No. 16-673

IN THE

Supreme Court of the United States

CHANCE E. GORDON,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF FOR THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

This brief addresses the first question presented by Gordon's petition:

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

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's 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.

Cato has devoted considerable attention to the Consumer Financial Protection Bureau's structure and functions. *See, e.g.*, Mark Calabria, "The CFPB: Problem or Solution?", Mortgage Orb (Aug. 17, 2012), http://bit.ly/29tbkAY; Testimony of Mark Calabria before the Comm. on Fin. Services, Subcomm. on Oversight and Investigations (Dec. 16, 2015), http://bit.ly/29B94qy (discussing Fourth Amendment implications for CFPB's data-collection activities).

This case interests Cato because it poses a significant challenge to the vitality of the Appointments Clause, a bulwark of individual liberty and check on unbridled executive power. Cato agrees with Petitioner that the possibility of future "ratification" cannot justify the present *ultra vires* exercise of ex-

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[1] Rule 37 statement: All parties were timely notified of and have consented to the filing of this brief. No party's counsel authored this brief in any part and no person or entity other than *amicus* and its counsel funded its preparation or submission.

ecutive power by an agency head not appointed in accordance with the Appointments Clause.

SUMMARY OF ARGUMENT

Petitioner Chance E. Gordon was found liable in an enforcement action brought by the Consumer Financial Protection Bureau (CFPB). The consequences of these proceedings were substantial: during the pendency of litigation, the district court froze Gordon's assets, appointed a receiver, and issued a preliminary injunction prohibiting him from operating his business. Pet. App. 6a. It then issued a judgment against Gordon that included an $11,403,338.63 damage award and permanent injunctive relief. *Id.*

It is now clear that, during the pendency of these enforcement proceedings by the CFPB, the appointment of its director, Richard Cordray, was invalid under Article II. The Ninth Circuit nonetheless held that, because Cordray was eventually confirmed by the Senate, his post hoc ratification cured any constitutional infirmities with the judgment against Gordon. *Id.* 17a. This is wrong for two reasons.

First, Cordray's ratification could be effective only if the CFPB had the authority to bring an action against Gordon in the first place. It did not. The statute authorizing the CFPB's creation specifically vests a duly appointed director with the power to bring a civil enforcement action. And Congress did not extend such power to a headless, executive-branch agency before a director could be duly-appointed. Instead, Congress granted limited, interim authority to the Secretary of the Treasury to perform certain functions. These functions, however, did

not include the CFPB's unique enforcement powers. Indeed, the Treasury Secretary never asserted that he possessed, nor sought to exercise, any such powers. Given Congress's specific delineation of which agency officer had such power and when that power could be invoked, it cannot be said the CFPB itself possessed enforcement authority.

Second, even assuming that Cordray had the power to ratify his past actions, he did not have the power to ratify the orders of an Article III court. By the time of Cordray's ratification, the district court had already issued numerous decisions with legally binding consequences, including a judgment on the merits. Executive officers do not have the power to ratify (or annul) the validity of such decisions. This is solely the province of the judiciary.

The Ninth Circuit's decision effectively allows the CFPB—an agency which already possesses massive enforcement powers—to circumvent the Appointments Clause (in violation of Article II) while, at the same time, seizing the ultimate authority over the legal effect of judicial orders (in violation of Article III). As James Madison observed long ago, "'[T]he accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.'" *I.N.S. v. Chadha*, 462 U.S. 919, 960 (1983) (Powell, J., concurring) (quoting The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961)). This Court should grant review to prevent such a gross abuse of executive power.

ARGUMENT

I. CORDRAY'S AFTER-THE-FACT RATIFICATION OF HIS CHARGING DECISION VIOLATES ARTICLE II

It is undisputed that, when the CFPB initiated its enforcement action against Gordon, its director had not been appointed consistent with the constitutional requirements under Article II. *See N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2556–57 (2014). The Ninth Circuit held that Cordray cured this defect by ratifying his past conduct after his nomination was confirmed by the Senate. It reasoned that "[b]ecause the CFPB had the authority to bring the action at the time Gordon was charged, Cordray's August 2013 ratification, done after he was properly appointed as Director, resolves any Appointments Clause deficiencies." Pet. App. 17a.

But the CFPB *did not have* "the authority to bring the action at the time Gordon was charged." *Id.* Under the plain terms of the agency's enabling statute, such enforcement powers were expressly conditioned on the appointment of a duly confirmed director. *See* 12 U.S.C. § 5586. When the CFPB initiated its enforcement action, no such director was in place.

The bootstrapping sanctioned by the Ninth Circuit would effectively render the Appointments Clause a nullity. Agencies would be free to act without the prior approval of Congress, even when Congress has made its express approval required. This not only threatens a central check on executive authority, but also the basic liberties our constitutional

system of separation of powers was meant to protect. *See Bond v. United States,* 564 U.S. 211, 222 (2011) ("The structural principles secured by the separation of powers protect the individual as well.").

A. Congress Did Not Authorize the CFPB to Bring an Enforcement Action Without a Duly Appointed, Senate-Confirmed Director

This Court has recognized that the *ultra vires* conduct of an executive agency may, at least in principle, be subject to later ratification. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). For a ratification to be effective, however, "it is essential that the party ratifying should be able . . . to do the act ratified *at the time the act was done*." *Id.* (emphasis added); *see also United States v. Heinszen,* 206 U.S. 370, 382–84 (1907).[2] This was not the case here.

The CFPB's authority to "commence a civil action," 12 U.S.C. § 5564, is neither unlimited nor un-

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[2] The Ninth Circuit also cited the Third Restatement of Agency's less-stringent rule that "ratification is valid 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." Pet. App. 16a. But that is not the rule that the Court adopted in *NRA Political Victory Fund.* Further, this rule does not support the proposition that the executive branch can ignore an express limitation on its powers imposed by Congress. Even under the Third Restatement, a principal cannot ratify its agent's unlawful conduct. *See* Restatement (Third) of Agency § 4.04 cmt. b. Here, the CFPB's initiation of action against Gordon was unlawful under the terms of its enabling statute.

differentiated. When the Dodd-Frank Wall Street Reform and Consumer Protection Act created the CFPB, it did not vest enforcement powers upon inception in the agency *qua* agency, or enable the exercise of *any* such powers by the director before he or she was validly appointed. Instead, it granted limited, interim authority to the Secretary of the Treasury to perform certain functions transferred from other agencies. *See id.* § 5586(a). This limited authority does *not* include enforcement powers unique to the CFPB. *See* Mem. from Inspectors Gen. of the Treasury Dep't and the Fed. Reserve, to Spencer Bachus, Republican Chairman of the House Fin. Serv. Comm. (Jan. 10, 2011) at 6–7, available at http://bit.ly/2i76zhS (explaining that "[t]he Secretary is not permitted to perform certain newly established Bureau authorities if there is no confirmed Director by the designated transfer date"). Accordingly, only a director properly appointed in accordance with 12 U.S.C. § 5491 can initiate the enforcement procedure at issue here.

The following is clear from this scheme: *First*, the "Interim authority of the Secretary" under § 5586(a) "does not authorize the Secretary to exercise the full panoply of the Bureau's powers. Rather, the scope of the Secretary's powers under [§ 5586(a)] is limited to 'the functions of the Bureau under this [Part] [F].'" David H. Carpenter, *Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection*, Congressional Research Service, at 3 (May 11, 2011) (third alteration in original); *see also* Offices of Inspector General, Board of Governors of the Federal

Reserve System and Bureau of Consumer Financial Protection Department of the Treasury, *Review of CFPB Implementation Planning Activities*, at 4 n.5 (July 15, 2011) ("According to the text of the . . . Act, the Treasury Secretary's authority under section 1066(a) [§ 5586(a)] does not extend to these newly-established authorities."). Part F transfers to the CFPB "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law" vested in (e.g.) HUD, the FDIC, and the Office of Thrift Supervision, and enforcement authority of consumer financial laws and regulations over larger depositories. 12 U.S.C. § 5581.

Second, the Secretary's "Interim authority" under § 5586(a) does "not expire *until a Director is appointed*." Carpenter, *supra*, at 3.

Third, the powers vested in the Secretary do not include "the Bureau's 'newly established' powers—*i.e.*, the enhanced consumer protection authorities that were not provided by law to federal regulators before the Dodd-Frank Act." *Id.* at 5. These "newly established" powers include those on which the CFPB based its enforcement action against Gordon.

The CFPB did not have a director until the Senate confirmed Cordray on July 16, 2013. Until then, the CFPB had no legal authority to initiate proceedings against Gordon, either under Article II or its enabling statute. No one had that authority until a constitutionally valid director was installed. Given Congress's carefully delineated allocation (and limitation) of the CFPB's power, it simply cannot be said, as the Ninth Circuit majority concluded, that the

CFPB "had the authority to bring the action at the time Gordon was charged." Pet. App. 17a.

Cordray's ratification thus cannot cure the unsanctioned prosecution against Gordon. Ratification is not legislation. Only Congress could authorize the CFPB's use of its newly created enforcement powers without first having a Senate-confirmed director in place—and Congress expressly chose not to do so.

Nearly two decades ago, Congress rejected the notion that the advice-and-consent requirement was a mere vestigial inconvenience when it enacted the Federal Vacancies Reform Act in 1998. It did so in direct response to *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203 (D.C. Cir. 1998). There, an unlawfully appointed "acting director" of OTS initiated an agency enforcement action against a bank. *Id.* at 204. The D.C. Circuit held that the subsequent ratification by a lawfully appointed OTS director rendered the *ultra vires* action "harmless." *Id.* at 213–14. Congress denounced the result in *Doolin* as "undermin[ing] the constitutional requirement of advice and consent"; if any subsequent acting official or anyone else can ratify the actions of a person who served unlawfully, "then no consequence will derive from an illegal acting designation." S. Rep. No. 105-250, at 8 (1998).

B. The Ninth Circuit's Decision Undermines Article II and Substantially Prejudices Gordon

The Appointments Clause is an essential bulwark against executive overreach. *See Weiss v. United States*, 510 U.S. 163, 184 (1994) (Souter, J., con-

curring) (noting that the Framers believed that the constitutional "requirement of Senate confirmation would serve as an 'excellent check' against Presidential missteps or wrongdoing" (citing The Federalist No. 76, at 513 (Alexander Hamilton) (J. Cooke ed., 1961)). At the time of the Founding, "the power of appointment to offices was deemed the most insidious and powerful weapon of eighteenth century despotism." *Freytag v. C.I.R.*, 501 U.S. 868, 883 (1991) (internal quotation marks omitted). Thus, advice and consent "is more than a matter of 'etiquette or protocol'; it is among the significant structural safeguards of the constitutional scheme" intended "to curb Executive abuses of the appointment power and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (alteration in original) (citation and internal quotation marks omitted).

Here, the potential for executive abuse is not only particularly potent, but fully realized as to Gordon. The Ninth Circuit's decision eliminates one of the only checks against the CFPB's immense and largely unaccountable authority. It also ignores the prejudice suffered by Gordon and others who were the targets of this authority.

1. The Ninth Circuit's Decision Removes One of the Few Constitutional Checks on the Powers of the CFPB

The Dodd-Frank Act grants the CFPB sweeping powers to define "unfair, deceptive, or abusive acts or practices." 12 U.S.C. § 5511(b)(2). This new authority is in addition to 18 pre-existing consumer

laws transferred to the CFPB from other agencies. *Id.* § 5481(12). The result is a "superregulator with massive powers." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 925 (2013). "[T]he Director of the CFPB possesses enormous power over American business, American consumers, and the overall U.S. economy. The Director unilaterally enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices." *PHH Corp. v. CFPB*, 839 F.3d 1, 7 (D.C. Cir. 2016).

Despite these massive powers, the CFPB is largely insulated from democratic accountability. It is housed within the Federal Reserve System, itself an independent regulatory agency. 12 U.S.C. § 5491(a). It is not subject to congressional restraints via the appropriations process. *Id.* § 5497(a)(1)–(2); *see U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) ("The power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" (quoting The Federalist No. 51, at 320 (James Madison) (C. Rossiter ed., 1961))). Moreover, the CFPB's structure, which gives the director virtually unchecked powers, is unprecedented. Congress created the CFPB as an independent agency, meaning the President could remove the director only for cause. 12 U.S.C. § 5491(c)(3). Moreover, in contrast to virtually every other independent agency, Congress vested control over the CFPB in a single director rather than a multi-member board. *PHH Corp.*,

839 F.3d at 15. In doing so, Congress removed a vital, and indeed constitutionally necessary, check against the CFPB's misuse of its statutory powers.

Given the near-total lack of oversight by the President or Congress over the CFPB's initiation or prosecution of enforcement proceedings against Gordon, one of the few remaining meaningful checks on arbitrary CFPB action was the requirement of Senate consent to the director's appointment. *See* U.S. Const., art. II, § 2; 12 U.S.C. § 5491(b)(2).

2. The Magnitude and Consequences of Cordray's Ultra Vires *Conduct*

The broad scope of the CFPB's regulatory powers was on full display throughout the lawsuit against Gordon. The CFPB obtained, without notice to defendants, an immediate appointment of a temporary receiver and an *ex parte* order freezing Gordon's assets. *CFPB v. Gordon*, No. 2:12-cv-6147 (C.D. Cal. Jan. 25, 2013) (ECF No. 12). It later obtained a broad preliminary injunction that not only continued the asset freeze and receivership during the pendency of the litigation, but prohibited Gordon from engaging in a range of conduct relating to his former business. *Id.* (ECF No. 76). Following summary judgment in its favor, Pet. App. 43a-57a, the CFPB obtained a $11,403,338.63 judgment and permanent injunctive relief that, among other things, "prohibits Gordon from providing any mortgage assistance relief product or service for a period of three years." *Id.* 23a, 58a-72a. The Ninth Circuit vacated the part of the order imposing monetary penalties based on the retroactive imposition of damages calculated for a

time period before the remedial regulation (Regulation O) was in effect, but otherwise affirmed the district court's judgment. *Id.* 27a.

That judgment, and all of the actions taken to obtain this outcome, were at the direction of a director not duly appointed. For the Ninth Circuit, that fact was of no moment because there was a duly appointed director *eventually*. Per the Ninth Circuit, Cordray's retroactive blessing of his prior conduct removed any taint caused by his invalid appointment. But even where a defendant has suffered no actual harm, "no harm no foul" is not an exception to Article II's requirements. In the case of "structural" constitutional violations, prejudice must be presumed. *See Landry v. F.D.I.C.*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) ("For Appointments Clause violations, demand for a clear causal link to a party's harm will likely make the Clause no wall at all.").

This Court has recognized that the

> separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. . . . [I]t is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). Violations of these structural safeguards cannot be set aside solely for the sake of administrative expediency. *See Chadha,* 462 U.S. at 959 ("There is no support in the Constitution . . . for the proposi-

tion that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided . . . .").

Here, Cordray's *ultra vires* conduct resulted in grave and irrevocable *judicial* consequences for Gordon. These consequences cannot be later sanitized by Cordray or the CFPB. As the D.C. Circuit explained in *Landry*, "the later conviction by a petit jury" does not undo the harm caused by an indictment of a constitutionally defective grand jury. *See Landry,* 204 F.3d at 1131 (citing in part *Vasquez v. Hillery*, 474 U.S. 254, 261 & n.4 (1986)). Cordray's *ultra vires* decision to charge Gordon here functions exactly like a grand jury indictment. It likewise cannot be cured by his later ratification once he was duly appointed.

Gordon's case is not an outlier. During the 18-month period when Cordray was improperly appointed, he filed 16 enforcement actions, resulting in over $500 million in monetary judgments.[3] The

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[3] In the Matter of: Capital One Bank, (USA) N.A., CFPB No. 2012-CFPB-0001 (Jul. 16, 2012); In the Matter of: Discover Bank, Greenwood, Delaware, CFPB No. 20 12-CFPB-0005 (July 24, 2012); *CFPB Orders American Express to Pay $85 Million Refund to Consumers Harmed by Illegal Credit Card Practices*, CFPB (Oct. 1, 2012), http://bit.ly/2hNdW19; CFPB v. Jalan, No. 8:12-cv-2088 (C.D. Cal. July 23, 2013) (ECF No. 76); CFPB v. Payday Loan Debt Sol., Inc., No. 1:12-cv-24410 (S.D. Fla. Dec. 21, 2012) (ECF No. 10); CFPB v. United Guaranty Corp., No: 1:13-cv-21189 (S.D. Fla. Apr. 8, 2013) (ECF No. 5); CFPB v. Radian Guaranty Inc., No. 1:13-cv-21188 (S.D. Fla. Apr. 9, 2013) (ECF No. 5); CFPB v. Genworth Mortg. Ins. Corp., No. 1:13-cv-21183 (S.D. Fla. Apr. 5, 2013) (ECF No. 5); CFPB v. Mortg. Guaranty Ins. Corp., No. 1:13-cv-21187 (S.D. Fla. Apr. 5, 2013) (ECF No. 5); CFPB v. Premier Consulting Grp. (Continued...)

CFPB has "an especially potent partnership" with the Justice Department; at least one of its referrals has resulted in criminal charges.[4] In addition, the CFPB coordinates its supervisory and enforcement actions with numerous other federal agencies. *See, e.g.*, CFPB, Strategic Plan, Budget, and Performance Plan and Report 37, http://bit.ly/2h2QBrf. The CFPB has also obtained information from—or cooperated and shared information with—local, state, or federal law enforcement partners in a number of cases, including 22 cases in fiscal year 2012 and 80 cases in fiscal year 2013. *Id.* at 37 tbl. 15.

The Ninth Circuit's decision has far-reaching consequences. If the CFPB can simply ratify this and other *ultra vires* conduct, the Appointments Clause

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(...Continued)

LLC, No. 1:13-cv-3064 (S.D.N.Y. Dec. 4, 2014) (ECF No. 34); In the Matter of: Paul Taylor, Paul Taylor Homes Ltd., & Paul Taylor Corp., CFPB No. 2013-CFPB-0001 (May 17, 2013); CFPB v. Am. Debt Settlement Sols., Inc., No. 9:13-cv-80548 (S.D. Fla. June 7, 2013) (ECF No. 5); *CFPB Ordered U.S. Bank & One of Its Nonbank Partner Companies to Refund Approximately $6.5 Million to Servicemembers*, CFPB (June 27, 2013), http://bit.ly/2hMYvX2.

[4] *Manhattan U.S. Attorney Charges Debt Settlement Company and Six Individuals for Multi-Million Dollar Scheme that Targeted Debt-Ridden Consumers*, U.S. Dep't of Justice (May 7, 2013), http://bit.ly/2gUkBSK; *see also* 12 U.S.C. § 5566 (requiring the CFPB to refer evidence of criminal activity to the Attorney General); Mem. of Understanding between the CFPB and the U.S. Dep't of Justice, http://bit.ly/2gUh1rQ; Mem. of Understanding between the Consumer Financial Protection Bureau and the U.S. Dep't of Justice Regarding Fair Lending Coordination, http://bit.ly/2h2WCEg.

will become "no wall at all." *See Landry*, 204 F.3d at 1131. This warrants review.

II. NINTH CIRCUIT'S EXPANSIVE INTERPRETATION OF THE RATIFICATION DOCTRINE VIOLATES ARTICLE III

Cordray's attempt to cure his past conduct through ratification is unconstitutional for another reason: it usurps the judicial authority over court proceedings.

It is a bedrock principle of the separation of powers that decisions of Article III courts cannot be "revised [or] controlled . . . by an officer in the executive department." *Hayburn's Case*, 2 U.S. 408, 410 (1792) (opinion of Wilson and Blair, JJ., and Peters, D.J.). However, by holding that an executive agency may ratify not only its own prior actions, but also the actions of Article III courts, the Ninth Circuit has granted executive agencies this very power.

The CFPB sought to preserve the judgment against Gordon by ratifying not only the initiation of the civil proceeding that gave rise to it, but also the judgment. If allowed, executive agencies will gain the de facto power to ratify—or annul—court decisions. These agencies could, at their own discretion, decide whether to preserve or nullify court orders by exercising or not exercising their ratification powers. But the executive branch does not have the last word on the finality or enforceability of judicial rulings. Courts do. *See Plaut*, 514 U.S. at 218–19, 227.

A. Executive Review of Court Decisions Undermines Judicial Independence and Individual Liberty

The "Constitution establishes an independent Judiciary, a Third Branch of Government with the 'province and duty . . . to say what the law is' in particular cases and controversies." *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1322 (2016) (ellipses in original) (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). This power grants courts the authority "not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy." *Plaut*, 514 U.S. at 218–19. It follows that the orders of Article III courts are not "subject to later review or alteration by administrative action." *Chicago & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 114 (1948).

This longstanding prohibition is no mere formality. As the Court has recently stressed, the independence of the judiciary is the "guardian of individual liberty." *Stern v. Marshall*, 564 U.S. 462, 495, (2011). The Founders were intent on protecting the colonists from the "judicial abuses" suffered "at the hand of the Crown," which wielded significant influence over courts. *Id.* at 483–84. The Founders thus sought to insulate courts from executive and legislative control. *Id.* While the executive branch is charged with enforcing the law, it is the judicial branch that has the authority to resolve cases. *See Plaut,* 514 U.S. at 222 ("[T]he power of '[t]he interpretation of the laws' would be 'the proper and peculiar province of the courts.'" (second alteration in

original) (quoting The Federalist No. 78, at 523, 525 (Alexander Hamilton) (J. Cooke ed., 1961))).

This independence is critical to ensuring that cases are judged fairly and impartially. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) ("As an inseparable element of the constitutional system of checks and balances, and as a guarantee of judicial impartiality, Art. III both defines the power and protects the independence of the Judicial Branch."). But such independence is threatened if "the other branches of the Federal Government c[an] confer the Government's 'judicial Power' on entities outside Article III." *Stern*, 564 U.S. at 484. It therefore must "be jealously guarded." *N. Pipeline Const. Co.*, 458 U.S. at 60.

The prohibition against executive control of judicial decisions provides one key safeguard of judicial independence. This principle is "deeply rooted in our law." *Plaut*, 514 U.S. at 218. "Judicial decisions in the period immediately after ratification of the Constitution confirm the understanding that it forbade interference with the final judgments of courts." *Id.* at 223.

Just years after the Constitution was ratified, this Court was faced with the question of whether Congress could give Article III courts jurisdiction to grant pension benefits to Revolutionary War veterans. *Hayburn's Case*, 2 U.S. 408. Under the statute, these awards were subject to review by the Secretary of War who could decline to follow the courts' recommendations. *Id.* While the Court declined to rule on the constitutionality of this statute on procedural

grounds, five of the six justices expressed the view, while riding circuit, that the statute violated Article III. These justices concluded that, "by the constitution, neither the secretary at war, nor any other executive officer, nor even the legislature, are authorized to sit as a court of errors on the judicial acts or opinions of this court." *Id.* at 410 (opinion of Jay, C.J., Cushing, J., and Duane, D.J.). Subjecting judicial decisions to "[s]uch revision and control . . . [would be] radically inconsistent with the independence of that judicial power which is vested in the courts; and consequently, with that important principle which is so strictly observed by the constitution of the United States." *Id.* (opinion of Wilson and Blair, JJ., and Peters, D.J.).

The Court has repeatedly affirmed this principle. In *United States v. Ferreira*, it held that it lacked jurisdiction to review claims made pursuant to a treaty because the Secretary of the Treasury could refuse to pay these awards if they were not "just and equitable." 54 U.S. 40, 47 (1851). Similarly, in *Chicago & Southern Air Lines*, the Court held that courts lacked jurisdiction to review a decision by the Civil Aeronautics Board granting international air routes because these decisions could be ignored by the President. 333 U.S. 103. The Court held: "Judgments, within the powers vested in courts by the Judiciary Article of the Constitution, may not lawfully be revised, overturned or refused faith and credit by another Department of Government." *Id.* at 113.

More recently, in *Plaut*, the Court struck down a statute that would have required courts to reopen judgments in securities actions that had previously

been dismissed as untimely. 514 U.S. at 215. Citing *Hayburn's Case,* the Court noted that "[t]he power to annul a final judgment . . . [is] an assumption of Judicial power, and therefore forbidden." *Id.* at 244 (internal quotation marks omitted). Just last term, in *Bank Markazi,* the Court again affirmed that Congress may not "'vest[] review of the decisions of Article III courts in officials of the Executive Branch.'" 136 S. Ct. at 1323 (quoting *Plaut*, 514 U.S. at 218).

Collectively, these cases stand for the proposition that courts have the "last word" on the enforceability of their orders and judgments. *See Plaut*, 514 U.S. at 218–19, 227. Other branches of government may not intrude upon or usurp this power.

B. The Ninth Circuit's Expansion of the Ratification Doctrine Gives the Executive Control over Judicial Decisions

Here, the Ninth Circuit's decision would effectively give the executive branch final authority over court decisions. By the time Cordray sought to ratify his past *ultra vires* actions as director—including the enforcement action against Gordon—the district court had already issued a series of binding orders, including an *ex parte* restraining order freezing Gordon's assets, a broad preliminary injunction both prohibiting and requiring Gordon to engage in a range of conduct, and a judgment against Gordon that included a permanent injunction over which the court retains jurisdiction. At no point did Cordray or the CFPB return to the district court and ask it to rule on the propriety of its prior orders given that these orders had been predicated on the agency's *ul-*

tra vires conduct. Instead, Cordray unilaterally blessed his prior acts and the judicial consequences that flowed from them.

By holding that Cordray's unilateral ratification could extend not only to his own conduct, but also to subsequent court orders, Pet. App. 15a, the Ninth Circuit stretched the ratification doctrine to its constitutional breaking point. That decision would convert the executive's limited ratification authority into a power to alter the result of judicial rulings.

While this Court has recognized that executive officials can ratify prior *ultra vires* actions taken in their name provided that certain conditions are met, *see NRA Political Victory Fund*, 513 U.S. at 98, it has never held that this ratification power extends to decisions made by the judiciary. "That prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed." *Plaut*, 514 U.S. at 230.

Under the Ninth Circuit's expansive interpretation of the ratification doctrine, agencies will gain the de facto power to review court orders. For example, an agency could initiate a series of *ultra vires* lawsuits in violation of Article II and then later decide whether it wants to preserve or nullify any orders that have issued in these cases by either ratifying them or declining to do so. In the most extreme instance, agencies would gain the authority to decide whether to ratify court judgments on the merits, as was the case here. Indeed, nothing would prevent

agencies from exercising this power even with respect to judgments that have already become final.[5] This is what *Hayburn's Case* and its progeny prohibit. Executive officers may not "revise[], overturn[], or refuse[] faith and credit" to a court decision solely at their own discretion. *Chicago & S. Air Lines,* 333 U.S. at 113.

It is true that in *Hayburn's Case* and the cases that have followed it, a coordinate branch of government never sought to undo or overturn a prior court judgment rather than affirm it. But this is immaterial, as these powers are simply two sides of the same coin. Implicit in the power to ratify past judicial decisions is the power to *not ratify* them. The relevant question is thus *whether* the executive has attempted to dictate the outcome of a judicial ruling, not *what* outcome it has chosen. Again, it is the courts that get "to *decide*" cases, not agencies. *Plaut*, 514 U.S. at 218–19.

It is equally clear that executive officers do not have the power to "authorize" court decisions, no more than they have the power to annul them. For example, in *Ferreira*, this Court noted that a district attorney did not have the power to "authorize a judgment against [the United States]." 54 U.S. at 49.

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[5] At least one other case had resulted in a final judgment during the period in which Cordray had been unlawfully appointed. CFPB v. Jalan, No. 8:12-cv-2088 (C.D. Cal. July 23, 2013) (ECF No. 76) (entering default judgment). Numerous other cases had ended in a stipulated final judgment through settlement. *See, e.g.*, CFPB v. Payday Loan Debt Sol., Inc., No. 1:12-cv-24410 (S.D. Fla. Dec. 21, 2012) (ECF No. 10).

Similarly, numerous courts have held that the executive branch may not enter into a stipulated judgment regarding the constitutionality of a statute. *See, e.g.*, *Nat'l Revenue Corp. v. Violet*, 807 F.2d 285, 288 (1st Cir. 1986) ("For an attorney general to stipulate that an act of the legislature is unconstitutional is a clear confusion of the three branches of government; it is the judicial branch, not the executive, that may reject legislation."); *O'Callaghan v. Coghill*, 888 P.2d 1302, 1303–04 (Alaska 1995) (explaining that the state may not declare a law invalid through "stipulation or consent judgment"). Each branch has its own authority and obligation to ensure its actions are constitutional. Accordingly, the power to ratify court decisions is just as repugnant to the separation of powers as the power to circumvent them.

None of the cases on which the Ninth Circuit relied supports the counterintuitive proposition that an executive officer can ratify *a court ruling*. In *FEC v. Legi-Tech, Inc.*, the primary authority on which the Ninth Circuit relied, the question was whether the district court was required to dismiss a lawsuit brought by the Federal Election Commission (FEC) after the D.C. Circuit had determined, in a separate action, that the FEC's makeup violated Article II. 75 F.3d 704, 706 (D.C. Cir. 1996). The court held that the FEC's subsequent ratification of its prior acts meant that its decision "to file suit" was not "void *ab initio*," and thus the lawsuit could proceed. *Id.* at 707. It did not address the question of whether the FEC could also ratify prior judicial orders, such as a preliminary injunction or a judgment on the merits.

The other cases cited by the Ninth Circuit, *Doolin* and *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Bd.*, 796 F.3d 111 (D.C. Cir. 2015), involved agency ratifications of *their own administrative proceedings*. In *Doolin*, the question confronted by the D.C. Circuit was whether the director of the Office of Thrift Supervision could ratify "administrative enforcement proceedings" initiated by a prior unlawfully appointed "acting Director." 139 F.3d at 204, 212. And in *Intercollegiate*, the issue was whether the Copyright Royalty Board could ratify a rate-setting decision it had made before its members were duly appointed. 796 F.3d at 114. Neither of these cases held that the ratification doctrine extends beyond conduct within the agency's own purview, such as to the rulings of Article III courts.

The Ninth Circuit's holding is also inconsistent with this Court's precedent. While the Court has held that *Congress* can pass a law that effectively ratifies what would otherwise be an invalid judicial proceeding, *Heinszen,* 206 U.S. 370, it has never held that this power extends to the executive branch. Congress always has the power to pass a new law that *courts* must then apply retroactively to pending litigation. *Plaut*, 514 U.S. at 226 ("When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly."). But that is not what happened here. Instead, Cordray unilaterally ratified his past conduct without any court involvement. In any event, the CFPB director

does not have the same lawmaking authority as Congress. Again, ratification is not legislation.

The Ninth Circuit's opinion thus constitutes an unprecedented intrusion into the province of the judiciary. What's more, the Ninth Circuit concluded that this very intrusion is what "cured" Cordray's *ultra vires* conduct in violation of Article II. But one cannot cure an Article II violation by violating Article III. The constitutional separation of powers is meant to check abuse of executive authority, not enable it.

CONCLUSION

For the above reasons, and those stated in the petition, the Court should grant a writ of certiorari.

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