No. 16-

IN THE

Supreme Court of the United States

CHANCE E. GORDON,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

It is uncontested that Richard Cordray's January 4, 2012 recess appointment to head the Consumer Financial Protection Bureau (CFPB) was invalid. During the following 18 months, he purported to authorize the filing and prosecution of a CFPB enforcement action against Petitioner Chance Gordon. After the district court's entry of judgment against Gordon, the Senate in July 2013 confirmed Cordray as the Director of CFPB. Cordray subsequently issued a perfunctory notice stating that he "ratif[ied] any and all actions" he took during the 18-month recess-appointment period. In June 2014, this Court unanimously ruled in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), that the Senate was not in recess on January 4, 2012, and thus that recess appointments made on that day were not valid. The Questions Presented are as follows:

1. May a federal official retroactively ratify an *ultra vires* government action when: (1) no federal official was authorized to perform the act at the time it was initially undertaken; (2) the purported ratification does not include an examination of any facts related to the act performed; or (3) the ratification purports to encompass not only the initial act but also federal court rulings entered in response to the act?

2. Do federal courts possess Article III subject matter jurisdiction to hear a case filed at the behest of an individual who, from the time suit was filed until judgment was entered, lacked authority to vindicate the Executive Branch's interest in seeing that the law is obeyed?

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PETITION FOR A WRIT OF CERTIORARI

Chance E. Gordon respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's opinion (Pet. App. 1a-42a) is reported at 819 F.3d 1179. The decision of the U.S. District Court for the Central District of California granting summary judgment to the Consumer Financial Protection Bureau, including a grant of monetary relief against Gordon (Pet. App. 43a-57a), is reported at 2013 WL 12116365. The district court's final judgment, which granted permanent injunctive relief against Gordon (Pet. App. 58a-72a), is unreported. The Ninth Circuit's order denying Gordon's petition for rehearing *en banc* (Pet. App. 73a-74a) is unreported.

JURISDICTION

The Ninth Circuit denied Gordon's petition for rehearing *en banc* on July 20, 2016. On September 20, 2016, Justice Kennedy granted an extension of time for filing the petition to and including November 17, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Relevant provisions of the U.S. Constitution are set forth in the Appendix.

INTRODUCTION

This case arises in an uncontested factual setting: Richard Cordray's invalid recess appointment in January 2012 as Director of the Consumer Financial Protection Bureau (CFPB). During the following 18 months, he lacked any authority to act on behalf of the federal government. Among the actions he purported to authorize were the filing and prosecution of a federal-court enforcement action against Petitioner Gordon. When the district court granted CFPB's motion for summary judgment and entered an $11.4 million judgment against Gordon in June 2013, it remained true that no properly appointed federal officer had authorized the lawsuit.

Despite Gordon's repeated objections that Cordray had no power to authorize the suit, the Ninth Circuit upheld the district court's judgment in substantial part. It held that Cordray, after the Senate confirmed his nomination to head the CFPB, successfully "ratified" all the actions he took during the 18 months preceding his confirmation. It upheld the ratification of the Gordon lawsuit (including the district-court judgment) based on a four-sentence Federal Register notice in which Cordray stated that he "affirm[ed] and ratif[ied] any and all actions" he took during his 18-month recess appointment. 78 Fed. Reg. 53,734 (Aug. 30, 2013). Pet. App. 75a.

The Ninth Circuit's endorsement of Cordray's ratification effectively nullifies the Appointments Clause, which rendered this enforcement action *ultra vires*. Article II of the U.S. Constitution makes explicit the qualifications that anyone purporting to act on

behalf of the Executive Branch must possess. Richard Cordray lacked those qualifications throughout all relevant stages of the district court proceedings, and the actions he took were *ultra vires*. Yet, if federal officials are permitted to retroactively affirm *ultra vires* acts without giving more than a momentary thought to their propriety, Article II's limitations on the President's appointment powers will be reduced to "a mere demarcation on parchment." THE FEDERALIST NO. 48, at 313 (James Madison) (Clinton Rossiter ed., 1961).

Moreover, the jurisdiction of the federal courts was never properly invoked in this matter. The President has a duty to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, and thus his duly authorized subordinates possess federal court standing to vindicate the Executive's abstract "interest in seeing that the law is obeyed." *FEC v. Atkins*, 524 U.S. 11, 24 (1998). But that standing does not extend to those, such as Cordray, whose status throughout district court proceedings was that of a private citizen. Because no properly constituted federal official authorized this lawsuit, the federal district court lacked Article III subject-matter jurisdiction over these proceedings.

Review is urgently needed to correct this undisguised assault on the Constitution's structural principles. The Ninth Circuit's ratification holding directly conflicts with the holdings of this Court and at least two other federal appeals courts. Its decision upholding Article III standing drew a strong dissent from Judge Ikuta for good reason: it cannot plausibly be reconciled with this Court's standing case law. If

Article II limitations on the President's appointment powers and Article III limitations on judicial power are to matter, then violations of those limitations must have consequences.

STATEMENT OF THE CASE

CFPB is a new federal agency, and Cordray is its first Director. Not surprisingly, the scope of its authority, and even its constitutional legitimacy, is being actively litigated in the federal courts.

Congress Creates CFPB. On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (the "Dodd-Frank Act"), Pub. L. 11-203, 124 Stat. 2376 (2010). Among other things, the Act created CFPB, a federal agency with expansive powers. Located within the Federal Reserve System, CFPB is charged with regulating "the offering and provision of consumer financial products and services under federal consumer financial laws." 12 U.S.C. § 5491(a). The Act provided for the transfer to CFPB of enforcement authority over 18 consumer protection laws that previously had been enforced by a variety of agencies.

Congress recognized that it would take a while for CFPB to get up and running. The Dodd-Frank Act provided that, beginning on a prescribed "transfer date" in July 2011 and continuing until "the Director of the Bureau is confirmed by the Senate," CFPB would operate as a branch of the Treasury Department, and the Secretary of Treasury would have ultimate authority to exercise many of CFPB's powers. 12

U.S.C. § 5586(a).[1]

Title X of the Dodd-Frank Act (also known as the Consumer Financial Protection Act or CFPA) established CFPB as an independent agency headed by a single Director. The statute provided that the Director was removable by the President only for cause—that is, for "inefficiency, neglect of duty, or malfeasance in office"—during the Director's fixed five-year term. 12 U.S.C. § 5491(c)(3). The D.C. Circuit recently ruled that CFPB was "unconstitutionally structured because it is an independent agency headed by a single Director." *PHH Corp. v. CFPB*, __ F.3d __, 2016 WL 5898801 at *26 (D.C. Cir. Oct. 11, 2016). As a remedy, the appeals court restructured the agency going forward by severing the "for cause" removal provision from the CFPA, thereby transforming CFPB from an independent agency into an executive agency whose Director is immediately answerable to the President. *Id.* at *28.[2]

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[1] The Treasury Secretary's enforcement powers did not, however, include authority to file legal claims of the sort ultimately pursued against Gordon. Section 5586(a) granted the Secretary authority to undertake activities set forth in Subtitle F of Title X of the Act (§§ 5581-87), but those activities did *not* include assertion of the legal claims at issue here. *See* David H. Carpenter, *Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection*, Congressional Research Service (May 18, 2011).

[2] Because the facts of the *PHH* case did not require it, the D.C. Circuit did not address what impact its "unconstitutionally structured" holding would have on the validity of CFPB acts undertaken prior to the CFPB's October 11, 2016 restructuring. *See id.* at *28 n.19.

The President Nominates Cordray. On July 18, 2011, just prior to the "transfer date," President Obama nominated Richard Cordray to serve as Director of CFPB. However, a Senate vote on his nomination stalled.[3]

On January 4, 2012, President Obama purported to invoke his recess appointment power to install Cordray as Director without the advice and consent of the Senate. The President contended (erroneously, it turned out) that the Senate was in recess on that day.

In January 2013, President Obama renominated Cordray to head CFPB, and the Senate confirmed that appointment on July 16, 2013. In the meantime, both the D.C. Circuit and the Third Circuit had issued decisions that called into question the legality of Cordray's recess appointment, by holding that the President exceeded his Article II appointment powers when, also on January 4, 2012, he gave recess appointments to three members of the National Labor Relations Board. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013); *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013). On August 30, 2013, Cordray published a four-sentence notice in the Federal Register that purported to "ratify" all actions taken by CFPB during the 18-month period of his recess appointment. He stated:

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[3] All parties agree that CFPB's Director is an "Officer of the United States" whose appointment must conform to the requirements of Article II of the Constitution. *See also* 12 U.S.C. § 5491(b)(2) ("[T]he Director shall be appointed by the President, by and with the advice and consent of the Senate.").

> I believe that the actions I took during the period I was serving as a recess appointee were legally authorized and entirely proper. To avoid any possible uncertainty, however, I hereby affirm and ratify any and all actions I took during that period.

Pet. App. 75a.

In June 2014, this Court unanimously affirmed the D.C. Circuit's *Noel Canning* decision, ruling that the Senate was not in recess on January 4, 2012 and thus that President Obama was not entitled to make recess appointments on that day. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). Given that decision, CFPB has ceased to contest the invalidity of Cordray's recess appointment and that all actions taken by the Bureau during the next 18 months were *ultra vires* when undertaken. Indeed, the Ninth Circuit repeatedly stated in its decision below that the recess appointment was "invalid." Pet. App. 4a, 14a.

CFPB Files Enforcement Action Against Gordon. Cordray purported to authorize the filing of an enforcement action against Gordon on July 18, 2012. The seven-count complaint alleged that Gordon, a licensed attorney in California, engaged in deceptive practices in connection with his provision of mortgage-relief services. The first three counts alleged that Gordon's actions violated Sections 1031 and 1036 of the newly adopted CFPA, 12 U.S.C. §§ 5531, 5536. Complaint, ¶¶ 56-66. The other four counts alleged violations of Regulation O, a regulation initially adopted by the Federal Trade Commission in December

2010 and reenacted by the Treasury Secretary in December 2011 for the purpose of prohibiting unfair or deceptive acts with respect to mortgage loans. Complaint ¶¶ 67-77.[4] The complaint sought both injunctive and monetary relief. The district court granted CFPB's Ex Parte Application for Temporary Restraining Order, which resulted in appointment of a receiver and the seizure of many of Gordon's assets.

Gordon's answer denied CFPB's claims, and he mounted a vigorous defense. In particular, he moved for summary judgment, asserting that Cordray's recess appointment was invalid and thus that CFPB lacked authority to file an enforcement action against him.

District Court Proceedings. On June 26, 2013, the district court denied Gordon's motion for summary judgment, granted CFPB's motion for summary judgment on both its CFPA claims and its Regulation O claims, and entered a judgment directing Gordon to disgorge $11.4 million allegedly collected from customers between January 2010 and July 2012. Pet. App. 43a-57a. The court deferred a ruling on permanent injunctive relief. *Id.* at 56a-57a.

The district court rejected Gordon's challenge to CFPB's authority to file an enforcement action against him. Pet. App. 52a-54a. The court declined to consider

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[4] FTC adopted the regulation, 16 C.F.R. Part 322 (then known as the MARS Rule), pursuant to authority granted it by the 2009 Omnibus Appropriations Act, Pub. L. 111-8, § 626. Acting pursuant to his interim authority over CFPB, the Treasury Secretary recodified the MARS Rule as 12 C.F.R. Part 1015 and designated it Regulation O.

Gordon's recess-appointment-based argument, concluding that the citations provided by Gordon in support of his argument lacked "precedential value" and were not sufficiently compelling. *Ibid.*[5]

The court's final judgment, issued July 26, 2013, *inter alia*: (1) permanently enjoined Gordon from violating the CFPA and Regulation O; and (2) enjoined Gordon for a three-year period from offering any mortgage-relief product or service or any debt-relief product or service. Pet. App. 58a-72a.

The Ninth Circuit Decision. A sharply divided Ninth Circuit affirmed in substantial part. Pet. App. 1a-42a. First, the appeals court majority rejected Gordon's contention that the federal courts lacked subject-matter jurisdiction to hear CFPB's enforcement action. *Id.* 7a-14a. Gordon asserted: (1) this Court's 2014 *Noel Canning* decision conclusively established that Cordray's recess appointment was invalid; (2) as a private citizen, Cordray lacked standing to authorize an enforcement action seeking to vindicate an interest in seeing that the law is obeyed; and (3) federal courts lack Article III case-or-controversy jurisdiction unless the plaintiff maintains standing throughout district court proceedings. While conceding the invalidity of Cordray's recess appointment, the court concluded that "Appointments Clause problems [do not] divest federal courts of jurisdiction." *Id.* at 14a. It concluded that subject-matter jurisdiction analysis should focus on the

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[5] Notably, CFPB did not assert in its summary judgment papers that the enforcement action would have been authorized even if Cordray's recess appointment were invalid. Rather, its sole response was that the recess appointment was valid.

standing of the federal agency, not on the standing of individuals purporting to act on behalf of the agency:

> Here, Congress authorized the CFPB to bring actions in federal court to enforce certain consumer protection statutes and regulations. *See* 12 U.S.C. § 5564(a)-(b). ... And with this authorization, the Executive Branch, through the CFPB, need not suffer a "particularized injury"—it is charged under Article II to enforce federal law. ... That its director was improperly appointed does not alter the Executive Branch's interest or power in having federal law enforced.

Id. at 10a (citations omitted).

The appeals court also concluded that the Article II violation did not bar affirmance of the district court judgment. It accepted CFPB's argument (raised for the first time in its Ninth Circuit response brief) that "[t]he subsequent valid appointment, coupled with Cordray's August 30, 2013 ratification, cures any initial Article II deficiencies." Pet. App. 15a.[6] The Court reasoned: (1) CFPB itself had authority to bring the enforcement action in 2012 by virtue of Congress's adoption of the

[6] The appeals court rejected CFPB's assertion that Gordon should not be permitted to raise the Article II issue in light of the district court's refusal to resolve it. Pet. App. 15a n.5. The appeals court concluded that Gordon had "undoubtedly" "properly raised" the issue by arguing in the district court that "Cordray was invalidly appointed under the Appointments Clause and, as a result, the enforcement action against Cordray was invalid." *Ibid.*

CFPA (citing 12 U.S.C. § 5564(a)-(b)); and (2) by August 2013, Cordray was "an agent authorized" to act on behalf of CFPB and thus was authorized to retroactively ratify an action that CFPB was empowered to undertake in 2012. *Id.* at 17a.[7]

Addressing the merits, the court affirmed the district court's grant of summary judgment on the issue of liability and the award of injunctive relief. Pet. App. 17a-23a; 28a-29a. The court also rejected most of Gordon's challenges to monetary relief. *Id.* at 23a-26a. The court vacated and remanded the monetary award for consideration of one issue: whether the award was excessive because it required disgorgement of funds obtained before enactment of the CFPA. *Id.* at 27a.[8]

Judge Ikuta dissented, concluding that the federal courts lacked subject-matter jurisdiction. Pet. App. 30a-42a. She asserted, "[N]o one had the executive power necessary to prosecute this civil enforcement action in the district court. And without the Executive's power to 'take Care that the Laws be faithfully executed,' U.S. Const. Art. II, § 3, no one could claim the Executive's unique Article III standing." *Id.* at 30a.

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[7] The court stated that it was not addressing whether the judgment could be upheld under either harmless-error review or the *de facto* officer doctrine. Pet. App. 17a n.5.

[8] The court noted that while the disgorgement remedy was based on gross income allegedly received by Gordon and related entities between January 2010 and July 2012, the CFPA did not take effect until July 2010, and Regulation O was not adopted until December 2010. *Ibid.*

Judge Ikuta rejected the majority's assertion that mere adoption of the CFPA by Congress was sufficient to provide CFPB itself with "executive authority that would allow it to enforce public rights." Pet. App. 35a. She explained:

> Congress cannot by itself confer executive authority to bring a civil enforcement action on an entity created by statute. ... Only the President and persons who are "Officers of the United States" [may] do so.

Ibid (citing *Buckley v. Valeo*, 424 U.S. 1, 139-40 (1976)). She concluded, "Because the Bureau lacked standing when it brought this enforcement action, we lack jurisdiction." *Id.* at 41a.

The Ninth Circuit denied Gordon's petition for rehearing *en banc* on July 20, 2016. *Id.* at 73a-74a. Judge Ikuta voted to grant the petition. *Id.* at 74a.

REASONS FOR GRANTING THE PETITION

The petition raises issues of exceptional importance. It is undisputed that the individual who purported to sanction the filing and prosecution of an enforcement action against Petitioner Gordon lacked authority to do so—because he had not been validly appointed as an Officer of the United States. The Framers of the Constitution sought to prevent abuse of Executive Branch power by carefully circumscribing the category of individuals authorized to exercise that

power.[9] This petition raises the issue of whether, and under what circumstances, the federal government may retroactively "ratify" actions taken in the name of the federal government by those who have not, in fact, been delegated the requisite power.

The federal courts of appeals are sharply split on that issue; the Ninth Circuit's position on when ratification is permissible directly conflicts with the position adopted by the D.C. and Third Circuits. And Congress has disapproved after-the-fact ratifications, concluding that prohibiting ratification provides Executive Branch officials with increased incentives to fully comply with Article II limitations on the appointment power.[10] This Court has imposed strict limits on retroactive ratifications, and the decision below directly conflicts with the Court's most recent pronouncement on the issue. *See FEC v. NRA Political Victory Fund*, 513 U.S. 588 (1994). Review is warranted to resolve the conflict among the federal

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[9] The Appointments Clause and the Recess Appointments Clause of Art. II, § 2 of the U.S. Constitution prescribe the manner in which "Officers" of the United States are to be chosen. The text of those clauses is set out at Pet. App. 76a.

[10] Congress adopted the Federal Vacancy Reform Act (FVRA) in 1998 to prevent the Executive Branch from allowing individuals named as "temporary" office holders (to fill unexpected vacancies) to remain in office for extended periods, thereby evading Appointments Clause requirements. *See SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015), *cert. granted*, 136 S. Ct. 2489 (2016). The FVRA states that an action taken by "any person" who has not been selected for federal office in accordance with the statute "shall have no force or effect" and "shall not be ratified." 5 U.S.C. § 3348(d)(1) & (2).

appeals courts and to determine whether the decision below—which effectively nullifies Article II limitations on the appointment power—properly adheres to the Framers' intent.

Ratification issues frequently arise in the context of an internal decision of a federal agency—*e.g.*, an agency regulation challenged on the ground that those responsible for its adoption were not authorized to do so. Under those circumstances, the question of an agency's standing to appear in federal court to defend its regulation does not arise. But in this instance, the *ultra vires* federal actions at issue are an agency's filing and prosecuting a federal-court enforcement action. As is true of any plaintiff, a federal agency that files a claim in federal court must maintain its standing *throughout* the proceedings. Although the United States possesses unique standing to file lawsuits to enforce federal law, only properly vested "Officers of the United States" are permitted to exercise that authority. Yet the Ninth Circuit authorized this suit to proceed in federal court even though none of the individuals who made the decision to file and prosecute an enforcement action against Gordon were Officers of the United States or properly appointed by an Officer. As Judge Ikuta cogently explained in dissent, the Ninth Circuit's decision conflicts sharply with well-established standing case law. In light of that conflict, review of the standing issue is warranted as well.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER RETROACTIVE RATIFICATION OF THE UNAUTHORIZED LAWSUIT AGAINST PETITIONER IS CONSISTENT WITH ARTICLE II CONSTRAINTS ON THE APPOINTMENT POWER

A. The Federal Appeals Courts Are Deeply Split Regarding When Ratification of *Ultra Vires* Actions Is Permissible

The Ninth Circuit held that Cordray's four-sentence August 30, 2013 Federal Register notice sufficed to "ratify" the filing and prosecution of the federal-court enforcement action against Gordon—conduct that the appeals court conceded was not properly authorized when undertaken. Pet. App. 15a. The court expressed no concern that the notice did not focus on the Gordon proceeding but rather was a blanket ratification of the thousands of actions that Cordray had undertaken in the prior 18 months. Indeed, the court concluded that ratification by an authorized federal officer "satisfies the Appointments Clause" even though the ratification does not involve a review of the facts of a case at issue and is "nothing more than a rubberstamp" of the initial decision. *Ibid.*

The Ninth Circuit's endorsement of "rubberstamp" ratifications conflicts sharply with decisions from the D.C. and Third Circuits. Review is warranted to resolve that conflict.

The D.C. Circuit held in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.* ["*Intercollegiate II*"], 796 F.3d 111, 117 (D.C. Cir. 2015),

that ratification of a prior, invalid action requires "a subsequent determination" by "a properly appointed official" who "has the power to conduct an independent evaluation of the merits and does so." *Intercollegiate II* involved a challenge to a decision by a federal administrative body (the Copyright Royalty Board) setting royalty rates in webcasting. The D.C. Circuit had previously held that the board's initial royalty-rate decision was invalid because the appointment of board members violated the Appointments Clause. *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.* ["*Intercollegiate I*"], 574 F.3d 748 (D.C. Cir. 2009). The D.C. Circuit upheld the new rate determination only after an entirely new board was appointed in compliance with the Appointments Clause and the new board conducted a *de novo* review before reaching a new decision. *Intercollegiate II*, 796 F.3d at 118-121.

Intercollegiate II reaffirmed an earlier D.C. Circuit decision that ratification of a prior, *ultra vires* administrative action requires the subsequent, properly appointed decisionmaker to "'make a detached and considered judgment' in ratifying the previous [official's] decision." *Id.* at 118 (quoting *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998)). The D.C. Circuit's limits on ratifications cannot be reconciled with the Ninth Circuit's position. Had Gordon's case arisen in the District of Columbia, the D.C. Circuit would have invalidated Cordray's purported ratification of the enforcement action because Cordray did not engage in any sort of "independent evaluation

of the merits" of (or even think about) Gordon's case.[11]

The decision below also sharply conflicts with a Third Circuit decision, *Advance Disposal Services East, Inc. v. NLRB*, 820 F.3d 592 (3d Cir. 2016). That case involved the NLRB's efforts to ratify the *ultra vires* actions of an improperly appointed NLRB Regional Director, who had overseen a disputed union election. The NLRB had properly re-appointed the Regional Director by the time of his purported ratification. The Third Circuit identified three "requirements" for a valid ratification:

> First, the ratifier must, at the time of ratification, still have the authority to take the action to be ratified. Second, the

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[11] The Ninth Circuit cited a separate D.C. Circuit decision, *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), in support of its view that ratification of a prior, invalid government action does not require actual reconsideration of the merits of the action. Pet. App. 15a. The Ninth Circuit has mischaracterized *Legi-Tech*; it never stated that "nothing more than a rubberstamp," *ibid*, is sufficient to effect a ratification. Indeed, the previous action at issue in *Legi-Tech* (an administrative decision to *initiate* enforcement action) was ratified by a properly reconstituted Federal Election Commission (FEC) only after the FEC conducted a *three-day hearing* on whether to ratify. In its citation to *Legi-Tech*, *Intercollegiate II* explicitly referenced the three-day hearing in explaining why *Legi-Tech* had concluded that the ratification process "was sufficient to cure the constitutional violation." *Intercollegiate II*, 796 F.3d at 118. While the D.C. Circuit, in conducting a ratification review, does not examine the ratifier's state of mind to determine whether he was open to changing the initial decision, it does require the ratifier at least to "conduct an independent evaluation of the merits" of the initial decision. *Id.* at 117.

> ratifier must have full knowledge of the decision to be ratified. Third, the ratifier must make a detached and considered affirmation of the earlier decision. These last two requirements are intended *to ensure that the ratifier does not blindly affirm the earlier decision without due consideration*.

Advanced Disposal, 820 F.3d at 602-03 (emphasis added).

The Third Circuit upheld the ratification only after determining that the Regional Director had undertaken the requisite "detached and considered affirmation" of his previous action. In contrast, CFPB has never suggested that Cordray—when he issued his blanket ratification of all actions taken between January 2012 and July 2013—undertook *any* analysis of the enforcement action filed against Gordon in July 2013, let alone a "detached and considered" one. Indeed, Cordray made plain in his August 2013 ratification that he did not believe that any analysis was required, stating that he still "believe[d] that the actions I took during the period I was serving as a recess appointee were legally authorized and entirely proper," Pet. App. 75a, even though we now know they were not. The Ninth Circuit nonetheless upheld the ratification under its nothing-more-than-a-rubberstamp-required standard. *Id.* at 15a.

Review is warranted to resolve the irreconcilable conflict between the Ninth Circuit, on the one hand, and the D.C. and Third Circuits, on the other hand, about the procedures a federal agency must employ if

it seeks to ratify a previous *ultra vires* action.

B. The Decision Below Conflicts with this Court's Case Law by Permitting Ratification When an Agency Would Not Have Been Able to Perform the Challenged Acts at the Time They Were Initially Undertaken

While government actors can in some circumstances ratify actions taken in their name without their prior authorization, this Court has held that such ratification is limited by the longstanding agency-law limitation 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." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1873) (emphasis omitted) (quoting *Cook v. Tullis*, 85 U.S. 332, 338 (1873)). Because neither Cordray nor anyone else associated with CFPB possessed legal capacity to authorize this enforcement proceeding at the time it was filed and litigated, *NRA Political Victory Fund* bars him from ratifying it later. The Ninth Circuit's efforts to distinguish *NRA Political Victory Fund*, 15a-17a, are unavailing. Accordingly, review is also warranted because of the clear conflict between that decision and the decision below.

NRA Political Victory Fund held that the U.S. Solicitor General could not ratify a Supreme Court certiorari petition filed by the FEC (which lacked legal capacity to file such petitions on its own) because, by the time the Solicitor General sought to ratify the filing, he no longer had the right to file a petition—the 90-day petitioning period had expired. *Id.* at 99. The

Court explained the rationale behind that rule as follows: "The intervening rights of third persons cannot be defeated by the ratification." *Id.* at 98. Thus, the question facing the court below was whether anyone at CFPB had authority in July 2012 to initiate enforcement proceedings against Gordon (in this instance, the third party with "intervening rights."). Neither CFPB nor the Ninth Circuit has been able to identify such an individual, and there was none. Upholding ratification under those circumstances is inconsistent with *NRA Political Victory Fund*'s admonitions that ratification is impermissible if the ratifier would not have been "able to do the act ratified at the time the act was done" or if ratification would defeat "[t]he intervening rights of third persons."[12]

The panel majority held that even though Cordray himself lacked authority to initiate and prosecute this action, CFPB should be deemed to have possessed such authority by virtue of Congress's adoption of the CFPA. Pet. App. 17a. That contention lacks merit. While CFPB existed on paper in 2012, it could litigate only through "designate[d] agents" constitutionally appointed "to represent it in federal court." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664

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[12] This Court's ratification rule is consistent with the Restatement (Third) of Agency § 4.05 (2006), which provides: "A ratification of a transaction is not effective unless it *precedes* the occurrence of circumstances that would cause the ratification to have adverse and inequitable effects on the rights of third parties." (Emphasis added.) Gordon will suffer serious adverse effects if ratification is upheld here: he will be subject to a ruinous court judgment that was the direct result of the *ultra vires* acts initiated by Cordray.

(2013). CFPB is a new federal agency that lacked any duly appointed Officers until after Cordray was validly installed as its Director in July 2013.[13] Moreover, congressional legislation can never by itself constitute the necessary authority to initiate Executive action. As Judge Ikuta explained in dissent, "Congress cannot by itself confer executive authority to bring civil enforcement action on an entity created by statute. ... Only the President and persons who are 'Officers of the United States' could do so." Pet. App. 35a (citing *Buckley*, 424 U.S. at 139-40).

The decision below conflicts with *NRA Political Victory Fund* for the additional reason that Cordray lacked authority at the time of ratification to initiate at least a portion of the enforcement action he purported to ratify. The enforcement action focused on Gordon's alleged activities between January 2010 and July 2012. The limitations period applicable to that action is three years. 12 U.S.C. § 5564(g)(1). Thus, as of August 30, 2013, Cordray lacked authority to initiate an enforcement action based on activities that occurred before August 30, 2010. Just as the Solicitor General was not permitted to ratify the FEC's *ultra vires* certiorari petition because the 90-day period for filing certiorari petitions had expired by the time of his purported ratification, so too is Cordray barred from seeking to ratify an enforcement action covering events

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[13] As noted *supra* at Note 1, the CFPA granted the Treasury Secretary authority, until the Senate confirmation of a CFPB Director, to keep the CFPB running and to exercise some of CFPB's powers. *See* 12 U.S.C. § 5586(a). But those powers did not include the authority to file federal-court actions to enforce the CFPA and Regulation O.

occurring more than three years before his attempted ratification.

C. The Decision Below Is Unprecedented in Purporting to Ratify Not Only an *Ultra Vires* Administrative Action but also a Court Judgment Issued in Response to that Action

At the time that Cordray sought to ratify CFPB's federal-court enforcement proceeding against Gordon, the district court had already entered final judgment against Gordon—including an $11.4 million monetary award. The panel held that the ratification applied not only to CFPB's decision to file suit but also to the district court's judgment. This expansive interpretation of the ratification doctrine is unprecedented and provides an additional reason to grant review.

In several cases, the Court has permitted the federal government (usually Congress) to ratify an Executive Branch act previously undertaken by officials not authorized to act, where the ratifier *was* so authorized at the time of the initial act. *See, e.g., United States v. Heinszen*, 206 U.S. 370 (1907) (although a Presidential order imposing a duty on goods imported into the Philippines was unauthorized when initially issued, legislation enacted by Congress in 1902—*which it could have enacted at the time of the initial Presidential order*—served to ratify the order). But in none of those cases did the Court uphold ratification of *court decisions* that were by-products of the previously unauthorized federal action. Indeed,

Heinszen explicitly limited ratification to events *preceding* a substantive court ruling in legal proceedings arising out of the prior Executive Branch action. 206 U.S. at 387-88.

In the court below, CFPB cited two cases to support its view that ratification of a government decision to file a lawsuit can also encompass ratification of the court's rulings in that lawsuit. CFPB Br. at 50 (citing *Bowles v. Wheeler*, 152 F.2d 34 (9th Cir. 1945), and *Rafferty v. Smith Bell Co.*, 257 U.S. 226 (1921)). Neither case supports CFPB's position. Indeed, in both cases lower courts had ruled against the United States; far from seeking to ratify those lower-court rulings, the United States sought to invoke ratification doctrine to *overturn* those decisions.

There is no way to accurately predict whether a federal district court would enter the same, severe judgment if CFPB were to proceed against Gordon a second time. Yet, by ruling that Cordray was entitled to ratify not only the filing of the enforcement action but also the district court judgment that flowed from that *ultra vires* filing, the Ninth Circuit deprived Gordon of an opportunity to have his defenses evaluated in a proceeding untainted by CFPB's constitutional violations. Review is warranted to examine this unprecedented expansion of ratification doctrine.

II. REVIEW IS WARRANTED BECAUSE THE NINTH CIRCUIT'S STANDING DECISION CIRCUMVENTS ARTICLE III'S CONSTRAINTS ON THE FEDERAL COURTS' JURISDICTION AND IS CONTRARY TO THIS COURT'S PRECEDENTS

Article III's bedrock requirement that a plaintiff must have standing—both at the time an action is filed and "throughout all stages of litigation," *Hollingsworth*, 133 S. Ct. at 2661, is "inflexible and without exception." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). This case-or-controversy requirement applies just as surely to litigation conducted by the United States as to private lawsuits. Yet from July 18, 2012, when this civil enforcement action against Gordon commenced, until June 26, 2013, when the district court granted summary judgment against him, *no one* before the court was properly vested by the Executive Branch with the necessary power and authority to enforce the CFPA—an absolute prerequisite for executive officers to enjoy unique standing under Article III.

Although no one below was authorized to file—much less prosecute—an enforcement action against Gordon on behalf of the United States, the Ninth Circuit nonetheless ruled that the "inflexible" constitutional threshold of standing was satisfied. Yet because "the law of Article III standing is built on a single basic idea—the idea of separation of powers," *Allen v. Wright*, 468 U.S. 737, 752 (1984), those who purported to prosecute this litigation on behalf of the United States without constitutional authority to do so lacked standing to invoke the subject-matter jurisdiction of the federal courts. The panel majority's

radical departure from Article III's case-or-controversy requirement, as repeatedly manifested in this Court's own precedents, ignores the vital role standing plays in preventing "the judicial process from being used to usurp the powers of the political branches," *Hollingsworth*, 133 S. Ct. at 2661, and thus merits further review by this Court.

A. The Ninth Circuit's Standing Decision Conflicts with this Court's Own Decisions

When Congress granted CFPB authority to "commence a civil action against" anyone who "violates a Federal consumer financial law," 12 U.S.C. § 5564(a), it did so on the condition that everyone representing CFPB in federal court would be *constitutionally* vested with the authority to do so.[14] Yet the panel majority concluded that "[w]hile the [Bureau's] failure to have a properly confirmed director may raise Article II Appointments Clause issues, it does not implicate our Article III jurisdiction to hear this case." Pet. App. 10a-11a. The Ninth Circuit went on to explain—without citing any authority for the proposition—that "it is the Executive Branch, not any particular individual, that has Article III standing." Pet. App. 8a. But that distinction has no basis in the law and is belied by this Court's own precedents.

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[14] Here the Legislative Branch enacted statutes that expressly conditioned the CFPB Director's authority to bring civil enforcement actions on his or her confirmation by the Senate. *See* 12 U.S.C. §§ 5491(b)(2), 5586(a). It is therefore not for the federal judiciary to nullify that important legislative check on executive power.

The federal courts "must stay within their constitutionally prescribed sphere of action, whether or not exceeding that sphere will harm one of the other two branches." *Steel Co.*, 523 U.S. at 102 n.4. This Court's standing jurisprudence "derives from Article III and not Article II," *ibid*, and it is well settled that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates." *Buckley*, 424 U.S. at 135 (quoting *Myers v. United States*, 272 U.S. 52, 117 (1926)). Contrary to the Ninth Circuit, the "primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights * * * may be discharged *only* by persons who are 'Officers of the United States' within the language of [the Appointments Clause]." *Id.* at 140 (emphasis added).

As the panel majority conceded, "*duly* appointed officers are excepted from the generalized grievance prohibition that private parties face under Article III." Pet. App. 8a (emphasis added). This relaxation of Article III's standing requirement derives from Article II, which requires the Executive Branch to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3; *see In re Debs*, 158 U.S. 564, 586 (1895) (holding that when the United States sues to enforce public rights, "the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts"). But where, as here, the plaintiff is nothing more than a nascent, faceless entity whose director and subordinate attorneys were not appointed by a body with proper appointment authority and therefore could not be considered "Officers of the United States," the Constitution's structural protections cannot be swept aside. In other words,

"Article III cannot confer on the executive a power that Article II denies." Tara Leigh Grove, *Standing Outside of Article III*, 162 U. Pa. L. Rev. 1311, 1334 (2014).

Indeed, before Mr. Cordray's valid appointment, *nobody* in the Executive Branch possessed authority to enforce the Dodd-Frank Act's new consumer protection laws. CFPB's Director had not been appointed by the President with the advice and consent of the Senate, as required by Congress. 12 U.S.C. § 5491(b)(2). And none of CFPB's inferior officers had, in turn, been appointed by a validly confirmed Director. *Id.* §§ 5491(b)(5) (deputy director), 5493(a)(1) ("all employees" including "attorneys").

A plaintiff with no lawful executive authority to bring suit whatsoever obviously lacks the unique attributes of executive standing. As Judge Ikuta explained in dissent:

> In most cases, an executive agency has Article III standing because it has a director properly vested with executive authority under Article II, but it is undisputed that the Bureau cannot claim standing on this basis. So the real question is: what is the alternative basis for the Bureau's standing? Instead of providing one, the majority merely reiterates that Congress enacted a statute stating that the Bureau is part of the Executive Branch.

Pet. App. 39a. Without a properly vested Officer of the United States, CFPB could not lawfully invoke the

jurisdiction of the federal courts.

Absent any executive authority to enforce federal law, Cordray's *ultra vires* agents were essentially private litigants, who "[i]n the ordinary course ... must assert [their] own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Hollingsworth*, 133 S. Ct. at 2663. Yet Cordray and his staff attorneys could not possibly satisfy Article III's traditional standing requirements for private plaintiffs bringing suit in federal court. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) ("The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.").

Even the Bureau did not contend—nor could it—that Cordray and his Bureau attorneys sought "a remedy for a personal and tangible harm," *Hollingsworth*, 133 S. Ct. at 2661. Shorn of executive authorization, they lacked standing to seek the mere "vindication of the rule of law." *Steel Co.*, 523 U.S. at 106; *see also Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam) ("Our refusal to serve as a forum for generalized grievances has a lengthy pedigree."); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 573-74 (1992) (a plaintiff "seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy"). Nonetheless, without even addressing how a Bureau with no valid executive power has standing to bring a civil enforcement action in federal court, the Ninth Circuit sidestepped Petitioner's Article III standing

challenge, perfunctorily observing that CFPB is "part of the Executive Branch." Pet. App. 11a.

It is true that when Cordray was ultimately confirmed by the Senate as CFPB's Director in July 2013, he constitutionally could have brought an enforcement action against petitioner at that time. Rather than do so, however, he opted to "ratify" all actions he took during the 18 months preceding his confirmation. But because Article III standing is measured at the time "when the suit is filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), such a jurisdictional defect cannot be cured by a change in circumstances after the fact. *See also Mollan v. Torrance*, 9 U.S. (1 Wheat) 537, 539 (1824) ("[T]he jurisdiction of the court depends upon the state of things at the time of the action brought.").

By resolving the standing issue in a manner that conflicts with these principles, the Ninth Circuit's holding affirmatively frustrates and erodes this Court's precedents. The decision is clearly and directly at odds with the myriad decisions discussed above that hold, without exception, that a plaintiff seeking to invoke the jurisdiction of the federal courts must have standing both at the time an action is filed and "throughout all stages of litigation." *Hollingsworth*, 133 S. Ct. at 2661. Review is therefore warranted to vindicate the Constitution's case-or-controversy requirement under Article III and this Court's standing precedents.

B. *None* of the Authorities Cited by the Panel Majority Support the Erroneous Holding Below

In rejecting Petitioner's Article III standing challenge, the panel majority relied on precedents it claimed demonstrate that all Article II defects are "nonjurisdictional." Pet App. 12a. But not one of the cases cited by the Ninth Circuit supports that tenuous proposition. The panel's principal authority, *United States v. Providence Journal Co.*, 485 U.S. 693 (1988), actually undermines that very contention. In that case, a special prosecutor filed a petition for certiorari "without the authorization of the Solicitor General, and without authorization to appear on behalf of the United States." 485 U.S. at 708. Although the "United States" was named as the petitioner in the suit, this Court did not embrace the novel rule the panel majority announced in this case, *i.e.*, that "it is the Executive Branch, not any particular individual" that justifies the exercise of federal court jurisdiction. Pet. App. 8a. Instead, the Court dismissed the petition, concluding that "[a]bsent a proper representative of the Government" as a litigant in the suit, "jurisdiction is lacking." 485 U.S. at 708. So too here, because Cordray and his designees engaged in litigation "without authorization to appear on behalf of the United States," the district court lacked jurisdiction.

In fact, *none* of the cases cited by the panel explain how a Bureau with no lawful executive power has Article III standing to bring a civil enforcement action. *Freytag v. Commissioner*, 501 U.S. 868 (1991), for example, merely held that a statute authorizing the Chief Judge of the U.S. Tax Court to assign any

proceeding to a special trial judge did *not* violate the Appointments Clause. There was no dispute in *Freytag* that the petitioners challenging the constitutionality of the judicial officer who ordered them to pay additional taxes to the federal government had sufficient standing to do so. More fundamentally, as *Freytag* makes clear, the U.S. Tax Court is wholly a creation of Congress under Article I, *id*. at 870, and so is not even subject to the stringent "case-or-controversy" requirement of Article III at issue in this case.

Nor did *Buckley*, also cited by the panel majority, hold that an Article III court has jurisdiction over a civil enforcement action brought by someone who lacks lawful executive authority. To the contrary, *Buckley* held that the FEC's Appointments Clause defect did not "affect the validity of the Commission's *administrative actions and determinations*," which this Court accorded "de facto validity." 424 U.S. at 142 (emphasis added). Most relevant here, at the time the Court decided *Buckley*, the FEC had never exercised its enforcement authority. *Ibid.* at 115 n.157; *see also Buckley v. Valeo*, 519 F.2d 821, 893 (D.C. Cir. 1975) ("No party has been joined in a civil enforcement action initiated by the Commission."). *Buckley* thus offers *no* support for the Ninth Circuit's conclusion that Article III standing was satisfied during CFPB's unauthorized enforcement proceeding in the district court below.

In sum, because CFPB had no executive authority to vindicate the public interest in federal court, it lacked standing to bring an enforcement action against petitioner. Rather than squarely address CFPB's standing deficiency, the Ninth Circuit's opinion elides the question of standing by citing authorities

that do not even address the standing requirements of Article III.

C. Because Permitting Federal Courts to Adjudicate Suits Brought by Plaintiffs Who Lack Article III Standing Violates the Separation of Powers, Review Is Warranted

The Framers' reliance on Article III standing to limit judicial review reflects their view that "neither department may invade the province of the other and neither may control, direct, or restrain the action of the other." *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). Article III's narrow limits on federal jurisdiction are "founded in concern about the proper—and properly limited—role of the courts in a democratic society." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Accordingly, "federal courts may exercise power only 'in the last resort' ... and only when adjudication is 'consistent with a system of separated powers and [the dispute is one] traditionally thought to be capable of resolution through the judicial process.'" *Allen*, 468 U.S. at 752 (citations omitted).

Because the standing requirements of Article III limit the accumulation of power by the Judicial Branch, this Court has consistently rejected assertions that federal courts may entertain suits under circumstances where those requirements are not satisfied. Although "[v]iolations of the separation-of- powers principle have been uncommon because each branch has traditionally respected the prerogatives of the other two," *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991), this

Court has not hesitated to enforce adherence to that principle when necessary. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 693 (1988) ("Time and again we have reaffirmed the importance in our constitutional scheme of the separation of governmental powers into the three coordinate branches.").

Article III's case-or-controversy requirement is "a crucial and inseparable element" of separation-of-powers principles embedded in the Constitution, "which successively describes where the legislative, executive and judicial powers, respectively, shall reside." Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U. L. Rev. 881, 881 (1983). It is the standing requirement that "makes possible the gradual clarification of the law through judicial application." *Allen*, 468 U.S. at 752; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("This Court has recognized that the case-or-controversy limitation is crucial in maintaining the tripartite allocation of power set forth in the Constitution.") (internal quotations omitted).

The Ninth Circuit's holding is thus sharply at odds with this Court's historic understanding of Article III. Failure to enforce Article III's core standing requirements invariably leads to "an over-judicialization of the processes of self-governance." Scalia, *supra*, at 881. Unfortunately, the Ninth Circuit's decision in this case, left unchecked, will severely erode the Constitution's carefully balanced separation of powers.

Further, it is well settled that one branch of government cannot consent to another branch's

encroachment on its constitutional role. Indeed, the Constitution's division of powers among the three branches of government is violated any time one branch invades the territory of another, "whether or not the encroached-upon branch approves the encroachment." *New York v. United States*, 505 U.S. 144, 182 (1992) ("The constitutional authority of Congress cannot be expanded by the 'consent' of the governmental unit whose domain is thereby narrowed.").

Ultimately, the federal courts' arrogation of power comes at the expense of the people and their elected representatives. By preventing an unelected, life-tenured judiciary from exercising executive or legislative powers—which are the exclusive province of the politically accountable branches of government—Article III's case-or-controversy requirement cabins the federal judiciary to its historic adjudicatory role:

> In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action.

Summers v. Earth Island Inst., 555 U.S. 488, 492 (2009). Article III standing thus "ensures that the

courts will more properly remain concerned with tasks that are, in Madison's words, 'of a Judiciary nature.'" John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 Duke L.J. 1219, 1232 (1993) (citation omitted).

By authorizing federal courts to entertain suits under federal statutes at the behest of individuals who have no authority to enforce them and who suffered no concrete injury caused by any alleged statutory violation, the decision below constitutes a significant relaxation of Article III's standing requirements and thus erodes the separation of powers.

III. THE QUESTIONS PRESENTED ARE IMPORTANT AND THIS CASE PROVIDES AN IDEAL VEHICLE TO ANSWER THEM

The Ninth Circuit's decision does more than simply contravene this Court's ratification and standing precedents and thereby undermine limitations that Article II imposes on the President's appointment powers and that Article III imposes on federal courts. It also raises important questions about the appropriate judicial response when government officials are shown to have violated separation-of-powers principles.

The importance of the separation-of-powers issues raised by this case is highlighted by the D.C. Circuit's recent *PHH* decision. The appeals court held that CFPB was "unconstitutionally structured because it is an independent agency headed by a single Director." *PHH*, 2016 WL 5898801 at *26. It remedied the constitutional deficiency going forward by severing

the "for cause" removal provision from the CFPA, thereby transforming CFPB from an independent agency into an executive agency whose Director is immediately answerable to the President. *Id.* at *28. But the appeals court left unanswered a crucial question that is bound to arise in scores if not hundreds of cases: what impact will the *PHH* decision have on the validity of the innumerable CFPB actions undertaken in the years prior to the Bureau's October 2016 restructuring?

CFPB apparently argues that it should be permitted to retroactively ratify all such actions, just as it argued in this case that Cordray (after his Senate confirmation) effectively ratified all CFPB actions taken during the 18 months in which he (mistakenly) asserted authority pursuant to his recess appointment. By granting review in this case, the Court can provide desperately needed guidance to the many courts that already face challenges to such ratification claims.

This petition provides an exceptionally good vehicle for resolving the ratification issues over which the federal appeals courts are divided. The case turns solely on questions of law. While Gordon disputes the accuracy of the charges raised against him by CFPB, he raises none of those factual issues in this petition. CFPB does not dispute the essential premise giving rise to the petition: Cordray's January 4, 2012 recess appointment was invalid because the Senate was not in recess on that day. The only issues in dispute are legal: whether and under what circumstances may CFPB ratify actions rendered *ultra vires* by the invalidity of the recess appointment, as well as court decisions obtained as a result of those actions? Accordingly,

there is no danger that a disputed factual record could muddle efforts by the Court to announce clear rules governing ratification and standing doctrine.

It is undisputed that Gordon raised his constitutional challenge to the CFPB enforcement action at all stages of the proceedings and that the Ninth Circuit directly ruled on the issue. Any dispute regarding whether Gordon adequately raised his challenge in the district court was resolved in his favor by the Ninth Circuit, which held that Gordon had "undoubtedly" "properly raised" the issue by arguing in the district court that "Cordray was invalidly appointed under the Appointments Clause and, as a result, the enforcement action against Cordray was invalid." Pet. App. 15a n.5. Although Gordon did not raise a challenge to subject-matter jurisdiction until his appeal reached the appeals court, jurisdictional issues are not subject to waiver. Moreover, the lengthy majority and dissenting opinions focused to a significant degree on the jurisdictional issue, thereby providing this Court with a fully developed record on which to address the issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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