No. 16-673

In the Supreme Court of the United States

CHANCE E. GORDON,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

Page(s)

INTERESTS OF AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million businesses and professional organizations of every size and in every industry sector and geographical region of the country. A principal function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases involving issues of vital concern to the Nation's business community.

This case arises from actions Director Richard Cordray took while serving as an unconstitutional recess appointee. The questions presented are whether the Consumer Financial Protection Bureau ("CFPB") had standing to commence a civil action, notwithstanding that its Director was not lawfully appointed by the President at the time the CFPB filed an enforcement action in district court, and whether the Director's *post hoc* blanket ratification cured his lack of authority under the Appointments Clause. These issues are of grave concern to the Chamber, whose members are subject to regulation and enforcement by the CFPB. The Ninth Circuit's decision allows the CFPB to circumvent fundamental

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[1] The parties have consented to the filing of this amicus brief. Counsel of record for all parties received timely notice of the intention to file this brief. No counsel for a party authored this brief in whole or in part, and no one other than amicus, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

requirements for standing under Article III of the Constitution. The Chamber urges the Court to grant review to restore proper Article III limitations.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the administrative state grows ever more sprawling and places unprecedented power in new creations like the Consumer Financial Protection Bureau, the structural limits on Executive power become increasingly important.

It is undisputed that Richard Cordray's recess appointment to be Director of the CFPB did not satisfy Article II's Appointment Clause requirements, and that *no one* at the CFPB possessed a valid grant of Executive power at the time the CFPB brought the enforcement action in this case. No matter. The Ninth Circuit panel majority below treated the CFPB as though it had the Article II power to ensure the faithful execution of the laws, and therefore held that the agency had Article III standing to sue even though the agency could have suffered no concrete and particularized harm from the conduct at issue.

That decision contravenes the fundamental requirement—which flows from Article III's case or controversy mandate—that every litigant must have a "direct stake" in the outcome of the case. The Executive is uniquely positioned to make that showing because it need only show an action is brought by a duly appointed Executive officer seeking to take care that the laws are faithfully executed. But when, as here, the action is brought by an individual who *lacks* a valid delegation of Executive authority, the Executive cannot make that showing and, instead, the individual's

claim that laws have been violated is no more than a generalized grievance insufficient to satisfy Article III.

In holding that the absence of a valid delegation of Executive authority was immaterial to its standing analysis, the Ninth Circuit split with other Courts of Appeals. In *Thiebaut v. Colorado Springs Utilities*, for example, the Tenth Circuit held that where a plaintiff—there, a Colorado District Attorney—brings suit to vindicate the government's interest in the general well-being of its populace, the plaintiff "must demonstrate that [he] ha[s] authority to represent a state's sovereign or quasi-sovereign interests" in order to establish Article III standing. 455 F. App'x 795, 800 (10th Cir. 2011). Here, by contrast, the Ninth Circuit held that there was *no need* for the CFPB to establish a valid authorization to represent the United States' sovereign interests—and, indeed, that it had standing even though it *lacked* such an authorization.

That resolution is also wrong under this Court's precedents. As Judge Ikuta recognized, because "no one had the executive power necessary to prosecute this civil enforcement action" when the action was filed, the CFPB lacked Article III standing. Pet. App. 30a. Article III not only limits the authority of the courts to intervene in matters, but also limits those who may assert the Executive's unique interest in seeing that "the Laws be faithfully executed" to Executive officers with a valid grant of legal authority. In that way, it serves as a vital safeguard to liberty. The panel majority, Judge Ikuta explained, "flout[ed] this most basic constitutional limit." *Id.* at 31a. Its decision is a constitutional double whammy—disregarding the limits of both Article II and Article III.

It is true, of course, that the Framers envisioned an "energetic executive" that could protect the Nation and faithfully execute the laws. The Federalist No. 70 (Alexander Hamilton). But they never could have conceived of what the Ninth Circuit embraced here: An unaccountable independent agency, acting in the face of the Senate's refusal to confirm its Director, invoking Executive power to bring enforcement actions against citizens in the federal courts. Instead, as then-Attorney General Robert Jackson once explained, the Framers intended that the "immense power to strike at citizens, not with mere individual strength, but with all the force of government itself" could only be exercised by Officers of the United States who had "w[o]n an expression of confidence in [their] character by both the legislative and the executive branches of government." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 3 (1940).

The Senate's opposition to Mr. Cordray was based on concerns that he would be overly aggressive. In the ensuing period of Mr. Cordray's unconstitutional leadership, the CFPB filed nearly a dozen complaints in federal court, and initiated numerous other administrative proceedings backed by the threat of judicial enforcement. Altogether, those unconstitutionally initiated enforcement actions extracted civil fines, restitution, and other payments totaling nearly $400 million, underscoring the breadth of the power that Mr. Cordray invoked.

This Court has recognized many times that structural limits on federal power ultimately operate as safeguards for liberty. But the Ninth Circuit's decision in this case disregards that principle, allowing the government to transgress limits on the power of both

the Executive and the federal courts in one fell swoop. This Court's review is warranted.[2]

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AS WELL AS THE DECISIONS OF THIS COURT

A. Article III Requires Every Litigant, Including The Executive, To Have A Direct Stake In The Outcome Of The Case

Time and time again, this Court has held that litigants cannot invoke the Judicial Power of the federal courts in the absence of a case or controversy that affects their concrete, particularized interests, such that they have a "direct stake" in the outcome. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Allen v. Wright*, 468 U.S. 737, 754 (1984). This core feature of "[t]he doctrine of standing ... 'serves to prevent the judicial process from being used to usurp the powers of the political branches,'" and "ensures that the Federal Judiciary respects 'the proper—and properly limited—role of the courts in a democratic society.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 2667 (2013) (citations omitted).

One implication of the injury-in-fact requirement is that litigants cannot bring suit merely to vindicate a generalized grievance, or generalized interest in seeing the law obeyed. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 24 (1998) (collecting cases); *Allen*, 468 U.S. at 754 ("[A]n asserted right to have the Government act in

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[2] Although the Chamber supports certiorari on both questions presented, it focuses this brief on the second question.

accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); *L. Singer & Sons v. Union Pac. R.R. Co.*, 311 U.S. 295, 304 (1940) (A federal suit "cannot be instituted by an individual unless he 'possesses something more than a common concern for obedience to law.'" (citation omitted)). As this Court has held, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973).

The Executive stands in a "unique" position with respect to the enforcement of the laws through the courts because of its Article II duties and powers. *See* Pet. App. 30a. Specifically, the Executive is both charged and empowered to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. That constitutional mandate, directed specifically to the Executive, creates a constitutionally cognizable interest in the enforcement of the laws that establishes a direct stake in the outcome and thus is sufficient to invoke the Judicial Power. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *L. Singer & Sons*, 311 U.S. at 304 ("The general or common interests find protection in the permission to sue granted to public authorities.").

Accordingly, federal criminal prosecutions and civil suits to vindicate the public interest in the enforcement of the law may be brought by those "Officers of the United States" to whom the Executive power has been validly delegated—and no one else. As the Court put it

in *Buckley*, "conducting civil litigation in the courts of the United States for vindicating public rights" is a "function[] [which] may be discharged only by persons who are 'Officers of the United States' within the language of" Article II. 424 U.S. at 140; *cf. Linda R.S.*, 410 U.S. at 619 (criminal prosecutions).

Ordinarily, of course, the Executive has little difficulty showing that it is acting through an Executive officer (or officers) validly entrusted with enforcement authority. But the requirement of an Executive officer with authority to enforce the laws is nevertheless vital to satisfy Article III. As Judge Ikuta put it, "[t]here is only one way for a plaintiff to obtain the Executive's Article III standing to enforce public rights in federal court: the plaintiff must be vested with executive authority." Pet. App. 34a. When such authority is absent, so is standing.

B. In Allowing The CFPB To Sue Without A Valid Grant Of Executive Power, The Ninth Circuit Created A Split With Other Circuits

It is undisputed that there was no duly approved Executive officer at the CFPB when this action was brought. No Officer of the United States authorized or initiated the suit, because the agency's putative head at the time had been unconstitutionally appointed. Indeed, until the month after the district court *entered judgment*, there was not a single validly appointed Officer of the United States in the entire CFPB. And the CFPB—"without an Officer of the United States"—was "a mere Congressional creation that could not exercise executive power." Pet. App. 30a (Ikuta, J., dissenting). Accordingly, no one (and no entity) had the requisite constitutional mandate to enforce the laws when the suit was filed.

The panel majority nevertheless held that the district court had Article III jurisdiction over this action. According to the panel majority, the fact that the CFPB's "director was improperly appointed does not alter the Executive Branch's interest or power in having federal law enforced," and "a lawsuit allegedly filed without authorization does not result in the district court 'lack[ing] subject matter jurisdiction in the sense that it would if plaintiffs lacked standing to sue.'" Pet. App. 10a-11a (alteration in original) (quoting *De Saracho v. Custom Food Mach., Inc.*, 206 F.3d 874, 878 n.4 (9th Cir. 2000)). That ruling conflicts with the decisions of other Courts of Appeals, which have held that plaintiffs who lack authorization to assert a particular interest cannot establish Article III standing by alleging an injury to that interest.

In *Thiebaut v. Colorado Springs Utilities*, for example, a Colorado District Attorney brought suit under the Clean Water Act against the City of Colorado Springs. 455 F. App'x 795, 796 (10th Cir. 2011). The district court dismissed his suit for lack of Article III standing. *Id.* at 797-98. On appeal, the District Attorney argued that he had standing under Article III because "the Colorado Legislature has authorized district attorneys in their official capacities to file CWA citizen suits in federal courts." *Id.* at 800. The Tenth Circuit disagreed. To establish standing, the court—relying on published precedent—held that the District Attorney "must demonstrate that [he has] authority to represent a state's sovereign or quasi-sovereign interests." *Id.* After finding that the State of Colorado had not delegated that authority to the District Attorney, the court held that the District Attorney lacked Article III standing. *Id.* at 801.

Other Circuits have similarly recognized that where plaintiffs assert claims that do not arise out of discrete injuries to the plaintiffs themselves, their authorization to assert those claims is properly treated as a question of Article III standing. In *Archer v. Preisser*, for example, the Eighth Circuit held that the plaintiff "did not have standing" because she had not been appointed legal representative of the deceased. 723 F.2d 639, 640 (8th Cir. 1983). By contrast, the Ninth Circuit below held that the fact that the CFPB lacked a duly authorized Executive officer when it brought this action was immaterial to standing.

C. The Ninth Circuit's Decision Also Is Irreconcilable With This Court's Precedents

The panel majority's decision also conflicts with this Court's precedents, which teach that a plaintiff's lack of authorization to assert the claimed injuries goes directly to the existence of Article III standing.

In *Karcher v. May*, for example, this Court held that after two state officials who had brought the suit ended their terms in office, "they lack[ed] authority to pursue [an] appeal on behalf of the legislature" and the Court thus "dismiss[ed] their appeal for want of jurisdiction." 484 U.S. 72, 81 (1987). As this Court described the case more recently, "Karcher and Orechio were permitted to proceed only because they were state officers, acting in an official capacity. As soon as they lost that capacity, they lost standing." *Hollingsworth*, 133 S. Ct. at 2665.

Just as an official who loses his office thereby loses the standing that goes with it, so too a litigant who never properly held an office in the first place lacks the standing that office would confer if validly filled. That

is the central holding of *Hollingsworth*, which held that because the petitioners in that case were not proper agents of the State, they lacked standing to assert the State's interests. 133 S. Ct. at 2665-67; *see also United States v. Providence Journal Co.*, 485 U.S. 693, 708 (1988) ("Absent a proper representative of the Government as a petitioner in this criminal prosecution, jurisdiction is lacking . . . .").

When the person overseeing the suit is not duly authorized to enforce federal law, the Executive's unique interest in vindicating public rights is constitutionally absent. At that point, the putative Executive officer, just like an ordinary private litigant, is merely seeking to adjudicate a generalized grievance. And the fact that the suit is ostensibly brought in the name of the Executive gives a federal court no more basis to entertain the suit under Article III than if it had been brought by a private party.

The panel majority below sought to sidestep *Hollingsworth* by distinguishing between suits brought by *individuals* and suits brought by *agencies*—as though an agency can exercise authority that no one running it is constitutionally permitted to wield. Pet. App. 8a-11a. "*Hollingsworth* would have relevance," the panel majority claimed, only "[i]f the CFPB, as an agency, had lost before the district court and decided not to appeal, and a concerned citizen wanted to intervene and bring the appeal." Pet. App. 11a. In its view, *Hollingsworth* was irrelevant here because Congress had "authorized the CFPB to bring actions in federal court," and it is "the Executive Branch, not any particular individual, that has Article III standing." Pet. App. 10a, 8a (citing *Lujan*, 504 U.S. at 576; *Providence Journal Co.*, 485 U.S. at 700).

Nothing the panel majority cited supports its extraordinary view that "Executive Branch" agencies can operate entirely without Executive *Officers*. To the contrary, this Court has held that "the administration and enforcement of public law . . . may . . . be exercised *only* by persons who are 'Officers of the United States'" within the meaning of Article II. *Buckley*, 424 U.S. at 141 (emphasis added). An agency lacking such Officers thus cannot carry out Executive functions. *See id.* at 137-38 (noting that while "an agency whose members have been appointed in accordance with the Appointments Clause" could exercise the civil litigation functions assigned to the FEC, the fact that "none of [the Commissioners] was appointed as provided by that Clause" meant that the FEC "as presently constituted may [not] exercise them"); *see also id.* at 142 (noting "the Commission's inability to exercise certain powers because of the method by which its members have been selected").

For constitutional purposes, at least, the CFPB cannot be more than the sum of its parts. At the time the CFPB brought an enforcement action against petitioner, no one at the agency had the constitutional authority to represent the interests of the United States. Mr. Cordray, who was unconstitutionally appointed over Senate opposition, plainly lacked such authority, and the CFPB does not even try to "claim that some other person in the Bureau had the requisite executive authority of an Officer of the United States." Pet. App. 32a (Ikuta, J., dissenting). Just hanging an "Executive Branch" label on the agency, as the panel majority did, does not change that fact.

By nevertheless holding that the CFPB had Article III standing to invoke the authority of the federal

courts, the panel majority not only excused a blatant abuse of Executive power, but undertook what Judge Ikuta aptly described as a "power grab," Pet. App. 31a—extending Article III beyond its limits.

II. ENFORCEMENT OF THE STRUCTURAL PROTECTIONS FOUND IN BOTH ARTICLES II AND III IS IMPORTANT TO PRESERVE LIBERTY AND PREVENT PROSECUTORIAL OVERREACH

The Framers who drafted Articles II and III of our Constitution "recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 501 (2010) (citation omitted); *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) ("[C]hecks and balances were the foundation of a structure of government that would protect liberty."). Indeed, "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary." *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring); *see also id.* ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

There is little greater threat to liberty than the baseless or overzealous exercise of prosecutorial authority. As then-Attorney General Robert Jackson observed to a gathering of the U.S. Attorneys in the 1940s, the "immense power to strike at citizens, not with mere individual strength, but with all the force of government itself," gives "[t]he prosecutor . . . more control over life, liberty, and reputation than any other person in America." Robert H. Jackson, *The Federal Prosecutor*, 31 J. Crim. L. & Criminology 3, 3 (1940)

(reproducing remarks delivered at the Second Annual Conference of U.S. Attorneys).

The typical prosecutor is small beans compared to the CFPB, an unprecedented administrative creation. As the D.C. Circuit recently observed, "other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 16 (D.C. Cir. 2016). Like any prosecutor, the Director "is obliged to choose his cases," and thus "can choose his defendants." Jackson, *supra*, at 5. Yet, unlike the typical U.S. Attorney (who is accountable on multiple levels up to the Attorney General and President), the Director enjoys an unprecedented degree of *un*accountability given the unique structure of the CFPB.

The Director's lack of accountability in choosing how to wield the immense enforcement authority of the Executive in pursuing the agency's (or his own) agenda only heightens the concerns that Justice Jackson recognized about the risks of prosecutorial abuse. The Director's unique status—and virtually unchecked discretion—turbocharges the risk "that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. . . . It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies." *Id.* (quoted in *Morrison v. Olson*, 487 U.S. 654, 727-28 (1988) (Scalia, J., dissenting)).

Fresh off their experience with the abuse of royal power, the Framers were well aware of the threat that

prosecutions posed to liberty, and thus from the earliest days of the Republic the authority to prosecute violations of the law on behalf of the United States "has been safeguarded by presidential appointment, requiring confirmation of the Senate of the United States." *Id.* at 3. The Framers intended that "[t]he possibility of rejection would be a strong motive to care in proposing" candidates to fill Executive offices. The Federalist No. 76 (Alexander Hamilton). "[B]efore assuming the responsibilities of a federal prosecutor," therefore, every U.S. Attorney must "win an expression of confidence in [his] character by *both the legislative and the executive branches of the government*." Jackson, *supra*, at 3 (emphasis added).

In a rush to unleash the full powers of the newly created CFPB, those longstanding safeguards were cast to the side. For more than a year and a half, the CFPB was headed by someone who had received no "expression of confidence" from the Senate (and, to the contrary, had garnered hardened opposition to his nomination given concerns that he would be overzealous in exercising the powers entrusted to the CFPB), and thus no valid grant of authority to prosecute violations of the law. The lack of a valid authorization was no fluke; it was the result of one of the very checks and balances (advise and consent) that the Framers adopted to *protect* liberty.[3]

The result was exactly what the Framers feared. As Justice Jackson had warned, "[w]ith the law books

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[3] Although Mr. Cordray was ultimately re-nominated after the 2012 election and confirmed by a 66-34 vote in the new Senate, that was the result of a broader compromise and does not validate the period that he acted without authority. *See* Pet. 6-7; 159 Cong. Rec. D704 (daily ed. July 16, 2013).

filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone," and thus faces a temptation to "pick people that he thinks he should get . . . and then search[] the law books, or put[] investigators to work, to pin some offense on" them. *Id.* at 5. With Mr. Cordray installed as putative Director, the CFPB did just that, embarking on an aggressive campaign to reform targeted industries (and entities and individuals) through litigation, which extended well beyond the CFPB's statutory mandate.

During the year and a half between when Mr. Cordray was first named (as a purported recess appointee) the CFPB's initial Director and when he was appointed after receiving Senate confirmation, the CFPB brought nearly a dozen enforcement actions in federal court, along with nearly a dozen more administrative actions backed by the threat of suit. Using its broad delegation of authority and the decidedly vague terms of the Consumer Financial Protection Act, the agency ultimately obtained civil penalties and other monetary relief of approximately $379 million through those proceedings. *See* Pet. App. 41a (Ikuta, J., dissenting) (recognizing that the CFPB undertook "numerous other enforcement actions . . . [in] the 18 months of its existence before Richard Cordray was properly confirmed by the Senate in July 2013").[4] During that period, the CFPB also launched investigations that never resulted in enforcement

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[4] These figures are based on publicly reported dispositions of enforcement actions initiated prior to July 16, 2013. In several instances, the reported figures represented the minimum amount the defendant would be required to pay; depending on various contingencies, the total recovery could be even higher.

actions, either because the charges proved unsustainable or for other reasons.

Even where charges are ultimately rejected or dropped, enforcement actions impose an enormous toll on the individuals and entities that they target. Responding to information requests or discovery and defending against court actions consumes an enormous amount of time and resources. In addition, the mere filing of actions places individuals and entities in a negative public light that can adversely impact their business operations and personal lives, regardless of whether the charges ever succeed. The tremendous costs and burdens that enforcement actions can inflict, even when they do not result in a finding of wrongdoing, underscores the importance of observing traditional limits on the exercise of prosecutorial authority, including those expressed in Article III.

In the case of the CFPB, in short, the "wolf" really does "come as a wolf." *Morrison v. Olson*, 487 U.S. 654, 728 (1988) (Scalia, J., dissenting). The agency was unconstitutionally headed by a Director who was opposed by the Senate because of concerns that he would be too aggressive. The merits of individual enforcement actions launched by the CFPB during Mr. Cordray's unconstitutional tenure as Director can be, and have been, reasonably questioned. What cannot be disputed is that they were brought by an agency that lacked a lawful delegation of the Executive power that is required to invoke the authority of the federal courts under Article III. This Court has recognized that "no principle is more fundamental to the Judiciary's proper role in our system of government" than Article III's standing requirement. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341-42 (2006) (citation omitted).

This case is a stark reminder of the consequences of disregarding that bedrock requirement.

The Ninth Circuit's decision holding that the CFPB possessed standing to press this action, notwithstanding Mr. Cordray's improper appointment, contravenes vital structural protections in the Constitution, conflicts with the decisions of this Court and other circuits, and merits this Court's review.

CONCLUSION

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

Respectfully submitted,

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