**No. 17-56324**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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CONSUMER FINANCIAL PROTECTION BUREAU,

Petitioner-Appellee,

*v.*

SEILA LAW, LLC,

Respondent-Appellant.

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On Appeal from the United States District Court
for the Central District of California

Hon. Josephine L. Staton

Case No. 8:17-cv-1081

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# SUPPLEMENTAL BRIEF OF APPELLEE CONSUMER FINANCIAL PROTECTION BUREAU

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## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases** **Page(s)**

**Statutes**



**Other Authorities**

## INTRODUCTION

This action to enforce a civil investigative demand (CID) has been ratified by two successive heads of the Consumer Financial Protection Bureau who were removable at will by, and thus fully accountable to, the President. Either ratification alone would fully resolve Seila Law's objection that, at the time this action was filed, it was not overseen by such an official. Nor would any legitimate purpose be served by setting aside the CID at this point. To the contrary, doing so now that it has been approved by two officials subject to the President's plenary supervision would undermine the very Article II authority that the Supreme Court sought to protect in this case.

This Court should grant the Bureau's petition and enforce the CID.

## BACKGROUND

1. The Bureau issued a CID to Seila Law in February 2017 as part of an effort to investigate the firm's involvement in a long-running, nationwide debt-relief scheme that deceived financially vulnerable consumers and cost them many millions of dollars in illegal fees. *See CFPB v. Morgan Drexen, Inc.*, No. 8:13-cv-1267, 2016 WL 6601650, at *3 (C.D. Cal. Mar. 16, 2016) (awarding more than $130 million in restitution to affected consumers and assessing $40 million in civil penalties against defendant for its role in the scheme); *CFPB v. Howard*, No. 8:17-cv-161 (C.D. Cal. Mar. 27, 2019) (entering consent judgment awarding an

additional $35 million in redress to consumers affected by the scheme and $40 million in penalties).

After Seila Law refused to answer fully the seven interrogatories and four requests for documents in the CID, the Bureau filed a petition in the Central District of California to enforce the CID. At the time, the Bureau was led by Director Richard Cordray, who the Bureau's statute provided could be removed only for cause. *See* 12 U.S.C. § 5491(c)(3).

The district court ordered Seila Law to comply with the CID. Seila Law filed this appeal, arguing that the CID should not be enforced because the removal provision violated the constitutional separation of powers and because the Bureau lacked statutory authority to issue the CID.[1]

While the appeal was pending but before briefing began, Director Cordray resigned, and the President designated Mick Mulvaney to serve as the Bureau's Acting Director pursuant to the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345-3349d. In his capacity as Acting Director, Mr. Mulvaney was removable by the President at will. *See* Bureau Br. at 14 (Doc. 23). Acting Director Mulvaney

[1] At one point, Seila Law appeared to suggest that it had constitutional objections to the Bureau's statutory method of funding as well. Seila Opening Br. at 13-14 (Doc. 13-1). But Seila Law never actually articulated such a challenge and thus waived any argument along these lines, which in any event would be without merit. *See* Bureau Br. at 13 n.1; *see also* Seila Reply Br. (making no attempt to dispute waiver or to otherwise resuscitate this argument) (Doc. 29).

reviewed the Bureau's decisions to issue the CID, to deny Seila Law's request to set it aside, and to petition to enforce it in district court. He formally ratified these decisions after being briefed on the case by Bureau staff. *See* Doc. 56 at 8 (Mulvaney Ratification). He also authorized the filing of the Bureau's brief in this Court, in which the Bureau explained why the ratification resolved Seila Law's constitutional objection. Bureau Br. at 13-19.

After briefing was complete but before oral argument, the Senate voted to confirm Kathleen Kraninger as Director of the Bureau. Director Kraninger has served in that capacity since December 2018.

After oral argument, the Court issued its decision affirming the district court's judgment. Doc. 44. The Court held that the removal provision was constitutional and that the CID was within the Bureau's statutory authority to issue. It did not address the effect of Acting Director Mulvaney's ratification.

Seila Law petitioned for certiorari on its separation-of-powers defense, and the Supreme Court agreed to decide that issue.

2. Vacating the panel's judgment, the Supreme Court held that the removal provision violates the separation of powers because it impedes the President's executive authority under Article II. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020). A different majority of the Court also held that the provision was severable from the rest of the Bureau's statute, thus rejecting Seila Law's claim

that the "offending removal provision means the entire agency is unconstitutional and powerless to act." *Id.* at 2208, 2211 (Roberts, C.J.); *see also id.* at 2245 (Kagan, J., dissenting in part and concurring with respect to severability). The Court emphasized that, in light of its decision, "[t]he agency may . . . continue to operate" with a Director who is "removable by the President at will." *Id.* at 2192. Recognizing that unresolved issues remained over the CID's ratification, the Court remanded the case "for the Government to press its ratification arguments in further proceedings." *Id.* at 2208 (Robert, C.J.).

In the wake of the Supreme Court's ruling that she is removable at will, Director Kraninger considered the bases for the Bureau's decisions relating to the Seila Law CID, and formally ratified those decisions on July 9, 2020. *See* Doc. 56 at 5-6 (Kraninger Ratification).

## ARGUMENT

### SEILA LAW'S CONSTITUTIONAL OBJECTION HAS BEEN FULLY RESOLVED, AND THE COURT SHOULD ENFORCE THE CID

Throughout this case, Seila Law has argued the CID should not be enforced because the removal provision in the Bureau's statute rendered the Director insufficiently accountable to the President. Now that the Supreme Court has held the removal provision invalid, but severable, this objection has been put to rest going forward. The Bureau is indisputably led by a Director removable at will by, and thus fully accountable to, the President.

Seila Law maintains that the CID still should not be enforced because at the time this action commenced, the Supreme Court had not yet held invalid the removal provision. But any defect in the initiation of this action has also been resolved: The CID, and this action to enforce it, have now been formally and expressly ratified by not one but two Bureau officials removable at will by the President. As this Circuit has already held, such ratification cures any lingering Article II problem with the initial filing of this suit. The CID should be enforced.

### A. Valid Ratification Cures an Initial Defect in an Agency Enforcement Action

Drawing from established principles of agency law, courts have long recognized ratification as a remedy for an initial defect in government-agency action, including the filing of an enforcement suit. "Ratification occurs when a principal sanctions the prior actions of its purported agent." *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998). In the context of an enforcement suit, such a ratification "remedie[s] the defect in [the] original issuance of the complaint." *Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 372 (D.C. Cir. 2017); *cf. generally Marsh v. Fulton Cty.*, 77 U.S. 676, 684 (1870) (valid ratification "operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally").

This Circuit applied these principles just a few years ago in *CFPB v. Gordon* to approve the ratification of a Bureau enforcement action initially authorized by

an official who had not been validly appointed under Article II's Appointments Clause. 819 F.3d 1179 (9th Cir. 2016). The suit was filed while the Bureau's then-Director, Richard Cordray, was serving as a recess appointee. *Id.* at 1185-86. While the suit was pending, the validity of his recess appointment was cast into doubt by the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). After Director Cordray was properly re-appointed to his position, the Bureau issued a ratification signed by Director Cordray in which he ratified "any and all actions" he had taken while serving as a recess appointee. 819 F.3d at 1186.

Gordon, supported by an amicus, urged that the suit against him had to be dismissed and that the ratification did not cure the Article II defect in Director Cordray's initial authorization of that suit. *Id.* The amicus went further, arguing that Director Cordray's invalid appointment meant "that the CFPB never existed for Article III purposes" until Director Cordray's proper appointment, thus depriving the Bureau of standing and, in effect, rendering the action void from the outset. *Id.* at 1188.

This Court rejected those arguments. It first confirmed its jurisdiction and the Bureau's standing. The Court emphasized that, in a government enforcement action, "it is the Executive Branch, not any particular individual, that has Article III standing." *Id.* at 1187 (*citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576

(1992)). It went on to explain that the Article II flaw in Director Cordray's initial appointment "does not alter the Executive Branch's interest or power in having federal law enforced." *Id.* at 1189. "While the failure to have a properly confirmed director may raise Article II Appointments Clause issues," the court concluded, "it does not implicate our Article III jurisdiction to hear this case." *Id.*

The Court then considered the ratification. It held that "any initial Article II deficiencies" with the filing of a suit were "cure[d]" by "[t]he subsequent valid appointment [of Director Cordray], coupled with Cordray's August 30, 2013 ratification." *Id.* at 1190-91. The Court noted the general principle that "for a ratification to be effective, 'it is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, but also at the time the ratification was made." *Id.* at 1191 (emphasis omitted) (*quoting FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994)).[2] But it confirmed that the ratifying party—i.e., the Bureau—at all times had the authority to bring the suit. *See id.* at 1192 (citing 12 U.S.C. § 5564(a)-(b)). "Because the CFPB had the authority to

[2] As the Court also observed, more recent agency law authority rejects altogether the requirement that a principal must have had authority at the time of the initial action. *Gordon*, 819 F.3d at 1191 (citing Restatement (Third) of Agency § 4.04 cmt. b (2006), which reports that "[c]ontemporary cases do not support" the requirement that "the principal have had capacity at the time of the original act"). The Court ultimately did not address this split in authority because it concluded that the Bureau had at all times had the authority to bring the suit.

bring the action at the time Gordon was charged," the Court explained, the ratification "resolves any Appointments Clause deficiencies." *Id.*; *see also United Food & Com. Workers Union Loc. Nos. 135, 324, 770, 1036, 1167, 1428, 1442 v. NLRB*, 669 F. App'x 397, 398 (9th Cir. 2016) (following *Gordon* and holding that ratification of final agency order by properly constituted agency "cured" any initial "Article II Appointments Clause defects").

Numerous other cases have considered and approved agency ratifications in a variety of contexts.[3] One other is worth highlighting here: the D.C. Circuit's decision in *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), which this Court closely analyzed, and "agree[d] with," in *Gordon*. 819 F.3d at 1191.

In *Legi-Tech*, the D.C. Circuit held that dismissing an enforcement action was "neither necessary nor appropriate" where the action was initially filed by an unconstitutionally structured agency but then ratified by that agency once the constitutional flaw was corrected. 75 F.3d at 708. The FEC filed suit against Legi-

[3] *See, e.g.*, *Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 602 (3d Cir. 2016) (approving double-layered ratification where agency heads ratified appointment of official who then ratified relevant agency action); *Doolin*, 139 F.3d at 212-14 (approving implicit ratification of enforcement action where official did not formally invoke the concept of ratification); *Combat Veterans for Cong. Pol. Action Comm. v. FEC*, 795 F.3d 151, 157-58 (D.C. Cir. 2015) (approving ratification as cure for statutory, as opposed to constitutional, problem); *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016) (approving ratification with respect to agency rulemaking, as opposed to enforcement action).

Tech at a time when the agency's leadership included two ex officio congressional members. *Id.* at 706. After the D.C. Circuit held in a different case that the inclusion of these members violated the separation of powers,[4] a "reconstitute[d]" Commission, which now excluded the congressional members, re-approved the suit against Legi-Tech. *Id.* The court rejected Legi-Tech's argument that dismissal was required because the separation-of-powers problem with the agency was "structural" and thus rendered "the FEC's entire investigation and decision to file suit void *ab initio*." *Id.* at 707. It held instead that "the better course" was to treat "the FEC's post-reconstitution ratification … as an adequate remedy" for the problem at the time the suit was filed. *Id.* at 709.

### B. This CID-Enforcement Action Has Twice Been Validly Ratified

Seila Law has now received the adequate remedy of ratification twice over.

This action was first ratified on March 16, 2018 by Acting Director Mulvaney. *See* Doc. 56 at 8. In his capacity as Acting Director, Mr. Mulvaney was removable by the President at will. *See* Bureau Br. 14; Seila Reply Br. at 8

[4] After holding unconstitutional the FEC's structure in this other case, the D.C. Circuit, being "aware of no theory" that would allow it to do otherwise, reversed the judgment in favor of the FEC. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993). That case, however, involved an enforcement action that was never ratified by a properly constituted agency. When the same court (indeed, in an opinion by the same judge) considered an action that *had* been ratified, in *Legi-Tech*, it held that dismissal was not appropriate. 75 F.3d at 708.

(appearing to agree with the Bureau on this point but arguing that "[o]nce a new Director is confirmed or Mulvaney's term expires, the CFPB will once again be led by a principal officer removable only for cause") (Doc. 29). Acting Director Mulvaney reviewed the Bureau's decisions to issue the CID, to deny Seila Law's request to set aside the CID, and to file this suit to enforce the CID. He then formally ratified these decisions on behalf of the Bureau.

This action was ratified a second time on July 9, 2020 by Director Kraninger, after the Supreme Court held in this case that she is removable at will by, and thus fully accountable to, the President. *See* Doc. 56 at 5-6. Director Kraninger considered the bases for the Bureau's decisions regarding this CID and formally ratified those decisions on behalf of the Bureau. *Id.*

Although Seila Law previously disputed whether the first ratification in fact took place, *see* Seila Reply Br. at 3-4, the Bureau has now documented both that ratification and Director Kraninger's, *see* Doc. 56. Nor could Seila Law reasonably dispute the formal sufficiency of these documents. Under basic principles of agency law, to which this Court and others have looked in assessing administrative-agency ratifications, all that is required for ratification is "the principal's assent (or conduct that justifies a reasonable assumption of assent) to be bound by the prior action of another person or entity." *Henderson v. United Student Aid Funds, Inc.*, 918 F.3d 1068, 1073 (9th Cir. 2019) (citing Restatement

(Third) of Agency § 4.01). Indeed, in the context of administrative-agency ratifications, courts "have consistently declined to impose formalistic procedural requirements before a ratification is deemed to be effective." *State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 184 (D.D.C. 2016); *see also Advanced Disposal Servs. East, Inc. v. NLRB*, 820 F.3d 592, 603 (3d Cir. 2016) ("[A]s an equitable remedy, ratification has been applied flexibly and has often been adapted to deal with unique and unusual circumstances.").

The courts of appeals have thus found valid ratifications even where agency officials did not formally invoke the term "ratification," *see Doolin*, 139 F.3d at 213-14 (agency official "effectively ratified" the initial filing of administrative enforcement proceeding by issuing a final order in the ordinary course that found the respondent bank had violated the law), and where they issued blanket ratifications of all prior actions, *see, e.g.*, *Advanced Disposal Servs*., 820 F.3d at 602 (finding valid ratification where agency official "affirm[ed] and ratif[ied] any and all actions taken by me or on my behalf during" the relevant time period). *Gordon* itself approved an example of the latter. *See* 819 F.3d at 1186. Moreover, ratifications by government agencies are accorded a presumption of regularity, *see Advanced Disposal Servs.*, 820 F.3d at 604-05, even when not offered, as was Director Kraninger's, under penalty of perjury.

Thus, Seila Law can no longer hope to argue as a factual matter that this action has not been ratified; it can only try to dispute the effect of such ratification.

**C. The CID Should Now Be Enforced**

1. The dual ratifications by Bureau officials removable at will have fully remediated any constitutional defect in the initial filing of this action. Seila Law has received exactly what it claimed was lacking, and received it twice: Two officials who were indisputably accountable to the President have confirmed that this case should proceed. Indeed, Acting Director Mulvaney ratified this action at a time when he was even serving in the President's Cabinet (by virtue of his simultaneously held position as Director of the Office of Management and Budget). And Director Kraninger ratified it after the Supreme Court had finally resolved the question of her removability by, and thus accountability to, the President. Seila Law can hardly claim as a practical matter that there has not been enough opportunity for presidential oversight of this proceeding.

Either ratification alone would provide Seila Law with a remedy exactly tailored to the scope of its objection. *See United States v. Morrison*, 449 U.S. 361, 364 (1981) (noting "general rule that remedies should be tailored to the injury suffered from the constitutional violation"); *cf. Seila Law*, 140 S. Ct. at 2209 ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem … ."). Seila Law complained that it should not

have to comply with a CID that the Bureau may not have chosen to pursue if the Bureau were more directly overseen by the President. That objection has been remedied by the decisions of two successive Bureau heads to affirm, while each was subject to the President's plenary oversight, that the CID should be pursued.

As in *Gordon*, those ratifications "cure[] any initial Article II deficiencies" in the filing of this proceeding. 819 F.3d at 1191; *see also Legi-Tech*, 75 F.3d at 709 (treating "the FEC's post-reconstitution ratification … as an adequate remedy" for the separation-of-powers problem at the time the suit was filed). And, as *Gordon* again makes clear, Seila Law is entitled to no more than that. The fact that Seila Law would prefer not to have to respond to the CID—just as Gordon would have preferred not to answer for the wrongdoing alleged in the Bureau's complaint—does not mean it has been denied an adequate remedy. *Cf. Barr v. Am. Ass'n of Political Consultants, Inc.*, 140 S. Ct. 2335, 2355 (2020) (proper remedy for plaintiffs' First Amendment challenge to ban on robocalls was to invalidate and sever an exception to the ban for government debt-collection, notwithstanding that plaintiffs' preferred relief would have been to invalidate the ban altogether).

Setting aside the CID at this point would serve no valid purpose. *Cf. Legi-Tech*, 75 F.3d at 708 (dismissing enforcement action was "neither necessary nor appropriate" after ratification). Again, Seila Law has now received a remedy that neatly fits the scope of its constitutional objection. The remedy is also one that is

appropriately tailored to take into account the legitimate interests of the Bureau and of the consumers who are or have been affected by the scheme under investigation. *Cf. Barr*, 140 S. Ct. at 2355-56 (rejecting challenger's request for broader remedy that "would end up harming a different and far larger set of strangers to this suit" than the narrower approach the Court did adopt); *Morrison*, 449 U.S. at 364 (remedies for constitutional violations "should not unnecessarily infringe on competing interests"). Declining to enforce the CID at this point would harm these significant interests by further delaying the progress of the Bureau's legitimate law-enforcement investigation.

This is also not a case in which a more sweeping remedy is needed in order to deter some type of bad conduct on the part of the Bureau: The Bureau has simply come to court seeking resolution of its dispute with Seila Law over the CID, in keeping with its statutorily mandated duty to enforce the federal consumer laws. In fact, the Bureau did everything it could in this case to ameliorate any issue with the removal provision by confirming, through the ratifications by officials to whom the provision did not apply, that the provision played no role in the Bureau's decisions about the CID. Moreover, the Supreme Court recently declined to dismiss an agency enforcement action even where the separation-of-powers problem at the start of that action was one that—in contrast to the problem here—the agency could have taken steps to avoid entirely. *See Lucia v. SEC*, 138 S. Ct.

2044, 2050 (2018) (hiring of administrative law judge violated Appointments Clause because Commission had not itself approved the appointment).[5]

More generally, setting aside the CID after officials fully accountable to the President have approved its prosecution would undermine the very Article II authority that the Supreme Court so emphasized in deciding this case. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2203 ("[T]he Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. … [They] deemed an energetic executive essential … ."). It could also, depending on the Court's reasoning, be used to raise doubts about the validity of other actions the Bureau has taken over the past decade and that a fully accountable Director has now also ratified. These actions include, for example, regulations governing the nation's multitrillion-dollar mortgage market. *See, e.g.*, Amicus Br. of Mortgage Bankers Ass'n at 20, *Seila Law*, 140 S. Ct. 2183, 2019 WL 6910300 (explaining

[5] *Lucia* also observed that the Supreme Court's "Appointments Clause remedies are designed … to create incentives to raise Appointments Clause challenges." 138 S. Ct. at 2055 n.5 (internal brackets and quotation marks omitted). The Court concluded that it "best accomplish[ed] that goal" by remanding for a new hearing before a properly appointed judge, *id.*—not by dismissing the enforcement action wholesale. Here, of course, the validity of this "hearing" is not in doubt—only the initial decision to seek enforcement of the CID. All that Seila Law was entitled to was a new decision by a properly accountable official on whether the CID should be pursued. It has received exactly that. (And if the Supreme Court thought that dismissal was necessary in order to encourage claims like Seila Law's, it surely would have said so rather than remanding this case for further proceedings.)

that "the CFPB's rules and guidance have permeated nearly every aspect of residential mortgage loan origination and servicing" and that "a ruling calling into question the ongoing legitimacy of the CFPB's past actions … could be catastrophic for the real estate finance industry"). The potential for disruption if the validity of these actions were called into question would be difficult to overstate.

2. Seila Law's remaining arguments against ratification are unavailing. It previously claimed that *Gordon*'s holding on ratification does not apply to this case because *Gordon* concerned the Appointments Clause and this case concerns the President's power to remove appointed officials. Seila Reply Br. at 6. But Seila Law made no effort to explain why that distinction makes any difference, nor could it. In both cases, the exercise of authority by the official who first authorized the action was called into question because of an Article II problem—in *Gordon*, the official had not been properly appointed; here, the official was not sufficiently accountable to the President. In both cases, that initial defect was cured when an official not subject to the original Article II problem approved the action. There is no reason the result should be any different here, and certainly no suggestion in *Gordon* (or any other case of which the Bureau is aware) that ratification is a remedy reserved for cases involving the Appointments Clause.

Seila Law also previously suggested, along related lines, that ratification is impossible in the circumstances here because the removal provision rendered the

Bureau's entire "structure" unconstitutional. Seila Reply Br. at 5-7. Seila Law's focus on labelling this issue a "structural" one misses the thrust of the Supreme Court's conclusion that the problem with the removal provision was that it put the Director's exercise of authority outside the President's ability to supervise. (The Court thus rejected Seila Law's argument that the "offending removal provision means the entire agency is unconstitutional and powerless to act." 140 S. Ct. at 2208, 2211 (Roberts, C.J.).) Whether that issue is described as having to do with the Bureau's structure, its statute, or—more precisely—the Director's former insulation from presidential oversight makes no difference to the result here. *Cf. Legi-Tech*, 75 F.3d 704 (ratification remedied what the court described as a "structural" separation-of-powers problem with the agency). Seila Law's "structural" argument amounts to little more than a label.

Finally, Justice Thomas's separate opinion in this case offers no help to Seila Law. Dissenting in part, Justice Thomas wrote that even if Acting Director Mulvaney had "properly ratified" the CID and this action, he logically could not have "ratif[ied] the continuance of the enforcement action by his successor, Director Kraninger," after she replaced him as head of the Bureau. 140 S. Ct. at 2221 (Thomas, J.). Justice Thomas would therefore have simply denied the petition to enforce the CID. *Id.* The majority, of course, did not embrace that view. And its factual premise (that some portion of this proceeding has not been ratified) no

longer holds in any event, since Director Kraninger has now herself approved this action.

Thus, even if this Court were inclined to think that Seila Law suffered some discrete form of harm merely from having to continue litigating this case in between when the first ratification fixed the problem with the suit's initiation and when the Supreme Court fixed the problem with the removal provision going forward, that harm was fully remediated by Director Kraninger's ratification.

## CONCLUSION

For all these reasons, the Court should affirm the district court's order enforcing the CID.

Dated: August 31, 2020

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on August 31, 2020, by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: August 31, 2020 /s/ Kevin E. Friedl

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