No. 18-60302

In the United States Court of Appeals for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, Individually,

Defendants-Appellants

On Appeal from the United States District Court for the Southern District of Mississippi
Case No. 3:16-cv-00356-WHB-JCG

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The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of any defendant-appellant or that own 10% or more stock in any defendant-appellant.

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Other Authorities

Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163 (2011) 8

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The President's Authority to Remove the Chairman of the Consumer Product Safety Commission, 25 Op. O.L.C. 171 (2001) 8

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Recent Legislation, Dodd-Frank Act Creates the Consumer Financial Protection Bureau, 124 Harv. L. Rev. 2123 (2011) 12

S. Rep. No. 105-250 (1998) 22

Sutherland Statutes & Statutory Construction (7th ed. 2009) 32

U.S. Dep't of Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* (June 2017) 12

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INTRODUCTION

All American demonstrated in its opening brief that under constitutional first principles and Supreme Court precedent, the Consumer Financial Protection Bureau ("CFPB") is unconstitutionally structured. Since then, this Court, relying on the same arguments All American presented, held that the structure of the Federal Housing Finance Agency ("FHFA")—which is structured almost identically to the CFPB—violates Article II and the separation of powers. *Collins v. Mnuchin*, 896 F.3d 640, 674–75 (5th Cir. 2018). That decision reinforces the CFPB's unconstitutionality.

In fact, the CFPB's unconstitutionality is even more obvious than that of the FHFA because, unlike the FHFA, "[t]he Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy" and "unilaterally implements and enforces 19 federal consumer protection statutes." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).[1] "Indeed,

[1] All American refers to the dissenting opinions of Judges Henderson and Kavanaugh in *PHH* as "*Henderson Op.*" and "*Kavanaugh Op.*," with page citations to the reporter version.

other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power." *Id.* at 171.

As the United States recently informed this Court, *Collins* is "correct" for the same reasons the United States gave when it "urged" that the CFPB was unconstitutional in *PHH*. U.S. Opp. to Pet. for Reh'g En Banc at 3, *Collins v. Mnuchin*, No. 17-20364, Doc. 514640966 (5th Cir. Sept. 13, 2018) ("U.S. Opp."). *Collins* applies equally to "the similar question whether for-cause removal protection for the single Director of the CFPB violates the separation of powers." *Id.* at 13.

The CFPB attempts to mask its constitutional deficiencies through the Acting Director's purported "ratification." But this enforcement action cannot be ratified because the CFPB is and always has been unconstitutional. The purported ratification here also fails under *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994)—which the CFPB all but admits by asking this Court to apply a different ratification test and equitable tolling. Finally, if this Court simply severs the for-cause removal provision, it will transform the CFPB into something that Congress never

would have enacted: an executive agency with powers previously administered by independent agencies now in the President's hands, but independently funded, and thus immune from congressional oversight. Although a ruling for All American is already compelled by existing Supreme Court precedent, *Collins* is additional authority for that result. This Court should reverse the district court without remanding.

ARGUMENT

I. The CFPB Is Unconstitutionally Structured.

First principles, the Supreme Court's precedents, and this Court's recent decision in *Collins* all lead to the same conclusion: The CFPB's structure is unconstitutional.

A. The CFPB's structure violates the Constitution.

The CFPB is a government unto itself. Its Director "is no less than the czar of consumer finance," and "[i]n that realm, he is legislator, enforcer *and* judge," without any oversight by the President or Congress; "'the very definition of tyranny.'" *Henderson Op.* 154 (quoting *The Federalist* No. 47, at 324). Under Supreme Court precedent, the President has "the power to oversee executive officers through removal," and "the

Legislature has no right to diminish or modify" this "Presidential oversight." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492, 500 (2010). The Supreme Court has allowed only "limited restrictions" on the President's removal power, and then only "under certain circumstances." *Id.* at 483, 495. But novel structures that further insulate executive officers from the President's control and diminish political accountability are unconstitutional. *Id*. at 486. The CFPB fails these standards.[2]

Not only is the CFPB unconstitutional under existing Supreme Court precedent, this Court's recent holding in *Collins* that the FHFA is unconstitutionally structured further demonstrates the CFPB's invalidity. The CFPB's vast authority over the entire "U.S. economy," *Kavanaugh Op.* 165, makes it an even more extreme case than the FHFA. No other single-Director independent agency has ever "exercis[ed] [such] substantial" authority. *Id*. "The concentration of massive, unchecked power" in the CFPB's Director makes it "unique among independent

[2] All American has petitioned this Court to hear this case en banc in the first instance to secure uniformity of this Court's decisions and guarantee that the parties receive the benefit of this Court's plenary consideration. ECF No. 514596535 (Aug. 13, 2018). Given the exceptional importance of this issue, this Court should grant that petition, which the CFPB does not oppose.

agencies." *Id.* at 172–73. "Indeed, other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166. Contrary to the CFPB's contention (at 25), *Collins* did not "conclude[]" that the CFPB was constitutionally structured. It simply pointed out several differences between the CFPB and the FHFA. 896 F.3d at 672–74. But the similarities are far more relevant. In fact, *Collins* relies most heavily on the *dissents* in *PHH*, citing them twenty-two times. Thus, the CFPB's structure is invalid not only under Supreme Court precedent, but also under any reasonable reading of *Collins*.

Collins analyzed the "combined effect" of five factors in determining whether an agency is so "insulated" that "the Executive Branch cannot control [it] or hold it accountable":

1. "for-cause removal restriction";
2. "single-Director leadership structure";
3. "lack of a bipartisan leadership composition requirement";
4. "funding stream outside the normal appropriations process"; and
5. the "oversight role" of other bodies.

896 F.3d at 666. Applying these factors, *Collins* concluded that the FHFA was unconstitutionally structured. *A fortiori*, the same result obtains here, as demonstrated by the CFPB's brief, which largely takes issue with matters *Collins* already decided. *See*, *e.g.*, CFPB Br. 26–32, 36–37, 38–40, 43. Under *Collins*, the CFPB is unconstitutionally insulated from the President, from Congress, and from democratic accountability.

1. ***For-cause removal.*** Like the FHFA Director, the CFPB Director is insulated from Presidential control by a for-cause removal restriction. 12 U.S.C. § 5491(c)(3). "Limiting the President to only 'for cause' removal dulls an important tool for supervising the [CFPB] because the agency is protected from Executive influence and oversight." *Collins*, 896 F.3d at 666 (footnote omitted); *see also* Appellants' Opening Br. ("AOB") 11–27.

The CFPB contends that the President has more authority over the Acting Director of the CFPB than over the FHFA's Acting Director. CFPB Br. 33–34 (citing *Collins*, 896 F.3d at 667 n.199). But the statutory requirement that "the President shall designate" one of the three FHFA deputy directors "to serve as acting Director" in the FHFA Director's absence, 12 U.S.C. § 4512(f), is *nearly identical* to the CFPB's provision that

the deputy director "shall" automatically "serve as acting Director in the absence or unavailability of the Director." 12 U.S.C. § 5491(b)(5). If anything, the President has *more* influence over the FHFA's Acting Director, because he can choose among three options. And Congress intended the CFPB to be just as much an "independent agency" as the FHFA. *Collins*, 896 F.3d at 656. Thus, whatever goes for the FHFA regarding the removability of the Acting Director and the applicability of the Federal Vacancies Reform Act ("FVRA") must apply equally to the CFPB.

2. *Single Director.* Also like the FHFA, the CFPB is headed by a single Director, 12 U.S.C. § 5491(b)(1), which "further insulates the Agency from presidential influence and oversight." *Collins*, 896 F.3d at 667. "Traditionally, independent agencies are governed by multi-member bodies"; this structure allows the President to "influence the agency through the power 'to designate the chairs of the agencies and to remove chairs at will from the chair position.'" *Id.* (quoting *Kavanaugh Op.* 166). But the CFPB "has no chair." *Id.* at 668. Instead, "a President may be stuck for years with a [CFPB] Director who was appointed by the prior President and who vehemently opposes the current President's agenda."

Id. (alteration omitted). "This dramatic and meaningful difference vividly illustrates that the single-Director structure diminishes Presidential power more than traditional multi-member independent agencies do." *Id.* (ellipsis omitted).

Contrary to the CFPB's assertion (at 42), the President may select and change the chair of agencies such as the Federal Reserve and the Consumer Product Safety Commission at will. *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 Colum. L. Rev. 1163, 1176 (2011) ("[O]n the face of the statutes there is no obstacle to the President removing [the Federal Reserve Chair and Vice-Chair] from their leadership posts."); *The President's Authority to Remove the Chairman of the Consumer Product Safety Commission*, 25 Op. O.L.C. 171, 171 (2001) ("[T]he Chairman of the CPSC serves at the pleasure of the President."). The CFPB is also wrong about the FEC's Chair, CFPB Br. 42, who exercises substantial control over the FEC's agenda, *see* 47 U.S.C. § 155(a).

3. ***Bipartisan balance.*** The FHFA and the CFPB equally lack bipartisan balance. AOB 24–25. "A bipartisan leadership structure gives the President allies" and "he often can secure a majority of the leadership on the governing board within the first two years of his term." *Collins*,

896 F.3d at 668. But the CFPB's "single Director is from a single party." *Id.* (quoting *Henderson Op.* 148). "Given the Director's fixed five-year term, the opposing party may dominate the Agency for the duration of the President's term." *Id.* "Plus, bipartisan leadership requirements enhance Executive Branch oversight" because "[p]arty members on an agency's governing board are 'likely to dissent if the agency goes too far in one direction,'" but at both the CFPB and the FHFA, "no one is there to sound the alarm." *Id.* (ellipsis omitted). The CFPB has no response other than to criticize *Collins* itself. CFPB Br. 38–40.

4. ***Funding.*** The CFPB's independent funding further demonstrates its unconstitutionality. AOB 42–45. "An agency's funding stream bears on presidential influence," because under "the normal appropriations process, the President can veto a spending bill containing appropriations for the agency." *Collins*, 896 F.3d at 668–69. Also, "the President submits an annual budget to Congress, which he uses 'to influence the policies of independent agencies.'" *Id.* at 669 (quoting *Henderson Op.* 147). But because the CFPB, like the FHFA, is "outside the normal ap-

propriations process, the President loses leverage over the agency's activities." *Id*. The CFPB, like the FHFA, "stands outside the budget" and is therefore "immune from presidential control." *Id*.

The CFPB tries to distinguish its funding because it is "capped" at 12% of the Federal Reserve's operating expenses. CFPB Br. 35–36. But currently, that amounts to more than $600 million,[3] more than three times the FHFA's budget.[4] Moreover, the FHFA's budget has held steady over the years,[5] whereas the CFPB's has swelled over time and will continue to balloon.[6] And if that is not enough, the CFPB can partially self-

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[3] CFPB, *Financial Report of the CFPB* 54 (Nov. 15, 2017), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_financial-report_fy17.pdf.

[4] FHFA, *2017 Report to Congress* 55 (May 23, 2018) ($199.5 million), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_2017_Report-to-Congress.pdf.

[5] FHFA, *2016 Report to Congress* 70 (June 15, 2017) ($199.1 million), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_2016_Report-to-Congress.pdf; FHFA, *2015 Report to Congress* 67 (June 15, 2016) ($199.7 million), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA_2015_Report-to-Congress.pdf.

[6] CFPB, *Annual Performance Plan and Report* 2 (Mar. 2018) (for Fiscal Year 2018, CFPB may demand up to $663 million), https://s3.amazonaws.com/files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy18.pdf.

fund from enforcement actions such as this one. 12 U.S.C. § 5497(d)(2).

Nor is the CFPB's funding more insulated from political oversight than the FHFA's. The CFPB points to the requirement that it send annual reports to Congress, *see* CFPB Br. 35–36 (citing 12 U.S.C. § 5497(e)(4)), but the FHFA is subject to a substantially similar mandate, *see* 12 U.S.C. § 4521. Moreover, the requirement has little practical effect for the CFPB because, unlike the FHFA, the CFPB's funds "shall not be subject to review by [Congress's] Committees on Appropriations," 12 U.S.C. § 5497(a)(2)(C). The CFPB also wrongly asserts that the FHFA is not "subject" to the requirement that it report to the Office of Management and Budget. CFPB Br. 36 (citing 12 U.S.C. § 5497(a)(4)(A)). In fact, the FHFA is subject to a *nearly identical* provision. *See* 12 U.S.C. § 4516(a)(g)(1).

5. ***Executive Branch Control.*** Finally, as with the FHFA, "[n]o statutory provision provides for formal Executive Branch control over the [CFPB's] activities." 896 F.3d at 669. It is true that *Collins* stated in dicta that the Financial Stability Oversight Council ("FSOC") "can influ-

ence the CFPB's activities," *id.*, by "set[ting] aside a final regulation prescribed by the Bureau," 12 U.S.C. § 5513(a).[7] This provision, however, applies only to formal regulations 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." *Id.* And FSOC can exercise this authority only if two-thirds of its members vote to set the regulation aside. *Id.* § 5513(c)(3)(A); *see Kavanaugh Op.* 172 (this is "a standard unlikely to be met in practice in most cases"); *Recent Legislation, Dodd-Frank Act Creates the Consumer Financial Protection Bureau*, 124 Harv. L. Rev. 2123, 2129 (2011) ("[FSOC's] high standard for vetoing regulations ... will be difficult to establish."). But the majority of FSOC's voting members head independent agencies—including the FHFA Director and even *the CFPB Director himself*—and are themselves unaccountable to the President. 12 U.S.C. § 5320(b)(1). FSOC thus has very little influence over the CFPB, and the President has almost none at all. For this reason, *Collins* rightly acknowledged that "[s]ome question whether the

[7] Not only was *Collins*'s discussion of FSOC dicta, it also appears that the Court did not receive the benefit of adversarial briefing on the issue.

FSOC is a 'meaningful substitute check' on the CFPB's actions." 896 F.3d at 670 n.233 (quoting *Henderson Op.* 159).

Further, FSOC's narrow authority has no relevance here, because no regulation is at issue. FSOC has zero influence on the CFPB when it "formulates policy through an enforcement action rather than rulemaking," something the CFPB notoriously does "a lot." *Henderson Op.* 159. The CFPB has "[e]xcessive[ly] reli[ed] on enforcement actions, rather than rules and guidance, to regulate conduct." U.S. Dep't of Treasury, *A Financial System That Creates Economic Opportunities: Banks and Credit Unions* 82–87 (June 2017). In particular, "the CFPB has initiated no rulemaking to explain to the regulated public, ex ante, what the agency will deem 'an unfair, deceptive, or abusive act or practice'"—the very provision at issue in this enforcement action—instead relying on "its know-it-when-we-see-it approach." *Henderson Op.* 159 (citing 12 U.S.C. § 5531(a)). Even FSOC's attenuated power is useless in these circumstances. "As far as [FSOC] is concerned, then, the CFPB can break the law or abuse its power as long as it does so (1) in an enforcement action or (2) in a regulation that does not threaten national financial ruin." *Id.*

Moreover, the CFPB provides the blueprint to strip the President of nearly all his executive power. *See* AOB 26–27. While the CFPB purports to preserve Presidential authority over "national defense, international relations, [and the] pardon power," CFPB Br. 32, everything else is apparently up for grabs. In fact, the CFPB's *amici* all but declare that Congress is free to make Treasury an independent agency. Members of Cong. Br. 8; Scholars' Br. 4–12. Under the CFPB's argument, Congress could convert Treasury, Interior, Agriculture, Commerce, Labor, Health and Human Services, Housing and Urban Development, Transportation, Energy, and Education into separate self-perpetuating mini-governments, all headed by single Directors and unaccountable to the President or Congress. In fact, what's to stop Congress from aggregating all of those departments into a single independent "Department of Finance," headed by one unaccountable and independently funded "Finance President"? As the United States put it, "there would be no rational limiting principle if *Humphrey's Executor* were extended beyond multi-member boards to single-headed agencies," and the CFPB's argument "could threaten to swallow Article II's general rule even for Cabinet officers like the Secretary of the Treasury or Labor." U.S. Opp. 14–15.

The CFPB assures this Court that "the President must have at-will authority to remove Cabinet officers." CFPB Br. 32. But "Cabinet officers," under the CFPB's circular reasoning, means nothing more than an agency head that Congress has not (yet) chosen to make independent. The CFPB's theory ensures only that a few officers like the Secretaries of State and Defense will remain in the Cabinet. The Constitution provides more protection than that.

* * *

Thus, when measured purely in terms of insulation from Presidential control, the CFPB's structure is at least as unconstitutional as the FHFA's. But viewed holistically, the CFPB is far worse. Unlike the FHFA, the CFPB has vast legislative, prosecutorial, and adjudicative power over a huge swath of the economy and over private citizens. AOB 40–41. In fact, the FHFA in *Collins* recently stated in its petition for en banc rehearing that, "[t]o the extent there are relevant distinctions between FHFA and CFPB, those distinctions cut the other way," because of the "'massive' and 'enormous' scope of executive law enforcement power vested in the CFPB, including enforcement of 19 consumer protection

statutes against a vast swath of industry and 'impos[ing] fines and penalties on private citizens.'" FHFA Pet. 14 n.3, *Collins v. Mnuchin*, No. 17-20364, Doc. 514623693 (5th Cir. Aug. 30, 2018) (quoting *Kavanaugh Op.* 165, 171, 175). Denying Presidential control over the CFPB deprives the Executive Branch of its power to take care that the laws be faithfully executed to a much greater extent than the FHFA, while at the same time placing far more power over private individuals in the hands of a single unaccountable Director.

Thus, viewed under the Supreme Court's precedents independent of *Collins*, the CFPB's structure violates the Constitution. And when analyzed under *Collins*, the CFPB's constitutional infirmities are even more obvious.

B. The Supreme Court's precedents do not sanction the CFPB's structure.

The CFPB also appeals to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). But, as All American explained in its opening brief, those precedents are no help to the CFPB. Moreover, *Collins* already rejected the agency's interpretation of those cases.

First, "*Humphrey's Executor* did not grant Congress blanket authority to create independent agencies whose leaders are protected from at-will removal." *Collins*, 896 F.3d at 670. Instead, *Humphrey's Executor* "established two demarcations regarding the President's oversight power: The President has 'unrestrictable power to remove purely executive officers,' and Congress may limit the President's power to remove commissioners of an independent agency that is 'wholly disconnected from the executive department,'" but "[b]etween those poles lies a 'field of doubt.'" *Id.* at 671 (quoting *Humphrey's Ex'r*, 295 U.S. at 630, 632); *see* U.S. Opp. ("*Humphrey's Executor* is a 'limited' exception to the 'general' rule that the President must have at-will removal authority over principal officers.") (quoting *Free Enter. Fund*, 561 U.S. at 495, 513).

"[C]entral to the [*Humphrey's Executor*] Court's decision was its perception that the FTC did not exercise executive power." *Collins*, 896 F.3d at 671. But the CFPB, with its sweeping authority to enforce numerous statutes, promulgate rules, levy penalties, and bring enforcement actions "can easily 'be characterized as an arm or eye of the executive.'" *Id*. And the CFPB "lacks formal nonpartisanship requirements," whereas the FTC "is bipartisan" with a presidentially selected chair,

"which allows the Executive Branch to wield considerable influence over the agency's priorities and actions." *Id.* at 671–72; *see* AOB 23–24. Finally, the FTC "is subject to the traditional appropriations process" and must request an annual budget, thereby "allow[ing] the President to monitor and shape the agency's activities." *Collins*, 896 F.3d at 672. No such check exists on the CFPB. "*Humphrey's Executor*, therefore, is inapposite." *Id.*

The CFPB also insists that *Humphrey's Executor*'s constitutional holding did not consider the FTC's "multi-member structure." CFPB Br. 41 n.31. That is wrong. *See* AOB 30; U.S. Opp. 13 ("the Supreme Court's decision in *Humphrey's Executor* depended fundamentally on the nature of the FTC as a multi-member body"). Indeed, *Collins* recognized that crucial to the Supreme Court's decision was the FTC's "bipartisan[ship]," 896 F.3d at 671 (citing *Humphrey's Ex'r*, 295 U.S. at 628), a feature that is, of course, unique to multi-member bodies. A single Director, after all, cannot be "bipartisan." *See* CFPB Br. 38.

Morrison v. Olson is equally off base. Despite the CFPB's protests, *see* CFPB Br. 30 n.20, *Collins* already held that the independent counsel's "inferior officer" status "influenced" the Supreme Court's "analysis of the

separation-of-powers," 896 F.3d at 665 n.179; *see* AOB 36–38. Moreover, the Executive Branch had "sufficient control" over the independent counsel because the Department of Justice was in charge of initiating the independent counsel's investigation and defining her jurisdiction, and the independent counsel was generally required to abide by Justice Department policy. *Collins*, 896 F.3d at 664–65. On her own, the independent "counsel had no authority to formulate policy for the Government or the Executive Branch." *Id.* at 665. The CFPB Director, on the other hand, "can *write and enforce* laws—as opposed to just enforcing existing laws"—and therefore "poses a more permanent threat to the President's faithful execution of the laws." *Id.* at 672.

In sum, the Supreme Court's precedents compel the conclusion that the CFPB's structure violates Article II and the separation of powers, even independent of *Collins*. And *Collins* makes this conclusion even more patent.

II. This Court Should Reverse And Grant Judgment To All American.

This Court should reject the CFPB's purported ratification as null and ineffective, strike down the Consumer Financial Protection Act

("CFPA") as a whole, without severing, and, in any event, reverse the district court's judgment without remand.

A. No valid ratification has occurred here.

This invalid enforcement action cannot be ratified because the CFPB's defects have not been remedied, ratification is impossible here, and the CFPB has not satisfied the two ratification requirements. As the district court held, if "the CFPB is not a constitutionally authorized entity," then "the case would not be able to proceed." ROA.7246.

1. The Acting Director's presence has not cured the CFPB's unconstitutional structure.

The Acting Director's purported ratification did "not cure the constitutional deficiencies with the CFPB's structure" because the "provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890, 2018 WL 3094916, at *36 (S.D.N.Y. June 21, 2018). Indeed, the Senate voted Kathleen Kraninger, the President's nominee for Director, out of committee on August 23, 2018, and she will be confirmed any day.[8] At

[8] Jim Puzzanghera, *Senate Committee Narrowly Confirms Kathy Kraninger to Head CFPB*, L.A. Times (Aug. 23, 2018), http://www.latimes.com/business/la-fi-cfpb-kraninger-vote-20180823-story.html.

that point, All American will undeniably be subject to an ongoing proceeding by an invalid entity. This is why the CFPB has conceded that the constitutional question is not moot. CFPB Br. 12 n.4. Its purported "ratification" is illusory for the same reason.

Moreover, even under the CFPB's theory, the Acting Director has not rectified the agency's constitutional infirmities. The CFPB contends that, "because [the Acting Director] is removable at will," his "ratification" has "cured any constitutional defect with initiation of this action." CFPB Br. 13. But *Collins* rejected that very argument as not "persuasive" because the FHFA remained "covered by the removal restriction," even "under the Acting Director's tenure." 896 F.3d at 655–56. As discussed above, *supra* pp. 6–7, this conclusion—as well as the FVRA's application here (*see* CFPB Br. 13 n.5)—applies to the CFPB to the exact same extent as it does to the FHFA.

Indeed, the CFPB's legal position here itself indicates that the agency remains unconstitutionally insulated from the President. *See* AOB 51–52 n.14. The CFPB under Acting Director Mulvaney maintains that, "[b]ased on binding precedent, the Bureau's structure is constitu-

tional." CFPB Br. 10. This argument contradicts the United States' consistent position that "Supreme Court precedent" like *Humphrey's Executor* "should not be extended to" independent agencies with a "single-head[]" like the "CFPB." U.S. Opp. 3. Thus, the CFPB appears to remain unconstitutionally insulated from the President.

2. Actions by an invalid agency are null and cannot be ratified.

The CFPB next argues (at 13–18) that an act undertaken by an unconstitutionally structured agency may later be ratified. Not so. Unlike with most of the cases the CFPB cites, "the constitutional issue raised" here "concerns the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *RD Legal Funding*, 2018 WL 3094916, at *36. A defective appointment affects the validity not of the agency or the office itself, but of the particular officer. Thus, *Gordon v. CFPB*—like the other Appointments Clause cases the CFPB cites (at 12)—allowed ratification because no party challenged the validity of the agency itself, and the court accordingly assumed that "the CFPB had the authority to bring the action" when it did. 819 F.3d 1179,

1191–92 (9th Cir. 2016). Here, on the other hand, All American challenges the CFPB's *own* authority both at the time this action was initiated and now. *See* AOB 55–56.

The Supreme Court has long held that the acts of an unconstitutional body cannot later be ratified by the invalid "officers" purportedly created by the unconstitutional statute. "An unconstitutional act is not a law; … it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby Cty.*, 118 U.S. 425, 442 (1886). "Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Id.* at 449. Thus, a lawful entity "[can]not ratify the acts of an unauthorized body." *Id.* at 451. This Court, too, has held that if "the only authority claimed" for a government action is "an unconstitutional statute," then the entity "had no authority in law to act at all" and therefore "its attempted action cannot be validated" subsequently. *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." *Id.*

Meanwhile, *Collins* and the cases it relies on to uphold the FHFA's action have *nothing* to do with ratification. Instead, those cases accorded *de facto* "validity to past acts of unconstitutionally structured government agencies." 896 F.3d at 675 & n.280; *see Buckley v. Valeo*, 424 U.S. 1, 142 (1976) ("The past acts of the Commission are … accorded de facto validity."); *Citizens for Abatement of Aircraft Noise, Inc. v. Metro. Wash. Airports Auth.*, 917 F.2d 48, 57–58 (D.C. Cir. 1990), *aff'd*, 501 U.S. 252 (1991) ("*CAAN*") ("past acts of invalidly constituted Commission accorded *de facto* validity").[9] Those cases do not involve enforcement proceedings, but rather are suits for declaratory and injunctive relief. *See Collins* 896 F.3d at 676; *Free Enter. Fund*, 561 U.S. at 487; *CAAN*, 917 F.2d at 52; *see also Buckley*, 424 U.S. at 116–18 (FEC had only "undertaken to issue rules and regulations" and its "other functions" such as enforcement "remain[ed] as yet unexercised"). Similarly, *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), confirms that the de facto doctrine is inapplicable

[9] The United States argues that the FHFA's actions should not be invalidated, *not* because of a de facto or ratification theory, but "[b]ecause the actions FHFA takes as conservator are not governmental actions." U.S. Opp. 15. That theory, too, is inapplicable here, since this enforcement action is indisputably a "governmental action."

in an enforcement action. There, the D.C. Circuit denied an injunction of a pre-enforcement investigation, but the panel was clear that a regulated party can and should "raise its separation-of-powers arguments" as a defense in an "enforcement action," as All American is doing here, and "if found to be constitutionally warranted, vacatur … would fully vindicate the [defendant's] separation-of-powers rights." *Id*. at 1135 (alterations omitted).

The only cases that involve enforcement actions by invalidly structured agencies are *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (D.C. Cir. 1993), and *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), and both support All American. Those cases hold that when an agency's structure "violate[s] the Constitution," the agency "ha[s] no authority to bring [an] enforcement action." *Id.* at 706. If a defendant raises that constitutional defect as a defense to the enforcement action, the proper remedy is for the court to "grant[] judgment for the defendant (by reversing the district court's judgment without remanding)." *Id.* at 706 n.2. The court should do the same here. *See* AOB 50–51.

Legi-Tech's discussion of *ratification*, on the other hand, is inapplicable here. *Contra* CFPB Br. 14–18. There, the D.C. Circuit permitted

the FEC to ratify its former decision to bring an enforcement action only after (1) a court had first declared the agency unconstitutional, and then (2) the FEC had formally "reconstituted" itself as a valid agency. 75 F.3d at 706. Neither has happened here.[10]

3. This action has not been validly ratified.

Even if this action could be ratified, the Acting Director's ratification was ineffective. AOB 54–61. The CFPB lacked authority when this action was filed and at the time of the purported ratification. The proper remedy is judgment for All American without remand.

a. As discussed above, *see supra* pp. 22–26, the purported ratification was null because the principal—an invalid agency—lacked the authority "to do the act ratified at the time the act was done." *NRA Political Victory Fund*, 513 U.S. at 98.

It is telling that the CFPB urges this Court to *ignore* Supreme Court precedent and instead adopt the Restatement (Third) of Agency. CFPB Br. 20. *Gordon*, on which the CFPB relies, affirmed under *NRA Political*

[10] *Legi-Tech*'s ratification discussion is also dubious, as it completely ignores *NRA Political Victory Fund*'s ratification requirements. *See* AOB 56 n.14.

Victory Fund and the *Second* Restatement. 819 F.3d at 1192. Similarly, the Supreme Court's decision in *United States v. Heinszen & Co.*, *see* CFPB Br. 15, expressly required that "the principal had the capacity" to act in the first place before ratification could occur, 206 U.S. 370, 382 (1907). Finally, even under the Third Restatement, the CFPB had no "legal existence" when it initiated this enforcement action, and therefore no one may "subsequently ratify it." Restatement (Third) of Agency § 4.04 cmt.c.

b. The CFPB also lacked authority to ratify at the time of the purported ratification on February 5, 2018 because the CFPA's three-year statute of limitations had lapsed. AOB 57–59.[11] The CFPB admits that it never alleged that any conduct occurred after February 5, 2015. *See* CFPB Br. 21; *see also* ROA.43–65. And for some counts, the CFPB conceded that the alleged conduct ceased in "June 2014." ROA.6512. Indeed, every date referenced in the complaint is well before February 5, 2015,

[11] Contrary to the CFPB's contention, CFPB Br. 21 n.10, All American "addressed" the statute of limitations and "the date" of discovery in detail in its response to the CFPB's "ratification" notice below. ROA.7190–91. In response, the district court implicitly rejected the CFPB's argument by acknowledging that the CFPB's unconstitutionality would preclude ratification. *See* ROA.7246.

see ROA.43–65, which makes it "evident from the pleadings" (CFPB Br. 21) that the alleged acts underlying this action occurred between 2011 and 2014. Furthermore, the CFPB never denies that it discovered the alleged actions no later than September 3, 2014, the date of the Civil Investigative Demand (and likely much earlier). *See* ROA.3332.

The CFPB is unable to distinguish the numerous cases holding that statutes of limitations can prevent ratification, AOB 57–58, and so instead relegates them to a footnote, CFPB Br. 24 n.11. But those cases all hold that this "timing issue" is crucial for the ratification analysis. *See*, *e.g.*, *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016). And the CFPB's proposed distinction between "jurisdictional" and "non-jurisdictional" time limits (at 23–34) conflicts with *NRA Political Victory Fund*'s own reliance on statute-of-limitations cases. 513 U.S. at 99 (citing *Nasewaupee v. Sturgeon Bay*, 251 N.W.2d 845, 848–849 (Wis. 1977)).

The CFPB's plea for "equitable tolling," CFPB Br. 22–23, is also revealing, but the agency cites no authority demonstrating that equitable tolling would apply to an enforcement action initiated by an invalid entity. The CFPB also fails to demonstrate the necessary "extraordinary

circumstances." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016). Nor has the CFPB moved to "amend" its complaint. CFPB Br. 23. Finally, a statute of limitations can be overcome only if "the law that provides the applicable statute of limitations allows relation back," *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 547 (2010), yet the CFPB cites no provision of the CFPA permitting relation back.

In sum, this "ratification" came "too late in the day to be effective" and is a nullity. *NRA Political Victory Fund*, 513 U.S. at 98.

4. This Court should address the constitutional merits

The CFPB insists that "this Court need not address [the] constitutional challenge" *at all*. CFPB Br. 12 n.4. But even if the CFPB's ratification theory had any merit—which it does not—All American would still be "entitled to a decision on the merits of the question *and* whatever relief may be appropriate." *Ryder v. United States*, 515 U.S. 177, 182–83 (1995) (emphasis added). *Lucia v. SEC*, 138 S. Ct. 2044 (2018), too, forecloses the CFPB's argument. There, the SEC issued a "ratification" while the case was pending, *id*. at 2055 n.6, yet the Supreme Court reached the merits and ordered an appropriate remedy. Declining to address a serious structural constitutional challenge based on a purported ratification

would be no relief at all, let alone "appropriate" relief. *Ryder*, 515 U.S. at 182. Indeed, the CFPB's ratification theory ignores the Supreme Court's instruction that structural constitutional remedies must "create incentives" for those challenges to be brought. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations omitted). Reversal and entry of judgment is the "appropriate" remedy.

B. Severance would be inappropriate here.

1. The CFPB urges this Court simply to sever the removal provision, as in *Collins*. CFPB Br. 43–47. But the CFPB's for-cause removal provision is different from the FHFA's (and from *Free Enterprise Fund*), because here, "historical context" shows that Congress "would have preferred no [CFPB] at all to one with a Director removable at will by the President." *Collins*, 896 F.3d at 675–76; *see* AOB 62–65; *RD Legal Funding*, 2018 WL 3094916, at *35–*36.[12] Congress abdicated its appropriations power over nineteen federal statutes—many of which were previ-

[12] The severability analysis in *Collins*, moreover, was undertaken without the benefit of the adversarial process, as appellants there conceded that severance "may be appropriate." Opening Br. 21, *Collins v. Mnuchin*, No. 17-20364, Doc. 514080709 (5th Cir. July 19, 2017).

ously administered by independent agencies—only because it also limited the President's influence. *See Henderson Op.* 145 (collecting legislative history); *id.* at 162 (severance "would by judicial decree transfer to the executive branch far-reaching new powers that, before Title X, resided with several non-executive agencies"). Numerous legislators, including Representative Barney Frank and Senator Elizabeth Warren, have insisted that severing the CFPA's removal provision is "at odds with Congress's design," would "undermine the CFPB's ability to fulfill its important role under Dodd-Frank," and would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." Members of Cong. Supporting Reh'g En Banc Br. 2, 5, *PHH Corp. v. CFPB*, No. 15-1177, 2016 WL 6994388 (D.C. Cir. Nov. 29, 2016). As even the en banc *PHH* majority recognized, Congress sought to "insulat[e]" the CFPB "from political winds and presidential will," whereas severing the removal provision would "effectively turn[] the CFPB into an instrumentality of the President." *PHH*, 881 F.3d at 83, 110.

Severance is particularly inappropriate when, as here, severing one part of a statute "alters the balance of powers between the Legislative and Executive Branches." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678,

685 (1987); AOB 64. In *Bowsher v. Synar*, the Supreme Court noted that simply striking the removal provisions would make the Comptroller General "subservient to the Executive Branch," thereby "significantly alter[ing]" the "balance that Congress had in mind." 478 U.S. 714, 734–36 (1986). The fallback provisions stripping the Comptroller's executive power prevented the Court from striking down the entire Act. *Id.* But here, Congress has not outlined a detailed fallback provision, instead including only a generic severability provision in Dodd-Frank as a whole. 12 U.S.C. § 5302. Simply severing the removal provisions would "significantly alter" the office of CFPB Director.

Moreover, a severability clause is "not an inexorable command." *Dorchy v. Kansas*, 264 U.S. 289, 290 (1924). Such clauses typically are "little more than a mere formality," 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 44:8, at 627 (7th ed. 2009), and Dodd-Frank's boilerplate severance clause is no exception. It "[a]ppear[s] in the mega Dodd-Frank legislation 574 pages before" the removability clause and "says nothing specific about Title X, let alone the CFPB's independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone

whether the Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control." *Henderson Op.* 163.

Severing only the removal provision while leaving the CFPB independent from congressional appropriations and oversight—thereby dramatically expanding Presidential power at the expense of Congress—"would have seemed exactly backwards" to Congress. *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018). In *Murphy*, the Supreme Court declined to sever an unconstitutional provision that prevented states from authorizing private gambling from a provision banning states from running their own gambling operations. *Id.* These two "similar restrictions" "were obviously meant to work together," and Congress would not "have wanted the former to stand alone" because they were "meant to be employed in tandem." *Id.* In the same way here, the "similar restrictions" on Congressional and Presidential oversight were meant to work "in tandem" to insulate the CFPB from any democratic influence. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 313 (1936) ("[T]o hold one part of a statute unconstitutional and uphold another part as separable, they must not be mutually dependent upon one another.").

Severing the for-cause provision here "would yield a mutant CFPB responsive to the President—and hence to majoritarian politics and lobbying—*but nowise accountable to the Congress*." *Henderson Op.* 163. This Court should declare the entire CFPA to be unconstitutional.

2. As discussed above, *see supra* pp. 25–26, and contrary to the CFPB's contention (at 47–48), even if this Court decides to sever the removal provision, it still should "revers[e] the district court's judgment without remanding" because the CFPB has not been validly "reconstituted." *Legi-Tech*, 75 F.3d at 706 n.2.

CONCLUSION

This Court should hold that the CFPB's structure violates the Constitution and reverse the district court's denial of All American's motion for judgment on the pleadings.

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Respectfully submitted,

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I hereby certify that on October 1, 2018, an electronic copy of the foregoing Reply Brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on the following parties by the appellate CM/ECF system:

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Undersigned counsel certifies that this Reply Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 6,497 words.

Undersigned counsel certifies that this Reply Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this Reply Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook.

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