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-DPJ-JCG

Defendants-Appellants' Supplemental En Banc Brief

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CERTIFICATE OF INTERESTED PERSONS

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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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STATEMENT REGARDING ORAL ARGUMENT

The Court has scheduled oral argument for the week of September 21, 2020.

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INTRODUCTION

This case presents a vital constitutional question: what remedy follows when a governmental enforcement action is tainted from the get-go by a structural separation-of-powers violation? As the Supreme Court has now conclusively held, the "structure" of the Consumer Financial Protection Bureau ("CFPB") "violate[d] the separation of powers." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192, 2202 (2020). From the day this action was filed, Michael Gray—a small businessman who already paid a heavy price in related state proceedings—has had the boot of an unconstitutional federal agency on his throat. But the CFPB insists it can escape *any* consequences in this action for the "constitutional defect in the original" filing of this case, *id.* at 2208 (plurality), through a purported "ratification," thereby insulating the agency from any repercussions and depriving litigants like All American and Mr. Gray of any meaningful relief.

The separation of powers would matter little if prevailing challengers received no meaningful relief in their cases. The Supreme Court has made clear that remedies for separation-of-powers violations must "create incentives" to bring such challenges in the first place. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018).[1] If the separation of powers could be evaded through an unconstitutional agency's maneuvering, then the Constitution would be reduced to a parchment barrier, and neither injured parties nor the political branches would have any incentive to raise and address separation-of-powers violations.

For this reason, when litigants timely and successfully challenge the actions of an unconstitutional entity, they are entitled to a judicial remedy that provides them real relief—especially where they have sought relief from *past* agency action, not merely *prospective* relief. Here, that means that this enforcement action, which was filed by the CFPB at a time when it was unconstitutionally structured, is void, the district court was never vested with jurisdiction over the action, and All American is entitled to the "straightforward remedy" of "dismiss[al]" under well-established remedial principles. *Seila Law*, 140 S. Ct. at 2208 (plurality).

Moreover, even if acts undertaken by an unconstitutional agency could ever be ratified, the CFPB would still not be able to proceed in *this*

[1] All internal quotation marks, citations, and alterations omitted unless otherwise indicated.

case because it fails *both* blackletter requirements of ratification doctrine under *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Under that two-pronged test, (1) the unconstitutionally structured agency lacked the authority to bring this enforcement action at the time it was initiated, *and* (2) the attempted ratifications of this enforcement action (by Director Kraninger and Acting Director Mulvaney) were outside the statute of limitations.

Further, the CFPB's unprecedented funding structure, which provides two levels of independence from congressional control over appropriations, continues to violate the Appropriations Clause to this day by delegating Congress's power of the purse to the Executive.

For each one of these independently sufficient reasons, this Court should reverse.

JURISDICTIONAL STATEMENT

The CFPB asserted that the district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1345. This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether All American is entitled to judgment on the pleadings in this enforcement action, which was brought by an unconstitutionally structured agency.

STATEMENT OF THE CASE

For nearly two decades, All American, a company founded by Michael Gray, offered check-cashing and lending services in Mississippi, Louisiana, and Alabama. Its business practices were heavily regulated by state law. *See*, *e.g.*, Miss. Code Ann. § 75-67-517; *id.* § 75-67-519(5); La. Stat. Ann. § 9:3578.4; Ala. Code §§ 5-18A-12(b), 5-18A-13(c). In 2014, All American became the subject of a state regulatory enforcement action. On May 11, 2016, the CFPB brought its own enforcement action against All American, based on the same grounds as the state enforcement action, for allegedly engaging in "unfair," "deceptive," and "abusive" acts and practices under 12 U.S.C. § 5531(a). *See* ROA.43–66. For instance, the CFPB alleged that All American "formulated and carried out a program aimed at subverting . . . consumer protections" under Mississippi and Louisiana law. ROA.48. The state enforcement matter was settled on June 8, 2017, ROA.2620, with All American paying $889,350 in fines and closing its Mississippi stores, ROA.2626. Mr. Gray subsequently sold the rest of his business and no longer works in the banking industry. But the CFPB has nevertheless continued its enforcement action against All American and Mr. Gray.

All American moved for judgment on the pleadings, arguing that the CFPB's enforcement action was void because the CFPB's structure violates the Constitution. While that motion was pending, the CFPB Director, Richard Cordray, resigned, and the President appointed Office of Management and Budget Director Mick Mulvaney as Acting Director of the CFPB under the Federal Vacancies Reform Act. ROA.7177. The CFPB then purported to "ratify" this enforcement action on the theory that because Acting Director Mulvaney was removable at will by the President during his limited tenure as head of the CFPB, his purported ratification "remedied any constitutional problem with the initiation of this case." ROA.7179.

The district court denied All American's motion, adopting the reasoning of *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), *abrogated by Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), which had upheld the CFPB's structure against a constitutional challenge, ROA.7206. The district court, however, certified the case for interlocutory review, and stayed all proceedings, ROA.7248, acknowledging that this "case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity," ROA.7246. This Court accepted the interlocutory appeal. ROA.7252. While the appeal was pending, the Senate confirmed Kathleen Kraninger as head of the CFPB in December 2018. The CFPB under Director Kraninger has continued to litigate this action for one-and-a-half years following Acting Director Mulvaney's departure.

While briefing was ongoing in this case, the en banc Court held in *Collins v. Mnuchin* that the substantially similar structure of the Federal Housing Finance Agency ("FHFA") violates the separation of powers because "it is headed by a single Director removable only for cause." 938 F.3d 553, 568 (5th Cir. 2019) (en banc), *cert. granted*, Nos. 19-422, 19-563 (U.S. July 9, 2020). A divided panel in this case, however, held that the CFPB's single-Director structure did not violate the Constitution. *CFPB v. All Am. Check Cashing, Inc.*, 952 F.3d 591 (5th Cir. 2020). Judge Smith dissented, stating that the CFPB Director's removal protection is indistinguishable from "the identical structural insulation that we held unlawful in *Collins*." *Id.* at 608 (Smith, J., dissenting). The Court then, *sua sponte*, voted to rehear this case en banc and vacated the panel decision. *CFPB v. All Am. Check Cashing, Inc.*, 953 F.3d 381 (5th Cir. 2020) (en banc).

On June 29, 2020, the Supreme Court held that the CFPB's single-Director structure "violates the separation of powers." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). The Court's landmark ruling in *Seila Law* tracks the same arguments that All American presented in this case and that Judge Smith's dissenting panel opinion set forth. *Compare id.* at 2197–207, *with All Am. Check Cashing*, 952 F.3d at 602–13 (Smith, J., dissenting); Opening Br. 11–48; Reply Br. 3–19.

As the Court explained, "[u]nder our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 140 S. Ct. at 2191 (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). That power necessarily includes the authority to remove subordinate executive officials, because such lesser functionaries "must remain accountable to the President, whose authority they wield." *Id.* at 2197. *Seila Law* concluded that the "unprecedented" and "anomal[ous]" structure of the CFPB—which vests vast executive power in a single Director who serves a five-year term and may not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office"—violates the separation of powers. *Id.* at 2193, 2201–02. The CFPB Director wields significant executive powers including authority to promulgate rules, issue final decisions in adjudications, and "seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power." *Id.* at 2200. And the CFPB is undisputedly a principal officer with "authority to bring the coercive power of the state to bear on millions of private citizens and businesses." *Id.* Such a "concentrat[ion]" of unilateral, unconstrained authority "in the hands of a[] single individual" "has no basis in history and no place in our constitutional structure." *Id.* at 2201–02.

Although "[t]he CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional" on its own, the Court also noted that "[t]he CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control." *Seila Law*, 140 S. Ct. at 2204.

The Supreme Court accordingly held that the CFPB's "single-Director structure contravenes [the Constitution's] carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one." *Seila Law*, 140 S. Ct. at 2203. The Court went on to sever the Director's unconstitutional removal protection from the remainder of Title X of the Dodd-Frank Act, also known as the Consumer Financial Protection Act ("CFPA"), on a prospective basis. *Id.* at 2192.

The Court remanded on the question of "the appropriate remedy." *Seila Law*, 140 S. Ct. at 2207 (plurality). The plurality noted that although the petitioner sought the "straightforward remedy" of "dismiss[al]," the government contended that the action had been ratified. *Id.* at 2208. Because the ratification issue had neither been "addressed below" nor "briefed here," the Court directed "lower Courts" to determine "in the first instance" whether any "alleged ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect" in the initiation and prosecution of the action. *Id.* Justice Thomas, in a separate opinion joined by Justice Gorsuch, stated that he would have held that "the alleged ratification does not cure the constitutional injury." *Id.* at 2221 (Thomas, J., concurring in part and dissenting in part).

The day after the Supreme Court decided *Seila Law*, this Court directed the parties to file en banc supplemental briefs in this case. Order (June 30, 2020). Two-and-a-half weeks later, the CFPB filed a letter notifying the Court that Director Kraninger had purported to "ratif[y] the enforcement action at issue here" following *Seila Law*. Ltr. Regarding Ratification (July 17, 2020).

The significant remedial question left open in *Seila Law* is now before this en banc Court.

SUMMARY OF THE ARGUMENT

I. This action must be dismissed because "the structure of the CFPB violate[d] the separation of powers" when the enforcement action was first brought. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). Now that the Supreme Court has conclusively recognized the "constitutional defect" in the initiation and prosecution of this action, this Court should apply the "straightforward remedy" of "dismiss[al]." *Id.* at 2208 (plurality). Because the CFPB was unconstitutionally structured at the time it filed suit, it "lack[ed] authority to bring [this] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). The action is therefore void *ab initio*, and the district court never lawfully acquired jurisdiction over the case. The proper remedy therefore is to reverse the district court's decision.

II. The CFPB's efforts to dodge the constitutional issue by purporting to "ratify" the suit change nothing. The purported ratifications fail because ratification simply does not apply to structural constitutional defects, and because, in any event, they cannot satisfy either requirement for a valid ratification: *first*, the CFPB's unconstitutional structure deprived it of the authority to bring this enforcement action in the first place; and *second*, the Director and Acting Director lacked authority to ratify this action at the time of purported ratification, because the statute of limitations had run in the meantime.

III. Further, the unprecedented manner in which the CFPB continues to be protected by two levels of funding independence itself impermissibly delegates Congress's power of the purse to the Executive.

ARGUMENT

I. The Proper Remedy For The Constitutional Defect Recognized In *Seila Law* Is To Grant Judgment To All American.

After the CFPB brought this enforcement action against All American in district court, All American moved for judgment on the pleadings on the ground that the CFPB was unconstitutionally structured and lacked authority to initiate the litigation. ROA.2209. The district court rejected All American's merits argument, but acknowledged that, if "the CFPB is not a constitutionally authorized entity," then "the case would not be able to proceed." ROA.7206, 7246. Now that the Supreme Court has vindicated All American's position on the merits in *Seila Law*, the proper result is to reverse the district court's order denying All American's motion for judgment on the pleadings.

A. Dismissal Is The Proper Remedy In The Normal Course.

1. "The very essence of civil liberty . . . consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," for "where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 William Blackstone, *Commentaries on the Laws of England* 23 (1765)). This principle is paramount when Congress violates "basic constitutional protections." *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) (plurality). Such violations demand a meaningful remedy for the aggrieved party.

Thus, when an agency's structure "violates the Constitution[]," that agency "lacks authority to bring [an] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) ("ensur[ing]" that the statute is "enforced only by a constitutional agency accountable to the Executive"). And when parties "raise [a] constitutional challenge as a defense to an enforcement action," as happened here, there is "no theory that would permit [a court] to declare the [agency's] structure unconstitutional without providing relief to [the regulated party]." *NRA Political Victory Fund*, 6 F.3d at 828; *cf. SW Gen., Inc. v. NLRB*, 796 F.3d 67, 69 (D.C. Cir. 2015) (holding that "complaint issued against the [defendant] was unauthorized" because of Federal Vacancies Reform Act violation and "vacat[ing] the [NLRB's] order"), *aff'd*, 137 S. Ct. 929 (2017).

Instead, the court should "cure the constitutional error" *and* "design[]" a "remed[y]" that "create[s] incentives to raise" structural constitutional challenges. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 & n.5 (2018). It matters little if a court declares an agency unconstitutional, but the prevailing challengers receive no meaningful relief. If Congress and executive agencies were permitted to violate the separation of powers with impunity without any hope of relief to a successful challenger, then that structural guarantee would become meaningless, and no "rational litigant" would bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014). Given that the Executive Branch cannot always be counted on to defend its own constitutional prerogatives, stripping from victims of constitutional violations any incentive to challenge those defects would make the separation of powers "depend on the views of individual Presidents." *Free Enter. Fund*, 561 U.S. at 497. It would also inappropriately relieve the political branches themselves of any incentive to remedy or precipitate prompt judicial resolution of a constitutionally dubious statutory scheme.

Thus, the Supreme Court has made clear that "one who makes a timely challenge to the constitutional validity of" a government official's authority "is 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). For example, when Congress endowed bankruptcy judges with power that the Constitution forbade them from exercising, the Supreme Court "affirmed" the "dismiss[al]" of the bankruptcy court action. *Id*. at 184 n.3 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)). The Court granted the same remedy in *Stern v. Marshall*, 564 U.S. 462 (2011), when it ruled that, because the bankruptcy court lacked the Article III power to rule on a state-law counterclaim, that claim must be dismissed. *Id.* at 503. In *NLRB v. Noel Canning*, the Supreme Court affirmed the D.C. Circuit's judgment that the NLRB's proceeding had been "void *ab initio*" on account of a structural constitutional defect, requiring vacatur of the agency's action. 705 F.3d 490, 493, 514 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513, 557 (2014); *cf. New Process Steel, L.P. v. NLRB*, 560 U.S. 674, 678, 681 (2010) (invalidating "almost 600" NLRB cases decided in violation of agency's statutory quorum requirement). Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights*

Commission, the Court held that, because the adjudicators of an enforcement action had violated a baker's free-exercise right, the "order" holding the baker in violation of state law "must be invalidated." 138 S. Ct. 1719, 1732 (2018); *see also*, *e.g.*, *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 815, 825 (1987) (Scalia, J., concurring in the judgment) (explaining that "fundamental" separation-of-powers error in prosecutor's appointment renders convictions "void" and "requires reversal of petitioners' convictions"); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("affirm[ing]" decision of three-judge district court panel—which included then-Judge Scalia—that had nullified presidential order because it was premised on action of unconstitutional officer, *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986) (per curiam)); *Clinton v. City of New York*, 524 U.S. 417, 425 & n.9 (1998) (holding that cancellation of certain funds under Line Item Veto was "invalid"); *INS v. Chadha*, 462 U.S. 919, 936 (1983) (holding that plaintiff had standing because "[i]f the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (holding that President must return seized steel mills).

The Supreme Court's recent decision in *Seila Law* confirms this commonsense remedial doctrine. After holding that the CFPB's enforcement action was "initially [filed] by a Director unconstitutionally insulated from removal" and severing the for-cause removal restriction, a majority of the Supreme Court recognized that "dismiss[al]" is the "straightforward remedy" for the undisputed "constitutional defect" in the filing of the action. *Seila Law*, 140 S. Ct. at 2208 (plurality); *accord id.* at 2220 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part) (concluding that the Court should "'reverse the court of appeals' judgment'" and "simply deny the CFPB's petition for an order of enforcement").

Here, the district court itself recognized that if the CFPB were unconstitutionally structured, "the case would not be able to proceed." ROA.7246. Now that *Seila Law* has established that constitutional defect, All American should receive the proper remedy. The separation of powers is simply too important for constitutional violations that strike at the very structure of our government to be cast aside or ignored.

2. Additionally, because the CFPB was not properly vested with executive power when it filed this enforcement action, it lacked Article

III standing to sue, and the district court was never vested with jurisdiction over this action. This case must be dismissed for this independent reason.

All plaintiffs must meet the "irreducible constitutional minimum of standing" to invoke the jurisdiction of Article III courts. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The Executive Branch is no exception to this universal requirement, which derives from the Constitution's limitation of the judicial power "only to 'Cases' and 'Controversies,'" and so applies across the board to "confine[] the federal courts to a properly judicial role." *Id.* (quoting U.S. Const. art. III, § 2). Thus the government, like any other litigant, must establish "injury in fact" by showing "an invasion of a legally protected interest that is concrete and particularized," among other requirements. *Id.* at 1548.

For governmental entities, it is "the injury to [the United States'] sovereignty arising from violation of its laws" that supports standing to bring an enforcement proceeding. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). The particularization requirement is satisfied in such actions only because "[v]indicating the *public* interest (including the public interest in Government observance of the

Constitution and laws) is the function of" the Executive Branch. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 576 (1992).

In this respect, the government stands in sharp contrast to other parties, which *lack* standing to sue to enforce federal law without "personally" suffering a cognizable injury. *Spokeo*, 136 S. Ct. at 1548. The Supreme Court has "repeatedly held that such a 'generalized grievance,' no matter how sincere, is insufficient to confer standing" on a plaintiff not possessed of valid executive authority. *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013). And Congress cannot override the limits of Article III by conferring the executive's unique standing outside the Executive Branch. *See Lujan*, 504 U.S. at 573–74 (Congress cannot authorize citizen suits to enforce public rights); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (per curiam) (Congress cannot authorize enforcement by legislative officers, because "civil litigation in the courts of the United States for vindicating public rights" may be conducted "only by persons who are 'Officers of the United States'" under Article II).

When this action was filed, the CFPB did not lawfully possess the executive power of the United States because the CFPA unconstitutionally vested all of its authority, including its enforcement authority, in "a unilateral actor"—the Director—outside the President's control and "accountable to no one." *Seila Law*, 140 S. Ct. at 2192, 2203. Because of the CFPB's severely—indeed, "unprecedented[ly]"—defective structure, *id.* at 2201, this enforcement action was brought by a "mere[]" "usurper, to whose acts no validity can be attached," *Norton v. Shelby Cty.*, 118 U.S. 425, 449 (1886). Thus, because "[a]n unconstitutional law is void, and is as no law," the district court here "acquired no jurisdiction" over this case in the first place. *Ex parte Siebold*, 100 U.S. 371, 376–77 (1880).

Standing must be assessed "when the suit [i]s filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), and "[a]bsent a proper representative of the Government" to bring this enforcement action, "jurisdiction is lacking," *United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988); *see also*, *e.g.*, *Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795, 800–01 (10th Cir. 2011) (affirming dismissal for lack of standing of suit brought by Colorado District Attorney "[b]ecause the State of Colorado has not authorized [him] to represent its sovereign interests in this matter," and he accordingly lacked the requisite "authority to represent a state's sovereign or quasi-sovereign interests"); *Cheng v. WinCo Foods LLC*, No. 14-cv-483, 2014 WL 2735796, at *9 (N.D. Cal. June 11, 2014) (dismissing state agency's Americans with Disabilities Act ("ADA") enforcement action for lack of standing "since the [agency] is not authorized by law to prosecute ADA violations").

Similarly, the Supreme Court has repeatedly dismissed for lack of standing when litigants without valid authority seek to invoke the generalized sovereign interest in defending a statute's constitutionality. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951–53 (2019) (state official cannot defend statute without authorization under state law); *Hollingsworth*, 570 U.S. at 715 (private parties cannot defend statute after officials decline to appeal); *Karcher v. May*, 484 U.S. 72, 81 (1987) (former officials cannot maintain appeal after leaving office).

So too here: because the CFPB's complaint invoked only the "undifferentiated public interest" in "vindication of the rule of law," *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 106 (1998), its lack of valid executive authority deprived the CFPB of standing—and the district court of subject-matter jurisdiction—from the beginning.

The Ninth Circuit in *CFPB v. Gordon*, 819 F.3d 1179 (9th Cir. 2016), suggested why this structural defect requires dismissal for lack of standing. The defendant in that enforcement action did not raise a structural constitutional defect, but instead challenged the individual appointment of then-Director Cordray under the Recess Appointments Clause. *Id.* at 1198 (Ikuta, J., dissenting). Judge Ikuta, writing in dissent, would have held that Cordray's defective appointment meant that the CFPB "lacked executive power and therefore lacked Article III standing." *Id.* As Judge Ikuta explained, "[t]here is only one way for a plaintiff to obtain the Executive's Article III standing to enforce public rights in federal court: the plaintiff must be vested with executive authority." *Id.* at 1200. An unconstitutionally structured agency "lack[s] the Executive's unique Article III standing" that is required to "allow it to enforce public rights." *Id.* Hence, "[b]ecause the plaintiff here lacked executive power and therefore lacked Article III standing, the district court was bound to dismiss the action." *Id.* at 1198. And "[s]ince Article III standing is assessed at the time an action is filed and must be met throughout all stages of litigation in the federal courts," the court of appeals is "now required to do the same." *Id.* at 1199, 1201.

The Ninth Circuit panel majority disagreed, concluding that the fact "[t]hat its director was improperly appointed does not alter the Executive Branch's interest or power in having federal law enforced." 819 F.3d at 1188–89. But the panel majority agreed with Judge Ikuta that Article III limits on executive standing "would have relevance" to a defense implicating the proper participation of "the CFPB, as an agency." *Id.* at 1189. For example, if the CFPB "had lost before the district court and decided not to appeal, and a concerned citizen wanted to intervene and bring the appeal," then the court would be bound to dismiss for lack of jurisdiction, because that citizen "would be asserting nothing more than a passionate but generalized grievance." *Id.* This is the very defect at issue here: it was the "structure" (and thus the authority) of the CFPB itself that "violate[d] the separation of powers." *Seila Law*, 140 S. Ct. at 2192; *see also CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018) (noting that the constitutional defect involved "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf").

Thus, even under the reasoning of the *Gordon* majority—and *a fortiori* under Judge Ikuta's opinion—the CFPB's defective structure here deprived it of valid authority to initiate this case from the beginning. The CFPB stood in the same position as any other litigant, or "concerned citizen," outside the Executive Branch. 819 F.3d at 1189. The constitutional defect barred the CFPB from partaking of the Executive's power to enforce laws in federal court without meeting the "particularized injury" requirement incumbent on all other parties. *Id.* at 1188. The district court thus never obtained jurisdiction over this action, and it should accordingly be dismissed.

B. *Collins* Is Not To The Contrary.

The CFPB has previously suggested that this Court's en banc decision in *Collins v. Mnuchin* weighs in its favor on the remedial questions now before this Court. *See* CFPB Ltr. 3–5. That is wrong for three reasons.

1. <u>*Collins*'s Limited Remedial Holding Does Not Extend To This Enforcement Action</u>.

The postures of *Collins* and this case are markedly different. In *Collins*, the shareholder plaintiffs brought a challenge under the Administrative Procedure Act ("APA") to invalidate only a limited component (the Net Worth Sweep) of a larger financing agreement. The Court observed that the shareholders did so "because," apart from the Net Worth

Sweep, "the rest of the deal is a pretty good one for them." 938 F.3d at 592. But, as the Court concluded, "[t]hat is inconsistent with the usual course of remedies." *Id.* The shareholders were not "entitled to pick and choose a single provision to invalidate." *Id.*

By contrast, here All American cannot be characterized as seeking inconsistent remedies or attempting to keep some benefit from an agency action while challenging the rest. Rather, All American is the defendant in an enforcement proceeding in federal court, where the remedy for a successful defense is judgment or dismissal, which All American has consistently sought. *See* Fed. R. Civ. P. 12(b), (c).

The CFPB is also wrong to read *Collins*, which sought prospective relief under the APA, as categorically preventing retrospective relief in cases involving unconstitutionally structured agencies. CFPB Ltr. 4. Indeed, if the en banc Court had so held, it would have created a circuit split with the D.C. Circuit, which has held that judgment is the proper remedy when an agency's unconstitutional structure is raised as a defense to an enforcement action. *See NRA Political Victory Fund*, 6 F.3d at 828.

Indeed, *Collins* acknowledged that "in some instances," the actions of an unconstitutional officer who is "too distant from presidential oversight to satisfy the Constitution's requirements" "should be invalidated." 938 F.3d at 593. This is one of those instances. The Court did not invalidate the action at issue in *Collins* because that action "was overseen by the Secretary of the Treasury, who was subject to at will removal by the President." *Id.* at 594. Because "[t]he President had full oversight of the adoption of the Net Worth Sweep," and "could have stopped it but did not," the Court declined to vacate that action. *Id.* But here, neither the President nor any executive officer removable at will had any oversight over the decision to initiate this enforcement action, rendering it void.

2. The CFPB's Constitutional Defect Deprived The District Court Of Jurisdiction Over This Enforcement Action.

The fundamental difference in posture between *Collins* and this case also has jurisdictional consequences. As explained above, *see supra* at 17–24, in this enforcement action, the CFPB is "[t]he party invoking federal jurisdiction," and so bears the burden to establish Article III standing, *Lujan*, 504 U.S. at 561—unlike the FHFA, which was defendant to the APA challenge in *Collins*. But because the CFPB was not properly vested with executive power, it lacked standing to bring this action to enforce public rights and never vested the district court with jurisdiction over this case. This crucial difference further distinguishes *Collins*.

3. The Supreme Court's Intervening Decision In *Seila Law* Clarified The Law.

In *Seila Law*, a majority of the Supreme Court confirmed that "dismiss[al]" is the "straightforward remedy" here. 140 S. Ct. at 2208 (plurality); *see id.* at 2220 (Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part) (same). Thus, to the extent *Collins* could be read to suggest that dismissal is *not* the normal remedy for a timely raised structural constitutional defense to an enforcement action, the Supreme Court's subsequent decision in *Seila Law* has now rejected that position.

Seila Law also undermines the distinction that the *Collins* remedial majority drew between removal-restriction cases and *Bowsher*. This Court's opinion had distinguished that case on the basis that an unconstitutional removal restriction does not involve an official wielding authority that she "never should have had" or that is "inconsistent with [her] role in the constitutional program." *Collins*, 938 F.3d at 593. But as the Supreme Court's intervening decision in *Seila Law* demonstrates, that is *exactly* what the CFPB involves. The Court held that by virtue of Article II's Vesting Clause, "[t]he entire 'executive Power' belongs to the President alone." *Seila Law*, 140 S. Ct. at 2197. The CFPB violated this constitutional structure by transferring to the independent Director (and away from presidential oversight) "enforcement authority[,] includ[ing] the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power." *Id.* at 2200. In short, the CFPB's design violated the separation of powers "by vesting significant governmental power in the hands of a single individual accountable to no one." *Id.* at 2203. Thus, *Seila Law* now confirms that, just as in *Bowsher*, the CFPB Director's power to authorize this enforcement action against All American without presidential oversight was authority that she "never should have had," and it therefore should be "invalidated." *Collins*, 938 F.3d at 593.

Moreover, as *Seila Law* makes clear, severance in no way displaces the remedy of invalidation. To the contrary, even after severing the for-cause removal provision, the Court still remanded for the lower court to consider whether the defendant was entitled to the "straightforward remedy" of "dismiss[al]," or whether the Acting Director's purported "ratifi[cation]" could preclude that remedy. 140 S. Ct. at 2208.

This Court is bound to depart from its prior decisions to the extent that "the Supreme Court either clearly holds or teaches to the contrary," *Ketchum v. Gulf Oil Corp.*, 798 F.2d 159, 162 (5th Cir. 1986), even if the intervening Supreme Court decision is "not directly on point," *United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007) (per curiam). *Seila Law* has now either "explicitly or implicitly overrul[ed]" any reading of *Collins* that would preclude the remedy of reversing the district court's denial of All American's motion for judgment on the pleadings. *United States v. Short*, 181 F.3d 620, 624 (5th Cir. 1999).

II. The Purported "Ratification" Was Invalid.

Seeking to avoid this straightforward constitutional remedy, the CFPB argues that the Director (and before her, the Acting Director) "ratified" the initiation of this enforcement action and thereby remedied All American's injury. *See* Ltr. Regarding Ratification; ROA.7177–7183. That is categorically wrong. The Supreme Court has never upheld a ratification in the context of a structural constitutional defect. And in any event, the CFPB fails to satisfy the two independent elements for any ratification: "it is essential that the party ratifying" was "able" (1) "to do the act ratified at the time the act was done," and (2) to do the act "also at the time the ratification was made." *NRA Political Victory Fund*, 513 U.S. at 98 (emphasis omitted).

A. Ratification Doctrine Has No Relevance To Structural Constitutional Violations.

As an initial matter, the CFPB's invocation of the "ratification" concept simply makes no sense in this posture. "Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts." *RD Legal*, 332 F. Supp. 3d at 785. But unlike a defective appointment, here the constitutional defect involved "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *Id.* (refusing to credit ratification). *Seila Law* has now conclusively confirmed that it is "the *structure of the CFPB* [that] violate[d] the separation of powers," because "[a]n agency with a *structure* like that of the CFPB is almost wholly unprecedented," and its "*structure* [was] an innovation with no foothold in history or tradition." *Id.* at 2192, 2201–02 (emphases added); *see also id.* at 2204 ("The CFPB Director's insulation from removal by an accountable President is enough to render the agency's *structure* unconstitutional." (emphasis added)). The constitutional violation therefore infected the *entire agency*, and all actions taken on the agency's behalf.

At the initiation of these proceedings, and throughout them, the CFPB's unconstitutional structure deprived it of the power to initiate enforcement actions: "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*, 118 U.S. at 442. The Supreme Court has thus held that 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" by "subsequent ratification." *Ringling v. City of Hempstead*, 193 F. 596, 601 (5th Cir. 1911).

Thus, cases involving the ratification of actions tainted by an *appointment* defect are inapt because they involve the authority of an *agent* and not the very *structure* of the agency. *See*, *e.g.*, *Gordon*, 819 F.3d at 1188; *see also Norton*, 118 U.S. at 442–44 (distinguishing the "invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office" from a constitutional defect in the governmental entity itself). Here, the *CFPB itself* was unconstitutionally structured and therefore lacked the authority to bring suit in the first place. *See Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start."). For that reason, neither the Supreme Court nor this Court has ever held that a structural constitutional violation like this can subsequently be ratified.

The only case that the CFPB can identify involving a ratification of an act taken by a structurally defective agency is *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996). But *Legi-Tech* never discussed the mechanics of ratification—in fact, it never even mentioned, let alone applied, the Supreme Court's two-step framework set forth in *NRA Political Victory Fund*, 513 U.S. at 98. *Collins*, meanwhile, did not address ratification at all, because the government made no ratification argument there. The

CFPB thus can point to no binding authority for the unprecedented application of ratification doctrine to the wholly inapposite context of structural constitutional defects.

B. Under *NRA Political Victory Fund*'s First Prong, The CFPB Lacked Authority To Initiate This Enforcement Action In The First Place.

Even assuming ratification doctrine applies, the CFPB flunks the first prong of *NRA Political Victory Fund*: the agency was not able "to do the act ratified at the time the act was done." 513 U.S. at 98; *Restatement (Second) of Agency* § 84(2) (1958) ("An act which, when done, the purported or intended principal could not have authorized, he cannot ratify."). The Supreme Court has applied this requirement for well over a century. *See United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907) (noting the requirement that "the principal had the capacity" to act in the first place for ratification to occur). Here, that requirement cannot be satisfied because the CFPB had no authority to act at the time of filing and hence no authority to act in the first place. That defect also deprived the district court of Article III jurisdiction, further preventing ratification. And the CFPB's attempts to evade *NRA Political Victory Fund* by following the *Third* Restatement of Agency are meritless.

1. The CFPB's Constitutional Deficiency Means That It Lacked Authority To Bring The Action In The First Place, And Thus Could Not Later Ratify.

The CFPB's unconstitutional structure when this suit was filed means that it "lack[ed] authority to bring this enforcement action" at that time. *NRA Political Victory Fund*, 6 F.3d at 822; *see also Noel Canning*, 705 F.3d at 493, 514 (NLRB action "void *ab initio*" because of structural defect); *Franklin Sav. Ass'n v. Dir. of Office of Thrift Supervision*, 740 F. Supp. 1535, 1538–41 (D. Kan. 1990) (newly appointed director "lacked the power" to ratify prior act by unconstitutionally appointed predecessor because he "had no power to" take the act at the original time, when the unconstitutional prior appointment remained in effect); *supra* at 13–17. Here the CFPB lacked power "to do the act ratified"—filing this enforcement action—"at the time th[at] act was done" on May 11, 2016. *NRA Political Victory Fund*, 513 U.S. at 98. Thus, no Director can ratify it now. *Id.*

2. The CFPB Also Lacked Power To Bring This Action In The First Instance Because It Lacked Standing To Do So.

The CFPB also fails *NRA Political Victory Fund*'s first prong because, as discussed above, *see supra* at 17–24, the district court never acquired jurisdiction over this action in the first place. *See* 513 U.S. at 98–99 (holding that jurisdictional filing requirement barred Solicitor General from ratifying FEC's unlawful filing of petition for writ of certiorari). The CFPB's constitutional defect deprived the agency of standing to bring this action.

Judge Ikuta explained in her *Gordon* dissent why this incurable standing defect precludes ratification under the first prong of *NRA Political Victory Fund*: "[f]ederal courts have consistently rejected arguments that a later act can cure a lack of standing at the time suit was filed." 819 F.3d at 1203 (Ikuta, J., dissenting) (citing *Police & Fire Ret. Sys. of City of Detroit v. IndyMac MBS, Inc.*, 721 F.3d 95, 110 (2d Cir. 2013) (subsequent intervenors cannot "revive claims that were dismissed . . . for want of jurisdiction"); *Utah Ass'n of Ctys. v. Bush*, 455 F.3d 1094, 1101 n.6 (10th Cir. 2006) (plaintiff cannot "file[] its complaint *before* the asserted injury on which it attempts to rely occurred")). Ratification therefore cannot resuscitate this action, which must be dismissed for lack of jurisdiction.

3. The Restatement (Third) Is Inapplicable And Of No Avail To The CFPB In Any Event.

The CFPB has urged this Court to ignore the Supreme Court precedent in *NRA Political Victory Fund* and instead adopt the Third Restatement of Agency, CFPB Panel Br. 20, which applies the first ratification requirement less "stringent[ly]" than did "[e]arlier statements of ratification doctrine," *Restatement (Third) of Agency* § 4.04 cmt. b (2006). But the Supreme Court has long applied the two-pronged ratification test as a matter of federal common law. *See Heinszen*, 206 U.S. at 382 (expressly requiring that "the principal had the capacity" to act in the first place before ratification could occur); *NRA Political Victory Fund*, 513 U.S. at 98 (same). This Court is bound to follow the Supreme Court's "ultimate authority to determine and declare" that federal common law. *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008).

Moreover, even if this Court were free to disregard Supreme Court precedent and adopt the Third Restatement, it should decline to do so. Such "modern Restatements . . . are of questionable value, and must be used with caution." *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part). Because "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be," "it cannot safely be assumed" that a modern "Restatement provision describes rather than revises current law." *Id.* at 475–76; *see also*, *e.g.*, *Hoffman v. L&M Arts*, 838 F.3d 568, 585 (5th Cir. 2016) (concluding that the Restatement (Third) of Restitution and Unjust Enrichment does not accurately reflect Texas remedies law).

The Third Restatement section relied on by the CFPB well illustrates this problem, because it is inconsistent with the relevant cases (even those on which the CFPB relies). For example, *Gordon* applied *NRA Political Victory Fund* and the *Second* Restatement. 819 F.3d at 1191–92. Other courts have done likewise. *See Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213 (D.C. Cir. 1998); *FEC v. Club For Growth, Inc.*, 432 F. Supp. 2d 87, 93–94 (D.D.C. 2006). And they have continued to do so, eschewing reliance on the Third Restatement more than a decade after its publication. *See Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603–04 & n.10 (3d Cir. 2016); *Alfa Int'l Seafood v. Ross*, 264 F. Supp. 3d 23, 44–47 (D.D.C. 2017). On this point, therefore, the Third Restatement "constitutes a 'novel extension'" that "should be given no weight whatever." *Kansas*, 574 U.S. at 476 (Scalia, J., concurring in part and dissenting in part).

In any event, the CFPB's purported ratification fails the first prong even under the Third Restatement. The Third Restatement retains the core precept that a principal "that has not yet commenced legal existence" at the time of an act "may not subsequently ratify it." *Restatement (Third) of Agency* § 4.04 cmts. b, c. Here, the CFPB's structural defect meant that "no office legally exist[ed]" at the time this suit was filed. *Norton*, 118 U.S. at 449. Because the CFPB had no "legal existence" at the time of that act, no one may "subsequently ratify it," even under the Third Restatement, § 4.04 cmt. c.

C. Under *NRA Political Victory Fund*'s Second Prong, The CFPB Lacked Authority To Act At The Time Of The Purported Ratification.

The CFPB also fails the second requirement for a valid ratification: "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.*" *NRA Political Victory Fund*, 513 U.S. at 98 (quoting *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874)). And its arguments for "equitable tolling" are entirely meritless.

1. The CFPB's Ratifications Came Too Late.

The CFPB cannot satisfy this requirement for the simple reason that its ratification came after the statute of limitations expired on its claims against All American.

a. "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." *NRA Political Victory Fund*, 513 U.S. at 98. Thus, if the ability to bring an action "has been terminated by lapse of time," such as the running of a statute of limitations, then "[t]he bringing of an action . . . can not be ratified" because the ratification "simply came too late in the day to be effective." *Id.*; *see also Restatement (Second) of Agency* § 90 cmt. c (ratification valid only if it comes "before a statute of limitations has run on the claim"); 2A C.J.S. *Agency* § 64 ("Where the doing of the original act is limited as to time, it must be ratified before the expiration of the time limit."); *In re W.R. Grace & Co.*, 316 F. App'x 134, 136 (3d Cir. 2009) ("ratifications are deemed ineffective in the face of an intervening deadline").

Importantly, it is the *CFPB* as the proponent of ratification—*not* All American—that bears the burden of establishing its validity, including its timeliness and the CFPB's full consideration of the issues. *See, e.g.*, *LHC Nashua P'ship, Ltd. v. PDNED Sagamore Nashua, LLC*, 659 F.3d 450, 461 (5th Cir. 2011) (burden falls on the "one seeking to prove ratification"); *see also NRA Political Victory Fund*, 513 U.S. at 98–99 (citing *Town of Nasewaupee v. City of Sturgeon Bay*, 251 N.W.2d 845, 846 (Wis. 1977); *Wagner v. City of Globe*, 722 P.2d 250, 254–55 (Ariz. 1986) (proponent's claim of ratification "fail[ed] to persuade" because "other interpretations are equally reasonable")).

The CFPB has previously tried to cabin this requirement to *only* those instances in which the failure to timely ratify resulted in a jurisdictional defect. CFPB Panel Br. 23–24. That distinction is irrelevant here because the CFPB's unconstitutional structure *does* result in a jurisdictional defect. *See supra* at 17–24; *Gordon*, 819 F.3d at 1203 (Ikuta, J., dissenting). But it is also refuted by *NRA Political Victory* itself. The

Supreme Court derived this second prong from cases such as *Nasewaupee*, 251 N.W.2d at 848–49, in which the Wisconsin Supreme Court refused "to uphold [a] town board's ratification of [a] private attorney's unauthorized commencement of" litigation "after the statute of limitations had run." *NRA Political Victory Fund*, 513 U.S. at 99. This is because, as expressed by the Second Restatement, ratification is allowed only "if the affirmance comes before a statute of limitations has run on the claim." *Restatement (Second) of Agency* § 90 cmt. c.

Accordingly, courts of appeals applying *NRA Political Victory Fund* have held that when a governmental entity attempts to ratify litigation that was initially brought without authority, but that ratification occurs after the running of the statute of limitations on the claims being ratified, such attempts "to ratify [the] suit c[o]me too late to be effective." *Benjamin v. V.I. Port Auth.*, 684 F. App'x 207, 212 (3d Cir. 2017) (affirming dismissal where claims subject to six-year statute of limitations accrued in 2007, but ratification did not come until 2015). And courts that have allowed a ratification have done so only after confirming, even *sua sponte*, that the statute of limitations would not prevent the government from taking the action at the time of ratification. *See*, *e.g.*, *Advanced Disposal*, 820 F.3d at 604 ("There is no statutory or administrative limitation preventing" the governmental officer's action "at the time he ratified it; thus the *NRA* 'timing issue' is not implicated here."); *Doolin*, 139 F.3d at 213 (allowing ratification because "[t]he timing problem posed in *NRA* is not present here," as "[n]o statute of limitations would have barred" the valid officer "from reissuing the Notice of Charges himself and starting the administrative proceedings over again").

b. Here, the CFPB may not ratify this enforcement action because the ratification "simply came too late in the day to be effective." *NRA Political Victory Fund*, 513 U.S. at 98. The CFPA prohibits the CFPB from bringing an action "more than 3 years after *the date of discovery of the violation to which an action relates*." 12 U.S.C. § 5564(g)(1) (emphasis added). Because Director Kraninger's purported ratification in this case occurred on July 8, 2020, it could not apply to any alleged violations "discover[ed]" before July 8, 2017. Similarly, Acting Director Mulvaney's prior purported ratification on February 5, 2018 could not apply to any alleged violations "discover[ed]" before February 5, 2015. All alleged violations in this case were discovered before *either* of those dates, and there are no disputed facts on that question. *See Benjamin*, 684 F. App'x at 212 (ratification done two years after a six-year statute of limitations had run was untimely under *NRA Political Victory Fund*).

First, Counts I through IV of the Complaint concerned All American's alleged check-cashing policies and practices, which the CFPB claims violated the CFPA. ROA.46–52 (¶¶ 12–32). On its face, the Complaint never alleges any act related to these policies after January 2013. ROA.47 (¶ 16). And the record is unmistakable that the CFPB knew of these alleged practices and policies by September 3, 2014, when the CFPB issued its Civil Investigative Demand ("CID"). The CID clearly evinced its knowledge of those alleged practices by making express inquiries about All American's "check cashing services," ROA.3351, dedicating an entire interrogatory (#5) solely to "check cashing services offered or provided by" All American, including "every fee, charge, interest rate, or penalty individuals may incur" in connection with those services, ROA.3357; *see also* ROA.3358 (regarding policy differences between government and non-government checks); ROA.3411 (document request regarding "provision of check cashing services"). A CID describes "the nature of . . . conduct constituting [an] alleged violation" of the CFPA, 12 U.S.C. § 5562(c)(2); *see also CFPB v. Source for Pub. Data, L.P.*, 903 F.3d

456, 458 (5th Cir. 2018) ("Section 5562(c)(2) requires that a civil investigative demand identify the nature of the conduct constituting the alleged violation."). As a matter of law, the CID shows the CFPB's "discovery of [a] violation to which [this] action relates" under the CFPA's statute of limitations. 12 U.S.C. § 5564(g)(1). And even if there were any doubt as to the CFPB's knowledge at that point, All American's responsive submission on October 3, 2014, of some 17,000 pages of documents, puts an end to the question as to all Counts. ROA.3351.

Second, Count V concerned All American's so-called "1st and 3rd" lending program. ROA.53–58 (¶¶ 41–53). No allegation in the Complaint suggests violations within the limitations period, *see* ROA.54 (¶ 42), and with good reason. All American stopped that program no later than June 19, 2014, in response to a cease-and-desist order from the Mississippi Department of Banking and Consumer Finance, ROA.6360; *see also* ROA.6352, which was conducting a *joint* investigation with the CFPB, ROA.6489. The CFPB's own papers in this case admit that the 1st-and-3rd-lending-program claims are based on conduct "[f]rom July 21, 2011 to June 19, 2014." ROA.3242–3243 (¶¶ 9–11). And the CFPB's

September 3, 2014 CID expressly mentions the 1st and 3rd lending program, again, showing the CFPB's knowledge of the claims years ago. ROA.3411.

Third, Count VI concerned violations based on alleged instances in which All American failed to notify or refund "consumers when consumers have made an overpayment." ROA.64 (¶ 85). The Complaint never alleges conduct past "2014." ROA.58 (¶ 55). The CFPB's own papers expressly state that it seeks to hold All American liable for conduct related to "overpayments" made "between October 2011 and July 2013," ROA.3251. And the September 3, 2014 CID expressly inquired into this issue of overpayments, just as it inquired into the subjects of all other Counts in the Complaint. *See* ROA.3351.

Under well-settled law applying *NRA Political Victory Fund*, the CFPB has failed to meet its burden.

c. The CFPB has argued that the timing defect in its attempted ratification cannot be decided on All American's Rule 12(c) motion because the CFPB's discovery of purported violations of the CFPA is not "evident from the pleadings." CFPB Panel Br. 21. The CFPB's argument lacks merit. First, the defect *is* evident from the pleadings. *See supra* at

42–45. Second, the pleadings are irrelevant to the question of ratification, which necessarily takes place outside the pleadings. The question before the Court is not an ordinary "statute of limitations objection" to the underlying claims. CFPB Panel Br. 21. In that scenario, the *defendant* would bear the burden of establishing that the statute had run in order to obtain dismissal under Rule 12(b) or judgment under Rule 12(c). The scenario here is very different. All American is entitled to judgment on the pleadings because the CFPB is unconstitutional and its actions are void—otherwise, there would be no reason for the agency to ratify in the first place. The CFPB has attempted to thwart judgment by introducing (outside the pleadings) two letters of ratification. As the proponent of ratification, the CFPB bears the burden of proving its validity, including its timeliness. *NRA Political Victory Fund*, 513 U.S. at 98; *LHC Nashua*, 659 F.3d at 461. And it has utterly failed to do so. The CFPB's own filings demonstrate as a matter of law that its purported ratification came too late. *See* ROA.46–52 (¶¶ 12–32); ROA.53–58 (¶¶ 41–53); ROA.58 (¶ 55); ROA.64 (¶ 85); ROA.3351; ROA.3357; ROA.3358; ROA.3411; ROA.3241; ROA.3242–3243 (¶¶ 9–11); ROA.3251; ROA.6352; ROA.6360; ROA.6489.

The CFPB is also wrong to suggest that "the parties have not addressed statute of limitations issues or the date of discovery in the district court." CFPB Panel Br. 21 n.10. All American has pointed out the timing deficiency in the CFPB's purported ratification in every brief filed in the district court and this Court since the CFPB submitted its original notice of ratification. *See* ROA.7190–7191 (Response to Ratification 5–6); Opening Br. 59; Reply Br. 27; Ltr. 10; Reply Ltr. 3. That the CFPB chooses to avoid responding, or to ignore what *its own* documents reveal about its knowledge at the relevant time, shows only that it has failed to meet its burden.

d. The CFPB also failed to meets its burden of showing that its ratification was more than a rubber stamp. "[T]he ratifier must make a detached and considered judgment, not simply rubberstamp the earlier action." *Advanced Disposal*, 820 F.3d at 603. Here, however, the Acting Director merely claimed to have "been briefed" on the case, ROA.7182, while Director Kraninger simply stated that she "considered the basis" of the lawsuit, Ltr. Regarding Ratification. Neither has discussed important considerations and post-filing developments such as the fact that (i) there were parallel state proceedings based on the same conduct,

(ii) Mr. Gray was subsequently fined close to a million dollars by state regulators, and (iii) Mr. Gray forfeited his business license and no longer works in the banking industry. The CFPB's *ipse dixit* fails to carry its burden of showing a valid ratification.

* * *

There can be no dispute that the CFPB "discover[ed]" the alleged violations "to which [this] action relates," 12 U.S.C. § 5564(g)(1), prior to the issuance of the September 3, 2014 CID—and therefore more than three years before either purported ratification. Throughout briefing on the issue in the district court, before the panel at the interlocutory certification stage, at the panel stage, supplemental briefing, and *two* oral arguments, the CFPB has never denied that it knew of the alleged basis for its Complaint by that time. That makes the bare-bones, purported ratifications far too late, and prevents the CFPB from meeting its burden of establishing a valid ratification.

2. <u>The CFPB's Equitable-Tolling Arguments Lack Merit</u>.

Realizing that its own record eviscerates its claim to ratification, the CFPB has previously grasped at straws in a plea for "equitable tolling." CFPB Panel Br. 22. These arguments fail utterly.

First, the CFPB forfeited its equitable-tolling argument by not raising it before the district court. *See*, *e.g.*, *Butler v. Cain*, 533 F.3d 314, 320 (5th Cir. 2008) (equitable-tolling argument "raised for the first time on appeal . . . may not be considered").

Second, the CFPB has cited no authority supporting the application of equitable tolling to an enforcement action initiated by an unconstitutional agency. *See* CFPB Panel Br. 22–23. Indeed, applying that doctrine here would contradict the Supreme Court's clear teaching that separation-of-powers remedies must be "designed . . . to create 'incentives to raise'" those challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (quoting *Ryder*, 515 U.S. at 183). The CFPB's argument for "equitable" tolling contains no limiting principle and would apply in *all* constitutional cases, meaning that there would be *no limit* to the time for an agency to ratify past unlawful actions. But the Supreme Court has declined to extend written statutes of limitations "in this context, where the plaintiff is not a defrauded victim seeking recompense, but is instead the Government bringing an enforcement action for civil penalties." *Gabelli v. SEC*, 568 U.S. 442, 449 (2013). Chief Justice Marshall "stat[ed] that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time,'" and allowing government enforcement actions to invoke equitable tolling "would raise similar concerns." *Id.* at 452 (quoting *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 342 (1805)).

Third, even if equitable tolling were theoretically available, the CFPB fails to demonstrate the necessary "extraordinary circumstances." *Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016). The "party seeking to establish tolling" bears the burden to establish its appropriateness in a particular case, *Phillips v. Donnelly*, 216 F.3d 508, 511 (5th Cir. 2000) (per curiam), which this Court has "emphasized" is a "fact-intensive" inquiry, *Penalva v. Sessions*, 884 F.3d 521, 525 (5th Cir. 2018). Here, the CFPB has cited no facts to carry its burden to distinguish this case from any other. *See V.I. Taxi Ass'n v. V.I. Port Auth.*, No. 08-cv-142, 2015 WL 5535237, at *5 (D.V.I. Sept. 16, 2015) (refusing to equitably toll statute of limitations to permit untimely ratification), *aff'd sub nom. Benjamin*, 684 F. App'x 207.

Indeed, the equities in this case favor *All American*. The CFPB claims that All American "want[s] a windfall" by seeking "judgment in [its] favor." CFPB Reply Ltr. 2. But it is the *agency* that seeks a windfall by carrying on an unconstitutionally filed enforcement action as if nothing ever happened. This Court's remedial mandate to "create incentives" aligned with the Constitution's "structural purposes," *Lucia*, 138 S. Ct. at 2055 n.5, applies equally to the *government's* incentives. If the political branches can violate the separation of powers with impunity, they will have no incentive to remedy, or precipitate judicial resolution of, constitutionally dubious laws. The open and notorious defect in the CFPB's structure here, which has been litigated for years and was even conceded by the agency, is a case in point.

Moreover, there is no risk that ruling in favor of All American here would result in scores of agency actions being nullified. The CFPB itself has made clear that "the ratification issue is implicated in at most a handful of cases." CFPB Br. in Opp. 16, *All Am. Check Cashing, Inc. v. CFPB*, No. 19-432, 2019 WL 5855804 (U.S. Nov. 6, 2019). Indeed, as of last November the CFPB "ha[d] [only] 19 pending enforcement actions, and the constitutional issue has not been preserved in all of those." *Id.* at 16 n.2. Thus, even if the equities weighed into the remedial calculus at all, they would favor strictly applying the statute of limitations to incentivize the government's own compliance with the constitutional plan—as well as incentivizing victims of constitutional violations to bring prompt judicial challenges—and rejecting the CFPB's untimely attempt at ratification.

D. The Acting Director's Previous Purported Ratification Was Invalid For Additional Reasons.

Acting Director Mulvaney's purported ratification on February 5, 2018, ROA.7177–7183, too, fails for all the reasons above, which are equally applicable. For example, the statute of limitations undisputedly ran before this first attempted ratification. *See supra* at 42–45. But the Acting Director's purported ratification also suffers three additional and independent fatal defects.

First, the CFPB's structural defect remained in place despite the temporary presence of the Acting Director. As the court held in *RD Legal* on analogous facts, Acting Director Mulvaney'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[ed] intact." 332 F. Supp. 3d at 785.

Second, this Court has already held in the analogous context of the FHFA that "removal restriction[s] appl[y] to the acting Director" of an independent agency. *Collins*, 938 F.3d at 589 (noting that Acting Director's presence did not change agency's "central character" as "an independent agency"). As with the FHFA, the CFPB's independence is unmistakably its "central character," *id.*, and it remained independent under Mulvaney. That independence is confirmed by the Acting Director's record of autonomous actions. An agency that is actually "subject to the authority of the President" may not take legal positions "contrary to the position of the United States." 7 Op. O.L.C. 57, 57 (1983). And the Attorney General has final authority on legal positions for "agencies whose heads serve at the pleasure of the President." Exec. Order No. 12,146, § 1-402 (July 18, 1979), *reprinted in* 28 U.S.C. § 509 note. But the CFPB under Mulvaney continued to defend its constitutionality, even after the United States admitted the constitutional defect. The Acting Director's purported ratification thus fails because he, too, was unconstitutionally independent of presidential control.

Finally, at the very least, the Acting Director's purported ratification could not cure any *subsequent* constitutional injury arising after he left office. *See RD Legal*, 332 F. Supp. 3d at 785 (holding that Acting Director Mulvaney's ratification was ineffective because "a new Director appointed in the coming months" would "be subject to the for-cause removal provision," and "[t]herefore, the Ratification does not cure the constitutional deficiencies"). From the time of Director Kraninger's confirmation in December 2018, this action was undisputedly prosecuted by an unconstitutionally independent Director.

Though the plurality in *Seila Law* declined to decide this question in the first instance, Justices Thomas and Gorsuch would have reached it and held that the Acting Director "certainly could not ratify the continuance of the enforcement action by his successor, Director Kraninger." 140 S. Ct. at 2221 (Thomas, J., concurring in part and dissenting in part). As these Justices concluded, that alone provides an independent ground to reject the Acting Director's asserted ratification as insufficient to resolve the constitutional defect.

III. The CFPB's Prosecution Of This Action Remains Unconstitutional After *Seila Law* Because The Agency's Funding Structure Violates The Appropriations Clause.

Reversal is also independently required to remedy a constitutional defect not presented in (let alone resolved by) *Seila Law*: the unprecedented two layers of insulation shielding the agency's funding from political accountability violates the Appropriations Clause.

As Chief Justice Roberts's opinion made clear, the decision in *Seila Law* was confined strictly to "the questions presented" on which the Court granted certiorari. 140 S. Ct. at 2208 n.12 (plurality). Those questions, in the CFPB's phrasing, were (1) "[w]hether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Consumer Financial Protection Bureau except for 'inefficiency, neglect of duty, or malfeasance in office,'" and (2) "[w]hether, if 12 U.S.C. 5491(c)(3) violates the separation of powers, it can be severed from the rest of" the Dodd-Frank Act. Br. for Respondent Supporting Vacatur *i, *Seila Law* (No. 19-7), 2019 WL 6727094 (U.S. Dec. 9, 2019). The Court answered both questions in the affirmative, but did not go further and address other constitutional claims that were not presented in that case.

The Court thus never addressed the Appropriations Clause question. But All American has argued from the outset that the CFPB suffers from "many other structural flaws, such as concentrating sweeping executive, rulemaking, and adjudicative powers in an agency immune from the Appropriations process," in addition to the Article II violation established in *Seila Law*. Opening Br. 65; *see also* Reply Br. 9–11, 30–31;

ROA.2228–2229 (Rule 12(c) Mem. 11–12). Reversal is required to remedy this constitutional defect in the CFPB's funding structure.

The Constitution mandates that "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). The CFPA, however, violates this constitutional requirement by delegating to the CFPB the unilateral authority to requisition hundreds of millions of dollars from the Federal Reserve each year. 12 U.S.C. § 5497(a)(2). And the CFPB supplements this largesse with the additional self-funding mechanism of enforcement actions, which have netted a Civil Penalty Fund currently containing $543 million. *Id.* § 5497(d)(2); CFPB, *Financial Report of the Bureau of Consumer Financial Protection* 18 (Nov. 15, 2019), https://tinyurl.com/y2sd9efv. In fact, the CFPB's funding authority is protected by *two* levels of independence: The CFPB can self-fund by demanding funds from the Federal Reserve, which itself is independently funded. And Congress may not even "review" the CFPB's budget. 12 U.S.C. § 5497(a)(2)(C).

This funding structure violates the separation-of-powers maxim, embodied in the Appropriations Clause, that the funding power and the executive power must be kept separate.

A. The Appropriations Clause Forbids Delegating The Power Of The Purse To The Executive.

The Framers well understood this fundamental principle. For this reason, they wrote the Appropriations Clause, placing the funding power exclusively in the hands of Congress. The Supreme Court, also, has long recognized the importance of the principle that Congress alone, and not the Executive Branch, may authorize the withdrawal and use of particular public funds. *See*, *e.g.*, *Bradley v. United States*, 98 U.S. 104, 112 (1878) ("Moneys not appropriated cannot be drawn from the treasury."); *Knote v. United States*, 95 U.S. 149, 154 (1877) ("Moneys once in the treasury can only be withdrawn by an appropriation by law."); *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.").

This limitation, established by the Appropriations Clause, "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321

(1937). As Justice Story explained, to preserve "in full vigor the constitutional barrier between each department," the Constitution grants Congress "a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable." Joseph Story, *Commentaries on the Constitution of the United States* § 531, at 372 (1833). St. George Tucker, too, characterized the Appropriations Clause as "a salutary check" on "any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make," thereby securing "the right of the people," through their elected representatives, to "be actually consulted upon the disposal of the money which they have brought into the treasury." St. George Tucker, *Views of the Constitution of the United States* 298 (1803).

The Framers knew firsthand how crucial it was to separate the power to appropriate funds from the power to execute the law against individuals. "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning*, 705 F.3d at 510. The delegates to the Constitutional Convention gave Congress the sole power to provide "the supplies requisite for the support of government" because they saw how "that powerful instrument," in the hands of Parliament, had overcome the "overgrown prerogatives" of the British monarch. *The Federalist Papers, No. 58*, at 359 (Madison) (Clinton Rossiter ed., 1961). The Appropriations Clause is therefore "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." *Id.*; *see* Baron de Montesquieu, *The Spirit of the Laws* 119 (1748) (Thomas Nugent trans., 1793) ("Were the executive power to determine the raising of public money otherwise than by giving its consent, liberty would be at an end . . . because the executive power would be no longer dependent.").

Thus, as then-Judge Kavanaugh recognized, the legislature's "exclusive power over the federal purse" stands as "one of the most important authorities allocated to Congress." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012); *see also Hart's Adm'r v. United States*, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress."), *aff'd*, 118 U.S. 62 (1886). The Appropriations Clause acts as a "bulwark of the Constitution's separation of powers" that is "particularly important as a restraint on Executive Branch officers." *Dep't of Navy*, 665 F.3d at 1347. It "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *OPM v. Richmond*, 496 U.S. 414, 428 (1990). "Any other course would give to the fiscal officers a most dangerous discretion." *Reeside*, 52 U.S. (11 How.) at 291.

B. The CFPB's Two-Layer Funding Independence Violates The Appropriations Clause.

Congress violated the Appropriations Clause by abdicating its exclusive power of the purse and insulating the CFPB from congressional oversight with an unprecedented two layers of fiscal independence.

Congress ceded its appropriations power by granting the CFPB unilateral authority to appropriate over half-a-billion dollars from the Federal Reserve's budget at will each year—plus the money in the Civil Penalty Fund—and further abdicated its own power even to review that budget. This level of budgetary independence for an agency that wields so much core executive power is entirely novel. Prior to the CFPB, "Congress has utilized self-funding in only a limited number of 'narrowly-focused' independent agencies." Charles Kruly, *Self-Funding and Agency*

Independence, 81 Geo. Wash. L. Rev. 1733, 1735 (2013). Those agencies "only regulate financial institutions or make technical financial decisions," or are otherwise "narrowly focused." Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1823 (2012). The CFPB, by contrast, "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy." *Seila Law*, 140 S. Ct. at 2191.

Congress's relinquishment of budget authority over the CFPB is thus an unconstitutional "delegat[ion of] legislative power to the agency." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). The Supreme Court has invalidated statutes delegating legislative power to bodies other than Congress. *See Clinton*, 524 U.S. at 421 (invalidating authorization of presidential line-item veto); *Chadha*, 462 U.S. at 959 (invaliding legislative veto empowering one House of Congress to invalidate executive action by resolution). That is because Article I's legislative process—including appropriations—"represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." *Chadha*, 462 U.S. at 951. And like its sister provisions in Article I, "[t]he Appropriations Clause is a vital instrument of separation of powers, which has as its aim the protection of individual rights and liberties." *Sierra Club v. Trump*, 929 F.3d 670, 704 (9th Cir. 2019). Article I forbids a "decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress." *Clinton*, 524 U.S. at 451 (Kennedy, J., concurring).

Congress's acquiescence in this delegation is irrelevant, because the separation of powers exists to preserve liberty and "does not depend on . . . whether 'the encroached-upon branch approves the encroachment.'" *Free Enter. Fund*, 561 U.S. at 497. Nor is it sufficient that Congress retains power to amend the CFPA's funding provisions. *All* statutes are subject to repeal. Congress could not delegate its constitutional "authority to admit states" or "to propose [constitutional] amendments" simply because those Acts could later be amended. Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1054–55 (2007). The fact that the CFPA's funding defects could be repealed does not resolve its unconstitutionality.

This Court, however, need not define the precise extent to which agencies can be funded outside the appropriations process. It is enough to hold that *this* agency—which is protected by *two* layers of budgetary independence, with *additional* self-funding via civil penalties to boot—goes too far. Like the dual-insulation from presidential removal invalidated in *Free Enterprise Fund*, the CFPB funds itself by requisitioning hundreds of millions of dollars from the Federal Reserve's budget, which itself is independently funded by fees assessed upon the Federal Reserve banks. 12 U.S.C. § 243. This "added layer of [budgetary] protection makes a difference." *Free Enter. Fund*, 561 U.S. at 495. The "novel structure does not merely add to the [CFPB's] independence, but transforms it," *id.* at 496, by thoroughly shielding the CFPB's expenditures from any accountability. "[W]here, in all this, is the role for oversight by an elected" Congress? *Id.* at 499.

C. *Seila Law* Did Not Address This Article I Issue.

The Supreme Court in *Seila Law* addressed a particular constitutional claim involving Article II's Vesting and Take Care Clauses. 140 S. Ct. at 2191. In keeping with the Supreme Court's role as a tribunal of review and not first view, *Seila Law* left all other matters to "lower courts to consider" in the first instance. *Id.* at 2208 (plurality).

All American's appropriations argument, in particular, was neither raised nor addressed in *Seila Law*. The CFPB's funding structure was briefly mentioned, but only as incidentally relevant to the *Article II* claim. In that respect, the CFPB's funding structure "aggravate[d] the agency's threat *to Presidential control*," by neutering the President's veto power over the congressional budget process. *Seila Law*, 140 S. Ct. at 2204 (emphasis added). The Court thus addressed the CFPB's funding only insofar as it confirmed that "the CFPB's independent, single-Director structure" violated Article II. *Id.* at 2204 n.9; *see also* Transcript of Oral Argument 35:9–20, *Seila Law*, No. 19-7 (U.S. Mar. 3, 2020) (Solicitor General stressing that the funding structure is "not the focus of our argument").

Nowhere did the Court address the separate constitutional threat to *Congress's* exclusive power of the purse. Indeed, the Appropriations Clause problem is even worse after *Seila Law*'s severance, now that the CFPB is an *executive* agency subject to full control by a President unconstrained by Congress's appropriations power. As Justices Story and Kavanaugh have noted, the Appropriations Clause was directed at the fear that "the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure." *Dep't of Navy*, 665 F.3d at 1347 (Kavanaugh, J.) (quoting Story, *supra*, § 1342, at 213–14). Today's CFPB, reconstituted as an executive agency, embodies that fear come to life.

CONCLUSION

This Court should reverse the district court's order denying All American's motion for judgment on the pleadings.

Dated: July 30, 2020

Respectfully submitted,

/s/ Theodore B. Olson

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I hereby certify that on July 30, 2020, an electronic copy of the foregoing 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 Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 12,708 words.

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Dear Mr. Christiansen, Mr. Conner, Mr. Cory, Mr. Danks, Mr. Lipshutz, Mr. Olson, Mr. Shelfer, and Ms. Walker,

You must submit the 22 paper copies of your appellants' supplemental brief required by 5th Cir. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1. The cover of the spirally bound paper copies of your brief will be blue.

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Sincerely,

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