Consumer Financial Protection Bureau

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

July 2, 2021

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 June 24, 2021, request. The Court sought additional briefing regarding the impact of the Supreme Court's decision in *Collins v. Yellen*, 141 S. Ct. 1761 (2021) on the above-named case. In *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. The Court's discussion of the impact of that provision on actions taken by the FHFA is directly relevant to this case. *Collins* confirms that, even though the for-cause removal provision in the Consumer Financial Protection Act (CFPA) (12 U.S.C. § 5491(c)(3)) was unconstitutional, actions taken by the Bureau in this case were valid.

1. The petitioners in *Collins* challenged the third amendment to purchasing agreements that the FHFA had entered into with the Treasury. They argued that the amendment, and actions implementing the amendment, were invalid because the FHFA's enabling statute purported to limit the President's authority to remove the FHFA's Director. 141 S. Ct. at 1775. The Court, relying on *Seila Law LLC v. CFPB*,

140 S. Ct. 1082 (2020), agreed that the removal limitation was unconstitutional. 141 S. Ct. at 1783-87. The Court then addressed the appropriate remedy. Petitioners argued that, because of the for-cause removal provision, actions taken by the FHFA, including the third amendment and the implementing of the amendment, were void ab initio. *Id.* at 1787. But the Court rejected this argument because "[a]ll the officers who headed the FHFA during the time in question were properly *appointed*." *Id.* (emphasis in original); *see also id.* at 1793 (Thomas, J., concurring) (because the Directors of the FHFA were properly appointed, "[t]here is thus no barrier to them exercising power in the first instance"). As a result, "there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void." *Id.* at 1787. Indeed, the Court characterized petitioners' request for the wholesale invalidation of the third amendment as "neither logical nor supported by precedent." *Id.*[1] The Court also held that petitioners could draw no support from cases addressing the Appointments Clause or other separation-of-powers violations because those cases "involved a Government actor's exercise of power that the actor did not lawfully possess." *Id.* at 1788; *see also id.* at 1801(Kagan, J., concurring regarding remedy) ("our Appointments Clause precedents have little to say about remedying a removal problem"). The Court stressed that, regardless of the for-cause removal provision, "there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office." *Id.* at 1788.

Petitioners in *Collins* argued that the Court's decision in *Seila Law* "implicitly meant that the [Bureau] Director's actions would be void unless lawfully ratified." *Id.* But the Court answered that argument emphatically: "we said no such thing." *Id.* Indeed, the Court explained that the remand ordered in *Seila Law* did not even "resolve any issue concerning ratification, including whether ratification was necessary." *Id.*

Nonetheless, the Court held that the petitioners might be entitled to relief if, on remand, they could show that, but for the for-cause removal provision, the agency would have acted differently in a way that affected petitioners. *Id.* at 1788-89; *see id.* at

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[1] More specifically, the Court held that the limitation would have no impact on the actual adoption of the third amendment because when the amendment was adopted, the FHFA was headed by an acting director to whom the limitation did not apply. 141 S. Ct. at 1781-83. But the subsequent implementation of the amendment remained at issue because after the amendment was adopted, the FHFA was once again headed by a Senate-confirmed director to whom, by its terms, the limitation applied. *Id.* at 1781.

1801 (Kagan, J., concurring regarding remedy) ("plaintiffs alleging a removal violation are entitled to injunctive relief – a rewinding of agency action – only when the President's inability to fire an agency head affected the complained-of decision. … Granting relief in any other case would, contrary to usual remedial principles, put the plaintiffs in a better position than if no constitutional violation had occurred." (internal quotation marks omitted)). Limiting the situations in which relief is available "ensures that actions the President supports – which would have gone forward whatever his removal power – will remain in place." *Id.* at 1801-02 (Kagan, J., concurring regarding remedy).

2. *Collins* answers the central issue raised by the Defendants in this case, which is whether the Bureau's complaint must be dismissed. Defendants argue that dismissal is necessary because, when the Bureau filed the complaint in 2016, the CFPA's for-cause removal provision purported to limit the President's authority to remove the Bureau's Director. *See* Defendants-Appellants' Supplemental En Banc Brief (Supp. Br.) at 10 ("This action must be dismissed because 'the structure of the CFPB violate[d] the separation of powers' when the enforcement action was first brought," quoting *Seila Law*, 140 S. Ct. at 2192).

Collins squarely rejects Defendants' argument that dismissal is appropriate. When the Bureau filed its complaint in this case, it was headed by a Director who, as required by the CFPA, had been appointed by the President and confirmed by the Senate. Defendants have never challenged the Director's appointment. As *Collins* explains, there is "no reason" to regard actions taken by a properly appointed official as void merely because the agency's enabling statute contained an invalid for-cause removal provision. 141 S. Ct. at 1787. That is the situation here. In arguing for dismissal, Defendants rely on Appointments Clause cases. Supp. Br. at 15-16. But those cases have no relevance where the official in question was properly appointed and only the President's removal authority has been challenged. *Collins*, 141 S. Ct. at 1788. And Defendants cannot show that the invalid removal provision in any way affected the decision to file, or pursue, this case. Quite the contrary, directors not subject to the removal restriction have ratified this enforcement action, thus eliminating any reason to believe that Defendants would be off the hook if the removal restriction had not been in place.

3. *Collins* also undercuts Defendants' arguments that the Bureau did not validly ratify the complaint. The Bureau ratified the issuance of the complaint in this case on two occasions. The first ratification, by the Bureau's then-Acting Director Mick Mulvaney, occurred on February 5, 2018. ROA 7177–7184. Then, on July 17, 2020,

after the Supreme Court's decision in *Seila Law*, the Bureau submitted a letter to this Court explaining that Kathleen Kraninger, who at that time was the Bureau's Senate-confirmed Director, had also ratified the decision to file the complaint. Defendants argue that these ratifications were invalid because the Bureau lacked authority to file the complaint in the first instance, and because the ratifications occurred after the CFPA's statute of limitations (12 U.S.C. § 5564(g)(1)) had expired. Supp. Br. at 29-54; Defendants-Appellants' Supplemental En Banc Reply Brief (Supp. Rep.) at 3-23. *Collins* demonstrates that Defendants misunderstand the role of ratification in this case.

The only action at issue in this case, which arises from the denial of Defendants' motion for judgment on the pleadings, is the filing of the complaint. Defendants argue that the complaint was not valid when it was filed, and that it could only be made valid through subsequent ratification if that ratification occurred prior to the expiration of the CFPA's statute of limitations. Supp. Br. at 29-48. But when the complaint was filed, the Bureau's Director had been properly appointed and confirmed. Therefore, "there is no basis for concluding that … [the Bureau's Director] lacked the authority to carry out the functions of the office." *See* 141 S. Ct. at 1788. As a result, the complaint was valid when filed, and that filing properly commenced this action thereby satisfying the CFPA's statute of limitations.

Defendants contend that they are entitled to relief (in the form of dismissal) as an "incentive" for having challenged the constitutionality of the CFPA's for-cause removal provision. *See*, *e.g.*, Supp. Rep. at 19. But the Court rejected that approach in *Collins* and held that a challenger could obtain relief only if an invalid removal restriction actually caused some harm. 141 S. Ct. at 1789. Otherwise, dismissal would, "contrary to usual remedial principles," put Defendants "in a better position than if no constitutional violation had occurred." *Id.* at 1801 (Kagan, J., concurring regarding remedy) (internal quotation marks omitted). Instead, Defendants are entitled to relief "only when the President's inability to fire an agency head affected the complained-of decision." *Id.* The ratifications in this case demonstrate that there was no such effect – any impediment to the President's ability to remove the Bureau's Director did not affect the decision to file the complaint. Because Acting Director Mick Mulvaney was appointed pursuant to the Federal Vacancies Reform Act, he was removable by the President at will. *See* Supplemental En Banc Brief of Plaintiff-Appellee CFPB at 9. And because Director Kraninger's July 2020 ratification occurred after the decision in

Seila Law, she was also unquestionably removable by the President at will.[2] On either occasion, the President could have expressed his displeasure with this case and directed either Acting Director Mulvaney or Director Kraninger to stand down. But that did not happen.[3] This Court should affirm the district court's denial of Defendants' Motion for Judgment on the Pleadings, and this case should go forward because that is the will of officials who were, and are, fully accountable to the President. *Collins* demonstrates that Defendants are entitled to nothing more.[4]

Respectfully submitted,

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[2] The Bureau is continuing to pursue this action under the direction of its current Acting Director, David Uejio, who is removable by the President at will.

[3] Because ratification is relevant only to whether the President's apparent inability to remove the Bureau's Director affected the decision to file the complaint, the discussion in Defendants' briefs regarding the timing of the ratifications, which incorrectly assumes that the original filing was not valid and did not satisfy the CFPA's statute of limitations, is irrelevant. *See* Supp. Br. at 38-54; Supp. Rep. at 13-23.

[4] Defendants also argue that the complaint must be dismissed because Congress funded the Bureau, like many other financial regulators, through the agency's enabling statute rather than through annual appropriations bills. *See* Supp. Br. at 54 - 65; Supp. Rep. at 23-28. The Court in *Collins* observed that the FHFA is also funded outside the appropriations process, 141 S. Ct. at 1772, but did not indicate that this had any impact on the outcome of the case.

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2020, 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