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WLF Cert Petition Invites Supreme Court to Rein in Two Separate Constitutional Violations by the CFPB

(Gordon v. Consumer Financial Protection Bureau)

“Whether the Supreme Court opts to review *Gordon v. CFPB* will have major ramifications for all federal agencies, those whom they regulate, and the survival of the Constitution’s constraints on the President’s appointment power.”

—Mark Chenoweth, WLF General Counsel

WASHINGTON, DC—Washington Legal Foundation today filed a reply brief on behalf of its client, Chance Gordon, in the U.S. Supreme Court. WLF’s brief in *Gordon v. Consumer Financial Protection Bureau* refutes the Consumer Financial Protection Bureau’s (CFPB) much-delayed brief in opposition filed on April 24. It invites the Court to review and reverse a Ninth Circuit decision that condones a federal agency’s ratification of an unauthorized enforcement action. The Justices will now receive all of the briefs and consider the petition later this month.

This case arises from the recess appointment of Richard Cordray as Director of CFPB in January 2012. CFPB concedes that Cordray’s appointment was invalid, which means that he lacked authority to act on behalf of the federal government for 18 months until renominated in 2013 and confirmed by the Senate that July. During that time CFPB (at Cordray’s direction) brought a civil enforcement action against a California attorney, Chance Gordon, for alleged violations of consumer protection laws. The Bureau insists that Cordray can retroactively ratify that lawsuit.

As WLF’s reply brief points out, CFPB’s position would upend the separation of powers. Under Article II of the Constitution, only Officers of the United States may bring litigation on behalf of the Executive Branch. Since Cordray’s appointment was defective, the new Bureau had no such officers and thus never received the executive authority it needed to bring this lawsuit. Moreover, the Consumer Financial Protection Act contained an express statutory prohibition against filing enforcement actions of this sort until the Senate confirmed CFPB’s Director. As the brief puts it:

CFPB is not simply attempting to ratify an exercise of power by an official whose appointment ... was invalid. It is also attempting to ratify an executive action that Congress expressly provided could not be done when undertaken.

WLF’s brief also debunks the agency’s argument for Article III standing. It points out that CFPB’s reply does not challenge the Supreme Court’s recognition that a federal court does not have jurisdiction in cases where the government lacks an authorized representative. Without a valid Officer of the United States in place at CFPB *at the time the suit was filed*, WLF argues that CFPB had no standing to bring a civil enforcement action in federal court.

Celebrating its 40th year, WLF is America’s premier public-interest law firm and policy center advocating for free-market principles, limited government, individual liberty, and the rule of law.