No. 16- 673

IN THE
Supreme Court of the United States

CHANCE E. GORDON,
Petitioner,
v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

CFPB's brief in opposition is more surprising for what it doesn't say than what it says. It concedes that Richard Cordray's recess appointment as Director of CFPB was "invalid." Resp.Br.11. It does not challenge *any* of the facts underpinning the Petition. Nor does CFPB cite a single decision from this Court upholding an Executive Branch official's efforts to retroactively ratify an Executive Branch action that was invalid when initially undertaken. CFPB does not even assert that the district court possessed Article III jurisdiction at the time of filing and through summary judgment.

Instead, CFPB argues that even though no officer of the United States authorized the filing and prosecution of this enforcement action, and even if CFPB lacked standing when suit was filed, Cordray's four-sentence August 2013 Federal Register notice corrected those deficiencies. That meager notice purported to retroactively ratify *all* CFPB actions taken during Cordray's invalid recess appointment.

The Ninth Circuit's conclusion that federal agencies may retroactively ratify previous invalid actions in this manner conflicts with decisions from other federal circuits and this Court. Moreover, that holding largely eviscerates the Constitution's checks on the President's recess appointment powers. It encourages Presidents to ignore those constraints, secure in the knowledge that ratification would preclude any consequence for unconstitutional appointments. Review is warranted to examine this important constitutional issue that has not been, but should be, settled by the Court.

Ratification is particularly objectionable because CFPB's *ultra vires* actions offended the separation of powers in two distinct ways. First, given that Cordray's appointment violated the Recess Appointments Clause, no Article II executive authority had devolved to CFPB, which can only exercise such authority through properly appointed officers. Second, CFPB's actions were barred by the Consumer Financial Protection Act (CFPA), which expressly precluded the Bureau from bringing enforcement actions of this sort until the Senate confirmed its Director. Cordray's blanket ratification failed to cure the former defect, and only Congress can cure the latter.

The Ninth Circuit's jurisdictional holding—that the filing of a federal-court enforcement action by individuals not empowered to bring it does not implicate Article III standing—contradicts numerous decisions of this Court, as Judge Ikuta's dissent demonstrated.

The Framers devised Article III standing to limit judicial review so 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). By authorizing federal courts to enforce federal statutes at the behest of individuals who lack Executive Branch authority to act, the decision below significantly erodes Article III's standing requirements, disregards the separation of powers, and urgently cries out for this Court's review.

I. THE NINTH CIRCUIT'S RATIFICATION HOLDING CREATES A SIGNIFICANT CIRCUIT CONFLICT AND CONTRADICTS THIS COURT'S CASE LAW

CFPB does not contest that the July 2012 filing of an enforcement action against Gordon was *ultra vires* when undertaken because no officer of the United States authorized it. CFPB's defense of the decision below rests entirely on its assertion that Cordray, following his confirmation as Director, could salvage the enforcement action (including the district court judgment) by "ratifying" it. Resp.Br.10-21. The Ninth Circuit's approval of that ratification conflicts with the decisions of other appeals courts. CFPB's effort to distinguish those decisions, Resp.Br.16-21, is unconvincing.

The perfunctory nature of Cordray's August 2013 ratification is self-evident from the wording of his four-sentence Federal Register notice. Pet.App.75a (stating that although "the actions I took during the period I was serving as a recess appointee were legally authorized and entirely proper ... I hereby affirm and ratify any and all actions I took" prior to confirmation, "[t]o avoid any possible uncertainty.").[1]

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[1] CFPB faults Gordon for failing to create a trial-court record regarding the too-cursory nature of the attempted ratification. Resp.Br.21. That argument overlooks that CFPB first asserted ratification on appeal. Given CFPB's concession that its enforcement action was unauthorized when initially filed, the burden falls *on CFPB* to demonstrate that it adequately corrected the deficiency.

CFPB fails to distinguish decisions from the D.C. and Third Circuits, which require much more of Executive Branch officials seeking to ratify an invalid agency decision. For example, CFPB mischaracterizes *Intercollegiate Broadcasting Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015), by asserting that *Intercollegiate* "did not involve a ratification, but rather a new decision." Resp.Br.18. The D.C. Circuit repeatedly characterized the agency action at issue as a "ratification" and noted that the agency elected to adopt (and not redo) many of the proceedings conducted as part of the earlier, invalid action. 796 F.3d at 116-121. *Intercollegiate* stated that ratification requires the later decisionmaker to "ma[k]e a detached and considered judgment in ratifying the previous director's decision." *Id.* at 118. CFPB does not contend that Cordray's cursory Federal Register notice satisfied *that* requirement. Nor does CFPB claim that it satisfied the Third Circuit's more-exacting standard: "the ratifier must make a detached and considered affirmation of the earlier decision, ... to ensure that the ratifier does not blindly affirm the earlier decision without due consideration." *Advance Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016).

Moreover, this Court has *never* upheld Executive-Branch ratification of actions that were *ultra vires* when undertaken. It explicitly rejected an attempted ratification in *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). CFPB concedes that *NRA Political* requires it to demonstrate, at the very least, that it was authorized to file suit against Gordon in July 2012. Resp.Br.10. Although CFPB claims that Congress granted it that authority by adopting the CFPA, it bases that contention on nothing more than

that "the Bureau existed when suit was filed." *Id.* at 11. While conceding that Cordray "was not a properly designated agent" for purposes of authorizing the filing, CFPB insists that deficiency is irrelevant. *Ibid.*

CFPB's claim raises *two* serious concerns that underscore the need for review. First, it would eviscerate constitutional constraints on the Executive Branch's appointment authority by permitting agencies to act in the absence of an "Officer of the United States." Article II requires that the executive power be carried out by the President or duly named officers. The government may litigate only through "[d]esignated agents" constitutionally appointed "to represent it in federal court." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2664 (2013). Because CFPB lacked *any* such officers in July 2012, it was not able "to do the act ratified at the time the act was done," *NRA Political*, 513 U.S. at 98, and thus—under this Court's case law—it lacked the ability to later ratify its July 2012 enforcement action. *Ibid.*[2]

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[2] CFPB attempts to evade the holding of *NRA Political* by citing the Second and Third Restatements of Agency regarding the circumstances under which a principal is held to have ratified the previously unauthorized actions of a purported agent. Resp.Br.11-12. To the extent that agency law is even relevant to ratification efforts by Executive Branch officials, CFPB has badly misinterpreted it. Contrary to CFPB's assertion, *id.* at 14, the Restatements' repeated references to "third parties" include anyone (such as Gordon) who is neither the principal nor the agent. And as *NRA Political* makes clear, "The intervening rights of third parties cannot be defeated by the ratification." 513 U.S. at 98.

Article II makes explicit the qualifications that anyone purporting to act on behalf of the Executive Branch must possess. Yet, if Article II violations have no consequences because Executive Branch officers are permitted to ratify any and all acts taken by improperly appointed predecessors, the President will have little incentive to comply with Article II.

Second, CFPB's ratification efforts are particularly objectionable because they ignore the CFPA's *express statutory prohibition* against filing enforcement actions of this sort without a properly appointed Director. Congress authorized CFPB to commence operations on July 21, 2011; it granted the Treasury Secretary some interim authority to operate CFPB from that date "until the Director of the Bureau is confirmed by the Senate in accordance with [12 U.S.C. § 5491]." 12 U.S.C. § 5586(a). But Congress carefully circumscribed CFPB's powers during that interim period (which lasted until July 2013). Congress authorized the Treasury Secretary to exercise *only* those powers set forth in Subtitle F of the CFPA, 12 U.S.C. §§ 5581-5587. *Ibid*. Those interim powers did *not* include filing an enforcement action of the sort CFPB filed against Gordon.

Although CFPB baldly asserts that the CFPA authorized the filing, Resp.Br.12, Subtitle F refutes that claim. Moreover, CFPB fails to acknowledge that all contemporaneous analyses of the Secretary's interim authority concluded that it did *not* encompass

enforcement actions of the type filed against Gordon.[3] Congress could not have been clearer: the filing of CFPA enforcement actions needed to await the confirmation of a Director.

In other words, CFPB is not simply attempting to ratify an exercise of power by an official whose appointment (it concedes) was invalid. It is also attempting to ratify an executive action that Congress expressly provided could not be done when undertaken. Review is particularly warranted when, as here, the Executive Branch has acted in a manner "incompatible with the expressed or implied will of Congress." *The Steel Seizure Case*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).[4] Under those circumstances, any ratification must come from Congress itself. Indeed, *every* case in which this Court has upheld ratification of an initially invalid federal action has entailed ratification by Congress, *not* the Executive Branch. *See, e.g., United States v. Heinszen*, 206 U.S. 370 (1907).

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[3] *See* "Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System, re: Request for Information Regarding the Bureau of Consumer Financial Protection" at 4-7 (Jan. 10, 2011) (available at http://bit.ly/29kpHci); David H. Carpenter, *Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection*, Congr. Research Serv. (May 18, 2011).

[4] Congress also disapproved of ratification by Executive Branch officials when it adopted the Federal Vacancy Reform Act of 1998 (FVRA). The FVRA provides that, with rare exceptions, actions taken by officials improperly appointed to federal vacancies "shall have no force and effect" and "may not be ratified." 5 U.S.C. § 3348(d).

CFPB also insists that its attempted ratification of a district court judgment is not problematic: "Cordray did not ratify anything other than the actions he had taken on the CFPB's behalf," and retroactive validation of the enforcement action was by itself "sufficient to sustain the district court's judgment." Resp.Br.15. But that explanation tacitly admits that the district court's judgment was invalid on the date rendered and would have remained invalid but for Cordray's purported ratification. CFPB points to no federal court decision that has ever upheld such sweeping ratification powers.

II. REVIEW IS WARRANTED TO VINDICATE ARTICLE III STANDING AS A VITAL BULWARK FOR THE SEPARATION OF POWERS

In opposing Gordon's claim that it lacked standing (and thus that the district court lacked subject-matter jurisdiction), CFPB does not dispute that Article III standing must exist "when suit was filed," *Davis v. FEC*, 554 U.S. 724, 734 (2008), or that such standing is mandatory "throughout all stages of litigation," *Hollingsworth*, 133 S. Ct. at 2661. Nor does CFPB challenge this Court's recognition that federal-court "jurisdiction is lacking" in cases where the Government lacks an authorized representative. *United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988). Yet CFPB never explains how a new Bureau without valid executive power had standing to bring a civil enforcement action in federal court—much less to prosecute that action to final judgment. Tellingly, CFPB never engages Judge Ikuta's well-reasoned dissent.

Instead, CFPB merely repeats the Ninth Circuit's rudimentary observation that "the Executive Branch is charged under our Constitution with the enforcement of federal law," Resp.Br.21 (quoting Pet.App.8a), to justify the district court's exercise of Article III jurisdiction in this case. But the "Executive Branch" did not bring suit in the district court; CFPB did. And it unquestionably did so *without* Executive Branch authority. Indeed, *Buckley v. Valeo* could hardly be clearer that "conducting civil litigation in the courts of the United States for vindicating public rights" is a "function[ ] [that] may be discharged *only* by persons who are 'Officers of the United States' within the language of" Article II. *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (emphasis added). Neither Cordray nor anyone else at CFPB was such an officer.

CFPB claims that "[c]ourts of appeals have consistently held that the improper appointment of an agency head does not affect courts' jurisdiction to hear actions brought by that agency." Resp.Br.23. But each of the cases cited by CFPB addressed only whether improper appointments to the NLRB deprived that agency of authority to conduct internal administrative proceedings and issue unfair-labor-practice orders. Those cases did *not* consider—and no party raised—the question of NLRB's Article III standing to file federal-court enforcement actions. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 350-51 (5th Cir. 2013); *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 794-95 (8th Cir. 2013); *GGNSC Springfield LLC v. NLRB*, 721 F.3d 403, 405-07 (6th Cir. 2013).

Those petitioners—who unquestionably possessed Article III standing to seek federal court

review of contested unfair-labor-practice orders—never raised the issue of the NLRB's statutory authority during the administrative proceedings. The Fifth, Sixth, and Eighth Circuits each held that because the statutory-authority issue was "nonjurisdictional," the petitioners had waived the issue by failing to raise it earlier. Contrary to CFPB's assertion, none of those decisions ever considered whether a federal court possesses Article III jurisdiction over an action filed at the behest of individuals to whom executive authority had not yet devolved.

CFPB alternatively contends that *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), "distinguished between Appointments Clause defects under Article II and problems of standing ... under Article III." Resp.Br.22. Not so. *Vermont Agency* justified *qui tam* actions under the False Claims Act based on a partial assignment of the government's damages claim and a "well nigh conclusive" tradition of such actions in English and American courts dating back many centuries. 529 U.S. at 771-78. As *Vermont Agency* carefully explained, because the petitioner in that case did "not challenge the *qui tam* mechanism" under Article II, the Court "express[ed] no view on the question whether *qui tam* suits violate Article II." *Id.* at 778 n.8.

Nor can anything be inferred from the fact that *Vermont Agency* upheld the *qui tam* mechanism without considering how any potential Article II defect would impact Article III jurisdiction. To the contrary, "when [waived] questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has

never considered itself bound when a subsequent case brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 533 n.5 (1974). "[D]rive-by jurisdictional rulings of this sort ... have no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998).

Nothing in *Vermont Agency* considers whether federal courts possess Article III subject-matter jurisdiction over an enforcement action filed by an individual who lacks Article II authority to vindicate the Executive Branch's interest in enforcing federal law. That important question is squarely presented for the Court's consideration in *this* case.

III. THE PETITION PROVIDES AN IDEAL VEHICLE FOR RESOLVING THE QUESTIONS PRESENTED

CFPB does not point to any disputed issues of fact, and there is no merit to its assertions that the petition is an inappropriate vehicle for resolving the Questions Presented.

CFPB errs in suggesting that Gordon partially waived the ratification issue. Resp.Br.6, 14-16. The Ninth Circuit rejected that argument, finding that Gordon "properly raised" issues regarding the "validity" of Cordray's recess appointment and whether Cordray's August 2013 attempted ratification of actions taken during the recess-appointment period "cure[d] any initial Article II deficiencies." Pet.App.15a & n.5.

Although the ratification issue was raised and decided in the Ninth Circuit, CFPB now asserts that Gordon waived certain arguments in support of his no-ratification claim because (CFPB alleges) they were not made below. Resp.Br.14-16. But this Court's "traditional rule" is that "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise argument they made below." *Lebron v. Nat'l Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995).

CFPB's criticisms of the allegedly limited scope of Gordon's ratification arguments in the Ninth Circuit are particularly unfounded given that CFPB invoked ratification *for the first time* in its Ninth Circuit opposition brief. In the district court, CFPB simply defended the validity of Cordray's recess appointment. Indeed, ratification could not have been raised in the district court, which entered judgment against Gordon in June 2013 *before* Cordray sought to ratify actions he took during the invalid recess-appointment period. Once CFPB raised its ratification claim in the appeals court, Gordon challenged that claim (in his reply brief, at oral argument, and in his petition for rehearing *en banc*), and the Ninth Circuit fully considered the claim. Pet.App.14a-17a.

The authority of Executive Branch officials to ratify invalid actions arises frequently across a broad spectrum of federal agencies, yet *NRA Political* (in which the Court *rejected* an effort by the Solicitor General to ratify an invalid action by another federal agency) is the *only* occasion on which the Court has addressed the issue. It has not addressed the Article III implications of *ultra vires* litigation since

Providence Journal.

CFPB's brief well illustrates one of many ways in which ratification issues can arise. CFPB notes that the Justice Department has determined that CFPB is unconstitutionally structured, calling into question the validity of every action taken by CFPB from its inception. Resp.Br.9 n.2. If CFPB is restructured, courts will need to address whether the restructured Bureau may ratify actions taken before the restructuring.

The petition provides the Court with an ideal vehicle for addressing both Questions, which raise important issues of federal constitutional law that have not been, but should be, settled by this Court.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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