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, 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 FOR LEAVE BY PACIFIC LEGAL FOUNDATION TO FILE AMICUS BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pursuant to Fed. R. App. Proc. 27 and 29 and Circuit Rules 27 and 29, Pacific Legal Foundation (PLF) seeks leave to file the accompanying amicus brief in support of Defendants-Appellants and reversal.

Defendants-Appellants consent to Pacific Legal Foundation's filing an amicus brief. The Consumer Financial Protection Bureau (CFPB) takes no position on PLF's request for leave to file an amicus brief.

PLF is a tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF recently initiated a Center for the Separation of Powers, which seeks to restore the structural protections of liberty in the Constitution. PLF therefore has an interest in this case as it involves core separation-of-powers questions.

In the accompanying brief, PLF addresses the issue whether the structure of the CFPB violates Article II of the

Constitution and the Constitution's separation of powers. PLF sets forth constitutional "first principles" concerning the central purpose of the Separation of Powers, the structure of the three branches required by the Constitution's vesting clauses, and the limits on Congress's power to establish executive-branch agencies that are virtually immune from the Chief Executive's control.

By offering a high-level perspective on the constitutional issue before the Court, this brief will assist the Court's review.

Accordingly, PLF respectfully asks that the Court grant its motion for leave to file the accompanying amicus brief.

DATED: July 9, 2018.

Respectfully submitted,

OLIVER J. DUNFORD
WENCONG FA
Pacific Legal Foundation

s/ Oliver J. Dunford
OLIVER J. DUNFORD

Attorney of Record for Amicus Curiae Pacific Legal Foundation

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, 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.

s/ Oliver J. Dunford
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CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit, Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the accompanying documents authorized by Rule 27(a)(2)(B), this document contains 245 words.

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DATED: July 9, 2018.

s/ Oliver J. Dunford
OLIVER J. DUNFORD

Attorney of Record for Amicus Curiae Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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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
OLIVER J. DUNFORD

Attorney of Record for Amicus
Curiae Pacific Legal Foundation

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INTEREST OF AMICUS[1]

Founded in 1973, PACIFIC LEGAL FOUNDATION is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited 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

[1] Defendants-Appellants consented to the filing of this brief. The Consumer Financial Protection Bureau took no position, however, and accordingly, PLF filed an accompanying Motion for Leave to file 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 their counsel made a monetary contribution to the preparation or submission of this brief.

under the Constitution's Separation of Powers. See, e.g., Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018); Lucia v. SEC, 585 U.S. --- (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); Decker v. Nw. Envtl. Def. Ctr., 568 U.S. 597 (2013) (Auer deference to Clean Water Act regulations); 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. PLF offers a discussion of first principles concerning executive power that should illuminate the Court's review of this case.

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). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed., 1961). See also James Madison (June 22, 1789), 1 Annals of Cong. 581 (Joseph Gales ed., 1834) ("[I]f there is a principle in our Constitution, indeed in any free constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers.").

When the carefully balanced scheme of the Framers is not enforced—when the powers of government are concentrated in a single branch, or as here in a sole agency, virtually immune

from oversight—the liberty and security of the governed lack protection.

The question here—whether the structure of the Consumer Financial Protection Bureau (CFPB or Bureau) violates Article II of the Constitution and the Constitution's separation of powers[2]—implicates core constitutional principles related to the liberty and security of the people and the people's ability to hold government responsible for its actions. See Dep't of Transp. v. Ass'n of Am. R.R.s, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability."); Elena Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2332 (2001) ("The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.") (internal quotation marks and citation omitted).

[2] Two questions were accepted for interlocutory appeal. CFPB v. All American Check Cashing, Inc., No. 3:16-cv-356 (S.D. Miss. Mar. 27, 2018) (Order) (Dkt. No. 240). We address only the first.

The lines of responsibility become blurred, and accountability for the exercise of power becomes less comprehensible, when Congress establishes "independent" executive-branch agencies armed with vast powers but placed beyond presidential control. The growth of the Administrative State—with its ever-increasing oversight by individuals wielding significant power—demands accountability. The decision below, if allowed to stand, would reduce that accountability.

The Constitution vests power in three—and only three—branches. "The" executive power is vested in "a" single president, who "shall take Care that the laws be faithfully executed[.]" U.S. Const. art. II, §§ 1, 3. As explained below, several principles follow:

- The president—and only the president—is authorized and obligated to execute the laws.
- To execute the laws, a president needs agents—i.e., executive "officers of the United States" (U.S. Const. art. II, § 2, cl. 2), whose offices are lodged in the Executive Branch.

- To faithfully execute the laws, the president must have control over these officers—by removal, if necessary.
- And to ensure that the president carries out these duties, the president must be accountable to the people, which in turn, requires that the president's agents be accountable to him. Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010).

The CFPB's structure—headed by a lone Director, appointed for a five-year term, and immune from presidential removal except for cause—violates these principles.

Created through the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB was given vast powers: It is authorized to "prescribe rules or issue orders or guidelines pursuant to" nineteen different consumer-protection laws, including the Fair Debt Collection Practices Act and the Truth in Lending Act, which were previously administered by seven separate agencies. 12 U.S.C. §§ 5481(12), 5581(a)(1)(A), 5581(b). The Bureau may initiate actions in federal court or through administrative actions to challenge "unfair, deceptive, or abusive act[s] or practice[s]"—according to definitions adopted

by the CFPB itself. Id. §§ 5531(a), (b). And it has broad powers to order legal and equitable relief. Id. § 5565(a)(2).

Congress also provided the CFPB with unprecedented independence from the president, i.e., from the head of the Executive Branch. The CFPB is led by a single "Director," 12 U.S.C. § 5491(b)(1), who is appointed by the president, with the advice and consent of the senate, to a five-year term, id. §§ 5491(b)(2), (c)(1). The Director may not be removed by the president, except "for inefficiency, neglect of duty, or malfeasance in office[]" (id. § 5491(c)(3))—that is, except for cause.

The CFPB is therefore an "independent" administrative agency, an aberration in the tripartite government established by the Constitution, which vests power in only three branches and which empowers the president to remove Executive-Branch officers at will. As the Supreme Court explained, "[s]ince 1789, the Constitution has been understood to empower the President to keep [] officers accountable—by removing them from office, if

necessary." Free Enterprise Fund, 561 U.S. at 483 (citing Myers v. United States, 272 U.S. 52 (1926)). The Court has held, though, that "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." Id. (emphasis added).

But the Supreme Court has never approved of a for-cause removal protection in these circumstances. Indeed, the CFPB's structure is unprecedented: "No independent agency exercising substantial executive authority has ever been headed by a single person." PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Previously, "[t]o mitigate the risk to individual liberty, [] independent agencies have been headed by multiple commissioners or board members." Id.

Because of the scope of CFPB's powers and the for-cause removal protection, its Director "enjoys more unilateral authority than any other official in any of the three branches of

the U.S. Government[,]" except for the president. PHH Corp., 881 F.3d at 166 (Kavanaugh, J., dissenting).

The CFPB's unprecedented concentration of power and independence from the Executive Branch present a unique and dangerous threat to the "liberty and security of the governed." Metro. Wash. Airports Auth., 501 U.S. at 272. As the Supreme Court explained, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." Free Enterprise Fund, 561 U.S. at 499.

While the Constitution was adopted to ensure liberty through accountability, the CFPB was designed precisely to escape the control of the president who is thus unconstitutionally hampered in his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The

president—and therefore, We the People—are prevented from holding the CFPB accountable for its administration of the laws.

The CFPB will no doubt offer various policy reasons for its unprecedented independence. But policy cannot override constitutional principles. And "[w]e ought always to consider the Constitution with an eye to the principles upon which it was founded." James Madison (June 19, 1789), 1 Annals of Cong. 582. This Court should reverse the district court's opinion and hold that the structure of the CFPB violates Article II of the Constitution and the Constitution's Separation of Powers.

ARGUMENT

I. THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT LIBERTY

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than this: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

tyranny." The Federalist No. 47, at 324 (James Madison) (J. Cooke ed. 1961).

To prevent tyranny and protect liberty, the Constitution divides the "powers of the . . . Federal Government into three defined categories, Legislative, Executive, and Judicial." INS v. Chadha, 462 U.S. 919, 951 (1983). Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States[;]" Article II vests "the" executive power "in a President of the United States of America[;]" and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

"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) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

The Framers recognized that these mere "parchment barriers" between the branches were not a sufficient guarantor of liberty. The Federalist No. 48, at 333 (James Madison) (J. Cooke ed. 1961). Therefore, the Constitution also "give[s] to each [branch] a constitutional control of the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." Id. at 332. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other." The Federalist No. 51, at 349 (James Madison) (J. Cooke ed. 1961).

In sum, so that individual liberty may be secured, the Constitution divides power into three branches but also gives to each branch certain powers to check the others:

> [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some

> practical security for each, against the invasion of the others.

The Federalist No. 48, at 332 (James Madison) (J. Cooke ed. 1961). See also Metro. Wash. Airports Auth., 501 U.S. at 272 ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each.").

A "key 'constitutional means' vested in the President—perhaps the key means"—to "'resist encroachments'" by the other branches, is the president's "'power of appointing, overseeing, and controlling those who execute the laws.'" Free Enterprise Fund, 561 U.S. at 501 (emphasis of controlling added) (quoting The Federalist No. 51, at 349 (James Madison) (J. Cooke ed. 1961); James Madison (June 8, 1789), 1 Annals of Cong. 463).

Congress's for-cause removal protection for the CFPB Director unconstitutionally encroaches on the president's

constitutional authority—and obligation—to control those who execute the laws.

II. "THE" EXECUTIVE POWER IS VESTED IN "A" PRESIDENT WHO "SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED"

A. The President—and Only the President—Is Authorized and Obligated To "take Care that the laws be faithfully executed"

The Constitution vests power in three branches—and in three branches only. U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. See Steven G. Calabresi & Saikrishna B. Prakash, The President's Power to Execute the Laws, 104 Yale L.J. 541, 566 (1994) ("Only the three specifically named branches are allowed. Indeed, each of the first three articles ordains and establishes one branch or institution and then very carefully describes how its officers are to be selected and what powers they are to have."); David P. Currie, The Distribution of Powers after Bowsher, 1986 Sup. Ct. Rev. 19, 35 ("The Constitution recognizes only three kinds of federal powers: legislative, executive, and judicial.").

"The" executive power is vested in "a" single "President of the United States of America." U.S. Const. art. II, § 1. See Calabresi & Prakash, supra, at 568–69 ("Article II's vesting of the President with all of the 'executive Power' give[s] him control over all federal governmental powers that are neither legislative nor judicial[.]"). And this president "shall take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. The president is thus "both empowered and obliged" to do so. Akhil Reed Amar, Some Opinions on the Opinion Clause, 82 Va. L. Rev. 647, 658 (1996).

B. To "Take Care" That the Laws Be Faithfully Executed, the President Must Have Agents—Executive-Branch "Officers of the United States"—Whose Offices Are Lodged in the Executive Branch

1. The Constitution Contemplates Presidential Assistants

The president is not required to personally execute all of the laws; rather, the president must "take Care" that the laws be (faithfully) executed. U.S. Const. art. II, § 3. As George Washington explained, because it is "'impossib[le] that one man

should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" 30 Writings of George Washington 334 (John C. Fitzpatrick ed., 1939) (quoted in Free Enterprise Fund, 561 U.S. at 483). See Myers, 272 U.S. at 117 ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").

Thus while congress writes the laws and creates offices for their administration, Buckley v. Valeo, 424 U.S. 1, 138–39 (1976), the actual administration of the laws is left to the president alone: "Legislative power, as distinguished from executive power, is the authority to make laws, [] not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." Id. at 139 (internal quotation marks and citation omitted). As Hamilton noted, the "administration of government ... is limited to executive details, and falls peculiarly within the province of the

executive department." The Federalist No. 72, at 486 (Alexander Hamilton) (J. Cooke ed., 1961) (emphasis added).

2. Executive Officers Work in the Executive Branch and Are Subordinate to the President

To repeat briefly, the Constitution vests the executive power exclusively in the president; and so that the president can exercise his power and duty to see that the laws are faithfully executed, he must have officers to assist him. See Calabresi & Prakash, supra, at 593 (Without "inferior executive officers and departments[,]" the "vast majority of federal laws would go unexecuted and the President would be without advice and help as he sought to carry out his constitutional powers and duties.").

Therefore, these executive officers, who carry out some portion of the president's executive power, are and must be agents of the president—and "of no one else." John Harrison, Addition by Subtraction, 92 Va. L. Rev. 1853, 1862 (2006) (emphasis added). See also The Federalist No. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961) (The "persons . . . to

whose immediate management these different [executive] matters are committed ought to be considered as assistants or deputies to the chief magistrate ….”); Gouverneur Morris (July 19, 1787), 2 Farrand, Records of the Federal Convention of 1787 at 53–54 (“There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive . . .. Without these ministers the Executive can do nothing of consequence.”) (emphasis added).

If these officers “were agents of someone else, that someone else would have the executive power, or some share of it.” Harrison, supra, at 1862. But the Constitution did not vest anyone else but the president with “[t]he” executive power. U.S. Const. art. II, § 1. See Neomi Rao, Removal: Necessary and Sufficient for Presidential Control, 65 Ala. L. Rev. 1205, 1213 (2014) (The Executive Vesting Clause “implies that all administrative powers that are not exercises of the legislative

and judicial powers are within the executive branch and therefore must be within the control of the President[.]").

Accordingly, the administrative power "must be a subset of the President's 'executive Power' and not of one of the other two traditional powers of government." Calabresi & Prakash, supra, at 569 (footnote omitted).

3. Summing Up

(1) The president—and only the president—is authorized and obligated to "take Care" that the laws be faithfully executed, (2) the president cannot personally execute all of the laws and must therefore have assistance, and (3) the individuals who assist the president in the execution (administration) of the laws—i.e., the executive[3] "officers of the United States"—are part of the Executive Branch and subordinate to the president.

[3] The Constitution also provides for legislative and judicial officers. U.S. Const. art. II, § 2. But those officers are employed in the legislative and judicial branches, respectively. That is, legislative and judicial officers, like executive-branch officers, are housed within their respective branches—and only in their respective branches. And outside of the appointment power, the president is not vested with any power to control the agents of the other two branches.

C. To Faithfully Execute the Laws, the President Must Have Control Over His Officers—By Removal, If Necessary

The president's exclusive authority and obligation to "take Care that the laws be faithfully executed" require that the president have sufficient control over his agents. Traditionally, the president's control was effected through his power to remove executive officers at-will. See Free Enterprise Fund, 561 U.S. at 483 ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.") (citing Myers, 272 U.S. 52).

Although not expressly provided for in the Constitution, the president's removal power has long been considered a necessary incident of the executive power vested exclusively in the president. See Myers, 272 U.S. at 163–64 ("[A]rticle 2 grants to the President the executive power of the government—i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive

officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed[.]").

As noted above, "the executive authority, with few exceptions, is to be vested in a single magistrate." The Federalist No. 69, at 462 (Alexander Hamilton) (J. Cooke ed., 1961) (emphasis added). The exceptions are explicitly identified in the Constitution. See id. (identifying exceptions, including the president's power, with the advice and consent of the senate, to make treaties). Therefore, when "traditional executive power was not 'expressly taken away, it remained with the President.'" Free Enterprise Fund, 561 U.S. at 492 (emphasis added) (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 Documentary History of the First Federal Congress 893 (2004)).

"Under the traditional default rule, [the] removal [power] is incident to the power of appointment." Free Enterprise Fund, 561 U.S. at 509 (citations omitted).

Again, Congress may have the power to establish administrative agencies but, according to the Supreme Court, Congress cannot restrict the president's executive power of removal and thereby "reduce the Chief Magistrate to a cajoler-in-chief." Free Enterprise Fund, 561 U.S. at 502. See id. at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices. Only presidential oversight can counter its influence."); id. at 499 (Congress has the "power to create a vast and varied federal bureaucracy[]," but the "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."). See also id. at 516 (Breyer, J., dissenting) (The separation-of-powers "principle, along with the instruction in Article II, § 3 that the President 'shall take Care that the Laws be faithfully executed,' limits Congress' power to structure the Federal Government.") (citations omitted); Calabresi & Prakash, supra, at 581 ("Once created, these agencies and officers executing federal law must retain the President's approval and be subject to presidential

superintendence if they are to continue to exercise 'the executive Power.'").

In short, the president is "both empowered and obliged" to take care that the laws be faithfully executed, Amar, supra, at 658; to exercise this power and meet this obligation, the president must have sufficient control over his administration—through the at-will removal power, if necessary.

D. The President's Control Over His Administration Makes the President Accountable for the Faithful Execution of the Laws—and Thereby Helps To Secure Individual Liberty

The president's (necessary) delegation of executive power to his agents involves a risk, since the "diffusion of power carries with it a diffusion of accountability." Free Enterprise Fund, 561 U.S. at 497. This risk, though, is tempered by the president's constitutionally derived control over his administrative agents.

The Constitution "that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to

remove those who assist him in carrying out his duties." Free Enterprise Fund, 561 U.S. at 513–14. Without the removal power, the president "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else[,]" and this "diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" Id. at 514 (quoting The Federalist No. 70, at 478 (Alexander Hamilton) (J. Cooke ed., 1961)).

The Constitution was designed to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." James Madison (June 17, 1789), 1 Annals of Cong. 499.

The president is "the only democratically elected official [within the Executive Branch]," and "the political accountability of his subordinates depends on their accountability to the President." Neomi Rao, A Modest Proposal: Abolishing Agency

Independence in Free Enterprise Fund v. PCAOB, 79 Fordham L. Rev. 2541, 2552 (2011) (citing Free Enterprise Fund, 561 U.S. at 497–98 (quoting The Federalist No. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961))).

The people do not vote for administrators—they "instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" Free Enterprise Fund, 561 U.S. at 497–98 (quoting The Federalist No. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961)). As Justice Scalia explained, the president is "directly dependent on the people, and since there is only one President, he is responsible. The people know whom to blame . . .." Morrison v. Olson, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting). See also James Madison (June 16, 1789), 1 Annals of Cong. 462 (The "first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.").

In short, the president "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." Free Enterprise Fund, 561 U.S at 484.

III. THE STRUCTURE OF THE CFPB VIOLATES ARTICLE II OF THE CONSTITUTION AND THE CONSTITUTION'S SEPARATION OF POWERS

The structure of the CFPB brings these concerns into focus. As described above, Congress established a uniquely powerful and independent administrative agency. See PHH Corp., 881 F.3d at 165 (Kavanaugh, J., dissenting) (Before the CFPB, "[n]o independent agency exercising substantial executive authority has ever been headed by a single person.").

And just as the Supreme Court has never approved a multi-level for-cause removal protection, see Free Enterprise Fund, 561 U.S. at 495 ("The [unconstitutional] result is a Board that is not accountable to the President, and a President who is not responsible for the Board."), the Supreme Court has never approved a for-cause removal protection for a single head of an

"independent" agency. See PHH Corp., 881 F.3d at 165 (Kavanaugh, J., dissenting).

In his dissent, Judge Kavanaugh exhaustively discussed the points above, focusing on historical practice (which the Supreme Court has "repeatedly emphasized" in this context); the importance of liberty in the Separation of Powers analysis; and the dangers of congressional interference in the president's authority over the Executive Branch. See PHH Corp., 881 F.3d at 164–98 (Kavanaugh, J., dissenting). See also CFPB v. RD Legal Funding, LLC, No. 17-cv-890 (LAP), 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (adopting Sections I-IV of Judge Kavanaugh's dissent in PHH Corp., "where, based on considerations of history, liberty, and presidential authority, [he] concluded that the CFPB 'is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director.'") (quoting PHH Corp., 881 F.3d at 198) (Kavanaugh, J., dissenting))).

Accordingly, the Supreme Court's decisions in Humphrey's Executor v. United States, 295 U.S. 602 (1935), and its progeny do not support the structure of the CFPB. Those cases hold that the president's removal power may be restricted when an agency is headed by multiple commissioners or board members. See PHH Corp., 881 F.3d at 165 (Kavanaugh, J., dissenting). The multi-member agencies do not present the same threat to individual liberty as the CFPB does because they "do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members." Id. The "multi-member structure thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual liberty." Id.[4]

[4] CFPB's actions in the PHH case provide a textbook example of the threat of arbitrary rulings—novel interpretations of statutory language (contrary to longstanding interpretation), unprecedented penalties, and unilateral action.

In that case, the CFPB initiated an administrative-enforcement action in January 2014, accusing PHH of violating the Real Estate Settlement Practices Act (RESPA), which bans kickbacks that are used to refer business involving a "real estate settlement service." 12 U.S.C. § 2607(a). PHH provided mortgage loans and referred borrowers to mortgage lenders who purchased reinsurance from a company that PHH owned. As a result,

Accordingly, the unique and unprecedented structure of the CFPB violates Article II and the Separation of Powers.

PHH received part of the reinsurance premiums. This type of arrangement (referring business to a "captive" reinsurer), however, had long been approved by the Department of Housing and Urban Development (HUD), so long as reinsurance premiums did not exceed market rates. PHH Corp. v. CFPB, 839 F.3d 1, 10–11 (D.C. Cir. 2016), reinstated in relevant part, 881 F.3d 75 (D.C. Cir. 2018) (en banc). In a Recommended Decision, an administrative-law judge (ALJ) concluded that PHH had violated RESPA because, he said, the reinsurance premiums exceeded market rates. PHH Corp., 881 F.3d at 82. The ALJ recommended an order of disgorgement in the amount of $6.4 million. Id.

The CFPB Director reviewed the ALJ's recommendation. PHH Corp., 881 F.3d at 82. The Director ignored HUD's long-standing interpretation of RESPA and also declared that RESPA's three-year statute of limitations applied only in court, not in administrative-enforcement actions. Based on these novel interpretations, the Director found additional RESPA violations and increased the disgorgement amount to $109 million. PHH Corp., 839 F.3d at 11–12.

Three years after the CFPB initiated its action against PHH, a panel of the D.C. Circuit vacated the Director's order. PHH Corp., 839 F.3d 1. According to the panel, the CFPB's "newly minted" reading of RESPA (1) "discarded HUD's longstanding interpretation[,]" and misinterpreted RESPA and (2) violated "bedrock due process principles by retroactively applying its new interpretation" against PHH. Id. at 11–12, 41–49. The panel further held that the three-year statute of limitations applied to administrative proceedings as well as court actions. Id. at 50–55.

The case was then heard by the en banc D.C. Circuit, which affirmed the panel's interpretation of RESPA and its application to PHH. PHH Corp., 881 F.3d at 83.

In sum, the Director—unilaterally and outside of the traditional APA requirements for rule-making—adopted new interpretations of RESPA and its statute of limitation. His interpretations upended well-settled law and would have resulted in an increased disgorgement order of $109 million (far above the ALJ's $6.4 million order). The Director's errors were corrected only after four years of litigation and appeals—by a party that had the resources to fight.

Because of the for-cause removal protection for the CFPB director, the "President is stripped of the power [the Supreme Court's] precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." Free Enterprise Fund, 561 U.S. at 496. "By granting the [CFPB] executive power without the Executive's oversight, [the Dodd-Frank] Act 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. The Act's restrictions are incompatible with the Constitution's separation of powers." Id. at 498.

CONCLUSION

The CFPB's structure presents an unprecedented violation of the Constitution's Separation of Powers. It is the Judiciary's responsibility to ensure that the branches stay

within their constitutionally prescribed roles.[5] This Court should therefore affirm the vested power of the president to "appoint[], oversee[], and control[] those who execute the laws." James Madison (June 8, 1789), 1 Annals of Cong. 463 (emphasis added). The district court's decision should be reversed.

DATED: July 9, 2018.

Respectfully submitted,

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WENCONG FA
Pacific Legal Foundation

s/ Oliver J. Dunford
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[5] As Chief Justice Roberts has noted, "[p]reserving the separation of powers is one of this Court's most weighty responsibilities." Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting). See id. at 1955 (identifying cases in which the Supreme Court had "invalidated executive actions that encroach upon the power of the Legislature, . . . legislative actions that invade the province of the Executive, . . . and actions by either branch that trench upon the territory of the Judiciary.") (citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2018, 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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CERTIFICATE OF COMPLIANCE

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DATED: July 9, 2018.

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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,
in Civil Action No. 3:16-cv-356

BRIEF OF THE STATES OF TEXAS, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, MICHIGAN, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, UTAH, WEST VIRGINIA, AND PAUL R. LEPAGE, GOVERNOR OF MAINE, AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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Interest of Amici Curiae

Amici are the States of Texas, Arkansas, Georgia, Indiana, Kansas, Louisiana, Michigan, Nebraska, Oklahoma, South Carolina, Tennessee, Utah, West Virginia, and Paul R. LePage, Governor of Maine. States have "special solicitude" to challenge unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Courts have long recognized that the States guard "the public interest in protecting separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

In this case, the Consumer Financial Protection Bureau (CFPB) has wielded its unchecked power to bring an enforcement action against All American Check Cashing, Inc. and other entities (collectively, "All American"), alleging deceptive trade practices. States enforce robust consumer protections, and indeed have severely sanctioned All American for its unlawful conduct. If federal agencies wish to assist States in protecting consumers and policing deceptive trade practices, they must do so in a manner consistent with Article II of the Constitution. For the reasons set out below, the CFPB's structure violates the Constitution. The CFPB thus has no authority to bring the enforcement action at issue in this case.

Amici therefore ask this Court to declare the CFPB's structure unconstitutional.[1]

[1] Neither amici nor counsel received any monetary contributions intended to fund preparing or submitting this brief. No party's counsel authored this brief in whole or in part.

INTRODUCTION

The "ultimate purpose" of our Constitution's separation of powers "is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). That is why the Framers "viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). This case calls upon the Court to vindicate that principle by striking down the unlawful action of an administrative agency built around a single unaccountable and unchecked administrator.

That agency—the CFPB—was created in 2010 under the Dodd-Frank Act. Charged with enforcing various federal consumer-protection laws, the CFPB is headed by a single director—not a board or a group of commissioners. The director is appointed by the President, with the advice and consent of the Senate, to a five-year term. 12 U.S.C. § 5491(b), (c). He may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

That structure is unprecedented. Before the CFPB's creation, "[n]o independent agency exercising substantial executive authority ha[d] ever been headed by *a single person*." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (emphasis in original). As Judge Kavanaugh of the D.C. Circuit recently observed, "the Director of the CFPB possesses more unilateral authority—that is, authority to

take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." *Id.* at 165-66 (Kavanaugh, J., dissenting). Indeed, "other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166 (Kavanaugh, J., dissenting); *see also Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, No. 17-CV-890 (LAP), 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (finding the CFPB's structure unconstitutional for the reasons identified by Judge Kavanaugh).

The Constitution forbids concentrated, unchecked authority in a sole, unaccountable director of an administrative agency charged with wielding executive power. And with good reason: a single-headed agency lacks the critical structural attributes that have historically justified multi-member regulatory commissions. Courts have permitted multi-member commissions on the basis that such a structure poses less threat to individual liberty than does a single-headed commission. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935); *see also* 51 Cong. Rec. 10,376 (1914) (Federal Trade Commission "would have precedents and traditions and a continuous policy and would be free from the effect of . . . changing incumbency"). An agency built around a sole director, by contrast, is unchecked by the constraints of group decisionmaking among members appointed by different Presidents. *PHH Corp.*, 881 F.3d at 166, 178 (Kavanaugh, J., dissenting) (citing Senate Committee on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 95-91, vol. 5,

at 35 (1977)). A single director, in other words, "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does." *Id.* at 166 (Kavanaugh, J., dissenting).

In this case, the CFPB brought that unchecked power to bear on All American for allegedly unlawful trade practices. It has done so free from any oversight by the Executive. Amici take no position on the propriety or legality of the business activities targeted in the CFPB's enforcement action in this case. Whatever those merits may be, the CFPB has no power to litigate them, because the CFPB's structure renders it unconstitutional. It follows that any action the CFPB undertakes is necessarily invalid.

Combating unlawful trade practices is among a State's most important responsibilities. The extent to which federal administrative agencies should involve themselves in consumer protection is debatable; what is not debatable, though, is the duty to comply with the Constitution. The Court should reverse the decision below.

ARGUMENT

The CFPB has the power to "seek to implement and, where applicable, enforce Federal consumer financial law" as a means of ensuring that "all consumers have access to markets for consumer financial products and services" and that the markets for such products and services are "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB furthermore may prescribe

rules implementing consumer-protection laws; conduct investigations of market actors; and enforce consumer-protection laws in administrative proceedings and in federal court, including through civil monetary penalties. *See, e.g.*, *id.* §§ 5511(c), 5562, 5563, 5565.

The Constitution does not permit the government to consolidate those sweeping executive powers in an administrative agency headed by a sole director who may be removed only for cause. Courts should thus invalidate any enforcement action promulgated pursuant to that unconstitutional structure.

I. THE CFPB'S STRUCTURE VIOLATES THE CONSTITUTION'S SEPARATION OF POWERS.

The Constitution vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. Precedent provides that removal restrictions such as those governing the CFPB are permissible only for multi-member commissions, not for those headed by a single director.

A. The President Must Retain the Power to Remove at Will the Heads of Single-Director Agencies.

Article II bestows "[t]he executive power" in a single, unitary executive. It makes "emphatically clear from start to finish" that "the president would be personally responsible for his branch." Akhil Reed Amar, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability." *Printz v.*

United States, 521 U.S. 898, 922 (1997). This unitary executive further promotes "[d]ecision, activity, secre[c]y, and d[i]spatch" in ways that a "greater number" cannot. 3 Joseph Story, Commentaries on the Constitution of the United States § 1414, at 283 (1833).

Of course, as a practical matter, the President cannot carry out the full scope of "the executive power" on his own. That is why, "as part of his executive power," the President "select[s] those who [are] to act for him under his direction in the execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Selecting assistants and deputies lies at the heart of "the executive power," which necessarily includes "the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)).

The President's essential power to select administrative officials necessarily includes the power to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (quotation marks omitted)); *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) ("To supervise and direct executive officers, the President must be able to remove those officers at will."); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*,

65 ALA. L. REV. 1205, 1215 (2014) ("The text and structure of Article II provide the President with the power to control subordinates within the executive branch.").

Since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund*, 561 U.S. at 483. This view "soon became the 'settled and well understood construction of the Constitution.'" *Id.* at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then "a subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) (citing *Bowsher*, 478 U.S. at 726). That, in turn, would intolerably impinge on the President's duty to execute the law. *See id.* And it would upend the chain of command on which the Executive Branch relies to function properly. *See Free Enter. Fund*, 561 U.S. at 513-14; *see also id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them.").

The Supreme Court first recognized and adopted this commonsense understanding in *Myers v. United States*, when it struck down as unconstitutional a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The Court held: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws

be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. If the President lacked the exclusive power of removal, he could not "take care that the laws be faithfully executed." *Id.* at 164.

The *Myers* rule has been reaffirmed repeatedly to the present day. The Supreme Court did so recently in *Free Enterprise Fund*, confirming that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting THE FEDERALIST No. 70, at 478 (Alexander Hamilton) (J. Cooke ed. 1961)).

B. Congress May Restrict the President's Removal Power Only As to Independent, Multi-Headed Commissions.

The Supreme Court has recognized one narrow exception to the general rule of *Myers*. In 1935, the Supreme Court held that Congress could create "independent" agencies whose heads were not removable at will and would operate free of the President's supervision and direction. *Humphrey's Ex'r*, 295 U.S. at 625, 631-32.

Humphrey's Executor concerned President Franklin Roosevelt's dispute with a commissioner of the Federal Trade Commission. President Roosevelt

attempted to fire the commissioner, but the commissioner contested his removal, claiming that he was protected against firing by the FTC's for-cause removal provision. *Id.* at 621-22. In presenting the case to the Supreme Court, the Roosevelt Administration's "chief reliance" was *Myers* and its articulation of the Article II executive power. *Id.* at 626.

The Supreme Court rejected that argument and held that Article II did not forbid Congress to create an independent agency "wholly disconnected from the executive department." *Id.* at 630. The Court deferred to the FTC's "nonpartisan" nature and its charge to "act with entire impartiality" while "exercis[ing] the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (quotation marks omitted). In that situation, the Court held, Congress could validly limit the President's power to remove the commissioners. *Id.* at 628-30.

Predictably, following *Humphrey's Executor*, independent agencies came to populate all corners of the federal government. These agencies "play[] a significant role in the U.S. Government" and "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting). Many significantly affect the daily lives of countless Americans, including the Federal Reserve Board, the Federal Communications Commission, the Federal Deposit Insurance Corporation, the Securities and Exchange Commission, the National Labor Relations Board, the Consumer Product Safety Commission, and many others. *Id.* at 173.

Those independent agencies share certain specific features recognized in *Humphrey's Executor*. Specifically, their leadership includes multiple members appointed at staggered times. As the Supreme Court observed in *Humphrey's Executor*, the FTC had five members with staggered terms, and no more than three of them could be of the same political party. 295 U.S. at 619-20. The Court thus held that the Commission was a "body of experts" deliberately "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Those features have come to be regarded as the *Humphrey's Executor* exception to the general rule announced in *Myers*. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (upholding the removal provisions of the three-member War Claims Commission); *see also Free Enter. Fund*, 561 U.S. at 483 ("In *Humphrey's Executor* [] we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.").

Courts have recognized two primary justifications for permitting the limited removal of the heads of these independent agencies. First, "[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). That is, "[t]he multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.* That basic structure makes it harder for the independent agency to impinge

on individual freedom. *See id.* It further discourages arbitrary, unsound agency actions driven by the whims of one individual. *Id.* Each commissioner, in other words, acts as a check on the others through the process of "deliberative decision making." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013).

Second, multi-member independent agencies have a historical tradition since *Humphrey's Executor*. *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting). In "separation of powers cases not resolved by the constitutional text alone, historical practice matters." *Id.* The Supreme Court confirmed as much in its recent decision in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), in which it relied on "[l]ong settled and established practice" to reach "a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." *Id.* at 2559 (quotation marks omitted).

In sum, only independent agencies with several directors serving staggered terms can possibly fall within the *Humphrey's Executor* exception to the general *Myers* rule.

C. The CFPB's Structure Violates the Constitution Because It Vests Unchecked Power in a Single Director Removable Only for Cause.

That legal background makes this case clear-cut: the CFPB's structure is impermissible under Article II. *See Myers*, 272 U.S. at 117.

Unlike the multi-member agencies approved in *Humphrey's Executor* and its progeny, the CFPB is headed by a single Director. 12 U.S.C. § 5491(b). He

serves a term of five years and may be fired only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c). And he wields "unmistakably executive responsibilities," including "criminal investigation and prosecution." *PHH Corp.*, 881 F.3d at 80 (majority op.).[2]

The director wields that executive power as to *nineteen* different federal consumer-protection statutes. 12 U.S.C. § 5512(b)(1). He may examine and investigate individuals and entities to assess their compliance with those statutes. *Id.* §§ 5514(b), 5515(b), 5516(c). He may issue "civil investigative demand[s]." *Id.* § 5562(c). He may institute enforcement actions and conduct "adjudication proceedings." *Id.* § 5563(a). He may sue in state or federal court to enforce consumer-protection laws. *Id.* § 5564.

Those facts are sufficient to resolve this case. *Myers* provides that the President's subordinates must be removable at will. *Humphrey's Executor* creates a narrow exception for multi-director independent agencies with directors serving staggered terms. Because the CFPB has a sole director, appointed for a term of five years and removable only for cause, its structure violates Article II by preventing the President from carrying out the executive power.

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[2] To be sure, the *Humphrey's Executor* Court termed the FTC functions "quasi-legislative" and "quasi-judicial," but the Court later recognized in *Morrison* that courts today would not use those same terms. 487 U.S. at 689 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.").

II. THE CFPB'S UNCONSTITUTIONAL STRUCTURE RENDERS ALL ITS ACTIONS UNLAWFUL.

A. The Court Should Invalidate the CFPB's Enforcement Action.

Because the CFPB's structure is unconstitutional, any action it takes is necessarily invalid. In *Free Enterprise Fund*, after concluding that the Public Company Accounting Oversight Board's structure was constitutionally impermissible, the Supreme Court declared that the challengers were entitled to relief "sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513 (citing *Bowsher*, 478 U.S. at 727 n. 5).

The outcome in this case should be the same. Any enforcement action brought by an administrative agency is permissible only when it is brought pursuant to a mechanism that does not violate the Constitution. Until then, All American is entitled to declaratory and injunctive relief. *See id.*

Striking down the CFPB will not leave consumers vulnerable to deceptive trade practices. Indeed, Mississippi already has vigorously protected its citizens from unlawful trade practices involving All American. *See* All American Br. 4-5. In May 2017, for example, Mississippi issued an Administrative Order against All American addressing various violations of state law.[3] Among other

[3] *See* Media Release, State of Mississippi Department of Banking and Consumer Finance (May 12, 2017), http://www.dbcf.state.ms.us/documents/pr051217.pdf.

things, the State levied monetary penalties totaling almost $1.6 million, along with several severe non-monetary sanctions.[4]

B. The Court Should Disagree with the D.C. Circuit's Recent Decision Upholding the CFPB.

Earlier this year, the en banc D.C. Circuit held in *PHH Corp.* that the CFPB's structure does not violate the Constitution. *See* 881 F.3d at 77, 84. For the reasons set out above, that holding misunderstands the Constitution. Indeed, Judges Henderson and Kavanaugh, writing in dissent, fully documented the majority's erroneous reasoning, and cogently explained why that court should have reached the opposite conclusion. *See id.* at 140-64 (Henderson, J., dissenting), 164-200 (Kavanaugh, J., dissenting).

Meanwhile, the Southern District of New York has reached the opposite conclusion. *See RD Legal Funding*, 2018 WL 3094916, at *35. That court explicitly "disagree[d] with the holding of the en banc court [in *PHH Corp.*] and instead adopt[ed] Sections I-IV of Judge Brett Kavanaugh's dissent." *Id.*

This Court should decline to follow the D.C. Circuit's erroneous decision. Like the Southern District of New York, it should hold that the CFPB's structure renders the CFPB unconstitutional.

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[4] *Id.*; *see also* Agreed Order, *All American Check Cashing, Inc. v. Corley*, No. G-2017-699 S/2 (Chancery Ct. of the 1st Judicial Dist. Hinds Cty., Miss. June 9, 2017), http://www.dbcf.state.ms.us/documents/aacc_agreed_060917.pdf.

Conclusion

This Court should hold that the CFPB's structure violates the Constitution and reverse.

Respectfully submitted.

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Certificate of Service

I certify that on July 9, 2018, the foregoing Brief of Amici Curiae was served through the Court's ECF filing system on all counsel of record.

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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 an interlocutory order of the United States District Court for the Southern District of Mississippi
Case No. 3:16-cv-356, Hon. William H. Barbour, Jr.

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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Pursuant to Federal Rules of Appellate Procedure 27 and 29, The Chamber of Commerce of the United States of America respectfully moves this Court for leave to file the attached brief as *amicus curiae* supporting Defendants-Appellants. Defendants-Appellants have consented to the filing of this brief. Plaintiff-Appellee Consumer Financial Protection Bureau ("CFPB") does not consent to the filing of the brief, but has stated that it will not oppose this motion.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including at the panel and en banc stages in *PHH Corp. v. Consumer Financial Protection Bureau* (D.C. Cir. No. 15-1177), which presented the same constitutional question before the Court in this case.

This case is of particular interest to the Chamber's members, many of whom are regulated by the CFPB. It is essential for these businesses

that the courts take action to remedy the unconstitutional features of the Bureau, which have made the agency unaccountable to the people and their elected representatives.

The Chamber submits that its brief, which explains in detail how the unconstitutional features of the Bureau have led to harmful consequences for the businesses that the Bureau regulates, will be helpful to the Court as it considers the issue presented on appeal. The Court should therefore grant the Chamber leave to file the attached brief as *amicus curiae*.

CONCLUSION

The Chamber's unopposed motion for leave to file a brief as *amicus curiae* supporting Defendants-Appellants should be granted.

Respectfully submitted,

Dated: July 9, 2018

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amicus curiae* certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 317 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that that on July 9, 2018, I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to the persons and entities identified in the Appellants' Certificate, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 of the Rules of this Court have an interest in the outcome of this case. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

1. The Chamber of Commerce of the United States of America, amicus curiae, has no parent corporations, and no publicly held company has any ownership interest therein;

2. Mayer Brown LLP (Andrew J. Pincus, Stephen C.N. Lilley, Matthew A. Waring), U.S. Chamber Litigation Center (Steven P. Lehotsky), counsel for amicus curiae The Chamber of Commerce of the United States of America.

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INTEREST OF THE AMICUS CURIAE[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau is unique:

- its broad regulatory authority is concentrated in a single Director—the "head of the Bureau" (12 U.S.C. § 5491(b)(1))—who single-handedly decides whether to bring enforcement actions, adjudicates administrative enforcement actions, and issues regulations (id. §§ 5512(b)(1), 5563(a))—and has exclusive au-

[1] Defendants-Appellants consented to the filing of this brief; Plaintiff-Appellee did not consent but will not oppose amicus' motion for leave to file the brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus, its members, and its counsel made a monetary contribution to fund the preparation or submission of the brief.

thority to appoint his Deputy and all other Bureau staff (id. §§ 5491(a)(5)(A), 5493(a)(1)(A));[2]

- the Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office" (12 U.S.C. § 5491(c)(3));
- the Bureau's rulemaking and adjudicatory authority extends broadly throughout the economy, affecting numerous types of businesses in addition to financial services companies—"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" (PHH Corp. v. Consumer Fin. Protection Bureau, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J. dissenting); and
- the Director may spend nearly $650 million dollars each year without seeking or obtaining the approval of Congress and the President. (The Bureau is funded by periodic transfers of money from the Federal Reserve in amounts "determined by the Director to be reasonably necessary" to fund the Bureau's op-

[2] The Bureau is located within the Federal Reserve as an organizational matter, but the Federal Reserve Board is expressly precluded from reviewing any action of the Director. See 12 U.S.C. § 5492(c).

> erations, limited by a statutory cap that in fiscal year 2017 is $646.2 million. 12 U.S.C. § 5497(a)(1), (a)(2); see also CFPB, The CFPB strategic plan, budget and performance plan and report 9 (Feb. 2016), https://goo.gl/Rk5zue.)

Most other independent regulatory agencies are headed by bipartisan, multi-member bodies[3]; when a department or agency is headed by a single individual, that person almost always serves at the pleasure of the President; and most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws.

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[3] See, e.g., 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners, with no more than three from any political party); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); id. § 1752a(b)(1) (National Credit Union Administration headed by three-member bipartisan board); id. § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five bipartisan Commissioners); id. § 78d(a) (Securities and Exchange Commission composed of five bipartisan Commissioners); id. § 2053(a) (Consumer Product Safety Commission composed of five Commissioners); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission composed of five bipartisan Commissioners); 47 U.S.C. § 154(a) (Federal Communications Commission composed of five bipartisan Commissioners). See generally PHH Corp. v. Consumer Fin. Protection Bureau, 881 F.3d 75, 173 (D.C. Cir. 2018) (Kavanaugh, J. dissenting).

There are a few exceptions to each of these generalizations—for example, other government entities funded outside the appropriations process. But no other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who can spend funds without obtaining an annual appropriation.

That unprecedented structure violates the Constitution. It conflicts fundamentally with the self-governance principle on which the Constitution rests, and the absence of any historical precedent in our history for a federal agency with the Bureau's structure and regulatory power provides strong additional evidence of its unconstitutionality. Three members of the D.C. Circuit dissented from that court's en banc holding and concluded that the Bureau's structure violates the Constitution,[4] as has a district court in the Southern District of New York.[5] This Court should do the same.

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[4] See PHH, 881 F.3d at 164 (Henderson, J., dissenting); id. at 198 (Kavanaugh, J., joined by Randolph, J., dissenting).

[5] See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC, 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (holding that the Director's for-cause removal protection was not severable from the rest of the statute and invalidating the whole of Title X of the Dodd-Frank Act).

The Bureau's lack of accountability has caused harm to the community that it regulates virtually from the Bureau's creation. Unanswerable to the President or to Congress, the Bureau has pursued enforcement actions that exceed its jurisdiction and issued vague regulatory pronouncements that maximize its own authority while denying businesses the certainty they need to operate. It is imperative for this Court to provide a permanent check on such abuses by holding that the Bureau's insulation from political control is unconstitutional.

ARGUMENT

I. THE BUREAU'S STRUCTURE VIOLATES THE CONSTITUTION.

The Bureau's unprecedented structure violates the Constitution in two separate, but related, ways. First, the complete insulation of the Bureau from accountability to citizens' elected representatives (the President and Congress) for the Director's entire five-year term is inconsistent with the Constitution's fundamental principle of self-governance. Second, the grant of broad power to a single Director unaccountable to the President violates basic separation-of-powers principles. The Supreme Court has repeatedly looked to history in construing the Constitution's structural protections, and these conclusions are therefore bolstered by the complete ab-

sence of any historical precedent for a federal agency resembling the Bureau.

A. The Bureau Is Not Accountable To The Elected Branches Of Government.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 499 (2010). It embodies "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The Federalist No. 39 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed39.asp; see also, e.g., Providence Bank v. Billings, 29 U.S. (4 Pet.) 514, 548 (1830) ("The power of self government is a power absolute and inherent in the people.").

For that reason, all "legislative Powers" of the federal government are "vested in a Congress of the United States," consisting of the people's elected Representatives and Senators. U.S. Const. Art. I, § 1. And "[t]he executive Power" is "vested in a President of the United States" (Art. II, § 1), who is "chosen by the entire Nation" (Free Enterprise Fund, 561 U.S. at 499). Conferring legislative and executive authority directly, and solely, on the representatives chosen by the people is essential for accountability

to the people—and therefore to the self-government on which the constitutional structure rests.

That is because "[t]he diffusion of power carries with it a diffusion of accountability," which "subverts . . . the public's ability to pass judgment on" the efforts of those whom they elect. Free Enterprise Fund, 561 U.S. at 497-98; see also id. at 498 ("[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall'" (quoting The Federalist No. 70, p. 476 (Alexander Hamilton) (J. Cooke ed. 1961)).

The Bureau's structure was expressly intended to achieve the opposite result: unprecedented insulation of the Director's actions from control by Congress or the President. That insulation violates the Constitution.

To begin with, the Director's authority is extremely broad. It extends to any person or business who engages in any of ten specified activities that are common throughout the economy, as well as service providers to such businesses.[6] And the Director may initiate enforcement actions; adjudicate enforcement actions brought administratively; and issue regula-

[6] See, e.g., 12 U.S.C. §§ 5481(15) & (26), 5514, 5531, 5536. The statute's exemptions (see id. § 5517) are quite narrow.

tions—not just under the Dodd-Frank Act but also under eighteen other federal laws.

The Director's exercise of this broad authority is not subject to any of the mechanisms for accountability to the people's elected representatives that apply to other agencies. Most pertinently, the President may not remove the Director at will to ensure the implementation of his policy priorities, and Congress may not use its "power of the purse" to circumscribe the Director's exercise of his authority. (The Framers recognized the importance of the appropriations power to ensuring accountability to the people: "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people," because those representatives "cannot only refuse, but they alone can propose, the supplies requisite for the support of government.") The Federalist No. 58 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed58.asp.

The majority opinion of the divided en banc D.C. Circuit in PHH, on which the district court relied, dismissed any concerns about the Director's removal protection and the agency's budgetary independence. The court there held that these two features of the Bureau are each "unproblematic"

in isolation and concluded that they do not "amplify each other in a constitutional way" because they insulate the Bureau from different branches of government (the President and Congress respectively). PHH, 881 F.3d at 96. But that is precisely the problem: the Bureau's unprecedented insulation from both of the political branches of government give it a degree of power and autonomy that is unknown in administrative law.[7]

And in any event, the features that contribute to the Bureau's lack of accountability go beyond merely the Director's removal protection and the agency's budgetary independence. Any penalties and fines collected by the Bureau are deposited into a separate account and, if not used to compensate affected consumers, may be expended by the Director—without any

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[7] The PHH majority cited the Federal Reserve and the Office of the Comptroller of the Currency ("OCC") as examples of agencies with heads who are removable only for cause and who have budgetary autonomy. 881 F.3d at 96. But the features of the Federal Reserve—which in any event makes policy through a multimember board and not a single individual—"reflect [its] unique function . . . with respect to monetary policy" and offer no precedent for creating a powerful, unaccountable regulatory and prosecutorial agency like the CFPB. Id. at 192 n.17 (Kavanaugh, J., dissenting). And the OCC Comptroller is removable at will by the President. Id. at 177 n.4.

The PHH dissents explain why the D.C. Circuit majority erred in concluding that the Dodd-Frank Act imposes meaningful review on the Director's exercise of the CFPB's broad authority that substitute for the unprecedented insulation from control by the elected Branches. 881 F.3d at 157-60 (Henderson, J., dissenting); id. at 171-73 (Kavanaugh, J., dissenting).

approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2).[8] The Director is specifically empowered to provide "legislative recommendations, or testimony, or comments on legislation" to Congress without prior review by "any officer or agency of the United States." Id. § 5492(c)(4). And the Director is authorized to appoint his own Deputy, who serves as Acting Director in the absence of a Director. Id. § 5491(a)(5).

The combination of all of these provisions creates an extraordinarily attenuated "chain of command" that uniquely limits the people's ability to exercise their right to self-government with respect to matters within the Bureau's jurisdiction. That unprecedented disconnection of federal executive and legislative power from all of the mechanisms for ensuring accountability, and therefore self-government, is unconstitutional.

[8] This provision not only provides the Bureau with another source of funding exempt from the accountability provided by the appropriations process; it also gives the Bureau a disturbing self-interest in pursuing remedies in enforcement actions—harkening back to a discredited era in law enforcement. See Margaret H. Lemos & Max Minzer, For-Profit Public Enforcement, 127 Harv. L. Rev. 853, 862 (2014) (describing the rejection of "bounty-based public enforcement" by most U.S. jurisdictions by the turn of the twentieth century).

B. The Bureau's Structure Violates Fundamental Separation of Powers Principles.

The Constitution charges the President with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In order to exercise the entire executive power of the federal government, the President necessarily must act with "the assistance of subordinates." Myers v. United States, 272 U.S. 52, 117 (1926).

But, because "[t]he buck stops with the President" under Article II (Free Enter. Fund, 561 U.S. at 493), the President remains responsible for supervising and controlling the actions of his subordinates. See Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1238 (2015) (explaining that Article II "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people").

And in order effectively to control his subordinates, the President must be able to remove them. See, e.g., Bowsher v. Synar, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (internal quotation marks omitted); see also, e.g., Myers, 272 U.S. at 119 ("[T]hose in charge of and responsible for administering functions of government, who select their

executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.").

To be sure, in Humphrey's Executor v. United States, 295 U.S. 602, 632 (1935), the Supreme Court held that Congress could create administrative agencies whose officers were protected from presidential removal except for cause. But the Court based this exception to the general rule of unfettered presidential control on the understanding that such officers would "be nonpartisan," "act with entire impartiality," exercise "neither political nor executive" duties, and apply " the trained judgment of a body of experts 'appointed by law and informed by experience.'" Id. at 624. The Court reasoned that such an expert body was not truly executive and thus could be insulated from presidential control. Id. at 628.

The extent to which the rationale of Humphrey's Executor extends to the labyrinth of administrative agencies established since 1935 is far from clear. But it surely does not reach the Bureau, whose Director bears no resemblance to the multi-member Federal Trade Commission before the Court in Humphrey's Executor—or to any other federal regulatory agency. That is because every agency that regulates the private sector and is headed by officials whom the President may remove only for cause has a

multi-member commission structure.[9] Because the terms of such commission members are staggered, a President inevitably will have the ability to influence the commission's deliberations by appointing one or more members. And, of course, many of these statutes establishing these agencies expressly require bipartisan membership. Those features provide at least some accountability to the President.

In addition, as Judge Kavanaugh explained in detail in his PHH dissent, a multi-member commission structure means that members have the ability to check each other and thus guard against the arbitrary exercise of power:

> [N]o single commissioner or board member can affirmatively do much of anything. Before the agency can infringe your liberty in some way – for example, by enforcing a law against you or by issuing a rule that affects your liberty or property – a majority of commissioners must agree. . . . That in turn makes it harder for the agency to infringe your liberty.

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[9] Apart from the Bureau, the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel ("OSC"), and the Social Security Administration ("SSA") also have single heads who are removable only for cause. But these agencies do not enforce laws against private persons—FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship with the FHFA as the conservator. 12 U.S.C. § 4511(b); FHFA, History of Fannie Mae & Freddie Mac Conservatorships, goo.gl/XzeAYr; see also PHH, 881 F.3d at 174-76 (Kavanaugh, J., dissenting).

PHH, 881 F.3d at 183-84. The Bureau's single-Director structure thus finds no support in Humphrey's Executor.

The en banc PHH court thought that this argument "flies in the face" of the Supreme Court's decision in Morrison v. Olson, 487 U.S. 654 (1988), which it considered to be precedent for an individual agency head not removable at will. PHH, 881 F.3d at 96. But the independent counsel whose removal protection was upheld in Morrison is in no way comparable to the Bureau. The Morrison Court stressed that the independent counsel had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority," making it hard for the Court to imagine "how the President's need to control [the independent counsel] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." Morrison, 487 U.S. at 691-92. By contrast, the Bureau is a permanent entity; the Director can serve for at least five years (and longer if a successor cannot be confirmed (12 U.S.C. § 5491(c)); and the Bureau unquestionably wields both "policymaking [and] significant administrative authority." Morrison accordingly offers no basis for upholding the problematic structure of the Bureau.

Even less does the Bureau resemble the War Claims Commission at issue in Wiener v. United States, 357 U.S. 349 (1958), which the PHH majority also cited as precedent for the Director's removal protection. The War Claims Commission, as the Wiener Court noted, was an adjudicative agency whose sole function—ruling on personal-injury and property-damage claims arising out of World War II—had an "intrinsic judicial character." Id. at 355. The Bureau and the Director, by contrast, do not have an "intrinsic judicial character"; while the Director may adjudicate certain matters, he also has substantial legislative and enforcement powers. See PHH, 881 F.3d at 154 (Henderson, J., dissenting) ("Adjudicative power is only a fraction of [the Director's] entire authority. He is no less than the czar of consumer finance."). Insulating such a powerful officer from presidential control squarely violates the separation of powers.

C. Longstanding Historical Practice Confirms That The Bureau Is Unconstitutional.

The Supreme Court has repeatedly emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. NLRB v. Noel Canning, 134 S. Ct. 2550, 2594 (2014); see PHH, 881 F.3d at 179-81 (Kavanaugh, J., dissenting) (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem

. . . is [a] lack of historical precedent." Free Enterprise Fund, 561 U.S. at 505 (internal quotation marks omitted).

The lack of any historical precedent for an agency with a structure like the Bureau's—set forth in detail in Judge Kavanaugh's PHH dissent (881 F.3d at 173-79)—is therefore telling proof that it violates the Constitution. Congress may not vest such sweeping executive power in the hands of a single person who is not accountable to the President, Congress, or the American people.

* * * *

The PHH majority defended its holding on the ground that the Constitution permits "a degree of independence" for heads of administrative agencies. 881 F.3d at 78. Proponents of the Bureau's unprecedented structure are clearer in asserting—as they likely will argue in this Court—that the Bureau was designed intentionally to "insulat[e]" the Bureau from any "political influence." Brief of Americans for Financial Reform, et al., as Amici Curiae in Support of Respondent at 12, PHH (No. 15-1177). That is what the statute achieves: "when measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB is even more powerful than the President.

The Director's view of consumer protection law and policy prevails over all others. In essence, the Director of the CFPB is the President of Consumer Finance." 881 F.3d at 172 (Kavanaugh, J., dissenting).

But that purpose and effect is wholly antithetical to the Constitution's design. And it is the precise argument rejected by the Supreme Court in Free Enterprise Fund, where the Public Company Accounting Oversight Board was defended on the ground that its mission was "said to demand both 'technical competence' and 'apolitical expertise,' and its powers . . . exercised by 'technical experts.'" 561 U.S. at 498. The Court asked, "where, in all this, is the role for oversight by an elected President?" Id. at 499. "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." Id.

Here, where the insulation from accountability to either of the elected Branches is much greater, and the reach of the Director's power far broader, this Court should reach the same conclusion: the Bureau's structure violates the Constitution.

II. THE BUREAU'S UNCONSTITUTIONAL STRUCTURE HAS HAD HARMFUL CONSEQUENCES FOR THE BUSINESSES IT REGULATES.

"[S]tructural protections against abuse of power," the Supreme Court has explained, are "critical to preserving liberty." Bowsher, 478 U.S. at 730. The Bureau's short history already has confirmed the truth of this principle—its unconstitutional structure has led to unfair, unjustified actions that have inflicted significant harm on the many businesses in the large sectors of the economy within the Bureau's jurisdiction.

A. The Bureau Has Ignored or Avoided Statutory Limits on Its Jurisdiction.

Although the Bureau's statutory authority is extremely broad, the Bureau's prior Director made a practice of circumventing the few limits that Congress imposed.

For example, the Consumer Financial Protection Act ("CFPA") expressly forbids the Bureau from exercising any authority over auto dealers (12 U.S.C. § 5519(a)), but the Bureau sought to end run this restriction by bringing enforcement actions under the Equal Credit Opportunity Act against indirect auto lenders (i.e., banks or other lenders who purchase installment sales agreements from dealers who have extended financing to car buyers) on the theory that the dealers with whom they do business have engaged in discrimination.

As of January 2017, the Bureau had extracted some $200 million in penalties in these actions without ever having to defend in court its disparate-impact legal theory—which has been heavily criticized elsewhere. See U.S. House of Reps., Comm. on Fin. Servs., Unsafe at any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders at 3 (Jan. 18, 2017). See also U.S. House of Reps., Comm. on Fin. Servs., Unsafe at any Bureaucracy, Part I: CFPB Junk Science and Indirect Auto Lending at 46 (Nov. 14, 2015) (explaining that "internal [CFPB] documents reveal that the Bureau's objective from the beginning has been to eliminate dealer discretion and dealer reserve"). This roundabout means of imposing the Bureau's dictates on auto dealers flouted the clear limitation in the CFPA.

Similarly, the Bureau has used its Civil Investigative Demand ("CID") power (12 U.S.C. § 5562(c)) to probe college accreditation bodies. These organizations are outside the Bureau's jurisdiction because they do not offer or provide consumer financial products or services. See Br. of Chamber of Commerce of the U.S. as Amicus Curiae 4–16, Consumer Fin. Protection Bureau v. Accrediting Council for Indep. Colleges & Schs., 854 F.3d 683 (D.C. Cir. 2017) (No. 16–5174). A unanimous D.C. Circuit panel threw out one such CID, explaining that it failed to comply with Dodd-

Frank's requirements because it gave "no description whatsoever of the conduct the CFPB is interested in investigating." Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Schs., 854 F.3d 683, 691 (D.C. Cir. 2017).

The Bureau also has asserted jurisdiction over businesses that purchase structured settlement or annuity payments. Although such businesses offer no consumer financial product or service, the Bureau has relied on the theory that such businesses may provide "financial advisory services" subject to Bureau regulation by possibly representing to consumers that a sale of their structured payments is "in their best interest." Decision and Order 3, In re J.G. Wentworth, LLC, 2015-MISC-J.G. Wentworth, LLC-0001 (Feb. 11, 2016). After the Bureau's civil investigative demand ("CID") in that case was contested in court, the Bureau withdrew it. See Notice, Consumer Fin. Protection Bureau v. J.G. Wentworth, LLC, No. 16-cv-02773 (E.D. Pa. June 5, 2017), ECF No. 33 (notice of withdrawal of CID). But the Bureau could pursue similar CIDs in the future.

Next, although the CFPA expressly denies the Bureau the authority to enforce the data security requirements of the Graham-Leach-Bliley Act (see 12 U.S.C. § 5481(12)(J)), the Bureau nonetheless has claimed the authority to fine companies for allegedly failing to protect customer data. See

Consent Order at 1, In re Dwolla, Inc., 2016-CFPB-0007 (Mar. 2, 2016). To justify this end run around the specific limitations on its authority under the governing Graham-Leach-Bliley Act, the Bureau has relied on its catch-all authority under the CFPA to prosecute unfair, deceptive or abusive acts or practices. Id.

Finally, the Bureau has pursued vicarious liability theories that ignore corporate forms, and the standards for disregarding them, that are long recognized under state law. For example, at least one court has rejected the Bureau's "common enterprise" theory, which would hold a company liable for the acts of its affiliates—see Pennsylvania v. Think Fin., Inc., 2016 WL 183289, at *26 (E.D. Pa. Jan. 14, 2016) (holding that the "common enterprise theory" is unavailable under the CFPA)—yet the Bureau has continued to advance that theory in enforcement actions. Not only is there no statutory language supporting the theory, but the statute reflects Congress' decision to take another approach to the liability of affiliated companies. See 12 U.S.C. § 5481(6)(B) (subjecting affiliated companies to direct liability when they serve as service providers).

Unchecked by political processes, these aggressive assertions of authority have harmed regulated businesses and the consumers they serve. The courts, which have the power to invalidate Bureau actions when the

agency exceeds its jurisdiction, stand as a check on the Bureau's overreach. But even where the courts rebuff overreach by the Bureau, companies are put to unnecessary effort and expense in defending themselves—and the Bureau may continue to employ the legal theories that courts invalidate.

B. The Bureau Has Deviated Significantly From The Norms Followed By Other Federal Regulatory Agencies.

The Director's unchecked power also has repeatedly resulted in deviations from the consistent approaches of other federal regulatory agencies—in the form of unfair, arbitrary actions.

The Bureau, unlike other regulators, has published unverified consumer complaint data on its public website. See, e.g., Disclosure of Consumer Complaint Narrative Data, 80 Fed. Reg. 15572 (Mar. 24, 2015). But it has done so "[w]ithout attempting to verify" the complaints, which it acknowledges "may be misleading or flat wrong." PHH, 881 F.3d at 149 (Henderson, J., dissenting). The Bureau accordingly knows "it is providing a 'megaphone' for debtors who needlessly damage business reputations." Id.

The Federal Trade Commission, by contrast, limits complaint database access to law enforcement agencies. See Federal Trade Comm'n, The FTC's Consumer Sentinel Network, goo.gl/5ctOlk. See generally PHH, 881

F.3d at 150 (Henderson, J., dissenting) ("One cannot help but think that the difference in the FTC's policy owes at least in part to the difference in its design.")

Next, unlike its fellow regulators, the Bureau has failed to take reasonable steps to reduce regulatory uncertainty. Other agencies employ robust advisory opinion and no-action letter processes to enable regulated businesses to clarify the rules of the road (see, e.g., 17 C.F.R. § 140.98 (Commodity Futures Trading Commission)), but the CFPB has created an extremely restrictive no-action letter process that the Bureau expects will be used only in "exceptional circumstances"—and result in a mere one to three actionable requests each year. See Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686, 8691 (Feb. 22, 2016); see also id. at 8693 (requiring a company to explain, among other things, why the company cannot avoid regulatory uncertainty by modifying its product).

Similarly, the Bureau has refused to institute a public proceeding to clarify the scope of its power under 12 U.S.C. § 5531(a) to prosecute "unfair, deceptive, or abusive act[s] or practice[s]"—even though the former Director himself testified to Congress that the "unreasonable advantage" element of the cause of action for "abusiveness" was "something of a vague term that needs definition." How Will the CFPB Function Under Richard

Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs, 112th Cong. 112-107, at 70 (2012).

This state of affairs is exactly the opposite of what Congress sought to accomplish when it created the Bureau. The Bureau was intended to "set and enforce clear rules of the road across the financial marketplace." Statement by the President on Financial Regulatory Reform (Mar. 22, 2010), perma.cc/Q2EC-MC2P; see also Pub. L. No. 111-203 § 1061(b)(7), 124 Stat. 1376, 2038 (2010) (transferring financial regulatory functions from other agencies to the Bureau). The Court should open the Bureau up to greater political accountability by invalidating the unconstitutional structure that insulates it from responsibility to the people.

III. THE COURT SHOULD ADDRESS THE CFPB'S CONSTITUTIONAL INFIRMITY NOW.

The Bureau's present Acting Director has indicated "frustrations" with the extent to which the Dodd-Frank Act "insulates the Bureau from virtually any accountability to the American people" or to Congress and has indicated his desire to "improve on the Bureau's record" in that regard. See Letter from Mick Mulvaney, Acting Director, CFPB, to The Hon. Elizabeth Warren, U.S. Senate, at 2 (Apr. 4, 2018), https://www.scribd.com/document/375624268/Read-Mulvaney-

letter#from_embed. He has also informed Congress that "the Bureau is far too powerful, and with precious little oversight of its activities," and has proposed legislative reforms that would address these issues. See CFPB, Semi-Annual Report of the Bureau of Consumer Financial Protection 1-2 (Apr. 2018), https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf.

But notwithstanding the Bureau's apparent change in approach, this Court should decide whether the Bureau's current structure complies with the Constitution now. The President has nominated an individual to serve as the new Director of the Bureau. See The White House, Seven Nominations Sent to the Senate Today (June 20, 2018), perma.cc/34D9-LDC8. Once a new Director is confirmed, that officer will be protected in her tenure by otherwise unconstitutional limits on the power of the President—whether the current incumbent of the Oval Office or another President within the next five years. In the meanwhile, the questions regarding the constitutionality of the Bureau's structure will loom over every action the Bureau takes. Any business subject to an enforcement action or regulation will raise the issue—with the risk that a huge number of administrative decisions would be invalidated if the structure is later held unconstitutional.

A court confronted with "'a constitutional flaw in a statute'" should generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" Free Enterprise Fund, 561 U.S. at 508 (quoting Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-29 (2006)). But that approach is not permissible when "it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." Free Enterprise Fund, 561 U.S. at 509 (citation omitted). It may be implausible to think here that Congress would have enacted a statute giving an official serving at the pleasure of the President sole authority to spend more than $650 million annually without congressional approval: the proposal submitted by President Obama and the bill enacted by the House of Representatives adopted the traditional multi-member commission structure. See PHH, 881 F.3d at 165 (Kavanaugh, J., dissenting). The more appropriate course, therefore, may be to leave to Congress the task of repairing the Bureau's unconstitutional structure. See id. at 160-64 (Henderson, J., dissenting).

CONCLUSION

The district court's decision denying defendants' motion for judgment on the pleadings should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for amicus curiae certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,420 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 9, 2018 /s/ Andrew J. Pincus

CERTIFICATE OF SERVICE

I hereby certify that that on July 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: July 9, 2018 /s/ Andrew J. Pincus