No. 18-60302

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellee

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, INDIVIDUALLY
Defendants-Appellants

On Appeal from the United States District Court for the
Southern District of Mississippi
Case No. 3:16-cv-00356-DPJ-JCG

UNOPPOSED MOTION OF THE CATO INSTITUTE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS ON REHEARING *EN BANC*

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UNOPPOSED MOTION TO FILE BRIEF *AMICUS CURIAE*

The Cato Institute moves for leave to file a brief as *amicus curiae* in support of defendants on rehearing *en banc*. Pursuant to Fed. R. App. P. 29, counsel for *amicus* states that all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

This case concerns *amicus* because liberty is best preserved by a constitutionally constrained government consistent with the Framers' design. *Amicus* has frequently filed in separation of powers cases including *Seila Law LLC v. CFPB*, 591 U.S. ___, 207 L. Ed. 2d 494, 527 (2020). The proposed brief addresses the constitutional and prudential concerns at play when determining the remedy for a separation-of-powers violation. Specifically, the brief demonstrates that the purpose of the separation of powers is the protection of individual liberty, that remedies for separation-of-powers violations should serve that liberty-protecting

purpose and provide meaningful relief for litigants, and that post-hoc ratification of agency actions that were unconstitutional at the time they were initiated both perpetuates the constitutional violation and denies litigants an adequate remedy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that all required privacy redactions have been made pursuant to Fifth Circuit Rules, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses. I further certify that this motion complies with the type-volume limitation of the relevant rules because this motion contains 268 words.

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I hereby certify that on August 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I also certify that the foregoing document is being served on all counsel of record and such service will be accomplished by the CM/ECF system.

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BRIEF OF *AMICUS CURIAE* THE CATO INSTITUTE IN SUPPORT OF DEFENDANTS-APPELLANTS ON REHEARING *EN BANC*

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No. 18-60302

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CONSUMER FINANCIAL PROTECTION BUREAU,
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v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, INDIVIDUALLY
Defendants-Appellants

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amicus* certifies that (1) *amicus* does not have any parent corporations, and (2) no publicly held companies hold 10% or more of the stock or ownership interest in *amicus*.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

This case concerns *amicus* because liberty is best preserved by a constitutionally constrained government of separated powers consistent with the Framers' design. *Amicus* has frequently filed in separation of powers cases including *Seila Law LLC v. CFPB*, 591 U.S. ___ (2020).

SUMMARY OF ARGUMENT

The Constitution as initially adopted lacked a bill of rights enumerating the inviolable liberties of the people. Instead, the Constitution was designed to protect individual liberty through a carefully structured government adhering to certain principles of Enlightenment political theory. Chief among these principles is the separation of powers, the idea that the three governmental powers—legislative, executive, and judicial—should be vested in separate branches of government. The

[1] Pursuant to Fed. R. App. P. 29, all parties have consented to the filing of this brief. Further, no party's counsel authored any part of this brief and no person other than *amicus* made a monetary contribution to fund its preparation or submission.

Framers hoped that by dividing power in this way, they could prevent any single person or entity from accumulating too much power. Over the centuries, these boundaries have been enforced largely through private litigation—citizens vindicating their constitutional rights by availing themselves of the courts. Litigation requires incentives for litigants, however, which includes providing a meaningful remedy when courts find that the separation of powers has been violated.

The Constitution vests the executive power, the power of enforcing the law, in the hands of a single president to ensure that he can be held accountable for the actions of his subordinates and can resist the encroachments of the legislature. Over the course of the 20th century, however, Congress began to create "independent agencies" that exercise the executive power without the substantial oversight or control of the president, nearly always in the form of multi-member commissions. In the wake of the 2008 financial crisis, Congress began to further experiment with agency structure and created the Consumer Financial Protection Bureau (CFPB), an independent agency with a single director, removable only for cause, who exercised vast, unilateral discretion over the enforcement of the nation's consumer finance laws. This past June, the Supreme Court held in *Seila Law LLC v. CFPB* that this structure was unconstitutional, severing the director's for-cause removal protection but leaving the restructured agency standing. 591 U.S. __ (2020).

This case arises in *Seila Law*'s wake and concerns the remedy for litigants who had challenged the CFPB's constitutionality. The CFPB argues that the enforcement actions it initiated while it was unconstitutionally structured can move forward because the former acting director and current director, both removable by the president at will, ratified these actions. This attempt at retroactive constitutional justification is dangerous. An illegitimate exercise of power cannot become legitimate through post-hoc ratification. Allowing such an action would perpetuate the constitutional violation and undermine the separation of powers. Worse still, it would decrease the incentive for litigants to file separation of powers challenges in the future, endangering a critical check on governmental power.

The purpose of the separation of powers is to protect liberty. The remedy for separation of powers violation should, accordingly, protect liberty by dismissing the unconstitutionally initiated enforcement action.

ARGUMENT

I. UNCONSTITUTIONALLY STRUCTURED AGENCIES LIKE THE CFPB THREATEN THE CONSTITUTION'S PROTECTION OF INDIVIDUAL LIBERTY

A. The Separation of Powers Is a Core Structural Safeguard of Individual Liberty

Separation of powers is the central principle of our constitutional structure. Under the Constitution, the federal government does not hold "an undifferentiated 'governmental power.'" *Seila Law*, 207 L. Ed. 2d at 527 (Thomas, J., concurring in

part and dissenting in part) (quoting *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring in judgment)). Instead, the Constitution "sets out three branches and vests a different form of power in each—legislative, executive, and judicial." *Id.* The separation of powers was a core concern of the founding generation. *See*, *e.g.*, The Federalist No. 47 (Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."). Although the interplay between branches themselves is the mechanism to "maintain[] in practice the necessary partition of power among the several departments," the purpose of the separation of powers is the preservation of individual liberty.[2] The Federalist No. 51 (Madison); *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (stating that the Framers' "ultimate purpose" behind separating certain federal powers was "to protect the liberty and security of the governed"). As Justice Scalia wrote in his concurring opinion in *NLRB v. Noel*

[2] Separation of powers as a means to secure liberty has its roots in the Enlightenment-era political theory on which the Framers heavily relied. *See*, *e.g.*, William Blackstone, 1 Commentaries on the Laws of England 142 (1765) (noting that "there can be no public liberty" where the executive and legislative powers are combined); Baron de Montesquieu, The Spirit of the Laws, 151–52 (photo. reprint 2002) (Colonial Press 1900) (1748) ("There is no liberty, if the judiciary power be not separated from the legislative and executive," just as "there can be no liberty" "[w]hen the legislative and executive powers are united in the same person" or group. And, "were the same man or the same body . . . to exercise those three powers" together, "[t]here would be an end of everything.")

Canning, the Constitution's structural provisions are "designed first and foremost not to look after the interests of the respective branches, but to protect individual liberty." 573 U.S. 513, 571 (2014) (Scalia, J., concurring) (cleaned up).

The separation of powers protects individual liberty by preventing the same individual or entity from writing, interpreting, and enforcing a given law. When government powers are separated, no single branch can deprive individuals of liberty without the complicity of the other branches. The executive may refuse to enforce an arbitrary law written by the legislature, the courts may throw out cases of arbitrary enforcement by the executive, and the legislature can change the law or remove judges to remedy arbitrary verdicts. Each branch is accountable in a different way, giving the public multiple avenues and opportunities for overseeing government action. The purpose of the system is not efficient lawmaking; instead, it is to introduce calculated *in*efficiencies that slow, limit, and reveal to the public the exercise of government power. *See Morrison v. Olson*, 487 U.S. 654, 710 (1988) (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty.").

The separation of powers serves perhaps its most important role in the case of the executive power. Without enforcement, the legislature's laws are but words on a page and the courtrooms are empty. It is the executive power that investigates, arrests, charges, and prosecutes. Who exercises the executive power is therefore a

central concern of government structure. The Constitution is clear: "The executive Power shall be vested in a President of the United States of America," who "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §1, §3. Specifically rejecting the "executive council" model of a multi-person branch, the Framers vested the entirety of federal executive power in the president. *Seila Law*, 207 L. Ed. 2d at 520 n.10. Although he is aided by subordinate officers, the president retains ultimate authority and the president alone remains ultimately accountable. *See Seila Law*, 207 L. Ed. 2d at 504–05 ("[T]he Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.' 'Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.'" (quoting *Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 513–14 (2010)).

Accountability and the unitary executive—which means a *unified*, not necessarily expansive executive—help secure individual liberty. If federal agencies abuse their power and enforce the law in arbitrary, vindictive, or overzealous ways, the public and Congress, know whom to hold responsible. But when executive power is exercised without full presidential control, accountability suffers and the executive power to check the other branches diminishes. As the lines delineating the separation of powers are smudged, the rule of law erodes and liberty evaporates.

B. Unconstitutional Agency Structures such as the CFPB's Impose Real, not Merely Theoretical, Harms

Nowhere is the erosion of our separation of powers more obvious or alarming than in the growth of the so-called "independent agencies," which exercise executive power without meaningful presidential control. *See Seila Law LLC*, 207 L. Ed. 2d at 528 (Thomas, J., concurring in part and dissenting in part) ("Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate example of the Court's failure to apply the Constitution as written."). Thankfully, this past term the Supreme Court took a step in the right direction when it held that the "the structure of the CFPB violates the separation of powers." *Seila Law*, 207 L. Ed. 2d at 505. The Court found that the single-director-led CFPB was too insulated from presidential oversight and severed the for-cause removal protection of the agency's director. *Id.* This built on the Court's opinion in *Free Enterprise Fund*, 561 U.S. 477 (2010), where it invalidated a dual-layered for-cause removal protection regime.

The *Seila Law* Court was unequivocal in its support for core separation-of-powers principles, holding that "[t]he entire 'executive Power' belongs to the President alone," and that "lesser officers must remain accountable to the President, whose authority they wield." *Seila Law*, 207 L. Ed. 2d at 510–11. The Court quotes Madison in establishing that, as an agency charged with the enforcement of consumer finance laws, the CFPB is undoubtedly executive in nature: "[I]f any power whatsoever is in its nature Executive, it is the power of appointing,

overseeing, and controlling those who execute the laws." *Id.* at 511 (quoting 1 Annals of Cong. 463 (1789)). *See also Morrison*, 487 U.S. at 710 (Scalia, J., dissenting) ("The President's constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law.").

Enforcement actions can be arbitrary, unfair, or wrongful whether initiated by an agency accountable or unaccountable to the president. "But the difference is the difference that the Founders envisioned when they established a single Chief Executive accountable to the people: the blame can be assigned to someone who can be punished." *Morrison*, 487 U.S. at 731 (Scalia, J., dissenting). The structure of the CFPB "contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one." *Seila Law*, 207 L. Ed. 2d at 518. The president's accountability to the nation gives him a strong incentive to, in turn, hold his subordinates accountable for their exercises of his executive power. An executive agency led by a single individual outside the president's control breaks this system. Prior to *Seila Law*, the CFPB director "enjoy[ed] more unilateral authority than any other official [other than the President] in any of the three branches of the U.S. Government," and "[i]ndeed, within his jurisdiction, the Director of the CFPB [wa]s even more powerful than the President. The Director's view of consumer protection law and policy prevail[ed] over all others. In essence, the Director of the CFPB [wa]s the President of Consumer

Finance." *PHH Corp. v. CFPB*, 881 F.3d 75, 165–66, 172 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). It doesn't take James Madison to see the danger there.

By splitting off pieces of the executive power and placing them in the hands of unelected bureaucrats, Congress simultaneously made law enforcement less accountable and increased its own power. Independent agencies freed of the president's electoral and popular accountability will make different enforcement and policy choices than they would were they controlled by the president. In the case of the CFPB, "[w]ith no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director [could] dictate and enforce policy for a vital segment of the economy affecting millions of Americans." *Seila Law*, 207 L. Ed. 2d at 518. Such an agency can take a far harsher approach to law enforcement than the president, elected with the mandate of the people, advocates. It can exploit legislative vagueness to craft policies and regulations that no candidate ever had to defend on national television. Regardless of *how* it deviates from the president's priorities, however, what matters is that it invariably *will* deviate. Our constitutional structure, which provides for a unitary reservoir of executive power, does not countenance this level of deviation within the executive branch.

When government powers leak from their assigned branches, liberty suffers. Our constitutional structure is built on ambition counteracting ambition, on each branch checking the others. When one branch is weakened, its ability to prevent

improper concentrations of power in the other branches diminishes. Splintering the executive power not only degrades the executive branch—it allows for the growth of the others. Isolated independent agencies have neither the size nor the constitutional powers necessary to resist the "impetuous vortex" of the legislature. The Federalist No. 48 (Madison). An unaccountable splinter of executive power contributes to an unchecked Congress, with individual liberty on the losing end of both. Constitutional violations beget constitutional violations.

II. MEANINGFUL REMEDIES FOR LITIGANTS ARE NECESSARY TO PRESERVE THE CONSTITUTION'S STRUCTURAL SAFEGUARD

A. Private Parties' Enforcement of Constitutional Structure Provides a Check on Government

Against the backdrop of the separation of powers' role in protecting individual liberty, the Supreme Court has recognized that private parties have an implied right of action to assert separation-of-powers challenges. *See Free Enter. Fund*, 561 U.S. at 491 n.2; *see also Bond v. United States*, 564 U.S. 211, 223 (2011) (stating that "individuals, too, are protected by the operations of separations of powers and checks and balances; and they are not disabled from relying on those principles in otherwise justiciable cases and controversies"); *Clinton v. City of New York*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring) (private parties have a personal "interest in the regularity of the exercise of governmental power.").

Because protecting individual liberty is the end goal of the separation of powers, individuals are thus the "intended beneficiaries" of the Constitution's

structural provisions. *See* Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. 665, 668 (2016) (citing *Bond*, 564 U.S. at 220–21). And, as Supreme Court precedent reveals, it is not the claims of the federal government that have been the focus of judicial decisions regarding separation-of-powers violations, but those of *individuals*. *See*, *e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983) (successful individual challenge to the so-called "legislative veto"); *see also Clinton* 524 U.S. at 433–36 (finding that injured parties have standing to challenge the line-item veto).

Allowing challenges by private parties based on the Constitution's structural provisions holds the political branches accountable. After all, the branches do not always jealously guard their constitutionally defined roles when structuring government agencies. In *Buckley v. Valeo*, for example, the president approved of appointment defects even though they diluted the powers of both the president and the Senate. *See Buckley v. Valeo*, 424 U.S. 1 (1976). And again, in *Chadha*, both the president and Congress diluted their own powers to approve legislative action. Private parties' ability to enforce structural provisions thus provides a meaningful check on inter-branch anti-constitutional collusion. In many cases, such as here, private parties serve as *better* guardians of the separation of powers than the branches or institutions that possess those powers themselves.

B. Private Parties Bringing Successful Separation-of-Powers Challenges Against the Administrative State are Entitled to Meaningful Remedies

Our Constitution's structure protects and secures individual liberty above all else. When that liberty is compromised by unconstitutional government action, citizens ought to have a means of recourse. As described above, permitting and incentivizing separation-of-powers challenges by private parties is thus vital to our constitutional scheme. But simply allowing such challenges is not enough. Without meaningful remedies, the right to bring constitutional challenges is a hollow one. That is especially true for private parties bringing claims against the outsized executive branch, which regularly tramples on individual freedom in the name of bureaucratic necessity. *See* Phillip Hamburger, *The Administrative Threat to Civil Liberties*, 2017-2018 Cato Sup. Ct. Rev. 15 (2018) (arguing that administrative power is the greatest threat to civil liberties in our era).

If a successful separation-of-powers challenge is timely raised, then the successful challenger is entitled to meaningful relief. *See Ryder v. United States*, 515 U.S. 177, 188 (1995). The proper remedy for a successful challenge is one that "afford[s] [the challenger] the relief requested pursuant to its constitutional challenge." *Id.* at 184 n.3 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57 (1982)). Providing real relief to successful challengers is crucial because a separation-of-powers violation entails subjecting a private party to an exercise of power by a constitutionally defective government entity. *See*

Pennsylvania v. United States, 124 F. Supp. 2d 917, 922–23 (W.D. Pa. 2000). If an agency's "composition violates the Constitution's separation of powers," that agency fundamentally "lacks authority" to enforce its organic statute. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (1993), *cert. pet. dismissed for want of jurisdiction*, 513 U.S. 99 (1994). Thus, if an agency takes enforcement actions while unconstitutionally structured and insulated from presidential oversight, those actions were invalid and must be vacated. *See Buckley*, 424 U.S. 141–43, (concluding that the FEC could not constitutionally exercise its powers because of a structural defect).

Unfortunately for private parties bringing successful separation-of-powers challenges, courts sometimes "provide meaningless remedies, with little discussion, that may place prevailing regulated parties in a worse position than had they not brought their challenges at all." Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. at 668; *see also* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 517–36 (2014) (arguing that courts often provide remedies in separation-of-powers litigation that do not satisfy relevant remedial values).

While unraveling the actions an agency undertook while it was unconstitutionally structured might create some practical difficulties, providing relief is still appropriate where Congress has ignored straightforward constitutional separation-of-powers requirements and centuries of historical practice. *See NRA*

Political Victory Fund, 6 F.3d at 828 (concluding that when a litigant raises a "constitutional challenge as a defense," courts may not declare a federal agency's "structure unconstitutional without providing relief to the [challengers]"). Prudential concerns are insufficient to overcome the strong interest in maintaining the constitutional plan of separation of powers. *Clinton*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring) ("The Constitution's structure requires a stability which transcends the convenience of the moment."). The court "cannot cast aside the separation of powers . . . for the sake of administrative convenience or efficiency." *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 948–49 (2017). "No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.'" *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *Chadha*, 462 U.S. at 944). While adhering to the Constitution's structural provisions and ensuring a government of "opposite and rival interests" may sometimes inhibit the smooth functioning of administration, The Federalist No. 51 (Madison), "a judiciary that licensed extraconstitutional government with each issue of comparable gravity would, in the long run, be far worse." *New York v. United States*, 505 U.S. 144, 187–88 (1992).

III. POST-HOC RATIFICATION REMEDIES NEITHER THE PUBLIC NOR THE PRIVATE HARMS OF A SEPARATION-OF-POWERS VIOLATION

C. Post-Hoc Ratification of Unconstitutional Government Actions Perpetuates Rather Than Cures the Constitutional Violation

"[T]he Constitution does not permit judges to look the other way" when presented with a "case or controversy [] within the judicial competence" asking the court to enforce the separation of powers. *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting). Judges "must call foul when the constitutional lines are crossed. Indeed, the framers afforded [judges] independence from the political branches in large part to encourage this kind of 'fortitude . . . to do [their] duty as faithful guardians of the Constitution.'" *Id.* And when a foul is called, the penalty must remedy the constitutional violation. Just as the Washington Football Team™ does not get to keep a touchdown scored after a referee calls a foul on its scoring play, Washington's consumer financial protection team does not get to keep its enforcement actions when the Supreme Court calls foul on its structure.

For the CFPB and other agencies whose constitutional foul is structural, the violation occurred at the time the agency was first constituted and continued to exist as long as the structural defect existed. As discussed above and in Appellants' brief, the existence of the constitutional defect renders enforcement actions taken by the agency during such a period void. *See*, *e.g.*, *NRA Political Victory Fund*, 6 F.3d at 822 (If an agency's "composition violates the Constitution's separation of powers,"

that agency fundamentally "lacks authority" to further enforce its organic statute.). An agency that is unconstitutionally structured cannot legitimately exercise power. That is particularly true where the constitutional violation is that the agency's structure was in violation of the separation of powers, resulting in it purporting to exercise executive power without effective presidential control. Because the Constitution vests all executive power in the president, actions taken by other governmental actors outside of his control cannot be legitimate exercises of executive power. And because law enforcement of the sort engaged in by agencies such as the CFPB is a quintessentially executive power, actions taken by agencies while unconstitutionally structured are illegitimate and have been so *ab initio*.

The CFPB contends that it can transform a governmental action that was plainly unconstitutional at the time it occurred into a constitutional one through a post-hoc ratification. Appellants thoroughly explain why the purported ratification is ineffective here, but it is difficult to conceive of any set of facts where a post-hoc ratification could retroactively legitimize an enforcement action undertaken by an agency that was unconstitutionally insulated from presidential control at the time the action was initiated. If at the time an enforcement action was initiated, the agency was unconstitutionally structured, then nothing the agency did could have rendered that action constitutional. The cure for such violations is straightforward: dismissal

of the enforcement actions. Ratification cannot retroactively create power where none existed; it can only perpetuate the constitutional violation.

D. Post-Hoc Ratification Is Not a Meaningful Remedy for Litigants

Just as ratification is unable to retroactively eliminate a constitutional violation, it is also unable to provide targets of enforcement actions with a meaningful remedy. A remedy that provides post-hoc validity to actions of unconstitutionally structured agencies fails both to compensate for past violations and to prevent future harms that flow from structurally defective agencies. Ratifying past actions and affording prospective validity to unconstitutional federal entities offends the separation of powers and perversely twists incentive structures. *See* Kent Barnett, *Standing for (and up to) Separation of Powers*, 91 Ind. L.J. at 714 (arguing that providing only for "minimalistic remedies for prevailing parties in structural litigation undermine[s] structural safeguards"). In the context of the Appointments Clause, the Supreme Court has said that remedies for separation-of-powers challenges must be "designed not only" to advance the Constitution's "structural purposes," "but also to create incentives" for future separation-of-powers challenges. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018).

Affording the CFPB's pre-*Seila Law* actions retroactive validity would instead create a disincentive for future challenges. Lawsuits are costly, time-consuming, and risky. If even a victory results in no material change in position, it

will often be cheaper, quicker, and safer for potential litigants to simply comply with the enforcement action, regardless of its constitutionality. Lawsuits that fail to provide a cure for the harm suffered are hardly worth winning. At a time when our national institutions are suffering crippling attacks on all fronts, courts should ensure that the incentives point towards upholding our constitutional values rather than tearing them down. Without meaningful relief, private parties will stop bringing separation-of-powers claims. Without such claims, an important and highly effective check on government power will disappear. The solution is straightforward: courts should recognize that the *remedy* for separation of powers claims should match the *purpose* of the separation of powers itself: liberty from unjust government action. To accomplish that, court should simply dismiss enforcement actions initiated by agencies that didn't have the constitutional authority to initiate them.

Finally, the incentive structure gets twisted for Congress too. Instead of telling Congress to structure agencies in accordance with the Constitution, ratification tells them that any agency they create will be treated as if it always were constitutional regardless of what happens. This further undercuts the incentives for litigants, because it lessens the chances of even a less tangible legislative win coming out of victory in the courtroom. If winning your separation-of-powers claim neither dismisses the enforcement action against you nor disincentivize Congress from continuing to violate separation-of-powers principles, why file suit?

Allowing the CFPB to paper over Congress's breach of the separation of powers without any impact on the actions it unconstitutionally initiated sends a clear signal: the separation of powers doesn't really act as a limitation on government power. Unconstitutional exercise of the executive power should have consequences, beginning with the dismissal of enforcement actions initiated without constitutional authority. Doing so would incentivize Congress and litigants alike to guard our constitutional principles zealously going forward. And, in the process, it would fulfill the constitutional purpose of securing liberty.

CONCLUSION

Remedies for separation-of-powers violations should both cure the constitutional defect and provide a meaningful remedy for litigants. The enforcement action against Appellants should be dismissed.

Dated: August 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on August 6, 2020, which will automatically send notification to the counsel of record for the parties.

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