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-356-WHB-JCG

BRIEF OF PLAINTIFF-APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

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STATEMENT REGARDING ORAL ARGUMENT

The Bureau believes that oral argument would facilitate this Court's consideration of the issues in this case.

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ISSUES PRESENTED

1) The for-cause removal provision that Defendants challenge does not apply to the Bureau's Acting Director, who has ratified this enforcement action. Does the existence of the for-cause removal provision nevertheless entitle Defendants to judgment on the pleadings?

2) This Court has determined that the Consumer Financial Protection Act (CFPA) structures the Bureau so that, even though its Director may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office, the President can better control the Bureau than he can the FHFA. Does the Bureau's structure nonetheless violate the Constitution?

3) The Dodd-Frank Act includes an express severability clause that applies to the CFPA. If this Court holds that the Bureau's structure is unconstitutional, should it impose the same remedy that it imposed in *Collins* and sever the for-cause removal provision?

STATEMENT OF THE CASE

A. Introduction

The Bureau of Consumer Financial Protection ("Bureau") sued All American Check Cashing, Inc.; Mid-State Finance, Inc.; and Michael E. Gray ("Defendants") more than two years ago. The Bureau's Complaint alleged that, in connection with their check cashing and payday lending business, the Defendants engaged in a variety of unfair, deceptive, and abusive practices that injured consumers and violated the

Consumer Financial Protection Act (CFPA), 12 U.S.C. 5481-5603. Since then, the parties completed discovery, filed dispositive motions, and began trial preparation. During this pre-trial phase, Defendants filed, and the district court denied, a motion for judgment on the pleadings. In doing so, the court rejected, *inter alia*, Defendants' challenge to the constitutionality of the Bureau's structure. But shortly after denying that motion, and just three months short of the scheduled trial, the district court stayed all proceedings. The district court certified its denial of the motion for judgment on the pleadings so that Defendants could seek further review of the constitutional issue. This Court then granted Defendants' Petition for Permission to Appeal.

This Court should affirm the district court's denial of Defendants' motion for judgment on the pleadings and return this case to the district court so that it may be resolved on the merits. Defendants' appeal rests on the claim that the Bureau's statutory structure is unconstitutional because the Bureau is headed by a single Director who is removable by the President only for cause, not at will. But since last November, the Bureau has been headed by an Acting Director who can be removed by the President *at will*. And the Bureau's Acting Director has ratified the Bureau's decision to sue Defendants (and has approved the decision to defend this appeal). So any constitutional flaw that may have applied when the Bureau initiated this suit has been cured.

In any event, Defendants' constitutional challenge fails under binding Supreme Court precedent,[1] as the en banc D.C. Circuit held in *PHH Corp. v. CFPB*, 881 F.3d 1 (2018). The Supreme Court has long held that the Constitution does not forbid independent agencies that perform the sorts of functions the Bureau performs from being headed by individuals who are removable by the President only "for cause." And Defendants' argument that the Bureau's structure is unconstitutional because it is headed by a single Director instead of a multi-member commission cannot be reconciled with the Supreme Court's reasoning.

Recently, in *Collins v. Mnuchin*, 896 F.3d 640 (2018), this Court concluded that the structure of another independent agency, the Federal Housing Finance Agency (FHFA), did, in fact, violate the Constitution. According to this Court, various aspects of the FHFA's structure "insulated [it] to the point where the Executive Branch cannot control [it] or hold it accountable." *Id.* at 666. But in so holding, this Court determined that "[t]he FHFA is sui generis," and that "[t]here are no similarly insulated agencies." *Id.* at 670. In particular, this Court identified "salient distinctions" between the FHFA's structure and the Bureau's. *Id.* at 673. Indeed, those distinctions, as well as several other features of the Bureau's structure make a difference. As a

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[1] The Bureau does not take a position on whether existing Supreme Court precedent was correctly decided, or whether the President has independent authority to determine whether the Bureau's structure is constitutional.

result, the Bureau is not so isolated from the President that he cannot fulfill his constitutional duty to take care that the laws be faithfully executed.

Finally, if there were any constitutional problem with the Bureau's structure that was not cured by the Acting Director's ratification, then the appropriate remedy would be to sever the for-cause removal provision in accordance with the severability clause that applies to the CFPA.

B. Background

1. The Bureau

As part of its response to the 2008 financial crisis, Congress enacted the CFPA, *supra*.[2] The CFPA established the Bureau and charged it with enforcing certain pre-existing consumer financial laws, as well as the newly enacted CFPA, which, among other things, prohibits unfair, deceptive, or abusive acts or practices in connection with consumer financial products or services. 12 U.S.C. 5491(a), 5531(a), 5536(a)(1)(B).

When Congress created the Bureau, it drew from its experience with other financial regulators and independent agencies. As it did with the Office of the Comptroller of the Currency (OCC), Congress provided that the Bureau would have a single Director who served a five-year term. *See* 12 U.S.C. 2 (OCC); 12 U.S.C. 5491(c)(1) (Bureau). And as it did with the leaders of the Federal Trade Commission

[2] The CFPA is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act).

(FTC) and the Federal Energy Regulatory Commission (FERC) (among many others), Congress provided that the Bureau's Director would be removable by the President only for cause – "inefficiency, neglect of duty, or malfeasance in office." *See* 15 U.S.C. 41 (FTC); 42 U.S.C. 7171 (FERC); 12 U.S.C. 5491(c)(3) (Bureau); *see also PHH*, 881 F.3d at 91-92 (collecting other examples). And as it did with other financial regulators, such as the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), and the OCC, Congress chose to fund the Bureau primarily outside of the annual appropriations process. *See* 12 U.S.C. 243 (FRB); 12 U.S.C. 1815(d), 1820(e) (FDIC); 12 U.S.C. 16 (OCC); 12 U.S.C. 5497 (Bureau). But unlike those agencies, the Bureau's funding is capped. 12 U.S.C. 5497. The Bureau can exceed the cap only with the approval of Congress and the President. 12 U.S.C. 5497(e). Congress also created the Financial Stability Oversight Council (FSOC), which has the authority to stay and set aside any rules promulgated by the Bureau if they threaten the safety and soundness of the banking system or the stability of the financial system. 12 U.S.C. 5513.

Although the Bureau's former Director, Richard Cordray, was removable only for cause, *see* 12 U.S.C. 5491(c)(3), the Bureau's current head is removable by the President at will, *Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154 (Nov. 25, 2017). On November 24, 2017, Director Cordray resigned. President Trump then designated Mick Mulvaney to serve as the Bureau's Acting Director pursuant to the Federal Vacancies Reform Act

(FVRA), 5 U.S.C. 3345-3349d. *See* The White House, Office of the Press Secretary, *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), www.whitehouse.gov/the-press-office/2017/11/24/statement-president-donald-j-trumps-designation-omb-director-mick. The FVRA does not preclude the President from designating another eligible official and thereby removing and replacing the Acting Director at will. *See* 5 U.S.C. 3345-3349d.

On June 18, 2018, President Trump nominated Kathleen Kraninger to head the Bureau. *See* Seven Nominations Sent to the Senate Today, www.whitehouse.gov/presidential-actions/seven-nominations-sent-senate-today-3/. If her nomination is confirmed, per the terms of the CFPA, she will be removable by the President only for cause.

2. Proceedings below

Because this Court is reviewing the district court's denial of a motion for judgment on the pleadings, the only facts before this Court are those alleged in the pleadings, including the Bureau's Complaint (ROA.43-66), which it filed on May 11, 2016. *Bosarge v. Miss. Bur. of Narcotics*, 796 F.3d 435, 440 (5th Cir. 2015). The Complaint alleged that, in connection with their offering and providing of payday loans and check cashing services, Defendants had engaged in abusive, deceptive, and unfair acts and practices that injured consumers and violated sections 1031 and 1036 of the CFPA, 12 U.S.C. 5531(a), 5536(a). In particular, the Complaint alleged that

Defendants obscured the actual costs of their check cashing service by, among other things, making false statements regarding the availability of information about the costs, physically blocking receipts that disclosed those costs, and interfering with consumers' ability to see state-mandated signs that disclosed the costs. ROA.60. Defendants also took advantage of consumers by processing checks without consent, and by applying an ink stamp on the back of checks that made it difficult for consumers to cash them elsewhere. ROA.61. The Complaint further alleged that, in connection with their payday lending business, Defendants falsely represented that the loans they offered were less expensive than their competitors' loans when, in fact, the opposite was true. ROA.63. In addition, Defendants failed to notify consumers who had overpaid their accounts, and also failed to provide refunds to those consumers. ROA.64. The Bureau sought, *inter alia*, injunctive relief, restitution for injured consumers, and civil penalties. ROA.65.[3]

On May 24, 2017, Defendants filed a motion for judgment on the pleadings raising a variety of constitutional challenges, including their argument now before this

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[3] Defendants suggest that, because of the settlement of a law enforcement action brought against them by the State of Mississippi, the Bureau's action is no longer necessary. *See* Appellants' Principal Brief (Br.) at 9-10. In fact, however, although Mississippi's action resulted in the revocation of Defendants' licenses to operate in Mississippi, it required them to provide refunds to only some of the Mississippi residents who could potentially receive refunds under the Bureau's action. Further, that action had no effect on Defendants' operations in either Alabama or Louisiana, nor did it provide restitution to residents of those states. *See* ROA.3254-94, 6628-39.

Court: that the Bureau is unconstitutionally structured because it is headed by a single Director who is removable by the President only for cause. ROA.2209-42.

On March 21, 2018, the district court denied that motion. ROA.7206-16. The court held that "'[n]o relevant consideration gives us reason to doubt the constitutionality of the independent [Bureau's] single-member structure. Congress made constitutionally permissible institutional design choices for the [Bureau] with which courts should hesitate to interfere.'" ROA.7209-10, quoting *PHH*, 881 F.3d at 110.

When the Bureau originally filed its Complaint against Defendants, it was headed by Director Cordray. But the Bureau has continued the prosecution of the case under the direction of Acting Director Mulvaney. Indeed, on February 5, 2018, the Bureau filed with the district court a notice that the Acting Director had ratified the Bureau's decision to file the lawsuit against Defendants, accompanied by a declaration from the Acting Director. ROA.7177-84. In his declaration, Acting Director Mulvaney explained that he had reviewed the Bureau's decision to file a lawsuit against Defendants; he had been briefed by the Bureau's Office of Enforcement regarding the case (once the Bureau issues a complaint, its Office of Enforcement has responsibility for the prosecution); and he then ratified the Bureau's decision.

On March 26, 2018, Defendants moved the district court to certify for interlocutory appeal its denial of Defendants' motion for judgment on the pleadings.

ROA.7224-43. The district court granted that motion and certified the following question: "Does the structure of the Consumer Financial Protection Bureau ('CFPB') violate Article II of the Constitution and the Constitution's separation of powers?" The court also stayed all proceedings in this case pending a decision by this Court regarding any interlocutory appeal. ROA.7244-47. On April 24, 2018, this Court granted permission for an interlocutory appeal. ROA.7252.

STANDARD OF REVIEW

This Court reviews the district court's denial of a motion for judgment on the pleadings *de novo*. *Bosarge*, 796 F.3d at 439.

SUMMARY OF ARGUMENT

To avoid this law enforcement action and potential liability, Defendants seek to have this Court hold the Bureau unconstitutional. They contend that the President must have unrestricted power to remove every executive officer of the United States, and that the Bureau is unconstitutional because the President can remove the Bureau's Director only for cause. *See* Br. at 13-14, citing *Myers v. United States*, 272 U.S. 52 (1926). Even if the CFPA's for-cause removal provision were unconstitutional, that would not entitle Defendants to judgment on the pleadings because the Bureau's Complaint has been ratified by the Bureau's Acting Director, Mick Mulvaney, who is removable at will. This ratification cured any defect with the initiation of this action.

In any event, the Supreme Court has held that for-cause removal, standing alone, is not unconstitutional. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935);

Morrison v. Olson, 487 U.S. 654 (1988); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Taken together, these cases hold that, depending on the functions performed by an agency, Congress may impose limited restrictions on the President's authority to remove an officer (such as the Bureau's Director) so long as the President retains sufficient authority under Article II to ensure that the laws are faithfully executed. *Humphrey's Executor* held that the limited removal protection that applies to FTC Commissioners satisfies that test. 295 U.S. at 629. The limited removal protection that applies to the Bureau's Director is identical to the for-cause removal protection that applies to FTC Commissioners, and is unlike the multiple layers of removal protection that the Supreme Court disapproved in *Free Enterprise*. Further, the Bureau performs many of the same functions that the FTC performed when its structure was approved by the Supreme Court in *Humphrey's Executor*. *Compare* 15 U.S.C. 45, 46(a), 49 (1934) (FTC), *with* 12 U.S.C. 5531(a), 5563, 5511(c) (Bureau). So the CFPA's for-cause removal provision is not inherently unconstitutional.

In *Collins*, this Court determined that various aspects of the structure of the FHFA rendered it unconstitutional. But this Court also determined that the Bureau's structure is different, and, unlike the FHFA, allows the President more "direct[] control." *See Collins*, 896 F.3d at 673. Based on binding precedent, the Bureau's structure is constitutional.

Although Defendants challenge the CFPA's for-cause removal provision, they seek a remedy that goes far beyond that provision: striking down the entire CFPA.

But the Dodd-Frank Act has a severability clause, expressing Congress's intent that if any provision of the Act is held unconstitutional, the remainder of the Act should remain in place. If this Court determines the CFPA's for-cause removal provision is unconstitutional, it should sever that provision. The Bureau would then be able to continue to carry out its mission headed by a Director who would always be removable by the President at will. Even without the clarity provided by a severability clause, this Court imposed the same remedy when it determined that the FHFA's structure was unconstitutional. So even if Defendants prevail in their constitutional challenge, remand – not dismissal – is required.

ARGUMENT

I. DEFENDANTS ARE NOT ENTITLED TO JUDGMENT ON THE PLEADINGS BECAUSE AN OFFICIAL WHO IS REMOVABLE AT WILL RATIFIED THE COMPLAINT

The appropriate remedy for a constitutional defect in a body charged with enforcing federal law is not to prevent the law from being enforced (as Defendants would prefer), but rather to provide that the law be enforced by a constitutional entity. *See Collins*, 896 F.3d at 675 ("When a removal limitation crosses constitutional lines, courts routinely declare the limitation inoperative, prospectively correcting the error."). In *Free Enterprise*, for example, the Supreme Court held that the challengers to the Public Company Accounting Oversight Board (PCAOB) were "not entitled to broad injunctive relief against the Board's continued operations" but were instead entitled to "declaratory relief sufficient to ensure that" the law "will be enforced only

by a constitutional agency accountable to the Executive." 561 U.S. at 513. And in *Collins*, this Court held that those challenging the FHFA's structure were entitled to have the FHFA operate as "a properly supervised executive agency." 896 F.3d at 676. The challengers were not, however, entitled to an order striking down the FHFA or invalidating any of the FHFA's past actions. *Id.*

Here, the Bureau filed and seeks to prosecute a Complaint. That Complaint has been ratified by an official, Acting Director Mulvaney, who is removable by the President at will. Under *Collins* and *Free Enterprise*, even if Defendants' constitutional challenge were meritorious, Defendants would not be entitled to stop the Bureau from ever pursuing its claims against them. Defendants would be entitled only to have the CFPA enforced against them by a Bureau whose Director is removable at will. Here, they have already received that relief with respect to the Complaint: An Acting Director removable at will approved this enforcement action. Because Acting Director Mulvaney's ratification already gave Defendants all the relief to which their constitutional challenge could entitle them at the pleading stage, this Court need not resolve Defendants' constitutional challenge in this interlocutory appeal.[4]

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[4] The Bureau's position is that this Court need not address Defendants' constitutional challenge. Contrary to Defendants' suggestion, Br. at 59-62, the Bureau does not contend that this Court somehow lacks jurisdiction to decide the constitutional question.

A. Acting Director Mulvaney's ratification cured any constitutional defect with the initiation of this case

Defendants argue that prosecution of this action is unconstitutional and the case must be dismissed because the Complaint was originally filed when the Bureau's Director was removable only for cause. However, any constitutional defect with the initiation of this action was cured by the Acting Director's ratification because he is removable at will.[5] While Defendants ask this Court to award them judgment without regard to the merits of the Bureau's claims, *see* Br. 49-51, they are not entitled to such overbroad relief, *see Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (declining to dismiss administrative enforcement action where adjudication had been conducted by an official who was appointed in violation of the Appointments Clause and remanding for a "new 'hearing before a properly appointed' official," quoting *Ryder v. United States*, 515 U.S. 177, 188 (1995)); *Collins*, 896 F.3d at 675 (explaining that "when fashioning relief for constitutional violations, courts try to limit the solution to the problem," and that "courts routinely accord validity to past actions of unconstitutionally structured governmental agencies." (cleaned up)).

1. Where an enforcement action is filed by an agency that is subject to a constitutional defect, the agency – as soon as it is properly constituted – can use

[5] Defendants rightly do not contest that the President may remove Acting Director Mulvaney at will. As noted above, the FVRA, under which Mr. Mulvaney was designated Acting Director, does not limit the President's ability to designate a different Acting Director, and thereby remove Mr. Mulvaney from that role.

ratification to cure the constitutional problem with the enforcement action. In such cases, dismissal is not warranted. For instance, in *FEC v. Legi-Tech*, the D.C. Circuit reversed the dismissal of an enforcement action the Federal Election Commission filed while it was unconstitutionally structured. 75 F.3d 704 (1996). The constitutional problem involved the Commission's structure: When the Commission authorized the enforcement action it was composed of six presidential appointees and two non-voting *ex officio* congressional members. But while cross-motions for summary judgment were pending, the D.C. Circuit held in a different case, *FEC v. NRA Political Victory Fund*, 6 F.3d 821 (1993), that the Commission's inclusion of the congressional members was unconstitutional. In response, the Commission reconstituted itself without the congressional members and ratified its decision to file the action. In *Legi-Tech*, the D.C. Circuit rejected defendants' request for dismissal and their argument that "reconstitution and ratification is not an effective remedy because separation of powers is a 'structural' constitutional defect." 75 F.3d at 708. The court held instead that ratification by a properly constituted Commission was an adequate remedy for the constitutional problem with the initial complaint. *Id.* at 708-09. It therefore permitted the Commission to proceed with its enforcement action without having "to return to square one." *Id.* at 708.

Likewise, in *CFPB v. Gordon*, the Ninth Circuit "agree[d] with the D.C. Circuit's approach" in *Legi-Tech* and rejected a claim that a Bureau enforcement action had to be dismissed merely because it was *initially* approved by a Director who was appointed

in violation of the Appointments Clause. 819 F.3d 1179, 1191 (9th Cir. 2016). Instead, the Ninth Circuit held that a subsequent ratification by a Director who had been validly appointed "cure[d] any initial Article II deficiencies." *Id.*

This Court should follow *Legi-Tech* and *Gordon* and hold that Acting Director Mulvaney's ratification cured any constitutional defect with the Bureau's initial filing of the Complaint.

2. *Legi-Tech* and *Gordon* are consistent with well-established agency-law principles. Under those principles, when an agent lacks authority to act on behalf of a principal, the principal (acting on its own or through a valid agent) may subsequently authorize actions that were taken by the agent who lacked authority. Restatement (Third) of Agency, ch. 4, intro. note; *id.* § 4.01 cmt. b; *see United States v. Heinszen & Co.*, 206 U.S. 370, 382 (1907). Such a ratification has retroactive effect: It "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally." *Marsh v. Fulton Cnty.*, 77 U.S. 676, 684 (1870); *accord Heinszen*, 206 U.S. at 382 (stating that ratification "retroactively give[s]" an agent's acts "validity").

That is precisely what happened here. Defendants claim that Director Cordray (who acted as an agent for the Bureau) lacked authority to initiate the suit against Defendants on behalf of the Bureau (the principal) because Director Cordray was removable by the President only for cause. But later, Acting Director Mulvaney (an agent) who is removable at will and therefore has unquestioned authority to act on

behalf of the Bureau (the principal) specifically reviewed the Bureau's decision to file the lawsuit against Defendants and then ratified that decision. ROA.7177-84.

Consistent with *Legi-Tech* and *Gordon*, any prior constitutional issue has now been remedied because the decision to issue the Complaint that the Bureau filed against Defendants has been ratified by an executive officer who is not subject to the constitutional defect Defendants allege. *See also Wilkes-Barre Hosp. Co., LLC v. NLRB*, 857 F.3d 364, 371-72 (D.C. Cir. 2017) (holding that a properly constituted Board could ratify prior actions of an improperly constituted Board and that properly appointed Board official could ratify his own prior actions); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604-05 (3d Cir. 2016) (same); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-19 (D.C. Cir. 2015) (de novo reconsideration by properly appointed Board cured prior violation of Appointments Clause); *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212-14 (D.C. Cir. 1998) (ratification by properly-appointed official cured prior violation of Vacancies Act).

B. Ratification can cure defects from "structural" constitutional violations

Defendants attempt to escape the effect of the Acting Director's ratification by, first, inventing an exception to the usual rules – they claim that "structural" constitutional violations cannot be cured by ratification. This argument is inconsistent with this Court's decision in *Collins* to "leave intact … the FHFA's past actions" even after the Court held that the FHFA's structure violated the separation of powers. 896

F.3d at 676. And it is inconsistent with the D.C. Circuit's decision in *Legi-Tech* that ratification could and did remedy a prior "structural" constitutional problem.[6]

Defendants do not cite any case recognizing a "structural" constitutional exception to ratification. Instead, they cite cases (1) explaining that violations of the separation of powers are important and should be remedied, *see* Br. at 53-54, citing *Ryder*, *Edmond v. United* States, 520 U.S. 651 (1997), *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), and *Stern v. Marshall*, 564 U.S. 462 (2011); (2) declining to accord *de facto* validity to decisions made by improperly constituted judicial panels, *see* Br. at 53, citing *Ryder* and *Nguyen v. United States*, 539 U.S. 69 (2003); and (3) invalidating a state administrative adjudication that failed to maintain religious neutrality, *see* Br. at 53, citing *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). None of these cases is about ratification.[7] So none holds or even suggests that ratification cannot remedy a prior "structural" constitutional violation.

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[6] Defendants dismiss *Legi-Tech* as irrelevant to their claim that "structural" constitutional violations cannot be ratified. Br. at 56 n.14. But, as explained above, the D.C. Circuit squarely rejected that very argument in concluding that the FEC's ratification was an adequate remedy for the structural constitutional problem the court previously identified in *NRA Political Victory Fund*. *See Legi-Tech*, 75 F.3d at 708.

[7] If Defendants intend to suggest that *Masterpiece Cakeshop* addressed ratification because a state court reviewed the commission's order *de novo*, they are mistaken. The Court found that the state court failed to correct, and even perhaps perpetuated, hostility to a religious viewpoint. *See* 138 S. Ct. at 1731 (finding state court did not "answer the baker's concern" of religious hostility and that state court's opinion "itself sends a signal of official disapproval of Phillips' religious beliefs").

This is not surprising. The law is clear that ratification *can* cure defects in actions that were originally taken in violation of the Appointments Clause and other "structural" constitutional protections. *See, e.g.*, *Wilkes-Barre Hosp. Co.*, 857 F.3d at 371 (Appointments Clause); *Advanced Disposal*, 820 F.3d at 602 (Appointments Clause); *Gordon*, 819 F.3d at 1191-92 (Appointments Clause); *Legi-Tech*, 75 F.3d at 708-09 (separation of powers).

C. The Bureau has sufficient authority to support the ratification

Second, Defendants argue that Acting Director's ratification failed because it did not satisfy the ratification standard described in the Restatement (Second) of Agency that the Supreme Court applied in *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994). Under the Second Restatement (but not the now-current Third Restatement), ratification requires that the party ratifying an action have the authority to act both at the time of the underlying action and at the time of the ratification.[8] Even assuming the Second Restatement applies, the Bureau had the required authority both when the Complaint was filed and when Acting Director Mulvaney ratified that filing.

1. The Bureau's authority at the time of the Complaint

At the time of the Complaint, the Bureau had authority to bring an action

[8] Under the Third Restatement, a principal may ratify if it existed at the time of the act and had capacity at the time of ratifying the act. *See* Restatement (Third) of Agency § 4.04.

against Defendants alleging that they violated the consumer laws. *See* 12 U.S.C. 5564. In *Gordon*, the Ninth Circuit held that this statutory delegation meant the Bureau had authority at the time the complaint in that case was filed even though the invalid recess appointment of Director Cordray had left the Bureau without a properly appointed Director. 819 F.3d at 1192. The same principles apply here. The Bureau had authority to file the Complaint when it did so even if Defendants are correct that the for-cause removal provision that applied to Director Cordray left the Bureau without a properly removable Director.

Defendants attempt to distinguish *Gordon* on the ground that it involved the President's power *to appoint* the Bureau's Director, while this case involves the President's power *to remove* the Bureau's Director. In Defendants' estimation, only the latter case involves a challenge to "the structure and authority of the [Bureau] itself." Br. at 55, quoting *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916, at *36 (S.D.N.Y. June 21, 2018). But this argument rests on a distinction that *Gordon* itself rejected.[9] As explained above, in upholding the Bureau's authority to ratify its prior decision to bring suit, *Gordon* relied on and expressly agreed with *Legi-Tech*. *Legi-Tech* held, and *Gordon* "agree[d]," that a subsequent ratification "cured" the constitutional problem with the filing of a complaint "[e]ven though the FEC was

[9] Such a distinction would also be inconsistent with the Supreme Court's teaching that the Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond*, 520 U.S. at 659.

illegally constituted when it [originally] brought the action." *Gordon*, 819 F.3d at 1191.

In any event, as the Third Restatement of Agency explains, "[i]t is not necessary for ratification that the principal have had capacity … at the time of the act that the ratification concerns." Restatement (Third) of Agency § 4.04 cmt. b. To be sure, in *NRA Political Victory Fund*, the Supreme Court mentioned the then-prevailing agency law principle (reflected in the Second Restatement) that for a ratification to be effective, the principal must have had authority to do the act at the time it was initially done. 513 U.S. at 98. The Court, however, did not actually address or apply this principle. The more recent agency law reflected in the Third Restatement rejects altogether the requirement that the principal have had authority at the time of the initial act. *See* Third Restatement § 4.04 cmt. b ("Contemporary cases do not support" the requirement that "the principal have had capacity at the time of the original act as well as at the time of ratification.").

2. The Bureau's authority at the time of the ratification

Defendants are likewise wrong to contend that the CFPA's statute of limitations, 12 U.S.C. 5564(g)(1), deprived the Bureau of authority at the time Acting Director Mulvaney ratified the Complaint. The statute of limitations provides that, "[e]xcept as otherwise permitted by law or equity, no action may be brought under [the CFPA] more than 3 years after the date of discovery of the violation to which an action relates." Defendants claim that by the time of the ratification in February 2018, this statute of limitations had run on the claims the Bureau asserted in its May 2016

Complaint. According to Defendants' theory, the Bureau's claims against Defendants for their conduct before February 2015 are barred by the CFPA's statute of limitations even though the Bureau diligently prosecuted its claims consistent with the requirements of the CFPA. Defendants are wrong.

First, the Bureau's Complaint contains several allegations regarding when Defendants commenced their violations; it includes none alleging when, or if, the conduct ceased, let alone when the Bureau discovered those violations. *See*, *e.g.*, ROA.46 (Complaint ¶ 9 (alleging when Defendants began their check cashing service; ROA.54 (Complaint ¶ 42 (alleging that Defendants implemented their lending program "since at least 2011"); ROA.58 (Complaint ¶ 55 (alleging that Defendants failed to make refunds "until at least 2014")). Because it is not "evident from the pleadings" that the Bureau's action would have been time-barred at the time of ratification, Defendants are not entitled to judgment on the pleadings based on their statute of limitations objection. *Cf. Taylor v. Bailey Tool Mfg. Co.*, 744 F.3d 944, 946 (5th Cir. 2014).[10]

Second, Defendants are wrong to claim that even though the Bureau attempted to prosecute its claims consistent with its organic statute, the statute of limitations in this case not only began to run, but, in fact, expired before (in Defendants' view) the

[10] Although the parties have not addressed statute of limitations issues or the date of discovery in the district court, the Bureau's summary judgment papers explained that, for remedial purposes, "[t]he record demonstrates that Defendants violated federal consumer financial laws … through at least June 8, 2017." ROA.6534.

Bureau could ever lawfully file suit. Defendants do not cite any case in which a statute of limitations was construed to run before a party (let alone the federal government) could lawfully file suit and obtain relief. *Cf. Johnson v. United States*, 544 U.S. 295, 305 (2005) (calling it "highly doubtful" that Congress intended a time limit on pursuing a claim to expire before the claim arose). This is not surprising. "Statutes of limitations are designed to encourage plaintiffs to pursue diligent prosecution of known claims." *California Pub. Employees' Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2049 (2017) (cleaned up). The Bureau certainly did that with respect to Defendants.

The CFPA's statute of limitations is particularly inhospitable to a construction that would provide no time during which the Bureau could bring suit for violations of the CFPA. The period only begins to run from the "date of discovery of the violation." 12 U.S.C. 5564(g)(1). Defendants do not explain how the Bureau could discover a violation at a time when, according to Defendants, the Bureau could not even act. And the limitations provision expressly contemplates that the Bureau will be permitted to bring claims even beyond three years from the date of discovery of the violation "as otherwise permitted by law *or equity*." *Id.* (emphasis added).

Here, equity surely permitted the Bureau (once it was led by a Director who was removable at will) to promptly ratify claims it had already brought during the limitations period. Indeed, "[c]ourts have typically extended equitable tolling where 'the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period.'" *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 239 (5th Cir.

2010), quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 & nn.3-4 (1990). This is because statutes of limitations "assure fairness to defendants" and "promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence is lost, memories have faded, and witnesses have disappeared." *Clymore v. United States*, 217 F.3d 370, 376 (5th Cir. 2000), quoting *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 428 (1965). Allowing the Bureau to continue to prosecute its claims in light of the Acting Director's ratification risks no unfair surprise or other injustice to Defendants because the Bureau timely filed its claims and the parties have already completed discovery and begun trial preparation.

Alternatively, the Court may construe the Bureau's notice of ratification as an amended or supplemental pleading that corrects a prior deficiency in its pleading and therefore relates back to when the Complaint was filed. *See FDIC v. Conner*, 20 F.3d 1376, 1385 (5th Cir. 1994) (explaining that "augmentation or rectification of claims that have been asserted before the limitations period has run does not offend the purpose of a statute of limitations, which is simply to prevent the assertion of stale claims").

NRA Political Victory Fund does not support Defendants' argument that the Bureau is forever barred from pursuing alleged CFPA violations because (according to Defendants) the statute of limitations expired while the Bureau was prosecuting those very claims. The Supreme Court's decision there did not concern whether a statute of limitations can preclude an agency from ratifying a timely (but defective) attempt to

bring a law enforcement action. Rather, it concerned whether the Solicitor General could ratify an unauthorized petition for certiorari after a *jurisdictional* time limit for filing of the petition had expired. 513 U.S. at 846. Here, by contrast, the non-jurisdictional statute of limitations has not expired and the Bureau did not sleep on its rights.[11]

II. THE BUREAU'S STRUCTURE IS CONSTITUTIONAL UNDER APPLICABLE PRECEDENT

Over the last 130 years, Congress has created many independent agencies within the executive branch headed by individuals who are removable by the President only for cause. *See*, *e.g.* Federal Reserve Board, 12 U.S.C. 242; Federal Trade Commission, 15 U.S.C. 41; Consumer Product Safety Commission, 15 U.S.C. 2053(a); *see also* Henry B. Hogue *et al*., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 1, 15 (2017). "And the Supreme Court has approved this design." *Collins*, 896 F.3d at 660, citing *Free Enterprise*, 561 U.S. at 483.

[11] Defendants' reliance, Br. at 57-58, on *Nasewaupee v. Sturgeon Bay*, 251 N.W.2d 845 (Wisc. 1977), is similarly misplaced. In that case the court declined to permit a town to ratify an unauthorized suit filed on its behalf where "no action was taken by the town board" within the sixty-day statute of limitations. *Advanced Disposal* and *Doolin*, *see* Br. at 58-59, are further afield. Those cases *upheld* agency ratifications while noting the absence of a statute of limitations issue; they did not say that a statute of limitations should be applied to preclude an agency from continuing its diligent prosecution of violations of federal law.

In *Collins*, this Court considered five elements of the structure of the FHFA, and concluded that, taken together, those elements "insulate that agency from meaningful Executive Branch oversight." 896 F.3d at 675. But this Court determined that there are "salient distinctions" between the FHFA's structure and the Bureau's. It concluded that, under the law of this Court and the Supreme Court, the Bureau's structure does not interfere with the President's duty to take care that the laws be faithfully executed because the President retains sufficient oversight as to the Bureau's activities.[12]

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[12] In addition to the en banc D.C. Circuit (and the court below), most lower court decisions have upheld the constitutionality of the Bureau's for-cause removal provision, although two have disagreed. *Compare:*

- *CFPB v. Think Finance, LLC*, No. 17-cv-127-GF-BMM, 2018 WL 3707911 (D. Mont. Aug. 3, 2018) (upholding the constitutionality of the Bureau);
- *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017), *stayed pending appeal*, No. 17-55721 (9th Cir. June 1, 2017) (same);
- *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-2106, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017), *appeal docketed*, No. 18-15431 (9th Cir. Mar. 15, 2018) (same);
- *CFPB v. TCF Nat'l Bank*, No. 17-CV-00166, 2017 WL 6211033 (D. Minn. Sept. 8, 2017) (same);
- *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), *stayed pending appeal*, No. 17-56324 (9th Cir. Sept. 13, 2017) (same);
- *CFPB v. Navient Corp.*, No. 3:17-CV-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (same);
- *CFPB v. CashCall, Inc.*, No. CV 15-7522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016), *appeal docketed*, No. 18-55479 (9th Cir. Apr. 12, 2018) (same);
- *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015) (same); *and*
- *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (same);

A. For-cause removal violates constitutional separation of powers only if it impedes the President's ability to perform his constitutional duties

In *Morrison*, the Court held that, whether restrictions of the President's authority to remove agency officials violate constitutional separation-of-powers principles turns on whether those restrictions "impede the President's ability to perform his constitutional duty" to faithfully execute the laws. 487 U.S. at 691. The CFPA imposes a limited restriction on the President's authority to remove the Bureau's Director – the Director is appointed for a five-year term, and during that term, can be removed by the President only for cause, *i.e.*, "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).[13] In *Humphrey's Executor*, the

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with:

- *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916 (S.D.N.Y. June 21, 2018) (Bureau's structure is unconstitutional); *and*
- *CFPB v. D&D Mktg.*, No. 2:15-cv-09692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016), *interlocutory appeal granted*, No. 17-55709 (9th Cir. May 17, 2017) (same).

Three judges did dissent to the en banc decision in *PHH*. 881 F.3d at 137 (Henderson, J., dissenting); *id.* at 164 (Kavanaugh J., and Randolph, J. dissenting).

[13] It makes no constitutional difference that, because the Director is appointed to a five-year term, a Director appointed by one president might serve through the term of another. *See* Br. at 24. "None of the leaders of independent financial-regulatory agencies serves a term that perfectly coincides with that of the President, and many have longer terms than the [Bureau's] Director." *PHH*, 881 F.3d at 99. Indeed, because the five FTC Commissioners serve staggered terms of seven years, 15 U.S.C. § 41, the President is more likely to have an opportunity to appoint the Bureau's Director in a single term than he is to appoint a controlling majority of the FTC. *See*

Supreme Court upheld the provision of the FTC Act that gives the five FTC Commissioners for-cause removal protection, protection that is identical to the Director's for-cause protection. *Compare* 15 U.S.C. 41 (FTC), *with* 12 U.S.C. 5491(c)(3) (Bureau).

The central holding of *Humphrey's Executor* was that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enterprise*, 561 U.S. at 483. As the Court later explained, *Humphrey's Executor* concluded that "it was not essential to the President's proper execution of his Article II powers that [the agency] be headed up by individuals who were removable at will." *Morrison*, 487 U.S. at 691. The reason for this was that "we cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority." *Id.*[14] And indeed, this Court recognized that "limiting the

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CFPB v. Navient, 2017 WL 3380530, at *17 (80% of the time the President will have an opportunity to appoint the Bureau's Director, but only 57% of the time will the President be guaranteed an opportunity to appoint a controlling majority of the FTC). This Court in *Collins* did not base its decision on the fact that the FHFA's Director serves a five-year term. *See* 12 U.S.C. 4512(b)(2).

[14] In *PHH*, the D.C. Circuit analyzed Supreme Court precedent to hold that for-cause removal provisions impose only a "mild constraint" on the President. 881 F.3d at 78. *See also Bowsher v. Synar*, 478 U.S. 714, 729 (1986) (describing a for-cause removal provision identical to the one in the CFPA as "very broad.").

President to 'for cause' removal is not sufficient to trigger a separation-of-powers violation." *Collins*, 896 F.3d at 667.[15]

When the Court elaborated on *Humphrey's Executor* in *Morrison*, it explained that the nature of the functions performed by the agency is also relevant. 487 U.S. at 691 n.30; *see also PHH*, 881 F.3d at 86 ("'the most reliable factor' in deciding whether a removal restriction comported with the President's constitutional authority [is] 'the nature of the function that Congress vested' in the agency," quoting *Wiener v. United States*, 357 U.S. 349, 353 (1958)). In *Humphrey's Executor*, the Court upheld for-cause removal for the Commissioners of the FTC, an agency that, like the Bureau, brings civil actions to enforce consumer protection statutes.[16] *Compare* 12 U.S.C. 5511,

[15] Defendants rely heavily on *Myers*, and argue that the President must have unlimited power to remove all executive officers. *See* Br. at 7, 13, 16-18. They further contend that *Humphrey's Executor* and *Morrison* are merely limited exceptions to *Myers*. *See* Br. at 27. But they ignore that in *Humphrey's Executor*, a unanimous decision that was issued just nine years after *Myers*, the Court held that *Myers* stood only for the narrow point on which the decision was based: that Congress could not condition the President's removal authority on the advice and consent of the Senate. 295 U.S. at 626. Further, although the Court in *Free Enterprise* referred to *Myers* as a "landmark" decision, *see* Br. at 16, it considered *Myers* to be a landmark, not because it provided the President with illimitable power of removal, but because it affirmed that the Constitution requires that "the President therefore must have *some power* of removing those for whom he can not continue to be responsible." 561 U.S. at 493 (internal quotation marks omitted; emphasis added).

[16] In their brief, amici Texas and 13 other states erroneously cite *PHH* for the proposition that the Bureau has criminal law enforcement authority. *See* Brief of Texas *et al.* at 13, citing *PHH*, 881 F.3d at 80. The Bureau has no such authority. The portion of *PHH* cited by the states merely recognized that, in *Morrison*, the Supreme Court

5481(14) (the Bureau implements its organic statute as well as eighteen enumerated consumer laws, some of which the FTC also enforces), *with* 15 U.S.C. 45 (authorizing FTC to prevent unlawful practices in or affecting commerce), *and* FTC.gov, *Statutes Enforced or Administered by the Commission*, www.ftc.gov/enforcement/statutes (listing more than 70 laws that FTC plays role in enforcing or administering); *see also PHH*, 881 at 94 ("the [Bureau's] function is remarkably similar to that of the FTC").[17] And in *Free Enterprise*, the Court held that the PCAOB, an agency that, like the Bureau, can issue rules, conduct examinations of industry members, and impose sanctions for law violations, could be separated from the President by one layer of for-cause removal. 561 U.S. at 485, 509.[18]

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approved for-cause removal for an independent counsel who could conduct criminal prosecutions. *Id.*

[17] In *Collins*, this Court explained that the FHFA "possesses broad discretion to exercise regulatory and enforcement authority over" "two of the nation's largest financial companies [*i.e.*, Fannie Mae and Freddie Mac]." 896 F.3d at 645, 647. This Court never suggested, however, that the nature of the functions performed by the FHFA would preclude for-cause removal.

[18] As Defendants note, the Court in *Humphrey's Executor* referred to the FTC's functions as "quasi-legislative" and "quasi-judicial." *See* Br. at 18, citing 295 U.S. at 628. But the Court later explained that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28. In *Collins*, this Court observed that the Supreme Court has never "formally abrogated the *Humphrey's Executor* holding" with respect to the nature of the functions performed by the FTC. 896 F.3d at 672 n.241. But the Court did subsequently recognize that the PCAOB, an agency that, like the Bureau, performs quintessentially executive functions, could be

But there are limits. In *Free Enterprise*, the Court applied the test from *Humphrey's Executor* and *Morrison* to overturn "an extreme variation on the traditional good-cause removal standard." *PHH*, 881 F.3d at 89. The provision at issue in *Free Enterprise* shielded members of the PCAOB from the President with two layers of for-cause removal protection. PCAOB members could be removed only by a formal order of the SEC upon a finding of "a sharply circumscribed definition of what constitutes 'good cause,'" *PHH*, 881 F.3d at 89,[19] and SEC Commissioners could be removed by the President only for good cause. Referring to cases such as *Humphrey's Executor* and *Morrison*, the Court observed that it had "previously upheld limited restrictions on the President's removal power." 561 U.S. at 495.[20] However, "[t]he added layer of tenure protection [for PCAOB members] makes a difference." *Id.*

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separated from the President by one layer of for-cause removal. *See Free Enterprise*, 561 U.S. at 509.

[19] It is not clear why Defendants contend that this second layer of for-cause removal protection resulted in "only a *marginal* additional diminution of Presidential authority." *See* Br. at 25 (internal quotation marks omitted; emphasis in original). Not only did the Court find that a second level of for-cause protection "changes the nature of the President's review," it described the second layer that applied to the PCAOB as an "unusually high standard" that presented "an even more serious threat to executive control." *Free Enterprise*, 561 U.S. at 496, 502-03.

[20] Defendants contend that *Morrison* applies only to inferior officers because such officers "generally have more limited authority and discretion than principal officers." Br. at 36. But as explained above, the Constitution requires that the President have sufficient authority to make sure that *all* officers – both principal and inferior – are performing their duties, and, per *Free Enterprise*, the President has that authority so long as he is separated from those officers by no more than one layer of limited for-

The Court solved this problem by removing one layer of for-cause protection (the one that limited the SEC's ability to remove PCAOB members) and retained the other (the one that limited the President's ability to remove SEC Commissioners). *Id.* at 509. By imposing this remedy, the Court made clear that under existing precedent it was permissible to separate the President from executive officers, such as SEC Commissioners and members of the PCAOB (an agency with "expansive powers to govern an entire industry," 561 U.S. at 485), by a single layer of for-cause removal protection.[21] In doing so, *Free Enterprise* affirmed the constitutionality of the sort of for-cause removal that applies to the Bureau.

Defendants contend that if this Court upholds for-cause removal protection for the Bureau's Director, this would somehow justify Congress providing similar protection for every other executive officer, including members of the President's Cabinet. *See* Br. at 26-27. But there are two reasons why this "slippery-slope argument" is incorrect under existing precedent. *See PHH*, 881 F.3d 106-108. First, as the Supreme Court has explained, the nature of the functions performed by the

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cause removal protection. *See PHH*, 881 F.3d at 96 n.2 ("The independent counsel's inferior-officer status is not ground for distinguishing *Morrison* from this case.")

[21] Defendants, as well as amici Separation of Powers Scholars, cite to debates in the First Congress regarding the President's authority to remove the secretaries of State, War, and Treasury, and claim that these debates support their contention that the President's removal authority is illimitable. Br. at 15; Brief of Amici Curiae Separation of Powers Scholars at 9-17. As *Humphrey's Executor*, *Morrison*, and *Free Enterprise* demonstrate, the Supreme Court has rejected that contention.

officer is a central consideration in determining whether for-cause removal is constitutional. The Constitution does not require that the President have authority to remove officers who are responsible for the sorts of functions performed by the FTC (and the Bureau). However, the President must have at-will authority to remove certain other officers who perform functions specifically identified in Article II (national defense, international relations, pardon power). *Id.* at 107, citing, *inter alia*, *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 211 (2012). Second, the President must have at-will authority to remove Cabinet officers because they are close presidential advisers. "There is thus little prospect that Congress could require the President to tolerate a Cabinet that is not fully and directly accountable to him." *Id.*, citing *Freytag v. Comm'r*, 501 U.S. 868, 887 (1991). But the Supreme Court has never held that the President must have this authority with respect to regulatory agencies such as the Bureau.

Indeed, "the slipperiest slope lies on the other side of the mountain." *Id.* Defendants would allow for-cause removal only for agencies that precisely mimic the structure and functions of the 1935 FTC. Br. at 30 n.11. No modern independent agency would satisfy Defendants' standard, not the SEC, not the FCC, nor the Federal Reserve Board, because none of them is identical to the 1935 FTC. Not even the current FTC would pass Defendants' test. But Defendants' standard is not the law. *Morrison*, 487 U.S. at 692 & n.31; *Free Enterprise*, 561 U.S. at 495.

B. This Court has determined that the Bureau's Director is less insulated from the Executive Branch than the Director of the FHFA

Nor, based on Supreme Court precedent, is the Bureau unconstitutional when for-cause removal protection is combined with other features of the Bureau's structure. In *Collins*, this Court held that "Congress insulated the FHFA to the point where the Executive Branch cannot control the FHFA or hold it accountable." 896 F.3d at 666. This Court reached its conclusion "after assessing the combined effect" of the for-cause removal provision that applied to the FHFA's director, its funding, the extent to which the Executive Branch could oversee and control its actions, the lack of a bipartisan balance requirement, and the FHFA's single-Director structure. *Id.* But this Court in *Collins* distinguished the Bureau, and pointed to the role the FSOC plays in controlling the Bureau. This Court determined that this difference makes the Bureau less insulated from the Executive Branch. Further, there are other features of the Bureau's structure that also render the Bureau less insulated from the Executive Branch.

1. For-cause removal – Although this Court recognized that for-cause removal does not trigger a separation-of-powers violation, it concluded that, at the FHFA, "statutory provisions governing how to *replace* the FHFA Director may blunt the effectiveness of 'for cause' removal." *Collins*, 896 F.3d at 667 n.199 (emphasis in original). At the FHFA, if the President removes the Director, he "cannot install the Director of his choice until the Senate approves his replacement." *Id.* at 667 n.199.

Instead, he "must designate an acting director from the ranks of Deputy Directors whom the recently removed Director selected." *Id.* And, as this Court determined, the President can remove that Acting Director only for cause. *Collins*, 896 F.3d at 656. So even if the President removes the Director, the FHFA will still be headed by a designee of that Director until the Senate approves a replacement. The combination of the removal protection and the restriction on the President's authority to replace makes a difference because, taken together, these features insulate the agency from the President. "These speedbumps to appointing a replacement Director render for-cause removal an impotent oversight mechanism." *Collins*, 896 F.3d at 667 n.199.

No such "speedbumps" restrict the President when it comes to replacing the Bureau's Director. As explained above, once the Bureau's Director is no longer in office, the President may, under the FVRA, immediately replace the Director with an Acting Director. *See English v. Trump*, 279 F. Supp. 3d 307, 319 (D.D.C. 2018). The President may choose that Acting Director from a much broader pool of candidates, including a substantial number whom the President has already selected to fill other positions. *See* 5 U.S.C. 3345. That Acting Director is removable by the President at will, and, subject to some limitations, may serve for a period of time designed to give the President time to nominate, and the Senate to confirm, a new permanent Director of the President's choosing.

Indeed, the President has more authority to replace the Bureau's Director than he does a Commissioner at the FTC, because the FVRA does not apply to agencies

headed by multi-member commissions like the FTC. 5 U.S.C. 3349c(1)(A). This means that if the President removes an FTC Commissioner for cause, he can replace that Commissioner only with the advice and consent of the Senate. At the Bureau, the FVRA allows for immediate replacement.

2. Funding – Although the Bureau, like the FHFA, is funded outside the annual appropriations process, there are differences.[22] Unlike the FHFA's enabling act, the CFPA limits the amount that the Bureau may spend without seeking congressional approval. *Compare* 12 U.S.C. 4516(a) (FHFA) ("The Director shall establish and collect from the regulated entities annual assessments in an amount not exceeding the amount sufficient to provide for reasonable costs … and expenses of the agency"), *with* 12 U.S.C. 5497 (a)(2)(A)(iii) (Bureau) (capping the Bureau's funding at 12% of the Federal Reserve System's 2009 operating expenses, adjusted for inflation). If the Bureau wants to exceed that amount, it must obtain any additional funding through the appropriations process, and the President could veto any Bureau request. *See* 12 U.S.C. 5497(e). Further, unlike the FHFA, each year the Bureau is required to prepare and submit a report to the Committees on Appropriations of both the Senate and the House regarding "the financial operating plans and forecasts of the Director, the financial condition and results of operations of the Bureau, and the

[22] *Cf.* Hogue, *supra*, at 27 (describing how the following financial regulatory agencies are funded outside the annual appropriations process: FDIC, Federal Reserve, NCUA, OCC, SEC (in part)).

sources and application of funds of the Bureau." 12 U.S.C. 5497(e)(4). This makes sure that Congress is apprised of the Bureau's funding.[23] And the President will also be aware of any funding that the Bureau obtains and how it spends that money because the Bureau must, every quarter, submit reports of the Bureau's financial condition and results of operations to the Director of the Office of Management and Budget. 12 U.S.C. 5497(a)(4)(A). The FHFA is subject to none of these requirements.[24]

In *Collins*, this Court expressed concern that, because the FHFA was funded "outside the normal appropriations process, the President loses 'leverage' over the agency's activities."[25] Defendants raise a similar concern with respect to the Bureau. Br. at 44. However, as to Defendants' concern, nothing in the CFPA stops the President from proposing funding and then vetoing spending bills that are not in line with his proposals. Indeed, in his most recent budget request, the President proposed

[23] The CFPA also requires the Director to appear twice a year before committees of both the House and the Senate, and, in conjunction with those appearances, to provide those committees with a detailed report regarding the Bureau's operations, including a justification for the Bureau's budget requests. 12 U.S.C. 5496.

[24] Pursuant to 12 U.S.C. 4521, the FHFA is only required to submit an annual report to the House and the Senate, in which it describes, *inter alia*, the "operations, resources, and performance" of the agency.

[25] Federal courts have consistently held that the Constitution does not require that agencies be funded as a part of Congress's annual appropriations process. *See PHH*, 881 F.3d at 95; *accord Am. Fed'n of Gov't Emps., AFL-CIO, Local 1647 v. FLRA*, 388 F.3d 405, 409 (3d Cir. 2004). Indeed, it is common for financial regulators to be funded outside the annual process. *See PHH*, 881 F.3d at 95.

changes to the Bureau's funding. *See Budget of the U.S. Government, Fiscal Year 2019* at 136. If Congress ultimately passes a budget that does not include the President's request, the President can use his veto power, the same power that he has with respect to any other agency's budget.

3. Executive Branch control – As this Court noted in *Collins*, the Bureau differs from the FHFA with respect to Executive Branch oversight and control: "[T]he President, through the Financial Stability Oversight Council ('FSOC'), can influence the CFPB's activities." 896 F.3d at 669. The FSOC has the authority to set aside any final regulations issued by the Bureau if it determines that the regulation would put the safety and soundness of the banking system or the stability of the financial system at risk. 12 U.S.C. 5513. Further, pending any vote by the FSOC, the Secretary of the Treasury has the authority, upon the request of any FSOC member, to stay the effective date of any Bureau rule. Neither the President nor any of his designees has such authority with respect to rules issued by the FHFA (or by the FTC, for that matter).

The Executive Branch also has oversight and control over the Bureau's exercise of litigation authority. *See* 12 U.S.C. 5564(d) (requiring the Bureau to notify the Attorney General when it commences an enforcement action in court, and to coordinate its investigations with the Attorney General). Consistent with *Collins*, such oversight may "serve[] as a 'fire alarm' that alerts the President about controversial agency actions." *See Collins*, 896 F.3d at 668. Further, the Bureau may represent itself

before the Supreme Court only if the Attorney General agrees. 12 U.S.C. 5564(e). This ensures that someone removable at will by the President will have an opportunity to determine the Bureau's position before the Supreme Court. There is no similar restriction on the FHFA's litigation authority. *See* 12 U.S.C. 4513(c). Thus, the President has greater oversight and control with respect to both the Bureau's rulemaking and litigation authority than he does with respect to the FHFA.[26]

4. Bipartisan balance – Because the FHFA is headed by a single Director, there is, *a fortiori*, no "bipartisan balance" at the top. *Collins*, 896 F.3d at 668. The same is true at the Bureau, because it, too, is headed by a single Director. Bipartisan balance is really a political affiliation requirement, and where it applies, it restricts the President's appointment power. In particular, at some multi-member agencies, the President is precluded from appointing an individual of his choosing to fill a vacancy if that individual belongs to the same political party as a majority of the agency's total

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[26] Defendants assert that 12 U.S.C. 5492(c)(4) and 12 U.S.C. 5512(b)(4) are "problematic features" of the CFPA. *See* Br. at 45-46. Neither unduly impinges on the President's authority. The first merely permits the Bureau, like other financial regulators, to submit a legislative recommendation to Congress without approval of the President so long as the recommendation makes clear that it does not necessarily contain the views of the President. *See* 12 U.S.C. 250 (similar provision applying to seven other financial regulators). Nothing restricts the President from expressing his own views as to any recommendation the Bureau makes. The other section, 12 U.S.C. 5512(b)(4), addresses the deference that courts should accord to the Bureau's interpretation of an ambiguous provision of the consumer financial laws when there are other agencies that also have enforcement responsibility for the same laws. This section has nothing to do with the President's authority to influence the Bureau's interpretation of the laws it enforces.

membership. *See*, *e.g.*, 15 U.S.C. 41 ("Not more than three of the [five FTC] Commissioners shall be members of the same political party").[27] There is no such restriction at the Bureau: The only limitation on the President's authority to appoint a Director is that the Director must be a citizen of the United States. 12 U.S.C. 5491(b)(3); *see also PHH*, 881 F.3d at 100 (noting that at the Bureau, the President is never required to select an individual who is not a member of his political party).

To the extent Defendants are correct that "bipartisan balance" restrictions actually force the President to appoint some officials who favor the positions and priorities of the opposing party rather than his own,[28] these restrictions "may raise serious constitutional questions" as Presidents have often argued. *See, e.g.*, *NRA Political Victory Fund*, 6 F.3d at 824. In weighing this factor, this Court should therefore

[27] Not all multi-member agencies have requirements regarding party membership. *See*, *e.g.*, 12 U.S.C. 241 (Federal Reserve Board); 29 U.S.C. 153 (National Labor Relations Board); 29 U.S.C. 661 (Occupational Safety and Health Review Commission); 30 U.S.C. 823 (Federal Mine Safety and Health Review Commission); 42 U.S.C. 7412(r)(6) (Chemical Safety and Hazard Investigation Board).

[28] Defendants' interpretation of the FTC Act as "assur[ing] a new President "that at least two of the five commissioners will be from his party," Br. at 34, is not only constitutionally suspect, it is inconsistent with the Act and its history. Once there are three commissioners of the President's political party on the FTC, the President is free to appoint independents who share his views. *See* 15 U.S.C. 41. Indeed, when President Wilson selected the first five members of the FTC, he selected no Republicans, filling the agency instead with three Democrats and two members of the Progressive Party. *See* www.ftc.gov/about-ftc/commissioners.

avoid applying *Collins* so that a removal limitation would be constitutional only so long as Congress has also restricted the President's appointment power.

5. Single-Director structure[29] – For-cause removal protection for an officer that is not part of a multi-member body is not per se unconstitutional under applicable precedent. In *Morrison*, the Court upheld for-cause removal protection for the independent counsel, a single official with significant powers to pursue criminal prosecutions of high-ranking federal officials. 487 U.S. at 693, 695-96. Nowhere did the Court – or even the dissent – suggest that the fact that the independent counsel's office was run by one person instead of a group had any relevance to the constitutional analysis.[30]

In *Collins*, this Court identified the single-Director structure of the FHFA as one of the factors that rendered that agency unconstitutional, but only in combination

[29] In addition to the FHFA and the Bureau, there are two other agencies that are headed by a single individual who is removable by the President only for cause: the Social Security Administration, 42 U.S.C. 902(a); and the Office of Special Counsel, 5 U.S.C. 1211.

[30] Defendants complain that, because the Bureau is headed by a single Director, the Bureau may be too decisive. *See* Br. at 25-26. But that does not diminish the President's power. As the D.C. Circuit noted, "Congress's choice – whether an agency should be led by an individual or a group – is not constitutionally scripted and has not played any role in the [Supreme] Court's removal-power doctrine." *PHH*, 881 F.3d at 97.

with several other aspects of the FHFA's structure. 896 F.3d at 667-68.[31] According to this Court, the reason for this is that at multi-member agencies, the President may "'designate the chairs of the agencies and … remove chairs at will from the chair position.'" *Id.*, quoting *PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting).[32] But the authority to appoint the agency's chair played no role in the Court's decision in *Humphrey's Executor*. Indeed, although the President now has authority to designate the chair of the FTC, he could not do so at the time of *Humphrey's Executor*. *Compare* 15 U.S.C. 41 (1934) ("The commission shall choose a chairman from its own membership") *with* 15 U.S.C. 41 (2012) ("The President shall choose a chairman from the Commission's membership"). And as Defendants recognize, Br. at 22 n.6, the

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[31] Defendants mistakenly contend that the FTC's multi-member structure was crucial to the Court's decision in *Humphrey's Executor*. *See* Br. at 29-30. In fact, however, the Court referred to the multi-member structure only in the statutory analysis portion of its opinion, which addressed a separate question: whether the FTC Act's removal provision – which had not previously been interpreted – was intended "to limit the executive power of removal to the causes enumerated [therein]." 295 U.S. at 624, 626. Notably, the Court did not even mention the FTC's multi-member structure in its constitutional analysis. *See id.* at 626-31; *see also PHH*, 881 F.3d at 98-99. If the Court in *Humphrey's Executor* – or any case after it – had believed that the number of officials who led an agency made a difference as to the constitutionality of removal limitations, the Court surely would have said so. Indeed, it would have been a natural way for *Humphrey's Executor* to distinguish the earlier decision in *Myers*, which disapproved a removal protection for a (single) postmaster.

[32] In *PHH*, the court concluded that the single-Director structure rendered the Bureau more, not less, accountable to the President because "if the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn," and he only needs to replace a single official to change the direction of the agency rather than undertake the more difficult task of effectuating multiple for-cause removals. 881 F.3d at 98.

President currently lacks any authority to designate the chair of certain multi-member agencies whose members have for-cause removal protection. *See* 45 U.S.C. 154 (National Mediation Board); 39 U.S.C. 202(a)(1) (United States Postal Service Board of Governors). As to several other agencies, the President may select the chair, but only with the advice and consent of the Senate. *See* 15 U.S.C. 2053(c) (Consumer Product Safety Commission); 5 U.S.C. 1203 (Merit Systems Protection Board); 25 U.S.C. 2704(b)(3) (National Indian Gaming Commission); 49 U.S.C. 1111(b) (National Transportation Board). Likewise, although the President may select the chair of the Federal Reserve Board, he may do so only with the advice and consent of the Senate, and only when the four-year term of the previous chair expires. 12 U.S.C. 242.

Nor does designation of an agency's chair necessarily permit the President to "exercise nearly total control" over a multi-member agency. *See* Br. at 23 (internal quotation marks omitted). In particular, at the Federal Communications Commission, the entire Commission, not the Chair, controls the administration of the agency. *See* 47 U.S.C. 154, 155.[33]

[33] Moreover, even at multi-member agencies where the President may designate the chair, the President's choice is limited – every statute that authorizes the President to name the agency's chair limits the President to selecting a chair from among the agency's members. *See* Br. at 22 nn.7, 8. As explained above, there is no guarantee that, at the outset of a presidency, a multi-member agency will include members who share the President's policy views.

Defendants also contend that, in the absence of presidential control, the members of a multi-member agency can serve as a "substitute check" on the agency's power. Br. at 33. But under the test established by the Supreme Court, the question is whether *the President*, not the members of a multi-member agency, can take care that the laws be faithfully executed. *See Free Enterprise*, 561 U.S. at 496 (emphasizing that "the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it" (cleaned up)).

So, as this Court determined in *Collins*, the Bureau differs in many important respects from the FHFA, such that the Bureau is sufficiently accountable to the President under Supreme Court precedent.[34]

III. THE PROPER REMEDY FOR ANY CONSTITUTIONAL VIOLATION WOULD BE SEVERANCE AND REMAND

If this Court concludes that the for-cause removal provision is unconstitutional, it should sever that provision, consistent with the statute's severability provision and this Court's decision in *Collins*. The Court should then remand this action to the district court to permit a constitutionally structured Bureau to continue this action.

1. "Because the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial,

[34] Defendants completely fail to explain how the fact that the Bureau's Director may "hire, fire, and compensate" Bureau employees has anything to do with the constitutionality of the Bureau's structure. *See* Br. at 46.

rather than facial, invalidation is the required course." *Free Enterprise*, 561 U.S. at 508 (cleaned up). Severance is particularly appropriate "[w]hen a removal limitation crosses constitutional lines." *Collins*, 896 F.3d at 675. In such cases, "courts routinely declare the limitation inoperative, prospectively correcting the error." *Id.* That is what the Supreme Court did to the removal limitation in *Free Enterprise*, what this Court did to the removal limitation in *Collins*, and what this Court should do if a constitutional remedy is required here. Just as in *Free Enterprise* and *Collins*, severance is appropriate in this case because the CFPA would remain "'fully operative as law with the tenure restrictions excised and nothing in the text or historical context of the statute makes it "evident" that Congress would have preferred no law at all to excising the restriction.'" *Id.*, quoting *Free Enterprise*, 561 U.S. at 509.

In fact, severance is even more clearly warranted here than in *Free Enterprise* or *Collins*, because Congress included an express severability provision when it enacted the CFPA as Title X of the Dodd-Frank Act. The statute provides that "[i]f any provision of th[e Dodd-Frank] Act … is held to be unconstitutional, the remainder of this Act … shall not be affected thereby." 12 U.S.C. 5302. Congress's choice to include a severability provision in the text of the statute creates a "presumption of severability" that "may be overcome only by 'strong evidence' that Congress would not have enacted the law without the invalidated portions of the statute." *Koog v. United States*, 79 F.3d 452, 462 (5th Cir. 1996) (quoting *Alaska Airlines, Inc. v. Brock*, 480

U.S. 678, 686 (1987)).[35] Defendants cannot present "strong evidence" that Congress would have preferred no Bureau at all to one led (as it currently is) by a Director who is removable at will. *See PHH Corp.*, 881 F.3d at 198-200 (Kavanaugh, J., dissenting) (agreeing with the United States as *amicus curiae* that "the Supreme Court's case law requires us to impose the narrower remedy of simply severing the for-cause removal provision").

Even beyond this, the legislative record makes plain that invalidating the entire CFPA would not vindicate Congress's intent, but defeat it. Congress's primary goal in enacting the CFPA was to consolidate the administration and enforcement of the consumer financial laws in a single agency with a dedicated consumer protection mission. *See* 12 U.S.C. 5491(a), 5511(a)-(b); S. Rep. No. 111-76, at 10-11. Before the Bureau was created, the administration of those laws was spread among seven different federal regulators – many with the mission of ensuring the safety and soundness of regulated institutions. *See* S. Rep. No. 111-176, at 10 (2010). This meant that competitors in the same consumer financial marketplace were subject to differing levels of oversight and accountability. Many in Congress believed that this system of "conflicting regulatory missions, fragmentation, and regulatory arbitrage" had

[35] Defendants err in suggesting that the relevance of the severability provision is attenuated because the provision applies to the entire Dodd-Frank Act, as opposed to only the CFPA. *Compare* Br. at 64-65, *with Med. Ctr. Pharmacy v. Mukasey*, 536 F.3d 383, 401-02 (5th Cir. 2008) (requiring "strong evidence" to overcome presumption created by a severability provision enacted in a *prior* statute); *Koog*, 79 F.3d at 462-63 (same).

catastrophic consequences: It "helped bring the financial system down." *Id.* at 10, 166.

In response, Congress created the Bureau as a stand-alone agency to focus exclusively on consumer protection. Congress directed the Bureau to use its consolidated authority to enforce the law "consistently" across the consumer financial marketplace so that consumers have access to markets that are fair, transparent, and competitive. 12 U.S.C. 5511(a), (b)(3). The CFPA also gave the Bureau new powers to supervise nonbanks, to stop abusive acts and practices, and to issue rules governing mortgages and debt collection (among other topics). *See, e.g.*, 12 U.S.C. 5514 (nonbank supervision), 5531 (abusive practices); 15 U.S.C. 1604 (integrated mortgage disclosure rule), 1692*l*(d) (debt collection rules). Defendants ask this Court to undo all of it.

This Court should decline Defendants' request to strike down the entire CFPA. To be sure, Defendants note that the CFPA's supporters believed that protecting the Bureau's Director from at-will removal was a valuable feature of the statute. Br. at 63-64. But that is a far cry from strong evidence that Congress would rather that the Bureau not exist than have the Bureau led by a Director who is subject to at-will removal. Indeed, even the legislative history Defendants themselves identify shows that the CFPA's supporters were focused less on establishing for-cause removal protection for the Director (after all, many of the existing consumer financial regulators were independent in this sense), and more on ensuring that the Bureau would be independent from other institutional missions besides consumer

protection.[36]

Defendants fare no better when they note that Congress described the Bureau as independent, *see* Br. at 63, because Congress described the FHFA the same way, *compare* 12 U.S.C. 5491(a) ("establish[ing]" the Bureau as "an independent bureau"), *with* 12 U.S.C. 4511(a) ("establish[ing]" the FHFA as "an independent agency"); *see also* 44 U.S.C. 3502(5) (listing both the FHFA and Bureau as "independent regulatory agenc[ies]").

Congress meant what it said: The "remainder" of the CFPA should "not be affected" if "any provision" is "held … unconstitutional," 12 U.S.C. 5302. So if this Court concludes that the for-cause removal provision is unconstitutional, it should sever that provision.

2. With the for-cause removal provision severed, the Bureau would continue to administer and enforce the consumer laws. *See PHH Corp.*, 881 F.3d at 199-200 (Kavanaugh, J. dissenting). Therefore, if this Court declares the removal provision

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[36] *See, e.g.*, 156 Cong. Rec. H5239 (Rep. Maloney) (explaining Bureau would have "an independently appointed director, an independent budget, and an autonomous rulemaking authority" – which would mean consumers "will have a Federal agency on their side to protect them" – in contrast to the prior regime, where "any concerns about consumer protection came in a distant second or a third"); S3187 (Sen. Kaufman) ("Most importantly, the head of this agency must not be subject to the authority of any regulator responsible for the 'safety and soundness' of the financial institutions."); *id.* at S7481 (Sen. Dodd) ("[B]y setting up this agency in the Federal Reserve, we are giving them independent rulemaking authority, appointed by the President, confirmed by the Senate as an operation … so we don't end up with a conflict between … safety and soundness … and the consumer protection issues.").

inoperative, it should remand this case to the district court to permit the reconstituted Bureau to continue to pursue this action.[37] *Cf. Lucia*, 138 S. Ct. at 2056 (remanding for a "new 'hearing before a properly appointed' official," quoting *Ryder*, 515 U.S. at 188); *Entergy Mississippi, Inc. v. NLRB*, 576 F. App'x 415, 416 (5th Cir. 2014) (vacating and remanding order in light of unconstitutional recess appointments); *Dresser-Rand Co. v. NLRB*, 576 F. App'x 332, 333-34 (5th Cir. 2014) (same).

[37] While Defendants may object to remand on statute of limitations grounds, any such objection would be meritless for the reasons discussed in Section I.

CONCLUSION

For the reasons set forth above, this Court should affirm the district court's interlocutory order denying the Motion for Judgment on the Pleadings.

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Consumer Financial Protection Bureau

CERTIFICATE OF SERVICE

I hereby certify that on September 10, 2018, I electronically filed the Brief of Plaintiff-Appellee Consumer Financial Protection Bureau with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that counsel for all parties in the case, listed below, are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The Bureau's Brief complies with the length limits permitted by Fed. R. App. P. 32(a)(7)(B)(i). It contains 12,742 words, excluding the portions exempted by Fed. R. App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Garamond) using the Microsoft Word word processing program .

Dated: September 10, 2018

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