IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 18-60302

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following persons, in addition to those listed in the Defendants-Appellants' Certificate of Interested Persons, are "interested persons" within the meaning of Fifth Circuit Rule 28.2.1. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amicus Curiae

The Cato Institute. The Cato Institute is a not-for-profit 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 Cato.

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Dated: July 13, 2018

s/ Marc J. Gottridge
Marc J. Gottridge

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STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Cato Institute ("Cato"), established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.[1] Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's financial-regulatory systems and to promote alternatives more conducive to a stable, flourishing, and free society. Toward those ends, Cato both publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

Cato has devoted considerable attention to the CFPB's structure and operations. *See, e.g.*, Cato Editors, *What the CFPB Should Do Differently*, CATO INST. (Apr. 10, 2018); Diego Zuluaga, *Watchdog Agency Must Stop Being Foe of Consumer Finance*, CATO INST. (Apr. 9, 2018); Ilya Shapiro, *CFPB Neither Protects Consumers Nor Is a Constitutional Board*, CATO INST. (Jan. 31, 2018); Thaya B. Knight, *The World of Financial Regulation Gets Weird…Again*, CATO INST. (Dec. 1, 2017); Thaya B. Knight & Caleb O. Brown, *With Cordray's*

[1] No counsel for a party authored any part of this brief, and no person other than the amicus curiae, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

Departure, can CFPB Be Scrapped?, CATO INST. DAILY PODCAST (Nov. 16, 2017).[2]

Cato has also filed two briefs addressing the structure of the CFPB and the very constitutional issue presented by this case. First, Cato filed an *amicus* brief in the U.S. Supreme Court in support of the petition for a writ of certiorari in *Gordon v. CFPB*, No. 16-673 (cert. denied June 26, 2017). Second, Cato submitted a merits *amicus* brief in the U.S. Court of Appeals for the D.C. Circuit on rehearing *en banc* in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the decision on which the court below exclusively relied in deciding the issue that is the subject of this appeal.

This case, like *PHH Corp. v. CFPB* and others addressing the structure of

[2] *See also* Thaya B. Knight, *Give the People What They Want—without Arbitration Clause Restrictions*, CATO INST. (Oct. 25, 2017); Thaya B. Knight, *New Poll On Dodd-Frank and CFPB Tells Us Poll's Creators Like Dodd-Frank and the CFPB*, CATO INST. (July 20, 2017); Thaya B. Knight, *CFPB's Theory of Consumer Protection: Less Choice, More Cost*, CATO INST. (July 13, 2017); Thaya B. Knight, *DOJ Enters the Fray . . . Against the CFPB*, CATO INST. (Mar. 20, 2017); Thaya B. Knight & Ilya Shapiro, *Please Stop the Tyranny*, CATO INST. (Mar. 10, 2017); Thaya B. Knight, *The Road to Cordray's Removal Just Got Longer*, CATO INST. (Feb. 17, 2017); Thaya B. Knight, *The Long Path to Director Cordray's Removal*, CATO INST. (Nov. 21, 2016); Thaya B. Knight, *Yes, Your Honor, the CFPB Is Indeed Unconstitutional*, CATO INST. (Oct. 12, 2016); Thaya B. Knight, *The CFPB Should Learn That No Means No*, CATO INST. (Oct. 11, 2016); Thaya B. Knight, *Marketplace Lending: Regulation Ahead?*, CATO INST. (Mar. 14, 2016); Mark A. Calabria, *The CFPB Gets One Right?*, CATO INST. (Sep. 14, 2012); Mark A. Calabria, *The CFPB: Problem or Solution?*, MORTGAGE ORB (Aug. 17, 2012); *Hr'g on Examining the Consumer Financial Protection Bureau's Mass Data Collection Program Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 114th Cong. (Dec. 16, 2015) (testimony of Mark A. Calabria, Ph.D., Director, Financial Regulation Studies, Cato Institute, discussing Fourth Amendment implications for CFPB's data-collection activities).

the CFPB, is of interest to Cato because it involves significant issues relating to the constitutional separation of powers, the vitality of Article II of the U.S. Constitution, and the threat posed to individual liberty by the creation of an "independent agency," exercising substantial executive powers, headed by a single person not subject to any meaningful checks or balances. Cato agrees with Defendants-Appellants that the CFPB's structure violates the separation of powers and that the CFPB, in unconstitutionally exercising its power, has violated the due process rights of Defendants-Appellants and others which it regulates.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional separation of powers does not demarcate the boundaries between the three branches of the federal government as an academic exercise in applied political theory, but rather to protect individual liberty. Article II, which vests all executive power in a president accountable to the electorate, likewise safeguards liberty by ensuring that those who execute the laws are, directly or indirectly, responsible to the people. The district court ignored all this. It ruled that the CFPB's structure—which authorizes a single director, sheltered from removal by the president except for cause, to exercise immense power over the entire sphere of consumer finance without accountability to either of the elected branches—passed constitutional muster, based solely on a recent *en banc* decision by the U.S. Court of Appeals for the D.C. Circuit. But the *en banc* majority's

opinion there, issued over two persuasive dissents explaining precisely how the CFPB director's unchecked power violates the separation of powers and thereby threatens individual liberty, is wrong and should not be followed.

The Dodd-Frank Act's grant of concentrated and massive power over the whole consumer finance industry to the CFPB's single director, without subjecting that director to presidential control, is unconstitutional. The director is in fact answerable to no one. Although he exercises enormous executive powers—not least the power to pursue enforcement proceedings such as the one giving rise to this appeal—he is not subject to any meaningful executive-branch oversight. He is, moreover, insulated from Congress's power of the purse or any real legislative oversight. And the solitary head of the CFPB, unlike commissioners of other "independent agencies," cannot even be held in check by fellow officers of his own agency. The structure of the CFPB is unique, and it violates the Constitution.

The record of this case illustrates how the director uses his unchecked power, unprecedented in the long history of federal "independent agencies," to deprive entities regulated by the CFPB of their liberty without due process. The CFPB initiated this enforcement action, which carries the potential to destroy the business of All American Check Cashing and Mid-State Finance (collectively, "All American"), on the basis of the CFPB's allegations that All American engaged in "unfair," "deceptive," and "abusive" practices. But the CFPB has failed to define

these vague "standards," despite legislative authorization to do just that. In the novel structure created by the Dodd-Frank Act, the director alone decides what conduct he disapproves of and seeks to punish—a core executive function—without being accountable to the president or Congress, who are constitutionally answerable to the people. The director exercises that power, and many others, without even the modicum of balance provided in other "independent agencies" by fellow commissioners; unlike the co-heads of such agencies, the director rules alone.

The fundamental constitutional flaws in the CFPB's formation relate to the agency's very structure. Absent a decision invalidating that structure, the CFPB will continue to violate the Constitution in other enforcement proceedings—both those (such as this case) brought in federal district court and those brought before administrative law judges in the CFPB's "in house" court—and in the CFPB's supervisory actions and rulemakings.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS GENERALLY, AND ARTICLE II IN PARTICULAR, SERVE AS IMPORTANT SAFEGUARDS OF INDIVIDUAL LIBERTY.

The centrality of the separation of powers to the Constitution's fundamental purpose of securing and protecting individual liberty is axiomatic. "The Constitution sought to divide the delegated powers of the new Federal Government

into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (brackets in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment)). In other words, "the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)); *see also Bowsher*, 478 U.S. at 722 ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty."); *PHH Corp. v. CFPB*, 881 F.3d 75, 164 (D.C. Cir. 2018) (*en banc*) (Kavanaugh, J. dissenting) ("To prevent tyranny and protect individual liberty, the framers of the Constitution separated the legislative, executive, and judicial powers of the new national government.").

Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. It confers on the

president 'the general administrative control of those executing the laws.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)). "It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's phrase." *Id.* at 493 (emphasis in original). By granting the president these powers and making him accountable to the electorate, the Constitution protects individual liberty: as the Supreme Court explained, "unlike [in] parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people." *Bowsher*, 478 U.S. at 722 (citing U.S. Const. art. II, § 4). The Framers thus "created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" *Free Enter. Fund*, 561 U.S. at 501 (brackets in original) (quoting The Federalist No. 51, at 349 (James Madison)); *see also PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting) ("To further safeguard liberty, the Framers insisted on accountability for the exercise of executive power. The Framers lodged full responsibility for executive power in a President of the United States, who is elected by and accountable to the people.").

The district court entirely overlooked these fundamental principles of our system of government. Instead, its brief treatment of the separation powers issue accepted uncritically the *en banc* majority's opinion in *PHH Corp*. *See*

ROA.7209-10.[3] And that opinion, in turn, barely paid lip service to the way the separation of powers and Article II operate to safeguard individual liberty, while misconstruing the argument made by PHH and its *amici curiae*, including Cato, as advocating a theory of "[f]reestanding liberty." *PHH Corp*., 881 F.3d at 105; *see also id*. at 106 (belittling PHH's argument as an "unmoored liberty analysis"). The *PHH Corp*. majority missed the point: the director's structural unaccountability threatens the liberty of his regulatory targets. As Judge Henderson explained in her dissent, our system is based on "government by consent of the governed," "[b]ut consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches. Such is the case with the Consumer Financial Protection Bureau." *PHH Corp*., 881 F.3d at 137 (Henderson, J., dissenting) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 524, 641 (1943)).

The *PHH Corp*. majority, moreover, was excessively deferential to Congress's creation of the CFPB, averring that "history teaches that financial regulators are exemplars of appropriate and necessary independence," *id.* at 85; *see*

[3] The only other district court to address the constitutionality of the CFPB's structure after the *en banc* decision in *PHH Corp*. adopted the reasoning of Judge Kavanaugh's dissent and rejected that of the majority opinion. *See CFPB v. RD Legal Funding, LLC*, No. 17-cv-890 (LAP), 2018 WL 3094916 (S.D.N.Y. June 21, 2018) (holding that the CFPB's structure violates the separation of powers and dismissing all of its claims, which were brought under the same statutory provision as the claims against Defendants-Appellants here).

also id. at 91-93, and relying heavily on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld Congress's conferral of good-cause tenure on the five commissioners of the Federal Trade Commission. *Id*. at 94. But application of separation of powers jurisprudence to "independent agencies" does not depend on which industry an agency is regulating. And as Judge Kavanaugh pointed out in his *PHH Corp*. dissent, "[n]either *Humphrey's Executor* nor any later case granted Congress a free pass, without boundaries, to create independent agencies that depart from history and threaten individual liberty." *Id. at* 193 (Kavanaugh, J., dissenting).[4]

II. THE CFPB DIRECTOR EXERCISES ENORMOUS UNILATERAL POWER, INCLUDING SIGNIFICANT EXECUTIVE POWER, WITHOUT ANY EFFECTIVE CHECK.

A. The Director Wields Unprecedented Power, Checked by No One.

"[T]he Director of the CFPB wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp.*, 881

[4] It is immaterial that a president acquiesced in the CFPB's unconstitutional structure by signing the Dodd-Frank Act, Title X of which created the CFPB. As Chief Justice Roberts explained in *Free Enterprise Fund*, 561 U.S. at 497: "Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, *see Freytag v. Comm'r*, 501 U.S. 868, 879-80 (1991), nor on whether 'the encroached-upon branch approves the encroachment,' *New York v. United States*, 505 U.S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending they are not his own." Indeed, the current administration has made clear that it does not endorse the current structure of the CFPB. *See* Br. for the United States as Amicus Curiae, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. filed Mar. 17, 2017).

F.3d at 165. The director "unilaterally implements and enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices." *Id.* He *alone* makes all decisions about "what rules to issue . . . how to enforce, when to enforce, and against whom to enforce the law . . . [and] what sanctions and penalties to impose on violators of the law." *Id.*; *see also id.* at 137-138 (Henderson, J., dissenting) ("[The CFPB's] Director has immense power to define elastic concepts of unfairness, deception and abuse in an array of consumer contexts; to enforce his rules in administrative proceedings overseen by employees he appoints; to adjudicate such actions himself if he chooses; and to decide what penalties fit the violation."). And the person brandishing this unprecedented power—far exceeding the authority entrusted to any director or commissioner of any other "independent agency"—is "unaccountable to the President," *id.* at 166 (Kavanaugh, J., dissenting), who can remove the director only "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). Moreover, the director's term is five years, *id.* § 5491(c)(1)—longer than that of the president himself—and the director can remain in office indefinitely after that term has expired, pending confirmation of a successor. *Id.* § 5491(c)(2).

The CFPB and its director, moreover, are immunized from Congress's power of the purse. The Bureau does not rely on legislative appropriations to fund

itself. Instead, the director is permitted to unilaterally tap from the Federal Reserve System an amount equal to 12% of the central bank's annual expenses—over $600 million per year each year since the CFPB's inception—without congressional review. *See* pp. 20-21 *infra*.

Although the CFPB was established as an "independent bureau" within the Federal Reserve System, 12 U.S.C. § 5491(a), it is not in any way accountable to the Federal Reserve. The Dodd-Frank Act denied the Federal Reserve—itself an independent agency—any power to oversee the CFPB. Indeed, the statute specifies that "[n]o rule or order of the Bureau shall be subject to approval or review by the Board of Governors." *Id.* § 5492(c)(3). The Federal Reserve may not deny the CFPB's request for transfers of funds up to the 12% cap. *See id.* § 5497(a)(1) ("Each year . . . the Board of Governors *shall* transfer to the Bureau . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau.") (emphasis added). Nor does the Federal Reserve have the power to intervene in CFPB enforcement actions, appoint or remove any officer or employee of the CFPB, or to approve, review, delay, or prohibit any CFPB rule or order. *See id.* §§ 5492(c)(2)(A)-(C), (c)(3).

The director, unlike commissioners in multi-member "independent agencies" (like the SEC or FCC) cannot even be held in check by peers or equals in the Bureau. He has none. "Never before has an independent agency exercising

substantial executive authority been headed by just one person." *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting). The director is, uniquely in our government, accountable to literally no one.

B. The Dodd-Frank Act Unconstitutionally Grants the CFPB and Its Sole Director Substantial Executive Powers Without Any Presidential Oversight.

A statute that grants an agency "executive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund*, 561 U.S. at 498. The Dodd-Frank Act is just such a statute, and its "restrictions" on the president's ability to effectively oversee the Bureau "are incompatible with the Constitution's separation of powers." *Id.*

Dodd-Frank bestows on the director immense executive authority. As the sole head of the CFPB, the director is empowered to "establish the general policies of the Bureau with respect to all executive and administrative functions." 12 U.S.C. § 5492(a). He is also authorized (among much else) to "implement[] the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions," *id.* § 5492(a)(10), and to "coordinate and oversee the operation of all administrative, enforcement and research activities of the Bureau." *Id.* § 5492(a)(10). Congress vested in the CFPB, and therefore in its single director, exclusive jurisdiction to administer

nineteen existing "Federal consumer financial law[s]" previously administered by other agencies, *id.* §§ 5481(12), (14), 5511,[5] and empowered the new agency to bring an innovative type of enforcement action—typified by this case—targeting allegedly "unfair, deceptive, or abusive act[s] or practice[s] under Federal law," *id.* § 5531(a).

This novel power is particularly broad because of the vagueness of the statutory terms. The first director of the CFPB himself acknowledged that "abusive" is "a little bit of a puzzle because it is a new term" and that the CFPB "determined that that is going to have to be a facts and circumstances issue." *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Public & Private Programs*, 112th Cong. 112-107, at 69 (2012). The meaning of "unfair" is equally unclear and subjective. Although Congress authorized the CFPB to "prescribe rules" that "identify" just which "acts or practices" fall within the categories of "abusive" or "unfair," 12 U.S.C. § 5531(b), the director ignored that provision. Instead of prescribing such rules, he chose simply to commence enforcement actions, such as the case at bar,

[5] The Dodd-Frank Act transferred to the CFPB "'consumer financial protection functions' previously exercised by the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Department of Housing and Urban Development, and the Federal Trade Commission." *PHH Corp.*, 881 F.3d at 171 (Kavanaugh, J., dissenting) (quoting 12 U.S.C. § 5581(b)).

alleging violations of these undefined terms whenever the "facts and circumstances" moved him.

Contrary to the *PHH Corp*. majority, the functions of the CFPB and its sole director—in particular, deciding which enforcement proceedings to bring under these broad provisions and then prosecuting them—are precisely the type of "core executive functions" that are typically "entrusted" to "Cabinet officer[s]" or others who "directly answer to the President's will." *PHH Corp*., 881 F.3d at 84. "[D]etermin[ing] the policy and enforc[ing] the laws of the United States" are executive functions, *Free Enter. Fund*, 561 U.S. at 484; "start[ing], stop[ping], or alter[ing] individual . . . investigations" are "executive activities typically carried out by officials within the Executive Branch." *Id*. at 505. That is precisely what the Departments of Justice,[6] Treasury,[7] Labor[8] and others do on a daily basis. And it is just what the CFPB has done in this case, among many others.[9] Yet despite

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[6] *See, e.g.*, U.S. Department of Justice, *About DOJ*, available at https://www.justice.gov/about (last visited July 9, 2018) ("[T]he Department of Justice has evolved into the world's largest law office and the chief enforcer of federal laws").

[7] *See, e.g.*, U.S. Department of Treasury, *Civil Penalties and Enforcement Information*, available at https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last visited July 9, 2018).

[8] *See, e.g.*, U.S. Department of Labor, *Data Enforcement*, available at https://enforcedata.dol.gov/homePage.php (last visited July 9, 2018).

[9] *See, e.g.*, CFPB, *Enforcement Actions*, https://www.consumerfinance.gov/policy-compliance/enforcement/actions/ (last visited July 9, 2018).

the director's extensive executive powers, under Dodd-Frank the president "may not supervise, direct, or remove at will the CFPB Director." *PHH Corp.*, 881 F.3d at 172 (Kavanaugh, J., dissenting).

That structure is unconstitutional. In *Free Enterprise Fund*, its most recent decision considering the president's removal power, the Supreme Court reaffirmed that "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws." 561 U.S. at 499. The Court there held unconstitutional the Sarbanes-Oxley Act's innovation of creating a board (the PCAOB) to which it granted "expansive powers to govern [the] entire industry" of public company accounting, while authorizing the SEC, rather than the president, to remove the PCAOB's five members. *Id*. at 485-86. This structure, providing for no "oversight by an elected President," was unconstitutional; the delegation of such authority to unaccountable "functionaries" could not be justified on the basis of "[c]onvenience and efficiency" or the supposed expertise of the bureaucrats. *Id*. at 498-99 (brackets in original) (internal quotation marks omitted).

In *Free Enterprise Fund*, the Court applied the lesson of "[t]he landmark case of *Myers v. United States*," *id*. at 492, which held that "under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Myers*, 272 U.S. at 60. The core principle underlying both *Free Enterprise Fund*

and *Myers* is that the president—who is constitutionally accountable to the people—cannot "'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484 (quoting U.S. Const. art. II, § 3). That principle now requires that the Dodd-Frank provision placing the Director outside of presidential oversight be struck down.

To be sure, there are two post-*Myers* cases in which the Supreme Court upheld, in "certain circumstances," "limited restrictions on the President's removal powers." *Id.* at 483, 495. But neither of those exceptions to the *Myers* rule—*Humphrey's Executor* and *Morrison v. Olson*, 487 U.S. 654 (1988)—can fairly be stretched to salvage the anomalous position of the CFPB Director.

"In *Humphrey's Executor*, the Court held that '*Myers* did not prevent Congress from conferring good-cause tenure'" on the five commissioners of the FTC. *Free Enter. Fund*, 561 U.S. at 493. Yet in Dodd-Frank, Congress has granted the sole CFPB director far more executive power than the New Deal-era FTC had. In *Humphrey's Executor*, the Supreme Court emphasized that the FTC's "duties [were] neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id*. at 624; *see also PHH Corp*., 881 F.3d at 142-44, 146-48 (Henderson, J., dissenting). That is not true of the CFPB director, who exercises enormous executive power. *See* pp. 12-15, *supra*. And the sole CFPB director by

definition has more power than any one FTC commissioner possesses. As only one member of five, no FTC commissioner can exercise any part of that agency's power unilaterally, yet that is precisely what the CFPB director does, with no colleagues to provide any check on his power.[10] As Judge Kavanaugh observed in his *PHH Corp.* dissent, "[i]n the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head. *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). "[It] thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.*[11] That "substitute check" is entirely lacking in the case of the sole CFPB director.[12]

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[10] The five-member structure is common to a number of "independent agencies." *See, e.g.*, 15 U.S.C. § 78d(a) (establishing five-member SEC); *id.* § 41 (establishing the five-member FTC); *id.* § 7211(e)(1) (establishing five-member PCAOB); 7 U.S.C. § 2(a)(1)(D)(2)(A) (establishing five-member CFTC). The *en banc* majority in *PHH Corp.* suggested that the president's power over the single CFPB director is enhanced because the president can change the face of the CFPB with a single act. *PHH Corp.*, 881 F.3d at 98. The contrary is true: "the single-Director CFPB structure diminishes the President's power more than the traditional multi-member agency does," because the president cannot "designate a new CFPB Director *at the beginning of the Presidency*," although presidents then routinely name new chairs of the FTC and other multi-member "independent agencies." *PHH Corp.*, 881 F.3d at 192 (Kavanaugh, J., dissenting) (emphasis in original); *see also id.* at 167. Indeed, given the fixed five year term of a CFPB director and the for-cause limitation on his removal, "the President may be stuck for years with a CFPB Director who was appointed by the prior President and who vehemently opposes the current President's agenda." *Id.*

[11] Although this "substitute check" significantly distinguishes the CFPB director from the FTC commissioner at issue in *Humphrey's Executor*, it is still not a *constitutionally sufficient* check, because the members of a multi-member commission—unlike the president and Congress—are not accountable to the people. The viability of *Humphrey's Executor* also is subject to question in light of the Supreme Court's more recent decision in *Free Enterprise Fund*. *See PHH Corp.*, 881 F.3d at 194 n.18 (Kavanaugh, J., dissenting); *In re Aiken Cnty.*, 645 F.3d 428, 446 (D.C.

What is more, unlike the FTC or other traditionally structured independent agencies that are subject to the appropriations process, *id.*., 881 F.3d at 146 (Henderson, J., dissenting),[13] the CFPB operates free of meaningful congressional oversight. Congress has renounced the power of the purse over the CFPB, instead permitting it to draw funds directly and in perpetuity from the Federal Reserve (which itself cannot curb the CFPB's funding or, for that matter, any aspect of its decision-making). *See* pp. 20-21 *infra*. The unaccountability of the CFPB Director to *any* political branch of government thus far exceeds that of the FTC commissioner whose tenure was at issue in *Humphrey's Executor*.

Nor does *Morrison* salvage the CFPB's structure from constitutional challenge. The Court there sustained the constitutionality of a now-defunct statute

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Cir. 2011) (Kavanaugh, J., concurring) ("[T]here can be little doubt that the *Free Enterprise* Court's wording and reasoning are in tension with *Humphrey's Executor* and are more in line with Chief Justice Taft's majority opinion in *Myers*"). The Court in *Free Enterprise Fund* specifically noted that the parties had not asked it to "reexamine" *Myers*, *Humphrey's Executor*, or *Morrison v. Olson*, 487 U.S. 654 (1988). *Free Enter. Fund*, 561 U.S. at 483.

[12] The FTC and several other "independent agencies" are also statutorily required to include members of both major political parties. *See PHH Corp*., 881 F.3d at 184 n.12 (Kavanaugh, J., dissenting) (listing examples). Dodd-Frank, meanwhile, requires no such thing; nothing mandates that the director be "non-partisan" or "act with entire impartiality." *Humphrey's Executor*, 295 U.S. at 624. The early history of the CFPB's operations reinforces this concern and shows that it is not hypothetical: "an agency cannot be considered 'impartial[]' under *Humphrey's Executor* if in partisan fashion it uniformly crusades for one segment of the populace against others," which "is what the CFPB has done." *PHH Corp*., 881 F.3d at 149 (Henderson, J., dissenting).

[13] Congress's high degree of oversight over the FTC is discussed at length in Daniel A. Crane, Debunking *Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1853-56 (2015).

creating an office of independent counsel, but that decision is distinguishable both because *Morrison* "did not expressly consider whether an independent agency could be headed by a single director" and because the independent counsel "had only a limited jurisdiction for particular defined investigations." *PHH Corp.*, 881 F.3d at 176 (Kavanaugh, J., dissenting); *see also Morrison*, 487 U.S. at 671-72. The independent counsel in *Morrison* was entirely unlike the CFPB director—she was "an inferior officer under the Appointments Clause," who "lack[ed] policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. The CFPB Director, by contrast, as the head of a supposedly "independent agency," is a "principal officer" who has no superior directing and supervising his work. *PHH Corp*., 881 F.3d at 152 (Henderson, J., dissenting). And unlike the independent counsel in *Morrison*, he exercises sweeping executive powers, including the ability to make (and change) federal policy and laws covering the entire field of consumer finance. *See* pp. 12-15 *supra*; *see PHH Corp*., 881 F.3d at 152-53 (Henderson, J., dissenting).

C. The Dodd-Frank Act Exempts the CFPB and Its Sole Director From the Congressional Power of the Purse or Any Meaningful Congressional Oversight.

In addition to being unaccountable to the president, the CFPB and its director are also unaccountable to the other elected branch of our government. "The power over the purse was one of the most important authorities allocated to

Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting The Federalist No. 52, at 320 (James Madison)). But unlike other "independent agencies" reliant on congressional appropriations, the CFPB director skirts that process altogether; he has the sole authority to establish his agency's budget and to demand up to 12% of the Federal Reserve System's annual operating expenses in order to satisfy it. *See* 12 U.S.C. § 5497(a)(2)(A). To drive the point home further, Dodd-Frank expressly insulates the CFPB from congressional oversight by exempting this demand for funding from "review by the Committees on Appropriations of the House of Representatives and the Senate," *id.* § 5497(a)(2)(C), notwithstanding the Constitution's Appropriations Clause. *See* U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

Through this uncontrolled and unreviewable process, the CFPB Director has consistently arrogated to his agency amounts just shy of the annual 12% "cap." The CFPB's budgets have exceeded $500 million in each year since 2014, with actual budget requests increasing in each year through 2017. *See* CFPB, *The CFPB strategic plan, budget, and performance plan and report* (May 2017) (increasing to $646.0 million from 2016 estimates of $636.1 million); CFPB, *The*

CFPB strategic plan, budget, and performance plan and report (Feb. 2015); CFPB, *The CFPB strategic plan, budget, and performance plan and report* (Mar. 2014).[14]

This lack of financial oversight has emboldened the CFPB to "stonewall[]" congressional inquiries about "its spending or policies." *PHH Corp*., 881 F.3d at 146 (Henderson, J., dissenting). Several members of Congress have expressed frustration with the CFPB's failure to provide information and answer questions. *See id*. at 146-47. In 2015, the director even declined to answer one representative's question concerning a $215 million project that he had authorized, instead asking her, "'[w]hy does that matter to you?'" *Id.* at 147.

In short, the CFPB director is accountable to no one. Neither the president, the Congress, nor the Federal Reserve has any meaningful control over him, and he even lacks any fellow directors or commissioners to check the exercise of his vast power. The district court erred in following the *en banc* decision in *PHH Corp*., which failed to appreciate that the CFPB's structure is unique, unprecedented and

[14] *Available at* https://files.consumerfinance.gov/f/documents/201705_cfpb_report_strategic-plan-budget-and-performance-plan_FY2017.pdf (last visited July 9, 2018); http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf (last visited July 9, 2018); http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf (last visited July 9, 2018). While the 2017 estimate for fiscal year 2018 lowers the predicted budget to $630.4 million, this amount still constitutes 97.5% of the $646.2 million cap. *See* CFPB, *The CFBP strategic plan, budget, and performance plan and report* (May 2017) (estimating a FY 2018 of $630.4 million).

incompatible with our Constitution, and improperly expanded the Supreme Court's narrow exceptions to the *Myers* rule to salvage that structure.

III. THE CFPB AND ITS DIRECTOR EXERCISE THEIR UNCHECKED POWER IN A MANNER THAT ENCROACHES ON INDIVIDUAL LIBERTY AND VIOLATES DUE PROCESS.

The threat to individual liberty posed by the unrestrained power of the CFPB and its director is not theoretical or abstract. The record of this case shows that the CFPB is primed to violate basic principles of due process.

In the district court, the CFPB alleged that All American engaged in "unfair," "deceptive," and "abusive" practices. Although Congress expressly authorized the CFPB to identify the types of acts or practices that it will consider "unfair" or "abusive," 12 U.S.C. § 5531(b), the CFPB's first director determined that it is "[p]robably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Public & Private Programs*, 112th Cong. 112-107, at 69 (2012). The CFPB simply refused, in the face of the statute, to give those subject to its jurisdiction any notice of what practices it deems "unfair" or "abusive." As the facts of this case demonstrate, the CFPB and its director have taken advantage of the lack of

accountability in the Bureau's structure to violate the due process rights of regulated entities and individuals.[15]

CONCLUSION

The Court should decide this appeal in light of the foregoing principles, and reverse the district court's order denying Defendant-Appellants' motion for judgment on the pleadings.

Dated: July 13, 2018

Respectfully submitted,

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[15] Neither the availability of judicial review of certain agency decisions nor appellate review of district court decisions in the CFPB's favor provides any reason for this court to refrain from holding the CFPB's structure unconstitutional. "[M]uch of what an agency does—determining what rules to issue within a broad statutory authorization and when, how, and against whom to bring enforcement actions to enforce the law—occurs in the twilight of discretion. Those discretionary actions have a critical impact on individual liberty. And courts do not review or only deferentially review such exercises of agency discretion." *PHH Corp.*, 881 F.3d at 198 (Kavanaugh, J., dissenting).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5856 words, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style, except for the footnotes, which appear in 12-point Times New Roman type style, as permitted by Fifth Circuit Rule 32.1.

s/ Marc J. Gottridge
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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I certify that on July 13, 2018, the foregoing was electronically filed through this Court's CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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