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WLF Files Cert Petition Seeking Supreme Court Review of Decision on CFPB's Ability to Ratify Past Invalid Actions

(Gordon v. Consumer Financial Protection Bureau)

“If the Ninth Circuit panel’s expansive ratification theory is upheld, future Presidents would receive a ‘free pass’ to install executive officers without Senate confirmation, knowing that a perfunctory ‘ratification’ by some future, validly appointed official could cure any defects.”—Mark Chenoweth, WLF General Counsel

WASHINGTON, DC—Washington Legal Foundation today filed a petition with the U.S. Supreme Court on behalf of its client, Chance Gordon, seeking a *writ of certiorari* in *Gordon v. Consumer Financial Protection Bureau* (CFPB). It asks the Court to review a U.S. Court of Appeals for the Ninth Circuit decision that created a circuit split with two other courts of appeal on when and how a federal agency may ratify prior conduct that was not allowed at the time the agency did it. WLF encourages the Court to strike down CFPB’s attempted ratification in this case.

Due to Richard Cordray’s invalid January 2012 recess appointment as Director of CFPB, he lacked authority to act on behalf of the federal government for the next 18 months until he was renominated and his nomination was confirmed by the Senate in July 2013. During the intervening period, CFPB (at Cordray’s direction) sought and obtained a civil judgment against a California attorney, Chance Gordon, for alleged violations of consumer protection laws.

The Ninth Circuit rejected Gordon’s claims that Cordray and CFPB lacked authority to prosecute the enforcement action against him, concluding that Cordray’s *post hoc*, four-sentence approval in August 2013 of every act he took during his invalid tenure effectively “ratified” all those prior actions. Judge Susan Ikuta dissented, arguing that in light of Cordray’s invalid appointment, CFPB never had standing to file suit against Gordon.

WLF’s petition argues that the ruling below conflicts with decisions from both the Supreme Court and other appeals courts regarding the authority of federal officials to ratify actions that were unauthorized when undertaken. In particular, the petition contends that courts have never previously permitted ratification of court judgments resulting from unauthorized enforcement actions. Even when ratification has been approved, courts have required *de novo*, item-by-item ratification, not the blanket ratification that occurred here. Second, the petition asserts that the courts below should have dismissed the case for lack of subject-matter jurisdiction. Because no validly appointed federal officer approved filing the suit, CFPB lacked standing to prosecute it.

Upon filing its petition, WLF issued the below statement by General Counsel Mark Chenoweth: “If the Ninth Circuit panel’s expansive ratification theory is upheld, future Presidents would receive a ‘free pass’ to install executive officers without Senate confirmation, knowing that a perfunctory ‘ratification’ by some future, validly appointed official could cure any defects. But that’s not the way the Constitution says recess appointments are supposed to work.”

WLF is a free-market, public-interest law firm and policy center that regularly litigates in federal court to ensure that administrative agencies adhere to the rule of law.

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