UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Northern Division

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff,

Case No. 3:16-cv-356-WHB-JCG

v.

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

ORAL ARGUMENT REQUESTED

Defendants.

DEFENDANTS' RESPONSE TO CONSUMER FINANCIAL PROTECTION BUREAU'S NOTICES OF SUPPLEMENTAL AUTHORITY AND RATIFICATION

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INTRODUCTION

The Consumer Financial Protection Bureau ("CFPB") claims that All American's constitutional challenge is "moot" because the Acting Director is removable by the President and has purported to "ratify" the agency's original decision to bring this suit. ECF No. 231, at 1. That is wrong for at least four separate and independent reasons.

First, All American's challenge is not moot because it is "capable of repetition yet evading review." The Acting Director's position is temporary, and a new Director could be nominated and confirmed at any time. In fact, the President *must* nominate a successor at the very latest by June 22, 2018—210 days after the vacancy arose on November 24, 2017—if he wants the Acting Director to continue to lead the CFPB while his nominee is pending before the Senate. *See* 5 U.S.C. § 3346(a). As soon as a new Director is confirmed, the CFPB will revert to its original structure, and All American will again be subjected to the whims of an agency headed by a single, unaccountable individual (among other constitutional problems with the agency). *Second*, the CFPB's attempt to dodge the constitutional issue is classic "voluntary cessation," and All American is virtually assured to be subjected to the same unlawful behavior in the near future. *Third*, the Acting Director lacks the power to ratify under well-settled Supreme Court case law that the CFPB fails to cite, let alone grapple with. *Fourth*, because the proper remedy here is invalidation of Title X of the Dodd-Frank Act—not severance or, as here, effective severance of the for-cause removal provision—the agency cannot simply continue to operate, contrary to the CFPB's presumption.

If anything, the CFPB's supplemental filing proves the constitutional point: There would be no need for "ratification" unless the agency now *agreed* with All American that the CFPB's actions under the former Director were unconstitutional and invalid. Indeed, the views of the President, who designated the Acting Director, are no secret: As the administration argued to the

D.C. Circuit, the CFPB's "[v]esting [of so much] power in a single person not answerable to the President constitutes a stark departure from [the constitutional] framework." U.S. Amicus Br., *PHH Corp. v. CFPB*, No. 15-1177, 2017 WL 1035617, at *15 (D.C. Cir. Mar. 17, 2017). Although the full D.C. Circuit, over powerful dissents of Judges Henderson and Kavanaugh, did not agree with that assertion, neither this Court nor the Fifth Circuit is bound by the *PHH* majority decision. *See* ECF No. 230.

This Court should schedule a hearing on and resolve All American's motion as soon as possible—before resolution of the CFPB's summary judgment motion and certainly before trial—to address this critical threshold issue of the agency's constitutionality.

ARGUMENT

I. The Constitutional Issue Is Capable Of Repetition Yet Evading Review.

A case is not moot where the dispute is "capable of repetition yet evading review." *Catholic Leadership Coal. of Texas v. Reisman*, 764 F.3d 409, 422 (5th Cir. 2014). All American's challenge meets both prongs of this inquiry: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*

As to the first prong, there can be little question that circumstances beyond All American's control have prevented it from having its challenge to the CFPB's structure "fully litigated" before the CFPB Director resigned and the President appointed an Acting Director. All American's motion for judgment on the pleadings was filed on May 24, 2017, six months before the Acting Director was designated. Indeed, the motion has now been pending longer than the Acting Director's entire statutory term. *See* ECF No. 144 (All American's Motion for Judgment on the Pleadings, filed 267 days ago on May 24, 2017); *see* 5 U.S.C. § 3346 (providing for 210-day appointment).

Moreover, there is little question that All American will continue to be subjected to the unlawful actions of the former Director—in fact, the Acting Director's professed ratification of this suit proves that All American *will continue* to be subjected to "the same action" as soon as the Acting Director's provisional period expires and a new (unconstitutional) Director is seated.

For the second prong, litigants need show only that the controversy is "*capable* of repetition," or "a reasonable expectation" that the illegality will reoccur, not "that a recurrence of the dispute [i]s more probable than not." *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). Given the inherently temporary nature of the Acting Director's tenure, there can scarcely be any doubt that the controversy is "capable" of arising again in these proceedings. In fact, a new Director could be appointed at any time, as soon as the President nominates and the Senate confirms a candidate. Under the Federal Vacancies Reform Act of 1998 ("Vacancies Act"), the Acting Director *cannot* serve past June 22, 2018 (210 days after the vacancy arose), unless the President nominates a new Director.[1] Thus, there may well be a new Director before the scheduled start-date for trial in April, and possibly much sooner. Even assuming the constitutional issues were extinguished by the fact that the Acting Director is removable at will by the President, and they were not, the issues are certain to spring back into being again, and soon.

[1] Under the Vacancies Act, an acting officer may serve in office "for no longer than 210 days beginning on the date the vacancy occurs," 5 U.S.C. § 3346(a)(1), unless the President nominates a successor before the end of that period, in which case the acting officer may continue to serve "for the period that the nomination is pending in the Senate," *id.* § 3346(a)(2). If the nomination is rejected, withdrawn, or returned to the President, the acting officer may continue to serve "for no more than 210 days" thereafter, *id.* § 3346(b)(1), unless a second nomination is made before the second 210-day period elapses, in which case the acting officer may continue to act "until the second nomination is confirmed," § 3346(b)(2)(A), or "for no more than 210 days after the second nomination is rejected, withdrawn, or returned," *id.* § 3346(b)(2)(B).

Further, the Acting Director's temporary position and supposed ratification do nothing to alter the numerous *additional* constitutional defects in the CFPB's statutory scheme—such as concentrating sweeping Executive, rulemaking, and adjudicative powers in an agency immune from the appropriations process, 12 U.S.C. § 5497(a)(2)(A)(iii); *see* ECF No. 145, at 11–12—defects to which All American is still subject, and will continue to be subject after the Acting Director's temporary appointment expires.

II. This Is A Classic Case Of "Voluntary Cessation."

All American's constitutional challenges are also not moot for a second, independent reason. "It is well settled" that the government's "voluntary cessation" of an unlawful practice "does not deprive a federal court of its power to determine the legality of the practice." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000).

The Acting Director's actions cannot meet the "stringent" standard of showing that it is "absolutely clear" that All American will no longer be subjected to actions by an unconstitutionally structured CFPB. *Friends of the Earth*, 528 U.S. at 189. To the contrary, the Acting Director's ratification proves the opposite: The CFPB clearly plans on continuing this unconstitutional action against All American even after the Acting Director is gone and a new Director "pick[s] up where he left off," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013), meaning All American's constitutional challenge is not moot. And, as explained above, the President can nominate a new Director at any time and must do so before June 22. To the extent the President prefers to hold off on naming a successor until the end of that period and thus maximize the duration of the Acting Director's tenure, that is the President's right. But it makes any "mootness" here a temporary and voluntary governmental cessation.

III. The Acting Director Lacks The Power To Ratify This Case.

Even more fundamentally, the Acting Director's attempt to "ratify" the unconstitutional actions of his predecessor—including the initiation and litigation of this enforcement action—cannot moot All American's constitutional challenges because ratification of this suit "is impossible." ECF No. 186 at 4 n.2. Whatever the current state of play, this Court is still required to invalidate all of the unconstitutional actions the CFPB has taken to date in this litigation.

There are two independent requirements for a valid ratification: "[I]t is essential that the party ratifying should be able" (1) "to do the act ratified at the time the act was done," and (2) to do the act "also at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (emphasis omitted). The CFPB cannot satisfy *either* requirement.

First, the CFPB lacked authority to bring this suit in the first place. An unconstitutionally structured agency "lacks authority to bring [an] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993); *see also Free Enter. Fund v. PCAOB*, 561 U.S. 488, 513 (2010) ("ensur[ing]" that the statute is "enforced only by a constitutional agency accountable to the Executive"). Because the unconstitutionally structured CFPB lacked the authority "to do the act ratified," namely filing this enforcement action, "at the time th[at] act was done" on May 11, 2016, the Acting Director cannot ratify it now. *NRA Political Victory Fund*, 513 U.S. at 98.

Second, the Acting Director lacks the authority to bring this suit now—"at the time the ratification was made," *i.e.,* on February 5, 2018. *NRA Political Victory Fund*, 513 U.S. at 98. The CFPB's supposed ratification "simply came too late in the day to be effective" because "[t]he bringing of an action . . . can not be ratified" if the right to bring that action "has been terminated by lapse of time," such as the running of a statute of limitations. *NRA Political Victory Fund*, 513 U.S. at 98–99; *accord Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203,

213 (D.C. Cir. 1998); *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016).

Here, the CFPB may not bring an action "more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). But the CFPB's suit is based almost entirely on actions that allegedly occurred between 2011 and 2014, well more than three years before the date of ratification. *See* Compl., ECF No. 1, ¶¶ 9, 16, 33, 42, 55; CFPB Summ. J. Mem., ECF No. 213, at 26, 35, 37, 38, 42, 46. And the CFPB "discover[ed]" the alleged conduct more than three years ago, as is evident from the fact that the agency issued its first Civil Investigatory Demand against All American on September 3, 2014. *See* ECF No. 203-1, Ex. 29, at 1. Thus, the Acting Director lacks authority to engage in "after-the-fact" ratification of the filing of this action. *NRA Political Victory Fund*, 513 U.S. at 98.

In any event, ratification of this suit by the Acting Director on the theory that he is not subject to the for-cause removal restriction in Title X would not solve the CFPB's many *other* structural flaws. *See supra* at 4. Moreover, there cannot *be* any ratification unless one presumes that the proper remedy for the separation-of-powers violation is severance of the removal provision. As explained below, that is incorrect.

IV. The Proper Remedy Is Invalidation of Title X.

Finally, the CFPB's theory of mootness is premised on the assumption that severance is the proper remedy for the unconstitutional limitation on the President's removal power. Only if that were so could the agency simply continue along its merry way. Here, the CFPB assumes that the removal provision has been rendered temporarily inoperative and effectively severed by way of substitution of the Vacancies Act. But, as demonstrated by Judge Henderson's thorough anal-

ysis in *PHH*, Congress would never have enacted Title X without ensuring "the CFPB's . . . independence" from the President. *PHH Corp. v. CFPB*, No. 15-1177, 2018 WL 627055, at *69 (D.C. Cir. Jan. 31, 2018) (en banc) (Henderson, J., dissenting); *see also* ECF No. 186, at 3. Simply eliminating the for-cause removal provision would endow the President with power over 19 federal consumer-protection statutes—several of which were previously administered exclusively by independent agencies—while at the same time abolishing Congress's appropriations powers. Courts cannot so drastically rewrite statutes, as Judge Henderson demonstrated, nor can the Executive Branch rewrite a congressional statute to dramatically expand the President's power at the expense of Congress.

Because the correct remedy here is to "invalidate Title X in its entirety and let the Congress decide whether to resuscitate the issue," *PHH*, 2018 WL 627055, at *50 (Henderson, J., dissenting), All American's challenge cannot be mooted by the effective severance of the for-cause removal provision.

CONCLUSION

All American's challenge to the CFPB is certainly not moot, and this important issue is fully ripe for resolution. All American respectfully urges the Court to set a hearing before adjudication of the summary judgment motion and trial, as this issue is a threshold, case-dispositive question. This Court should follow the well-reasoned dissenting decisions of Judges Henderson and Kavanaugh, as well as the view of the United States, all demonstrating that the CFPB is unconstitutionally structured. And if, as the CFPB asserts, the Acting Director serves at the pleasure of the President, it stands to reason that even he would now acknowledge the unconstitutionality of the agency's statutory structure and the threat it poses to individual liberty— and will continue to pose long after the Acting Director is gone.

This Court should hold argument and grant judgment on the pleadings in All American's favor.

Dated: February 15, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served via the Court's ECF system on the following counsel of record on February 15, 2018:

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