Restatement (Second) of Agency § 93(3) (1958) ("The affirmance can be made by an agent authorized so to do.")). *Accord Consumer Fin. Prot. Bureau v. Seila Law LLC*, 984 F.3d 715, 718–19 (9th Cir. 2020) (upholding a ratification against an *NRA Political Victory Fund* objection in part because the Bureau as ratifying entity had the constitutional authority to

take the ratified action both originally and at the time of ratification).

The Ninth Circuit's approach to ratification cannot be reconciled with that taken by the D.C. Circuit. For the Ninth Circuit, it is not enough that a ratifying official be unconstrained by any "timing" problem; the official must also possess the substantive authority to take the act. In contrast, for the D.C. Circuit, so long as the ratifying official still has the time to take anew the original action, the ratification will be upheld even if the act cannot be squared with the substantive limitations that would normally govern the act to be ratified. The Ninth Circuit's broader (and correct) understanding of ratification and *NRA Political Victory Fund* therefore conflicts with the D.C. Circuit's.

III.

The Propriety of the D.C. Circuit's Ratification Defense Presents the Important Federal Issue of the Extent to Which the Judiciary Should Diligently Enforce the Appointments Clause

The D.C. Circuit's ratification defense is pernicious because it gives agency officials virtually no incentive to eliminate entrenched practices that are contrary to the Appointments Clause. *See* Kent Barnett, *The Consumer Financial Protection Bureau's Appointment With Trouble*, 60 Am. U. L. Rev. 1459, 1484 (2011) ("If such ratification were permissible, the Executive Branch would have little reason to comply with the Appointments Clause for either principal or inferior officers."). That executive branch officials may be happy with a loosening of the Appointments Clause in return for a blurring of official accountability is no

reason for the courts to approve the exchange.[19] *See Free Enterp. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) ("Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether the encroached-upon branch approves the encroachment.") (quotations and citations omitted). If anything, maintenance of the separation of powers requires heightened judicial vigilance. *See generally Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a structural safeguard . . . , establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict."). Such enhanced supervision is necessary to ensure that federal

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[19] An executive order issued at the end of the previous administration and recently revoked by the current administration generally required all federal agency rules to be promulgated by politically accountable officials, *i.e.*, "senior appointees." *See* Exec. Order No. 13979, § 2(a)(i), 86 Fed. Reg. 6813, 6813 (Jan. 18, 2021). Although the order went a long way to remedying the systemic Appointments Clause violations exemplified by this litigation, it did not fully solve the problem. A "senior appointee" included inferior officers, but Petitioners' main contention in this litigation has been that agency rulemaking may be finalized only by non-inferior officers. *See* Appellants' Opening Br. 53–57, D.C. Cir. Doc. No. 1840563. In some respects, however, the order went further than what Petitioners here seek—for example, the order would have required even notices of proposed rulemaking to be approved by a "senior appointee." Exec. Order No. 13979, § 2(a)(ii), 86 Fed. Reg. at 6813. In any event, the order's emphasis on political accountability throughout the rulemaking process supported Petitioners' view that rubberstamp ratification of regulations is particularly inappropriate.

officials, acting as fiduciaries of the People, honor their obligations to the same by faithfully adhering to the divisions of power that the People's Constitution ordains. *Metro. Wash. Airports Auth.*, 501 U.S. at 272. *Cf*. Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 Notre Dame L. Rev. 1475, 1493 (2018) ("Congress . . . has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries.").

To see the bad behavioral effects of the D.C. Circuit's ratification defense, one need look no further than FDA. A recent study of that agency's rulemaking practices over the last two decades reveals that career employees, not officers of the United States, routinely issued regulations, some of which (like the Deeming Rule) have resulted in substantial economic and social harm. *See* Erickson & Berry, *supra*, at 23 ("Twenty-five rules were issued unconstitutionally with an economic impact of more than $2.5 billion."). Yet when its unconstitutional practice of delegating significant federal authority to non-officers was called out in litigation, FDA took no action to abandon the practice. Instead, the agency relied upon the D.C. Circuit's ratification defense to avoid an adjudication of its unconstitutional addiction until, on the eve of appellate oral argument, the Secretary of Health and Human Services forced the agency—for the moment—to abandon the habit. *See supra* n.3. Thus, by virtue of the ratification defense, the D.C. Circuit not only ignores this Court's admonition that the "[s]eparation of powers, a distinctively American political doctrine, profits from the advice authored by a distinctively American poet: Good fences make good neighbors."

Plaut, 514 U.S. at 240. It also gives administrative officials a power that this Court has generally denied to a strategic repeat-defendant—the ability to get out of a case scot-free "simply by ending its unlawful conduct once sued,'" yet "then pick up where [it] left off, repeating this cycle until [it] achieves all [its] unlawful ends." *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)).[20]

Another lamentable consequence of the ratification defense is its retarding of the development of Appointments Clause case law, a phenomenon that in an analogous context has been called "constitutional stagnation." Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 6 (2015). As the D.C. Circuit reaffirmed below, when an official successfully ratifies an action, the case is over and the courts do not address whether the original act violated the Appointments Clause. *See* App. A-9 to A-10. Thus, thanks to ratification, it remains undecided whether agency rules may be issued only by non-inferior officers; or whether persons selected for the career Senior Executive Service are *eo ipso* validly appointed inferior officers; or whether mere "approbation" by a head of department is sufficient to appoint an inferior officer selected by someone else. And because these issues have not been ruled upon, government actors likely will persist in decision-making practices that

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[20] Because the D.C. Circuit considers ratification to resolve an Appointments Clause claim on the merits, litigants like Petitioners cannot rely upon mootness exceptions like the voluntary cessation doctrine to combat strategic litigation maneuvers such as those described in the text. App. A-9 to A-10.

may be unconstitutional. Such an unfortunate result—which conflicts with this Court's policy of encouraging litigants to contest violations of the Appointments Clause, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) ("[O]ur Appointments Clause remedies are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create '[]incentive[s] to raise Appointments Clause challenges.'") (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995))—can be readily avoided by this Court's rejection of the D.C. Circuit's ratification defense.

CONCLUSION

The petition for writ of certiorari should be granted.

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Respectfully submitted,

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