No. 16-673

In the Supreme Court of the United States

CHANCE E. GORDON, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Director of the Consumer Financial Protection Bureau properly ratified the filing of a suit against petitioner, thereby eliminating any Appointments Clause defect in the initial authorization for the suit.

2. Whether the Consumer Financial Protection Bureau's suit against petitioner must be dismissed on the theory that the Bureau lacked standing to bring a suit against petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-42a) is reported at 819 F.3d 1179. The opinion of the district court (Pet. App. 43a-57a) is not published in the *Federal Supplement* but is available at 2013 WL 12116365.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 2016. A petition for rehearing was denied on July 20, 2016 (Pet. App. 73a-74a). On September 22, 2016, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including November 17, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Consumer Financial Protection Act of 2010 (CFPA or Act), 12 U.S.C. 5481 *et seq.*, established the Consumer Financial Protection Bureau (CFPB or Bureau) and charged it with "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. 5491(a). The Act "established the position of the Director" to "serve as the head of the Bureau." 12 U.S.C. 5491(b)(1). The Director is to "be appointed by the President, by and with the advice and consent of the Senate." 12 U.S.C. 5491(b)(2).

The Act makes it illegal for certain persons and businesses to "engage in any * * * deceptive * * * act or practice" in connection with consumer financial products and services, such as home loan modification services. 12 U.S.C. 5536(a)(1)(B). The Act authorizes the Bureau to bring civil suits against any person who violates the Act or any other "Federal consumer financial law." 12 U.S.C. 5564(a). The other consumer financial laws that the Bureau enforces include a regulation known as Regulation O, which prohibits mortgage assistance relief service providers from deceiving consumers and engaging in other prohibited practices. 12 C.F.R. Pt. 1015; see 12 U.S.C. 5481(12)(Q) and (14).

In July 2011, the President announced his nomination of Richard Cordray to be the first Director of the Bureau. Office of the Press Sec'y, White House, *Presidential Nominations Sent to the Senate* (July 18, 2011), http://www.whitehouse.gov/the-press-office/2011/07/18/presidential-nominations-sent-senate. The Senate failed to vote on the nomination. See 157 Cong. Rec. 19,192-19,193 (2011). Thereafter, in January 2012,

the President invoked the Recess Appointments Clause of the Constitution, Art. II, § 2, Cl. 3, to appoint Cordray as the Bureau's first Director. Pet. App. 4a. In January 2013, the President renominated Cordray to be the Bureau's Director, *ibid.*, and the Senate consented to Cordray's appointment on July 16, 2013, 159 Cong. Rec. S5704-S5705 (daily ed.).

After his confirmation as Director of the Bureau, Cordray ratified his actions taken while he served pursuant to a recess appointment. The Bureau published a notice in the *Federal Register* stating that the Director "affirm[ed] and ratif[ied] any and all actions [he] took during" his recess appointment so as "[t]o avoid any possible uncertainty" about their validity. 78 Fed. Reg. 53,734 (Aug. 30, 2013).

In June 2014, this Court held in *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, that recess appointments to the National Labor Relations Board (NLRB) that were made on the same date as Cordray's recess appointment were invalid under the Recess Appointments Clause. *Id.* at 2574; see *id.* at 2578; see also Pet. App. 4a.

2. a. Petitioner, a licensed attorney, obtained millions of dollars from financially distressed homeowners through a scheme involving illegal upfront fees and numerous false representations. Pet. App. 2a-3a, 18a-23a.

Petitioner initially charged homeowners a fee to negotiate with lenders on their behalf regarding their mortgages. Pet. App. 2a. Later, after it became illegal to charge up-front fees for home loan modification services, petitioner began to describe his business as involving the sale of "legal 'products' advertised to help" in disputes with lenders. *Ibid.* Petitioner then

claimed to provide "pro bono" legal services to individuals who bought the products, including the service of negotiating with lenders on the homeowner's behalf. *Ibid.* Petitioner provided those "pro bono" services only to homeowners who paid for his legal products. *Ibid.*

Petitioner marketed his services through a scheme that involved false and misleading statements. At petitioner's direction, co-defendant Abraham Pessar developed direct mailings seeking business from financially distressed homeowners. Pet. App. 3a. Mailings sent out in early 2010 bore the title "Notice of HUD Rights" and stated that the mailer was "courtesy of the Qualification Intake Department." *Ibid.* (brackets omitted). The mailings bore a return address in Washington, D.C., to which neither petitioner nor Pessar had any connection. The mailer stated that the recipient "could have the right to participate in a repayment program that could prevent future foreclosure proceedings." *Ibid.* Mailings sent out in 2011 were labeled "Program: Making Homes Affordable"—a title that "closely resembled the federal government's 'Making Homes Affordable Program,' (though the mailer disclaimed any affiliation with the government)." *Ibid.* Pessar's statements and other evidence established that petitioner reviewed and approved all marketing materials. *Ibid.*; *id.* at 20a-21a.

In direct mailings, websites, and unsolicited phone calls, petitioner and his associates falsely promised consumers substantial reductions in their mortgage payments and interest rates. Pet. App. 47a-48a. In addition, petitioner and his associates sold consumers "forensic audits" of their mortgage files to identify lender misconduct, but—when consumers inquired

about the status of forensic audits they had paid for—denied that they offered that service. *Id.* at 48a. Petitioner and his associates also falsely represented that they would handle communications with lenders on behalf of customers but then never even contacted many of the customers' lenders. *Id.* at 50a. In addition, petitioner and his associates advised customers that they could stop making mortgage payments while participating in the program that petitioner sold, without advising homeowners (as required by applicable regulations) that missing payments could result in foreclosure as well as a lower credit rating. Petitioner obtained modifications or forbearances for only a small percentage of the homeowners who paid for his services, and many homeowners were left financially worse off as a result of the actions and advice of petitioner and his associates. *Id.* at 47a-48a.

b. In July 2012, while Director Cordray was serving as a recess appointee, the Bureau brought an enforcement action against petitioner, Pessar, and several related entities, alleging violations of the Act and Regulation O, the regulation governing mortgage assistance relief services, see 16 C.F.R. Pt. 322 (2011) (recodified as 12 C.F.R. Pt. 1015). The complaint alleged that petitioner and his co-defendants violated the Act and Regulation O by misrepresenting the results that their services would achieve; falsely promising forensic audits; and falsely implying an affiliation with the U.S. Government. The complaint also alleged that petitioner and his co-defendants violated Regulation O by charging unlawful upfront fees, telling consumers not to communicate with their lenders, and failing to make certain required disclosures. Pet. App. 43a-44a.

The district court granted summary judgment in favor of the Bureau. Pet. App. 43a-57a. The court found that undisputed evidence established that petitioner violated the Act and Regulation O. *Id.* at 47a-52a. The court also declined to dismiss the Bureau's suit on the ground that the President's recess appointment of Director Cordray had been invalid. *Id.* at 53a-54a. It concluded that petitioner had "waived the argument that the CFPB may not act in the absence of a properly installed Director," and therefore declined to decide whether Director Cordray had been properly appointed. *Id.* at 54a. The court concluded that petitioner was liable for $11,403,338.63 in disgorgement and restitution. *Id.* at 55a-56a.

3. a. The court of appeals affirmed the judgment in part, and vacated and remanded in part for reconsideration of the amount of the monetary judgment against petitioner. Pet. App. 1a-30a.

The court of appeals first concluded that the Bureau had Article III standing for its suit against petitioner. Pet. App. 7a-14a. The court noted that "the Executive Branch is charged under our Constitution with the enforcement of federal law" and has standing to bring suit to "[v]indicat[e] the public interest." *Id.* at 8a (emphasis omitted) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992)). This was such a suit, the court explained, in which "it is the Executive Branch, not any particular individual, that has Article III standing." *Ibid.* The court rejected the argument that the improper recess appointment of Director Cordray meant that the Bureau lacked Article III standing during Director Cordray's recess appointment. *Id.* at 8a-11a. The court explained that it was the Bureau that had brought the suit, and that the fact

that "its director was improperly appointed does not alter the Executive Branch's interest or power in having federal law enforced." *Id.* at 10a. "While the failure to have a properly confirmed director may raise Article II Appointments Clause issues," the court wrote, "it does not implicate our Article III jurisdiction to hear this case." *Id.* at 10a-11a.

The court of appeals next concluded that under Article II, "[t]he initial invalid [recess] appointment of [Director] Cordray also is not fatal to this case" because "[t]he subsequent valid appointment" of Director Cordray—and Director Cordray's ratification of the filing of the suit following that appointment—"cures any initial Article II deficiencies." Pet. App. 15a. The court explained that it was "not the first court to grapple with this issue." *Ibid.* It observed that the D.C. Circuit had addressed ratification of an enforcement action in *FEC* v. *Legi-Tech, Inc.*, 75 F.3d 704 (1996). That decision, the court observed, concluded that "[e]ven though the [Federal Election Commission (FEC)] was illegally constituted when it brought the action, it cured this problem when the newly constituted Commission reapproved the litigation decision," "even if the subsequent FEC 'review' was 'nothing more than a rubberstamp.'" Pet. App. 15a (citation omitted).

The court of appeals stated that it "agree[d] with the D.C. Circuit's approach." Pet. App. 15a. It also found that approach supported by this Court's decision in *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994), which looked to the Restatement of Agency to determine whether ratification was proper. Pet. App. 15a. The court of appeals explained that under both the Restatement (Second) of Agency and

the "less stringent" approach of the Restatement (Third) of Agency, Director Cordray properly ratified the CFPB's filing of a suit against petitioner. *Id.* at 16a (internal quotation marks omitted). In particular, it explained, "[u]nder the Second Restatement, if the principal (here, CFPB) had authority to bring the action in question," then Director Cordray's ratification upon confirmation is sufficient. *Ibid.* (citing Restatement (Second) of Agency § 84(1) (1958) (Second Restatement)). In addition, under the Third Restatement, an agent may ratify an action "even if the principal did not have capacity to act at the time, so long as the person ratifying has the capacity to act at the time of ratification." *Ibid.* (citing Restatement (Third) of Agency § 4.04(1) & cmt. b (2006) (Third Restatement)). Under both approaches, the court concluded, because the Bureau had authority to bring a suit against petitioner at the time of the suit, Director Cordray's ratification, "done after he was properly appointed as Director, resolves any Appointments Clause deficiencies." *Id.* at 17a. Because the court of appeals concluded that Director Cordray's ratification was effective, it declined to address whether the enforcement action could proceed under a harmless-error analysis or under the de facto officer doctrine. *Id.* at 17a n.6.

The court of appeals also affirmed the district court's determination on the merits that the Bureau was entitled to summary judgment on liability, Pet. App. 17a-23a, but it vacated the district court's monetary judgment and remanded the case for further

consideration of the relevant time period for the award of monetary relief, *id.* at 30a.[1]

b. Judge Ikuta dissented. Pet. App. 30a-42a. She concluded that the Bureau lacked Article III standing to bring suit when Director Cordray was serving pursuant to an invalid recess appointment. *Id.* at 30a-36a. Because, in her view, the Bureau's standing was dependent on Director Cordray's being validly appointed, and "Article III standing must exist at the time a complaint is filed," Judge Ikuta would have held that Director Cordray's ratification "could not retroactively cure the district court's lack of jurisdiction." *Id.* at 40a.

c. The court of appeals denied rehearing en banc, with only Judge Ikuta voting in favor of rehearing en banc. Pet. App. 73a-74a.

ARGUMENT

Petitioner contends that this Court should grant review to consider whether Director Cordray properly ratified his earlier actions in connection with the Bureau's suit against petitioner and whether the Bureau's suit should have been dismissed on standing grounds. The court of appeals correctly decided each of those questions, and its decision implicates no conflict among the courts of appeals. Further review is unwarranted.[2]

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[1] On remand, the district court revised its calculations and entered a final judgment against petitioner in the amount of $8,606,280.86. See D. Ct. Doc. 217 (Dec. 19, 2016).

[2] The United States has taken the position that the Act's restriction on the President's power to remove the Director (12 U.S.C. 5491(c)(3)) is unconstitutional, but severable. U.S. Amicus Br., *PHH Corp.* v. *CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017). Petitioner has never argued that the Director's action is

1. a. The court of appeals correctly rejected petitioner's argument that the civil action against petitioner should be dismissed because Director Cordray was serving pursuant to an invalid recess appointment when the suit was filed. When an agent lacks authority to act on behalf of a principal, the principal (acting on its own or through a valid agent) may subsequently authorize actions that were taken by the agent who lacked authority. Third Restatement ch. 4, intro. note; *id.* § 4.01 cmt. b; see *United States* v. *Heinszen & Co.*, 206 U.S. 370, 382 (1907). 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 County*, 77 U.S. (10 Wall.) 676, 684 (1871); accord *Heinszen & Co.*, 206 U.S. at 382 (stating that ratification "retroactively give[s]" an agent's acts "validity").

This Court has indicated that ordinary agency law principles of ratification presumptively apply to governmental actions that were not properly authorized when they were taken. *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (stating that whether a later governmental authorization made valid an unauthorized filing was "at least presumptively governed by principles of agency law, and in particular the doctrine of ratification"); see *Heinszen & Co.*, 206 U.S. at 382 (describing it as "elementary" that "the power of ratification as to matters within their authority may be exercised by Congress, state governments or municipal corporations").

As the court of appeals explained, under those agency principles, Director Cordray's ratification of

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invalid for that reason, and he has thus forfeited any such challenge.

his actions with respect to petitioner's suit rendered those actions valid. Under the approach in the Second Restatement, an agent's unauthorized act may be ratified if the act, "when done, could have been authorized by a purported principal." Second Restatement § 84(1). Ratification on behalf of a principal may then "be effected by an agent authorized to do the act." *Id.* § 87 cmt. c; see *id.* § 93. Director Cordray's ratification was effective under those principles because the Bureau (the principal) had the authority to file suit against petitioner when the suit was filed, and although Director Cordray was not a properly designated agent at that time, he later ratified those actions when properly serving as the Bureau's Director. Director Cordray's ratification was equally valid under the approach of the most recent Restatement of Agency, under which a principal "may ratify an act" if the principal "existed at the time of the act" and, at the time of the ratification, had the capacity to commit the act in question. Third Restatement § 4.04; see *id.* § 3.04. Because the Bureau existed when the suit was filed, and the Bureau had the capacity to file the suit in this case at the time of the ratification, Director Cordray, acting as the Bureau's properly authorized agent, could ratify the actions he previously took on the Bureau's behalf when serving pursuant to an invalid recess appointment.

b. Petitioner's arguments to the contrary lack merit. Petitioner asserts (Pet. 19-20) that the decision below conflicts with *NRA Political Victory Fund*, which stated that ratification requires 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*," 513 U.S. at 98 (citation

omitted); see *ibid.* (citing Second Restatement § 90 & cmt. a). Petitioner misunderstands *NRA Political Victory Fund*. That decision directed that ordinary principles of agency law should presumptively guide questions of ratification, and cited the then-current Second Restatement to shed light on those principles. *Ibid.* The Second Restatement requires that the *principal* have had the capacity to do the act in question at the time that it was done and at the time of ratification—not that the *agent* have had that capacity. As explained above, the ratification in this case was consistent with the requirements of the Second Restatement, because the principal—the Bureau—had the authority to institute the litigation against petitioner at the time of the action by its purported agent. See Second Restatement § 84. The CFPA makes "the Bureau" the entity authorized to "commence a civil [enforcement] action" and "act in its own name * * * in enforcing" particular statutes. 12 U.S.C. 5564(a) and (b). Congress conferred that authority on the Bureau well before this enforcement action was filed. See CFPA, Pub. L. No. 111-203, Tit. X, § 1058, 124 Stat. 2035 (12 U.S.C. 5561 note) (establishing "designated transfer date" as effective date of provisions conferring enforcement authority); *id.* § 1062 (12 U.S.C. 5582); 75 Fed. Reg. 57,252 (Sept. 20, 2010) (establishing July 21, 2011 as "designated transfer date").[3] Because the Bureau was authorized to file

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[3] Congress's directive vesting authority in the CPFB on a specified date contrasts with language that Congress has used elsewhere to vest authority in an agency only upon the appointment of an agent or agents who can act for the principal. See 52 U.S.C. 21134(a) (Supp. II 2014) (providing that provisions transferring functions to Election Assistance Commission "shall take effect

enforcement actions when the action against petitioner was filed, this is not a case in which the principal lacked the authority to take an action at the time of a purported agent's act. Cf. Second Restatement § 84 cmt. a (explaining that, for instance, no ratification would be proper if a purported agent issued a promissory note on behalf of a principal on a Sunday, but "[b]y statute a note issued on Sunday has no legal effect").

In addition, although the agency law principles prevailing at the time of *NRA Political Victory Fund* required that the principal have had authority to do the act at the time it was initially done, more recent agency law authority rejects that requirement. Third Restatement § 4.04 cmt. b (explaining that "[c]ontemporary cases do not support" the requirement that "the principal have had capacity at the time of the original act as well as at the time of ratification"). Under the more recent authority, "[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." *Ibid.*

Petitioner contends (Pet. 20-21) that the Bureau did not in fact have authority to file an enforcement action at the time this action was filed because it had no properly appointed agents in place to exercise that authority on the Bureau's behalf. But that argument confuses the question of whether the Bureau had the

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upon the appointment of all members of the Election Assistance Commission under section 20923 of this title"); cf. Federal Alcohol Administration Act, ch. 814, § 3(a) and (b), 49 Stat. 978 (providing that substantive prohibitions on regulated entities' conduct "shall take effect sixty days after the date upon which the Administrator first appointed under this Act takes office").

authority to institute litigation (which it did) with the question of whether it had personnel in place that gave it the practical ability to exercise its authority. For purposes of agency law, what is required is that the principal—the Bureau—could have brought suit at the time that suit was filed. Petitioner cites no authority supporting his argument that ratification is improper simply because a principal lacked a properly designated agent at the time of a decision that was later ratified. And petitioner cannot claim that any decision of this Court addresses that question—much less conflicts with the court of appeals' analysis on this point.[4]

Petitioner fares no better in contending (Pet. 21-22) that Director Cordray lacked the authority to ratify the filing of the suit against him because at the time of the ratification, a portion of the claims against petitioner would have been barred by the CFPA's three-year statute of limitations. Petitioner is mistaken in pressing this argument, which he did not advance in the court of appeals, because the CFPA's

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[4] In a footnote, petitioner suggests (in an argument not raised below) that Director Cordray's ratification was also invalid because it would defeat the "intervening rights of [a] third person[]"—petitioner himself. Pet. 20 & n.12. This argument is equally without merit. Petitioner is not a "third person" with respect to the ratified acts; he is one of the subjects of the ratified action. See Third Restatement § 4.02 (explaining that ratification cannot "diminish the rights or other interests of persons, *not parties to the transaction*, that were acquired in the subject matter prior to the ratification") (emphasis added). Nor does petitioner explain how it would be "adverse and inequitable," *id.* § 4.05, for Director Cordray to ratify the filing of the suit against him in light of petitioner's own "rights or other interests," *id.* § 4.02. To the contrary, there is nothing inequitable about requiring petitioner to disgorge millions of dollars he unlawfully obtained from consumers.

statute of limitations extends "3 years *after the date of discovery of the violation*." 12 U.S.C. 5564(g)(1) (emphasis added). The Bureau only assumed authorities under the Act on July 21, 2011, and thus the earliest date on which the Bureau could have "discover[ed]" petitioner's violations was July 21, 2011. And because petitioner raised no argument relating to the statute of limitations below, petitioner has forfeited any such argument.

Petitioner alternatively contends (Pet. 22-23), in an argument also not raised below, that the court of appeals could not apply the ratification doctrine because doing so required applying ratification principles "not only to CFPB's decision to file suit but also to the district court's judgment." But Director Cordray did not ratify anything other than the actions that he had taken on the CFPB's behalf, and the court of appeals did not purport to apply ratification principles to anything other than those actions. Director Cordray's ratification was sufficient to sustain the district court's judgment because ratification conferred retroactive validity on the CFPB's filing of the suit against petitioner—"operat[ing] upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh*, 77 U.S. at 684. Accordingly, Director Cordray's ratification eliminated the defect that formed the basis of petitioner's Article II argument to set aside the judgment against him. Moreover, because petitioner did not argue in the court of appeals that the district court's grant of summary judgment to the Bureau made any subsequent ratification invalid, the court of appeals did not consider or pass upon any such argument. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a

court of review, not of first view."); *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (stating that the Court generally will not review claims neither "pressed [n]or passed upon below") (citation omitted).[5]

c. The petition for a writ of certiorari does not present any conflict concerning ratification that warrants this Court's review. Petitioner identifies no decision of any court that has adopted any of the arguments that he has made concerning when an agency official has the capacity to ratify prior actions. Instead, petitioner asserts (Pet. 15-19) that the decision below conflicts with decisions of the D.C. Circuit and the Third Circuit concerning whether ratification can be accomplished through what petitioner describes as "'rubberstamp' ratifications." Pet. 15. But petitioner did not argue in his briefs before the court of appeals panel that Director Cordray's ratification was invalid on the theory that it was "'nothing more than a rubberstamp' of [his] initial decision," *ibid.* (citation omitted), and even before this Court, he has developed no argument that Director Cordray was required to use particular ratification procedures. He has instead argued (Pet. 19-23) that Director Cordray lacked the capacity to ratify the Bureau's decisions in this case through *any* procedures. This case would therefore not be an appropriate vehicle for addressing whether agency officials must use particular procedures to ratify earlier decisions.

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[5] Petitioner suggests (Pet. 13) that "Congress has disapproved after-the-fact ratifications," but the statute he invokes (Pet. 13 n.10) bars ratification only of certain decisions by officials serving in an acting capacity in violation of the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* See 5 U.S.C. 3348(a)(2)(A)(ii), (B)(i)(II), and (d). That prohibition does not apply here.

In any event, petitioner is mistaken in asserting that the decision below implicates a conflict concerning ratification procedures. Petitioner suggests that the decision below conflicts with decisions of the D.C. Circuit, but the D.C. Circuit itself has indicated that the validity of a ratification does not turn on a judicial inquiry into whether the ratification reflected a "rubberstamp." In *FEC* v. *Legi-Tech*, 75 F.3d 704 (1996), the D.C. Circuit held that although the FEC had been improperly constituted when the FEC brought a civil enforcement proceeding, the FEC cured any defect through ratification, regardless of the extent of the deliberation underlying the ratification. *Id.* at 706. The court stated that "Legi-Tech may well be right in arguing that the Commission's 'review'" for purposes of ratification "was nothing more than a 'rubberstamp.'" *Id.* at 709. But it found no basis to hold the ratification invalid on that ground, stating that "we cannot * * * examine the internal deliberations of the Commission, at least absent a contention"—not present in the case before it—"that one or more of the Commissioners were actually biased." *Ibid.* *Legi-Tech* thus expressly rejected a test for ratification that turns on a judicial assessment of whether the ratification was a "rubberstamp."[6]

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[6] Petitioner errs in suggesting (Pet. 17 n.11) that *Legi-Tech* did not in fact sanction that kind of ratification because the FEC ratified its prior enforcement action in that case "only after [it] conducted a *three-day hearing* on whether to ratify." The court of appeals expressly declined to hold (based on the FEC's hearings or any other consideration) that the FEC had done more than rubberstamp its prior decisions. 75 F.3d at 709 (stating that "Legi-Tech may well be right" that the FEC had merely rubberstamped its prior actions). Rather, it found that even a "rubberstamp" ratification would suffice. *Ibid.* Moreover, petitioner is mistaken

Petitioner errs in suggesting (Pet. 15-17) that the D.C. Circuit nevertheless required particular procedures for ratification in *Intercollegiate Broadcasting System, Inc.* v. *Copyright Royalty Board*, 796 F.3d 111 (2015) (*Intercollegiate*). In that case, an improperly constituted Copyright Royalty Board adopted certain royalty schedules. After the D.C. Circuit found an Appointments Clause violation, the Librarian of Congress appointed new members, as a result of which the Board was properly constituted. *Id.* at 115-116. The new Board "decided neither to 'rubber stamp' the prior Board's decision, nor to conduct a 'complete "do over" of the entire original process,'" but instead decided to "conduct an independent, de novo review of the entire written record of the proceeding." *Id.* at 116 (citation omitted). At the conclusion of the proceeding, the Board adopted certain fee rules that the improperly constituted Board had previously adopted.[7] *Id.* at 117. The court rejected the claim that the fee rules were "tainted by the Appointments Clause violation" that affected the initial Board action. *Ibid.* (citation omitted). The court explained that its cases concerning "the validity of decisions made after the replacement of an improperly appointed official * * * support the validity of a subsequent determination when—as here—a properly appointed official has the

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in suggesting that the record in *Legi-Tech* established that the FEC had devoted time to the reconsideration of the decision at issue in that case. The "three days of deliberation" in *Legi-Tech* covered "all pending proceedings," and the court did not inquire into what consideration, if any, the decision at issue in *Legi-Tech* received. *Id.* at 706.

[7] *Intercollegiate* thus did not involve a ratification, but rather a new decision by a properly constituted Board. 796 F.3d at 117.

power to conduct an independent evaluation of the merits and does so." *Ibid.* Accordingly, it found no constitutional violation.

Although the D.C. Circuit found no constitutional problem in *Intercollegiate* when a properly constituted Board had conducted an independent reevaluation, that case did not conclude that a ratification would be improper unless it reflected comparable deliberation. To the contrary, the *Intercollegiate* court noted that *Legi-Tech* had found that a reconstituted FEC could ratify prior decisions "notwithstanding the possibility that the Commission may have in fact 'rubber-stamp[ed]' the enforcement action." *Intercollegiate*, 796 F.3d at 118 (citation omitted; brackets in original). And it explained its own holding as flowing logically from *Legi-Tech*'s conclusion. *Id.* at 118-119 ("[B]ecause Legi-Tech held that ratification by a reconstituted Commission with the same voting members was sufficient to satisfy the Appointments Clause, it follows a fortiori that a de novo determination by a Copyright Royalty Board with all new members was sufficient as well.").

Nor did the D.C. Circuit hold in *Doolin Security Savings Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203 (1998), that ratification requires a particular set of stringent procedures. *Doolin* found that the Director of the Office of Thrift Supervision had ratified a Notice of Charges that had been issued by an official who allegedly lacked authority to issue the notice. The Notice of Charges was ratified, the court concluded, when a properly appointed official went on to consider the charges, render a decision against the charged bank, and issue a cease-and-desist order. *Id.* at 204, 211, 214. The D.C. Circuit again relied on

Legi-Tech, which it observed had "sustained the [FEC's] ratification" of a decision by an improperly constituted body "despite misgivings about whether the new FEC had engaged in a 'real fresh deliberation.'" *Id.* at 213 (citation omitted). The case at hand, the D.C. Circuit stated, was "somewhat different, but not in ways that assist the Bank," in that the court "ha[d] no doubt that" the new Director "made a detached and considered judgment in deciding the merits against the Bank." *Ibid.* Accordingly, the court concluded, any defect in the initial notice had been cured through ratification. *Id.* at 213-214.

The decision in this case likewise implicates no conflict with the Third Circuit's approach to ratification. Although *Advanced Disposal Services East, Inc.* v. *NLRB*, 820 F.3d 592 (3d Cir. 2016), stated that ratification requires "a detached and considered affirmation of the earlier decision," *id.* at 602, the court made clear that an official is presumed to have engaged in sufficient deliberation in the absence of evidence to the contrary. The court wrote that because of the "presumption of regularity," "the burden is on [a litigant challenging ratification] to produce evidence that casts doubt on the agency's claim" that its officials "properly ratified their earlier actions." *Id.* at 604. The court applied that presumption to sustain an official's blanket ratification of "any and all actions taken" during a period when the official was claimed to have been serving improperly. *Id.* at 602. The plaintiff had asserted that the "ratification [wa]s a 'rubberstamp,'" and noted the absence of "evidence of independent consideration," but the court concluded that "mere lack of detail in [the official's] express ratification is not sufficient to overcome the presumption of regular-

ity." *Id.* at 605. Application of the Third Circuit's approach would yield the same result as the Ninth Circuit reached here. Because petitioner put forward no evidence that Director Cordray did not make a detached and considered judgment concerning the matters he ratified, Director Cordray's ratification would be upheld in the Third Circuit. Petitioner's case therefore does not implicate any tension between the approach of the Third Circuit and other courts concerning the prerequisites for ratification.

2. a. The court of appeals was also correct to conclude that the courts had the power to consider this suit under Article III throughout the pendency of the litigation. The plaintiff in this suit is the Bureau, acting under a provision of the Act that states that "the Bureau may * * * commence a civil action against" any person who "violates a Federal consumer financial law." 12 U.S.C. 5564(a). The Bureau had standing to pursue such claims because "the Executive Branch is charged under our Constitution with the enforcement of federal law," and has standing to bring suits to "[v]indicat[e] the public interest." Pet. App. 8a (emphasis omitted) (quoting *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 576 (1992)); see *id.* at 33a (Ikuta, J., dissenting) (acknowledging this point). Of course, although the Bureau has standing to enforce consumer financial laws, a court may dismiss an action brought in the Bureau's name by an official who was not validly appointed. See *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 823, 827-828 (D.C. Cir. 1993) (dismissing enforcement action brought by FEC when Commission included two members improperly appointed by Congress), cert. granted, 512 U.S. 1218, and cert. dismissed, 513 U.S. 88 (1994); cf. *Legi-Tech*,

75 F.3d at 706, 709 (declining to dismiss action brought by improperly constituted FEC, after a "reconstitute[d]" agency ratified its earlier decision). But that dismissal would not be based on the *court's* lack of "authority to consider" the action, but on the *executive officials'* lack of "authority to bring it." *LaRouche* v. *FEC*, 28 F.3d 137, 140 (D.C. Cir. 1994); cf. Pet. App. 10a-11a ("While the failure to have a properly confirmed director may raise Article II Appointments Clause issues, it does not implicate our Article III jurisdiction to hear the case.").

Consistent with these principles, this Court has distinguished between Appointments Clause defects under Article II and problems of standing and other jurisdictional defects under Article III. In *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, 529 U.S. 765 (2000), for example, this Court held that private individuals possessed standing to bring *qui tam* suits, *id.* at 778, but noted that it did not decide whether "*qui tam* suits violate Article II," including its Appointments Clause limitations, *id.* at 778 n.8. The Court explained that petitioner had not raised any Article II claim and that—unlike the question of standing, see *id.* at 771—"the validity of *qui tam* suits under those provisions" was not "a jurisdictional issue," *id.* at 778 n.8. That is because, as the Seventh Circuit has explained, "an Appointments Clause challenge does not involve Article *III*, but Article *II*." *United States ex rel. Hall* v. *Tribal Dev. Corp.*, 49 F.3d 1208, 1216 (1995) (concluding that Appointments Clause challenge is "non-jurisdictional").

b. Petitioner's standing argument implicates no conflict. Courts 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. Multiple courts of appeals have held, for example, that they had jurisdiction to consider petitions by the NLRB to enforce its orders, even though the petitions were approved by Board members whose recess appointments may have been unconstitutional. See *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 350-351 (5th Cir. 2013); *NLRB* v. *Relco Locomotives, Inc.*, 734 F.3d 764, 794-795 (8th Cir. 2013); *GGNSC Springfield LLC* v. *NLRB*, 721 F.3d 403, 405-407 (6th Cir. 2013). Similarly, the D.C. Circuit in *Legi-Tech* adjudicated an enforcement action that the FEC had initiated at a time when the Commission included several improperly appointed members—with the court concluding that the FEC was entitled to go forward with its suit because the enforcement action brought by an improperly constituted Commission had later been ratified. See 75 F.3d at 706, 709.

Neither petitioner nor his amici identify any conflicting decision. The Chamber of Commerce suggests (Amicus Br. 9) that the decision below conflicts with *Archer* v. *Preisser*, 723 F.2d 639 (8th Cir. 1983) (per curiam), but that case held that an individual lacked standing to assert the claims of a deceased person when the individual had no right to pursue such a third-party claim under the relevant state's law. *Id.* at 639-640. The court did not address the standing of government agencies—let alone consider the relationship between the Appointments Clause and Article III. Nor is the Chamber of Commerce correct to suggest (Amicus Br. 8) a conflict with *Thiebaut* v. *Colorado Springs Utilities*, 455 Fed. Appx. 795 (10th Cir. 2011). That case can create no conflict warranting this Court's review because, as an unpublished

decision, it is without precedential effect. And, like *Archer*, it involved the standing of an individual plaintiff who sought to vindicate the interests of others without legal authorization. *Id.* at 800-802 (explaining that district-attorney plaintiff lacked standing under parens patriae and associational theories). Neither petitioner nor any amicus identifies any conflict concerning whether a government agency is deprived of standing due to an Appointments Clause deficiency.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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