No. 18-60302

In the United States Court of Appeals for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, Individually,

Defendants-Appellants.

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

Unopposed Petition for Initial Hearing En Banc

Dale Danks, Jr.
Michael V. Cory, Jr.
DANKS, MILLER & CORY
213 S. Lamar Street
P.O. Box 1759
Jackson, MS 39215-1759
Phone: (601) 957-3101
Fax: (601) 957-3160
ddanks@dmc-law.net

Bentley E. Conner
P.O. Box 563
Canton, MS 39046-5630
Phone: (601) 859-6306
Fax: (601) 859-6307
connerbentleye@bellsouth.net

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Joshua S. Lipshutz
Lochlan F. Shelfer
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 955-8500
Fax: (202) 530-9575
tolson@gibsondunn.com
hwalker@gibsondunn.com
jlipshutz@gibsondunn.com
lshelfer@gibsondunn.com
jchristiansen@gibsondunn.com

Attorneys for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS

No. 18-60302

In the United States Court of Appeals
for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, Individually,

Defendants-Appellants

The undersigned counsel of record certify that the following interested persons and entities described in the fourth sentence of Fifth Circuit 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-appellant or that own 10% or more stock in any defendant-appellant.

A. Plaintiff-Appellee

Consumer Financial Protection Bureau

B. Current and Former Attorneys for Plaintiff-Appellee

Current Attorneys:

Lawrence De-Mille-Wagman
Emily Hope Mintz
Christopher Deal
Michael Philip Favretto
Stephanie C. Brenowitz
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552

Former Attorneys:

Daniel David McDonough Abraham
Edward Keefe
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552

Mitzi Dease Paige
Gregory K. Davis
U.S. ATTORNEY'S OFFICE - JACKSON
501 East Court Street
Suite 4.430
Jackson, MS 39201
Phone: (601) 965-4480

C. Defendants-Appellants

- All American Check Cashing, Inc.
- Mid-State Finance, Inc., d/b/a Thrifty Check Advance
- Michael E. Gray

D. Current and Former Attorneys for Defendants-Appellants

Current Attorneys:

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Joshua S. Lipshutz
Lochlan F. Shelfer
Jeremy C. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dale Danks, Jr.
Michael V. Cory, Jr.
Kenneth C. Miller
DANKS, MILLER & CORY
213 S. Lamar Street
P.O. Box 1759
Jackson, MS 39215-1759

Bentley E. Conner
P.O. Box 563
Canton, MS 39046-5630

Former Attorneys

Robin H. Rasmussen
Peter D. Baskind
Megan B. Ross
DINKELSPIEL, RASMUSSEN & MINK, PLLC
1669 Kirby Parkway, Suite 106
Memphis, TN 38120

E. Other Interested Persons

None.

s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
Attorney of Record for Defendants-Appellants

RULE 35(B) STATEMENT

Pursuant to Federal Rule of Appellate Procedure 35(a)(2) and (b)(1)(B), counsel for Defendants-Appellants, All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively "All American"), respectfully states as follows:

Initial en banc hearing is warranted in this case because it raises an issue of exceptional importance. This appeal presents the question whether the structure of the Consumer Financial Protection Bureau ("CFPB"), *i.e.*, the for-cause removal protection for its Director and its funding outside the normal appropriations process, violates Article II of the Constitution and the separation of powers.

Numerous federal judges have considered that same question in the past few years and come to different answers, and it is being considered in other cases on appeal and in various district courts too. The United States has taken the position that the CFPB's structure violates the Constitution. Moreover, on July 16, 2018, a panel of this Court found that the Federal Housing Finance Agency was unconstitutionally structured because it is an independent agency headed by a single Director. On August 2, 2018, plaintiffs in that case filed a petition for rehearing en banc.

See Petition for Rehearing En Banc, *Collins v. Mnuchin*, No. 17-20364, Doc. 514582948 (5th Cir.) (Aug. 2, 2018).

All American believes that its constitutional challenge to the CFPB would succeed under the panel decision in *Collins*. Nevertheless, in light of the possibility that a panel decision in this appeal, the *Collins* case, or both could eventually be reheard en banc, All American respectfully submits that en banc hearing in the first instance here will (1) conserve judicial resources, (2) secure uniformity of this Court's decisions, and (3) guarantee that the parties and other courts receive the benefit of this Court's plenary consideration of the exceedingly important issues at stake in this case.

Counsel for the CFPB has informed counsel for All American that the CFPB does not oppose this petition.

s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500
Attorney of Record for Defendants-Appellants

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STATEMENT OF THE ISSUE SUPPORTING INITIAL HEARING EN BANC

All American respectfully requests that the Court hear this appeal en banc in the first instance. *See* Fed. R. App. P. 35(a)(2).

This appeal raises a question of exceptional importance, one on which this Court has already granted interlocutory review in this case: Whether the structure of the CFPB—an independent agency that is headed by a single Director whom the President may remove only for cause and that is funded outside the congressional appropriations process—violates Article II of the Constitution and the separation of powers.

On July 16, 2018, a panel of this Court ruled that the Federal Housing Finance Agency—also an independent agency headed by a single Director and funded outside the appropriations process—was unconstitutionally structured. *Collins v. Mnuchin*, --- F.3d --- , No. 17-20364, 2018 WL 3430826 (5th Cir. July 16, 2018). On August 2, 2018, plaintiffs in *Collins* filed a petition for en banc rehearing, asking this Court to reconsider the panel's decision regarding the proper remedy for a violation of Article II. Petition for Rehearing En Banc, *Collins v. Mnuchin*, No. 17-20364, Doc. 514582948 (5th Cir.). Meanwhile, the constitutionality of the

CFPB's structure is currently pending in several cases on appeal, and has divided federal judges throughout the country.

This case is of tremendous importance, as the CFPB exercises sweeping executive power under 19 separate consumer-protection statutes, *see* 12 U.S.C. §§ 5481(12), 5531(a), and yet is entirely unaccountable to the President or the electorate. Hearing this appeal through the normal panel process could be a waste judicial resources, especially if this Court votes to rehear *Collins* en banc. Moreover, whichever way a panel in this case rules, it is likely that one party will petition this Court to rehear the case en banc, as happened last year when the full D.C. Circuit granted the CFPB's petition for rehearing en banc. *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

All American therefore submits this unopposed petition, asking this Court to grant initial en banc review of this question. Reasonable judges can—and have—disagreed on the correct answer. And the United States has agreed that the CFPB's insulation from Presidential influence violates Supreme Court precedent.

Given the time, effort, and cost of litigating cases such as this, en banc hearing of this appeal in the first instance is the most efficient way

of ensuring that this Court speaks with one voice on this question of exceptional importance. More broadly, ensuring prompt resolution in this Court with an en banc ruling would bring substantial value to the CFPB, and to All American and others regulated by the CFPB. The CFPB does not oppose this petition.

STATEMENT OF THE PROCEEDINGS AND FACTS

The CFPB filed this enforcement action against All American, a provider of check-cashing and lending services, 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. A at 1. All American moved for judgment on the pleadings, arguing, among other things, that it violates the Constitution for the CFPB to be structured as an independent agency that is headed by a single Director whom the President may remove only for cause and that is funded outside the congressional appropriations process. Ex. A at 3.

The district court denied All American's motion, Ex. A, 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. B at 3–4. A motions panel of this Court then accepted the interlocutory appeal. Ex. C, at 1. On July 2, 2018, All American filed its Opening Brief. On July 19, 2018, the clerk of this Court granted the CFPB's unopposed motion to extend the time to file its brief to September 10, 2018.

ARGUMENT

The CFPB is an independent agency with vast executive powers. It oversees 19 consumer-protection statutes and may bring enforcement actions for whatever it considers "unfair, deceptive, or abusive act[s] or practice[s]." *See* 12 U.S.C. §§ 5481(12), 5531(a). But instead of balancing this sweeping authority with checks and balances, Congress eliminated all political accountability for the CFPB. It is headed by a single Director

who may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(b), (c). And the agency is funded directly by the Federal Reserve rather than through congressional appropriations, with the ability to unilaterally demand over half a billion dollars a year. *See* 12 U.S.C. § 5497(a). The central question raised in this appeal—whether the CFPB's structure violates Article II of the Constitution and the separation of powers—is "a question of exceptional importance" that merits initial en banc consideration. Fed. R. App. P. 35(a)(2).

On July 16, 2018, a panel of this Court ruled that the Federal Housing Finance Agency—also an independent agency headed by a single Director and funded outside the appropriations process—was unconstitutionally structured. *Collins v. Mnuchin*, --- F.3d --- , No. 17-20364, 2018 WL 3430826 (5th Cir. July 16, 2018). On August 2, 2018, plaintiffs in that case filed a petition for rehearing en banc regarding the proper remedy for a constitutional violation. Petition for Rehearing En Banc, *Collins v. Mnuchin*, No. 17-20364, Doc. 514582948 (5th Cir.).

Initial en banc consideration of All American's case would eliminate any possibility of intra-circuit inconsistency and guarantee that the Fifth

Circuit speaks with one voice regarding the constitutionality of these agencies' structures. Additionally, in the event this Court grants the petition to rehear *Collins* en banc, appellants here respectfully request that this Court coordinate en banc argument in the two cases.

Rule 35(a)(2) has been invoked to hear important cases en banc in the first instance. *See*, *e.g.*, *Int'l Refugee Assistance Project v. Trump*, No. 17-1351 (4th Cir. April 10, 2017) (sua sponte ordering initial hearing en banc in challenge to executive order); *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. May 1, 2016) (sua sponte ordering initial hearing en banc in challenge to presidential Clean Power Plan); *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1125 (10th Cir. 2013) (initial hearing en banc, on petition, of challenge to contraceptive-coverage requirement under Affordable Care Act); *Gratz v. Bollinger*, 277 F.3d 803 (6th Cir. 2001) (granting petition for initial hearing en banc in affirmative action challenge).

As in those cases, the question presented in this appeal has broad, national importance, has produced numerous judicial challenges across the country, and has resulted in numerous federal judges reaching different conclusions. In 2016, a panel of the D.C. Circuit, in an opinion

authored by Judge Kavanaugh, held that the CFPB's structure was unconstitutional. *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017), *on reh'g en banc*, 881 F.3d 75. As Judge Kavanaugh put it, because of the CFPB's unprecedented insulation from political accountability, its Director "enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President," while at the same time "possess[ing] enormous power over American business, American consumers, and the overall U.S. economy." *Id.* at 7. Judge Kavanaugh held that "[t]he CFPB's concentration of enormous executive power in a single, unaccountable, unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty." *Id.* at 8. Therefore, Judge Kavanaugh concluded, "the CFPB is unconstitutionally structured." *Id.*

The full D.C. Circuit then voted to rehear the case en banc, and, earlier this year, the en banc majority upheld the CFPB's structure. *PHH*, 881 F.3d 75. Six judges were of the opinion that the CFPB was constitutionally structured, and three judges dissented, maintaining that

the CFPB's structure was unconstitutional. In total, there were seven separate opinions. *See id.* at 77 (majority opinion by Pillard, J.); *id.* at 111 (Tatel, J., concurring); *id*. at 113 (Wilkins, J., concurring); *id.* at 214 (Griffith, J., concurring in the judgment); *id.* at 137 (Henderson, J., dissenting); *id.* at 164 (Kavanaugh, J., dissenting); *id.* at 200 (Randolph, J., dissenting).

The United States, too, believes that the CFPB's structure constitutes "a stark departure from" the "constitutional design." Brief for the United States as Amicus Curiae at 15, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (No. 15-1177), 2017 WL 1035617. So does Acting CFPB Director Mulvaney, who believes that the CFPB's "structure and powers … are not something the Founders and Framers would recognize." CFPB Semi-Ann. Rep. 1 (Apr. 2018).

Further, the Ninth Circuit has granted interlocutory review on the constitutionality of the CFPB's structure 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). And the same question is currently pending in other appeals. *See*, *e.g.*, *Seila Law, LLC v. CFPB*, No. 17-56324 (9th Cir.); *CFPB v. Future Income Payments, LLC*, No. 17-

55721 (9th Cir.). Moreover, 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).

And the lower courts are divided on the question. *Compare*, *e.g.*, *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916 (S.D.N.Y. June 21, 2018) (CFPB's structure is unconstitutional); *CFPB v. D&D Mktg*., No. 2:15-cv-09692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016), *interlocutory appeal granted*, No. 17-55709 (9th Cir. May 17, 2017) (same); *with*, *e.g.*, *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017), *stayed pending appeal*, No. 17-55721 (9th Cir. June 1, 2017) (CFPB's structure is constitutional); *CFPB v. ITT Educ. Servs., Inc*., 219 F. Supp. 3d 878 (S.D. Ind. 2015) (same).

The rapid development of conflicting judicial opinions on the same issue in concurrent nationwide litigation underscores the exceptional importance of this appeal. If this appeal is heard under the normal panel process, this Court will likely be asked to rehear that panel's decision en

banc, as occurred in the D.C. Circuit's *PHH* case. Judicial efficiency and consistency would therefore best be served by hearing this appeal en banc now. That approach would aid the parties in this case, as well as other courts and litigants, all of whom would have the benefit of this Circuit's plenary consideration of this critically important national issue.

If this Court agrees to hear this case en banc as an initial matter, All American respectfully requests that it be set for argument in this Court's January 2019 en banc sitting, or, in the event the en banc Court should also vote to rehear *Collins* en banc, that this Court coordinate the oral argument for both cases. All American suggests the following schedule for initial en banc briefing, which the CFPB does not oppose:

- All American's En Banc Brief Due: September 11, 2018;
- CFPB's En Banc Brief Due: October 11, 2018;
- All American's En Banc Reply Due: November 1, 2018;
- *Amicus Curiae* En Banc Briefs Due: the Same Day as the Supported Party

CONCLUSION

All American respectfully asks this Court to grant its unopposed petition for initial hearing en banc of this appeal.

Dated: August 13, 2018

Respectfully submitted,

s/ Theodore B. Olson

Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Attorney of Record for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Undersigned counsel certify that this Petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 35(b)(2) because, excluding the parts of the Petition exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 1,999 words.

Undersigned counsel certify 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: August 13, 2018

s/ Lochlan F. Shelfer
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Attorney of Record for Defendants-Appellants

CERTIFICATE OF SERVICE

Undersigned counsel certify that on August 13, 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 on all parties.

s/ Lochlan F. Shelfer
Lochlan F. Shelfer
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Attorney of Record for
Defendants-Appellants

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CONSUMER FINANCIAL PROTECTION BUREAU **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:16-cv-356-WHB-JCG**

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

OPINION AND ORDER

This cause is before the Court on the Motion of Defendants for Judgement on the Pleadings. Having considered the pleadings, as well as supporting and opposing authorities, the Court finds the Motion is not well taken and should be denied.

I. Factual Background and Procedural History

The Consumer Financial Protection Bureau ("Bureau") filed a lawsuit against All American Check Cashing, Inc. ("All American"); Mid-State Finance, Inc.; and Michael E. Gray,[1] alleging that they violated Sections 1031(a), 1036(a), and 1054(a) of the Consumer Finance Protection Act of 2010 ("CFPA"), codified at 12 U.S.C. §§ 5531(a), 5536(a), and 5564(a), respectively.[2] The alleged

[1] All American Check Cashing, Inc.; Mid-State Finance, Inc.; and Michael E. Gray will be collectively referred to as "Defendants".

[2] As the Complaint alleges claims arising under federal law, and is brought by an agency of the United States Government, the Court may exercise federal subject matter jurisdiction in this case under 28 U.S.C. §§ 1331 and 1345.

violations are connected with check cashing services and payday loans that had been offered by Defendants.

In its Complaint, the Bureau alleges that Defendants violated the CFPA by engaging in "abusive acts and practices" and/or "deceptive acts or practices" with respect to the check cashing services they provided. The alleged abusive and/or deceptive acts and practices included, but were not limited to, that Defendants: (1) failed to inform customers of the fees they would be charged for check cashing services; (2) intentionally blocked or otherwise interfered with a customer's ability to see the fee they were being charged on the receipt they were required to sign to have their check cashed; (3) provided false and/or misleading information to customers regarding the fees they would be charged and their ability to cancel check-cashing transactions; and (4) pressured or coerced customers into cashing their checks by, *inter alia*, processing checks without the customer's consent or prematurely endorsing the check thereby impeding the ability of the customer to have the check cashed elsewhere.

The Bureau also alleges that Defendants violated the CFPA by engaging in "deceptive acts or practices" with respect to the payday loans they offered. Specifically, the Bureau alleges that Defendants misrepresented to customers that the two-week payday loans they offered provided greater financial benefit than the thirty-day payday loans offered by their competitors when in

reality the customer was charged higher fees for the two-week payday loans. Finally, the Bureau alleges that Defendants violated the CFPA by failing to notify customers when they had overpaid their loan amounts and/or by failing to refund the overpayments.

Defendants have now moved for judgment on the pleadings arguing that this action in void *ab initio* because, *inter alia*, the CFPA is unconstitutional.

II. Discussion

Defendants have moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. This rule provides, in relevant part: "[a]fter the pleadings are closed ... a party may move for judgment on the pleadings." According to the United States Court of Appeals for the Fifth Circuit, "'[a] motion brought pursuant to [Rule] 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts.'" Machete Prods., L.L.C. v. Page, 809 F.3d 281, 287 (5th Cir. 2015)(quoting Great Plains Tr. Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 312 (5th Cir. 2002)). When considering a Rule 12(c) motion, the Court applies the same standard as is used when considering a motion for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Great Plains, 313 F.3d at 313. As with Rule

12(b)(6), the "central issue" when deciding a Rule 12(c) motion "is whether, in the light most favorable to the plaintiff, the complaint states a valid claim for relief." Hughes v. Tobacco Inst., Inc., 278 F.3d 417, 420 (5th Cir. 2001)(alteration in original)(internal quotations omitted).

In their Motion for Judgment on the Pleadings, Defendants first argue that the structure of the Bureau is unconstitutional and, therefore, the agency lacks authority to bring this action. The claim underlying this argument is that the structure of the Bureau is "antithetical to the separation of powers" doctrine in so far as the Bureau is headed by a single director who allegedly "wields unchecked legislative, executive, and judicial powers", and who is not accountable to either Congress or the President. See Mem. in Supp. of Mot. [Docket No. 145], 5-15. The argument that the Bureau is unconstitutional based on its single-director status, however, was recently rejected by the United States Court of Appeals for the District of Columbia. See PHH Corp. v. CFPB, 881 F.3d 75 (D.C. Cir. 2018). As summarized by that Court:

> The Supreme Court's removal-power decisions have, for more than eighty years, upheld ordinary for-cause protections of the heads of independent agencies, including financial regulators. That precedent leaves to the legislative process, not the courts, the choice whether to subject the Bureaus's leadership to at-will presidential removal. Congress's decision to provide the CFPB Director a degree of insulation reflects its permissible judgment that civil regulation of consumer financial protection should be kept one step removed from political winds and presidential will. We have no warrant here to invalidate such a time-tested course. No relevant

> consideration gives us reason to doubt the constitutionality of the independent CFPB's single-member structure. Congress made constitutionally permissible institutional design choices for the CFPB with which courts should hesitate to interfere. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

Id. at 110. For the same reasons stated in PHH Corp., this Court rejects the arguments raised by Defendants, and likewise finds that the Bureau is not unconstitutional based on its single-director structure.

Next, Defendants argue that the claims alleged under the CFPA violate due process because the Act fails to give fair notice of the conduct proscribed by that statute. The issue of due process/fair notice was considered by the United States District Court for the Southern District of Indiana in the case of CFPB v. ITT Educational Services, Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015). In ITT, the defendant argued that the CFPA claims alleged against it were subject to dismissal because the Act did not provide fair notice as to what constituted "unfair" and "abusive" conduct thereunder. The defendant further argued that because the terms "unfair" and "abusive" were vague, any attempt to enforce the CFPA against it would violate the Due Process clause of the Fifth Amendment.

In considering the vagueness/due process challenge, the court in ITT began with this summary of applicable case law on the issue.

> "A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." F.C.C. v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)("Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids.")(citations omitted). A statute is void for vagueness if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008); Hill v. Colorado, 530 U.S. 703, 732 (2000). This doctrine is not implicated merely because "it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved." Fox Television, 567 U.S. at 253. Nor can a court declare a law unconstitutionally vague based on "the mere fact that close cases can be envisioned" under its provisions. Williams, 553 U.S. at 305–306. Rather, we refuse to apply a statutory standard only where it is so amorphous that reasonable observers have no choice but to "guess at its meaning[,] and differ as to its application." Connally v. General Constr. Co., 269 U.S. 385, 391 (1926)(explaining that "[a] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law".).

ITT, 219 F.Supp.3d at 899 (alterations in original). The ITT court then considered the challenged provision of the CFPA, which provides, in relevant part: "It shall be unlawful for ... any covered person or service provider ... to engage in any unfair, deceptive, or abusive act or practice." 12 U.S.C. § 5536(a)(1)(B). On review the court in ITT rejected the defendant's argument that the terms "unfair" and "deceptive" were impermissibly vague on the grounds that these same terms are contained in the Fair Trade

Commission Act, codified at 15 U.S.C. § 45(a)(1), and Congress was well aware of the meaning given to those terms when it enacted the CFPA. As further explained:

> The CFPA, like the FTCA before it, has empowered the agency itself to fill in the broad outlines of its authority with specific regulations and interpretations. The agency and the courts have done so in fleshing out the term "unfair ... act or practice," and Congress has tapped into that existing body of law in framing the CFPA with identical terminology. We thus have no difficulty in rejecting [defendant's] suggestion that a reasonable business entity would be forced to guess at the term's meaning, or would be subject to agency's standardless discretion in its enforcement.

ITT, 219 F.Supp.3d at 904.

The court in ITT likewise rejected the argument that the phrase "abusive act or practice" was unconstitutionally vague, first, on the grounds that the CFPA expressly describes the type of conduct/practice that can be declared "abusive". See 12 U.S.C. § 5531(d).[3] Second, the court in ITT found that the term "abusive"

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[3] The relevant subsection of the CFPA provides:

> (d) The Bureau shall have no authority under this section to declare an act or practice abusive in connection with the provision of a consumer financial product or service, unless the act or practice –
>
> (1) materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service; or
>
> (2) takes unreasonable advantage of –
>
> (A) a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service;
>
> (B) the inability of the consumer to protect the

was not novel in that the same term was used by Congress when enacting the Fair Debt Collection Practices Act ("FDCPA"), see 15 U.S.C. § 1692(e)(explaining that one of the purposes of the FDCPA is to "eliminate abusive debt collection practices by debt collectors"), and that that Act expressly describes conduct and/or practices considered abusive. See 15 U.S.C. § 1692d. As summarized by the court in ITT:

> Because the CFPA itself elaborates the conditions under which a business's conduct may be found abusive – and because agencies and courts have successfully applied the term as used in closely related consumer protection statutes and regulations – we conclude that the language in question provides at least the minimal level of clarity that the due process clause demands of non-criminal economic regulation.

ITT, 219 F.Supp.3d at 906. For the same reasons stated by the court in ITT, this Court rejects the fair notice/due process challenge made by Defendants, which is premised on arguments that the terms "unfair", "deceptive" and "abusive acts and practices" in the CFPA are unconstitutionally vague.

Third, Defendants argue that the CFPA violates the non-delegation doctrine because Congress did not clearly delineate the general policy for, or the boundaries of delegated authority to, the Bureau. Contrary to this argument, the CFPA does provide general policy/boundaries of authority for the Bureau. See 12

> interests of the consumer in selecting or using a consumer financial product or service; or
>
> (C) the reasonable reliance by the consumer on a covered person to act in the interests of the consumer.

U.S.C. § 5511 (providing that the purposes of the Bureau include implementing and enforcing federal consumer financial law; investigating consumer complaints; identifying risks to consumers in the marketplace; taking appropriate enforcement action against violators of federal consumer financial law; and issuing rules, orders, and guidance for implementing federal consumer financial law). The CFPA likewise provides limits on the types of conduct that can be declared "unfair" or "abusive" under the Act. See 12 U.S.C. § 5532(c) and (d). Because Congress, when enacting the CFPA, delineated a general policy for the Bureau to follow, and provided limits on its authority, the Court finds Defendants have failed to show that the CFPA violates the non-delegation doctrine. See e.g. United States v. Whaley, 577 F.3d 254, 263-64 (5th Cir. 2009)(explaining that the "modern test" for assessing alleged violations of the non-delegation doctrine is "whether Congress has provided an 'intelligible principle' to guide the agency's regulations", and that delegation is "'constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority'")(quoting Mistretta v. United States, 488 U.S. 361, 372 (1989) and American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946), respectively).

Finally, Defendants argue that they are entitled to a judgment on the pleadings because the CFPA violates the principles of

federalism. The federalism challenge stems from the fact that the Bureau allegedly bases several of its FCPA claims on allegations including that All American violated state law. According to Defendants, if their conduct violated state law, then the state, as opposed to the federal government, should be responsible for bringing an enforcement action. See Mem. in Supp. of Mot. [Docket No. 145], 21 (arguing that the Bureau, by basing its claims on alleged violations of state law, has intruded on the rights of the states "to determine how far their laws should reach and how they should be enforced."). A review of the Complaint makes clear, however, that while there are allegations that state law was violated, the Bureau also alleges conduct on the part of All American that has not been shown subsumed by state law. For example, the Complaint alleges that Mississippi and Louisiana law require the display of fees for check cashing services. See Compl. ¶ 21. According to the Complaint, All American did display the required fee information, but it was displayed in such a manner as to make it unlikely that customers would actually see it. Id. (alleging that the fee sign was placed "under the counter" in All American offices). The Complaint further alleges that All American employees were specifically instructed to take action so as to either minimize or negate the likelihood that the fee display would be seen by customers. Id. (alleging that All American employees were told to limit the time customers were at the counter, and have

them wait in the lobby while their checks were processed so as to minimize the likelihood that they would see the posted fee signs); Id., ¶ 22 (alleging that All American employees were trained to use distraction techniques including providing consumers with non-relevant information and small gifts to keep them from having an opportunity to ask about fees). Because there has been no showing that all of the conduct on which the Bureau bases this enforcement action would be solely in the providence of state law, the Court finds Defendants have failed to show that they are entitled to judgment on the pleadings based on federalism concerns.

III. Conclusion

For the foregoing reasons:

IT IS THEREFORE ORDERED that the Motion of Defendants for Judgment on the Pleadings [Docket No. 144] is hereby denied.

IT IS FURTHER ORDERED that the Motion of Defendants for Hearing on their Motion for Judgment on the Pleadings [Docket No. 235] is hereby denied as unnecessary.

SO ORDERED this the 21st day of March, 2018.

s/ William H. Barbour, Jr.
UNITED STATES DISTRICT JUDGE

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

CONSUMER FINANCIAL PROTECTION BUREAU **PLAINTIFF**

VS. **CIVIL ACTION NO. 3:16-cv-356-WHB-JCG**

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

ORDER

On March 21, 2018, the Court entered an Opinion and Order by which the Motion of Defendants for Judgment on the Pleadings was denied. Defendants have now moved for an Order certifying the following two questions for interlocutory appeal.

> (1) Does the structure of the Consumer Financial Protection Bureau ("CFPB") violate Article II of the Constitution and the Constitution's separation of powers?
>
> (2) Do principles of fair notice and due process prevent the CFPB from enforcing the Consumer Financial Protection Act's prohibition against "unfair," "deceptive," and "abusive" acts, 12 U.S.C. § 5536(a)(1)(B), without defining those terms?

Interlocutory appeals are governed by 28 U.S.C. § 1292(b), which provides:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such 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, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may

> thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

As regards the question of whether the structure of the Consumer Financial Protection Bureau violates Article II of the Constitution and the separation of powers set forth therein, the Court finds the grounds for granting an interlocutory appeal are satisfied. First, whether the structure of the CFPB is unconstitutional based on its single-director status presents a controlling question of law that has not yet been decided by the United States Court of Appeals for the Fifth Circuit. Second, 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. See PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2017)(holding the CFPB was unconstitutionally structured)(opinion by J. Kavanagh, with separate concurring opinion by J. Randolph, and separate concurring in part, and dissenting in part opinion by J. Henderson); rev'd en banc, 881 F.3d 75 (D.C. Cir. 2018)(holding that the statutory provision by which the Director of the CFPB could be removed by the President only for cause was constitutional)(opinion and occurring opinions by Judges Pillard, Tatel, Millett, Wilkins, and Rogers; opinion

concurring with judgment by J. Griffith; dissenting opinions by Judges Henderson, Kavanaugh, and Randolph). Third, 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. A decision that the case cannot proceed at this time would avoid the anticipated two week jury trial, which, in turn, would prevent the parties' incurring addition litigation expenses and would prevent the expenditure of judicial resources.

As regards the question of whether the principles of fair notice and due process prevent the CFPB from enforcing the Consumer Financial Protection Act's prohibition against "unfair," "deceptive," and "abusive" acts without defining those terms, the Court finds the grounds for granting an interlocutory appeal have not been satisfied because there is no substantial ground for difference of opinion as to whether the terms "unfair," "deceptive," and/or "abusive" have been adequately defined by other federal statutes from which Congress borrowed when enacting the Consumer Financial Protection Act.

For these reasons:

IT IS THEREFORE ORDERED that the Motion of Defendants for Certification of Questions for Interlocutory Appeal [Docket No. 238] is hereby granted only as to the following question:

(1) Does the structure of the Consumer Financial

Protection Bureau ("CFPB") violate Article II of the Constitution and the Constitution's separation of powers?

IT IS FURTHER ORDERED that the Clerk of Court is directed to stay all proceedings in this case pending decision by the United States Court of Appeals for the Fifth Circuit as to whether it will consider the question herein certified, or until the interlocutory appeal is concluded, whichever is later.

SO ORDERED this the 27th day of March, 2018.

s/ William H. Barbour,
UNITED STATES DISTRICT JUDGE

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-90015

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff - Respondent

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E GRAY, Individually,

Defendants - Petitioners

A True Copy
Certified order issued Apr 24, 2018

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for Leave to Appeal
from an Interlocutory Order

Before DENNIS, SOUTHWICK, and HIGGINSON, Circuit Judges.

PER CURIAM:

The motion for leave to appeal from the interlocutory order of the United States District Court of the Southern District of Mississippi, entered on March 21, 2018, is GRANTED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

April 24, 2018

TO: All Counsel and Parties Listed Below

Misc. No. 18-90015 Consum Fincl Protc Bur v. All Amer Check Cashing, Inc., et al
USDC No. 3:16-CV-356

Enclosed is a copy of the court's order granting the motion(s) for leave to appeal. The case is transferred to the court's general docket. All future inquiries should refer to docket No. 18-60302.

Unless the district court has granted you leave to proceed on appeal in forma pauperis, the appellant(s) should immediately pay the court of appeals' $505.00 docketing fee to the clerk of the district court, and notify this office of your payment within 14 days from the date of this letter. If you do not, we will dismiss the appeal, see 5TH CIR. R. 42.3.

Counsel desiring to appear in this case must electronically file a "Form for Appearance of Counsel", naming each party you represent, within 14 days from the date of this letter. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, we will remove your name from the docket. Pro se parties do not need to file an appearance form.

Sincerely,

LYLE W. CAYCE, Clerk

Mary Stewart

By: _____
Mary C. Stewart, Deputy Clerk
504-310-7694

Mr. Jeremy Max Christiansen
Mr. Bentley Edd Conner
Mr. Dale Danks Jr.
Mr. Lawrence W. DeMille-Wagman
Mr. Christopher J. Deal
Mr. Joshua Seth Lipshutz
Mr. Theodore Olson
Mr. Lochlan Francis Shelfer
Ms. Helgard Clarice Walker
Enclosure(s)
cc:
Mr. Arthur S. Johnston III