No. 24-185

In the Supreme Court of the United States

NATIONAL COLLEGIATE MASTER STUDENT LOAN TRUST, ET AL., PETITIONERS

v.

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the constitutional defect in the statutory provision restricting the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) requires dismissal of a civil enforcement action that was initially filed while the removal provision was in effect, where petitioners have not identified any causal link between the removal provision and the enforcement action, and where the CFPB has formally continued the action under multiple Directors who are fully removable by the President, including by filing the operative complaint.

2. Whether trusts that contract with third parties to service student loans as a necessary part of the trusts' operation, and that arrange for third parties to file thousands of debt-collection suits in the trusts' name, "engage[] in offering or providing a consumer financial product or service," 12 U.S.C. 5481(6)(A), and therefore are "covered person[s]" under the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5481(6)(A); see 12 U.S.C. 5531(a).

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OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2024. A petition for rehearing was denied on May 21, 2024 (Pet. App. 48a-50a). The petition for a writ of certiorari was filed on August 16, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A. Legal Background

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act or Act), Pub. L. No. 111-203, 124 Stat. 1376

(2010). As part of Congress's effort to reform the financial-services industry in the wake of the 2008 financial crisis, the Act established the CFPB, 12 U.S.C. 5491(a), as an agency headed by a Director who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1) and (2). The Act provided that, before the end of the Director's five-year term, the Director may be removed only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

As relevant here, the Act prohibits any "covered person" or "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5536(a)(1)(B). The "covered persons" subject to this prohibition include "any person that engages in offering or providing a consumer financial product or service," such as collecting debt or servicing loans. 12 U.S.C. 5481(5), (6)(A), (15)(A)(i) and (x). The Act authorizes the CFPB to bring a civil action in court to enforce this prohibition. 12 U.S.C. 5564(a).

2. In 2020, this Court held that the statutory limit on the President's authority to remove the CFPB Director "violates the separation of powers," and that the Director "must be removable by the President at will." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 205 (2020). That holding was consistent with the views of the Executive Branch, which had argued in litigation that the for-cause removal limitation was unconstitutional. The government first took that position in a brief filed in March 2017, months before the CFPB commenced this enforcement action. See U.S. Amicus Br. at 5-23, *PHH Corp.* v. *CFPB*, No. 15-1177 (D.C. Cir.) (Mar. 17, 2017); see also Gov't Br. at 7-38, *Seila Law*, *supra* (No. 19-7) (Dec. 9, 2019).

B. Factual And Procedural History

1. Petitioners are fifteen trusts established for the purposes of acquiring a pool of student loans, issuing securities backed by those loans, and servicing and collecting on those loans. See Pet. App. 3a-4a, 38a; see also 12 Del. C. Ann. tit. 12, § 3801 *et seq.* (West 2024). Over several years, petitioners acquired more than 800,000 private student loans and later brought tens of thousands of debt-collection lawsuits against borrowers. Pet. App. 38a-39a; see C.A. App. 388, 391. Because the value of the securities sold by petitioners depends on how many students default on their loan payments, petitioners "have a powerful incentive to ensure that students do not miss loan payments." Pet. App. 39a; see *id.* at 38a.

Petitioners' governing documents state that the purpose of each petitioner "is to engage in" activities that included "acquir[ing] a pool of Student Loans" and providing the "servicing of the Student Loans." Pet. App. 24a-25a; C.A. App 107. Those documents also instruct petitioners to "engage in those activities * * * that are necessary, suitable or convenient to accomplish the foregoing." Pet. App. 25a (emphasis omitted); C.A. App. 107. Petitioners have no employees and therefore "collect debt and service the loans through third parties." Pet. App. 39a. To bring debt-collection lawsuits on past-due and defaulted student loans, petitioners contracted with a "special servicer" who, "in turn, entered into agreements with subservicers." *Ibid.* (citation and internal quotation marks omitted).

In September 2017—after the Executive Branch had taken the position that the CFPB Director is removable

at will, but before this Court so held in *Seila Law*, *supra*, see p. 2, *supra*—the CFPB brought suit against petitioners. Then led by Director Richard Cordray, the CFPB alleged that petitioners had engaged in unfair and deceptive practices in connection with collecting debts, including by filing debt-collection lawsuits while lacking key evidence. Pet. App. 38a-39a. In November 2017, Acting Director Mick Mulvaney—who was appointed and removable at will by President Trump—replaced Director Cordray. The CFPB continued to litigate this action.[1]

2. After this Court decided *Seila Law*, *supra*, petitioners moved to dismiss on various grounds. While that motion was pending, the CFPB notified the district court that then-serving Director Kathleen Kraninger—who was appointed and removable at will by President Trump—had considered and expressly ratified the enforcement action against petitioners. C.A. App. 318.

The district court granted petitioners' motion to dismiss. Pet. App. 11a. The court held that Director Kraninger's ratification of the CFPB's original complaint was not effective because that ratification had occurred after the applicable statute of limitations had expired. *Ibid.* The court took the view that equitable tolling did not apply. *Ibid.* The court dismissed the action but allowed the CFPB to file an amended complaint. *Ibid.*

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[1] The CFPB also took action against one of petitioners' servicers for its role in the illegal collection practices. C.A. App. 80-81. In 2017, the CFPB issued a consent order against the servicer, requiring it to pay a civil penalty and to comply with certain conduct provisions. See *Transworld Systems, Inc.*, 2017-CFPB-18, 2017 WL 7520640 (Sept. 18, 2017).

3. a. The CFPB filed an amended complaint in 2021 under Acting Director David Uejio, who was appointed and removable at will by President Biden. Petitioners again moved to dismiss. Pet. App. 11a.

This Court subsequently issued its decision in *Collins* v. *Yellen*, 594 U.S. 220 (2021), which addressed the appropriate relief for parties who challenge an agency action that was taken before an unconstitutional removal restriction has been invalidated. See *id.* at 257-260. The Court rejected the argument that the action "would be void unless lawfully ratified." *Id.* at 259. So long as the officer in question was "properly appointed," the Court explained, "there is no reason to regard" the officer's actions as "void ab initio." *Id.* at 257-258 (emphasis omitted).

The *Collins* Court observed that "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)." 594 U.S. at 259. Nonetheless, the Court explained that "it is still possible for an unconstitutional provision to inflict compensable harm." *Ibid.* The challengers in *Collins* asserted that "[w]ere it not for that provision," the President "might have replaced one of the confirmed Directors who supervised the [challenged agency action], or a confirmed Director might have altered his behavior in a way that would have benefited the shareholders"; while the government "dispute[d] the possibility that the unconstitutional removal restriction caused any such harm." *Id.* at 260. The Court left those arguments to be "resolved in the first instance by the lower courts." *Ibid.*

b. This case was transferred to Judge Bibas, sitting by designation in the district court. Judge Bibas requested supplemental briefing on the effect of the removal provision, and both parties submitted briefs that addressed, among other things, the decision in *Collins*. C.A. App. 423-443. At this point in the litigation, the CFPB was headed by its fifth director, Director Rohit Chopra, who was appointed and removable at will by President Biden.

The district court denied petitioners' motion to dismiss. Pet. App. 37a-47a. First, the court held that, under *Collins*, it was unnecessary for the CFPB to ratify this action if petitioners could not show "that the removal provision harmed [them]." *Id.* at 42a. The court determined that petitioners could not make the necessary showing since "[t]his suit would have been filed even if the director had been under presidential control." *Ibid.* The court viewed the fact that this case "has been litigated by five directors of the CFPB, four of whom were removable at will by the President," and that "the CFPB did not change its litigation strategy once the removal protection was eliminated," as "strong evidence that this suit would have been brought regardless" of the removal provision. *Ibid.*

The district court also determined that petitioners are "covered persons" under the Act because petitioners "engage[] in" the provision of consumer financial products and services. Pet. App. 44a (quoting 12 U.S.C. 5481(6)); see *id.* at 44a-45a. The court observed that, under the ordinary definition of "engage," a person can "engage" in an activity even "if he contracts with a third party to do that activity on his behalf." *Id.* at 45a. Applying that definition, the court explained that petitioners had engaged in the "business of collecting debt and

servicing loans" by contracting "with the servicers and subservicers to collect their debt and service their loans." *Ibid.* (internal quotation marks omitted). The court emphasized that the debt-collection lawsuits that were the subject of the CFPB's complaint were "brought on behalf of the Trusts" and "could have proceeded only with the Trusts' involvement" and with "the Trusts' say-so." *Id.* at 45a-46a.

4. The court of appeals accepted the case for interlocutory review and affirmed. Pet. App. 1a-36a; see 28 U.S.C. 1292(b).

a. The court of appeals determined that "the CFPB did not need to ratify this action before the statute of limitations had run." Pet. App. 36a. The court explained that, under this Court's decision in *Collins*, "the heart of the issue is whether the insulation provision * * * caused harm." *Id.* at 30a. Consistent with "the approaches [its] sister circuits have taken in interpreting *Collins*," *ibid.*, the court of appeals reasoned that petitioners must provide "something more" than "a mere allegation that the unconstitutional provision inherently caused harm," *id.* at 32a-33a. The court recognized that petitioners might "be entitled to some type of relief" if they could show "any link whatsoever between the removal provision and [c]laimant's case." *Id.* at 33a (citation omitted). But the court held that it "cannot find such a link." *Ibid.*

To the contrary, the court of appeals agreed with the district court that "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." Pet. App. 33a (citation and internal quotation marks omitted). The

court declined to adopt petitioners' view that "an impermissible insulation provision * * * on its own, cause[s] harm," finding that argument to be "directly counter to the Supreme Court's holding in *Collins*" and to "guidance provided by * * * sister circuits." *Id.* at 34a-35a. The court further explained that a remand was unnecessary because "[t]he record is * * * clear here"—*i.e.*, "[t]here is no indication that the unconstitutional limitation on the President's authority harmed the Trusts." *Id.* at 36a.

b. The court of appeals also held that petitioners are "covered persons subject to the CFPA's enforcement authority because they 'engage' in the requisite activities." Pet. App. 36a. Based on dictionary definitions and on this Court's interpretation of the same term in *Southwest Airlines Co.* v. *Saxon*, 596 U.S. 450 (2022), the court determined that the phrase "engage in" means to be "'occupied, employed, or involved in something'" or to "embark on" or "take part in" an enterprise or activity. Pet. App. 23a-24a (brackets and internal quotation marks omitted) (quoting *Saxon*, 596 U.S. at 463); see *id.* at 21a-24a. Under that definition, the court determined that petitioners "engage in both student loan servicing and debt collection." *Id.* at 28a. The court emphasized that petitioners' own governing documents state that each petitioner's purpose is to "engage in both student loan servicing and debt collection." *Id.* at 28a; see *id.* at 24a-25a. The court further observed that petitioners were involved in the relevant activities because petitioners had entered into agreements with third parties to service the loans as a "necessary part of [petitioners'] business," and to pursue collection suits brought in petitioners' own names to collect on debts

petitioners claimed to hold. *Id.* at 27a; see *id.* at 23a-28a.

5. The court of appeals denied a petition for rehearing. Pet. App. 48a-50a.

ARGUMENT

Petitioners contend that (1) this action must be dismissed because the CFPB initiated it under a Director who was purportedly insulated from removal, and (2) petitioners did not "engage in" the offering of consumer financial products or services because petitioners contracted with third parties to litigate petitioners' debt-collection suits. The courts below correctly rejected petitioners' arguments, and the court of appeals' holdings on those issues do not conflict with any decision of another court of appeals or otherwise satisfy this Court's traditional criteria for review. The petition for a writ of certiorari should be denied.

1. a. Petitioners argue (Pet. 12-21) that this suit should be dismissed because the suit was initiated at a time when the statutory restriction on the President's ability to remove Director Cordray had not yet been declared invalid. The court of appeals correctly rejected that argument. Pet. App. 29a-36a. This Court held in *Collins* v. *Yellen*, 594 U.S. 220 (2021), that, if an officer was "properly appointed," "there is no reason to regard" the officer's actions as "void ab initio." *Id.* at 257-258 (emphasis omitted). Instead, a plaintiff who seeks relief from a past agency action, based on a court's invalidation of an improper removal restriction, must show that the unconstitutional provision "inflict[ed] compensable harm"—that is, that the President's inability to remove the relevant officers caused the agency to do something to the plaintiff that it would not otherwise

have done. *Id.* at 259; see *id.* at 260 (asking whether the statutory provision "cause[d] harm"); see also *id.* at 275 (Kagan, J., concurring in part and concurring in the judgment).

The court of appeals correctly applied that standard. The court explained that, under *Collins*, there "must be something more" than "a mere allegation that the unconstitutional provision inherently caused [petitioners] harm." Pet. App. 32a-33a. The court determined that petitioners had failed to establish "any link whatsoever between the removal provision and [this] case." *Id.* at 33a (citation omitted). The court further observed that there was "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." *Ibid.* (citation omitted). In these circumstances, the court concluded, "[t]here is no indication that the unconstitutional limitation on the President's authority harmed the Trusts." *Id.* at 36a.

Petitioners contend that the court of appeals ignored the "obvious parallel" between this case and the examples the *Collins* Court gave of ways to demonstrate harm. Pet. 17; see Pet. 16-17. In *Collins*, this Court explained that a party could demonstrate harm from an unconstitutional removal restriction 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 statute did not stand in the way." 594 U.S. at 260. But petitioners have not identified any instance in which a President stated that he would remove the CFPB's Director if the statute made the Director removable at will. To the contrary, the materials petitioners cite (Pet. 17) suggest

that considerations other than the perceived legality of the for-cause removal restriction were at play. See, *e.g.*, Elizabeth Dexheimer, *Trump Said to Weigh Political Consequences of Firing CFPB Chief*, BNA's Bankr. L. Rep. (Mar. 16, 2017).

Indeed, at the time the CFPB filed the original complaint in this case, the Executive Branch had already taken the position that the purported restriction on the President's removal power was unconstitutional. See p. 2, *supra*. And petitioners have not identified any presidential statement expressing displeasure with this lawsuit. To the contrary, after Director Cordray left office, President Trump's appointees to replace him—Acting Director Mulvaney and Director Kraninger—continued to purse this litigation and expressly ratified the decision to continue. See p. 4, *supra*. Accordingly, there is simply no basis to think that, absent the statutory removal restriction, Director Cordray "might have altered his behavior in a way that would have benefited" petitioners or that the President would have replaced him with a Director who would have desisted from this case. *Collins*, 594 U.S. at 260.

Petitioners next argue that the court of appeals created a "but-for standard" not found in the *Collins* Court's opinion. Pet. 18. That is incorrect. In *Collins* this Court held that an unconstitutional removal restriction will provide grounds for vacating agency action only if the restriction actually "inflict[s] compensable harm." 594 U.S. at 259; see *id.* at 260 (describing circumstances in which "the statutory provision would * * * cause harm"). Accordingly, a causal link to a challenger's harm is required, and "[t]he traditional way to prove that one event was a factual cause of another is to show that the latter would not have occurred 'but for' the former."

Paroline v. *United States*, 572 U.S. 434, 449-450 (2014). Moreover, "but-for causation" is particularly "important in determining the appropriate remedy." *Babb* v. *Wilkie*, 589 U.S. 399, 413 (2020). For those reasons, asking whether the removal provision was the but-for cause of this lawsuit is an appropriate way to determine whether the provision inflicted harm under *Collins*.

In any event, the court of appeals did not unambiguously require but-for causation. The court explained that petitioners "may be entitled to some type of relief" if they could show "any link whatsoever" between the removal provision and petitioners' claim. Pet. App. 33a (citation omitted). It further explained that petitioners had not demonstrated such a link, either by establishing that the CFPB would not have "taken this action but for the President's inability to remove the Director," or by linking the removal provision to their harm in another manner. *Ibid.* The court of appeals therefore found "no indication" at all that the unconstitutional limitation had "harmed [petitioners]." *Id.* at 36a.[2]

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[2] Petitioners also fault the court of appeals for citing Justice Kagan's concurring opinion in *Collins*, which stated that a party is entitled to relief based on an unconstitutional removal restriction "only when the President's inability to fire an agency head affected the complained-of decision." Pet. App. 14a (quoting *Collins*, 594 U.S. at 274 (Kagan, J., concurring in part and concurring in the judgment)). But that opinion was describing the remedial approach adopted by the Court, while expressing the concurring Justices' "agree[ment]" with that approach. *Collins*, 594 U.S. at 274 (Kagan, J., concurring in part and concurring in the judgment). In all events, petitioners have not explained how any daylight between Justice Kagan's description and the Court's formulation of "inflict[ing] com-

Finally, petitioners express concern that, given the difficulty of showing "that the agency would not have initiated the particular action at issue if the officer had been properly removable," the court of appeals' approach provides "only an illusory promise of relief." Pet. 18-19. But petitioners ignore the significant relief that the Court's ruling in *Seila Law LLC* v. *CFPB*, 591 U.S. 197 (2020), has already provided. As a result of that decision, the CFPB's pursuit of this case "remains subject to the ongoing supervision and control of the elected President." *Id.* at 224; see *Office of U.S. Tr.* v. *John Q. Hammons Fall 2006, LLC*, 144 S. Ct. 1588, 1600 (2024) (explaining that a prospective remedy "cures the constitutional violation," and declining to provide challengers retrospective relief).

Under *Collins*, moreover, additional remedies remain available to parties who actually experience harm caused by an unconstitutional provision—*e.g.*, because a Director who was removable at will "might have altered his behavior in a way that would have benefited [them]." 594 U.S. at 260. But where (as here) a party does not allege—let alone demonstrate—any causal link between an invalid removal provision and the complained-of agency action, there is no harm to remedy. See, *e.g.*, *id.* at 261, 271 (Thomas, J., concurring) (explaining that "[t]he Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract" and that, "absent an unlawful act, [parties] are not entitled to a remedy"). Awarding remedies to a party (like petitioners) who was not harmed by a

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pensable harm," *id.* at 259, could matter given their failure to establish "any link" between the removal restriction and the CFPB action in this case. Pet. App. 33a (citation omitted).

statutory removal restriction would put that party "in a more favorable position than he or she would have enjoyed absent" the constitutional violation. *Babb*, 589 U.S. at 413; see *Collins*, 594 U.S. at 274 (Kagan, J., concurring in part and concurring in the judgment). The court of appeals rightly rejected such an approach.

b. Contrary to petitioners' contention (Pet. 13-15), the decision below does not conflict with any decision of another court of appeals.

Petitioners assert a conflict with decisions of the Sixth, Eighth, and Ninth Circuits, which have "ensured that parties challenging actions by unconstitutionally insulated officers have at least an opportunity to demonstrate harm." Pet. 13. In fact, the decisions that petitioners invoke hold—consistent with the decision below—that a party can show harm from an unconstitutional removal restriction only by establishing some connection between that restriction and the challenged agency action. *Rop* v. *FHFA*, 50 F.4th 562, 576 (6th Cir. 2022) (holding that the determinative question is "whether the restriction [on the President's removal authority] actually affected any actions * * * that allegedly harmed shareholders"), cert. denied, 143 S. Ct. 2608 (2023); *Bhatti* v. *FHFA*, 97 F.4th 556, 560-562 (8th Cir. 2024) (holding that the harm claimed "must be connected in some way, or share some nexus with, the president's inability to remove" the officer); *Kaufmann* v. *Kijakazi*, 32 F.4th 843, 849 (9th Cir. 2022) (explaining that "[a] party challenging an agency's past actions must instead show how the unconstitutional removal provision *actually harmed* the party"). Indeed, petitioners acknowledge (Pet. 18 n.1) that the Ninth Circuit employs the same "substantive standard" for assessing harm as did the decision below.

Petitioners emphasize that the Sixth, Eighth, and Ninth Circuits have remanded cases to district courts for further consideration of the harm question, while the decision below determined that remand was unnecessary. See Pet. 13-14. But those other courts deemed remand appropriate because *Collins* had been decided while each of the cases was pending on appeal, so that "the district court did not have the benefit of *Collins* to guide its analysis." *Rop*, 50 F.4th at 576; see *CFPB* v. *Nationwide Biweekly Admin., Inc.*, No. 18-15431, 2023 WL 566112, at *1-*2 (9th Cir. Jan. 27, 2023); *Bhatti* v. *FHFA*, 15 F.4th 848, 852 (2021). Here, by contrast, the district court issued its decision after this Court decided *Collins*, and both parties had an opportunity to brief the issue of harm before both the district court and the court of appeals.

Subsequent developments in each circuit further illustrate the absence of any conflict on this issue. In determining the proper disposition of *Bhatti* after the remand proceedings were completed, the Eighth Circuit ruled that the plaintiff was not entitled to relief because he had "failed to plausibly plead the requisite connection or causation," namely that "the harm claimed by the shareholders" was "connected in some way, or share[d] some nexus with, the president's inability to remove [the official]." 97 F.4th at 561. The Sixth and Ninth Circuits have similarly declined to remand where, as here, "[t]he record is sufficiently clear that the removal protections did not cause harm." *Calcutt* v. *FDIC*, 37 F.4th 293, 316-317 (6th Cir. 2022), rev'd on other grounds, 598 U.S. 623 (2023); accord *Decker Coal Co.* v. *Pehringer*, 8 F.4th 1123, 1137-1138 (9th Cir. 2021) (declining to remand "as the record is clear" that there was no harm).

c. This case is an especially poor vehicle for clarifying the circumstances in which an invalid removal provision "inflict[s] compensable harm" under *Collins*, 594 U.S. at 259, because petitioners have never identified *any* link between the removal provision here and the CFPB's pursuit of this case. See Pet. App. 33a. Petitioners assert that their argument is "no hail mary." Pet. 21. But they seek dismissal of a civil enforcement suit that the Bureau has now pursued under the leadership of five successive Directors or Acting Directors appointed by three different Presidents. Four of those officials were removable at will by the President. Pet. App. 33a; accord *id.* at 15a, 42a.[3]

Petitioners do not appear to contend that Director Cordray would have declined to authorize the September 2017 original complaint if it had been clear at that time that the Director was removable at will. Rather, petitioners suggest (*e.g.*, Pet. 17) that the President might have removed Director Cordray before that date if the President's authority to do so had been settled. But even leaving aside the highly speculative character of that suggestion (see pp. 10-11, *supra*), the behavior of Director Cordray's successors—under whose leadership the agency continued this suit, ratified the original complaint in July 2020, and filed an amended complaint

[3] As petitioners recognize, the amended complaint filed in April 2021 is now the "operative complaint" (Pet. 9) and the one that petitioners presently seek to have dismissed. Petitioners do not contend that the amended complaint, which was filed nearly a year after this Court decided *Seila Law*, was itself tainted by the prior uncertainty about the Director's removability. Rather, they suggest (Pet. 21) that, if the original pre-*Seila Law* complaint is treated as a nullity, the agency's subsequent ratification of that complaint and filing of an amended complaint are barred by the statute of limitations.

in April 2021—strongly indicates that the CFPB ultimately would have filed a timely complaint against petitioners even if Director Cordray had been removed before the actual complaint was filed.

2. The court of appeals correctly held that petitioners are "covered persons" under the Act. That holding is supported by the plain meaning of the phrase "engage in," petitioners' own governing documents, and petitioners' role in pursuing debt-collection suits against borrowers and in servicing loans. Petitioners' contrary arguments lack merit, and the court of appeals' resolution of the issue does not warrant this Court's review.

a. i. The CFPA term "covered person" encompasses "any person that engages in offering or providing a consumer financial product or service." 12 U.S.C. 5481(6). The Bureau's amended complaint sufficiently alleged that petitioners "engage" in covered activity and thus fall within the purview of the Act. See Pet. App. 28a. In *Southwest Airlines Company* v. *Saxon*, 596 U.S. 450 (2022), this Court considered the Federal Arbitration Act term "engaged in," explaining that "to be 'engaged' in something means to be 'occupied,' 'employed,' or 'involved' in it." *Id.* at 457; see *id.* at 456. That definition has remained consistent over time. See *Black's Law Dictionary* 646 (10th ed. 2009) (defining "engage" to mean "take part in"); Pet. App. 23a-24a.

The court of appeals correctly applied that definition to petitioners' conduct as alleged in the amended complaint. See Pet. App. 24a-29a. Petitioners' own Trust Agreements, executed at petitioners' formation, state that the purpose of each petitioner "is to *engage in*" the activities of "acquir[ing] a pool of Student Loans," providing for the "servicing of the Student Loans," and "*engag[ing] in* those activities * * * that are necessary,

suitable or convenient to accomplish the foregoing." *Id.* at 24a-25a. Petitioners were "involved in" the provision of consumer financial products or services because petitioners entered into agreements that required third parties to carry out debt-collection activities, including lawsuits, in order to "perform the duties of the [petitioners]." *Id.* at 26a (citation and internal quotation marks omitted); see *id.* at 26a-27a. Petitioners were also involved in the servicing of loans because petitioners' administrator entered into servicing agreements that were a necessary part of petitioners' business. *Id.* at 27a. Finally, petitioners were involved in the debt-collection lawsuits because those lawsuits were brought by parties acting on behalf of and for the benefit of the trusts, which retain the legal right to the student loans. *Id.* at 28a.

ii. Petitioners' contrary arguments (see Pet. 22-26) are unavailing.

Petitioners primarily contend that they do not "engage in" the specified activities because that term requires active involvement and petitioners are passive conduits with no employees or directors. See Pet. 22-23. That argument lacks merit. As an initial matter, it is an elementary principle that artificial persons can and do act through others. *Board of Comm'rs of Leavenworth Cnty.* v. *Sellew*, 99 U.S. 624, 627 (1879) ("As the corporation can only act through its agents, the courts will operate upon the agents through the corporation."). The CFPA defines "person" to include many types of artificial persons that necessarily act through their agents, including both "trust[s]" and "unincorporated" "association[s]," 12 U.S.C. 5481(19), and petitioners were required to enter agreements with third parties in

order to collect the debt and service the loans as "a necessary part of their business," Pet. App. 27a. Given the practical necessity of acting through others, petitioners cannot explain why contracting with third parties to carry out petitioners' core purpose as set out in their governing documents—including to file and prosecute debt-collection lawsuits in the trusts' name and for their benefit—is insufficiently direct to constitute being "involved in" or "taking part in" those activities.

Petitioners are also wrong to contend that they "do not do *anything*." Pet. App. 22. In seeking this Court's review, petitioners have retained counsel and petitioned for certiorari. Petitioners have also brought thousands of debt-collection suits against consumers in petitioners' own names, and they have arranged for others to assist them in bringing collection suits on their behalf. C.A. App. 382, 387-388, 391. And petitioners themselves have long insisted upon their ability to act and to collect debt in their own name. See, *e.g.*, Trusts' Opp. to Mot. to Dismiss at 5, *National Collegiate Student Loan Trust 2004-2* v. *Martin*, No. 2015-cv-10002 (Ohio Com. Pl. Mar. 12, 2015), 2015 WL 13285077 (arguing that "NCSLT * * * has the capacity and standing to file suit in its own name, and routinely does so throughout the United States"); *In re National Collegiate Student Loan Trusts 2003-1, 2004-1, 2004-2, 2005-1, 2005-2, 2005-3*, 971 F.3d 433, 446 (3d Cir. 2020) (noting NCSLT's argument that petitioners "retain the obligation to take various actions to protect their interests and enforce the obligations of persons doing business with them").

Petitioners thus can and do take action to engage in the collection and servicing of debt.[4]

Petitioners also emphasize that, in drafting the statutory definition of "covered person," Congress removed the phrase "directly or indirectly" from an earlier version of the bill that became the CFPA. Pet. 25. But as the district court noted, "if Congress wanted to allow enforcement against only those who *directly* engage in offering or providing consumer financial services, it could have said so." Pet. App. 46a (citing 12 U.S.C. 5481(15)(A)(vii)(I) (carving out certain payment processing by merchants for goods "sold directly by such person to the consumer")); see 12 U.S.C. 5517(a)(2)(A)(i) (limiting CFPB's authority with respect to certain merchants that "extend[] credit directly to a consumer"); 12 U.S.C. 5517(d)(2)(C) (same with respect to certain accountants that "only extend [] credit directly to a consumer"). Congress could have achieved the result that petitioners advocate by deleting from the earlier version of the bill only the words "or indirectly"; but Congress deleted the word "directly" as well.

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[4] Petitioners also invoke a Securities and Exchange Commission (SEC) definition of the term "asset-backed securities" to suggest that petitioners are purely "passive entit[ies]" that cannot act on their own. Pet. 6-7 (citations omitted). But the SEC's definition for purposes of a regulation that governs reporting requirements does not address whether passive entities are "covered persons" that "engage in" financial activities for purposes of the CFPA. In any event, the SEC regulations further underscore that the agreements with third parties to engage in consumer financial activities are necessary aspects of petitioners' business. See 70 Fed. Reg. 1506, 1511 (Jan. 7, 2005) (noting that third-party servicers "are generally necessary to collect payments" and to "carry out the other important functions involved in administering the assets").

Congress's removal of the entire phrase more likely illustrates that the statute's final language—"engages in"—is broad enough to capture both direct and indirect activity. In any event, petitioners cannot use "ambiguous legislative history to muddy clear statutory language." *Milner* v. *Department of Navy*, 562 U.S. 562, 572 (2011). And the ordinary meaning of "engage in" easily covers activities that an artificial entity contracts with third parties to pursue on its behalf in carrying out the entity's core mission. See pp. 17-18, *supra*.

b. Petitioners' second question presented does not warrant this Court's review. Petitioners do not argue that the courts of appeals' reading of the disputed CFPA language conflicts with any decision of another court of appeals, or that the interpretive issue otherwise satisfies this Court's traditional certiorari standards. See Pet. 21-30; see also Sup. Ct. R. 10.

Petitioners instead assert that the court of appeals' interpretation is too broad and will have significant practical consequences. Pet. 25-29. But the court of appeals simply adopted and applied a dictionary definition that this Court has invoked and that has "remained remarkably consistent over time." Pet. App. 24a. That decision, tied to petitioners' own governing documents and core business function, does not address the Act's application to third parties that are involved in ancillary activities "in some distant sense." Pet. 26.

Petitioners also contend that the decision below shifts the regulatory landscape and could lead to unintended consequences. Pet. 26-27. But seven years have passed since the CFPB filed this suit alleging that petitioners are covered persons, and nearly three years have passed since the district court ruled that they

were. The CFPB has consistently adhered to this position across the leadership of multiple Directors. In all that time, the only negative impact that petitioners can identify is that, shortly after the CFPB brought suit, a credit rating agency considered downgrading petitioners' transactions. See Pet. 27. But a negative effect on a party that is alleged to have violated the law has no bearing on the activities of other market participants. Indeed, it is unsurprising that this litigation has had no noticeable market effect to date given that petitioners (and others who act similarly) are already subject to other legal prohibitions on unfair and deceptive practices. See, *e.g.*, 15 U.S.C. 45(a)(1) (Federal Trade Commission Act); 15 U.S.C. 1692e, 1692f (Fair Debt Collection Practices Act).

3. Finally, the interlocutory posture of this case weighs against the Court's review. The court of appeals answered the two questions on interlocutory appeal and remanded the case back to the district court to continue proceedings. Under this Court's usual practice, that fact "alone furnishe[s] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). If petitioners prevail on remand, there may be no need for the Court to consider the questions raised here. And if they do not, they may raise their current contentions, together with any additional issues that arise out of proceedings on remand, in a single petition after the court of appeals renders a final decision. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment"); see also Stephen M. Shapiro et al.,

Supreme Court Practice 250 (10th ed. 2013) ("It is often most efficient for the Supreme Court to await a final judgment and a petition for certiorari that presents all issues at a single time rather than reviewing issues on a piecemeal basis.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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