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July 2, 2021

VIA CM/ECF

Lyle W. Cayce
Clerk of the Court
U.S. Court of Appeals for the Fifth Circuit
F. Edward Herbert Building
600 S. Maestri Place
New Orleans, LA 70130

Re: *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, et al., No. 18-60302

Dear Mr. Cayce:

Pursuant to the Court's June 24, 2021 order, Appellants All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") submit this letter brief addressing "[h]ow the case should proceed from here, in light of the Supreme Court's decision in *Collins v. Yellen*, 2021 WL 2557067 (June 23, 2021)." Doc. No. 515912627 at 1.

This Court granted rehearing en banc after a divided panel held that the for-cause removal protection that the Director of the Consumer Financial Protection Bureau ("CFPB") enjoyed did not violate the Constitution. *CFPB v. All Am. Check Cashing, Inc.*, 952 F.3d 591, 593 (5th Cir. 2020); 953 F.3d 381 (granting rehearing en banc). The Supreme Court subsequently rejected that conclusion in *Seila Law LLC v. CFPB*, holding that the removal restriction transgressed the separation of powers. 140 S. Ct. 2183 (2020).

Thus, the only remaining questions in this case are remedial, and *Collins* instructed that the lower courts should address those questions in the first instance. Further, *Collins* expressly contemplated that litigants challenging unconstitutionally structured agencies would be entitled to a remedy in circumstances that closely resemble those at issue here. As set forth below, All American is entitled to relief in this case.

I. *Collins* Expressly Left The Question Of Remedies To This Court.

In *Collins*, plaintiff shareholders brought suit seeking injunctive relief against the Department of Treasury to recover millions of dollars that their companies had transferred to the Treasury through an agreement created by the Federal Housing Finance Agency ("FHFA"). *Collins v. Yellen*, Nos. 19-422 & 19-563, slip op. at 2 (June 23, 2021). The Supreme Court found *Seila Law* "all but dispositive" and held that "[a] straightforward application" of *Seila Law*'s reasoning "dictate[d]" that the FHFA's "for-cause restriction on the President's removal authority violates the separation of powers." *Id.* at 26.

Collins then turned to the question of remedies. The Court was clear that, despite refusing to *necessarily* undo *every* action the FHFA Director had ever taken, this "does not necessarily mean . . . that the shareholders have no entitlement to retrospective relief." *Id.* at 35. The Court found that "it is still possible for an unconstitutional provision to inflict compensable harm" and offered two non-exhaustive examples of the sorts of situations where such a provision "would clearly cause harm": (1) when "the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have 'cause' for removal," *id.*; and (2) when "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," *id.* Finally, the Court ruled that "[t]he parties' arguments should be resolved in the first instance by the lower courts." *Id.* at 36.

II. Dismissal Of The CFPB Enforcement Action Is Consistent With *Collins*.

Dismissal of the CFPB's enforcement action against All American is consistent with *Collins*. *First*, the CFPB's enforcement action here inflicts the type of constitutional injury that *Collins* envisioned as requiring a remedy. *Second*, *Collins* does not foreclose dismissal of this enforcement action in any event because *Collins* was decided in a fundamentally different litigation posture.

A. *Collins* Envisioned The Exact Type Of Constitutional Injury Here.

The public record amply demonstrates that President Trump desired to remove Director Cordray but was impeded by the for-cause removal provision. The President gave Cordray an "ultimatum": "Go the easy way, or go the hard

way." Lorraine Woellert et al., *Can the Consumer Watchdog Trump Loathes Win an Ohio Election?*, Politico (Apr. 17, 2017, 5:09 AM), https://www.politico.com/story/2017/04/cordray-ohio-election-banks-237272. Cordray knew that President Trump was "on the verge of forcing him out." Kate Berry, *In Tell-all, Ex-CFPB Chief Cordray Claims Trump Nearly Fired Him*, American Banker (Feb. 27, 2020, 9:30 PM), https://www.americanbanker.com/news/in-tell-all-ex-cfpb-chief-cordray-claims-trump-nearly-fired-him. According to Cordray's published book, after President Trump was elected, he hired a lawyer in case President Trump fired him. *Id.*

Moreover, just weeks after President Trump took office, the en banc D.C. Circuit vacated the panel decision in *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016)—which had held that the CFPB's for-cause removal provision was unconstitutional—"in its entirety" and ordered that that case be reheard. *PHH Corp. v. CFPB*, 881 F.3d 75, 83 (D.C. Cir. 2018), *abrogated by Seila Law*, 140 S. Ct. 2183. And nearly every other federal court to confront the issue had upheld the for-cause removal provision. President Trump was thus "being advised to hold off on firing Cordray to get the Supreme Court to rule on the extent of the president's executive powers." Kate Berry, *Why Hasn't Trump Fired CFPB's Cordray?*, American Banker (Feb. 8, 2017, 3:17 PM), https://www.americanbanker.com/news/why-hasnt-trump-fired-cfpbs-cordray.

Thus, the public record shows that for a substantial period of time in which this enforcement action was pending in the district court, President Trump's desire and inclination was to replace Cordray—the CFPB's Director at the time this case was filed, Appellants' Suppl. En Banc Reply Br. at 9—but was restricted by the removal restriction. In the words of *Collins*, "the statutory provision [has] clearly cause[d] harm" to All American. Slip op. at 35.

B. In Any Event, *Collins* Did Not Limit Remedies For Defendants.

Moreover, *Collins*' discussion of remedies is far afield from this case because, quite unlike the enforcement action at issue here, *Collins* was decided in the "unique context" of shareholder plaintiffs seeking affirmative relief in the form of millions of dollars from the Treasury Department. *Id.* at 8 (Gorsuch, J., concurring in part). Justice Gorsuch's concurrence observed—without objection from the majority—that the Court's remedies analysis was "prompted by the

prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands." *Id.* Accordingly, "nothing" in the Court's opinion "undoes [its] prior guidance authorizing more meaningful relief in other situations." *Id.* Indeed, *Collins*' unique litigation posture explains why the majority discussed constitutional injuries as inflicting "*compensable* harm." *Id.* at 35 (majority op.) (emphasis added). Compensable harm has no relevance here because, unlike plaintiff shareholders seeking to recover money, All American is a *defendant* seeking to *dismiss an enforcement action*.

All American's litigation posture is one of the "other situations" deserving relief that *Collins* did not foreclose. *Id.* at 8 (Gorsuch, J., concurring in part). In *Seila Law*, Justice Thomas, joined by Justice Gorsuch, reasoned that "[i]t is the attempted enforcement of a civil investigative demand under § 5562(e)(1) by an unconstitutionally insulated Director that causes the constitutional injury in this case." *Seila Law*, 140 S. Ct. at 2222 n.7 (Thomas, J., concurring). Because the enforcement action "injure[d] Seila," Justice Thomas would have "simply den[ied] the CFPB's petition for an order of enforcement." *Id.* at 2220. Notably, Justice Thomas joined the *Collins* majority "in full," slip op. at 1 (Thomas, J., concurring), while stating in his concurrence that he "continue[s] to adhere to the views that [he] expressed in *Seila Law*." *Id.* at 8 n.5.

"[M]eaningful relief" is available here. *Id.* at 8 (Gorsuch, J., concurring in part). Like the defendant in *Seila Law*, All American faces a civil enforcement action from the CFPB. The constitutional injury that Justice Thomas identified in *Seila Law* also exists in the virtually identical situation here. Because All American has experienced a constitutional injury, this Court should "simply deny" this enforcement action. *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring). Nothing in *Collins* contemplates abrogating the separation of powers as a valid, remedial defense to an enforcement action.

C. The CFPB Missed The Statute Of Limitations To Ratify This Constitutional Injury.

Collins observed that *Seila Law* remanded the case to the lower courts to "resolve any issue concerning ratification," while remaining agnostic on whether ratification was necessary or proper. Slip op. at 34. Here, the CFPB cannot rely

on ratification to save the day, because it has missed the statute of limitations. The CFPB lacked authority to ratify at the time of the purported ratification on February 5, 2018 because, by that time, the CFPA's three-year statute of limitations had long since lapsed, as All American has explained in its briefs before this Court. *See* Appellants' Suppl. En Banc Br. at 39–48; Appellants' Suppl. En Banc Reply Br. at 13–17. The "ratification" came "too late in the day to be effective" and is therefore a nullity. *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994).

* * *

This Court should declare the CFPB unconstitutionally structured and grant All American judgment on the pleadings. All American recommends that this Court issue an opinion on remedies and welcomes pairing this case with *Collins* on remand to the en banc Court. All American stands prepared for oral argument, and for further briefing if the Court so desires.

Sincerely,

s/ Theodore B. Olson
Theodore B. Olson

CERTIFICATE OF SERVICE

I certify that on July 2, 2021, an electronic copy of the foregoing Letter Brief 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 will be accomplished on the following parties by the appellate CM/ECF system:

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