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-356-WHB-JCG

SUPPLEMENTAL EN BANC BRIEF OF PLAINTIFF-APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

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STATEMENT REGARDING ORAL ARGUMENT

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

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JURISDICTIONAL STATEMENT

The Bureau agrees with the jurisdictional statement included in Defendants' Principal Brief filed in this Court on July 2, 2018.

ISSUES PRESENTED

1) In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court held that the for-cause removal provision in the Consumer Financial Protection Act (CFPA) that applied to the Director of the Consumer Financial Protection Bureau (Bureau) unconstitutionally impeded the President's powers under Article II of the Constitution. The Supreme Court also held that this provision was severable from the remainder of the CFPA, and that the Bureau could continue to operate under a Director fully accountable to the President. Although the for-cause removal provision had not been declared invalid when the Complaint in this case was filed, the Complaint has now been ratified by two officials removable by the President at will. Does the fact that this case was initially approved by a Bureau Director prior to the Supreme Court's ruling entitle Defendants to dismissal even though this case was subsequently approved by two officials who were, and understood themselves to be, fully accountable to the President?

2) The Consumer Financial Protection Act authorizes the Bureau to commence civil actions to enforce federal consumer financial laws, including the CFPA's prohibition of unfair, deceptive, and abusive acts or practices. 12 U.S.C. 5564. Did the Bureau lack Article III standing to enforce that prohibition against Defendants

because, at the time the Complaint was filed, the for-cause removal provision had not yet been declared invalid by the Supreme Court?

3) As it has done with respect to other agencies, Congress chose to fund the Bureau through its organic statute (*i.e.*, the CFPA) rather than through annual appropriations. In funding the Bureau by statute, did Congress violate the Appropriations Clause's requirement that no money be drawn from Treasury except by appropriations "made by Law"?

STATEMENT OF THE CASE

A. Introduction

More than four years ago, the Bureau sued All American Check Cashing, Inc.; Mid-State Finance, Inc.; and Michael E. Gray (Defendants). The parties completed discovery, filed dispositive motions, and began trial preparation. But after discovery had been completed, and just months short of a trial, all of this came to a halt. Although the district court denied Defendants' motion for judgment on the pleadings and upheld the constitutionality of the CFPA's for-cause removal provision, it then stayed further proceedings, and certified the constitutional issue to this Court for further review.

In *Seila Law LLC v. CFPB*, *supra*, the Supreme Court held that the for-cause removal provision was unconstitutional. It also held that this provision was severable from the remainder of the CFPA, and therefore did not affect the validity of the remainder of the statute. *Id.* at 2192. The Court did not grant Seila Law's request for a

dismissal of the Bureau's action against it. Instead, the Court remanded so that the lower courts could resolve the following issue: whether a ratification had occurred and whether that ratification would be sufficient to cure the constitutional defect that existed when the Bureau initiated its action against Seila Law. *Id.* at 2208.

The issue that is now before this Court is similar to the one that the Supreme Court left for resolution on remand in *Seila Law*. The Bureau filed its Complaint against Defendants before the Supreme Court had declared the for-cause removal provision unconstitutional. This injured Defendants by subjecting them to the authority of an official unconstitutionally insulated from Presidential control. *See id.* at 2196. But as the Supreme Court has explained, "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981); *see also Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem."). Thus, the appropriate remedy for Defendants – one that is precisely tailored to the problem – is to make sure that this case does not go forward unless that is the wish of a Bureau Director who is fully accountable to the President, *i.e.*, not subject to for-cause removal. Defendants have now gotten exactly that because the Bureau's Complaint has been ratified by two officials who were, and understood themselves to be, fully accountable to the President.

Despite these ratifications, Defendants contend that they (and presumably every other defendant in an ongoing action brought by the Bureau) are nonetheless entitled to more: a dismissal of the Bureau's Complaint. They are not. Dismissal is not a remedy tailored to the problem. Indeed, it would exacerbate it. The problem with this action was that the President lacked sufficient oversight at the time this action commenced. But now, he has sufficient oversight. To dismiss this law-enforcement action now – after officials fully accountable to the President have approved it – would undermine, not protect, the very executive power that the Court's decision in *Seila Law* took care to protect. Moreover, dismissal would be a windfall for defendants – why does the invalidity of the for-cause removal provision entitle them to escape any consequences of the illegal conduct the Bureau has alleged? And dismissal would be unfair to the consumers allegedly injured by these illegal acts – why should the invalidity of the for-cause removal provision be grounds for denying them any relief? Ratification, not dismissal, provides a modest solution tailored to the constitutional problem without unnecessarily infringing on competing interests of injured consumers and the public. Although Defendants argue that the Bureau has not satisfied all the requirements for a valid ratification, those arguments are meritless.

Defendants also argue that, because of the unconstitutional for-cause removal provision, the Bureau lacked Article III standing when it filed its Complaint. But the for-cause removal provision in the CFPA implicated the President's powers under Article II of the Constitution, not this Court's jurisdiction under Article III. As the

court explained in *CFPB v. Gordon*, 819 F.3d 1179, 1187 (9th Cir. 2016), when it comes to enforcing federal laws, "it is the Executive Branch, not any particular individual, that has Article III standing." The unconstitutional for-cause removal provision had no effect on the Bureau's standing.

Finally, Defendants contend that the Bureau's statute violates the Appropriations Clause in Article I of the Constitution because it provides funding for the Bureau outside the annual appropriations process. But the Appropriations Clause requires that appropriations be "made by Law." That is exactly what Congress did when it provided for the Bureau's funding in the CFPA. The Constitution does not require that agencies be funded as part of Congress's annual appropriation, and numerous other agencies are funded that way.

B. Background

1. The Bureau

As part of its response to the 2008 financial crisis, Congress enacted the CFPA. 12 U.S.C. 5481-5603.[1] The CFPA established the Bureau and charged it with enforcing certain pre-existing consumer financial laws, as well as the newly enacted CFPA itself, which, among other things, prohibits unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services. 12 U.S.C. 5491(a), 5531(a), 5536(a)(1)(B).

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[1] The CFPA is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act).

The Bureau is headed by a single Director who serves a five-year term. As originally established, during that five-year term, a Director was to be removable by the President only for cause – "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(1), (3).

Congress chose to fund the Bureau primarily through an appropriation in its organic statute, *i.e.*, the CFPA, rather than through separate statutes enacted as part of the annual appropriations process. Congress has done the same with respect to other financial regulators, such as the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), and the Office of the Comptroller of the Currency. *See* 12 U.S.C. 243 (FRB); 12 U.S.C. 1815(d), 1820(e) (FDIC); 12 U.S.C. 16 (OCC); 12 U.S.C. 5497 (Bureau). But unlike those agencies, the Bureau's funding is capped. 12 U.S.C. 5497. If the Bureau needs additional funds to carry out its duties, Congress must separately appropriate such funds. 12 U.S.C. 5497(e).

2. Proceedings below

Because this Court is reviewing the district court's denial of a motion for judgment on the pleadings, the only facts before this Court are those alleged in the pleadings, including the Bureau's Complaint (ROA.43-66), which it filed on May 11, 2016. *Bosarge v. Miss. Bureau of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015). The Complaint alleged that, in connection with their offering and providing of payday loans and check cashing services, Defendants had engaged in unfair, deceptive, and abusive acts and practices that injured consumers and violated sections 1031 and 1036

of the CFPA, 12 U.S.C. 5531(a), 5536(a). According to the Complaint, Defendants obscured the actual costs of their check cashing service by, among other things, making false statements regarding the availability of information about the costs, physically blocking receipts that disclosed those costs, and interfering with consumers' ability to see state-mandated signs that disclosed the costs. ROA.60. Defendants also took advantage of consumers by processing checks without consent, and by applying an ink stamp on the back of checks that made it difficult for consumers to cash them elsewhere. ROA.61. The Complaint further alleged that, in connection with their payday lending business, Defendants falsely represented that the loans they offered were less expensive than their competitors' loans when, in fact, the opposite was true. ROA.63. In addition, Defendants failed to notify consumers who had overpaid their accounts, and also failed to provide refunds to those consumers. ROA.64. The Bureau sought, *inter alia*, injunctive relief, restitution for injured consumers, and civil penalties. ROA.65.[2]

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[2] Defendants suggest that, because of the settlement of a law enforcement action brought against them by the State of Mississippi, the Bureau's action is no longer necessary. *See* Defendants' Supplemental En Banc Brief (Suppl. Br.) at 4-5. In fact, however, although Mississippi's action resulted in the revocation of Defendants' licenses to operate in Mississippi, it required them to provide refunds to only some of the Mississippi residents who could potentially receive refunds under the Bureau's action. Further, Mississippi's action had no effect on Defendants' operations in either Alabama or Louisiana, nor did it provide restitution to residents of those states. *See* ROA.3254-94, 6628-39. The Bureau's action seeks relief for all injured consumers, regardless of where they live.

On May 24, 2017, Defendants filed a motion for judgment on the pleadings raising a variety of constitutional issues, including a challenge to the constitutionality of the CFPA's for-cause removal provision. ROA.2209-42. The district court denied that motion in March 2018, rejecting Defendants' challenge to the removal provision. ROA.7206-16. However, the court granted Defendants' motion to certify that issue for interlocutory appeal, and it also stayed all proceedings. ROA.7244-47. This Court then granted permission for an interlocutory appeal. ROA.7252.

In March 2020, a panel of this Court upheld the constitutionality of the for-cause removal provision. 952 F.3d 591 (5th Cir. 2020). This Court later voted to rehear the case en banc, and vacated the panel's opinion. 953 F.3d 381 (5th Cir. 2020).

3. *Seila Law LLC v. CFPB*

In *Seila Law*, which was an action brought by the Bureau to enforce a civil investigative demand (CID), the Supreme Court held that while the CFPA's for-cause removal provision was unconstitutional, that provision could be severed from the remainder of the CFPA. 140 S. Ct. at 2192. The Court rejected the argument (urged by the petitioner in *Seila Law* and by Defendants previously in this case) that the constitutional problem with the removal provision required eliminating the Bureau altogether. Getting rid of the Bureau, the Court explained, would "trigger a major regulatory disruption" that "would leave appreciable damage to Congress's work in the consumer-finance arena." *Id.* at 2210. As the Court noted:

> The provisions of the [CFPA] bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the [CFPA] that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. Quite the opposite.

Id. at 2209.

The CID at issue in *Seila Law* had been ratified by a former Acting Director of the Bureau, Mick Mulvaney, who, the parties agreed, was removable by the President at will because he was an acting director appointed pursuant to the Federal Vacancies Reform Act (FVRA), 5 U.S.C. 3345-3349d. *See* Reply Brief of Appellant, *CFPB v. Seila Law, LLC*, No. 17-56324, 2018 WL 2197465, at *8 (9th Cir. May 9, 2018); *see also Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154, at *7 (Nov. 25, 2017) ("the removal protections for the Director would not insulate an Acting Director from displacement by the President under the Vacancies Reform Act," citing *Swan v. Clinton*, 100 F.3d 973 (D.C. Cir. 1996)). In light of factual questions about whether that ratification had occurred and the lack of briefing on whether that ratification cured the problem, the Supreme Court declined to address the issue of ratification, and instead remanded that issue to the lower courts. Although Justices Thomas and Gorsuch would have held that Acting Director Mulvaney "could not ratify" the *later* involvement of an unconstitutionally insulated Director Kraninger, *Seila Law*, 140 S. Ct. at 2221 (Thomas, J., concurring in part and dissenting in part) – the majority specifically

refused to endorse that view. *Id.* at 2208 n.12. The Court had no opportunity to address the effect of Director Kraninger's ratification, which occurred after the for-cause removal provision had been invalidated because, of course, no such ratification had yet occurred.

4. Ratification

The Bureau's decision to bring this case has been ratified by officials who are removable by the President at will. When the Bureau originally filed its Complaint against Defendants, it was headed by Director Richard Cordray who, according to the CFPA, could be removed by the President only for cause. But in November 2017, Director Cordray was replaced by Acting Director Mick Mulvaney, who, as explained above, was removable by the President at will as a result of his appointment pursuant to the FVRA. The Bureau continued the prosecution of this case under his direction. On February 5, 2018, the Bureau filed with the district court a notice indicating that Acting Director Mulvaney had ratified the Bureau's decision to file the lawsuit against Defendants. ROA.7177-84. The Bureau attached a declaration from the Acting Director, in which he explained that he had reviewed the Bureau's decision to file a lawsuit against Defendants; he had been briefed by the Bureau's Office of Enforcement regarding the case (once the Bureau issues a complaint, its Office of Enforcement has responsibility for the prosecution); and he then ratified the Bureau's decision.

In December 2018, the Bureau's current Director, Kathleen Kraninger, replaced Acting Director Mulvaney after being nominated by the President and confirmed by the Senate. The Bureau continued to pursue this case before this Court under her direction. Now, as a result of the Supreme Court's decision in *Seila Law*, it is settled that Director Kraninger is removable by the President at will. On July 17, 2020, the Bureau submitted a letter to this Court explaining that, on July 8, Director Kraninger had ratified the decision to file the Complaint in this case after considering the basis for bringing the lawsuit against Defendants. The Bureau attached a declaration from Director Kraninger to the letter.

STANDARD OF REVIEW

This Court reviews the district court's denial of a motion for judgment on the pleadings *de novo*. *Bosarge*, 796 F.3d at 439.

SUMMARY OF ARGUMENT

1. When the Bureau issued its Complaint in this case, its Director believed himself to be insulated from presidential control by the CFPA's for-cause removal provision. In *Seila Law*, the Supreme Court held that the removal provision was unconstitutional and severable from the remainder of the CFPA. The Supreme Court has explained that remedies for constitutional violations such as this one should not unnecessarily infringe on competing interests but should be tailored to the violation. That is, the solution should be limited to the problem. Defendants ignore those admonitions and urge dismissal. But dismissal is not a limited solution tailored to the

problem and it completely ignores the competing interests of the consumers who may have been injured by the law violations alleged in the Complaint. The appropriate solution is one that makes sure this case goes forward only if that is the wish of a Bureau Director who is fully accountable to the President. Defendants have gotten exactly that because the Bureau's Director, who is now fully accountable to the President, has ratified the Complaint.

Courts have routinely held that, once a constitutional violation has been corrected, ratification is the appropriate remedy for a complaint that an agency had previously issued. For example, in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), the agency's organic statute had a constitutional defect (similar to the one here) when the complaint was issued – by statute, the FEC had included members from the legislative branch who were, therefore, not subject to presidential control. But the court rejected Legi-Tech's request to dismiss the complaint and allowed the enforcement action to go forward because, after those members were removed, the FEC had ratified its action against Legi-Tech. And in *CFPB v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016), the Bureau's complaint had initially been approved by a Director whose appointment violated the Appointments Clause. The court held, however, that any constitutional deficiencies in the filing of the complaint had been cured because, after the Director had been properly appointed, he had ratified the complaint.

Defendants argue that the ratification here is invalid because the Bureau lacked authority to file the Complaint when it originally did so. But even if that were a

requirement for ratification, it is satisfied here because Congress vested the authority to enforce the CFPA in the Bureau, so the Bureau had enforcement authority regardless of whether it was led by a director protected from removal. Defendants also argue that the ratification was invalid because, by the time the Director ratified the Complaint, the statute of limitations had run. Even if it had, the statute of limitations should be equitably tolled because the Bureau pursued its rights diligently – it timely filed the Complaint in 2016 – and it was subject to an extraordinary circumstance over which it had no control – the unconstitutionality of the CFPA's for-cause removal provision. In any event, the statute of limitations did not run. The CFPA's three-year statute of limitations begins to run only after the Bureau discovers the violation. Defendants do not explain how the Bureau could be sufficiently constitutional so that it could "discover" violations of the CFPA and begin the ticking of the statute of limitations clock, but insufficiently constitutional to file a complaint and stop the running of that clock.

2. Defendants' contend that the now-severed for-cause removal provision deprived the Bureau of standing. If this were correct, it would undermine every ongoing Bureau enforcement action. But Defendants' contention is wrong. The for-cause removal provision interfered with the President's oversight of the Bureau's Director. That violated Article II. It did not, however, implicate the power of the courts under Article III. That is, the courts do not exceed their power when they adjudicate a case brought by a federal agency, even if the President initially lacked

sufficient oversight over the official who authorized it. In *Legi-Tech*, the court held that the challenge to the FEC's constitutional structure was an affirmative defense that could be waived. Waiver would not have been possible if the challenge had implicated standing, *i.e.*, the court's subject matter jurisdiction.

3. Congress provided in the CFPA that the Bureau draws its funding, up to a specified limit, from the earnings of the Federal Reserve System. Defendants contend that this violates the Appropriations Clause because the Bureau is not funded as part of the annual appropriations process. In fact, what the Appropriations Clause actually requires is that appropriations must be "made by Law." U.S. Const. art. I, § 9, cl. 7. That is what Congress did when it provided for the Bureau's funding through the CFPA, *i.e.*, "by Law." There is no requirement that an agency be funded as part of the annual appropriations process, and, in fact, Congress has, by law, provided that several other financial regulatory agencies are also funded outside the annual appropriations process.

ARGUMENT

I. ANY PURPORTED INJURY SUFFERED BY DEFENDANTS AS A RESULT OF THE CFPA'S FOR-CAUSE REMOVAL PROVISION HAS BEEN CURED BY RATIFICATION, AND ACCORDINGLY, DISMISSAL IS NOT APPROPRIATE

A. Ratification has cured any constitutional problem caused by the for-cause removal provision

In their Supplemental Brief, Defendants repeatedly urge this Court to dismiss the Bureau's case against them because the for-cause removal provision had not been

declared invalid when the Bureau filed its Complaint. *See*, *e.g.*, Suppl. Br. at 2, 10, 12, 18, 21, 24, 25, 35. But there is no justification for dismissing the Bureau's Complaint because the decision to file that Complaint has been ratified by officials who were removable at will by the President. There is ample support that those ratifications cured any constitutional problem that existed when the Complaint was filed.

In *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, *supra*, the D.C. Circuit reversed the dismissal of an enforcement action the Federal Election Commission filed when it was unconstitutionally structured. While cross-motions for summary judgment were pending in *Legi-Tech*, the D.C. Circuit held in a different case, *FEC v. NRA Political Victory Fund,* 6 F.3d 821 (D.C. Cir. 1993), that the Commission's membership was unconstitutional because it included two congressional officers as *ex officio* members. In response, the Commission voted to amend its structure by excluding the congressional members. *Legi-Tech*, 75 F.3d at 706. The Commission also voted to ratify its decision to file the action against Legi-Tech. *Id.* In *Legi-Tech*, the D.C. Circuit rejected defendants' request for dismissal as "neither necessary nor appropriate," and held instead that ratification by a now-properly constituted Commission was an adequate remedy for the constitutional problem that had existed at the time the

complaint was filed. *Id.* at 708-09. It therefore permitted the Commission to proceed with its enforcement action without having "to return to square one." *Id.* at 708.[3]

In *CFPB v. Gordon*, the Ninth Circuit "agree[d] with the D.C. Circuit's approach" in *Legi-Tech* and rejected a claim that a Bureau enforcement action had to be dismissed because it was initially approved by a Director who was appointed in violation of the Appointments Clause. 819 F.3d 1179, 1191 (9th Cir. 2016). Instead, the court held that a subsequent ratification by a Director who had been validly appointed "cure[d] any initial Article II deficiencies." *Id.* Other courts have likewise recognized that ratification can cure Article II deficiencies with an action's initial approval. *See, e.g.*, *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 338–39 (6th Cir. 2017) (ratification cured any constitutional deficiency in the initial filing of administrative complaint against employer); *Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371-72 (D.C. Cir. 2017) (a properly constituted Board could ratify prior actions of an improperly constituted Board, and a properly appointed Board official

[3] Defendants, of course, want the Bureau to return to "square one," (or, even worse, to a position from which it could never pursue this action) and contend that *Legi-Tech* does not demonstrate that ratification is appropriate because the court did not discuss the mechanics of ratification. Suppl. Br. at 32. But the point of *Legi-Tech* is that the court permitted an enforcement action brought by an unconstitutionally structured agency to go forward because, after the constitutional problem was fixed, the agency ratified the action. 75 F.3d at 708. It is hard to imagine more direct support for the proposition that ratification permits the Bureau's action against Defendants to go forward.

could ratify his own prior actions); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604-05 (3d Cir. 2016) (upholding ratification of agency action originally taken by Board with improperly appointed officials).

Defendants cite a number of other cases that they claim favor dismissal in lieu of ratification. *See* Suppl. Br. at 12-17.[4] But in none of those cases did the court overturn an action that had been ratified by the appropriate agency official after a constitutional flaw had been corrected. In fact, for each of the cases Defendants cite that involved an agency enforcement action there is a later case (or cases) confirming that a ratification by an appropriate agency official could fix the problem. Defendants' heavy reliance on *FEC v. NRA Political Victory Fund*, *supra*, *see* Suppl. Br. at 13, 25, illustrates the flaw in their argument. In that case, there had been no ratification, and the court never addressed ratification.[5] Although the court noted that it was "aware of no theory" that would permit it to avoid ordering a dismissal in the circumstances there, 6 F.3d at 828, as explained above, less than three years later, the same court

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[4] Defendants' reference to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), goes particularly far afield. *See* Suppl. Br. at 15. That case invalidated on First Amendment grounds a state agency's action that reflected "impermissible hostility toward [a party's] sincere religious beliefs"; it in no way considered ratification. *Masterpiece Cakeshop,* 138 S. Ct. at 1729, 1732.

[5] Defendants also cite *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), *see* Suppl. Br. at 13, 14, but that case involved a request for prospective relief preventing the Oversight Board from exercising its powers, not a challenge to any past agency action, and had nothing to do with ratification.

(indeed, in an opinion by the same judge) held in *Legi-Tech* that dismissal was not appropriate where a properly constituted FEC had ratified the action. 75 F.3d at 708. That ratification was, in fact, an adequate remedy for the constitutional problem that the court had identified in *NRA Political Victory Fund*, a problem that still existed when the FEC filed its complaint against Legi-Tech. 75 F.3d at 708-09.[6]

Similarly, in *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014), *see* Suppl. Br. at 15, the D.C. Circuit held that actions taken by the NLRB when it lacked a quorum would be void ab initio. But subsequent to *Noel Canning*, and after the NLRB once again had a quorum, the agency ratified many of the decisions it had made when it lacked a quorum and courts have routinely affirmed those ratifications. *See*, *e.g. McKinney v. Ozburn-Hessey Logistics*, *supra*; *Wilkes-Barre Hosp. Co. v. NLRB*, *supra*; *Advanced Disposal Servs. v. NLRB*, *supra*; *Allied Aviation Serv. Co. v. NLRB*, 854 F.3d 55 (D.C. Cir. 2017). Similarly, in *NLRB v. SW Gen., Inc.,* 796 F.3d 67 (D.C. Cir. 2015), *aff'd* 137 S. Ct. 929 (2017), *see* Suppl. Br. at 13, the court overturned an NLRB order because the complaint had been issued by invalidly appointed general counsel. But in *Midwest Terminals of Toledo Int'l, Inc. v. NLRB*, 783 F. App'x 1 (D.C. Cir. 2019), the court enforced an NLRB order even though the complaint had been issued

[6] As *Legi-Tech* demonstrates, Defendants are wrong to argue that the D.C. Circuit holds that "judgment is the proper remedy when an agency's unconstitutional structure is raised as a defense to an enforcement action." *See* Suppl. Br. at 25.

by the same general counsel because the complaint was subsequently ratified by a properly appointed general counsel.

Nor does *Lucia v. SEC*, 138 S. Ct. 2044 (2018), justify dismissal. *See* Suppl. Br. at 14. After holding that the administrative law judge who presided over Lucia's trial had not been constitutionally appointed, the Court held that Lucia was entitled to a new hearing before a properly appointed official. *Id.* at 2055. Here, of course, the "hearing" is not at issue because any hearing on the merits will be conducted by the district court, not by any officer whose appointment is subject to challenge. And although the Court did refer to creating "incentives to raise Appointments Clause challenges," *id.* at 2055 n.5, citing *Ryder v. United States*, 515 U. S. 177, 183 (1995), the incentive was a new hearing before a new official – not a free pass: the Court did not dismiss the administrative complaint that the SEC had issued against Lucia.[7] Just as Lucia was entitled to a new hearing before a properly appointed administrative law judge, in this case Defendants are entitled to, at most, a decision by an official fully accountable to the President on whether the Bureau should bring this action. Ratification gives them exactly that.

Defendants cite several other cases, Suppl. Br. at 15-16, in which the Court held that an official's role in the constitutional system precluded the official from ever

[7] After the Supreme Court's decision in *Lucia*, the SEC resumed its administrative adjudication, and ultimately entered a cease and desist order that included conduct prohibitions and a civil penalty. *In the Matter of Raymond Lucia Cos.*, SEC File No. 3-15006, https://www.sec.gov/litigation/admin/2020/34-89078.pdf (June 16, 2020).

taking a challenged action. In the cited cases, the Court invalidated an action taken by an official that was inconsistent with that official's position in the constitutional scheme. *See Collins v. Mnuchin*, 938 F.3d 553, 593 (5th Cir. 2019) (en banc), *cert. granted* 2020 WL 3865248, 3865249 (U.S. July 9, 2020) (Nos. 19-422, 19-563).[8] But this remedial principle is irrelevant here because the Supreme Court rejected the argument that the Bureau lacked the authority ever to enforce the consumer laws.

B. Defendants' attacks on the Bureau's ratification fail

Defendants mount a two-pronged attack on the Bureau's ratification based on the Supreme Court's statement in *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994), that "it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." (Emphasis omitted.) Neither attack has merit.

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[8] Within this class, Defendants cite *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (Court overturned judicial functions performed by non-Article III officers); *Stern v. Marshall*, 564 U.S. 462 (2011) (same); *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787 (1987) (Court overturned a criminal prosecution that had been conducted by a prosecutor who had an interest in the outcome); *Bowsher v. Synar*, 478 U.S. 714 (1986) (affirming the reversal of executive actions taken by a legislative official); *Clinton v. City of N.Y.*, 524 U.S. 417 (1998) (overturning a line-item veto that authorized the President to usurp the legislative process, and canceling certain actions taken by the President pursuant to that veto); *INS v. Chadha*, 462 U.S. 919 (1983) (Court affirmed reversal of a deportation order that was issued pursuant to an unconstitutional one-house veto); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (affirming order prohibiting the President from seizing steel mills without legislative authority).

1. First, Defendants contend that the Bureau cannot ratify the Complaint because the Bureau lacked authority to initiate this action back in 2016. Suppl. Br. at 33-38. But even assuming that the ratification is valid only if the Bureau had authority back then (which is far from clear[9]), there is no doubt that the Bureau has at all times had authority to prosecute this suit, including when it originally filed this case. Congress gave the Bureau the authority to enforce the consumer laws. 12 U.S.C. 5564, 5565; *see also Seila Law*, 140 S. Ct. at 2193 ("Congress … vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court."). Congress vested that authority in the Bureau, regardless of whether it was led by a director who believed (incorrectly, as it turned out) that he was protected from removal during his five-year term, or an acting director subject to removal at will. And the Supreme Court confirmed that the unconstitutional for-cause removal provision did not affect the Bureau's authority or,

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[9] Under agency law principles as reflected in the more recent Restatement (Third) of Agency, "[i]t is not necessary for ratification that the principal have had capacity as well at the time of the act that the ratification concerns." Restatement (Third) of Agency § 4.04 cmt. b. In *NRA Political Victory Fund*, the Court held that ratification principles from the older Restatement (Second) Agency "presumptively governed." 513 U.S. at 98. Although the Court observed that "the party ratifying should be able … to do the act ratified at the time the act was done," the Court addressed only whether the principal had authority at the time of the ratification. 513 U.S. at 98-99. There was no dispute that the principal originally had authority to do the act in question, and the Court accordingly had no occasion to consider whether having authority at the time the act was originally done was even necessary. *Id.* at 99.

indeed, its duty to enforce those laws. *See*, *e.g.*, *Seila Law*, 140 S. Ct. at 2208-09 (concluding that the removal provision was severable, meaning that the removal provision's unconstitutionality did not "render[] the whole act void"). The petitioner in *Seila Law* also sought dismissal of that action and made the same argument Defendants make here: that the "offending removal provision means the entire agency is unconstitutional and powerless to act." *Id.* at 2208. But the Court rejected this argument when it held the removal provision did not affect the operation of the remainder of the Bureau's statute, including the provisions authorizing the Bureau to bring enforcement actions like this one, and declined to dismiss the action.

Legi-Tech, *Gordon*, and the other cases cited above show that an Article II problem that existed at the time the agency originally acted is no impediment to ratification.[10] Well-established agency-law principles also support the Bureau. Under those principles, when an agent (in this case, the Bureau's for-cause-protected Director – an agent of the Bureau) lacked authority to act on behalf of a principal (in this case, the Bureau), the principal, acting on its own or through a valid agent (in this

[10] Defendants cite a 30-year-old case from the District of Kansas in which the court refused to permit a successor federal officer to ratify an action taken by a predecessor who held office in a manner that violated the Appointments Clause. *See* Suppl. Br. at 34, citing *Franklin Sav. Ass'n v. Dir. of Office of Thrift Supervision*, 740 F. Supp. 1535 (D. Kan. 1990). That decision is inconsistent with unanimous court of appeals authority, including *Gordon*, *Legi-Tech*, and all the other cases cited *supra.* In any event, although the court refused to uphold a ratification, it applied the *de facto* officer doctrine to validate the predecessor's action, thereby reaching the same outcome.

case, the Bureau's Director now removable at will) may subsequently authorize actions that were taken by the agent when he or she lacked authority. *See United States v. Heinszen*, 206 U.S. 370, 382 (1907); *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1074 (9th Cir. 2019). Such a ratification has retroactive effect: It "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton Cnty.*, 77 U.S. 676, 684 (1870); *accord Heinszen*, 206 U.S. at 382 (stating that ratification "retroactively give[s]" an agent's acts "validity").[11]

2. Second, Defendants argue that the Bureau's ratification was ineffective because, at the time of the ratification, the Bureau lacked authority to file a complaint against Defendants. In particular, they contend that, between May 2016 when the

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[11] Defendants criticize the Bureau for previously citing Restatement (Third) of Agency in a brief submitted to this Court. *See* Suppl. Br. at 36-38. The Bureau's ratification of the Complaint in this case is consistent with Restatement (Third) of Agency, ch. 4, intro. note; id. § 4.01 cmt. B, which, as noted above, provides that a ratification is effective so long as the principal has the capacity to act as a principal at the time of the ratification. (Defendants suggest that the Bureau's ratification is not consistent with Restatement (Third) because the Bureau did not legally exist until after the Supreme Court issued its decision in *Seila Law*. *See* Suppl. Br. at 38. *Seila Law*, however, is to the contrary. *See*, *e.g.*, 140 S. Ct. at 2192 ("[t]he agency may therefore *continue* to operate" (emphasis added).) But as *Gordon* illustrates, the ratification is also consistent with Restatement (Second) of Agency, § 84(1): "An act which, when done, could have been authorized by a purported principal … can be ratified if, at the time of affirmance, he could authorize such an act." 819 F.3d at 1191-92. As the court explained in *Gordon*, the Bureau's Director is the agent, the Bureau is the principal, and the Bureau has, at all times relevant to this case, had the power (and the duty) to enforce the laws at issue here. *Id.*

Bureau filed its Complaint in this case and July 2020 when Director Kraninger ratified the Complaint, the statute of limitations continued to run and expired on all the Bureau's claims. Suppl. Br. at 38-52. Defendants are wrong both as a matter of law and as a matter of fact.[12]

The CFPA's statute of limitations provides that, "[e]xcept as otherwise permitted by law or equity, no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. 5564(g)(1). Even assuming that the statute of limitations had run by July 2020 (but more on that later), it should be equitably tolled.[13] A party is entitled to equitable

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[12] Defendants also suggests that, contrary to the declaration that Director Kraninger signed under penalty of perjury, her ratification was merely a "rubber stamp." *See* Suppl. Br. at 47-48. The same argument was made, and rejected, in *Legi-Tech*. As the court there noted, it had no authority to review the agency's decision to sue, absent a showing of actual bias. 75 F.3d at 709. Defendants cite *Advanced Disposal v. NLRB*, Suppl. Br. at 47, but ignore that the court's holding that "[a]gency action is entitled to a presumption of regularity," and this presumption applied to the agency's ratification of its earlier decision, 820 F.3d at 604. The same is true here because Defendants have made no showing whatsoever of bias or bad faith on the part of Director Kraninger.

[13] Defendants contend that the Bureau waived its equitable-tolling argument because it did not raise it before the district court. Suppl. Br. at 49. In fact, the Bureau had no opportunity to do so because Defendants raised their statute-of-limitations argument in connection with the Bureau's ratification for the first time in the last substantive filing submitted to the district court before that court denied Defendant's motion for judgment on the pleadings. *See* ROA.7185. In any event, this Court may consider an issue not raised before the district court where that issue involves a purely legal question or where failure to consider it would result in a miscarriage of justice. *Atlantic Mut. Ins. Co. v. Truck Ins. Exch.*, 797 F.2d 1288, 1293 (5th Cir.1986). There are no facts at issue with respect to the Bureau's entitlement to equitable tolling, and failing to

tolling "if he shows (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649, 130 S. Ct. 2549, 2562 (2010). Further, "we draw on general principles to guide when equitable tolling is appropriate. We must be cautious not to apply the statute of limitations too harshly." *Fisher v. Johnson*, 174 F.3d 710, 713 (5th Cir. 1999). If ever there was a case for equitable tolling, this is it, and this is apparent from the pleadings.[14] There is no dispute that the Bureau filed its Complaint in May 2016. And, although Defendants contend that by July 2020 the statute of limitations had run with respect to the violations alleged in the Complaint, *see* Suppl. Br. at 42-45, they do not argue that the statute of limitations had expired by May 2016. Thus, the Bureau pursued its rights diligently (by timely filing a complaint in 2016). And the unconstitutionality of the CFPA's for-cause removal provision was an extraordinary circumstance over which the Bureau had absolutely no control. Accordingly, if this Court concludes that the statute of limitations would otherwise

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consider that issue would result in a miscarriage of justice because the Bureau had no opportunity to raise the issue before the district court.

[14] Defendants invoke *Gabelli v. SEC*, 568 U.S. 442 (2013), *see* Suppl. Br. at 49, but that case had nothing to do with equitable tolling. The Court merely held that it was unwilling to add a discovery rule to a statute of limitations that did not already include one. Here, of course, there is a discovery rule in the CFPA's statute of limitations.

bar Director Kraninger's ratification in July 2020, the statute of limitations should be tolled.[15]

Indeed, the CFPA's statute of limitations is particularly amenable to equitable tolling because, by its terms, it applies "[e]xcept as otherwise permitted by law or equity …." 12 U.S.C. 5564(g)(1). Here, equity surely permitted the Bureau, now that it is led by a Director who is unmistakably removable by the President at will, to ratify claims it had already brought during the limitations period. Courts have equitably tolled statutes of limitations where "the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period." *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & nn.3-4 (1990); *see D.J.S.-W. v. United States*, 962 F.3d 745 (3d Cir. 2020) (equitable tolling is appropriate if the plaintiff has pursued its rights diligently). This is because statutes of limitations "are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost,

[15] Defendants cite *Lucia*, *supra*, and claim that equitable tolling would not be appropriate here because it would encourage government agencies to violate the Constitution with impunity. *See* Suppl. Br. at 49, 51. But there was no impunity here because the Bureau did not create the constitutional flaw in its organic statute. The courts protect the separation of powers by making sure that a law-enforcement action goes forward only with the approval of an official fully accountable to the President. No precedent or principle supports Defendants' bold contention that the separation of powers requires the courts also to punish Congress and the Executive (and, by extension, the public) by preventing enforcement of the laws that Congress enacted.

memories have faded, and witnesses have disappeared." *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Allowing the Bureau to continue to prosecute its claims in light of the Director's ratification risks no unfair surprise or other injustice to Defendants because the Bureau timely filed its claims and the parties have already completed discovery.[16] *See also Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 603–04 (3d Cir. 2016) ("[W]e are quick to note that as an equitable remedy, ratification has been applied flexibly and has often been adapted to deal with unique and unusual circumstances.").

In any event, the CFPA's statute of limitations, by its terms, has not expired and does not time-bar Director Kraninger's July 2020 ratification. The statute provides only that no action "may be brought" more than three years after discovery of the relevant violation. 12 U.S.C. § 5564(g)(1). The Bureau "brought" this action within that timeframe – and nothing in the statute suggests that Congress would have intended to bar an action as untimely when the Bureau brought it within the statutory time limit but it was not ratified by a fully accountable Director until later.

There is another reason that the CFPA's statute of limitations is particularly inhospitable to Defendants' construction, a construction that is essentially heads-I-

[16] Defendants contend that the Bureau would receive a windfall if it were permitted to ratify the Complaint. Suppl. Br. at 50-51. Ratification provides no windfall for the Bureau. However, dismissal would be unfair to the consumers who were allegedly injured by Defendants.

win-tails-you-lose. Again, the limitations period only begins to run from the "date of discovery of the violation." 12 U.S.C. 5564(g)(1). According to Defendants, the Bureau could and did "discover" violations of the CFPA and thereby begin the ticking of the statute of limitations clock. But, again according to Defendants, until *Seila Law*, the Bureau could not file a complaint and stop the running of that clock. Defendants do not explain how the Bureau could discover a violation at a time when, according to Defendants, the Bureau could not even act. Defendants cannot have it both ways, and they cite nothing in the statute's text, structure, or history to suggest that is what Congress intended.

Moreover, even if Defendants were somehow correct that, prior to *Seila Law*, the Bureau could not lawfully file suit and obtain relief, *but see infra*, they do not cite any case in which a statute of limitations was construed to run against the federal government before it could lawfully file suit and obtain relief. *Cf. Johnson v. United States*, 544 U.S. 295, 305 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose); *Bay Area Laundry & Dry Cleaning Pension Tr. Fund v. Ferbar Corp. of Cal.*, 522 U.S. 192, 201 (1997) (absent some contrary indication in statute, limitations period ordinarily does not begin to run until "the plaintiff can file suit and obtain relief").[17] This is not surprising. "Statutes of

[17] Neither *Benjamin v. V.I. Port Auth.*, 684 Fed. Appx. 207 (3d Cir. 2017), nor *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994), is such a case. *See* Suppl. Br. at 42. In both of those cases the court rejected ratification because the party attempting to

limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017). The Bureau certainly did that with respect to Defendants.[18]

Finally, even if this Court does not conclude either that the filing of the Complaint satisfied the statute of limitations, or that the statute of limitations was equitably tolled, it was satisfied in February 2018 by Acting Director Mulvaney's ratification.[19] As explained above, because he was appointed pursuant to the FVRA,

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ratify the agent's action could have, but failed to, ratify within the limitations period. That is not the situation here because the Bureau's Director could not have corrected the constitutional flaw in the filing of the Bureau's Complaint until after the Court issued its decision in *Seila Law*. While it may be reasonable to understand a statutory time limit to preclude ratification where the ratifying party simply acted too late, there is no reason to interpret the CFPA's statute of limitations to preclude a ratification where the Bureau brought suit within the time limit and otherwise did everything it could to meet it. *See* 12 U.S.C. § 5564(g)(1) (specifying time in which an action "may be brought").

[18] Defendants cite a series of other cases that are irrelevant. In *Nasewaupee v. Sturgeon Bay*, 251 N.W.2d 845 (Wisc. 1977), *see* Suppl. Br. at 40, the court declined to permit a town to ratify an unauthorized lawsuit filed on its behalf where the town could have, but did not, file the suit within the sixty-day statute of limitations. In *Wagner v. City of Globe*, 722 P.2d 250 (Ariz. 1986), *see* Suppl. Br. at 40, the court refused to permit the defendant to ratify certain conduct where it was doing so in an attempt to undercut the plaintiff's lawsuit. And in *LHC Nashua P'ship v. PDNED Sagamore Nashua, LLC*, 659 F.3d 450 (5th Cir. 2011), *see* Suppl. Br. at 40, the court rejected a claim by *a defendant*, who had been charged with fraudulent misrepresentation, that *the plaintiff* had taken actions that had the effect of ratifying the tortious conduct. Here, of course, the Bureau has done everything it possibly could to maintain its law enforcement action against defendants.

[19] Defendants complain that Acting Director Mulvaney's ratification did not cure any subsequent constitutional injury that it may have suffered after he left office (*i.e.*, while

the CFPA's for-cause removal provision did not apply to him.[20] Defendants contend that the Bureau had discovered all the violations alleged in the Complaint at least three years before Mr. Mulvaney's ratification. *See* Suppl. Br. at 42-45. But Defendants' contention is a factual argument never addressed by the district court and, in any event, it is wrong.

Defendants contend that the Bureau discovered their conduct when it began its investigation in 2014. But the mere fact that the Bureau is conducting an investigation does not establish that the Bureau has knowledge of violations. *See United States v. Morton Salt Co.*, 338 U.S. 632, 643 (1950) (an agency may conduct an investigation just to make sure that the law is not being violated). Defendants also argue that they ceased some of the conduct challenged in the Complaint more than three years before Mr. Mulvaney's ratification. *See* Suppl. Br. at 44-45. Of course, that is irrelevant

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this case was on review before this Court). But to the extent that there was any such injury, it was addressed by Director Kraninger's 2020 ratification. Moreover, even if this Court declined to hold that the filing of the Complaint in 2016 satisfied the CFPA's statute of limitations, it was certainly satisfied by the Acting Director's ratification of the Complaint because, pursuant to the CFPA, the statute of limitations is satisfied once the action is "brought." The statute of limitations clock did not start ticking again merely because Mr. Mulvaney left office, and Defendants offer no reason to think otherwise.

[20] Defendants cite this Court's decision in *Collins* and contend that Mr. Mulvaney was not in fact removable at will. Suppl. Br. at 53, citing 938 F.3d at 589. But what this Court actually said was that the Office of Legal Counsel opinion cited above was not necessarily applicable to the Acting Director of the FHFA, who was not appointed pursuant to the Federal Vacancies Reform Act.

because the CFPA's statute of limitations is triggered by the Bureau's discovery of conduct, not by its cessation.[21]

C. Dismissal would be inappropriate

This Court's decision in *Collins v. Mnuchin*, *supra*, further demonstrates why it would be inappropriate to dismiss the Bureau's Complaint. In *Collins*, this Court held that the for-cause removal provision that applied to the Director of the Federal Housing Finance Agency (FHFA) was unconstitutional and severable from the remainder of the FHFA's organic statute. 938 F.3d. at 588, 595. However, the Court refused to overturn the so-called "Net Worth Sweep," the challenged FHFA action that had been adopted by an FHFA Director unconstitutionally protected from removal.[22] This Court recognized that the actions of an unconstitutionally insulated officer should "[p]erhaps" be invalidated "in some instances" – but not where, despite

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[21] Defendants cite the Complaint and contend that it demonstrates that the statute of limitations has expired. *See* Suppl. Br. at 46. In fact, the Bureau's Complaint contains several allegations regarding when Defendants commenced their violations; it includes none alleging when, or if, the conduct ceased, let alone when the Bureau discovered those violations. *See*, *e.g.*, ROA.46 (Complaint ¶ 9 (alleging when Defendants began their check cashing service)); ROA.54 (Complaint ¶ 42 (alleging that Defendants implemented their lending program "since at least 2011")); ROA.58 (Complaint ¶ 55 (alleging that Defendants failed to make refunds "until at least 2014")).

[22] Defendants contend that this Court did not overturn the Net Worth Sweep because it was part of a larger Preferred Stock Purchase Agreement. Suppl. Br. at 24-25. In fact, however, what this Court actually indicated was that, because the Net Worth Sweep was part of the larger agreement, this Court would have to overturn the entire agreement if it were to overturn the Net Worth Sweep. *Collins*, 938 F.3d at 592.

the removal restriction, "the President had adequate oversight over" the action. *Id.* at 593, 595. In *Collins*, this Court held that the President had adequate oversight in part because the challenged action was adopted only with the approval of the Treasury Secretary (who was subject to plenary removal by the President). *Id.* at 594. The Court concluded that it would not "make sense" to "wipe out" the action – one that the President "could have stopped … but did not" – "under the guise of respecting the presidency." *Id.* Indeed, invalidating such an action "would actually erode executive authority rather than reaffirm it." *Id.*

There is even less reason here to dismiss the Bureau's Complaint because not one, but two Bureau Directors subject to the President's plenary removal power have approved this enforcement action. As in *Collins*, dismissing this law-enforcement now – after the President's fully accountable subordinates have approved it – "would actually erode executive authority rather than reaffirm it." *Id.* Nor does *Seila Law* compel dismissal. In that case, the Court explained that, in curing the constitutional defect with the Bureau's organic statute caused by the for-cause removal provision, we "prefer that we use a scalpel rather than a bulldozer." 140 S. Ct. at 2210-11. It rejected a request to "eliminate the CFPB," not least because that "would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena." *Id.* at 2210; *see* Br. of Amicus Mortg. Bankers Ass'n, at 10, *Seila Law*, *supra,* 2019 WL 6910300, at *10 (explaining that "calling into question the ongoing legitimacy of the CFPB's past actions … could be catastrophic for the

real estate finance industry").[23] So the court severed "[t]he only constitutional defect [it] identified" – the for-cause removal provision – leaving the remainder of the CFPA intact. *Seila Law,* 140 S. Ct. at 2208, 2209.

Defendants nonetheless urge the bulldozer approach and argue that the Bureau's past actions cannot be ratified because "the constitutional violation … infected the *entire agency*, and all actions taken on the agency's behalf." Suppl. Br. at 31 (emphasis in original).[24] But the Supreme Court held that "[t]he only constitutional defect we have identified in the CFPB's structure is the Director's insulation from

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[23] Defendants seek to diminish the impact of their arguments, which, if accepted, would cast grave doubt on every action that the Bureau has taken since it was first established. *See* Suppl. Br. at 51; *see also* Suppl. Br. at 31 (the constitutional violation "infected the *entire agency*, and all actions taken on the agency's behalf" (emphasis in original)). But just counting the number of cases that would fall does not begin to account for all the consumers who are the potential beneficiaries of the Bureau's law enforcement actions. Nor do Defendants consider the impact that overturning all the rules issued by the Bureau would have on both consumers and on providers of consumer financial services.

[24] The cases Defendants cite lend it no support because they are based on Defendants' contention that the Bureau should be struck down altogether. In *Norton v. Shelby County*, 118 U.S. 425, 442, 453 (1886), *see* Suppl. Br. at 31, the Court held that bonds issued by a county commission were not valid because the statute creating that body violated the state constitution. Further, the county court could not ratify the commission's actions because it also lacked authority to issue the bonds. And in *CFPB v. RD Legal Funding, LLC*, 332 F. Supp 3d 729, 784-85 (S.D.N.Y. 2018), *appeal docketed*, No. 18-2743 (2d Cir. Sept. 17, 2018), *see* Suppl. Br. at 30, the court thought the Bureau's action could not be ratified because, in its view, the entire CFPA should be struck down, and the Bureau along with it. But those cases, which may support Defendants' argument that ratification is not available to an agency that has been entirely struck down, *see* Suppl. Br. at 30-32, are not relevant here because *Seila Law* held (contrary to the district court in *RD Legal*) that only the for-cause removal provision, and not the entire Bureau, was invalid.

removal." 140 S. Ct. at 2209. And because that provision is severable, "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative." *Id.* That is, the Court wanted the Bureau to *remain* operative, not just *become* operative, once the for-cause removal provision was severed. *See id.* at 2208 (indicating that, because the for-cause removal provision had been severed, remand to consider issues surrounding ratification would not be "futile").

Defendants point out that in *Seila Law* the Court referred to the dismissal Seila Law requested as a "straightforward remedy." Suppl. Br. at 27. But the Court never said that dismissal was the appropriate remedy, or the "normal" remedy for an unconstitutional removal provision. Indeed, Justice Thomas (joined by Justice Gorsuch) argued for exactly that. 140 S. Ct. at 2224. The Court, however, rejected that approach, *see id.* at 2208 n.12, and remanded so that the Court of Appeals could determine whether ratification by Acting Director Mulvaney was sufficient. Thus, *Seila Law* hardly compels the dismissal that Defendants urge.

II. THE FOR-CAUSE REMOVAL PROVISION DID NOT DEPRIVE THE BUREAU OF STANDING

Defendants offer little to support their contention that the Complaint in this case must be dismissed because the unconstitutionality of the for-cause removal provision somehow deprived the Bureau of standing. *See* Suppl. Br. at 17-24, 26-27. Mostly, they repeat black-letter principles. *See*, *e.g.*, *id.* at 18, 20, 26. But when it comes to their argument – that "[the Bureau's] lack of valid executive authority deprived the

CFPB of standing … and the district court of subject-matter jurisdiction," *id.* at 21 – their support is quite thin.

This is not surprising because Article III's standing doctrine limits *the judiciary's* role in our constitutional system – by ensuring that courts do not encroach on "the Chief Executive's most important constitutional duty" to enforce the laws. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992). Standing requirements ensure that the judiciary decides the rights of those with a concrete stake in the outcome, while leaving it to the Executive Branch to "vindicat[e] the public interest." *Id.*; *see also In re Debs*, 158 U.S. 564, 584 (1895) (for Article III standing purposes, the "injury" in a government enforcement suit is to the United States). The courts in no way exceed the limits on their powers by adjudicating a federal agency's enforcement action, even if the President initially lacked sufficient oversight over the official who authorized it. *See Buckley v. Valeo*, 424 U.S. 1, 139-140 (1976) (a federal agency is just the component of the executive that Congress has designated to litigate a particular injury on behalf of the United States). If the President lacks adequate oversight over the official prosecuting a suit, that violates Article II; it does not implicate the *courts'* powers under Article III. The Supreme Court confirmed as much in *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, when it held that it need not address whether a statute authorizing qui tam suits by private relators impinged on the President's authority to execute the laws because that would not present a "jurisdictional issue that we must resolve." 529 U.S. 765, 778 n.8 (2000). This is because "standing jurisprudence …

derives from Article III and not Article II." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 n.4 (1998); *see also Stevens*, 529 U.S. at 778 n.8 (quoting *Steel Co.*). Defendants' "standing" arguments conflate these two distinct Articles.

Indeed, the only support Defendants cite for their argument is a dissent in *CFPB v. Gordon*, 819 F.3d 1179, 1198 (9th Cir. 2016); *see* Suppl. Br. at 22, 23, 35, 40. But this is not surprising because as the majority in *Gordon* explained, "no court, including the Supreme Court, has ever suggested that Article II problems nullify Article III jurisdiction." *Id.* at 1190.[25] And that is what the Supreme Court identified in *Seila Law* – an Article II problem. In any event, even the *Gordon* dissent's reasoning does not directly apply here. According to that dissent, "any person exercising significant executive authority must be appointed in the manner prescribed by [the Appointments Clause]." *Id.* at 1200. There is no dispute that at the time the Complaint was filed in this case, the Bureau's Director had been appointed in a manner consistent with the Appointments Clause. Moreover, as the *Gordon* majority explained, when it comes to enforcing federal laws, "it is the Executive Branch, not any particular individual, that has Article III standing."[26] *Id.* at 1187, citing *Lujan*, 504

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[25] As the *Gordon* majority explained, the dissent "Bass-O-Matics the CFPB's authority to execute the laws (Article II) with the United States' interest in the case (Article III)." 819 F.3d at 1189. Defendants here make the same mistake.

[26] Defendants claim that "under the reasoning of the *Gordon* majority … the CFPB's defective structure here deprived it of valid authority to initiate this case from the beginning." Suppl. Br. at 23-24. But the *Gordon* majority's reasoning suggests no such

U.S. at 577. The delegation to the Bureau of enforcement authority is specifically set forth in the CFPA.[27] *See* 12 U.S.C. 5564(a) ("If any person violates a Federal consumer financial law, the Bureau may … commence a civil action against such person"); 12 U.S.C. 5564(b) ("The Bureau may act in its own name and through its own attorneys in enforcing any provision of [the CFPA], rules thereunder, or any other law or

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thing. Instead, the court reasoned broadly that an Article II defect in an agency's structure or leadership does not deprive a court of Article III jurisdiction. *See Gordon*, 819 F.3d at 1189-90 & n.3 (holding that the court had jurisdiction over the Bureau's enforcement action based, in part, on the D.C. Circuit's treatment of the "unconstitutionally composed FEC" in *Legi-Tech*).

[27] None of the other cases Defendants cite is relevant. *Norton v. Shelby County*, *supra*, *see* Suppl. Br. at 20, involved bonds issued by a county commission whose existence had never been properly authorized. *Ex parte Siebold*, 100 U.S. 371, 376 (1879), *see* Suppl. Br. at 20, involved a habeas corpus petition filed in the wrong court. *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), *see* Suppl. Br. at 20, involved an attempt by a private attorney who had been appointed as a special prosecutor to seek certiorari on behalf of the United States. *Thiebaut v. Colo. Springs Utils.*, 455 F. App'x 795 (10th Cir. 2011), *see* Suppl. Br. at 20, involved a state county district attorney who lacked authority to sue as *parens patriae*. *Cheng v. WinCo Foods LLC*, No. 14-cv-483, 2014 WL 2735796 (N.D. Cal. June 11, 2014), *see* Suppl. Br. at 20, involved a state official whose agency was not empowered to enforce the Americans with Disabilities Act. In *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), and *Hollingsworth v. Perry*, 570 U.S. 693 (2013), *see* Suppl. Br. at 21, the Court rejected private citizens' attempts to defend the constitutionality of a state statute when state officials had chosen not to. *Karcher v. May*, 484 U.S. 72 (1987), *see* Suppl. Br. at 21, held that public officials who have participated in a lawsuit solely in their official capacities may not appeal an adverse judgment after they have left office. And *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998), *see* Suppl. Br. at 21, held that a private citizen did not have standing to seek a civil penalty payable to the federal government. None of these cases involved a federal agency enforcing a law that it was specifically authorized to enforce.

regulation …").[28] And *Seila Law* confirmed that the unconstitutional removal provision had no effect on this delegation.

The *Gordon* majority drew support from *FEC v. Legi-Tech*, *supra*. 819 F.3d at 1190. In *Legi-Tech*, although the D.C. Circuit considered (and rejected) Legi-Tech's constitutional objection, it also held that the objection was an affirmative defense that could be waived. 75 F.3d at 707 ("[Legi-Tech's] assertion that the FEC is unconstitutionally composed cannot be regarded as anything other than an affirmative defense against an enforcement proceeding."). *See also LaRouche v. FEC*, 28 F.3d 137, 140 (D.C. Cir. 1994) (the constitutional objection to the FEC's composition could be waived because the constitutional flaw did not affect "[the court's] authority to consider the FEC's enforcement action," but rather "[the FEC's] authority to bring it."). Waiver would not have been possible in *Legi-Tech* and *LaRouche* if the Article II problem had implicated the court's Article III jurisdiction to hear the case. *See Jackson v. FIE Corp.*, 302 F.3d 515, 525 (5th Cir. 2002) ("objections to subject-matter jurisdiction cannot be waived").

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[28] Defendants contend that *Seila Law* held that the CFPA vested all of the Bureau's enforcement authority in its Director. *See* Suppl. Br. at 19-20, citing *Seila Law*, 140 S. Ct. at 2192, 2203. But that does not matter because the Bureau's Director was undeniably an executive official exercising the executive power to enforce the law, even when she was unconstitutionally insulated from the President's removal power. Indeed, it is precisely because the Bureau's Director "wield[s] significant executive power" that the Supreme Court concluded that the President must have plenary authority to remove her. *See Seila Law*, 140 S. Ct. at 2211.

As explained above, the Bureau, and the executive branch, have always had the authority, *i.e.*, standing, to bring law enforcement actions such as the one initiated against Defendants. The problem identified in *Seila Law* was that the President lacked sufficient oversight over those actions, not that the Bureau lacked standing. And although this has allowed defendants in Bureau enforcement actions (such as this one) to question whether those actions had been properly authorized, it did not undermine the Bureau's standing or the courts' constitutional power to adjudicate those actions.[29]

III. THE BUREAU'S FUNDING DOES NOT VIOLATE ARTICLE I OF THE CONSTITUTION

Throughout this case, Defendants have complained that, as a result of the CFPA's for-cause removal provision, the Bureau was unconstitutionally insulated from presidential control. Now that the for-cause removal provision has been severed, Defendants shift gears and argue that, as a result of the way it is funded, the Bureau is unconstitutionally insulated from Congress, the President has too much

[29] Note that in *Seila Law*, the Court rejected a challenge to its jurisdiction raised by the court-appointed amicus, 140 S. Ct. at 2195-96, and held that the for-cause removal provision was severable even though Justice Thomas argued that the Court lacked authority under Article III to do so, *id.* at 2211, 2220 (Thomas, J., dissenting in part). Despite this discussion of jurisdictional issues, no one ever suggested that the Bureau lacked standing to bring the action in the first place. *See Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 (1986) (the Court must in every case evaluate whether there is standing).

control over the Bureau, and the Bureau's funding violates the Appropriations Clause. *See* Suppl. Br. at 54-65. They are wrong.

Under the Appropriations Clause, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7.[30] This "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937); *see OPM v. Richmond*, 496 U.S. 414, 424 (1990) (the Appropriations Clause simply requires that "the payment of money from the Treasury … be authorized by a statute"); *see also United States Dep't of the Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (the Appropriations Clause "is not self-defining and Congress has plenary power to give meaning to the provision"). Here, Congress exercised its power under the Appropriations Clause by enacting a law (the CFPA) that authorizes the Bureau to obtain a capped amount from the Federal

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[30] The CFPA also requires the Bureau's Director to report annually to the House and Senate Appropriations Committees about the Bureau's financial operating plans and use of funds. 12 U.S.C. 5497(e)(4). Further, each year the Bureau is required to prepare and submit a report to the Committees on Appropriations of both the Senate and the House regarding "the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the sources and application of funds of the Bureau." *Id.* This makes sure that Congress is apprised of the Bureau's funding. The CFPA also requires the Director to appear twice a year before committees of both the House and the Senate, and, in conjunction with those appearances, to provide those committees with a detailed report regarding the Bureau's operations, including a justification for the Bureau's budget requests. *Id.* 5496.

Reserve each year to fund its operations. 12 U.S.C. 5497(a).[31] That is precisely what the Appropriations Clause requires.

The Appropriations Clause restricts "the disbursing authority of the Executive department," *Cincinnati Soap*, 301 U.S. at 321, while giving Congress "absolute" "control over federal expenditures," *Dep't of Navy v. FLRA*, 665 F.3d at 1348. There has been no "relinquishment of budget authority," or "threat to Congress's exclusive power of the purse," as Defendants hyperbolically claim. *See* Suppl. Br. at 61, 64. To the contrary, the CFPA is an exercise by Congress of its power of the purse – and nothing in the Appropriations Clause (or any other constitutional provision) prevents Congress from appropriating funds in whatever way it sees fit. Indeed, it is well established that "Congress can, consistent with the Appropriations Clause, create governmental institutions reliant on fees, assessments, or investments rather than the ordinary appropriations process." *PHH v. CFPB*, 881 F.3d 75, 95 (D.C. Cir. 2018) (en banc), *abrogated on other grounds by Seila Law*, *supra.*; *accord Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004).[32]

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[31] If the Bureau needs additional funds to carry out its duties, Congress must separately appropriate such funds. 12 U.S.C. 5497(e).

[32] Nor is the Bureau's funding structure unique. Congress has chosen to fund other agencies outside the annual appropriations process. *See*, *e.g.*, 12 U.S.C. 243 (Federal Reserve); *id*. 1755 (National Credit Union Administration); *id*. 1815(d), 1820(e) (FDIC); 12 U.S.C. 2250 (Farm Credit Administration); 31 U.S.C. 5142 (Bureau of Engraving and Printing). (Moreover, in 2017, only 30% of the federal budget was allocated through the annual appropriations process. https://www.gao.gov/

Finally, Defendants cite *Free Enterprise*, *supra*, and contend that because the Bureau is funded from the earnings of the Federal Reserve System, it is somehow "protected by *two* layers of budget independence." *See* Suppl. Br. at 63 (emphasis in original). *Free Enterprise* has nothing to do with the Bureau's funding or the Appropriations Clause. In *Free Enterprise*, the Court overturned "an extreme variation on the traditional good-cause removal standard." *PHH*, 881 F.3d at 89. The members of the Oversight Board could be removed only for cause, and only by the SEC. *Id.* SEC Commissioners in turn could be removed by the President but only for good cause. So this meant that members of the Oversight Board were shielded from the President by two layers of for-cause removal protection. The Bureau's funding is not shielded from Congress at all. It is irrelevant that the Bureau draws its funding from the earnings of the Federal Reserve System, of which it is a part, 12 U.S.C. 5491(a), because nothing about that arrangement interferes with Congress's authority to alter, at any time, the source of the Bureau's funding, or to eliminate that funding altogether. *PHH Corp. v. CFPB*, 839 F.3d 1, 36 n.16 (D.C. Cir. 2016), *reh'g en banc*

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key_issues/federal_budgeting/issue_summary.) Also, although Defendants contend that the Bureau differs from those agencies because it has authority over "a significant portion of the U.S. economy," *see* Suppl. Br. at 61, it is certainly a matter of judgment whether the Bureau has more authority than, for example, the Federal Reserve Board. *See also Collins*, 938 F.3d at 595 (referring to the FHFA, which receives its funding outside of the annual appropriations process, 12 U.S.C. 4516, as "one of the most financially consequential agencies").

granted, order vacated (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018) (Kavanaugh, J.) ("Congress can always alter the CFPB's funding in any appropriations cycle (or at any other time). Section 5497 is not an entrenched statute shielded from future congressional alteration, nor could it be.").[33] So nothing about this arrangement impinges in any way upon Article I of the Constitution.

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[33] As Defendants note, the CFPA also permits the Bureau to use amounts that it obtains in civil penalties from violators of Federal consumer financial laws to pay redress to victims of law violations. *See* Suppl. Br. at 56, citing 12 U.S.C. 5497(d)(2). Congress is of course also free to modify or eliminate this provision at any time.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's interlocutory order denying the Motion for Judgment on the Pleadings.

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CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2020, I electronically filed the Supplemental En Banc Brief of Plaintiff-Appellee Consumer Financial Protection Bureau with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that counsel for all parties in the case, listed below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The Bureau's Supplemental En Banc Brief complies with the length limits permitted by Fed. R. App. P. 32(a)(7)(B)(i). It contains 12,232 words, excluding the portions exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Garamond) using the Microsoft Word word processing program.

Dated: August 31, 2020

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No. 18-60302 Consum Fincl Protc Bur v. All Amer Check Cashing, Inc., et al
USDC No. 3:16-CV-356

Dear Mr. DeMille-Wagman,

You must submit the 22 paper copies of your appellee's 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. Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5th Cir. R. 42.3. Exception: As of July 2, 2018, Anders briefs only require 2 paper copies.

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