Consumer Financial Protection Bureau

1700 G Street NW, Washington, D.C. 20552

October 10, 2019

Lyle W. Cayce, Clerk of Court
Office of the Clerk
United States Court of Appeals
for the Fifth Circuit
F. Edward Hebert Building
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: *Consumer Financial Protection Bureau v. All American Check Cashing, Inc., et al.*, No. 18-60302 (5th Cir.)

Dear Mr. Cayce:

Appellee Consumer Financial Protection Bureau (Bureau or CFPB) submits this Letter Brief pursuant to this Court's September 10, 2019, request. The Court sought additional briefing regarding the impact of the decision in *Collins v. Mnuchin*, No. 17-20364, 2019 WL 4233612 (5th Cir. Sept. 6, 2019) (en banc), on the above-named case.[1] In

[1] Subsequent to this Court's request, Defendants filed in the Supreme Court a Petition for a Writ of Certiorari Before Judgment. *All American Check Cashing, Inc. v. CFPB*, No. 19-432 (S. Ct.). That petition asks the Court to address whether the Bureau's structure violates the separation of powers, and whether a successful separation-of-powers challenger is entitled to dismissal of the action against it.

Collins, a majority of the Court held that the for-cause removal provision that applied to the Director of the Federal Housing Finance Agency (FHFA) was unconstitutional. A different majority held that the appropriate remedy was to sever the for-cause removal provision from the FHFA's enabling act, but to leave intact actions that the FHFA had taken.

Collins confirms that, if this Court holds that the removal provision that applies to the Bureau's Director (12 U.S.C. § 5491(c)(3)) is unconstitutional, the Court should sever the for-cause removal provision from the Consumer Financial Protection Act (CFPA), leave the remainder of the CFPA intact, and allow this case to proceed. *See* Brief of Plaintiff-Appellee Consumer Financial Protection Bureau (September 10, 2018) (CFPB Br.) at 43-48.

1. In its brief, the Bureau argued that the for-cause removal provision that applies to its Director is constitutional under applicable Supreme Court precedent. CFPB Br. at 24-43. However, as explained in the Letter that the Bureau filed in this proceeding on September 18, 2019, the Bureau's Director has now concluded that the CFPA's for-cause removal provision impermissibly infringes on the President's constitutional obligation to take care that the laws be faithfully executed. Accordingly, the Bureau will no longer defend the constitutionality of that provision in this case (or in any other). If the Court holds the provision unconstitutional, *Collins* dictates that severance of that provision, not dismissal of the Bureau's case, is the proper remedy.[2]

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[2] In *Collins*, the en banc Court reinstated the portion of the panel's decision that held that the FHFA's structure was unconstitutional. 2019 WL 4233612 at *22; *see Collins v. Mnuchin*, 896 F.3d 640, 659-675 (5th Cir. 2018). While the panel observed that there were "salient distinctions" between the Bureau and the FHFA, 896 F.3d at 673, the organic statutes of both agencies share the same critical feature: they

2. In its discussion of remedy, *Collins* recognized that "'[g]enerally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact.'" 2019 WL 4233612 at *25 (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (internal quotation marks omitted)). Thus, while multiple features may have promoted the FHFA's independence, *see* 2019 WL 4233612 at *26, this Court explained that "we should not roam further to invalidate other provisions or modify the statute's requirements." *Id.* Accordingly, this Court severed the for-cause removal provision that applied to the FHFA's Director, leaving the remainder of the FHFA's enabling act intact. The Court concluded that by doing so, it had "remedie[d] the [Plaintiffs'] injury as found by the majority of this court of being overseen by an unconstitutionally structured agency," and that "the executive officer [*i.e.*, the FHFA's Director] will immediately be subject to sufficient Presidential oversight." *Id.* at *25.

The Court also rejected Plaintiffs' request to invalidate a specific action taken by the FHFA – the Net Worth Sweep. *Id.* at *28. The Court discussed two classes of cases where a constitutional problem with an agency's leadership might make it appropriate to invalidate an agency's actions. "First, the Supreme Court has invalidated actions by actors who were granted power inconsistent with their role in the constitutional program." *Id.* at *26. The Court gave as an example *Bowsher v. Synar*, 478 U.S. 714 (1986), where Congress had assigned executive authority to a congressional officer. "Because the officer never should have had the authority in the first place, courts would naturally invalidate exercises of the authority." 2019 WL 4233612 at * 26.

Second, the Supreme Court "has invalidated actions taken by individuals who were not properly appointed under the Constitution."

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each contain a provision that restricts the President's ability to remove the single director of an agency tasked with exercising executive power.

Id. at *27. The opinion gave two examples: *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and *Noel Canning v. NLRB*, 573 U.S. 513 (2014). In *Lucia*, the Court "vacated and remanded adjudications by officers who were not appointed by the appropriate official." 2019 WL 4233612 at * 27. And in *Noel Canning*, the Court affirmed the invalidation of an order issued by the NLRB because, as a result of an invalid recess appointment, the NLRB lacked a quorum. *Id.* The "common thread" in all these cases was that "officers were vested with authority that was never properly theirs to exercise." 2019 WL 4233612 at * 27.

However, "[r]estrictions on removal are different. In such cases the conclusion is that the officers are duly appointed by the appropriate official and exercise authority that is properly theirs." *Id.* The only problem is that the official is "too distant from presidential oversight." *Id.* The Court noted that, although there might be some instances where unconstitutional removal restrictions would justify overturning an agency's actions, it would be particularly inappropriate to overturn the FHFA's Net Worth Sweep for two reasons. First, the adoption of the Net Worth Sweep was overseen by the Secretary of the Treasury, "who was subject to at will removal by the President. The President, thus, had plenary authority to stop the adoption of the Net Worth Sweep." *Id.* Second, the Net Worth Sweep was supported and defended by an FHFA Director who was selected by President Obama and confirmed by the Senate, was later reaffirmed by an acting Director selected by President Trump under the Vacancies Reform Act, and was never opposed by the current Director who was appointed by President Trump and confirmed by the Senate. *Id.* As *Collins* explained:

> These subsequent picks' affirmation of the Net Worth Sweep demonstrates without question that invalidating the Net Worth Sweep would actually erode executive authority rather than reaffirm it. … Undoing the Net Worth Sweep … would wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency; how does that make sense?"

Id. at *27-*28. Thus, "the [Plaintiffs'] ongoing injury … is remedied by a declaration that the 'for cause' restriction is declared removed. We go no further." *Id.* at *28.

3. *Collins* fully supports the Bureau's argument that the proper remedy for any constitutional violation would be severance of the CFPA's for-cause removal provision from the remainder of the statute, and remand to the district court. *See* CFPB Br. at 43-48. First, the Bureau argued that the unconstitutionality of a portion of a statute should not affect the validity of its remaining provisions. *Id.* at 43-44. This Court said exactly as much in *Collins*:

> When addressing the partial unconstitutionality of a statute such as this one, we seek to honor Congress's intent while fixing the problematic aspects of the statute. Thus, in this case, the appropriate – and most judicially conservative – remedy is to sever the 'for cause' restriction on removal of the FHFA director from the statute.

2019 WL 4233612 at *25.[3] The same is true here – severing the removal provision from the CFPA would honor Congress's intent. In fact, this case is even easier than *Collins* because there is an express severability provision that applies to the CFPA.[4] CFPB Br. at 44 (citing 12 U.S.C. § 5302). This provision creates a presumption of severability, a

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[3] Just like in this case, the challengers in *Collins* argued that the FHFA's structure was unconstitutional not only as a result of the for-cause removal provision, but also because the agency was funded outside the annual appropriations process, and because it lacked a bipartisan balance requirement. *Compare* Appellants' Principal Brief, *CFPB v. All American*, pp. 42-47 (July 2, 2018), *with Collins v. Mnuchin*, 896 F.3d at 666.

[4] There is no severability provision in the FHFA's enabling act.

presumption that can be overcome only by "strong evidence" that Congress would not have enacted the CFPA without the removal provision. CFPB Br. at 44 (citing *Koog v. United States*, 79 F.3d 452, 462 (5th Cir. 1996)). There is no "strong evidence" that Congress would prefer no Bureau at all instead of a Bureau headed by a Director who could be removed by the President at will. Far from it – the legislative history shows that Congress's primary goal in enacting the CFPA was to consolidate administration and enforcement of the consumer financial laws in a single agency that had a dedicated consumer protection mission. *Id.* That goal is still achieved even if the for-cause removal provision is severed from the CFPA. Thus, *Collins* confirmed what the Bureau argued: The proper remedy for an unconstitutional for-cause removal provision, the remedy that best honors Congress's intent, is severance of that provision.

Defendants urge this Court to go much further – to strike down the entire CFPA, or all actions the Bureau has taken, or at least the complaint against Defendants. Appellants' Reply Brief at 22-34. But *Collins* confirms that none of these would be appropriate. 2019 WL 4233612 at *27. As in *Collins*, this is not a case where an officer is exercising authority that was never hers to exercise. *See id.* Indeed, like the Director of the FHFA, the Bureau's Director was "duly appointed by the appropriate officials and exercise[s] authority that is properly [hers]." *See id.*

As in *Collins*, the problem here is that the Director is "too distant from presidential oversight," but, as in *Collins*, that problem does not justify invalidating the Bureau's action by dismissing the complaint here for the same two reasons. First, the Bureau's complaint was approved by an official who could be removed by the President at will. Although the complaint was filed by Bureau Director Richard Cordray, to whom the removal restriction applied, the Bureau continued to pursue its complaint under the Bureau's Acting Director Mick Mulvaney. Acting Director Mulvaney was appointed by President Trump pursuant to the Federal Vacancies Reform Act, and he was therefore removable at will. He could have ordered that the Bureau stop pursuing this enforcement action. Instead, in February 2018, he specifically ratified it. *See* ROA.7177-7184; CFPB Br. at 13 & n.5. Thus,

as in *Collins*, the Court can "know that the President, acting through the [Acting Director], could have stopped" the prosecution of this action, "but did not." 2019 WL 4233612, at *27.

Second, if this Court were to overturn the complaint in this case, it "would wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency." *Id.* at * 28. Again, as explained above, when the complaint against Defendants was filed in May 2016, it was approved by a Director who was nominated by President Obama and confirmed by the Senate. *See* ROA 43-65. It was then ratified by an Acting Director who was appointed by President Trump. And, as indicated by the Letter filed by the Bureau in this Court on September 18, 2019, although the Bureau's current Director, Kathleen Kraninger, who was appointed by President Trump and confirmed by the Senate, agrees with Defendants that the for-cause removal provision is unconstitutional, she does not agree that the complaint in this case should be dismissed. So, just as in *Collins*, dismissing the complaint here "would actually erode executive authority rather than reaffirm it" because it "would wipe out an action approved or ratified by two different Presidents' directors under the guise of respecting the presidency; how would that make sense?" 2019 WL 4233612 at *27-*28.

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Collins shows that, if this Court concludes that the CFPA's for-cause removal provision is unconstitutional, Defendants' injury "is remedied by a declaration that the 'for cause' restriction is declared unlawful." *Id.* And, as in *Collins*, this Court need "go no further." *Id.* Thus, *Collins* provides no support for dismissing the complaint in this case, and certainly none for overturning the entire CFPA.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2019, I electronically filed the Bureau's Letter Brief with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I certify that counsel for all participants are registered CM/ECF users and that service on them will be accomplished by the appellate CM/ECF system.

/s/ *Lawrence DeMille-Wagman*