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, INC., MID-STATE FINANCE, INC., and MICHAEL E. GRAY,
Defendants-Appellants.

Appeal from United States District Court for the Southern District of Mississippi

BRIEF OF AMICI CURIAE SEPARATION OF POWERS SCHOLARS IN SUPPORT OF APPELLANTS

Ilan Wurman
Sandra Day O'Connor College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(480) 965-2245
ilan.wurman@asu.edu

Attorney for Separation of Powers scholars

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 18-60302

Short Caption: Consumer Protection Financial Bureau v. All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3): Steven G. Calabresi; Michael W. McConnell, Saikrishna Prakash, Jeremy A. Rabkin, Michael Rappaport, Michael Ramsey

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: Not applicable

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(ii) List any publicly held company that owns 10% or more of the party's or amicus' stock: Not applicable

Attorney's Signature: /s/ Ilan Wurman Date: 07/05/18

Attorney's Printed Name: Ilan Wurman

Please indicate if you are *Counsel of Record* for the above listed party pursuant to Circuit Rule 3(d). Yes

Address: Sandra Day O'Connor College of Law
111 E. Taylor St.
Phoenix, AZ 85004
Phone Number: (480) 965-2245
Fax Number: (480) 965-2427
Email Address: ilan.wurman@asu.edu

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INTRODUCTION AND STATEMENT OF *AMICI CURIAE* *

Amici separation of powers scholars seek to alert this Court to important points of constitutional text, structure, and history that support appellants' constitutional arguments respecting the Consumer Financial Protection Bureau. *Amici* in particular respond to points raised by amici separation of powers scholars in *PHH Corp., et al. v. Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), and on which the en banc court in that case relied. The exact same issues are present here, and *amici* believe this Court should reach the opposite conclusion.

As discussed below, insulating a principal officer serving as the single director of an administrative agency from the President's removal power violates the Constitution's provisions for executive power. Although the amici separation of powers scholars and the D.C. Circuit in *PHH Corp.* relied on the revisionist argument of recent decades that there is a difference between "Article I" agencies created pursuant to Congress's Article I, § 8 powers and "Article II" agencies that assist the President in exercising inherent executive powers, there is simply no

* Pursuant to Rule 29(a)(2), all parties consented to the filing of this brief.

evidence that the Founding generation ever conceived of such a distinction.

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court created a different sort of exception, one grounded in the structure of the Federal Trade Commission (FTC). As the Court explained, the FTC was "nonpartisan," composed of a multimember, bipartisan commission that was to deploy administrative expertise in a particular field. To consider a principal officer who alone directs an entire department of government as "nonpartisan" would be to defy all human political experience. The exception of *Humphrey's Executor* should not extend to this case.

Amici are law professors who teach and write about executive power, administrative law, constitutional law, and the separation of powers. They are interested in the sound development of these fields. Each *amici* is listed below. Institutional affiliations are included for identification purposes only.

Steven G. Calabresi
Clayton J. & Henry R. Barber Professor,
Northwestern Pritzker School of Law

Michael W. McConnell
Richard and Frances Mallery Professor of Law

Director, Constitutional Law Center
Stanford Law School

Saikrishna Prakash
James Monroe Distinguished Professor of Law
Paul G. Mahoney Research Professor of Law
University of Virginia School of Law

Jeremy A. Rabkin
Professor of Law
Antonin Scalia Law School
George Mason University

Michael Ramsey
Professor of Law
University of San Diego School of Law

Michael Rappaport
Hugh & Hazel Darling Foundation Professor of Law
Director, Center for the Study of Constitutional Originalism
University of San Diego School of Law

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Amici certify that no party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed any money to fund the preparation of this brief. No one contributed money to the preparation and filing of this brief.

STATEMENT

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376

(2010) ("Dodd-Frank"). Title X created the Consumer Financial Protection Bureau (CFPB) and granted it authority, among other things, to implement and enforce numerous consumer protection laws. 12 U.S.C. § 5481(12). The CFPB, denominated an "Executive agency," is headed by a single "Director" appointed to a five-year term who may be removed only "for inefficiency, neglect of duty, or malfeasance in office" and whose term may be extended indefinitely until a new director is appointed and confirmed. *Id.* §§ 5491(a), (c)(3), (c)(2).

The CFPB brought a civil enforcement action against defendants-appellants, who filed a motion for judgment on the pleadings on the ground that CFPB's structure is unconstitutional. This Court granted interlocutory appeal on the question of CFPB's constitutionality.

SUMMARY OF ARGUMENT

The for-cause removal provision respecting the director of the CFPB is unconstitutional.

1. The Constitution vests executive power in the President of the United States. U.S. Const. Art. II, § 1 ("The executive Power of the United States shall be vested in a President of the United States of America."). The Constitution expressly distributes some historically ex-

ecutive powers to other branches of government. For example, the Senate has a share in the appointment and treaty powers, *id.* § 2, and the Congress may declare war and grant letters of marque and reprisal, *id.* at Art. I, § 8, cl. 11. Thus, just as the President has no legislative power except where the Constitution expressly grants such power—for example in Art. I, § 7 granting the President a veto power—the other branches share in the executive power only where the Constitution expressly provides.

On this textual and structural basis, the First Congress in 1789 concluded that, although not expressly mentioned in the Constitution, the power to remove principal officers was constitutionally vested in the President because it was an executive power not otherwise qualified in the Constitution. The First Congress also reasoned, correctly, that the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, suggests that "it was generally intended he should have that species of power [removal authority] which is necessary to accomplish that end," 1 Annals of Cong. 496 (Joseph Gales, ed. 1790) (hereinafter "1 Annals") (James Madison). The representatives (and senators) thus voted to remove provisions in the bills creating the

executive departments that implied Congress had the discretion to grant the removal power. Instead Congress deliberately included language—"whenever the said principal officer shall be removed by the President"—that implied that the Constitution itself granted the President a power to remove. 1 Annals 578, 580, 585. Congress's "Decision of 1789" was understood for almost 150 years to stand for the proposition that the President had the constitutional power to remove principal officers at will.

2. In recent decades, revisionist scholars have argued that the President's authority over the Treasury Department, financial regulators, and "Article I" agencies is distinct from the President's authority over "Article II" agencies tasked with assisting the President in exercising inherent constitutional power. *See, e.g.*, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Columb. L. Rev. 1, 35, 71 (1994); Brief of Separation of Powers Scholars as *Amici Curiae*, No. 15-1177 (D.C. Cir. Mar. 31, 2017) ("SOP Brief"), at 2. The Framers and Founding generation recognized no such distinction, however, which is merely an anachronistic imposition of late nineteenth-century views upon an earlier generation.

3. In 1935, the Supreme Court recognized a different kind of exception to the President's removal authority. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Rebuffing President Roosevelt's attempt to remove a commissioner of the Federal Trade Commission, a Supreme Court hostile to Roosevelt's New Deal observed that the FTC "is charged with the enforcement of no policy except the policy of the law," that "[i]ts duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." 295 U.S. at 624. Crucially, the Court noted that the FTC consisted of a five-member commission, not more than three of whose commissioners "shall be members of the same political party." *Id.* at 620 (quoting statute). Thus "[t]he commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality." *Id.* at 624. Further, "its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* (citation omitted).

The exception to presidential removal authority upheld in *Humphrey's Executor* should apply only if all of its many factors are present. That is not the case here, where a single CFPB director, belonging to a single political party, can have no pretensions to being

"nonpartisan" and acting "with entire impartiality." And obviously a single person cannot supply "the trained judgment of a body of experts." For these reasons, *amici* submit that CFPB's structure is unconstitutional.

ARGUMENT

I. Text, structure, and history show that the Vesting and Take Care Clauses confer on the President the power to remove principal executive officers.

The Constitution provides that "[t]he executive Power of the United States shall be vested in a President of the United States of America." U.S. Const. Art. II, § 1. Particularly when compared to the limited grant of legislative power to Congress—"all legislative Power *herein* granted," *id.* at Art. I, § 1 (emphasis added)—the Vesting Clause of Article II implies that *all* executive power, absent other express limitations, is vested in the President of the United States. The Constitution does, in fact, expressly qualify this general grant of executive power for certain historically executive powers. For example, the Senate has a share in the appointment and treaty powers, *id.* at Art. II, § 2, and the Congress may declare war and grant letters of marque and reprisal, *id.* at Art. I, § 8, cl. 11. (Indeed, several of Congress's enumerated powers

were historically considered part of the executive power vested in the British King.[1])

As a structural matter, the Senate or Congress thus share in the executive power only where the Constitution expressly provides, just as the President shares in the legislative power only where the Constitution expressly provides. *See id.* § 7 (granting the President a veto power). The Constitution's text and structure therefore suggest that the removal power, although not expressly mentioned, is constitutionally vested in the President because the ability to superintend and remove executive officers is an executive power not otherwise qualified by the text of the Constitution.

History confirms this understanding. The First Congress came to the same conclusion in 1789 when it created the first three executive departments. Congress first debated a draft bill creating the Department of Foreign Affairs, which provided that the Secretary of the department could "be removed from office by the President of the United States." 1 Annals 455; *see also id.* at 385. Some representatives worried that a removal power would be dangerous if vested in the President

[1] *See* Michael W. McConnell, The President Who Would Not Be King (manuscript on file with counsel).

alone, and argued that the President could only remove officers by and with the advice and consent of the Senate—the same process by which he could appoint them. *See, e.g.*, 1 Annals 381 (Representative Livermore arguing that the "same power which appointed an officer, had the right of removal also").

Other representatives disagreed, arguing that the Constitution vested the removal power in the President alone. James Madison, Fisher Ames, and other representatives made two constitutional arguments in favor of a presidential removal power.

First, the removal power is an executive power. "The Constitution places all Executive power in the hands of the President," exhorted Fisher Ames, "and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others." 1 Annals 474. Because the President cannot possibly handle all the minutiae of administration, he "must therefore have assistants." *Id.* But "in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease

to exist." *Id.* The executive power thus includes a "choice in selecting [ ] assistants, a control over them, with power to remove them." *Id.* "What could be a power more executive in nature," Madison added, than the power of "appointing, overseeing, and controlling those who execute the laws"? 1 Annals 463; *see also id.* at 500 ("[I]f any thing in its nature is executive, it must be that power which is employed in superintending and seeing that the laws are faithfully executed.").

Because removal was an executive power, it belonged to the President unless qualified by the Constitution. Madison elaborated on the textual argument:

> The Constitution affirms, that the Executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The Constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers. Have we a right to extend this exception? I believe not.

1 Annals 463; *see also id.* at 496 (Madison) ("[T]he Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly.").

Second, Madison argued that the Take Care Clause was another textual reason why the removal power was constitutionally vested in the President:

> [T]here is another part [of the Constitution], which inclines, in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end.

1 Annals 496. Thus the Take Care Clause supports the structural inference about the Vesting Clause: the President may remove executive officers in part to ensure the faithful execution of the laws.

With these and contrary arguments on the table, the House of Representatives debated for over five full days on the question of the President's removal power. After the first day, a majority agreed to retain the clause "to be removable by the President," 1 Annals 383, and further rejected a proposal to include the modifying phrase "by and with the advice and consent of the senate," *id.* at 382.

After the fifth day, the House made a significant change. It altered the bill to ensure that its language would not be construed as a *conferral* of the removal power. The amended provision stated that

"whenever the said principal officer shall be removed by the President," the departmental papers would then be under the control of the department's clerk. 1 Annals 578. As explained by the sponsor of this amendment, Representative Benson:

> If we declare in the bill that the officer shall be removable by the President, it has the appearance of conferring power upon him. . . . For this reason, I shall take the liberty of submitting an alteration, or change in the manner of expression, so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President.

Id. at 505. This amendment passed by a vote of 30 to 18. *Id.* at 580. The Senate agreed by a vote of 10-10, with Vice President Adams breaking the tie. Journal of William Maclay, 1789-1791, at 116, https://memory.loc.gov/ammem/amlaw/lwmj.html.

Madison thought that Congress's decision on this question, which has come to be known as the "Decision of 1789," would become the "permanent exposition of the Constitution." 1 Annals 495. And with a few minor exceptions—such as the Tenure of Office Act, enacted by radical Republicans to prevent Andrew Johnson from removing certain of Lincoln's cabinet members—so it remained. "Summing up . . . the facts as to acquiescence by all branches of the Government in the legislative

decision of 1789, as to executive officers, whether superior or inferior," the Supreme Court explained in *Myers v. United States*, "we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government." 272 U.S. 52, 163 (1926). Alexander Hamilton and Chief Justice Marshall had no doubt that Congress's decision reflected its constitutional interpretation that the removal power was constitutionally vested in the President. *See* Pacificus No. 1, *reprinted in* 15 The Papers of Alexander Hamilton 33, 40 (Harold C. Syrett ed., 1969); 5 John Marshall, The Life of George Washington 200 (1807).

To be sure, three great constitutional scholars—Justice Brandeis, Edwin Corwin, and David Currie—have suggested that the Decision of 1789 was no decision at all because, they argued, the majority in favor of Benson's amendment was actually cobbled together by representatives who believed the removal power was *constitutionally* vested in the President and those who believed Congress could *confer* such power. *Myers*, 272 U.S. at 285 n.75 (Brandeis, J., dissenting); Edwin S. Corwin,

Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 362-63 (1927); David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 40-41 (1997).

They arrived at this conclusion because some of the representatives voting in favor of Benson's amendment *also* voted to retain the original language in the bill, suggesting that perhaps these representatives thought the removal power was still a matter of legislative discretion. *Compare* 1 Annals 580, *with id.* at 585. Yet no fair reading of the debates would allow such a conclusion. The entire debate was framed as a constitutional question, and the tenor was constitutional. As Madison reminded the representatives toward the end of the debate, "Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President; and what arguments were brought forward respecting the convenience or inconvenience of such a disposition of power, were intended only to throw light upon what was meant by the compilers of the Constitution." 1 Annals 578.

Given the amended text, which nowhere confers a power to remove upon the President, it is likely that most of the representatives voting against striking out the original language after approving of

Benson's amendment did so because they agreed with Representative Boudinot or Representative Sedgwick. Boudinot argued that the original clause was nothing more than a legislative declaration on the meaning of the Constitution, 1 Annals 583-84, and Sedgwick argued that keeping in the original language "could do no harm" and the words "stand very well with the amendment already agreed to." *Id.* at 583. That is the most logical conclusion: if these representatives believed that Congress had to confer such power on the President, there would have been no point in voting for Benson's amendment at all because it did not confer the removal authority on the President. Again, the language assumed a constitutional grant. *See generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

In any event, the standard interpretation of the First Congress's decision is the best interpretation in light of the Constitution's text and structure. As Madison explained in a letter to Thomas Jefferson, the House's decisions about the removal power was "most consonant to the text of the Constitution, to the policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsi-

bility and harmony in the Executive Department." Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* Correspondence, First Session: June-August 1789, 16 Documentary History of the First Federal Congress, 1789-1791, at 890, 893 (Charlene Bangs Bickford et al. eds., 2004).

II. There is no constitutional distinction between financial or other "Article I" agencies and "Article II" agencies.

In recent decades, revisionist scholars have sought to cast doubt on these textual, structural, and historical arguments by claiming that financial and other "Article I" agencies are distinct from "Article II" agencies tasked with assisting the President in exercising inherent constitutional power. For example, in their brief to the D.C. Circuit a number of scholars made the claim that the CFPB's

> independence is consistent with governmental structures dating back to the earliest days of the Republic. At that time, the first Congress distanced the Department of the Treasury from the President's direct control, in stark contrast to its choices for the Departments of State and War. Around the same time, Congress created the relatively independent Office of the Comptroller and the National Bank. Thus began a long national history of granting independence to financial institutions and regulators, which has continued through the present day.

SOP Brief at 2. The en banc D.C. Circuit adopted this view, focusing particularly on the structure of the Treasury Department. *PHH Corp.*, 881 F.3d at 91-92.

More generally, Professors Lawrence Lessig and Cass Sunstein have argued for "another conception of the original understanding" inspired by the distinction made by nineteenth-century theorists between "politics" and "administration"—an original understanding "that imagines that the framers conceived of departments differently, and contends that the President would, by the Constitution, have directory power over only some of those departments." Lessig & Sunstein, 94 Columb. L. Rev. at 35. They thus distinguish between executive power "derived from Article II" and administrative power "stemming from Article I." *Id.* at 71. "Applying the nineteenth century vision as mechanically as possible to some modern developments," Lessig and Sunstein argue, "we think that Congress could not constitutionally make the Department of Defense into an independent agency; but it could allow at least a degree of independence for such modern institutions as the National Labor Relations Board and the Federal Communications Commission." *Id.*

The Framers and Founding generation, however, did not recognize any such distinction, which is merely an anachronistic imposition of late nineteenth-century views. Early Congresses never granted "independence" to any early agency; never imposed "for cause" restrictions; and never limited executive control over financial agencies. To the contrary, the evidence overwhelmingly points to the opposite conclusion: "Treasury was an executive department under the Articles [of Confederation]; it was designated as such in the [Constitution's] drafting[and] ratifying [debates], and [in] the First Congress's debates; its officers were referred to as executive during the same debates;" and "after its creation, members of Congress continued to label Treasury an executive department and treat its officers as executives." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 804 (footnotes omitted). Finally, treasury officials were also designated "executive" officers in the First Congress's act providing salaries to executive branch officials. Act of Sept. 11, 1789, ch. 13 § 1, 1 Stat. 67.

The arguments made in favor of a distinction between financial and other "Article I" agencies and "Article II" agencies generally focus on the early structure of the Treasury Department, but none overcomes

the positive evidence. First, the separation of powers scholars in the D.C. Circuit litigation argue that "Congress specified the offices and functions of the Department of the Treasury in detail and gave its Secretary specified responsibilities," which "gave Congress a degree of oversight over the Department." SOP Brief at 5-6; *see also PHH Corp.*, 881 F.3d at 91. This is a red herring. Congress creates offices and specifies their functions and it did so for all early departments. Its undoubted ability to create offices says nothing about whether the President can remove Treasury officers. Nor does it refute the notion that Treasury was an executive department, a categorization borne out by ample direct evidence.

Second, these scholars argue that the Comptroller of the Treasury was given prosecutorial power along with a "measure of independence," noting that his "decisions to prosecute" were independent and that his "decisions against claimants" would be "final and conclusive." SOP Brief at 7-8; *PHH Corp.*, 881 F.3d at 91. To buttress this point, they assert that Congress specified that the Comptroller could only be removed *for cause*. They rely on the statute creating the Comptroller, which provided that "if any person shall offend against any of the prohibitions

of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office." SOP Brief at 8 (quoting Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67); *PHH Corp.*, 881 F.3d at 91. This provision, they argue, "protected [the Comptroller] from . . . removal in much the way that Dodd-Frank protects the Bureau's Director." SOP Brief at 7.

These claims are irrelevant or mistaken. Whether or not decisions to prosecute were made in the absence of presidential direction and whether or not comptroller decisions were subject to judicial review simply does not speak to whether the Comptroller enjoyed any removal protections. On this score, the scholars misread the statute. The cited provision says *nothing at all* about the President's removal power. Whether *Congress* can *also* effect a removal of executive officers upon the occurrence of a certain event—like a criminal conviction—has no bearing on whether Congress can *prevent the President* from removing an officer absent cause. That statute in no way limits the President's ability to remove the Comptroller.

Indeed, that is the only plausible reading of the statute because the cited provision applied to *all* Treasury officials, including the Secre-

tary. No one claims (nor could they) that Alexander Hamilton had for-cause removal protections because of this statute. And President Washington certainly did not believe that the statute granted any removal protection, for he issued a commission to a comptroller that noted the comptroller served during his pleasure. Saikrishna Bangalore Prakash, Imperial from the Beginning 197 (2015). Apparently, neither the comptroller nor Congress objected to Washington's claim of authority.

Third, these scholars cite to James Madison's observation respecting the Comptroller, claiming he "went so far as to argue that 'there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.'" SOP Brief at 7 (citing 1 Annals 612); *PHH Corp.*, 881 F.3d at 91. Madison had suggested that perhaps the properties of the Comptroller's office "are not purely of an Executive nature" and "partake of a Judiciary quality as well as Executive." 1 Annals 611.

These scholars make a mountain out of a molehill. To begin with, Madison's proposal never imposed any restriction on the President's removal power; to the contrary, it actually assumed that the President could remove at pleasure. Moreover, Madison *walked back* his pro-

posal. In the face of opposition, the very next day, "MR. MADISON withdrew the proposition which he yesterday laid upon the table." *Id.* at 615. Nothing more was heard from Madison on the matter.

Fourth, these scholars point to the Bank of the United States as an example of a federal financial institution over which the United States government, let alone the President, did not have direct control because private shareholders selected most of the directors. SOP Brief at 8-10. But the Bank of the United States was not considered an arm of the federal government at all.[2]

Finally,[3] Lessig and Sunstein assert that constitutional text supports their view that there is a distinction between "executive depart-

[2] *Bank of U.S. v. Planters' Bank of Georgia*, 22 U.S. 904, 908 (1824) ("The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. . . . Suits brought by or against it are not understood to be brought by or against the United States."); *see also* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 99 (1995) ("[A] corporation is an agency of the Government, for purposes of the constitutional obligations of Government . . . , when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.").

[3] The separation of powers scholars also point to state constitutions, with very different separation of powers provisions, as informing the meaning of the Constitution's own provisions. SOP Brief at 10-13. If anything, however, the state constitutions suggest the opposite of what the D.C. Circuit scholars imply: they suggest that the Framers had good examples of how to create a plural executive if that had been their intent.

ments" headed by "principal officers," and Article I "administrative" departments headed by "heads of department" but not "principal officers." Lessig & Sunstein, 94 Columb. L. Rev. at 34-38. Namely, the Opinions Clause provides that the President may require opinions in writings from the "principal officers" of the "*executive* departments." Art. II, § 2, cl. 1 (emphasis added). And the inferior officer appointments clause provides that Congress may vest the power to appoint inferior officers in the President alone, the courts of law, or in "heads of departments." *Id.* § 2, cl. 2. These textual differences, combined with Congress's denomination of the secretaries of foreign affairs and war as "principal officers" but the secretary of Treasury as a "head of department," lead them to ask: "Why does the Opinions Clause speak only of 'executive' departments? Are there other kinds of departments? And why speak of 'Heads of Departments' in clause 1 of section 2, but 'principal Officers' in clause 2?" Lessig & Sunstein, at 35. They suggest that the text makes sense on the nineteenth-century understanding that there are certain departments that are inherently executive, derived from Article II, and the Opinions Clause ensures that the President has authority to

control the principal officers of *these* departments, but not the heads of *all* the departments of government. *Id.* at 37-38.

The evidence does not bear out this view. The reference to "executive" departments in the Opinions Clause was in response to proposals that would have given the President power to demand opinions from the Chief Justice and officers of the House and Senate. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute The Laws*, 104 Yale L.J. 541, 628-29 (1994). As for the distinction between "principal officers" and other "heads of departments," the Framers used these terms interchangeably—there is no evidence at all that the Framers ever thought of them differently. *Id.* at 629. Indeed, as explained above, the Treasury was referred to as an executive department under the Articles of Confederation, at the Constitutional Convention, in the ratification debates, and throughout the First Congress. Moreover, as noted, the Secretary of Treasury, although denominated a "head of department" in the bill creating that department, was denominated an "executive officer" in the act providing for his salary. Act of Sept. 11, 1789, ch. 13 § 1, 1 Stat. 67. Finally, the President received written opinions from Alexander Hamilton—relying upon the Opinions Clause

that speaks of "principle officers in the executive departments." Treasury was (and is) an executive department through and through.

III. The exception in *Humphrey's Executor* is limited to circumstances in which all of its rationales apply, including the presence of a nonpartisan, multimember body.

Because there is no textual, structural, or historical constitutional reason supporting a distinction between financial or other executive departments deriving their powers from Article I, and those deriving their powers from Article II, the CFPB's unique structure should be upheld only if it fits within the four corners of *Humphrey's Executor v. United States*.

When Congress created the Federal Trade Commission, it provided that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U.S. at 619. President Roosevelt nevertheless sought to remove a commissioner whom President Hoover had appointed because, as Roosevelt wrote the commissioner, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frank-

ly, I think it is best for the people of this country that I should have a full confidence." *Id.*

The Supreme Court first held that the statute by its terms precluded the President from removing a commissioner for reasons other than those specified in the statute. The Court reasoned, "The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly *quasi*-judicial and *quasi*-legislative." *Id.* at 624. The Court concluded that the "general purposes of the legislation . . . demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625-26. Indeed, the statute created a five-member commission on which "[n]ot more than three of the commissioners shall be members of the same political party." *Id.* at 620 (quoting statute).

The Court held this arrangement constitutional. The Court concluded that the reach of *Myers v. United States* affirming the Decision of 1789 "goes far enough to include all purely executive officers," but "goes no farther; much less does it include an officer who occupies no place in the executive department, and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 627-28. The presidential removal power was inapplicable to the FTC, which was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." *Id.* at 628. Thus the FTC "acts in part *quasi*-legislatively and in part *quasi*-judicially." *Id.*

In sum, the Court concluded, an unfettered presidential removal power "threatens the independence of a commission which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Id.* at 630.

The Court's holding cannot be divorced from the kind of body then before it. What made the FTC a "judicial" and "legislative" aid that, according to the Court, did not exercise any of the executive power vested in the President of the United States? It was the nature of the commission as much as its duties. The commission was to be "nonpartisan" and "act with entire impartiality." *Id.* at 624. It was "a body of experts who shall gain experience by length of service." *Id.*

The Court perhaps was embracing the distinction of early nineteenth-century theorists between "politics" and "administration." But a key component of this distinction was that administrative officials worthy of insulation from politics must be impartial. As Woodrow Wilson wrote, "The study of administration is a field of business. . . . [A]dministration lies outside the proper sphere of politics. Administrative questions are not political questions. . . . 'Politics is thus the special province of the statesman, administration of the *technical official*.'" Woodrow Wilson, *The Study of Administration*, Pol. Sci. Q. vol. 2, no. 2 (June 1887) (emphasis added). And Frank Goodnow wrote:

> there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of *semi-*

> *scientific*, *quasi*-judicial and *quasi*-business or commercial activity. . . . [Administrative officials] should be free from the influence of politics because of the fact that their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information, *the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings*, and the provision of the most efficient possible administrative organization.

Frank J. Goodnow, Politics and Administration 85 (1900) (first and last emphases added).

Simply put, if the exception to the presidential removal power is to apply, it can only apply when all the factors supplied by the Court in *Humphrey's Executor* are present. That includes a multimember body of "experts" from different political parties who are to be "nonpartisan" and act "impartially."

The CFPB does not resemble, in any way, the FTC. A single principal officer, who is a partisan of a particular political party and who enjoys a sweeping portfolio over all the nation's consumer protection laws, is far removed from the FTC. The CFPB Director, who has no need to convince, reason, or debate fellow commissioners, can hardly be counted on to be nonpartisan, impartial, or to act as an "expert." The benefits of a multimember commission structure—the ability to listen, to compromise, and to engage in reasoned deliberation—are wholly absent from

the CFPB. Analogizing the director of the CFPB to the commissioners of the FTC would be to defy all human political experience.

CONCLUSION

The CFPB's removal structure violates the Constitution's provisions for executive power. The removal power is an executive power, which is vested in the President because it is not specifically qualified by another provision of the Constitution—an interpretation supported by the President's duty to take care that the laws be faithfully executed. There is no textual, structural, or historical reason for distinguishing between financial agencies and other executive agencies.

If Congress can insulate principal administrative officers from presidential removal at all, it can do so only on the grounds supplied by *Humphrey's Executor*, in which the officers were to be nonpartisan, impartial, and members of bipartisan boards with expertise in a particular administrative area. The CFPB's director does not fit these criteria.

Respectfully submitted,

/s/ Ilan Wurman

Ilan Wurman
Sandra Day O'Connor College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(480) 965-2245
ilan.wurman@asu.edu

Attorney for Separation of Powers scholars

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,239 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)).

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DATED: JULY 5, 2018

/s/ Ilan Wurman
ILAN WURMAN

United States Court of Appeals

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OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

July 05, 2018

Mr. Ilan Wurman
Sandra Day O'Connor College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004

No. 18-60302 Consum Fincl Protc Bur v. All Amer Check Cashing, Inc., et al
USDC No. 3:16-CV-356

Dear Mr. Wurman,

The following pertains to your brief electronically filed on July 5, 2018.

We filed your brief. However, you must make the following corrections within the next 14 days.

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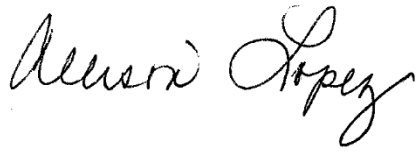

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Case No. 18-60302

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff - Appellee

v.

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

Defendants - Appellants