No. 19-432

In the Supreme Court of the United States

ALL AMERICAN CHECK CASHING, INC., ET AL.,
PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

MARY MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
KRISTIN BATEMAN
Senior Counsel
Consumer Financial Protection Bureau
Washington, D.C. 20552

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Consumer Financial Protection Bureau (Bureau) except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether an enforcement action initiated by the Bureau while its Director was improperly insulated from removal by the President must necessarily be dismissed, or whether that action can proceed if it is ratified by an official who is fully accountable to the President.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (S.D. Miss.):

Consumer Fin. Prot. Bureau v. *All Am. Check Cashing, Inc.*, No. 16-cv-356 (Mar. 27, 2018)

United States Court of Appeals (5th Cir.):

Consumer Fin. Prot. Bureau v. *All Am. Check Cashing, Inc.*, No. 18-90015 (Apr. 24, 2018)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

In the Supreme Court of the United States

No. 19-432

ALL AMERICAN CHECK CASHING, INC., ET AL.,
PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals granting leave to appeal the district court's interlocutory order (Pet. App. 1a-2a) is unreported. The opinion of the district court denying petitioners' motion for judgment on the pleadings (Pet. App. 8a-18a) is not published in the Federal Supplement but is available at 2018 WL 9812125.

JURISDICTION

The district court issued its decision denying petitioners' motion for judgment on the pleadings on March 21, 2018 (Pet. App. 8a-18a) and certified that decision for interlocutory appeal on March 27, 2018 (Pet. App. 4a-7a). Petitioners sought permission from the Fifth Circuit to appeal pursuant to 28 U.S.C. 1292(b) on April 3, 2018, and the court of appeals accepted the case for interlocutory review on April 24, 2018 (Pet. App. 1a-2a). The petition for a writ of certiorari before judgment was filed on September 30, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2101(e).

STATEMENT

1. In July 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Act or Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat. 1376 (12 U.S.C. 5301 *et seq.*). The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.* As relevant here, the Act established the Consumer Financial Protection Bureau (Bureau) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a).

a. The Dodd-Frank Act transferred to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to enforce and prescribe regulations implementing laws such as the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, the Fair Credit Reporting Act, the Truth in Lending Act, and the Real Estate Settlement Procedures Act. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

In addition, the Dodd-Frank Act also prohibits any "covered person" or "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice."

12 U.S.C. 5536(a)(1)(B). The "'covered persons'" subject to this prohibition are generally entities and persons involved in "offering or providing a consumer financial product or service," such as extending consumer credit or providing consumers check-cashing services. 12 U.S.C. 5481(5), (6)(A), and (15). The Act authorizes the Bureau to bring actions in court or in the Bureau's administrative forum to enforce this prohibition or any other "[f]ederal consumer financial law." 12 U.S.C. 5563, 5564(a).

b. The Dodd-Frank Act established the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1)-(2). The only qualification required for the Director is that he or she be a United States citizen. 12 U.S.C. 5491(b)(3). The Director serves for a term of five years, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1)-(2). The President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau's operations are largely funded from the combined earnings of the Federal Reserve System. Each quarter, the Board of Governors of the Federal Reserve is required to transfer "the amount determined by the Director [of the Bureau] to be reasonably necessary to carry out the authorities of the Bureau," up to a set percentage of the Federal Reserve System's total 2009 operating expenses. 12 U.S.C. 5497(a)(1); see 12 U.S.C. 5497(a)(2)(A)-(B) (establishing a cap of 12% to be adjusted annually by any increase in the employment cost index). The Director may also request additional funds from Congress if necessary to carry out the authorities of the Bureau. See 12 U.S.C. 5497(e).

2. a. Petitioners are two companies that offer payday loans and check-cashing services, All American Check Cashing, Inc. and Mid-State Finance, Inc., as well as Michael E. Gray, the president and sole owner of the companies at the time this suit was initiated. See Pet. App. 44a-46a. The Bureau brought suit against petitioners on May 11, 2016, alleging that petitioners committed unfair, deceptive, and abusive practices in carrying out their check-cashing and payday-lending businesses, including by obscuring the true costs of their check-cashing services, processing checks without consent, misrepresenting that their loans were cheaper than alternatives, and failing to provide refunds to consumers who had overpaid their accounts. *Id.* at 64a-68a.

b. Petitioners moved for judgment on the pleadings, arguing (as relevant here) that the enforcement action must be dismissed because the Bureau is unconstitutionally headed by a single director who is removable by the President only for cause. See Pet. App. 10a-18a. While that motion was pending, the Bureau's former Senate-confirmed Director resigned, and the President designated Mick Mulvaney to serve as the Bureau's Acting Director. See The White House, *Statement on President Donald J. Trump's Designation of OMB Director Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau* (Nov. 24, 2017), https://go.usa.gov/xEXRs. In February 2018, the Bureau notified the district court that Acting Director Mulvaney had ratified the enforcement action against petitioners. Pet. App. 19a-26a. The Bureau argued that this ratification rendered irrelevant petitioners' constitutional challenge to the removal restriction, because that provision did not apply to Acting Director Mulvaney. *Id.* at 20a-21a; see *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 10 (Nov. 25, 2017) (slip op.) (explaining that the removal protection applicable to the Director of the Bureau does not apply to an Acting Director).

The district court denied petitioners' motion for judgment on the pleadings on March 21, 2018. Pet. App. 8a-18a. As relevant here, the district court rejected petitioners' separation-of-powers challenge "[f]or the same reasons" stated in the D.C. Circuit's en banc decision in *PHH Corp.* v. *Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018). Pet. App. 12a. The court quoted a passage from *PHH* observing that the Supreme Court had previously upheld for-cause removal protections for the heads of independent agencies and concluding that the Bureau's "single-member structure" did not cast doubt on the constitutionality of the provision protecting the Bureau Director from removal. *Id.* at 11a-12a (quoting *PHH*, 881 F.3d at 110).

At petitioners' request, the district court certified its order for interlocutory appeal under 28 U.S.C. 1292(b) on March 27, 2018. Pet. App. 4a-7a. In particular, the court concluded that whether the Bureau's "structure" violates Article II and the separation of powers was suitable for interlocutory review. *Id.* at 5a. In support of that conclusion, the court stated that "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." *Id.* at 6a. The court also stayed all proceedings until any interlocutory appeal is concluded. *Id.* at 7a.

c. The court of appeals accepted the case for interlocutory review on April 24, 2018. Pet. App. 1a-2a. The court heard oral argument on March 12, 2019, and has scheduled a second oral argument for December 4, 2019, following the completion (on October 24, 2019) of supplemental briefing regarding the implications for this case of the Fifth Circuit's recent en banc decision in *Collins* v. *Mnuchin*, 938 F.3d 553 (2019) (en banc), petition for cert. pending, No. 19-422 (filed Sept. 25, 2019), and petition for cert. pending, No. 19-563 (filed Oct. 25, 2019).

In *Collins*, a majority of the en banc court held that the structure of the Federal Housing Finance Agency—which, like the Bureau, is headed by a single director whom the President may not remove at will—violates constitutional separation-of-powers principles. *Collins*, 938 F.3d at 591 (opinion of Willett, J.). A different majority of the en banc court further held that the constitutional problem with the Federal Housing Finance Agency's structure can be remedied by severing the "for cause" removal restriction from the statute, and that it did not need to also invalidate the agency's past action that had been challenged there. *Id.* at 592-595 (opinion of Haynes, J.).

d. Petitioners filed a petition for a writ of certiorari before judgment on September 30, 2019.

ARGUMENT

Petitioners ask this Court to grant a writ of certiorari before judgment in order to review two separate questions: (1) whether the structure of the Bureau, including the removal restriction that applies to its single director, violates the constitutional separation of powers; and (2) if so, whether this constitutional defect necessarily requires dismissal of an enforcement action initially approved by a Director who was improperly protected from removal, regardless of whether an official fully accountable to the President has subsequently approved of the action. A writ of certiorari before judgment is not warranted to address either of those questions in this case.

Petitioners' first question is undeniably important. As the United States has previously advised the Court, it is of the view that the provision of the Dodd-Frank Act that restricts the President's authority to remove the Bureau's Director unconstitutionally frustrates the President's Article II "responsibility to take care that the laws be faithfully executed," *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010). See Gov't Br. at 7-16, *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, No. 19-7 (Sept. 17, 2019). But the Court will already consider that issue in another case this Term, *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, No. 19-7, 2019 WL 5281290 (Oct. 18, 2019). Granting review in this case would do nothing to enhance the Court's consideration of the issue.

Petitioners' second question—whether the unconstitutional removal provision compels dismissal of this enforcement action—does not warrant this Court's review in this case, particularly before judgment by the court of appeals. To the extent that this second question raises severability issues, those issues are already presented in *Seila Law*. And while petitioners make additional arguments regarding the implications of ratification by a Bureau officer who is fully accountable to the President, those arguments were not analyzed by the district court below and have not been thoroughly considered by any court of appeals. To the extent that courts of appeals have weighed in on related questions, moreover, those decisions uniformly suggest that dismissal is not an appropriate remedy here. Petitioners are simply wrong that to protect the President's ability to faithfully execute the law, courts must dismiss law-enforcement actions even if they are approved by an official fully accountable to the President.

1. Petitioners contend (Pet. 9) that a writ of certiorari before judgment is warranted because it "is of the highest importance" that this Court determine whether the Bureau's structure, including the statutory restriction on the President's removal authority, violates the Constitution. That question is indeed important, but the Court will have a full opportunity to consider it in *Seila Law*. There is no reason to grant a writ of certiorari before judgment in this case to review the same issue. Contrary to petitioners' contention (Pet. 5), no "possible vehicle problems" with *Seila Law* warrant this Court's taking a second case to address the same question.

a. Petitioners observe (Pet. 30-31) that *Seila Law* is an action to enforce a civil investigative demand (CID), whereas this case is an action to enforce substantive provisions of federal law. For purposes of determining the constitutionality of the removal restriction, however, that is a distinction without a difference—both cases involve an exercise of core executive power. The Dodd-Frank Act grants the Bureau power to issue CIDs for the express purpose of bringing actions to enforce federal consumer financial laws. See, *e.g.*, 12 U.S.C. 5562(c)(1) (authorizing Bureau to issue CIDs "before the institution of any proceedings under the Federal consumer financial law"); 12 U.S.C. 5562(c)(2) (requiring CIDs to "state the nature of the conduct constituting the alleged violation which is under investigation"). That power to "investigate and prosecute" violations of the law is "one of the most significant forms of executive authority." *Consumer Fin. Prot. Bureau* v. *Seila Law LLC*, 923 F.3d 680, 683 (9th Cir. 2019) (discussing *Morrison* v. *Olson*, 487 U.S. 654 (1988)), cert. granted, No. 19-7, 2019 WL 5281290 (Oct. 18, 2019).

Petitioners emphasize (Pet. 30) that Congress may sometimes issue similar CIDs. It does so, however, in aid of its legislative function, as part of its power to investigate "matters and conditions relating to contemplated legislation." *Quinn* v. *United States*, 349 U.S. 155, 160 (1955). This Court has emphasized that Congress's power in that regard "must not be confused with any of the powers of law enforcement." *Id.* at 161; accord *Watkins* v. *United States*, 354 U.S. 178, 187 (1957) (Congress is not a "law enforcement or trial agency," as those are "functions of the executive and judicial departments"). Because the CID in *Selia Law* was issued in furtherance of the Bureau's federal law-enforcement responsibilities, not as a prelude to legislative action, it cannot plausibly be disputed that issuance of that CID constituted an executive act. See Gov't Br. at 19-20, *Seila Law*, *supra* (No. 19-7); Pet. Reply Br. at 2, *Seila Law*, *supra* (No. 19-7) (Oct. 4, 2019). Indeed, the Bureau in *Seila Law* abandoned any argument that its power to issue CIDs should be considered somehow less "executive" than its other powers. See Bureau Br. at 22 n.4, *Consumer Fin. Prot. Bureau* v. *Seila Law LLC*, No. 17-56324 (9th Cir. Mar. 19, 2018). The fact that *Seila Law* involves enforcement of a CID thus will not prevent this Court from fully considering the constitutionality of the limitations on the President's removal authority.

b. Petitioners next suggest that it is "unclear" whether the order enforcing the CID in *Seila Law* is a final appealable judgment. Pet. 31 (citing Pet. at 20-22, *Collins* v. *Mnuchin*, No. 19-422 (Sept. 25, 2019)). That suggestion, too, is incorrect. The Dodd-Frank Act makes clear that an order enforcing a CID issued by the Bureau is a final, appealable order. The Act provides that if a person fails to comply with a Bureau CID, as Seila Law did, the Bureau may petition a district court for an order enforcing the CID. 12 U.S.C. 5562(e)(1). And the Act specifies that "[a]ny final order" of a district court in such a case "shall be subject to appeal" under 28 U.S.C. 1291. 12 U.S.C. 5562(h)(2).

The district court in *Seila Law* entered such a "final order." A "final" order is "one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co.* v. *Central Pension Fund of Int'l Union of Operating Eng'rs & Participating Emp'rs*, 571 U.S. 177, 183 (2014) (citation omitted). The district court's order enforcing the CID against Seila Law did just that—it ordered Seila Law to comply, concluding that case. See *Consumer Fin. Prot. Bureau* v. *Seila Law, LLC*, No. 17-cv-1081, 2017 WL 6536586, at *6 (S.D. Cal. Aug. 25, 2017), aff'd, 923 F.3d 680 (9th Cir. 2019), cert. granted, No. 19-7, 2019 WL 5281290 (Oct. 18, 2019); see also Pet. Reply Br. at 3-4, *Seila Law*, *supra* (No. 19-7) (explaining the basis for the Ninth Circuit's jurisdiction).

c. Finally, there is likewise no merit to petitioners' contention (Pet. 31) that this case presents the constitutional issue more "concrete[ly]" because petitioners are subject to a law-enforcement action, not just an action to enforce a CID. Being subject to a court order to produce information for a law-enforcement investigation gives Seila Law just as concrete a stake in the constitutional challenge to the Bureau as petitioners here have.

2. The Court also should not grant a writ of certiorari before judgment in this case in order to consider "the merits and remedies questions together" (Pet. 32). The primary and overarching remedies question is whether the provision limiting the President's power to remove the Director of the Bureau, 12 U.S.C. 5491(c)(3), can be severed from other provisions in the Dodd-Frank Act. *Seila Law* presents that question. See Order, *Seila Law LLC* v. *Consumer Fin. Prot. Bureau*, No. 19-7, 2019 WL 5281290, at *1 (Oct. 18, 2019) (directing parties to brief and argue whether "12 U.S.C. § 5491(c)(3) [can] be severed from the Dodd-Frank Act" if "the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers"). Granting review here would not add to the Court's consideration of that question of law.

Nor is there any basis to grant a writ of certiorari before judgment to decide whether (as petitioners contend) an enforcement action initiated by an official who was unconstitutionally protected from removal must necessarily be dismissed, even where an official who is fully accountable to the President determines that the action should proceed. Neither the district court in this case nor any court of appeals (in this case or otherwise) has addressed that question in any depth. As a result, not only is there no circuit conflict that requires this Court's intervention to resolve, but there is a dearth of lower court case law to look to in sharpening the issue for this Court's consideration. And, besides, petitioners' position lacks merit.

a. Petitioners' lead argument with respect to remedies (Pet. 18-21) is that the limitation on the President's power to remove the Director of the Bureau, 12 U.S.C. 5491(c)(3), cannot be severed from the other provisions of the Dodd-Frank Act relating to the creation and authorities of the Bureau. After the petition for a writ of certiorari before judgment in this case was filed, however, the Court granted the petition for a writ of certiorari in *Seila Law* and directed the parties there to address whether "12 U.S.C. § 5491(c)(3) [can] be severed from the Dodd-Frank Act" if "the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers." *Seila Law LLC*, 2019 WL 5281290, at *1. As with the underlying constitutional question, therefore, there is no reason to grant the petition for a writ of certiorari before judgment here in order to address the remedial question about severability, because that question is already before the Court in *Seila Law*.

b. Petitioners also present (Pet. 22-24) a secondary remedial issue: whether an enforcement action initiated at a time when the Director of the Bureau was insulated from removal by the President must necessarily be dismissed, even if an official who is fully accountable to the President decides that it should proceed.

i. That secondary issue does not warrant this Court's review at this time, especially in the posture presented here. This Court has often emphasized that it is "a court of final review and not first view" and thus ordinarily does "not decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citation omitted). And there are particularly strong reasons to follow that usual course here, given that *no* lower court has thoroughly analyzed whether ratification cures the defect resulting from the unconstitutional removal restriction. The district court had no occasion to address it (because it held the removal restriction constitutional, see Pet. App. 12a), the Fifth

Circuit has yet to issue a decision, and no other court of appeals has considered the issue in any depth.[1]

There is no basis for petitioners' contrary contention (Pet. 24) that this issue has "fully percolated" in the lower courts. The decisions petitioners cite either do not address the specific issue or do not analyze it in any depth. And while some decisions on related issues shed light on the proper remedy here, they all point the same way: An enforcement action can proceed so long as an official who is properly accountable to the President approves it.

In its vacated panel decision in *PHH Corp.* v. *Consumer Financial Protection Bureau*, the D.C. Circuit would have allowed a Bureau enforcement action to proceed on remand to the agency after the court severed the removal provision from the statute. 839 F.3d 1, 39, 55 (D.C. Cir. 2016) (opinion of Kavanaugh, J.), vacated, 881 F.3d 75 (D.C. Cir. 2017) (en banc). The panel's decision is correct, but it offers no detailed discussion of that path forward, presumably because the challengers in that case had not suggested that the enforcement action should be dismissed altogether even if the for-cause removal provision were severed. See Pet. Br. at 45-51, *PHH Corp.*, *supra* (No. 15-1177) (Sept. 28, 2015).

[1] In certifying an interlocutory appeal the district court stated without further explanation that "the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." Pet. App. 6a. Petitioners suggest (Pet. 29) that this statement was made "[i]n the face of the CFPB's ratification arguments," and thus represented a rejection of those arguments. That is speculative. The Bureau did not raise the Acting Director's ratification as a reason to decline to certify an interlocutory appeal, and the district court's reference to whether the Bureau is "a constitutionally authorized entity," Pet. App. 6a, is more naturally read to relate to the severability question than the ratification question.

In *Consumer Financial Protection Bureau* v. *RD Legal Funding, LLC*, the United States District Court for the Southern District of New York dismissed a Bureau enforcement action based on the unconstitutionality of the removal restriction—but only because that court concluded that the removal provision was not severable. 332 F. Supp. 3d 729, 784-785 (2018), appeals pending, No. 18-2743 (2d Cir. Sept. 17, 2018), No. 18-2860 (2d Cir. Sept. 27, 2018), No. 18-3033 (2d Cir. Oct. 15, 2018), and No. 18-3156 (2d Cir. Oct. 23, 2018); see Pet. 26. That case therefore did not address whether dismissal would be required even if the provision were severable and a properly accountable official approved the enforcement action. Moreover, the district court's decision is currently being challenged on appeal.

Collins v. *Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), petition for cert. pending, No. 19-422 (filed Sept. 25, 2019), and petition for cert. pending, No. 19-563 (filed Oct. 25, 2019), likewise does not address the effect of ratification on ongoing enforcement matters. *Collins* involved a constitutional challenge to a final agency action, not a constitutional defense to an enforcement action. See *id.* at 568 (opinion of Willett, J.). And to the extent its reasoning is instructive here, it supports letting this enforcement action proceed. The court of appeals there held that the Federal Housing Finance Agency was unconstitutionally structured for reasons also present here—because that agency is headed by a single director protected from removal by the President. *Id.* at 587-588. But the court held that severing the removal restriction remedied that problem, and the court declined to invalidate a past action over which the President, for various reasons, in fact "had adequate oversight." *Id.* at 595 (opinion of Haynes, J.).

Petitioners also rely (Pet. 25-26) on the D.C. Circuit's decision in *Federal Election Commission* v. *NRA Political Victory Fund*, where it ordered dismissal of an enforcement action brought by a commission whose structure violated the separation of powers by including non-voting representatives of Congress among its members. 6 F.3d 821, 827-828 (1993), cert. dismissed, 513 U.S. 88 (1994). But the court ordered dismissal without any analysis of whether that remedy was required and only because the court was "aware of no theory that would permit [it] to declare the Commission's structure unconstitutional without providing relief to the appellants in this case." *Id.* at 828. A few years later, the D.C. Circuit clarified that dismissal was *not* necessarily required when an unconstitutionally structured agency filed an enforcement action. In *Federal Election Commission* v. *Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), the court considered an enforcement action that was brought by the same unconstitutionally structured agency. But there the court did not order dismissal, because the agency had reconstituted itself to comply with constitutional requirements and then ratified the action. *Id.* at 709. The court of appeals concluded that this approval by a properly constituted agency "[w]as an adequate remedy" for the earlier constitutional problem. *Ibid.*

Applying *Legi-Tech*, the D.C. Circuit has held that an enforcement action instituted by an improperly appointed official may proceed if ratified by a properly appointed successor. *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203, 213-214 (1998). The Ninth Circuit reached the same conclusion in the context of an Appointments Clause challenge to an enforcement action by the Bureau that was ratified by a properly appointed Director, *Consumer Fin. Prot. Bureau* v. *Gordon*, 819 F.3d 1179, 1190-1192 (2016), and this Court denied review when presented with a petition for a writ of certiorari raising that ratification issue, 137 S. Ct. 2291 (2017).

Thus, lower courts have not yet addressed the particular issue here—whether an enforcement action that was filed by an official who was unconstitutionally insulated from removal by the President must be dismissed even where an official fully accountable to the President decides that it should move forward. And the few reasoned decisions that address related issues are in accord: A separation-of-powers problem with an agency does not compel invalidation of the agency's actions if those actions are subsequently approved in compliance with separation-of-powers requirements. There is therefore no circuit conflict even on related remedial issues. Moreover, the ratification issue is implicated in at most a handful of cases.[2] The courts adjudicating those cases can decide that issue in the first instance if and when doing so becomes necessary.

ii. Finally, the case for granting a writ of certiorari before judgment to address petitioners' ratification arguments is particularly weak because those arguments lack merit.

The Bureau initially filed this enforcement action against petitioners under the leadership of a Director whom the President could remove only for specified reasons. That restriction on the President's removal authority unconstitutionally infringed the President's power under Article II to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, because it

---

[2] The Bureau currently has 19 pending enforcement actions, and the constitutional issue has not been preserved in all of those.

raised the prospect that the Director might choose to pursue enforcement proceedings or enforcement theories of which the President would not approve. See Gov't Br. at 7-16, *Seila Law*, *supra* (No. 19-7). On that much, petitioners and the United States are in agreement.

Petitioners are incorrect, however, that the way to remedy such a violation is to dismiss an enforcement proceeding even where an official fully accountable to the President determines that it should go forward. This Court rejected a similar position in *Free Enterprise Fund*. In that case, after the Public Company Accounting Oversight Board (Board) initiated a "formal investigation" of a Nevada accounting firm, the accounting firm and a public-interest group of which the firm was a member sought "a declaratory judgment that the Board is unconstitutional and an injunction preventing the Board from exercising its powers." 561 U.S. at 487; see also *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 537 F.3d 667, 670 (D.C. Cir. 2008) (explaining that the accounting firm "is subject to an ongoing formal investigation" and "sought declaratory and injunctive relief prohibiting the Board from carrying out its duties, including taking 'any further action' against" the firm), aff'd in part, rev'd in part and remanded, 561 U.S. 477 (2010). In arguing for that relief, the challengers contended "that the Board's 'freedom from Presidential oversight and control' rendered it 'and all power and authority exercised by it' in violation of the Constitution," *Free Enterprise Fund*, 561 U.S. at 508 (citation omitted). This Court, however, took a more measured approach. The Court explained that "'[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Ibid.* (quoting *Ayotte* v. *Planned Parenthood*, 546 U.S. 320, 328-329 (2006)). Accordingly, rather than enter an injunction barring further investigation by the Board, the Court held that the appropriate remedy was simply to provide "declaratory relief sufficient to ensure that the [accounting requirements] to which [the challengers] are subject will be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. Cf. *United States* v. *Morrison*, 449 U.S. 361, 364 (1981) (recognizing a "general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests").

In arguing otherwise, petitioners contend that under *Norton* v. *Shelby County*, 118 U.S. 425 (1886), "a lawful entity '[can]not ratify the acts of an unauthorized body.'" Pet. 22 (quoting *Norton*, 118 U.S. at 451) (brackets in original). *Norton* does not stand for that proposition. Indeed, the Court there expressly recognized that ratification can be made so long as "the party ratifying possesses the power to perform the act ratified." 118 U.S. at 451. But the Court concluded that the board of commissioners that had attempted the ratification in that particular case had itself lacked "the power to perform the act ratified" at the time of the attempt. *Ibid.* It was only for that case-specific reason—not because of some general rejection of ratification—that the board of commissioners could "not ratify the acts of an unauthorized body." *Ibid.* Here, by contrast, the Bureau has authority to commence or continue enforcement proceedings so long as it is subject to appropriate Executive oversight—whether that be because it is temporarily under the leadership of an Acting Director who is not subject to the removal limitations in Section 5491(c)(3), or because this Court declares Section 5491(c)(3) unconstitutional for *all* Directors. Ratification in those circumstances is fully consistent with *Norton*. See *ibid.*

Petitioners also contend that if ratification is allowed, parties will lack adequate "incentives" to raise separation-of-powers challenges. Pet. 23 (quoting *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)). Requiring ratification, however, provides a meaningful incentive that is appropriately "tailored to the injury suffered from the constitutional violation," *United States* v. *Morrison*, 449 U.S. at 364. The thing most "worrisome" to those who face prosecution at the hands of one insulated from Executive oversight is the prosecutor's "isolation from the Executive Branch and the internal checks and balances it supplies." *Morrison* v. *Olson*, 487 U.S. at 731 (Scalia, J., dissenting) (quoting Levi et al. Amici Br. at 11, *Morrison* v. *Olson*, *supra*, No. 87-1279 (Apr. 8, 1988)). A ratification requirement puts those "checks and balances," *ibid.*, back in place. And where a fully accountable officer determines that enforcement is appropriate, a defendant has no further "injury suffered from the constitutional violation." *United States* v. *Morrison*, 449 U.S. at 364.[3]

[3] *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), on which petitioners rely (Pet. 22-23), is not to the contrary. Although the petitioners in *Lucia* asked the Court to order dismissal of the administrative proceeding against them because the administrative law judge who presided over that proceeding had been unconstitutionally appointed, see Pet. Br. at 49-58, *Lucia*, *supra*, No. 17-130 (Feb. 21, 2018), the Court did not order that relief. Instead, the Court ordered a new hearing before a properly appointed administrative law judge who had not previously been involved in the case. *Lucia*, 138 S. Ct. at 2055 n.5. And the Court

3. For all of the foregoing reasons, review in this case is not warranted. And while it is often appropriate for the Court to hold a petition raising the same issue as a case in which a writ of certiorari has already been granted, that course is not warranted here because of this case's interlocutory posture. The court of appeals is presently considering petitioners' interlocutory appeal of their motion for judgment on the pleadings. Once this Court decides *Seila Law*, the court of appeals or the district court, as appropriate, will be able to apply this Court's ruling in deciding petitioners' case. If relevant, they can also address in the first instance petitioners' additional argument that the constitutional flaw with the Bureau's organic statute entitles them to dismissal. There is no sound reason to circumvent that ordinary course.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted.

MARY MCLEOD
General Counsel
JOHN R. COLEMAN
Deputy General Counsel
STEVEN Y. BRESSLER
Assistant General Counsel
KRISTIN BATEMAN
Senior Counsel
Consumer Financial Protection Bureau

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
MARK B. STERN
DANIEL AGUILAR
Attorneys

NOVEMBER 2019

---

indicated that challengers would not get the benefit of a "new" decisionmaker if "no substitute decisionmaker" were available. *Ibid.* In no event would the proceeding simply be dismissed.