No. ______

In the
Supreme Court of the United States

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST, ET AL.,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), this Court held that the director of the Consumer Financial Protection Bureau was unconstitutionally insulated from presidential removal, in violation of the separation of powers, and the Court severed the unlawful restrictions on the director's removal from the rest of the Consumer Financial Protection Act (CFPA). The CFPB initiated this enforcement action under the direction of Richard Cordray before that decision. Petitioners are 15 passive securitization trusts, with no employees, officers, or directors, that are used to acquire, pool, and securitize private student loans. The CFPB has sued petitioners for the alleged conduct of third parties who service the securitized loans. The questions presented are as follows:

1. When should an enforcement action that is initiated by an agency head unconstitutionally insulated from removal be dismissed to remedy that separation-of-powers violation?

2. Whether passive securitization vehicles used to acquire and pool consumer loans are "covered persons" because they "engage[] in offering or providing a consumer financial product or service" under the CFPA.

PARTIES TO THE PROCEEDING

Petitioners are:

- National Collegiate Master Student Loan Trust, The National Collegiate Student Loan Trust 2003-1, The National Collegiate Student Loan Trust 2004-1, The National Collegiate Student Loan Trust 2004-2, The National Collegiate Student Loan Trust 2005-1, The National Collegiate Student Loan Trust 2005-2, The National Collegiate Student Loan Trust 2005-3 The National Collegiate Student Loan Trust 2006-1, The National Collegiate Student Loan Trust 2006-2, The National Collegiate Student Loan Trust 2006-3, The National Collegiate Student Loan Trust 2006-4, The National Collegiate Student Loan Trust 2007-1, The National Collegiate Student Loan Trust 2007-2, The National Collegiate Student Loan Trust 2007-3, and The National Collegiate Student Loan Trust 2007-4 (defendants-appellants below).

Respondents are:

- The Consumer Financial Protection Bureau (plaintiff-appellee below).
- Ambac Assurance Corporation (intervenor-appellant below).
- GSS Data Services LLC (intervenor-appellant below).
- Transworld Systems Inc. (intervenor-appellant below).

STATEMENT OF RELATED PROCEEDINGS

This case arises from and is directly related to the following proceedings:

- *Consumer Financial Protection Bureau v. National Collegiate Master Student Loan Trust, et al.*, No. 22-1864 (3d Cir. 2024), judgment entered on March 19, 2024; petition for rehearing en banc denied on May 21, 2024.
- *Consumer Financial Protection Bureau v. National Collegiate Master Student Loan Trust, et al.*, No. 1:17-cv-1323-SB (D. Del.), order denying motion to dismiss entered December 13, 2021; order certifying dismissal for interlocutory appeal entered February 11, 2022.

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INTRODUCTION

This case is about the unaccountable exercise of executive power to target individual companies. When Congress created the Consumer Financial Protection Bureau (CFPB), it provided that the agency would be led by a single director who would serve for a term of five years and could not be removed by the President except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(1), (3). This restriction on the President's removal authority was later held unconstitutional, and the offending provision was severed from the statute. *Seila Law LLC v. CFPB*, 591 U.S. 197, 205 (2020). But for much of its existence, the CFPB was led by a director free from the presidential supervision and democratic accountability that the Constitution's separation of powers requires. The question is whether targets of such unconstitutional exercises of executive power can ever receive any meaningful relief.

This case is a poster child for the risks posed by such unchecked power. In the absence of appropriate constitutional constraints, the CFPB initiated this enforcement action based on an aggressive and expansive theory untethered from any reasonable reading of its statutory authority. Relying on its authority to regulate entities "engaged" in providing consumer financial services, the CFPB sued petitioners, alleging unfair, abusive, and deceptive practices in the servicing of student loans. But petitioners do not service loans. Nor do they direct, control, or contract with any entity that does.

Petitioners are a group of 15 Delaware statutory trusts (the Trusts) formed only to create asset-backed

securities by acquiring and pooling student loans and then issuing corresponding notes. They do not act for themselves, and they are connected to the loan servicers whose actions the CFPB targeted only through four layers of trust, administration, and servicing agreements. By any reasonable measure, they are not "engaged" in loan servicing.

In the decision below, the court of appeals blessed the CFPB's expansive theory and adopted a remedial framework that effectively forecloses ever affording relief to the targets of unaccountable exercises of executive authority. This Court's guidance is required to ensure that the lower courts remain a bulwark against this constitutional and regulatory overreach.

First, the lower courts are divided over how to remedy removal violations such as this. Under *Seila Law*, the approach was clear: targets of unaccountable agency action were entitled to the remedy of dismissal unless the action was timely ratified by a constitutionally accountable officer. Since this Court's decision in *Collins v. Yellen*, 594 U.S. 220 (2021), however, the remedial waters have become muddied. Although *Collins* reaffirmed that a removal violation can cause compensable harm, courts of appeals have struggled to assess such "harm" consistently. Several courts, including the court below have defined harm in a way that all but forecloses the prospect of any relief. The court below went even further, summarily denying relief for petitioners without any real inquiry. If the Court is to preserve any incentive for private parties to challenge and vindicate separation-of-powers principles, this status quo is untenable.

Second, the Court's guidance is required to clarify the scope of the CFPB's enforcement authority. Deeming the Trusts to be "covered person[s]," the court of appeals held they were "engage[d]" in offering consumer financial products or services because they were "involved" in servicing loans, no matter how remote that involvement. In place of ordinary meaning, the decision below offers a sweeping definition of "engage" that swallows the statute's careful delineation of who is subject to the agency's UDAAP authority, and it does so with no discernible limiting principle. The result threatens the stability of securitization markets and vests the CFPB with authority across a host of markets far beyond what Congress intended. This Court's intervention is warranted to ensure that this overbroad conception of the CFPB's power does not become the law.

OPINIONS BELOW

The court of appeals' opinion is reported at 96 F.4th 599 and reproduced at App.1a-36a. The opinion of the district court is reported at 575 F. Supp. 3d 505 and reproduced at App.37a-47a.

JURISDICTION

The court of appeals denied a timely filed petition for rehearing en banc on May 21, 2024. App.48a-50a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix.

STATEMENT OF THE CASE

1. The CFPA was enacted in 2010 as part of the statute commonly referred to as the Dodd-Frank Act. Pub. L. 111-203, 124 Stat. 1376 (July 21, 2010). The CFPA created the CFPB, a federal agency tasked with, among other things, regulating the offering and provision of consumer financial products and services under federal consumer protection laws. *See Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197, 205–06 (2020). Congress tasked the CFPB with administering numerous existing federal statutes. *Id.* at 206. The Act also prohibited "any unfair, deceptive, or abusive act or practice" (UDAAP) committed by certain financial persons and institutions. 12 U.S.C. § 5536(a)(1)(B). And it authorized the CFPB to take action to prevent those entities from committing such acts or practices "in connection with" offering consumer financial products or services. 12 U.S.C. § 5531(a).

The CFPA's UDAAP provision was new but not novel. The Federal Trade Commission Act (FTCA), for example, had long prohibited "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1). The Fair Debt Collection Practices Act (FDCPA) had similarly banned the use of "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. § 1692f.

In targeting unfair practices, Congress has structured statutes in a couple different ways. One approach has been to target a broad swath of actors, subject to limited and enumerated exceptions. So, for example, the FTCA "empowered and directed" the Federal Trade Commission (FTC), with limited

exceptions, to police all "persons, partnerships, or corporations." 15 U.S.C. § 45. A second approach, by contrast, targets only a carefully defined group. The FDCPA, for example, governs only "debt collector[s]." 15 U.S.C. § 1692f; *see* 15 U.S.C. § 1692a(6) (defining "debt collector").

Congress took the more targeted approach when it passed the CFPA. It gave the CFPB broad powers within the sphere of its authority: promulgating rules, conducting investigations, initiating administrative adjudications, and prosecuting civil actions seeking a range of remedies. *See* 12 U.S.C. §§ 5562; 5564(a), (f); 5565(a), (c)(2); 12 C.F.R. § 1083.1(a). But the agency's UDAAP authority extends only to a limited set of actors ("covered person[s] or service provider[s]") that participate in a limited set of activities (namely, offering or providing "consumer financial product[s] or service[s]"). 12 U.S.C. § 5531(a).

The CFPA from its inception vested this authority in a single director insulated from presidential removal. The director was "appointed by the President with the advice and consent of the Senate . . . for a term of five years, during which the President may remove the Director from office only for 'inefficiency, neglect of duty, or malfeasance in office.'" *Seila Law*, 591 U.S. at 207 (quoting 12 U.S.C. § 5491(c)(1), (3)). In a series of cases, this Court has defined the circumstances in which Congress may permissibly restrict the President's authority to remove executive officers in that manner. *See, e.g.*, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654 (1988); *Humphrey's Ex'r v. United States*, 295

U.S. 602 (1935); *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Perkins*, 116 U.S. 483 (1886).

In 2020, the Court considered the constitutionality of the CFPA's removal restrictions. The petitioner in *Seila Law* was a law firm to which the CFPB had issued a CID. 591 U.S. at 208. After the firm declined to respond, the CFPB petitioned to enforce the CID in district court. *Id.* The firm argued in response that the CID was invalid because the restrictions on the President's authority to remove the CFPB's director violated the constitutional separation of powers. *Id.* at 213. This Court ultimately agreed that the restrictions were unconstitutional, severing them from the remainder of the Act. *Id.* at 238. As to the "appropriate remedy," the Court remanded for lower courts "to consider whether the [CID] was validly ratified" and if so, whether ratification "is legally sufficient to cure the constitutional defect." *Id.*

2. Petitioners are 15 passive securitization vehicles formed between 2001 and 2007, prior to the enactment of the CFPA. CA3.App.305; *see generally In re Nat'l Collegiate Student Loan Trusts 2003-1, et al.*, 971 F.3d 433 (3d Cir. 2020) (*In re NCSLTs*). The Trusts were formed under Delaware law to acquire pools of private student loans, issue notes secured by, among other things, the cash flow generated on those loans, and provide for the servicing of the loans and the distribution to noteholders of the loan payments made by borrowers. CA3.App.107 (Trust Agreement § 2.03(a)).

As statutory trusts, they have no officers, employees, or directors and thus cannot act on their own. As federal regulations explain, issuers of "asset-

backed securities" like the Trusts are "limited to passively owning or holding the pool of assets, issuing the asset-backed securities supported or serviced by those assets, and other activities reasonably incidental thereto." 17 C.F.R. § 229.1101(c)(2)(ii). They have "essentially no business or management" functions and are "designed to be a solely passive entity." Asset-Backed Securities, Final Rule, 70 Fed. Reg. 1506, 1511 (Jan. 7, 2005). The Trusts are thus managed pursuant to a set of governing documents and agreements with third parties.

These agreements include Trust Agreements, Administration Agreements, Indenture Agreements, a Special Servicing Agreement, and a Default Prevention and Collection Services Agreement. CA3.App.305-06. The Trust Agreements appoint an Owner Trustee and empower it to "act on behalf of the Trust subject to direction by the Owners." CA3.App.107-09. The Administration Agreements delegate certain powers to an Administrator. CA3.App.150. Separate Indenture Agreements grant "all rights, powers and options" of the Trusts to an Indenture Trustee, including in connection with the securitized student loans. CA3.App.230.

These managing entities entered the Trusts into the Special Servicing Agreement with two Special Servicers tasked with collecting payments from past-due and defaulted borrowers. CA3.App322-55. And the Special Servicer entered into the separate *sub*servicing agreement with another party responsible for actually servicing and collecting on delinquent loans. CA3.App.476-573; *see In re NCSLTs*, 971 F.3d at 440. It is the *sub*servicers whose

alleged conduct is the focus of the CFPB's complaint. *See* CA3.App.389, 391, 393 (¶¶ 44, 50, 51, 71).

3. In September 2014, the CFPB issued a civil investigative demand (CID) to each of the Trusts for information concerning collections lawsuits brought against borrowers who defaulted on student loans owned by the Trusts. CA3.App.367. At the time, the agency was led by Director Richard Cordray. Director Cordray had been appointed by President Obama and could not be removed except for inefficiency, neglect, or malfeasance. CA3.App.374. A law firm purporting to represent the Trusts engaged with the CFPB. CA3.App.367.

In January 2017, President Trump was sworn in, replacing President Obama. Despite the change in administration, Director Cordray continued in his role as CFPB director. And despite serious questions as to the firm's authority to represent the Trusts—communicated to the CFPB by the Owner Trustee and others—the CFPB continued to negotiate with the law firm purporting to represent the Trusts.

On September 18, 2017, the CFPB—still led by Director Cordray—filed this action against the Trusts and moved simultaneously for approval of a Proposed Consent Judgment (PCJ). CA3.App.77-92. Numerous parties intervened and objected. CA3.App.163. The district court denied the CFPB's motion to approve the PCJ, holding that the law firm purporting to represent the Trusts lacked that authority. CA3.App.303-17. Shortly thereafter, this Court decided *Seila Law*, finding the CFPA's restrictions on removing the CFPB director unconstitutional. 591 U.S. at 205.

Initially, in the wake of *Seila Law*, this case was dismissed. In response to a motion by certain intervenors, the district court expressed "some doubt that the Trusts are 'covered persons' under the plain language of the statute," and held that, in any event, "the complaint, initially filed by a [d]irector unconstitutionally insulated from removal, cannot still be enforced." CA3.App.371,379. Nevertheless, even while expressing skepticism that the agency could cure this defect via amendment or otherwise, the court afforded the CFPB the opportunity to replead. CA3.App.380.

Thereafter, the CFPB filed the operative complaint. CA3.App.381-402. It alleges that the Trusts are "covered persons" under the CFPA because they "engage" in debt collection through "the actions of entities acting within the prescribed authority of relevant Trust-Related Agreements" and that these actions "are, legally, the actions of the Trusts themselves." *Id.* And it claims that the Trusts violated the CFPA's prohibition against unfair or deceptive practices based on alleged wrongdoing by certain subservicers. CA3.App.391-95. The amended complaint seeks legal and equitable relief, including civil monetary penalties and injunctive relief against the Trusts. CA3.App.401-02.

Following reassignment of the case, the district court changed course and declined to dismiss the amended complaint. App.37a-47a. Contrary to the first dismissal, the court concluded that the Trusts were "covered persons" under the CFPA. The court reasoned that the term "engage" was "broad enough to encompass actions taken on a person's behalf by

another, at least where that action is central to his enterprise." App.45a. And the court concluded that the Trusts were engaged in the business of "collecting debt and servicing loans when they [allegedly] contracted with the servicers and subservicers to collect their debt and service their loans." App.45a.

The district court relied on this Court's intervening decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), to reverse course on the constitutional question. In *Collins*, this Court held that removal restrictions on the director of the Federal Housing Finance Agency (FHFA) also violated the separation of powers. 141 S. Ct. at 1783. But the Court refused to grant the broad relief the *Collins* plaintiffs sought—to reverse transfers of roughly $200 billion to the Treasury Department—because "there was no constitutional defect in the statutorily prescribed method of appointment" for the FHFA director. *Id.* at 1787-88. As a result, the Court reasoned there was "no reason to regard" his actions as necessarily "void." *Id*. Instead, the Court remanded the matter to the lower courts to determine whether the plaintiffs had suffered any "compensable harm" from the unconstitutional removal provision. *Id.* at 1789.

In this case, the district court interpreted *Collins* to hold that "an unconstitutional *removal* restriction" does not invalidate any agency action "so long as the agency head was properly *appointed*." App.42a. It thus reasoned that the CFPB's enforcement actions were not void when taken and need not have been ratified. *Id.* And it concluded that the Trusts could not prove that "the removal provision harmed" them in a manner warranting relief because, in its view, the fact

that the case had not been voluntarily dismissed showed that the "suit would have been filed even if the director had been under presidential control." App.42a.

The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b), CA3.App.11-20, and the Third Circuit accepted the certification. CA3.App.21-22.

4. The court of appeals affirmed. The court first held that the Trusts were "covered person[s]" that "'engage' in consumer financial products or services" because the Trusts were established for the purpose of engaging in such activities, including acquiring and servicing the loans. App.24a. The court determined that the "Trust Agreement's purpose indicates that the Trusts engage in" all those activities and thus engage in "both student loan servicing and debt collection." App.28a.

The court of appeals further held that the Trusts were not entitled to relief for the actions taken by the CFPB while its director was unconstitutionally insulated from removal because the Trusts could not show "that this suit would not have been undertaken *but-for* a president's authority to remove the CFPB's Director, or that the CFPB was able to target the Trusts via the unconstitutional provision." App.35a. Despite evidence that President Trump wanted to remove Director Cordray before this suit was filed but could not, the court considered the record "clear" and saw "no indication that the unconstitutional limitation on the President's authority harmed the Trusts." App.36a.

The court of appeals subsequently denied a timely petition for rehearing and rehearing en banc. App.48a.

REASONS FOR GRANTING THE PETITION

This Court should grant review of both questions presented. With respect to the constitutional question, the circuits are divided over how to remedy separation-of-powers violations after *Collins,* and the decision below only adds to the confusion. Without clear guidance from this Court, *Collins* will continue to be inconsistently construed and misapplied, further eroding the incentive to bring such challenges. With respect to the statutory question, the decision below misapplies the text of the CFPA, expanding the CFPB's enforcement power far beyond what Congress imagined. On the court of appeals' reading, any person (however remotely) "involved" in the chain of offering a consumer financial product or service is now fully exposed to the CFPB's most powerful enforcement tool. This dramatic expansion of regulatory power, as well as the risk that it will grow still further, requires this Court's immediate intervention and guidance.

I. The First Question Presented Warrants this Court's Review.

The decision below conflicts with how several other courts of appeals have assessed claims of "compensable harm" under *Collins*. The Third Circuit adopted a definition of "harm" that is virtually impossible to satisfy and then foreclosed any attempt by the Trusts to even try. Because this case exemplifies the lower courts' confusion over how and when to remedy separation-of-powers violations caused by unconstitutional removal restrictions, this Court should accept review and clarify the standard.

A. The Circuits Are Divided over How to Assess Harm Under *Collins*.

Following *Collins*, three circuits (the Sixth, Eighth, and Ninth) have ensured that parties challenging actions by unconstitutionally insulated officers have at least an opportunity to demonstrate harm and obtain meaningful relief.

In *Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562 (6th Cir. 2022), for instance, shareholders of Fannie Mae and Freddie Mac brought a challenge similar to the one in *Collins*. *Id.* at 564. The Sixth Circuit noted this Court's observation in *Collins* that harm would result "if 'the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the removal restriction did not stand in the way.'" *Id.* at 575 (quoting *Collins*, 594 U.S. at 260). The shareholders in *Rop* claimed to have evidence of just such "displeasure"—specifically, a letter from former President Trump stating that "[he] would have fired . . . Mel Watt from his position as Director and would have ordered FHFA to release these companies from conservatorship." *Id.* at 576 (quoting Letter from Donald Trump to Sen. Rand Paul, Real Clear Politics (Nov. 11, 2021), https://bit.ly/3ped1sP). The Sixth Circuit expressed some doubt that the *Rop* shareholders would ultimately succeed in showing harm, but remanded to the district court with instructions to weigh the evidence nonetheless. *Id.* at 576-77.

The Eighth Circuit followed the same approach, making quick work of another post-*Collins* shareholder challenge to the FHFA. *See Bhatti v.*

FHFA, 15 F.4th 848 (8th Cir. 2021). The plaintiffs there also argued that they "sustained actual, compensable harm" under *Collins*. *Id.* at 854. And like the *Rop* plaintiffs, they also pointed to a letter from former President Trump "explain[ing] exactly the steps he would have taken but for the unconstitutional removal restriction." Brief of Plaintiffs-Appellants, *Bhatti v. FHFA*, No. 23-1051, 2023 WL 2465097 at *9 (8th Cir. Mar. 2, 2023). *Collins*, the *Bhatti* court held, required an inquiry to consider this evidence and "to determine whether the unconstitutional removal restriction caused" this harm. *Id.* at 854. Like the Sixth Circuit, the Eighth Circuit remanded to the district court for initial consideration of the shareholders' evidence directed to that question.

The Ninth Circuit considered a challenge to the CFPB's removal protections in *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 18-15431, 2023 WL 566112, at *1 (9th Cir. Jan. 27, 2023). While that case was pending, this Court decided *Collins*. *Id.* at *1. In the wake of that decision, the *Nationwide Biweekly* plaintiffs argued that Director Cordray had initiated the case against them and that President "Trump had no qualms . . . about making public his wishes to fire Cordray." Defendants' Opening Supplemental Brief on Recent Cases, *CFPB v. Nationwide Biweekly Administration, Inc.*, Nos. 18-15431, 18-15887, 2022 WL 2297662, at *12 (9th Cir. June 21, 2022). The Ninth Circuit acknowledged there were questions surrounding "Nationwide's showing of harm" in this regard and held those questions had to be considered and "resolved" before the legitimacy of the CFPB's actions could be considered. *Id.*

The court of appeals' decision below, by contrast, made no room for such an inquiry. Despite the fact that no discovery has taken place, and despite the Trusts' showing—based on the pleadings and judicially noticeable facts—that harm within the meaning of *Collins* likely occurred, the Third Circuit appeared to conclude, once and for all, that no remedy is available for the separation-of-powers violation in this case.

This approach denies the Trusts any opportunity to substantiate their defense to the CFPB's action. The Trusts had no chance before the district court to present evidence of harm under *Collins*. *Collins* was decided two days *after* the Trusts filed their motion to dismiss. And though the district court requested supplemental briefing on certain specific questions, whether *Collins*' "compensable harm" standard had been satisfied was not among them. And the Third Circuit has seemingly closed the door to further inquiry.

The Third Circuit's refusal to order an inquiry into the Trusts' evidence of harm breaks sharply from the approach taken by the Sixth, Eighth, and Ninth Circuits under virtually identical circumstances. This conflict among the circuits warrants this Court's review.

B. The Court of Appeals' Decision Is Wrong on the Merits Because It Effectively Forecloses Meaningful Relief.

This Court's review is also warranted because the decision below is wrong. The court of appeals justified its denial of any further inquiry into the Trusts' harm only by relying on a substantive standard of "harm"

that effectively forecloses any possibility of relief in this context. No searching inquiry is ever required when the standard can never be met. But that standard conflicts with this Court's precedents and should be reversed.

Relief from unaccountable executive action has always been available under this Court's precedent. In *Seila Law*, the Court reaffirmed its long-held view that agency action initiated under a director who was unconstitutionally insulated from removal can inflict a "here-and-now" injury on a plaintiff "that can be remedied by a court." *Seila Law*, 591 U.S. at 212; *see also Free Enter. Fund v. Pub. Co. Acctg. Oversight Bd.*, 561 U.S. 477, 513 (2010); *Bowsher v. Synar*, 478 U.S. 714, 727 & n.5 (1986). Nothing in *Collins* altered this holding. An unconstitutional removal provision, the Court there reiterated, *can* "inflict compensable harm" that would demand a remedy. *Collins*, 141 S.Ct. at 1789. Indeed, that "possibility . . . c[ould]not be ruled out" in *Collins* itself. *Id.*

The *Collins* Court set forth two examples of when a restriction on the President's removal powers would cause compensable harm. *Id.* "Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal." *Id.* "Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way." *Id.* In either situation, the statutory removal restrictions "would clearly cause harm." *Id.* The Court then remanded the case for a

determination whether the shareholders could satisfy this standard. *Id*.

Here, the Trusts offered evidence squarely in line with those examples. The Trusts pointed to statements made by President Trump expressing his displeasure with and desire to remove Director Cordray. *See* C.A.Br.61-62. Indeed, President Trump's dissatisfaction with Director Cordray was public knowledge, as was his frustration with the unique agency structure constraining him. *See, e.g.*, John Berlau, *Why Hasn't Trump Fired CFPB's Cordray?*, Forbes (Aug. 10, 2017) (noting mounting pressure for Trump to fire Cordray, who "has been empowered by the CFPB's glaring lack of accountability"); Renae Merle, *Richard Cordray is Stepping Down as Head of Consumer Financial Protection Bureau*, Washington Post (Nov. 15, 2017) ("Trump has on at least two occasions griped about Cordray in private and wondered what to do about his tenure, according to two financial industry executives who attended the meetings. Under the agency's current structure, Trump could only fire Cordray for cause."); Elizabeth Dexheimer, *Trump Said to Weigh Political Risks of Firing CFPB's Cordray*, Bloomberg (Mar. 10, 2017); Editorial Board, *Mr. Trump Goes After Consumer Financial Protection Bureau*, NYT (Mar. 22, 2017) ("Last week, however, the administration signaled it wanted to fire Mr. Cordray."). And it was during this time, when Director Cordray was all but untouchable, that he initiated this enforcement action against the Trusts.

The decision below ignored this obvious parallel with the *Collins* examples and applied a standard

much different than the one set forth in that case. Although targeted for enforcement by an unaccountable executive officer, the court of appeals held that the Trusts suffered no harm, because they could not show that the CFPB would not have filed the action "but for the President's inability to remove the Director." App.33a.

But this but-for standard appears nowhere in the *Collins* majority, which requires only that the President have expressed his desire and bemoaned his inability to remove the official in question. Holding to the contrary, the court of appeals expressly relied, not on Justice Alito's majority opinion in *Collins*, but on Justice Kagan's separate opinion, concurring in part and dissenting in part. App.14a, 31a. As Justice Kagan saw it, retrospective relief should be available "only when the President's inability to fire an agency head affected *the complained-of decision*." *Collins*, 594 U.S. at 274 (Kagan, J., concurring in part and dissenting in part) (emphasis added). But a concurring opinion is not the law.[1]

If left to stand, the court of appeals' decision would require a party targeted for enforcement by an unaccountable officer to prove an impossible counterfactual: that the agency would not have

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[1] To be sure, the Third Circuit was not the first to accept Justice Kagan's alternative substantive standard harm. The decision below relied on decisions from the Second and Ninth Circuits, which also expressly adopted Justice Kagan's concurring opinion for only three Justices. *See CFPB v. Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023); *Kaufmann v. Kijakazi*, 32 F.4th 843, 850 (9th Cir. 2022). This fact only further militates in favor of this Court's review here.

initiated the particular action at issue if the officer had been properly removable. This would apparently require not only public statements by the President that he would have removed the officer if he could *but also* some indication that the President's replacement would not have brought the same case. The set of cases where such proof is possible is vanishingly small, if not a null set.

This Court's precedents should not be read to offer only an illusory promise of relief. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (remedies for separation-of-powers violations exist "to create incentives" to raise them). Particularly where evidence demonstrates that an executive officer *retains* an executive position only by virtue of that provision, the executive power the officer wields is usurped, illegitimate. The harm suffered by targets of that power is indistinguishable from the harm suffered under the authority of executive officers who were not properly appointed in the first instance. In either case, the officer exercises executive authority only by virtue of the unconstitutional provision. *See Ryder v. United States*, 515 U.S. 177 (1995) (actions by improperly appointed officers void). The court of appeals erred in nevertheless foreclosing any possibility of relief. App. 33a-34a.

C. This Case Offers an Ideal Vehicle to Address this Important Question.

The first question is unquestionably important. It concerns when, how, and for whom the lower courts will remedy violations of the Constitution. In the wake of *Collins*, lower courts have narrowed the class of litigants eligible for such relief under Article II—none

more drastically so than the Third Circuit. This trend should concern the Court. Without the prospect of meaningful relief, would-be challengers have little incentive to bring private separation-of-powers challenges.

The question of how to remedy removal violations is one of ongoing significance that is certain to recur. To be sure, the universe of CFPB actions initiated by Director Cordray still subject to challenge is dwindling.[2] But challenges to for-cause removal restrictions for other independent agencies are not going anywhere. *See, e.g.*, Petition for a Writ of Certiorari, *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, No. 23-1323 (U.S. Sup. Ct. June 14, 2024) ("Whether the for-cause restriction on the President's authority to remove Commissioners of the Consumer Product Safety Commission violates the separation of powers."). As courts countenance such challenges—particularly as this Court continues to clarify the scope of the exception set forth in *Humphrey's Executor*—they will also need to know how to remedy them. A remedial framework that is at once chimeric and unpredictable is neither sustainable nor consistent with precedent.

This case perfectly demonstrates why. On a faithful read of this Court's cases, the Trusts' claim for

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[2] The CFPB has not hesitated in deploying the decision below in those that remain. *See* Gov't Resp. to Pet. for Rehearing at 9, *CFSA v. CFPB*, No. 21-50826 (5th Cir. Aug. 5, 2024) (citing the Third Circuit's opinion here and arguing that *Collins* requires "a showing that, but for the removal provision, the complained-of agency action would have been different in some meaningful way").

relief is no hail mary. Following his election in 2020, President Trump repeatedly expressed displeasure with Director Cordray and complained of his inability to remove him. Director Cordray nevertheless continued to wield "executive power without the Executive's oversight," *Free Enterprise*, 561 U.S. at 489—and in fact, over the Executive's objection. And during this period, Director Cordray exercised a core executive power in bringing this enforcement action against the Trusts. *Collins* and a long line of cases before it promise relief under that scenario, and this Court should not allow the lower courts to abandon that promise.

This case offers an ideal vehicle for this Court to clarify the law post-*Collins*. The Trusts have raised and preserved the remedial question every step of the way, including as both *Seila Law* and *Collins* were decided while the proceedings below were pending. This Court's guidance will also have a material effect on the proceedings. This case remains on a motion to dismiss stage, so any clarification of the standard for harm will influence all phases of the litigation. And should the Trusts prevail in vindicating this Court's precedents, dismissal is the only appropriate remedy. The CFPB has conceded that its attempt at ratification by a constitutionally accountable officer came after the applicable statute of limitations had run and was therefore ineffective. *See* App.10a.

II. The Second Question Presented Warrants this Court's Review.

The decision below also misinterpreted a crucial provision of the CFPA, expanding the CFPB's enforcement authority to an already-regulated

segment of the economy it was never previously thought to reach. The court of appeals held that the Trusts are "covered persons" that "engage[] in offering or providing a consumer financial product or service," 12 U.S.C. § 5481(6), because they are "occupied," "involved in," or "carrying on an enterprise or activity" that eventually results—after an extended chain of delegations of authority—in the servicing of private student loan debt. That reading of the CFPA is both wrong and startling in its breadth. And it threatens to destabilize securitization markets that were designed based on a much different view of potential liability and legal responsibility.

A. The Court of Appeals' Interpretation of the CFPA Is Wrong.

The court of appeals' broad interpretation of "engage" should not be allowed to stand. Statutory text, structure, context, and history all confirm that the term does not extend to passive securitization vehicles. The Trusts were created solely to acquire and securitize pools of consumer loans. They have no employees or directors. They are not involved in their own management. They do not even direct or control the third parties that act on their behalf. Indeed, by their very design, the Trusts do not do *anything*—much less actively engage in servicing and collecting student loan borrower debt.

The decision below ignored these features of statutory trusts and ignored the CFPA's requirement of active involvement. Instead, the Third Circuit adopted a definition of "engage" that sweeps in all involvement with consumer financial products and services, seemingly no matter how remote and

regardless of who directs or controls the conduct. That result undermines Congress's very intentional limits on the agency's UDAAP authority and invites an interpretation of that authority with no limits at all.

1. The plain meaning of the statutory text and all other interpretive tools indicate that the term "engage" in the CFPA requires active involvement in the conduct at issue.

The CFPA defines a "covered person" as "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6). To "engage" in an activity is to "involve" or "occupy oneself" with that activity, to "take part" in it and "be active." Webster's New World College Dictionary at 471 (4th ed. 1999); *see* Webster's Unabridged Dictionary of the English Language at 644 (2001) ("[T]o occupy oneself; become involved."). Or, as this Court put it recently, the "common meaning" of "engage" is "direct[] involve[ment]." *Southwest Airlines Co. v. Saxon*, 596 U.S. 450, 457 (2022); *see Lopez v. Cintas Corp.*, 47 F.4th 428, 432 (5th Cir. 2022) (concluding that "last leg" drivers were not engaged in interstate commerce because they were "further removed from the channels of interstate commerce"). The Trusts, as mere passive conduits, simply do not meet this definition.

The Act's structure reinforces this conclusion. It carefully delineates the types of actors subject to the agency's UDAAP authority, focusing on the specifics both of their conduct and of their relationships with other industry participants. The "covered person" definition, for instance, includes "any *affiliate* of [such] a person." *Id.* § 5481(6). An "affiliate," in turn,

is "any person that controls, is controlled by, or is under common control with another person." *Id.* § 5481(1). For non-banks, a "related person" is considered a "covered person" as well. *Id.* § 5481(25). And "related persons" are a carefully selected set of individuals and entities including directors, controlling shareholders, agents, and certain independent contractors. *Id.* § 5481(25)(C).

The CFPB has never claimed that the Trusts fall into any of these other categories, insisting instead that they are "covered persons" in their own right. But that holding eviscerates Congress' careful delineation of who is subject to UDAAP authority. If the word "engage" were already capacious enough to cover those other categories—as it is under the court of appeals' reading—then these painstaking provisions would be superfluous.

Likewise, the broader statutory context supports the Trusts' interpretation. In the consumer protection realm, Congress knows how to confer broad enforcement powers. For example, quite unlike the CFPA, the FTC's enforcement authority broadly reaches all "persons, partnerships, or corporations," with limited exceptions. 15 U.S.C. § 45. And the FTC's authority is not confined by industry, covering anything "in or affecting commerce." 15 U.S.C. § 45(a)(1). By contrast, the CFPB's UDAAP authority is far more circumscribed, limited to only certain actors involved in offering financial products and services. In that way, the CFPA is more akin to the FDCPA, as the latter specifically targets only "debt collector[s]." 15 U.S.C. §§ 1692f, 1692a(6). By

extending "engage" beyond its plain meaning, the decision below subverts this congressional design.

Finally, the CFPA's drafting history lends further support to the Trusts. The bill's first draft defined "covered person" in more sweeping terms: "any person who engages *directly or indirectly* in a financial activity, in connection with the provision of a consumer financial product or service." Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 11th Cong. § 4002(9)(A) (2009) (emphasis added). Indeed, this proposed definition was so broad that the bill explicitly exempted from the definition "the Secretary, the Department of the Treasury, [and] any person collecting Federal taxes for the United States." *Id.* § 4002(9)(B). The meaning of "covered person," however, was narrowed while the bill was under consideration. The final bill enacted into law omits the broad "directly or indirectly" phrase—as well as the corresponding exemption for government officials. *See* 12 U.S.C. § 5481(6); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). The decision below reads the sweeping definition that Congress rejected back in.

2. The court of appeals' interpretation of "engage" is not just wrong, it could hardly be broader.

Under the decision below, the term "engage" applies to anyone "involved" in an "enterprise or activity" no matter how remotely or indirectly. App.23a. According to the Third Circuit, the Trusts were engaged in covered activity not because they

serviced loans, or even because they controlled or directed those that serviced loans, but because they contracted with an Owner Trustee that contracted with an Administrator and appointed a Special Servicer that engaged (but did not direct) loan subservicers.

Critically, the court of appeals offered no limiting principle. Nothing in the decision below establishes, or even acknowledges, a point at which "involvement" becomes too remote to constitute engagement. Taken to its logical conclusion, it could implicate third parties who, in some distant sense, are "involved" or "take part in" any aspect of the Trusts' operation. That extremely broad reading makes a hash of the Act's carefully articulated scheme. The CFPB could scarcely have hoped for a more expansive interpretation of its powers.

B. The Second Question Presented Is Vitally Important to Securitization Markets and Beyond.

The statutory question is no less important than the constitutional one. The decision below not only enlarges the CFPB's regulatory authority, but it does so in an already-regulated industry where an increase in regulatory risk can have perverse and dramatic consequences.

1. The decision below shifts the previously understood regulatory landscape (and associated loss risk) facing the securitization market. As *amici* SIFMA argued below, deeming passive securitization trusts to be "covered persons" subverts the expectations of investors, many of which are public pension plans and university endowments. *See* SIFMA

Br. 22-24. A new risk of direct regulation could lead investors to reduce their securitization positions and prompt agencies to downgrade ratings. *See id.* Indeed, the mere *filing* of this suit led Finch to designate certain NCSLT transactions as "Ratings Watch Negative." *Id.* at 24 (citing Sasha Padbidri, *CFPB lawsuit, potential rating downgrades add to NCSLT struggles*, Global Capital (Sept. 25, 2017), https://bit.ly/3M3uhLM).

The Trusts are not alone in sounding the alarm. Following the Third Circuit's decision, industry commentators have expressed concern that the increased risk profile facing securitization vehicles may have unintended consequences, such as higher rates on consumer loans. *See, e.g.*, Scott Carpenter, *Asset-Backed Securities Face New Risks From a US Court Decision*, Bloomberg Law News (Mar. 26, 2024), https://bloom.bg/4dJiqhH (noting that the panel's opinion "could boost borrowing costs for firms that use securitizations by spurring investors to demand higher yields to compensate for the risk the trusts could be hit with lawsuits that would claw away funds"); *New NCSLT Ruling Could be Negative for U.S. Consumer Structured Finance*, Fitch Ratings (Apr. 3, 2024), https://bit.ly/4deLm1j (noting that this Court's "recent ruling . . . could increase the risk of unforeseen monetary losses," which "could significantly affect transaction performance and introduce increased rating volatility in U.S. structured finance transactions backed by consumer assets"); Adam Levitin, *Securitization Trusts Are Subject to the Consumer Financial Protection Act*, Credit Slips (Mar. 27, 2023), https://bit.ly/46LbgqS (noting that the panel's opinion "could shake things

up in the securitization world" and observing that "language in the opinion suggests that merely holding the loans would be sufficient" for the CFPA to apply); Shannon Clark, *ABS Market Brace for Fallout from CFPB Court Victory*, Inside Mortgage Finance (Apr. 5, 2024), https://bit.ly/3SOSskQ (warning that the panel's opinion "will alter [the] dynamic" and "could have a 'chilling effect' on the broader securitization market").

2. The scope of the CFPB's authority to regulate "covered persons" also extends well beyond securitization markets. Time and again, this Court has emphasized that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000). Recognizing the critical importance of delineating the bounds of an agency's authority, this Court has regularly exercised its certiorari discretion to police that line. *See, e.g.*, *id.* at 131-32 (whether the Food, Drug, and Cosmetic Act gave the Food and Drug Administration authority to regulate tobacco products); *Biden v. Nebraska*, 143 S. Ct. 2355, 2362 (2023) (whether the Higher Education Relief Opportunities for Students Act of 2003 permitted the Secretary of Education to cancel approximately $430 billion of federal student loan balances); *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 763–65 (2021) (whether the Public Service Health Act authorized the Center for Disease Control to promulgate an eviction moratorium during the Covid-19 pandemic).

The CFPB's UDAAP enforcement authority is a powerful tool for an agency that already wields "enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting); *see Seila Law*, 591 U.S. at 206 ("Congress also vested the CFPB with potent enforcement powers."). But that power is not and should not be unlimited. Before the court of appeals' decision, the CFPB's reach was never thought to extend to the passive trusts that create asset-backed securities. And for good reason, as several other agencies have responsibility for regulating these complex financial instruments, as well as mandates more plainly suited to the task. *See, e.g.*, 15 U.S.C. § 78o-11 (directing "the Federal banking agencies and the Commission" to "jointly prescribe regulations" on asset-backed securities). The courts below ignored these limits and expanded the scope of the Act—not for anything the Trusts did, but for the acts of third parties they do not even control. The result is a statutory scope beyond even what the CFPA's proponents advocated for.

C. This Case Is an Ideal Vehicle to Address the Second Question Presented.

This case presents an ideal opportunity to police the limits of the CFPB's UDAAP authority and scope of the "covered person" definition. Although the CFPB has generated no shortage of cases for this Court's consideration, it has yet to address the scope of the agency's authority to regulate "covered persons." The breadth of the court of appeals' interpretation makes this case a perfect candidate for this Court to begin

providing guidance on that question. And the question is clearly and squarely presented here. The Trusts raised the "covered person" definition at every stage and offered a full-throated argument against the CFPB's assertion of authority. If the Trusts prevail, the statutory question is dispositive of the entire case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: August 16, 2024

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1864

CONSUMER FINANCIAL PROTECTION BUREAU

v.

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4,

Delaware Statutory Trusts,

Appendix A

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4; AMBAC ASSURANCE CORPORATION; TRANSWORLD SYSTEMS INC,

Appellants

Appeal from the United States District Court for the District of Delaware. (D.C. Civil Action No. 1-17-cv-01323). Circuit Judge: Honorable Stephanos Bibas[1] .

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1. Honorable Stephanos Bibas, United States Court of Appeals Judge for the Third Circuit Court of Appeals, sitting by designation.

May 17, 2023, Argued
March 19, 2024, Opinion Filed

Before: RESTREPO, ROTH and McKEE, *Circuit Judges*.

ROTH, *Circuit Judge:*

The issues before the Court on this interlocutory appeal are whether the Trusts are covered persons subject to the Consumer Financial Protection Act (CFPA), and whether the Consumer Financial Protection Bureau (CFPB) was required to ratify the underlying action. As a result of our review of the case, we will remand it to the District Court with our answers to the two questions certified.

I. BACKGROUND

A. Formation and Obligations of the Trusts

Between 2003 and 2007 there was a massive uptick in securitized assets.[2] Part of this increase in securitization was the privatization of student loans.[3] During this period, the fifteen appellant trusts (the Trusts), which are "offshoots of the National Collegiate Student Loan

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2. *See* Sergei Chernenko et al., *The Rise and Fall of Demand for Securitizations*, HARVARD BUSINESS SCHOOL, 1 (2014), https://www.hbs.edu/ris/Publication%20Files/The%20Rise%20and%20Fall%20of%20Demand%20for%20Securitizations_26afb79a-342c-42d6-9b8e-184c0b9ec2f4.pdf.

3. *See id.* at 5.

Master Trust," were formed "for the narrow purpose of acquiring and servicing a sizable portfolio of student loans."[4] Indeed, the Trusts have since amassed over eight hundred thousand private loans.[5]

"At their formation, each of the 15 Trusts and the Owner Trustee executed a Trust Agreement governed by Delaware law."[6] This agreement defined the purpose of the Trusts.[7] Under the agreement, because the Trusts have no employees, the Owner Trustee "is empowered to 'act on behalf of the Trust[s].'"[8] One way to do so is by entering into Administration Agreements.[9] "[T]he Administration Agreements make clear the Administrator will 'perform' the 'duties of the [Trusts]' as well as 'the duties and obligations of the Owner Trustee on behalf of the [Trusts] under . . . the Trust Agreement.'"[10] Therefore,

4. *In re Nat'l Collegiate Student Loan Trusts Litig.*, 251 A.3d 116, 127 (Del. Ch. 2020) (hereinafter *In Re NCLST*).

5. *CFPB v. Nat'l Collegiate Master Student Loan Trust*, 575 F. Supp. 3d 505, 506 (D. Del. 2021), *motion to certify appeal granted*, No. 1:17-CV-1323-SB, 2022 U.S. Dist. LEXIS 24879, 2022 WL 548123 (D. Del. Feb. 11, 2022) (hereinafter *CFPB II*).

6. *In Re NCLST*, 251 A.3d at 132. There is no discernible difference between the Trusts in *In Re NCLST* and the Trusts from *CFPB II*.

7. *See infra* note 105.

8. *In Re NCLST*, 251 A.3d at 131 (alteration in original).

9. *See id.*

10. *Id.* at 140 (quoting JA150).

"Administration Agreements . . . play a pivotal role in the overall structure of the securitization transaction."[11]

Part of the role played by the Administrator is contracting with third parties through Servicing Agreements.[12] "[F]or each Trust, the Administrator contracted with a [Special] Servicer (or a similar entity) in a Servicing Agreement. In that agreement, the Servicer promised to 'provide and perform' certain services such as '[b]orrower communications,' '[p]rocedures for delinquency and default,' and '[d]isbursement.'"[13] The Special Servicer, would, in turn, contract with subservicers that would "conduct[] collections" and "oversee[] . . . collection lawsuits against borrowers in the name of the Trusts." [14] As such, in each suit, one of the Trusts was the named plaintiff and the primary beneficiary of any action in which it prevailed.[15]

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11. *Id.* at 133.

12. *Id.* at 141.

13. *Id.* at 141 (alterations in original) (footnote omitted).

14. *CFPB II*, 575 F. Supp. 3d at 506-07 (alterations in original).

15. *See* Amici Br. Student Borrower Protection Center at 15 (stating that, in California, "every time" a suit was brought against a delinquent debtor, the creditor was represented by counsel) (citing Mark Huelsman, *The Debt Divide: The Racial and Class Bias Behind the "New Normal" of Student Borrowing*, DEMOS (2015), https://www.demos.org/publication/debt-divide-racial-and-class-bias-behind-new-normal-student-borrowing).

In 2014, after noticing the practices of the Trusts and those acting on their behalf, the CFPB issued a civil investigative demand (CID) to each Trust for information on collections lawsuits brought against borrowers for defaulted student loans.[16] In 2017, the CFPB initiated enforcement proceedings against the Trusts.[17] The parties reached a settlement and asked the court to enter a consent decree. The court declined to do so.[18] The CFPB then filed this action.[19]

B. Precedential Developments and Their Effect on the Instant Matter

While the case was proceeding through the District Court, the Supreme Court issued two relevant opinions. The first was *Seila Law LLC v. Consumer Financial Protection Bureau*.[20] There, the Court addressed 12 U.S.C. § 5491(c), the statute establishing the CFPB and its Director. According to the statute, the Director may

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16. *CFPB v. Nat'l Collegiate Master Student Loan Tr.*, No. CV 17-1323 (MN), 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *2 (D. Del. Mar. 26, 2021) (hereinafter *CFPB I*); JA367 (same); NCMSLT Br. at 14.

17. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *2.

18. *CFPB II*, 575 F. Supp. 3d at 507.

19. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *2; JA367.

20. 140 S. Ct. 2183, 207 L. Ed. 2d 494 (2020).

be removed by the President only "for cause."[21] However, the Constitution dictates that agency heads must be freely removable by the President.[22] The Court held that the CFPB's removal provision unconstitutionally insulated the Director of the CFPB from the president's removal authority because "the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers."[23]

When an unconstitutional "provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court."[24] The Court then evaluated 12 U.S.C. § 5491(c)(3)

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21. 12 U.S.C. § 5491(c)(3).

22. *See Bowsher v. Synar*, 478 U.S. 714, 726, 106 S. Ct. 3181, 92 L. Ed. 2d 583 (1986) (stating that executive officials "must fear and, in the performance of [their] functions, obey" (quotation omitted)). Even though this removal power is not without limit, "[t]he parties do not ask us to reexamine any of these [limits], and [thus] we do not do so." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483, 130 S. Ct. 3138, 177 L. Ed. 2d 706 (2010).

23. *Seila Law LLC*, 140 S. Ct. at 2197. There was also a secondary basis for this decision: that the Director would be appointed every five years, and so a sitting President may not have the opportunity to appoint the agency head. *Id.* at 2204. This is why the opinion refers to the Director as being "insulated by two layers of for-cause removal protection." *Id.* at 2198. However, because the parties focus purely on the fact that the Director was unconstitutionally insulated because he could only be removed for cause, there is no need to address this secondary ground discussed in *Seila Law*.

24. *Id.* at 2196 (citing *Bowsher*, 478 U.S., at 727 n.5).

within the broader context of the Dodd-Frank Act.[25] It noted that "[i]t has long been settled that 'one section of a statute may be repugnant to the Constitution without rendering the whole act void.'"[26] "Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact."[27] Therefore, "[w]hen Congress has expressly provided a severability clause, [a court's] task is simplified."[28] Because "[t]he only constitutional defect [the Court] identified in the CFPB's structure is the Director's insulation from removal . . . . [the Court] must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities."[29]

The Dodd-Frank Act itself, which contains the CFPA, includes the following provision: "If any provision of this Act . . . or the application of such provision . . . is held

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25. *Id.* at 2207, 2209. The CFPA is contained within the Dodd-Frank Act. Because the parties do not discuss Dodd-Frank outside the confines of the CFPA, the two terms may be used interchangeably.

26. *Id.* at 2208 (quoting *Loeb v. Columbia Twp. Trs.*, 179 U.S. 472, 490, 21 S. Ct. 174, 45 L. Ed. 280 (1900)).

27. *Id.* at 2209 (quoting *Free Enter. Fund*, 561 U.S. at 508)); *see id.* at 2208 ("If the removal restriction is not severable, then we must grant the relief requested, promptly rejecting the demand outright.").

28. *Id.*

29. *Id.*

to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby."[30] Thus, because Dodd-Frank has an express severability clause, "[t]here is no need to wonder what Congress would have wanted if 'any provision of this Act' is 'held to be unconstitutional.' Congress has told us: 'the remainder of this Act' shall 'not be affected.'"[31] The Court found there to be no support for the notion that "Congress would have preferred *no* CFPB to a CFPB supervised by the President."[32] The Court concluded that "[t]he provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction."[33]

The Supreme Court then severed 12 U.S.C. § 5491(c), and remanded the action "to determine what to do about a petition to enforce a CID that the Bureau had filed while its structure was unconstitutional."[34] This conformed with the law at the time that constitutional defects had to be cured by ratification,[35] and "the party ratifying should be able not merely to do the act ratified at the time the act

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30. 12 U.S.C. § 5302.

31. *Seila Law*, 140 S. Ct. at 2209 (quoting 12 U.S.C. § 5302).

32. *Id.*

33. *Id.*

34. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *4.

35. *Id.*

was done, but also at the time the ratification was made."[36] The court concluded that, if the CFPB Director did not effectively ratify the underlying suit, the petition had to be dismissed.[37]

Turning to the case before us, the Trusts moved to dismiss the CFPB's complaint on several grounds.[38] However, the District Court felt it "need only address two" of those grounds:[39] first, whether the Trusts were "covered persons" subject to the CFPA;[40] second, whether the suit had to be ratified because the action was initiated while there was a constitutional deficiency within the agency. The contention was that this suit was ratified after the statute of limitations had run and thus was untimely.[41]

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36. *Advanced Disposal Servs. E., Inc. v. N.L.R.B.*, 820 F.3d 592, 603 (3d Cir. 2016).

37. *Id.* Ratification will be discussed in more depth below.

38. More specifically, there were several entities that intervened in this matter, and they moved to dismiss in the wake of *Seila Law*. The Trusts joined the intervenors' motion to dismiss. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *3.

39. 2021 U.S. Dist. LEXIS 58013, [WL] at *3. These are, in essence, the two grounds in this appeal.

40. *See id.*

41. *Id.*; *see* 12 U.S.C. 5564(g)(1) (stating that "no action may be brought . . . more than 3 years after the date of discovery of the violation to which an action relates").

The District Court agreed that the suit was untimely.[42] Relying on our opinion in *Advanced Disposal*, it concluded that "ratification is, in general, not effective when it takes place after the statute of limitations has expired."[43] The CFPB Director ratified the action more than three years after the date of discovery of these violations.[44] The District Court also rejected the CFPB's alternative argument that the statute of limitations be equitably tolled. The court found that the bureau did not "diligent[ly] pursu[e] . . . its rights" during the relevant period because "the Bureau was (as it should have been) acutely aware that there was doubt over the constitutionality of its enforcement authority."[45]

With the court's leave, the CFPB filed an amended complaint. The CFPB's amended complaint emphasized that the Trusts are "covered persons" who "engage in" debt collection and are thus subject to the CFPA.[46] Again, the Trusts and several intervenors moved to dismiss, arguing that they are not "covered persons" under the statute and that the suit was untimely.[47]

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42. The District Court did not thoroughly address whether the Trusts were "covered persons" under the CFPA, but it did "harbor[ ] some doubt" that they were. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *3.

43. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *5 (citing *Benjamin v. V.I. Port Authority*, 684 F. App'x 207, 212 (3d Cir. 2017)).

44. *Id.*

45. 2021 U.S. Dist. LEXIS 58013, [WL] at *6.

46. JA383-84.

47. *CFPB II*, 575 F. Supp. 3d at 507.

Before the District Court decided these motions, the Supreme Court issued a new opinion, in *Collins v. Yellen*.[48] There, the Court was facing a situation similar to that in *Seila Law*. The underlying suit was brought against the Federal Housing Finance Authority (FHFA) on the ground that the FHFA Director was impermissibly insulated from the President's removal authority because he could only be removed for cause.[49] Because of this, the Shareholders argued that agency enforcement actions made while the FHFA Director was impermissibly insulated were void *ab initio*.[50]

The Court made quick work of the insulation issue. It found its decision in *Seila Law* to be "all but dispositive": "[a] straightforward application of [the] reasoning in *Seila Law*" required the Court to conclude that a for-cause restriction on the President's removal power violates separation of powers.[51]

However, unlike in *Seila Law*, the Court also addressed the question of whether the actions of agency heads lacking constitutional authority were void *ab initio*.[52] At the outset, it noted that "there is no basis for concluding

48. 141 S. Ct. 1761, 210 L. Ed. 2d 432 (2021).

49. *Id.* at 1784.

50. *Id.* at 1787.

51. *Id.* at 1783-84. Though there are obviously some differences between the CFPB and the FHFA, the Court did not "find any of these distinctions sufficient to justify a different result." *Id.* at 1784.

52. *Id.* at 1787.

that any head of the FHFA lacked the authority to carry out the functions of the office."[53] The Court concluded that whether agency action was void *ab initio* came down to whether an agency director was properly appointed.[54] More particularly, the Court held:

> All the officers who headed the FHFA during the time in question were properly *appointed*. Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA . . . as void.[55]

In so holding, the Court rejected the claim that agency actions are void unless "ratified by an Acting Director who was removable at will by the President."[56]

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53. *Id.* at 1788 (citing *Seila Law*, 140 S. Ct. at 2207-11).

54. *Id.* at 1787. There is no support for the notion that any CFPB director was improperly appointed, and neither party argues this point. *See* JA15 (stating that "the Bureau's director was properly appointed").

55. *Collins*, 141 S. Ct. at 1787.

56. *Id.* In *Collins*, the petitioning shareholders argued that an unconstitutionally insulated "Director's action would be void unless lawfully ratified," *id.* at 1788, based on the fact that the Court in *Seila Law* remanded "to consider whether the civil investigative demand was validly ratified," *Seila Law*, 140 S. Ct. at 2211. However, the Court in *Collins* noted that it never mentioned "whether ratification

The Court further clarified that actions taken by an improperly insulated director are not "void" and do not need to be "ratified" unless a plaintiff can show that the removal provision harmed him.[57] "[P]laintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision."[58] In other words, if there is no harm derived from the President's inability to remove the agency head, then the agency action will not be unwound.[59]

Because in *Seila Law* there was a "dispute [about] the possibility that the unconstitutional removal restriction caused any such harm," the Court held that such disputes should be resolved by the lower courts and remanded the action to the court of appeals.[60] In so doing, the Court in *Collins* extended the rule established in *Seila Law* to permit consideration of harm and, as a result of doing so, to determine if the agency action had to be rewound.

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was necessary" when agency action was taken at the behest of an unconstitutionally insulated agency director. *Collins*, 141 at 1788.

57. *Id.* at 1788-89.

58. *Id.* at 1801 (Kagan, J., concurring in part).

59. *Id.*

60. *Id.* at 1789; *see, e.g.*, *id.* at 1795 (Thomas, J., concurring) ("The Fifth Circuit can certainly consider this issue on remand."); *id.* at 1802 (Kagan, J., concurring in part) (stating that the "Court of Appeals already considered and decided the issue remanded").

Against this backdrop of *Collins* and *Seila Law*, the District Court considered the underlying action. It addressed two questions: whether the CFPB needed to ratify this action (which necessarily addresses the suit's timeliness) and whether the Trusts were "covered persons" under the CFPA.[61] Based on *Collins*, the District Court held that the agency head was properly appointed, and that the agency would have filed the action regardless of the President's ability to remove the agency head. More particularly, it held:

> This suit would have been filed even if the director had been under presidential control. It has been litigated by five directors of the CFPB, four of whom were removable at will by the President. And the CFPB did not change its litigation strategy once the removal protection was eliminated. This is strong evidence that this suit would have been brought regardless. Thus, the CFPB's initial decision to bring this suit was not ultra vires.[62]

This conclusion resolved the first question.

The District Court then considered whether the Trusts were "covered persons" under the CFPA.[63] Section 5584(a) of the statute, which governs the CFPB's

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61. *See CFPB II*, 575 F. Supp. 3d at 506.

62. *Id.* at 508 (citation omitted).

63. *See id.* at 509.

enforcement authority, states that "[t]he CFPB may bring enforcement actions to 'prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice.'"[64] Under the CFPA, a "covered person," is "any person that engages in offering or providing a consumer financial product or service."[65] Because "[t]he Trusts do not deny that their subservicers collected debt or serviced loans" the District Court noted that "this dispute boils down to the breadth of the word 'engage.'"[66] The central question in evaluating this inquiry was: "Does a person 'engage' in an activity if he *contracts* with a third party to do that activity on his behalf?"[67] The court's answer was "Yes."[68]

Relying on multiple dictionaries, the District Court determined that "'[e]ngage' means to 'to embark in any business' or to 'enter upon or employ oneself in an action.'"[69] This definition, it found, was "broad enough to encompass actions taken on a person's behalf by another, at least where that action is central to his enterprise."[70]

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64. *Id.* (quoting 12 U.S.C. § 5531(a)).

65. 12 U.S.C. § 5481(6)(A).

66. *CFPB II*, 575 F. Supp. 3d at 509.

67. *Id.* (emphasis added).

68. *Id.*

69. *Id.* (citing *Engage* (def. 16), Oxford English Dictionary (2d ed. 2000)); *see also Engage*, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on.").

70. *CFPB II*, 575 F. Supp. at 509.

The court found that "[t]he Trusts 'embark[ed] in [the] business' of collecting debt and servicing loans when they contracted with the servicers and subservicers to collect their debt and service their loans."[71] The court continued, "[t]he Trusts cannot claim that they were not 'engaged in' a key part of their business just because they contracted it out."[72]

Shortly thereafter, the Trusts and intervenors timely filed a motion for interlocutory appeal. The District Court certified two questions for review: first, the statutory question whether the Trusts are "'covered persons' subject to the [CFPB's] enforcement authority" under the CFPA;[73] second, the constitutional question, whether, after *Collins*, "the Bureau need[ed] to ratify this suit before the statute of limitations ran, having first filed it while the Bureau's director was improperly insulated from presidential removal[.]"[74]

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71. *Id.*

72. *Id.* at 509-10 (citing *Barbato v. Greystone All., LLC*, 916 F.3d 260, 266-68 (3d Cir. 2019) (finding that a "passive debt owner" counted as a "debt collector" under the Fair Debt Collection Practices Act when it contracted with a third party to collect debt on its behalf)).

73. JA20.

74. JA20.

II. JURISDICTION AND STANDARD OF REVIEW

The Trusts petitioned us for review pursuant to 28 U.S.C. § 1292(b).[75] We have jurisdiction under that same provision.[76] We also have jurisdiction pursuant to 28 U.S.C. § 1331. We review questions certified for interlocutory review *de novo*.[77]

III. DISCUSSION

A. Statutory Question

The statutory dispute between the parties boils down to a central question: Are the Trusts "covered persons" under the CFPA because they *engage* in consumer financial products or services?[78]

In interpreting a statute, we begin our analysis with the plain language of the statute. Just as the District Court did, we "[s]tart with the text."[79] That text begins

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75. NCMSLT Br. at 4-5.

76. NCMSLT Br. at 4.

77. *Barbato*, 916 F.3d at 264.

78. *See* NCMSLT Br. at 24, 33; CFPB Br. at 12.

79. *CFPB II*, 575 F. Supp. 3d at 509; *see Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1056, 203 L. Ed. 2d 433 (2019) ("We begin 'where all [statutory interpretation] inquiries must begin: with the language of the statute itself.'" (quoting *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S*, 566 U.S. 399, 412, 132 S. Ct. 1670, 182 L. Ed. 2d 678 (2012) (cleaned up))).

with 12 U.S.C. § 5531(a), which dictates the CFPB's enforcement authority. The statute states the following:

> The Bureau may take any action . . . to prevent a *covered person* or service provider from committing or *engaging in* an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a *consumer financial product or service*, or the offering of a *consumer financial product or service*.[80]

A "covered person" is defined by § 5481(6)(A) as "any person that engages in offering or providing a consumer financial product or service."[81] To apply the statutory interpretive framework above, and thus determine whether the Trusts are "covered persons" subject to the

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80. 12 U.S.C. § 5531(a) (emphases added).

81. 12 U.S.C. § 5481(6)(A). The omitted portion of this provision states the following: "and any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person." While we do agree that servicers were "central" to the Trusts' "enterprise," *see* JA14, neither party argues at this time that the Trusts should be liable for the acts of the servicers. Indeed, that would likely be an entirely different matter. *See* CFPB Br. at 31; *Barbato*, 916 F.3d at 269-70 (illustrating that whether one can be liable for the actions of another is a different question from the one presented on appeal). As such, we need not evaluate affiliate liability, especially if the Trusts can be said to "engage" on their own accord. Thus, the relevant inquiry is not whether the servicers are an affiliate of the Trusts, but whether the Trusts "engaged" others to proliferate their business.

CFPB's enforcement authority, we must look to "engage" in its statutory context.[82] To streamline this process, we will define this context first so that we can then apply "engage" against that background.

A "person," under the CFPA, "means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, or other entity."[83] "Trusts" are explicitly mentioned here. Additionally, the Trusts are statutory trusts formed under Section 3801 of Title 12 of the Delaware Code.[84] Title 12 of the Delaware Code states that statutory trusts are defined as "unincorporated associations."[85] Congress's intent is clear: the Trusts were to be included as "persons" under the CFPA.[86]

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82. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L. Ed. 2d 808 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *see* JA14.

83. 12 U.S.C. § 5481(19).

84. *CFPB I*, 2021 U.S. Dist. LEXIS 58013, 2021 WL 1169029, at *1.

85. 12 Del. Code § 3801(i).

86. "If the language of the statute expresses [the legislature's] intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms." *Gregg*, 226 F.3d at 257 ("If the language of the statute expresses [the legislature's] intent with sufficient precision, the inquiry ends there and the statute is enforced according to its terms.").

A similarly inevitable conclusion is reached when defining "consumer financial product[s and] service[s]."[87] In defining this phrase,[88] the statute directs us to the definition of "financial product or service."[89] Under § 5481(15), a financial product or service may include "extending credit and servicing loans."[90] The Trusts themselves state in their opening brief that they "were formed to acquire a pool of private student loans, to issue securitized notes on those loans, and to *provide for the servicing of the loans* and the distribution to noteholders of the loan payments made by borrowers."[91] Thus, they unambiguously fall within the statute.[92]

We then turn to the primary statutory question: whether the Trusts "engage." If they do "engage," they

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87. 12 U.S.C. § 5481(5).

88. *See supra* notes 80-81 and accompanying text.

89. 12 U.S.C. § 5481(5).

90. *Id.* § 5481(15)(A)(i). Thus, the terms of § 5481(15) are included in § 5481(5).

91. NCMSLT Br. at 10 (emphasis added) (citing JA107, which is part of the trust agreement).

92. This point does not seem to be disputed by the parties. *See* Amici Br. Securities Ind. & Fin. Mkts. Assoc. at 15 (stating that the Trusts "do not, and cannot, 'engage in' offering or providing consumer financial products or services *such as the debt collection services at issue here*" (emphasis added)); *see also* JA13-14 ("True, third parties, not the Trusts, collected the debt and serviced the loans. But the loan servicing and debt collection were crucial to the Trusts' business and could not have happened without their say-so.").

are covered persons under the CFPA; if they do not, they do not fall within the purview of the CFPA. The District Court found "room for reasonable disagreement" in the definition of "engage."[93] For this reason, we will look to other interpretative measures to define this term. To do so, we will review how this definition has been applied in earlier cases.[94]

In *Southwest Airlines Co. v. Saxon*, the Supreme Court had to determine whether a "class of workers *engaged in* foreign or interstate commerce."[95] Southwest

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93. JA14.

94. Unfortunately, Dodd-Frank's legislative history does not adequately define "engage." Thus, we cannot glean much by examining CFPA's history. Something we can glean, though, is that when Dodd-Frank was before Congress, its purpose was broad: "This is a time to bring certainty back into the market and reasonable regulation and reasonable enforcement back to the financial system." 156 Cong. Rec. H5223-02, 156 Cong. Rec. H5223-02, H5231. But Congress addressed the concern that the Act was too broad: "One of the initial concerns we heard was that companies who do not engage in consumer financial business would be regulated by [Dodd-Frank]. We fixed that. Merchants, retailers, doctors, realtors, and others—some suggested the butcher, the baker, the candlestick maker—let's be clear, they're exempt from [Dodd-Frank] as was intended and as they should be." 155 Cong. Rec. H14762-01, 155 Cong. Rec. H14762-01, H14773. So when Congress walked back Dodd-Frank's broad grant of enforcement authority, it retained the notion that Dodd-Frank applies to those taking part in the financial system and consumer financial business. As such, it is clear that Congress intended the Dodd-Frank to apply to the consumer financial industry.

95. *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 457, 142 S. Ct. 1783, 213 L. Ed. 2d 27 (2022) (emphasis added) (internal quotations omitted).

Airlines attempted to enforce an arbitration agreement against Saxon under the Federal Arbitration Act (FAA).[96] In response, "Saxon [argued] that the [FAA] did not apply because she was a member of a 'class of workers engaged in foreign or interstate commerce,' and therefore exempted by § 1 of the [FAA]."[97] To determine whether this exemption applied, the Supreme Court had to define "engage."[98]

The Court, "begin[ning] with the text," stated that the word "'engaged' . . . mean[s] 'occupied,' 'employed,' or 'involved' in [something]."[99] In applying this definition, the Court held that Southwest Airlines interpreted the statute too narrowly, and that Saxon, as a ramp supervisor for the airline, was part of a "'class of workers engaged in foreign or interstate commerce' to which [the statutory] exemption applies."[100]

This interpretation is consistent with colloquial and legal dictionaries that define "engage." *Merriam-Webster's Dictionary* contemporarily defines engage as "to begin and carry on an enterprise or activity" and "to

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96. *See Id.*

97. *Saxon v. Sw. Airlines Co.*, 993 F.3d 492, 495 (7th Cir. 2022).

98. *Saxon*, 596 U.S. at 463.

99. *Id.* (citing Webster's New International Dictionary 725 (1922) and Black's Law Dictionary 661 (3d ed. 1933) (defining "engage")).

100. *Id.*

do or take part in something."[101] *Black's Law Dictionary* defines engage as: "To employ or involve one's self; to take part in; to embark on."[102] This definition has remained remarkably consistent over time, and is the same definition referred to by the Supreme Court in *Saxon*.[103]

Using this definition, we can now determine whether the Trusts "engage" in consumer financial products or services. If the Trusts meet any of the aforementioned definitions, they can be said to "engage." For example, if they "embark on" or "take part in" collecting debt or servicing loans, they can be said to engage in those consumer financial products or services.[104] And if they engage, they will come under the purview of the CFPA.

The Trust Agreement that each Trust entered into states the following:

> The purpose of the Trust is to *engage in* the following activities and *only* these activities: (i) To acquire a pool of Student Loans, to execute

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101. *Engage*, Merriam-Webster's Dictionary.

102. *Engage*, Black's Law Dictionary (11th ed. 2019). This definition is also consistent with the one used by the District Court. *See CFPB II*, 575 F. Supp. 3d at 509.

103. *Compare Engage*, Black's Law Dictionary (3d ed. 1933) *with Engage*, Black's Law Dictionary (11th ed. 2019).

104. The District Court found "debt collection and loan servicing [to be] core aspects of the Trusts' business model." *CFPB II*, 575 F. Supp. 3d at 509.

> the Indenture and to issue the Notes; (ii) To *enter into* the Trust Related Agreements and to provide to the administration of the Trusts and servicing of the Student Loans; (iii) To *engage in* those activities and to enter into such agreements that are necessary, suitable or convenient to accomplish the foregoing or are incidental thereto or connected therewith; and (iv) To *engage in* other such activities as may be required in connection with conservation of the Trust Property and Distributions to Owners.[105]

Thus, the Agreement itself states that the Trusts "engage" in these activities, which include consumer financial products or services. Nonetheless, because the parties dispute the definition of engage, we will apply it to each purpose mentioned in the Trust Agreement.

First, in "acquir[ing] a pool of Student Loans,"[106] the Trusts "beg[an] . . . an enterprise or activity,"[107] with that enterprise[108] "involv[ing]"[109] financial products or services. As the Trusts themselves state in their brief, "the defendants are 15 statutory trusts formed to purchase,

105. JA107 (emphasis added).

106. *Id.*

107. *See supra* note 101.

108. *See Enterprise*, Black's Law Dictionary (11th ed. 2019) ("An organization or venture, esp[ecially] for business purposes.").

109. *Engage*, Black's Law Dictionary (11th ed. 2019).

pool, and securitize student-loan debt."[110] Moreover, it seems unlikely that one can acquire[111] something without "involv[ing] one's self."[112]

Second, the Trusts "carr[ied] on [their] enterprise" through Administration Agreements.[113] These Agreements "make clear the Administrator will 'perform' the 'duties of the [Trusts].'"[114] More particularly, "[t]he Administrator shall prepare for execution . . . , or shall cause the preparation . . . of, all such documents, reports, filings, instruments, certificates and opinions . . . of the [Trusts] . . . pursuant to the Trust Related Agreements."[115] In this vein, "the Administrator need not await instructions before pursuing ordinary course lawsuits initiated 'by the [Trust] or its agents . . . for the

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110. NCMSLT Br. at 1.

111. *See Acquire*, Black's Law Dictionary (11th ed. 2019) ("To gain possession or control of; to get or obtain.").

112. NCMSLT Br. at 1.

113. *See supra* note 101.

114. *In re NCLST*, 251 A.3d at 140 (alteration in original) (quoting JA150). While the Trusts purport that the Administrator is separate from the Trusts, *see* NCMSLT Br. at 11 (arguing that "the Administrator is 'not . . . subject to the supervision of the [Trusts] or the Owner Trustee with respect to the manner in which it accomplishes the performance of its obligations'"), we need not address this claim. It is a bridge too far. All we need to determine is whether the Trusts engaged in such agreements.

115. JA149.

collection of the Student Loans owned by the [Trust].'"[116] Therefore, through the Administration Agreements, the Trusts "involv[ed]"[117] themselves in consumer financial products or services.

Third, the Trusts "carr[ied] on [their] enterprise"[118] by further "involv[ing]"[119] themselves in agreements for the servicing of loans.[120] Another such set of agreements were Servicing Agreements, which were entered into by the Administrator.[121] Servicing Agreements were a necessary part of their business.[122] Again, as the Trusts mention in their brief, "[t]hey have no employees and no directors."[123] So, in order to fulfill their obligation of "servicing . . . student loans"[124] they had to enter into agreements with "third parties [to] collect[] the debt and service[] the loans," which "could not have happened

116. *In re NCLST*, 251 A.3d at 140-41 (alteration in original) (quoting JA151).

117. *Engage*, Black's Law Dictionary (11th ed. 2019).

118. *See supra* note 101.

119. *Engage*, Black's Law Dictionary (11th ed. 2019).

120. *See supra* note 101.

121. *In re NCLST*, 251 A.3d at 131.

122. JA14.

123. NCMSLT Br. at 1.

124. *See supra* note 105.

without [the Trusts'] say-so."[125] Indeed, without these agreements, the Trusts could not have "embark[ed] on"[126] the servicing of student loans.

Finally, the Trust Agreement states that the Trusts are to "engage in *other activities*" that may be "required in connection or conservation of Trust Property . . . ."[127] Trust Property, according to the Trust Agreement, is defined as "all right, title and interest of the Trust or the Owner Trustee on behalf of the Trust in and to any property contributed to the Trust."[128] And "the Trusts retained legal title to the Collateral [i.e., the Student Loans] so that they could collect Student Loans for distribution . . . ."[129] When suits are brought against borrowers for the Trusts to collect on student loans, third parties are acting for the benefit of the Trusts.[130] As such, the Trusts cannot claim that they did not "take part in" collecting debts.[131]

The Trust Agreement's purpose indicates that the Trusts engage in both student loan servicing and debt collection. As such, the Trusts fall within the purview of the CFPA because they "engage" in a known "consumer

125. JA13.

126. *Engage*, Black's Law Dictionary (11th ed. 2019).

127. *See supra* note 105.

128. JA105.

129. *In Re NCSLT*, 251 A.3d at 194.

130. *See supra* note 15 and accompanying text.

131. *See supra* notes 15, 91, 104, and accompanying text.

financial product or service" and are necessarily subject to the CFPB's enforcement authority.[132]

B. Constitutional Question

We now turn to the constitutional question that was certified: Ratification of agency action. The Trusts argue that the underlying suit needed to be ratified by the Director of the CFPB because it was initiated while the agency head was improperly insulated; and since that ratification came after the statute of limitations had run, the suit was untimely.[133] Moreover, they claim that action undertaken while an agency head is impermissibly insulated creates a "here-and-now injury."[134] The CFPB responds by arguing that ratification was not necessary in the wake of *Collins* because the agency head was properly appointed and the statute did not cause harm to the Trusts.[135]

To properly evaluate these arguments, we must briefly revisit our discussion of *Collins*. As the District Court found, "[t]he [*Collins*] Court explained that actions taken by an improperly insulated director are not 'void' and do not need to be 'ratified' unless a plaintiff can show that the removal provision harmed him."[136] The parties do not dispute whether the CFPB Director was properly

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132. 12 U.S.C. § 5584(a).

133. NCMSLT Br. at 49-53.

134. NCMSLT Br. at 21.

135. CFPB Br. at 34-54.

136. JA16 (citing *Collins*, 141 S. Ct. at 1787-88).

appointed.[137] Thus, the heart of the issue is whether the insulation provision, 12 U.S.C. § 5491(c), caused harm.[138] This is not an issue of first impression. We begin by evaluating the approaches our sister circuits have taken in interpreting *Collins*.

The Second Circuit Court of Appeals in *CFPB v. Law Offices of Crystal Moroney, P.C.*,[139] addressed whether a civil investigative demand (CID), often the first step in an enforcement suit by the CFPB "was void *ab initio* because, when the CID was issued, the CFPB Director was shielded by an unconstitutional removal provision."[140] The court held that "[t]his argument is foreclosed by the Supreme Court's decision in *Collins*."[141] It interpreted the Court in *Collins* as "h[olding] that the relevant inquiry for determining whether an officer 'lacked constitutional authority and that [her] actions were therefore void *ab initio*' is whether the officer in question [was] properly

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137. JA15. However, the Trusts do argue that the harm from impermissible insulation is "indistinguishable" from harm of improper appointment.

138. *Cf. Kaufmann v. Kijakazi*, 32 F.4th 843, 849-50 (9th Cir. 2022) (holding that, when an agency head is impermissibly insulated, the matter is to be decided based on whether the statute itself caused harm).

139. 63 F.4th 174 (2d Cir. 2023). A Petition for Writ of Certiorari has been docketed.

140. *Id.* at 179.

141. *Id.*

appointed,' not whether she was properly *removable*."[142] Like our interpretation of *Collins* today, the circuit court also noted that a party could, nevertheless, "be entitled to relief if it could show that 'an unconstitutional provision . . . inflict[ed] compensable harm' on the petitioner."[143] In determining the nature of that harm, the circuit court relied on Justice Kagan's concurrence to determine that "[r]equiring but-for causation in these cases properly matches the constitutional injury to the requested remedy."[144] The circuit court found this interpretation to be consistent with its own and with Supreme Court precedents.[145]

The Ninth Circuit Court of Appeals in *Kaufmann v. Kijakazi*,[146] further defined the requisite harm. There, the circuit court was faced with deciding whether an impermissibly insulated agency head violated the separation of powers, and if so, whether the agency action was necessarily void.[147] At the outset, the court noted that, "[f]or the purpose of the constitutional analysis,

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142. *Id.* (alterations in original) (quoting *Collins*, 141 S. Ct. at 1787). Again, we agree that the CFPB's Director was properly appointed. *See* JA15 (stating that "the Bureau's director was properly appointed").

143. *Id.* (quoting *Collins*, 141 S. Ct. at 1789).

144. *Id.* at 180.

145. *Id.*

146. 32 F.4th 843 (9th Cir. 2022).

147. *Kaufmann*, 32 F.4th at 846.

the Commissioner of Social Security is indistinguishable from the Director of the FHFA discussed in *Collins* and the Director of the CFPB discussed in *Seila Law*."[148] Much like *Seila Law*, the circuit court also found "the removal provision . . . severable from the remainder of the statute," and that the remainder of the statute was capable of functioning independently of the impermissible provision.[149] Still, the circuit court also noted that "[a] party challenging an agency's past actions must . . . show how the unconstitutional removal provision *actually harmed* the party."[150] "[*U*]*nless* a claimant demonstrates actual harm, the unconstitutional provision has *no effect* on the claimant's case. Because Claimant has not shown actual harm, we uphold the Commissioner's decision."[151]

Here, as discussed above, the Trusts claim that an unconstitutional provision violating the separation of powers caused them harm.[152] But a mere allegation that the unconstitutional provision inherently caused them

148. *Id.* at 849.

149. *Id.* ("[O]ne provision of a [statute] may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity.") (quoting *Seila Law*, 140 S. Ct. at 2208)) (alteration in original).

150. *Id.*

151. *Id.* at 850 (emphasis added).

152. That harm is the purported "here-and-now" injury. *See supra* note 134 and accompanying text; *infra* note 159 and accompanying text.

harm is insufficient. There must be something more.[153] For example, if the CFPA suggested "any link whatsoever between the removal provision and [c]laimant's case," then the Trusts may be entitled to some type of relief.[154]

We cannot find such a link. The statute, in relevant part, states: "The Director shall serve for a term of 5 years"; "An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified"; and "The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."[155] There is no notion in this statute that the CFPB would have taken this action but for the President's inability to remove the Director.[156] On the contrary, as the District Court noted, there "is strong evidence that this suit would have been brought regardless" of a president's authority to remove because the CFPB's litigation strategy has been consistent across five directors, four of whom were removable at will.[157]

While the Trusts argue that the unconstitutional provision, in and of itself, created a here-and-now injury,[158]

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153. *Id.* at 849-50.

154. *Id.* at 850.

155. 12 U.S.C. § 5491.

156. *See Kaufmann*, 32 F.4th at 850.

157. *See CFPB II*, 575 F. Supp. 3d at 508; *supra* notes 61-62 and accompanying text.

158. NCMSLT Br. at 21 ("An enforcement action initiated by an

their analysis of the injury does not go far enough. They argue that harm from an unconstitutional statutory restriction on removal authority is "indistinguishable" from the "harm suffered under the authority of executive officers who were not properly appointed in the first instance."[159] This presupposition of harm, as discussed above, is foreclosed by

Collins and its progeny because there must be an actual, compensable harm in order for there to be an injury from an impermissible insulation provision.[160] Again, the circuit court in *Kaufmann* held that an impermissible insulation provision does not, on its own, cause harm, and "*unless* a claimant demonstrates actual harm, the unconstitutional provision has *no effect* on the claimant's case."[161]

Additionally, the Trusts' interpretation of their purported injury seems to be in discord with other precedential examples of "here-and-now" injuries. For example, the Supreme Court has noted that "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker" is a manifestation of a "here-and-now"

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unconstitutionally structured agency inflicts a 'here-and-now' injury, that demands a remedy tailored 'to the injury suffered.'" (quoting *United States v. Morrison*, 449 U.S. 361, 364, 101 S. Ct. 665, 66 L. Ed. 2d 564 (1981))) (cleaned up).

159. NCMSLT Br. at 62.

160. *Kaufmann*, 32 F.4th at 850.

161. *See id.* (emphasis added).

injury.[162] There is no support in the record for the notion that instant proceeding was similarly illegitimate because, like *Kaufmann*, there is no indication that this suit would have been undertaken *but-for* a president's authority to remove the CFPB's Director, or that the CFPB was able to target the Trusts via the unconstitutional provision.[163] In another example, in *Sherley v. Sebelius*, the D.C. Circuit Court of Appeals found there to be a "here-and-now injury" when doctors would have to invest additional time and resources because of a loss, or different allocation, of funding.[164] In both of these examples, there was a compensable and identifiable harm. Here, there is no such thing.

The Trusts argue, contrary to these precedents, that *Collins* did not actually change the legal landscape, and that the matter before us still needed to be ratified by a properly appointed director after the constitutional defect was cured via severing pursuant to 12 U.S.C. § 5491(c).[165] This notion is directly counter to the Supreme Court's holding in *Collins*. It is also counter to guidance provided by our sister courts. For example, the Tenth Circuit Court of Appeals in *Integrity Advance, LLC v. CFPB* held that "*Collins* put to rest" the argument that ratification was necessary for actions taken while the agency was

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162. *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 143 S. Ct. 890, 903, 215 L. Ed. 2d 151 (2023).

163. *See CFPB II*, 575 F. Supp. 3d at 508.

164. 610 F.3d 69, 74, 391 U.S. App. D.C. 258 (D.C. Cir. 2010).

165. NCMSLT Br. at 53-67.

unconstitutionally structured.[166] And the Ninth Circuit Court of Appeals had nearly the same interpretation of a post-*Collins* world: "We find it unnecessary to consider ratification because [*Collins*] has made clear that despite the unconstitutional limitation on the President's authority to remove the Bureau's Director, the Director's actions were valid when they were taken."[167]

We see no need to remand the ratification issue. As our sister courts have noted, "[w]hile *Collins* remanded for further factual development on the issue of harm, we need not do so here, as the record is clear."[168] The record is also clear here: There is no indication that the unconstitutional limitation on the President's authority harmed the Trusts.

CONCLUSION

For the above reasons, we will respond to the District Court's queries by holding that (1) the Trusts are covered persons subject to the CFPA's enforcement authority because they "engage" in the requisite activities and (2) the CFPB did not need to ratify this action before the statute of limitations had run.

166. 48 F.4th 1161, 1170 (10th Cir. 2022), *cert. denied*, 143 S. Ct. 2610, 216 L. Ed. 2d 1208, 2023 WL 3937614 (2023).

167. *CFPB v. CashCall, Inc.*, 35 F.4th 734, 742 (9th Cir. 2022).

168. *Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1137 (9th Cir. 2021) (citation omitted).

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE, FILED DECEMBER 13, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

No. 1:17-cv-1323-SB

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

v.

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST *et al.*,

Defendants.

December 13, 2021, Decided;
December 13, 2021, Filed

MEMORANDUM OPINION

BIBAS, *Circuit Judge*, sitting by designation.

Sometimes litigation is a moving target. Legal rules can change while the parties are battling it out. Earlier this year, the National Collegiate Student Loan Trusts successfully argued that the Consumer Financial Protection Bureau's suit against them was untimely. This Court dismissed the case without prejudice, relying on

then-prevailing precedent. But then the Supreme Court announced a new rule. And the CFPB renewed its suit. Applying the new rule, at least on the complaint before me, this case is timely.

Plus, the Trusts say the CFPB lacks authority to sue them because they are not “covered persons” under the Consumer Financial Protection Act. But they “engaged in” servicing loans and collecting debt through their contractors, so they fall within the statute. I must thus let the CFPB’s case proceed.

I. Background

In 2017, the CFPB sued the Trusts for engaging in forbidden debt-collection and litigation practices. First Am. Compl., D.I. 362 ¶¶ 1-2. Now the Trusts move to dismiss. Understanding that motion requires us to take a whistle-stop tour through both this protracted enforcement action and the structure of the CFPB.

A. The Trusts and the CFPB’s enforcement

The Trusts were set up to securitize student loans. They bought a pool of 800,000 private loans, then sold notes secured by that pool to investors. *Id.* ¶¶ 27, 34. As students repaid their loans, the investors would take a cut. D.I. 54, at 4. Just like any other securitization, the value of the notes depended on the riskiness of the underlying asset: the more students default on their loan payments, the less valuable the notes.

Thus, the Trusts have a powerful incentive to ensure that students do not miss loan payments. Since the Trusts have no employees, they collect debt and service the loans through third parties. First Am. Compl. ¶ 29.

To that end, in 2009 the Trusts contracted with a special servicer to collect "past-due and defaulted student loans" and to do "collections litigation." D.I. 54, at 5. The special servicer, in turn, entered into agreements with "subservicers," who would "conduct[ ] collections" and "oversee[ ] various law firms that [would] file collection lawsuits against borrowers in the name of the Trusts." *Id.*; *see* First Am. Compl. ¶¶ 38-44.

But the subservicers soon attracted the attention of the CFPB. After a lengthy investigation, it found that the subservicers had "executed and notarized deceptive affidavits" and "filed ... collections lawsuits lacking" key evidence. First Am. Compl. ¶¶ 49-50. The CFPB concluded that they engaged in unfair and deceptive debt-collection practices. D.I. 54, at 1-2.

So in 2014, the CFPB started administrative proceedings against the Trusts. Though the parties reached a settlement and asked the Court to enter a consent decree, the Court declined. D.I. 272. That forced the CFPB to sue.

B. The structure of the CFPB and the Trusts' first motion to dismiss

But midway through this litigation, the Supreme Court injected a new issue. Since its creation in 2008, the

CFPB had been headed by a single director, insulated from removal by the President. Yet the Court said that structure "violate[d] the separation of powers." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197, 2209, 207 L. Ed. 2d 494 (2020). So it severed the removal restriction, leaving the rest of the statute intact.

That ruling implicated this enforcement action, which the CFPB filed in 2017 while headed by an improperly insulated director. Aware that such a director may have lacked the power to bring an enforcement action, a new director (now removable at will by the President) ratified the suit to cure any defect. D.I. 308-1.

But earlier this year, Judge Noreika ruled that the ratification came too late to save this suit. D.I. 359, at 8-14. All CFPB enforcement actions must be brought within three years of the date on which it discovers the violation. 12 U.S.C. § 5564(g)(1). Yet here, the CFPB admitted that "ratification ... came more than three years after the date of discovery." D.I. 356, at 40:20-21. Plus, it could not show that the statute-of-limitations clock was extended by equitable tolling. So Judge Noreika dismissed the suit without prejudice, giving the CFPB another chance to explain why its suit was timely. D.I. 360.

After that ruling, the CFPB amended its complaint. And the Trusts brought this motion to dismiss, arguing that the new complaint suffered from the same timeliness defect as the first one. D.I. 367, at 7-11. They also contend that the Trusts do not count as "covered person[s]" under the Act and so cannot be targets of CFPB enforcement. *Id.* at 11; 12 U.S.C. § 5481(6).

To survive a motion to dismiss, a complaint must contain enough facts to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). I must accept all allegations in the complaint as true and draw all inferences in favor of the nonmoving party. *Foglia v. Renal Ventures Mgmt., LLC*, 754 F.3d 153, 154 n.1 (3d Cir. 2014).

II. This Suit Is Not Yet Time Barred

The Trusts say the CFPB failed to ratify this suit before the statute-of-limitations clock ran out. But this assumes that unconstitutional removal protections automatically void agency action. And earlier this year, the Supreme Court rejected that premise. Thus, the CFPB stopped the clock when it sued. So on the compliant now before me, the suit is timely filed.

A. There was no need for the CFPB to ratify this suit

The CFPB brought this suit while it was unconstitutionally structured. Back then, courts saw actions brought by improperly structured agencies as "ultra vires" and so void. *Collins v. Yellen*, 141 S. Ct. 1761, 1795, 210 L. Ed. 2d 432 (2021) (Gorsuch, J., concurring in part). And void actions cannot stop the statute-of-limitations clock. Thus, to save the suit, an agency had to cure the constitutional defect, then ratify the action before the clock ran out. Here, ratification happened too late. So Judge Noreika dismissed this lawsuit.

Yet earlier this year, the Supreme Court undercut that reasoning. *Id.* at 1788 (majority opinion). It held that an unconstitutional *removal* restriction does not invalidate agency action so long as the agency head was properly *appointed*. Such an agency head has "authority to carry out the functions of the office." *Id.* So the agency's actions are not "void" and do not need to be "ratified," unless a plaintiff can show that the removal provision harmed him. *Id.* Put differently, he must show that the agency action would not have been taken but for the President's inability to remove the agency head. *Id.*

That is not the case here. This suit would have been filed even if the director had been under presidential control. It has been litigated by five directors of the CFPB, four of whom were removable at will by the President. D.I. 377, at 2. And the CFPB did not change its litigation strategy once the removal protection was eliminated. This is strong evidence that this suit would have been brought regardless. Thus, the CFPB's initial decision to bring this suit was not ultra vires.

B. At this stage, I may not decide whether this suit is time barred

Because the decision to bring this suit was a valid agency action, it is not untimely if it was *filed* within three years of the date on which the CFPB discovered the alleged violation. 12 U.S.C. § 5564(g)(1).

The Trusts argue that even under this test, the suit is time barred. The CFPB sued on September 18, 2017.

Yet the Trusts say, the CFPB had discovered the alleged misconduct by September 4, 2014, when it issued a civil investigative demand asking the Trusts for information about possible violations. D.I. 367, at 19. If true, this suit is time barred.

But the Trusts' argument is premature. On this motion to dismiss, I may consider a statute-of-limitations defense only if "the face of the complaint demonstrates that the plaintiff's claims are untimely." *Stephens v. Clash*, 796 F.3d 281, 288 (3d Cir. 2015) (internal quotation marks omitted). Otherwise, the defendant would be forced to state facts necessary to anticipate and overcome an affirmative defense. *Id.*

Yet the Trusts fall afoul of this rule by relying on a civil-investigative-demand letter outside the complaint. *See* D.I. 302-3. Because I may not consider that letter, the Trusts' argument fails. Even if I *could* look at the letter, it does not unambiguously show that the CFPB knew about the alleged violations by September 4, 2014. The letter states that its purpose is to "determine whether [the Trusts] ... engaged [in] ... unlawful acts." *Id.* at 4. Such an investigation would have been pointless if the agency already knew about the Trusts' alleged misconduct.

The Trusts may still try to make out a statute-of-limitations defense, but that will have to wait until summary judgment.

III. The Trusts Are "Covered Persons" Under the Consumer Financial Protection Act

The Trusts argue that the CFPB cannot bring an enforcement action against them because they are not "covered persons" as required under the Act. But this theory is undercut by the statute's text: the Trusts "engage in" servicing and collecting debt.

Start with the text. The CFPB may bring enforcement actions to "prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5531(a). Thus, it may sue only a "covered person" or a "service provider." The CFPB does not argue that the Trusts are "service provider[s]." *See* First Am. Compl. ¶ 8. So this suit may only proceed if they are "covered person[s]": "person[s] that engage[ ] in offering or providing a consumer financial product or service." 12 U.S.C. § 5481(6).

The CFPB argues that the Trusts qualify because they "engage[ ] in" providing some of the "financial product[s] or service[s]" listed in the Act: "servicing loans, including acquiring, purchasing, selling, brokering, or other extensions of credit" and "collecting debt." *Id.* § 5481(6), (15)(A)(i), (x); First Am. Compl. ¶ 8. More precisely, it claims that the Trusts "engage in regular servicing of ... loans" and "debt-collection activities through ... [its] subservicers." *Id.* ¶¶ 35-36.

The Trusts do not deny that their subservicers collected debt or serviced loans. Instead, they contend that

the CFPB cannot hold them liable for those actions. D.I. 367, at 13. The Trusts characterize themselves as "passive securitization vehicles ... [that] take no action related to the servicing of student loans or collecting debt." *Id.* at 12.

So this dispute boils down to the breadth of the word "engage." Does a person "engage" in an activity if he contracts with a third party to do that activity on his behalf? Yes.

"Engage" means to "to embark in any business" or to "enter upon or employ oneself in an action." *Engage* (def. 16), Oxford English Dictionary (2d ed. 2000); *see also Engage*, Black's Law Dictionary (11th ed. 2019) ("To employ or involve oneself; to take part in; to embark on.").

That definition is broad enough to encompass actions taken on a person's behalf by another, at least where that action is central to his enterprise. Thus, if a dairy farmer contracts with a farmhand to milk his cows and never does that job himself, he is still employed in or in the business of milking cows.

So too here. The Trusts "embark[ed] in [the] business" of collecting debt and servicing loans when they contracted with the servicers and subservicers to collect their debt and service their loans. Indeed, the CFPB alleges that the unfair and deceptive debt-collection practices happened in lawsuits brought on behalf of the Trusts, with the "relevant Trust ... named [as the] plaintiff in the action." First Am. Compl. ¶ 37. Those suits could have proceeded only with the Trusts' involvement: with narrow exceptions,

"a party ... must assert his own legal rights and interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129, 125 S. Ct. 564, 160 L. Ed. 2d 519 (2004) (internal quotation marks omitted). The subservicers could not have collected any debt without the Trusts' say-so.

True, the subservicers were independent contractors and not Trust employees. D.I. 302-1 § 17. But that is not dispositive. Debt collection and loan servicing are core aspects of the Trusts' business model. If they did not enforce debtors' obligations, their pool of loans would be less valuable, as would the notes they sell to investors. The Trusts cannot claim that they were not "engaged in" a key part of their business just because they contracted it out. *Cf. Barbato v. Greystone All., LLC*, 916 F.3d 260, 266-68 (3d Cir. 2019) (finding that a "passive debt owner" counted as a "debt collector" under the Fair Debt Collection Practices Act when it contracted with a third party to collect debt on its behalf).

Plus, if Congress wanted to allow enforcement against only those who *directly* engage in offering or providing consumer financial services, it could have said so. *See, e.g.*, 12 U.S.C. § 5481(15)(A)(vii)(I) (exempting some merchants from "covered person" status where they deal in "nonfinancial good[s] or service[s] sold *directly* ... to the consumer").

Pushing back, the Trusts note that the Act expressly enumerates when a "related person" may be sued based on his relationship to a covered person. D.I. 367, at 14 (citing 12 U.S.C. § 5481(25)). That provision, they reason,

displaces common-law vicarious liability. Maybe so. But because the Trusts *themselves* count as covered persons, I need not decide whether a non-covered-person principal can ever be held vicariously liable for the acts of his covered-person agent.

* * * *

The Trusts argue that the CFPB was powerless to file this suit and that it filed too late. But both arguments fail. On the complaint now before me, this suit was timely filed. And the CFPB may sue the Trusts because they are "covered persons" under the Consumer Financial Protection Act. Thus, this enforcement action may proceed.

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED MAY 21, 2024

UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

No. 22-1864

(D.C. No. 1-17-cv-01323)

CONSUMER FINANCIAL PROTECTION BUREAU

v.

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2; NATIONAL COLLEGIATE

STUDENT LOAN TRUST 2007-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4, Delaware Statutory Trusts

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2003-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2004-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2005-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2006-4; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-1; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-2; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-3; NATIONAL COLLEGIATE STUDENT LOAN TRUST 2007-4; AMBAC ASSURANCE CORPORATION; TRANSWORLD SYSTEMS INC,

Appellants

SUR PETITION FOR REHEARING

Present: CHAGARES, *Chief Judge*, JORDAN, SHWARTZ, KRAUSE, RESTREPO, PORTER, MATEY, FREEMAN, MONTGOMERY-REEVES, CHUNG, *ROTH and *MCKEE, *Circuit Judges*

The petition for rehearing filed by *Appellants* in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is **DENIED.**

BY THE COURT,

s/ JANE R. ROTH
Circuit Judge

* The vote of the Honorable Jane R. Roth and the Honorable Theodore A. McKee are limited to panel rehearing only.

APPENDIX D — RELEVANT STATUTORY PROVISIONS

U.S. Constitution Article II

Article II

Section 1.

The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice President, chosen for the same term, be elected, as follows:

Each state shall appoint, in such manner as the Legislature thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes

shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; A quorum for this purpose shall consist of a member or members from two thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be the Vice President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any person be eligible to that office who shall not have attained to the age of thirty five years, and been fourteen Years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the

Vice President, and the Congress may by law provide for the case of removal, death, resignation or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly, until the disability be removed, or a President shall be elected.

The President shall, at stated times, receive for his services, a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office, he shall take the following oath or affirmation:--"I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States."

Section 2.

The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual service of the United States; he may require the opinion, in writing, of the principal officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

Section 3.

He shall from time to time give to the Congress information of the state of the union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both Houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Section 4.

The President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

12 U.S.C.A. § 5481(5), (6), (25) and (26)

§ 5481. Definitions

(5) Consumer financial product or service. The term "consumer financial product or service" means any financial product or service that is described in one or more categories under—

(A) paragraph (15) and is offered or provided for use by consumers primarily for personal, family, or household purposes; or

(B) clause (i), (iii), (ix), or (x) of paragraph (15)(A), and is delivered, offered, or provided in connection with a consumer financial product or service referred to in subparagraph (A).

(6) Covered person. The term "covered person" means—

(A) any person that engages in offering or providing a consumer financial product or service; and

(B) any affiliate of a person described in subparagraph (A) if such affiliate acts as a service provider to such person.

(25) Related person. The term "related person"—

(A) shall apply only with respect to a covered person that is not a bank holding company (as that term is defined in section 2 of the Bank Holding Company Act

of 1956 [12 USCS § 1841]), credit union, or depository institution;

(B) shall be deemed to mean a covered person for all purposes of any provision of Federal consumer financial law; and

(C) means—

(i) any director, officer, or employee charged with managerial responsibility for, or controlling shareholder of, or agent for, such covered person;

(ii) any shareholder, consultant, joint venture partner, or other person, as determined by the Bureau (by rule or on a case-by-case basis) who materially participates in the conduct of the affairs of such covered person; and

(iii) any independent contractor (including any attorney, appraiser, or accountant) who knowingly or recklessly participates in any—

(I) violation of any provision of law or regulation; or

(II) breach of a fiduciary duty.

(26) Service provider.

(A) In general. The term "service provider" means any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that—

(i) participates in designing, operating, or maintaining the consumer financial product or service; or

(ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes).

(B) Exceptions. The term "service provider" does not include a person solely by virtue of such person offering or providing to a covered person—

(i) a support service of a type provided to businesses generally or a similar ministerial service; or

(ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media.

(C) Rule of construction. A person that is a service provider shall be deemed to be a covered person to the extent that such person engages in the offering or provision of its own consumer financial product or service.

Appendix D

12 U.S.C.A. § 5491

§ 5491. Establishment of the Bureau of Consumer Financial Protection

(a) Bureau established. There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5, United States Code. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5 [5 USCS §§ 500 et seq. and 701 et seq.], shall apply to the exercise of the powers of the Bureau.

(b) Director and Deputy Director.

(1) In general. There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment. Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification. The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation. The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of Title 5, United States Code.

(5) Deputy Director. There is established the position of Deputy Director, who shall—

(A) be appointed by the Director; and

(B) serve as acting Director in the absence or unavailability of the Director.

(c) Term.

(1) In general. The Director shall serve for a term of 5 years.

(2) Expiration of term. An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause. The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

(d) Service restriction. No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.

(e) Offices. The principal office of the Bureau shall be in the District of Columbia. The Director may establish regional offices of the Bureau, including in cities in which the Federal reserve banks, or branches of such banks, are located, in order to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws.

Appendix D

12 U.S.C.A. § 5531

§ 5531. Prohibiting unfair, deceptive, or abusive acts or practices

(a) In general. The Bureau may take any action authorized under subtitle E [12 USCS §§ 5561 et seq.] to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking. The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

(c) Unfairness.

(1) In general. The Bureau shall have no authority under this section to declare an act or practice in connection with a transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service, to be unlawful on the grounds that such act or practice is unfair, unless the Bureau has a reasonable basis to conclude that—

(A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and

(B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

(2) Consideration of public policies. In determining whether an act or practice is unfair, the Bureau may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(d) Abusive. The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice—

(1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or

(2) takes unreasonable advantage of—

(A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;

(B) the inability of the consumer to protect the interests of the consumer in selecting or using a

consumer financial product or service; or

(C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

(e) Consultation. In prescribing rules under this section, the Bureau shall consult with the Federal banking agencies, or other Federal agencies, as appropriate, concerning the consistency of the proposed rule with prudential, market, or systemic objectives administered by such agencies.

(f) Consideration of seasonal income. The rules of the Bureau under this section shall provide, with respect to an extension of credit secured by residential real estate or a dwelling, if documented income of the borrower, including income from a small business, is a repayment source for an extension of credit secured by residential real estate or a dwelling, the creditor may consider the seasonality and irregularity of such income in the underwriting of and scheduling of payments for such credit.

SUPREME COURT OF THE UNITED STATES

No. 24-

---X

NATIONAL COLLEGIATE MASTER STUDENT
LOAN TRUST, ET AL.,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET. AL.,

Respondents.

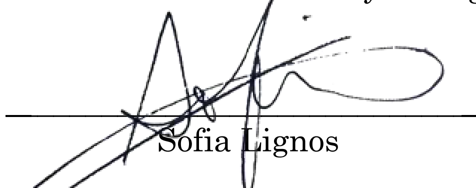
---X

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 7,271 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

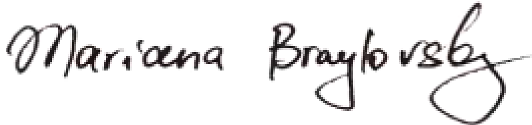
I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of August, 2024.



Sofia Lignos

Sworn to and subscribed before me this 16th day of August, 2024.



Mariana Braylovskiy
Notary Public State of New York
No. 01BR6004935
Qualified in Richmond County
Commission Expires March 30, 2026

#332199

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)

COUNTY OF NEW YORK)

I, Sofia Lignos, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am retained by Counsel of Record for *Petitioner.*

That on the 16th day of August, 2024, I served the within *Petition for a Writ of Certiorari* in the above-captioned matter upon:

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by sending three copies of same, addressed to each individual listed above respectively, through FedEx Overnight Mail; and

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by sending three copies of same, addressed to each individual listed above respectively, through USPS Express Mail.

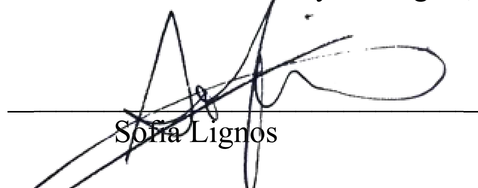
An electronic version was also served by email.

That on the same date as above, I sent to this Court forty copies of the *Petition for a Writ of Certiorari* and three hundred dollar filing fee check through Federal Express by Express Mail, postage prepaid. In addition, the brief has been submitted through the Court's electronic filing system.

All parties required to be served have been served.

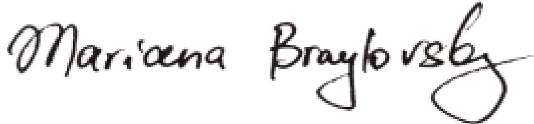
I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 16th day of August, 2024.



Sofia Lignos

Sworn to and subscribed before me this 16th day of August, 2024.



MARIANA BRAYLOVSKIY
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Commission Expires March 30, 2026

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