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, Jackson
Honorable William H. Barbour, Jr., District Judge

UNOPPOSED MOTION OF PACIFIC LEGAL FOUNDATION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS ON REHEARING *EN BANC*

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UNOPPOSED MOTION TO FILE BRIEF *AMICUS CURIAE*

PACIFIC LEGAL FOUNDATION respectfully asks the Court for leave to file a brief as *amicus curiae* in support of Defendants-Appellants on rehearing *en banc*. The parties have consented to the filing of PLF's amicus brief. No party's counsel authored the brief in whole or in part, no party or party's counsel made a monetary contribution to fund the preparation or submission of the brief, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of the brief.

Amicus PLF is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF seeks leave to file because of its interest defending the constitutional principle of separation of powers in the arena of administrative law. This case raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its powers. And PLF of-

fers a discussion of the first principles on the connection between the people's liberty and government accountability. In particular, PLF explains the important interests at stake as this Court considers the appropriate remedy for Appellants' successful challenge here. *See Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) ("[O]ur Appointments Clause remedies are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise Appointments Clause challenges.") (citation omitted).

PACIFIC LEGAL FOUNDATION respectfully asks the Court to grant leave to file a brief as amicus curiae in support of Defendants-Appellants on rehearing en banc.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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DATED: August 7, 2020.

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SUPPLEMENTAL EN BANC BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS

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DISCLOSURE STATEMENT

No. 18-60302

Consumer Financial Protection Bureau

v.

All American Check Cashing, et al.

Pacific Legal Foundation (PLF) is a nonprofit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in PLF.

/s/ Oliver J. Dunford
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SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 18-60302

Consumer Financial Protection Bureau

v.

All American Check Cashing, et al.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that no persons or entities other than those in the parties' briefs have an interest in the outcome of this case.

/s/ Oliver J. Dunford
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Pacific Legal Foundation

INTEREST OF AMICUS[1]

Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judiciary as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020); *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (non-delegation doctrine); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018);

[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

Lucia v. SEC, 138 U.S. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

This case raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its powers. To assist the Court's review, PLF offers a discussion of the first principles on the connection between the people's liberty and government accountability.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has consistently reaffirmed the central judgment of the Framers that the "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). The "great difficulty" in framing such a government, "which is to be administered by men over men," is that "you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist No. 51*, at 349 (Madison) (J. Cooke ed., 1961).

Now that the Supreme Court has resolved the substantive issue here in Appellants' favor, *see Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020) (invalidating removal protection for Consumer Financial Protection Bureau (CFPB) Director as a structural constitutional violation), this Court must decide what happens when the government fails to control itself.

Appellants are, of course, entitled to relief. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) ("'[O]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his

case' is entitled to relief.") (quoting *Ryder v. United States*, 515 U.S. 177, 182–83 (1995)). Only a meaningful remedy will ensure that government remains accountable for violating the people's liberties. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring) ("Liberty requires accountability."). And it is the Judicial Branch's duty to police the Constitution's separation of powers and hold the political branches accountable for overreach. *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001); *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) ("[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'") (quoting *Pub. Citizen v. Dep't of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in the judgment)).

Here, there is no longer any dispute that the Consumer Financial Protection Bureau was, when it initiated its enforcement action against Appellants, unconstitutionally structured. *Seila Law*, 140 S. Ct. at 2192 (holding that "the structure of the CFPB violates the separation of powers"). And even though the CFPB itself acknowledges as much, *see* CFPB Br. for Resp. Supporting Vacatur, *Seila Law*, 140 S. Ct. 2183 (No. 19-7),

it asks the Court to paper over its constitutional violation and let the agency pick up right where it left off—prosecuting All American through an in-house, administrative-enforcement action.

The Court should instead vindicate Appellants' successful defense by reversing the district court's order denying Appellants' motion for judgment on the pleadings and ordering dismissal of the CFPB's enforcement action.

Otherwise—should the Court refuse to impose a meaningful remedy and give the government a pass—the Court will send a dangerous message that litigating structural constitutional challenges is not worth the fight. *Cf. Lucia*, 138 S. Ct. 2044 at 2055 n.5 ("[O]ur Appointments Clause remedies are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise Appointments Clause challenges.") (citing *Ryder*, 515 U.S. at 183).

Similarly, should the Court allow the CFPB to continue this action, the government will take the lesson that it may overstep its bounds, drag regulated parties through time-consuming and expensive enforcement

proceedings, and—when caught—simply "ratify" constitutionally deficient actions and fall back on the significant resources of the federal government.

The threat of do-over, punishment-through-process prosecutions—even after, as here, a finding that the initial action was unconstitutional and even when, as here, the statute of limitations has run—is only heightened by the continuous expansion of the administrative state, "which now wields vast power and touches almost every aspect of daily life." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010); *see also City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (observing that "the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies . . . [a]nd more are on the way") (citations omitted); *cf.* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 Notre Dame L. Rev. 1475, 1492 (2018) ("As should be evident with both the PCAOB and the CFPB, Congress presently has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries.").

If the Judicial Branch abdicates its obligation to police the political branches, the people's liberties will find little protection in the Constitution's mere "parchment barriers." *The Federalist No. 48*, at 333 (Madison).

ARGUMENT

I. MEANINGFUL RELIEF IS REQUIRED TO ENSURE THE RULE OF LAW AND PROTECT THE PEOPLE'S LIBERTIES

A. The Court is obligated to provide a meaningful remedy

In establishing the United States government, the sovereign people assigned to the three different "departments" "their respective powers" and "establish[ed] certain limits not to be transcended by those departments." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). But if "those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation[,]" then the "distinction, between a government with limited and unlimited powers, is abolished[.]" *Id.* at 176–77.

Further, it is the "very essence of judicial duty" to determine whether the Constitution or a conflicting legislative act governs the case to which they both apply. *Marbury*, 5 U.S. at 177. Since the Constitution is a "superior, paramount law," an ordinary "legislative act contrary to

the constitution *is not law*." *Id.* at 178 (emphasis added). And, therefore, "the constitution, and not such ordinary act, must govern the case." *Id.*

To conclude otherwise "would subvert the very foundation of all written constitutions." *Marbury*, 5 U.S. at 178. It would declare an act "entirely void" according to the principles and theory of our Constitution, but "completely obligatory" in practice. *Id.* It would "prescrib[e] limits" on the legislature but "declar[e] that those limits may be passed at pleasure." *Id.*

The American people have a right to a government of laws and not of men—a right that requires meaningful remedies for government overreach. Indeed, while the "government of the United States has been emphatically termed a government of laws, and not of men[,] [i]t will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Marbury*, 5 U.S. at 163 ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."); *cf. Kendall v. U.S. ex rel. Stokes*, 37 U.S. 524, 620 (1838) ("[T]his court may, and of right ought, for the sake of justice, to interpose in a summary way, to supply a remedy; where, for the want of a specific one,

there would otherwise be a failure of justice."); *Garfield v. U.S. ex rel. Goldsby*, 211 U.S. 249, 262 (1908) ("There is no place in our constitutional system for the exercise of arbitrary power, and, if [an official] has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.").

B. The Court should not ignore the CFPB's still-extraordinary powers

The Constitution's division of power in "three distinct and separate departments . . . is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital"—to "preclude a commingling of these essentially different powers of government in the same hands." *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933) (citation omitted).

The Supreme Court, of course, invalidated the CFPB Director's removal protection. *Seila Law*, 140 S. Ct. 2183. But because this provision was the only substantive part of Dodd-Frank at issue, the rest of the agency and the Director's extraordinary executive, legislative, and judicial powers remain in full force. A brief review of those powers suggests the risks of refusing to order a meaningful remedy. *Cf. New York v. United States*, 505 U.S. 144, 187 (1992) (The Constitution "protects us

from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.").

The CFPB is charged with enforcing a large body of consumer financial-protection statutes previously administered by seven different federal agencies. It is authorized to issue binding regulations defining "unfair, deceptive, or abusive" acts or practices. 12 U.S.C. §§ 5531(a)–(b), 5536(a)(1)(B), 5581(a)(1)(A), (b). And it was given vast discretion to determine how it may enact these generally applicable rules. It is not limited to the formal rulemaking process, and it may establish new policies—and, in the process, punish previously lawful conduct—through enforcement actions. *See id.* § 5492(a)(10).

The CFPB was also given "potent" enforcement powers. *Seila Law*, 140 S. Ct. at 2193. It may conduct investigations, issue subpoenas and civil-investigative demands, and initiate enforcement actions either—at its sole discretion—through in-house administrative hearings or in federal court, 12 U.S.C. §§ 5562, 5564(a), (f), and it may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to

$1,000,000 (inflation adjusted) for each day a violation occurs, *id.* §§ 5565(a), (c)(2); 12 C.F.R. § 1083.1(a), Table (2019).

When the CFPB proceeds in-house, it exercises "extraordinary adjudicatory authority." *Seila Law*, 140 S. Ct. at 2193. The in-house hearing officer may issue subpoenas, order depositions, and resolve any motions filed by the parties. *Id.* (citing 12 C.F.R. § 1081.104(b)). The hearing officer issues a "recommended decision," which is then considered by the CFPB Director, who "issue[s] a final decision and order." 12 C.F.R. §§ 1081.400(d), 1081.402(b); *see also id.* § 1081.405. The CFPB—*i.e.*, the Director—is empowered to "to grant any appropriate legal or equitable relief." 12 U.S.C. § 5565(a)(1).

Judicial review of a CFPB administrative-enforcement action is allowed only after the protracted administrative processes discussed above, 12 U.S.C. § 5563(b)(4); 12 C.F.R. § 1081.402(c), and the judiciary's independence is burdened by a deferential standard of review of both the law and the facts. Courts are limited to determining whether the CFPB proceedings were—aside from the lack of a neutral, Article III judge—"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance

with law" or, *inter alia*, "unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2)(A), (E).

In short, the CFPB—under and through its Director, and insulated from the constitutional branches[2]—may exercise all three powers of government, as it alone deems "necessary or appropriate to enable the [Bureau] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1). As a result, it is "one of the most powerful and publicly unaccountable agencies in American history." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 875 (2013).

And while Congress and the Executive supervise the acts of administrative agents, "under Article III, Congress established courts to adjudicate cases and controversies as to claims of infringement of individual

[2] To further protect the CFPB's "independence," Dodd-Frank also placed the agency beyond Congress's appropriations power. Instead, the CFPB is funded by the Federal Reserve, another "independent" agency that itself receives funding outside of the appropriations process. *Seila Law*, 140 S. Ct. at 2193–94. Accordingly, the "Director receives over $500 million per year to fund the agency's chosen priorities." *Id.* at 2204. These funding decisions are unreviewable. *See* 12 U.S.C. § 5497(a)(2)(C) ("[T]he funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the [House and Senate] Committees on Appropriations . . . .").

rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power." *Stark v. Wickard*, 321 U.S. 288, 310 (1944).

The CFPB has already exceeded its constitutional authority. If not made to suffer the consequences, the agency—and Congress, in considering future legislation—will have little reason not to push the constitutional envelope. *See* Hickman, 93 Notre Dame L. Rev. at 1492.

II. Giving the government a do-over is a meaningless remedy and would create dangerous incentives

Since this action began, All American has been subject to an enforcement action carried out by an unconstitutionally structured agency. In other words, All American has been subject to an unconstitutional enforcement action. As a result, the CFPB's "separation-of-powers violation [has] create[d] a 'here-and-now' injury" that must be remedied by the Court. *Free Enter. Fund*, 561 U.S. at 513 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).[3]

"*Meaningful* remedies should provide wronged parties with incentives to enforce their interests because otherwise the underlying norm

[3] As noted below, the purported "ratifications" of the original enforcement action are invalid. Therefore, All American's injury continues.

has no traction in the real world." Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014) (emphasis added; citations omitted). As Professor Barnett notes, courts unfortunately in these structural-violation cases "rarely even consider remedial alternatives or the normative goals," such as deterrence and incentive to litigate, "that they have recognized in other settings as critical for fashioning proper remedies." *Id.* at 487 (footnote omitted).

The Supreme Court's separation-of-powers cases, however, *require* courts to consider these normative goals. *See Lucia*, 138 S. Ct. at 2055 n.5 (explaining that Appointments Clause remedies should preserve the separation of powers and "create '[]incentive[s] to raise Appointments Clause challenges'") (alterations in original) (quoting *Ryder*, 515 U.S. at 183); Barnett, 92 N.C. L. Rev. at 509 ("If the right or norm's value is lower than the cost of asserting the claim or if the remedy does little to advance the litigant's related interests, the rational litigant will not bother to assert that interest.").

In a closely analogous case out of the D.C. Circuit, defendants successfully defeated an enforcement action on the ground that the FEC was

unconstitutionally structured. *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (*NRA I*), *aff'd*, 513 U.S. 88 (1994) (*NRA II*). In determining the remedy, the court found "no theory that would permit [the court] to declare the Commission's structure unconstitutional *without providing relief to the appellants in this case*." *Id.* (emphasis added). The only relief available, therefore, was dismissal. *Id.*; *see also CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 785 (S.D.N.Y. 2018) (finding that the CFPB "lacks authority to bring this enforcement action because its composition violates the Constitution's separation of powers," and dismissing CFPB's claims) (quoting *NRA I*, 6 F.3d at 822); *cf. CFPB v. Gordon*, 819 F.3d 1179, 1198 (9th Cir. 2016) (Ikuta, J., dissenting) ("Because the [CFPB] here lacked executive power and therefore lacked Article III standing, the district court was bound to dismiss the action.").[4]

Finally, without a meaningful remedy, not only will regulated parties lack the incentive to bring structural claims in the future, but also, the prevailing regulated parties will often be "place[d] . . . in a *worse position* than had they not brought their challenges at all." Kent Barnett,

[4] In *NRA I*, the court distinguished *Buckley v. Valeo,* 424 U.S. 1 (1976), in which the Court relied on the *de facto* officer doctrine to validate FEC's past actions, because plaintiffs there sought purely prospective relief. *See NRA I*, 6 F.3d at 828.

Standing Up For (and To) Separation of Powers, 91 Ind. L.J. 665, 668 (2016) (footnote omitted).

All American runs just this risk. Having successfully challenged the validity of the CFPB's enforcement action—and despite spending over four years in litigation and no doubt incurring significant attorney's fees—the agency proposes that it can simply ratify the initiation of the enforcement action and continue to prosecute All American in an in-house enforcement proceeding.[5]

As a result, prospective relief (*i.e.*, an order requiring future enforcement actions to be initiated only by a constitutionally structured agency) would not only fail to provide All American a remedy; it would put All American in a worse position than if it had simply buckled under

[5] And ratification cannot save the CFPB's actions. Under well-established law, one may not ratify an *ultra vires* act unless one had the authority to execute the initial act *both* (1) when the act was done *and* (2) when the act was ratified. *NRA II*, 513 U.S. at 98 ("[I]t is essential that the party ratifying should be able not merely to do the act ratified at the time the act was done, *but also at the time the ratification was made*.") (quoting *Cook v. Tullis*, 85 U.S. (18 Wall.) 332, 338 (1874)); *cf. Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) (holding that ratification cannot give legal significance to an act that was a nullity from the start).

Here, as Appellants explain, the CFPB Director's constitutional defect when this action was begun forbids the Director from later ratifying the same. *NRA II*, 513 U.S. at 98. Further, Acting Director Mulvaney and Director Kraninger's ratifications were ineffective because they lacked the power to initiate the enforcement action at the time of the ratification, *see id.*, as the statute of limitations had run by then. *See* Appellants' Supp. En Banc Br. 38–45.

and accepted the jurisdiction of an unconstitutionally structured agency. *Cf. John Doe Co. v. CFPB*, 849 F.3d 1129, 1137 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from decision that affirmed denial of company's motion for preliminary injunction) ("The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency.").

CONCLUSION

This Court should reverse the district court's order denying All American's motion for judgment on the pleadings and order the dismissal of CFPB's enforcement action against All American.

DATED: August 6, 2020.

Respectfully submitted,

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I hereby certify that on August 6, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

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