No. 18-____

In the United States Court of Appeals for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Respondent,

v.

ALL AMERICAN CHECK CASHING, INC., MID-STATE FINANCE, INC., and MICHAEL E. GRAY,

Defendants-Petitioners.

Appeal from the United States District Court for the Southern District of Mississippi
Case No. 3:16-cv-00356-WHB-JCG

Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b)

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CERTIFICATE OF INTERESTED PERSONS

No. 18-____

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Respondent,

v.

ALL AMERICAN CHECK CASHING, INC., MID-STATE FINANCE, INC., and MICHAEL E. GRAY,

Defendants-Petitioners.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of any defendant-petitioner or that own 10% or more stock in any defendant-petitioner.

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INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB") is structured unlike any agency that has ever existed in our country. The CFPB is headed by a lone Director, aggregating sweeping legislative, executive, and judicial power into the hands of a single person who lacks any constitutional accountability: He is removable by the President only for cause and is insulated from Congress's appropriations power. The constitutionality of the CFPB's structure is a critical issue not only for the targets of this civil enforcement action—All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American")—but for financial institutions in this circuit and around the Nation. The matter has divided federal judges across the country, and even the United States agrees that the agency's structure violates the Constitution—but this Court has not yet had an opportunity to consider the important separation-of-powers issue raised by this novel entity. This Petition for interlocutory appeal cleanly presents the question and should be granted.

Below, the district court upheld the constitutionality of the CFPB but nonetheless certified for immediate appeal the following question:

"Does the structure of the Consumer Financial Protection Bureau ('CFPB') violate Article II of the Constitution and the Constitution's separation of powers?" Ex. A at 3–4. The court held that the factors for certification under 28 U.S.C. § 1292(b) were met: (1) the constitutionality of the CFPB's structure "presents a controlling question of law that has not yet been decided by" this Court; (2) "there is substantial ground for difference of opinion as to this issue," considering that federal judges have come to dramatically different conclusions; and (3) "the immediate appeal of this question will materially advance the ultimate termination of the litigation because the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." *Id.* at 2–3. The Ninth Circuit has already granted interlocutory review on the same question. *CFPB v. Fomichev*, No. 17-80047, Order Granting Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (9th Cir. May 17, 2017).

All American therefore respectfully petitions this Court to grant interlocutory review on this question. Reasonable judges can—and have—disagreed on its correct answer. And given the time, effort, and cost of litigating cases such as this, both for the district court and the parties,

answering this controlling and important question of law in All American's favor would terminate this litigation altogether, as the CFPB has already acknowledged. *See* ECF No. 151, at 4 (separation-of-powers question is "dispositive"). More broadly, a ruling on this issue would bring substantial value both to All American and to others regulated by the CFPB.

STATEMENT OF JURISDICTION

This Court has jurisdiction to permit an interlocutory appeal because on March 27, 2018, the district court determined that its order of March 21, 2018, which denied All American's motion for judgment on the pleadings, "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b); *see* Ex. A. This petition is timely because it was filed within ten days of that certification order. *See* 28 U.S.C. § 1292(b); Fed. R. App. P. 5(a)(3). The district court had jurisdiction of this enforcement action under 28 U.S.C. §§ 1331 and 1345. *See* Ex. B at 1 n.2.

STATEMENT OF THE QUESTION

The CFPB was established as an independent agency responsible for administering 19 consumer-protection statutes, 18 of which were previously handled by other agencies (the 19th is the CFPA itself). *See* 12 U.S.C. §§ 5481(12), 5491(a), 5581. The CFPB is headed by a single Director who serves a five-year term and, under the statute, may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(b), (c). The Director may request over half a billion dollars a year in funds from the Federal Reserve without any review by Congress or the President. *See id.* § 5497(a). In addition, the CFPB is authorized to bring enforcement actions against entities who engage in acts that the CFPB deems "unfair, deceptive, or abusive." *Id.* § 5531(a); *see also id.* § 5536(a).

The question is: Does the structure of the Consumer Financial Protection Bureau ("CFPB") violate Article II of the Constitution and the Constitution's separation of powers?

RELIEF SOUGHT

Petitioners ask this Court to grant interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), of the question regarding the constitutionality of

the CFPB's structure, and to rule that the CFPB's structure violates the Constitution.

STATEMENT OF FACTS

All American provides check-cashing and lending services, Ex. B at 1–2, practices that are already heavily regulated by state law, *see*, *e.g.*, Miss. Code Ann. § 75-67-517 (establishing check-cashing fees); *id.* § 75-67-519 (establishing loan fees); La. Rev. Stat. § 9:3578.4 (regulating short-term consumer loans); Ala. Code §§ 5-18A-12, 5-18A-13 (same).

The CFPB filed this enforcement action against All American on May 11, 2016, alleging that All American violated Dodd-Frank's prohibition against practices that the CFPB considers "unfair, deceptive, or abusive." 12 U.S.C. §§ 5531(a), 5536(a), 5564(a); *see* Ex. B at 1. All American moved for judgment on the pleadings, arguing that the CFPB's enforcement action was void for four reasons: (1) the CFPB's structure violates the Constitution; (2) the enforcement action violates the Due Process Clause because the CFPB never provided fair notice of the conduct it considered to be proscribed by the vague statutory terms "unfair, deceptive, or abusive"; (3) that same statutory provision violates the non-delegation doctrine because it lacks any intelligible principle that would restrict the

CFPB's discretion; and (4) the CFPB's allegations transform state statutory requirements into federal law, thereby violating the principles of federalism. *Id.* at 3–11.

The district court denied All American's motion, Ex. B, and All American moved for certification under 28 U.S.C. § 1292(b), which allows district courts to certify "question[s] of law" for interlocutory review when they are "of the opinion" that (1) the question is "controlling," (2) "there is substantial ground for difference of opinion" on the issue, and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The next day, the district court certified for interlocutory review the following question:

> Does the structure of the Consumer Financial Protection Bureau ("CFPB") violate Article II of the Constitution and the Constitution's separation of powers?

Ex. A at 3–4.

The court concluded that all three prongs of the interlocutory review standard were satisfied. First, the issue "presents a controlling question of law that has not yet been decided by the United States Court

of Appeals for the Fifth Circuit." *Id.* at 2. Second, the court found "substantial ground for difference of opinion" based on the split among the judges in the D.C. Circuit's recent en banc decision on this very issue. *Id.* at 2–3 (citing *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc); *id.* at 113 (Wilkins, J., concurring); *id.* at 124 (Griffith, J., concurring in the judgment); *id.* at 137 (Henderson, J., dissenting); *id.* at 164 (Kavanaugh, J., dissenting); *id.* at 200 (Randolph, J., dissenting)). Finally, the court held that "the immediate appeal of this question will materially advance the ultimate termination of the litigation because the case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity." *Id.* at 3. Therefore, if this Court concludes that the CFPB is unconstitutionally structured, the parties could "avoid the anticipated two week jury trial," and that decision "would prevent the parties' incurring addition[al] litigation expenses and would prevent the expenditure of judicial resources." *Id.* The court "stay[ed] all proceedings in this case" pending the question's resolution, *id.* at 4, and held all pending motions "in abeyance, and the rulings thereon deferred, until the interlocutory appeal has been decided by the United States Court of Appeals for the Fifth Circuit," ECF No. 241.

ARGUMENT

The constitutionality of the CFPB's structure has been the subject of vigorous debate since the agency was first created. Numerous federal judges have come to disparate conclusions, and the United States itself has taken the position that the agency's structure violates the Constitution. Moreover, this is a threshold, case-dispositive, issue that will completely terminate the present litigation if decided in All American's favor.

Indeed, the Ninth Circuit has already granted interlocutory review on this very question under Section 1292(b), *CFPB v. Fomichev*, No. 17-80047, Order Granting Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) (9th Cir. May 17, 2017), further demonstrating that the standard for interlocutory appeal is satisfied. And two other district courts in addition to the district court in this case have certified the same issue for interlocutory appeal, *CFPB v. D & D Mktg., Inc.*, No. CV 15-9692 PSG (EX), 2017 WL 5974248 (C.D. Cal. Mar. 21, 2017) (certifying the issue in three related cases); *CFPB v. CashCall, Inc.*, No. 2:15-cv-07522-JFW-RAO, ECF No. 236 (C.D. Cal. Jan. 3, 2017). It is thus particularly appropriate for interlocutory appeal.

I. The District Court Properly Certified Its Order For Interlocutory Review Based On The Controlling Question Of The Constitutionality Of The CFPB's Structure.

The district court correctly determined that the constitutional question whether the CFPB's structure violates the separation of powers satisfied the requirements of Section 1292(b). Ex. A. This Court, "in its discretion," may "permit an appeal" from an interlocutory order in a civil case when a district court has determined that the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b).

A legal question presents "substantial ground for difference of opinion" when "reasonable jurists can . . . debate" the issue. *Castellanos-Contreras v. Decatur Hotels, LLC*, 622 F.3d 393, 399 (5th Cir. 2010) (en banc); *see Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) (requirement satisfied when "reasonable judges might disagree on an issue's resolution"). Moreover, "[t]he level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case."

16 Charles Alan Wright, Arthur R. Miller, and Edward H. Cooper, *Federal Practice and Procedure* § 3930, at 494–95 (3d ed. 2012).

A question of law is "controlling" and will "materially advance the ultimate termination of the litigation" when "[a]n authoritative decision" in petitioner's favor would mean that "the Constitution [would] forbid[ ] the further prosecution of the case." *Ex parte Tokio Marine & Fire Ins. Co.*, 322 F.2d 113, 115 (5th Cir. 1963). In that situation, the question "would not only 'materially advance' the ultimate disposition of 'the litigation,' it would terminate it altogether," and "to require the parties to go through a trial . . . would be both expensive and senseless for no matter what facts were developed on the trial, the Constitution would forbid the adjudication." *Id.*

Interlocutory appeal is appropriate here because these standards under Section 1292(b) are met—there are substantial grounds for a difference of opinion regarding an unsettled yet controlling question of law that would dispose of this case.

A. The Issue Of The Constitutionality Of The CFPB's Structure Is One Over Which Reasonable Jurists Could—And Do—Disagree.

There is substantial disagreement on the issue of the constitutionality of the CFPB's structure. As a general rule, the Constitution forbids Congress from limiting the President's ability to hold executive officers accountable by removing them from office. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). Thus, an agency headed by a Director who may not be removed at will by the President is presumptively unconstitutional. *See id.* To be sure, judicial decisions have held that "under certain circumstances" Congress may "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Id.* For example, the Supreme Court has upheld independent, multi-member commissions like the Federal Trade Commission ("FTC"). *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935). The Court has also upheld limits on the President's control over inferior officers with limited tenure and narrow power. *See Morrison v. Olson*, 487 U.S. 654, 671–73, 695–97 (1988).

As three members of the D.C. Circuit recognized in *PHH*, however, the CFPB presents a new problem: an agency that concentrates "massive, unchecked power in a single Director." *PHH Corp. v. CFPB*, 881 F.3d 75, 172 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). It "is an agency like no other," headed by a Director with "immense power to define elastic concepts of unfairness, deception and abuse." *Id.* at 137 (Henderson, J., dissenting). But the Director has no "significant check by the President or the Congress" since Dodd-Frank "prohibits the President from removing him except for cause" and funds the agency "outside the ordinary appropriations process," meaning that the CPFB is freed "from a powerful means of Presidential oversight and the Congress's most effective means short of restructuring the agency." *Id.* at 138. And, since the Director serves a five-year term, "a President may be stuck for years—or even for his or her entire four-year term—with a single Director who was appointed by a prior President and who has different policy views." *Id.* at 189 (Kavanaugh, J., dissenting).

These judges stressed that the Director's unaccountability is particularly concerning because he may unilaterally decide "how to enforce,

when to enforce, and against whom to enforce the law" and "what sanctions and penalties to impose." *Id*. at 165 (Kavanaugh, J., dissenting). "[T]he Director is unique among the principal officers of independent agencies in that he exercises vast executive power unilaterally: as a board of one, he need not deliberate with anyone before acting." *Id.* at 138 (Henderson, J., dissenting). For all of these reasons and more, three members of the D.C. Circuit concluded that the Bureau's structure is unconstitutional. A district court has reached the same conclusion. *See CFPB v. D & D Mktg, Inc.*, No. CV 15-9692 PSG (EX), 2016 WL 8849698, at *4 (C.D. Cal. Nov. 17, 2016).

The judges on both sides of the issue, moreover, concluded that their position was dictated by Supreme Court precedent. The majority of the D.C. Circuit, for instance, held that the issue of the constitutionality of the CFPB's structure was controlled by *Humphrey's Executor* and *Morrison*. *PHH Corp.*, 881 F.3d at 92–101. The dissenters disagreed. As Judge Henderson saw it, the CFPB "is not even a distant cousin of the FTC blessed by *Humphrey's Executor*," *id.* at 146 (Henderson, J., dissenting), for three reasons: (1) unlike the CFPB, "the FTC is and always has been subject to the appropriations process," *id.*; (2) "unlike the FTC, the

CFPB is not a 'non-partisan' commission pursuing 'entire impartiality' in law and policy," *id.* at 147–48 (quoting *Humphrey's Ex'r*, 295 U.S. at 624); and (3) the CFPB "Director is not a 'body of experts' 'informed by experience,'" *id.* at 150 (quoting *Humphrey's Ex'r*, 295 U.S. at 624). Moreover, the CFPB and the independent counsel from *Morrison* "are not on the same jurisprudential planet," since the independent counsel was "an *inferior officer* under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority," whereas the CFPB Director is a principal officer with vast power. *Id.* at 151–52 (quoting *Morrison*, 487 U.S. at 691).

Instead, the outcome of this question flows from *Free Enterprise Fund*, which held that, "[b]ecause '[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders,' the President 'as a general matter' has power to remove the principal officers of an agency—based on 'simple disagreement with the [agency's] policies or priorities'—as a means of ensuring that the agency does not 'slip from the Executive's control, and thus from that of the people.'" *PHH Corp.*, 881 F.3d at 156 (Henderson, J., dissenting) (quoting *Free Enter. Fund*, 561 U.S. at 499, 502, 513). There is "only one exception to the default

rule": *Humphrey's Executor*; but because that case is not analogous, the CFPB Director's removal protection is unconstitutional. *Id*.

Similarly, Judge Kavanaugh noted that *Myers v. United States*, 252 U.S. 52 (1926), "recognized the President's Article II authority to supervise, direct, and remove at will subordinate officers in the Executive Branch." *PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting). In *Humphrey's Executor* the Supreme Court "carved out an exception" to that rule, but the CFPB does not fall into that exception because it is headed by a single Director, not by a commission. *Id.* In fact, there is no historical precedent for the CFPB, which is "'[p]erhaps the most telling indication of the severe constitutional problem' with the CFPB." *Id.* at 183 (quoting *Free Enter. Fund*, 561 U.S. at 505). And the Supreme Court in *Free Enterprise Fund* indicated that any "diminution of Presidential control beyond that" countenanced in *Humphrey's Executor* would "violate[ ] Article II." *Id.* at 188. Here, there is further diminution, because the President cannot, for instance, name a Commission Chair at will, as is possible for other independent agencies. *Id.* at 189–90.

Even the United States agrees that the CFPB is unconstitutional as presently structured. *See* U.S. Amicus Br., *PHH Corp. v. CFPB*, No.

15-1177, 2017 WL 1035617 (D.C. Cir. Mar. 17, 2017) (en banc). "Vesting such power in a single person not answerable to the President constitutes a stark departure from [the Constitution's] framework." *Id.* at *15. "[S]ingle-headed agencies" like the CFPB "are meaningfully different from the type of multi-member regulatory commission addressed in *Humphrey's Executor*." *Id.* at *2. And the "exception recognized in *Humphrey's Executor*" for multi-member commissions is the "only . . . restriction with respect to principal officers who head agencies" that "the Supreme Court has upheld." *Id.* at *8. This "exception does not apply to the CFPB's Director, and it should not be so extended." *Id.* The United States concluded that "a removal restriction for the Director of the CFPB is an unwarranted limitation on the President's executive power" and that "the exception established by the Supreme Court in *Humphrey's Executor*" should not be extended "to undermine the general constitutional rule that the President may remove principal officers at will." *Id.* at *19.

Thus, the district court below has taken a position on this question that is in line with the conclusions of some federal judges, but which conflicts with the perspective of other federal judges and of the United States itself. As the district court acknowledged, "there is substantial ground

for difference of opinion as to this issue as exhibited by the differences of opinion amongst the jurists in the United States Court of Appeals for the District of Columbia who have considered the issue." Ex. A at 2. Whatever one's ultimate view, the question of the CFPB's constitutionality is one about which reasonable jurists disagree.

B. The Validity Of The CFPB's Structure Is A "Controlling" Issue Of Law, The Resolution Of Which Would Not Just "Materially Advance" But Terminate This Litigation.

The issue of the CFPB's unconstitutionality is controlling and would materially advance the litigation. In fact, a ruling by this Court on the separation-of-powers issue in All American's favor "would not only 'materially advance' the ultimate disposition of 'the litigation,' it would terminate it altogether." *Ex parte Tokio Marine*, 322 F.2d at 115. Indeed, the CFPB has already acknowledged that this question is "dispositive." ECF No. 151, at 4. Because this question is a threshold issue, its resolution will hasten the termination of this litigation.

If this Court agrees with All American that the CFPB's structure "violates the Constitution," then the agency "lacks authority to bring [an] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993); *see Free Enter. Fund*, 561 U.S. at 513 ("ensur[ing]" that

the statute is "enforced only by a constitutional agency accountable to the Executive"). This case is just such an action, and when parties "raise [a] constitutional challenge as a defense to an enforcement action," there is "no theory that would permit [a court] to declare the [agency's] structure unconstitutional without providing relief to [the regulated party]." *NRA Political Victory Fund*, 6 F.3d at 828. In *Ryder v. United States*, 515 U.S. 177 (1995), the Supreme Court concluded that a decision of an appellate military tribunal was invalid because two of three judges were serving in violation of the Appointments Clause. *Id*. at 179. The Supreme Court held that "one who makes a timely challenge to the constitutional validity of" a government official's authority "is entitled to a decision on the merits of the question and whatever relief may be appropriate." *Id.* at 182–83. The Supreme Court further noted that, in an earlier case, it had struck down a statute granting authority to bankruptcy judges as unconstitutional, and that "in doing so, [the Court] affirmed" the district court's "dismiss[al]" of the action because the court lacked authority. *Id*. at 184 n.3 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

Similarly, because the CFPB is unconstitutionally structured, this enforcement action is *ultra vires*, void, and must be dismissed. The D.C. Circuit has emphasized that "'[i]ssues of separation of powers' are structural errors" that require "automatic reversal." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015) (quoting *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000)), *aff'd*, 137 S. Ct. 929 (2017). Unconstitutional statutes "have some impact" on how the unconstitutionally structured entity "decides matters before it," and a plaintiff "need not show that" a particular entity "would have acted differently if it were constitutionally composed." *NRA Political Victory Fund*, 6 F.3d at 825. All American made a "timely challenge to the constitutional validity" of the CFPB's authority, and if it prevails on that challenge it is entitled to dismissal of this enforcement action. *Ryder*, 515 U.S. at 182–84 & n.3. Because a ruling in its favor will end the litigation, the question is controlling and will materially advance the litigation.

Notably, courts of appeals commonly grant motions for interlocutory appeal from the denial of a motion for judgment on the pleadings. *See*, *e.g.*, *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 445 (2009) (reviewing on a Section 1292(b) interlocutory appeal a decision

denying a motion for judgment on the pleadings). That is because "[p]lainly dispositive questions going to the merits of the case may be raised by motions . . . for judgment on the pleadings," just as All American did here. 16 Wright & Miller, *Federal Practice and Procedure* § 3931, at 526.

More broadly, a ruling for All American by this Court would provide "precedential value for a large number of other suits." *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 921 F.2d 21, 24 (2d Cir. 1990). This question is hotly contested in numerous enforcement proceedings, yet with little appellate precedent addressing an entity that is "unique among independent agencies." *PHH Corp.*, 881 F.3d at 172–73 (Kavanaugh, J., dissenting); *see id.* at 138 (Henderson, J., dissenting) ("the Director is unique among the principal officers of independent agencies"); Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 899 (2013) ("[T]he CFPB . . . appears to be unique in recent American history."). The CFPB is prosecuting active enforcement actions in federal district courts across the country, *see En-*

forcement Actions, CFPB, https://www.consumerfinance.gov/policy-compliance/enforcement/actions (last visited Mar. 30, 2018), and rulings on this important constitutional issue would bring substantial value both to All American and to others regulated by the CFPB.[1] This Court should join the debate and provide its view.

* * *

This case presents an unsettled, dispositive question that the district court, even while rejecting All American's argument, agreed should

[1] Below, the CFPB argued that the constitutional question is moot due to the Director's resignation and the interim Acting Director's ratification of the enforcement action. ECF No. 231. That is wrong, *see* ECF No. 232 (All American Response), as the district court implicitly recognized in reaching the merits and concluding that a ruling in All American's favor would automatically terminate the litigation, *see* Ex. A at 3. The presence of the Acting Director cannot cure the agency's constitutional deficiencies, and ratification here is impossible. *See FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994). Regardless, the inherently temporary nature of the Acting Director's tenure makes the question "capable of repetition yet evading review," *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014), and the Acting Director's presence is at most the "voluntary cessation" of an unlawful practice, *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000). To the extent the CFPB raises this issue in opposition to the instant motion, the place to decide it is on interlocutory appeal with the benefit of briefing and argument, not in resolving this motion.

be resolved by this Court. The constitutional question merits interlocutory review in light of its implications for regulated parties, consumers, and the bedrock constitutional principle of separated powers. This Court's analysis of these issues will be a valuable contribution to the debate and, not least of all, could make all the difference to All American.

CONCLUSION

For these reasons, this Court should grant Petitioners permission to appeal from the district court's order denying the motion for judgment on the pleadings.

Dated: March 30, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 5(c)(1) because, excluding the parts of the Petition exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 4,284 words.

Undersigned counsel certifies that this Petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this Petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook.

Dated: March 30, 2018

s/ Theodore B. Olson
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CERTIFICATE OF CONFERENCE

I hereby certify that, pursuant to Fifth Circuit Rule 27.4, counsel for defendants-petitioners conferred with opposing counsel for plaintiff-respondent concerning this Petition. Undersigned counsel was advised that opposing counsel will oppose this Petition.

Dated: March 30, 2018

s/ Theodore B. Olson
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2018, an electronic copy of the foregoing Petition was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service was accomplished the following parties via first-class mail and email:

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