No. 16-673

In the

Supreme Court of the United States

CHANCE GORDON,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional
Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae

QUESTION PRESENTED

Can a "ratification" legalize actions taken when an individual occupies the position of a principal officer of the United States in violation of the Constitution?

TABLE OF CONTENTS

QUESTION PRESENTED.. i

TABLE OF AUTHORITIES.................................... iii

IDENTITY AND INTEREST
OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT....................................2

REASONS FOR GRANTING REVIEW 3

I. The Court Below Created a New Theory of Ratification that Threatens to Undermine the Senate's Role in the Appointments Process 3

II. The Senate Role in Appointment of Principal Officers Is an Important Component of Separation of Powers. 7

A. The Appointments Clause Is No Mere Procedural Technicality. 7

B. The founding generation insisted on separation of powers as a protection of individual liberty...........9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Buckley v. Valeo,
424 U.S. 1 (1976) 11
Clinton v. City of N.Y.,
524 U.S. 417 (1998) 8
Consumer Financial Protection Bureau v. Gordon,
819 F.3d 1179 (9th Cir. 2016) 4
Cook v. Tullis,
85 U.S. 332 (1873) 3, 4
Department of Transportation v. Association of American Railroads,
135 S.Ct. 1225 (2016) 1
Edmond v. United States,
520 U.S. 651 (1997) 9
Ex parte Grossman,
267 U.S. 87 (1925) 9
Federal Elections Commission v. NRA Victory Fund,
513 U.S. 88 (1994) 3, 4, 6
Free Enterprise Foundation v. Public Company Accounting Oversight Board,
561 U.S. 477 (2010) 2
Freytag v. Commissioner,
501 U.S. 868 (1991) 7
Kilbourn v. Thompson,
103 U.S. 168 (1880) 10, 11
Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.,
501 U.S. 252 (1991) 8
Mistretta v. United States,
488 U.S. 361 (1989) 10, 11
Ryder v. United States,
515 U.S. 177 (1995) 7

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 9

Other Authorities

Adams, John, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA (The Lawbook Exchange Ltd. 3rd ed., 2001) 11

Blackstone, William, COMMENTARIES ON THE LAWS OF ENGLAND (William S. Hein & Co. ed., 1992) 9, 10

Carpenter, David H. and Garvey, Todd, Practical Implications of *Noel Canning* on the NLRB and CFPB, CRS Report for Congress (2015) 4, 6

Hamilton, Alexander, Federalist 69, THE FEDERALIST PAPERS 8

Hamilton, Alexander, Federalist 9, THE FEDERALIST PAPERS 10

Hamilton, Alexander, Federalist No. 76, THE FEDERALIST PAPERS 8

Jefferson, Thomas, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS (Lester J. Cappon ed., 1959) 10

Locke, John, THE SECOND TREATISE ON GOVERNMENT (Thomas P. Peardon, ed.,1997) 9

Madison, James, Federalist 47, THE FEDERALIST PAPERS 10

Madison, James, Federalist 48, THE FEDERALIST PAPERS (Clinton Rossiter, ed. 1961) 7, 10

Madison, James, Federalist 51, THE FEDERALIST PAPERS 8, 10, 11

Madison, James, Writings, 8:250-51 (1813) reprinted in THE FOUNDERS CONSTITUTION 9

Montesquieu, THE SPIRIT OF THE LAWS (Franz Neumann ed. & Thomas Nugent trans., 1949) 9

RESTATEMENT (THIRD) OF AGENCY 4, 5

Story, Joseph, Commentaries on the Constitution of the United States, § 1521 (1833), reprinted in THE FOUNDERS CONSTITUTION (Phillip B. Kurland and Ralph Lerner, eds. Univ. of Chicago Press 1987) ... 7
Trenchard, John, Cato's Letters, reprinted in THE FOUNDERS CONSTITUTION ... 11
Tucker, St. George, Of the Several Forms of Government, reprinted in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (Liberty Fund 1999) ... 8
Wilson, James, Remarks in Pennsylvania Convention, reprinted in COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall and Mark David Hall, eds. Liberty Fund 2007) ... 8

Rules

Sup. Ct. R. 37.2(a) ... 1
Sup. Ct. R. 37.6 ... 1

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, the Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. This includes the principle that officials who exercise the power of the United States must be principal officers, appointed by the President and confirmed by the Senate, and that the Separation of Powers that underlies the design of government in the Constitution precludes the retroactive authorization to exercise the power of a principal officer of the United States. A "ratification" cannot confer legal authority on an individual appointed in violation of the Constitution. The Center has participated as amicus in a number of cases before this Court that raised issues concerning appointment of officers and their role in government, including *Department of Transportation v. Association of American Railroads*, 135 S.Ct. 1225 (2016) and *Free Enterprise Foundation v. Public*

---

[1] Pursuant to this Court's Rule 37.2(a), Amicus Curiae gave all parties notice of amicus's intent to file at least 10 days prior to the filing of this brief. Petitioners filed a blanket consent to all amicus briefs. Counsel for respondent consented to this brief and Amicus lodged a copy of the letter evidencing that consent with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Company Accounting Oversight Board, 561 U.S. 477 (2010).

SUMMARY OF ARGUMENT

The parties agree that the President's "recess" appointment of Richard Cordray on January 4, 2012 was an unconstitutional end run of the Senate's power to review the nomination of principal officers. That unconstitutional action violated the Appointments Clause and thus, the Separation of Powers principle that underlies our design of government. As a result, the appointment had no legal effect. Mr. Cordray was later properly nominated, confirmed by the Senate, and appointed by the President to the office of Director more than a year and half later. At issue here is Mr. Cordray's purported "ratification" of actions he took during the time he occupied the office of Director in violation of the Constitution. Mr. Cordray claims that a blanket "ratification" he signed made all of his prior unconstitutional actions "legal."

Ratification requires two essential elements. First, the principal (the one ratifying the action) must have had the power to take the action in question *at the time the action was taken*. Second, the ratification must happen while the principal had authority to take the action in question. Here, the Director did not have constitutional authority at the time these actions were taken, and thus could not later "ratify" them. The cavalier claim of ratification of unconstitutional actions demonstrates the danger to the Separation of Powers presented by the decision of the Ninth Circuit.

The Appointments Clause is no mere technical, procedural requirement of the Constitution. It is part

of the Separation of Powers structure that the founding generation relied on to protect liberty. This design of government is under attack in this case. This Court should grant review to determine if the cavalier "ratification" that did not meet the requirements of this Court's past rulings is sufficient to authorize actions taken by Mr. Cordray during the time he occupied the office of Director in violation of the Constitution.

REASONS FOR GRANTING REVIEW

I. The Court Below Created a New Theory of Ratification that Threatens to Undermine the Senate's Role in the Appointments Process

In *Cook v. Tullis*, 85 U.S. 332 (1873), Justice Field, writing for the Court, set out the essential requirements for an effective ratification. First and foremost, the principal must have had legal authority to take the action that was ratified at the time the action was taken. *Id.* at 338. Further, the principal must have the legal ability to take the ratified action at the time of the ratification. *Id.*

This Court applied Justice Field's analysis to the ratification of acts of government officers in *Federal Elections Commission v. NRA Victory Fund*, 513 U.S. 88, 98 (1994). There, the Court considered whether the Solicitor General's ratification of a petition for writ of certiorari by the Federal Elections Commission was sufficient to allow the Commission to pursue the case in the Supreme Court. The Solicitor General certainly had authority to file a petition for writ of certiorari when the Commission filed its petition, however the Solicitor General's ratification occurred after the time to petition had expired. Thus, the ratification

failed the second part of the *Tullis* test – that the principal had the legal authority to do the act ratified at the time of the ratification. *Id*.

In this case, the principal, Mr. Cordray, did not have the authority to ratify the actions he had taken when he was first appointed in violation of the Constitution at the time the actions were taken under the first prong of the *Tullis* test. He had no authority at the time of initial actions because, as this Court held in *National Labor Relations Board v. Noel Canning*, 134 S.Ct. 2550, 2578 (2014), the President's attempt to recess-appoint officers on January 4, 2012, when the Senate was not actually in recess was unconstitutional. Indeed, because the Consumer Financial Protection Bureau was a new agency and Mr. Cordray was its first Director, *no one* had constitutional authority to take those actions at the time. *See* David H. Carpenter and Todd Garvey, Practical Implications of *Noel Canning* on the NLRB and CFPB, CRS Report for Congress (2015), at 15

The court below decided that it was not bound by the *Tullis* test and reasoning in this Court's decision in *NRA Victory Fund* adopting that test for analyzing ratification of actions of government agencies that acted without authority. The lower court reached this conclusion because it found significant that this Court in *NRA Victory Fund* relied on an earlier version of the Restatement of Agency. *Consumer Financial Protection Bureau v. Gordon*, 819 F.3d 1179, 1191 (9th Cir. 2016).

The Ninth Circuit instead applied a misreading of the more recent Restatement (Third) of Agency to uphold the ratification at issue in this case. *Id*. Under that restatement, a principal who lacked *capacity* at

the time an agent acted may ratify that action after regaining capacity. The Ninth Circuit reasoned that Mr. Cordray simply suffered a lack of capacity during the time of his unconstitutional occupation of the principal office of Director of the Bureau.

The question in this case is not Mr. Cordray's "capacity," however. The Restatement's provisions on lack of capacity refer to a lack of mental capacity or disability because of age. RESTATEMENT (THIRD) OF AGENCY, § 3.04, comment b (American Law Institute 2006). The problem with Mr. Cordray's actions before he was properly nominated, confirmed, and appointed was not a lack of mental capacity or disability because of age. Rather, it was a lack of constitutional authority to act. Thus, this is more like the situation where the principal had no legal *existence* at the time the agent acted. The office existed, but the officer did not. This is a new agency and Mr. Cordray is the first incumbent in the Director's position. At the time of his actions in this case, there was no constitutionally nominated, confirmed, and appointed Director of the Consumer Financial Protection Bureau. According to the Restatement, such actions can be *adopted* by the principal once the principal comes into existence – but cannot be *ratified*. Ratification relates back to the time the agent took the action; adoption does not. RESTATEMENT (THIRD) OF AGENCY, *supra*, § 4.04, comment c.

In other words, the issue here is not about Mr. Cordray's *capacity* at all. Instead, the issue is whether there existed at the relevant time a constitutionally authorized principal officer who could take the actions being challenged here. Congress gave no

authority to any person other than the properly nominated, confirmed, and appointed Director to perform the duties at issue in this case. *See* Practical Implications, *supra*, at 15. No such officer existed before Mr. Cordray was confirmed by the Senate and appointed by the President. There is no dispute that there was no person with the constitutional authority to exercise the powers of a principal officer on behalf of the Bureau at the time Mr. Cordray took the actions challenged in this case. While the properly confirmed and appointed Director may have been able to "adopt" actions taken prior to confirmation and appointment, that adoption does not relate back to the time of the original action.

Mr. Cordray, as the properly confirmed and appointed Director, could not ratify any actions prior to the existence of a constitutionally confirmed and appointed Director. Since Mr. Cordray is the first individual to occupy the principal office of Director, the authority of the Director came into existence when he was confirmed by the Senate and appointed by the President.

Mr. Cordray had no authority to empower, retroactively, any individual to exercise the authority of a principal officer. Only the President can nominate a principal officer, and the President can only appoint an individual to serve as the officer after confirmation by the Senate (barring a legitimate recess).

The Ninth Circuit's failure to follow the reasoning in *NRA Victory Fund* applying the *Tullis* test and its acceptance of Mr. Cordray's unique "ratification" theory converted the Appointments Clause into an exercise of mere protocol and etiquette. But the Framers of the Constitution "had a less frivolous purpose in

mind." *Ryder v. United States*, 515 U.S. 177, 182 (1995). Review by this Court is necessary to determine whether the constitutional check of the Appointments Clause can be defeated by a ratification of actions taken without constitutional authority.

II. The Senate Role in Appointment of Principal Officers Is an Important Component of Separation of Powers.

A. The Appointments Clause Is No Mere Procedural Technicality.

The Appointments Clause is an integral part of the "checks and balances" that the Framers designed to ensure that the principal of separation of powers was not dependent on mere "parchment barriers." James Madison, Federalist 48, THE FEDERALIST PAPERS 308 (Clinton Rossiter, ed. 1961). The President has the exclusive power to nominate and appoint principal officers, but that power is checked by the need for the Senate's consent to any such appointment. Given the enormous power wielded by executive officers, this check is critical to preserving liberty. Joseph Story, Commentaries on the Constitution of the United States, § 1521 (1833), reprinted in THE FOUNDERS CONSTITUTION, vol. 4, 117 (Phillip B. Kurland and Ralph Lerner, eds. Univ. of Chicago Press 1987). Indeed, this Court has noted that the Appointments Clause is an important structural element of the Constitution's design of government. *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991).

Separation of power and the attendant checks and balances are meant to secure liberty. St. George Tucker, Of the Several Forms of Government, reprinted in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS (Liberty Fund 1999)

48; *Noel Canning*, *supra*, 134 S.Ct. at 2559; *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). It accomplishes this by compelling the branches of government to work with each other in the exercise of their powers. *See Clinton v. City of N.Y.*, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring). This forced cooperation is one of the major purposes of the Senate's role in the appointment of principal officers. Alexander Hamilton, Federalist No. 76, THE FEDERALIST PAPERS, *supra*, at 457; James Wilson, Remarks in Pennsylvania Convention, reprinted in COLLECTED WORKS OF JAMES WILSON (Kermit L. Hall and Mark David Hall, eds. Liberty Fund 2007), vol. 1, 213. This power of the Senate is meant to be one of the checks on the power of the President. *Id*. Alexander Hamilton even noted that this provision in particular was meant to reduce the power of the President. Alexander Hamilton, Federalist 69, THE FEDERALIST PAPERS, *supra*, at 421.

The Framers and Ratifiers of the Constitution understood that it was not enough to merely separate the powers of government in different branches. Maintenance of this separation also required "checks and balances." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216 (2015) (Thomas, J., concurring in the judgment). These checks and balances enable each branch of government to enforce the separation and constitutional limit of power on the other branches. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra*, 321. It is for this reason that the appointment of a principal officer requires the joint action of both the President and the Senate. *See* James Madison, Writings, 8:250-51 (1813) reprinted in THE FOUNDERS CONSTITUTION, *supra*, vol. 4, 112.

This Court has noted the importance of the structural protection to separation of powers provided by the Appointments Clause. *Edmond v. United States*, 520 U.S. 651, 659–60 (1997); *see Ex parte Grossman*, 267 U.S. 87, 120 (1925). The Framers purposefully introduced "friction" into the operation of the federal government to require some level of cooperation between the branches and thus restrain autocratic impulses. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613–14 (1952) (Frankfurter, J. concurring); *Ex parte Grossman*, *supra*, 267 U.S. at 1120.

This Court should grant review in this case to ensure that this important structural tool of enforcing separation of powers is not relegated to a mere procedural technicality.

B. The founding generation insisted on separation of powers as a protection of individual liberty.

Separation of the powers of government is a foundational principle of our constitutional system. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government. *See e.g.* Montesquieu, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed. & Thomas Nugent trans., 1949); 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 58 (William S. Hein & Co. ed., 1992); John Locke, THE SECOND TREATISE ON GOVERNMENT 82 (Thomas P. Peardon, ed.,1997).

The concerns about too great a consolidation of power resulted in structural separation of power protections in the design of the federal government.

James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra*, 318; James Madison, Federalist 47, THE FEDERALIST PAPERS, *supra at* 298-99 ; Alexander Hamilton, Federalist 9, THE FEDERALIST PAPERS, *supra*, 72; *see also* Thomas Jefferson, Jefferson to Adams, THE ADAMS-JEFFERSON LETTERS 199 (Lester J. Cappon ed., 1959).

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough. James Madison, Federalist 48, THE FEDERALIST PAPERS, *supra* at 308-09. Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each branch with the power necessary to resist encroachment by another. *Id*. Madison explained that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation. *Id.*; James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra* at 317-19; *see Mistretta v. United States*, 488 U.S. 361, 380.

To preserve the structure set out in the Constitution, and thus protect individual liberty, the constant pressures of each branch to exceed the limits of their authority must be resisted. Any attempt by any branch of government to encroach on powers of another branch, even if the other branch acquiesces in the encroachment, is void. *Chadha*, 462 U.S. at 957-58; *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1880). The judicial branch, especially, is called on to enforce this essential protection of liberty. *Chadha*, 462 U.S.

at 944-46. The Constitution was designed to pit ambition against ambition and power against power. James Madison, Federalist 51, THE FEDERALIST PAPERS, *supra*, 321; *see also* John Adams, Letter XLIX, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 323 (The Lawbook Exchange Ltd. 3rd ed., 2001). When this competition of interests does not stop an encroachment, however, it is the duty of this Court to void acts that overstep the bounds of separated power. *Buckley v. Valeo*, 424 U.S. 1, 123 (1976); *Kilbourn v. Thompson*, 103 U.S., at 199.

The judiciary, like any other branch, must jealously guard its rightful authority. It has readily done so in the past and must always be prepared to do so in the future. *Mistretta*, 488 U.S. at 382 ("[W]e have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."). Review should be granted in this case to check the violation of separation of powers inherent in a blanket "ratification" of an unconstitutional appointment of a principal officer.

CONCLUSION

"Great Bodies of Men have seldom judged what they ought to do, by any other Rule than what they could do." John Trenchard, Cato's Letters, reprinted in THE FOUNDERS CONSTITUTION, *supra*, Vol 1, at 621. The Framers and Ratifiers of the Constitution sought to take a different approach. The United States would be a government of laws and its officers would be bound to the legal limits of their authority. Separated powers and elaborate checks and balances, like the

Senate role in confirmation of principal officers, are meant to preserve this ideal. This Court should grant review in this case to review the radical new exception to this principle created by the decision below.

DATED: December, 2016.

Respectfully submitted,

JOHN C. EASTMAN
ANTHONY T. CASO
Counsel of Record
Center for Constitutional Jurisprudence
c/o Chapman University Fowler School of Law
One University Drive
Orange, CA 92866
Telephone: (714) 628-2666
E-Mail: caso@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence