

18-2743(L)

18-3033(CON), 18-2860(XAP), 18-3156(XAP)

United States Court of Appeals for the Second Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK, by Letitia James,
Attorney General for the State of New York,

Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC, RD LEGAL FUNDING PARTNERS, LP,
RD LEGAL FINANCE, LLC, RONI DERSOVITZ,

*Defendants-Third-Party-Plaintiffs-Third-Party
Defendants-Appellees-Cross-Appellants.*

On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE STATE OF NEW YORK

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PRELIMINARY STATEMENT

This appeal arises from a joint enforcement action by the New York Attorney General (NYAG) and the Consumer Financial Protection Bureau (CFPB) to halt and seek redress for the abusive and deceptive tactics used by RD Legal Funding, LLC, and its affiliates to induce the beneficiaries of various statutory and settlement funds to enter into what are effectively usurious loans.¹ RD Legal's basic business practice was to target individuals who were waiting to receive awards from settlements or statutory funds and to offer to advance a portion of their awards in exchange for the individuals paying RD Legal a much larger sum of money when their payments finally arrived.

This enforcement proceeding focuses on RD Legal's targeting of September 11 victims, for whom Congress established a special fund; and retired professional football players suffering from chronic illnesses, who stand to benefit from a settlement with the National Football League.

¹ Defendants are RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Funding Partners, LP, and Roni Dersovitz, the founder and owner of the RD Legal entities. This brief will refer to defendants collectively as "RD Legal" unless it is necessary to identify a specific defendant by name.

The NYAG and CFPB brought claims against RD Legal for deceptive and abusive practices under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (Dodd-Frank Act). The NYAG also brought claims under New York law.

The United States District Court for the Southern District of New York (Preska, J.) correctly rejected all of RD Legal's statutory and pleadings-based objections to the complaint. But the district court incorrectly accepted RD Legal's argument that the structure of the CFPB was unconstitutional because the agency was led by a single Director who was removable by the President only for cause, rather than at will. Moreover, the court found the for-cause removal provision inseparable from the remainder of Title X and accordingly struck down Title X in its entirety—not only eliminating the CFPB as an agency, but also eradicating the ability of the States to enforce both old and new consumer protections contained in the statute. On the basis of this sweeping invalidation of a vital federal regime, the district court dismissed the

CFPB's claims entirely, dismissed the NYAG's federal-law claims with prejudice, and dismissed the NYAG's state-law claims without prejudice.²

This Court should reverse. In *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the en banc D.C. Circuit upheld the constitutionality of the for-cause removal provision over an attack identical to RD Legal's. That decision correctly recognized that Supreme Court precedents dating back to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), make clear that Congress may create an independent agency, like the CFPB, which is led by a principal officer removable only for cause, because such an agency does not unduly interfere with the President's executive powers under Article II.

But even if the for-cause removal provision were unconstitutional, the district court should have severed that provision and preserved the

² The district court issued an initial opinion and order on June 21, 2018, which held that the entirety of Title X was invalid, but nonetheless suggested that the NYAG could continue to pursue both its federal and state-law claims. On September 12, 2018, the court issued an amended order clarifying that, as a result of its decision to invalidate Title X in its entirety, the NYAG could not pursue its federal law claims. The court further ruled that it lacked federal jurisdiction over the NYAG's state-law claims. Based on the combined effect of the two orders, all of the NYAG's claims were dismissed. (Special Appendix 90-103, 109-115, 119.)

remainder of Title X. The law of severability requires courts to take a scalpel rather than a meat axe to a statute. Here, severability is supported not only by the Dodd-Frank Act's express severability clause, but also by Congress's strongly expressed intent to create a robust consumer protection regime to avert another financial crisis. There is no indication that Congress would have abandoned this important policy objective if it had understood that the CFPB's Director must be removable at will rather than for cause.

Finally, even if the entirety of Title X were invalid and New York therefore had no federal cause of action, the district court should have found that New York's state-law claims survived. Because those claims depend in part on the application of the federal Anti-Assignment Act, 31 U.S.C. § 3727, and because that interpretation has implications for the federal government's broader financial interests, there was a substantial federal question sufficient to establish federal court jurisdiction over the state-law claims.

ISSUES PRESENTED

1. Whether Congress's provision of for-cause removal protection to the CFPB Director is constitutional?
2. Whether, assuming the for-cause removal protection is unconstitutional, that provision may be severed from the remainder of Title X of the Dodd-Frank Act to preserve the continued existence of the CFPB, the Act's substantive prohibitions on deceptive and abusive conduct, and the NYAG's authority to enforce those prohibitions?
3. Whether the district court had jurisdiction over the NYAG's state-law claims in any event, where those claims contained an embedded federal question concerning the applicability of the federal Anti-Assignment Act to RD Legal's agreements with beneficiaries of the September 11th Victim Compensation Fund?

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over this action under 28 U.S.C. §§ 1331 and 1345. (Joint Appendix (J.A.) 30-31.) On September 19, 2018, the district court entered a final amended judgment dismissing the NYAG's federal-law claims with prejudice and its state-law claims without prejudice (Special Appendix (S.A.) 119), and the

NYAG filed a timely notice of appeal on October 12, 2018 (J.A. 802). This Court has appellate jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE CASE

A. **The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act)**

1. **Congress creates the Consumer Financial Protection Bureau (CFPB) to centralize and strengthen enforcement of consumer protection laws**

Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (“Dodd-Frank Act”), in response to the financial crisis of 2008—a crisis that “nearly crippled the U.S. economy” and caused millions of Americans to lose their jobs, homes, and savings. S. Rep. No. 111-176, at 2, 9 (2010). After studying the causes of the crisis, Congress concluded that “it was the failure by the prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down.” *Id.* at 166; *see also PHH Corp. v. CFPB*, 881 F.3d 75, 80 (D.C. Cir. 2018) (en banc) (“In Congress’s view, the 2008 crash represented a failure of consumer protection.”). Although numerous federal statutes authorized agencies to prevent and prosecute the abusive mortgage and credit

practices that contributed to the crisis, the federal consumer protection regime ultimately proved ineffective due to “conflicting regulatory missions, fragmentation, and regulatory arbitrage.” S. Rep. No. 111-176, at 10.

To remedy these structural flaws, Title X of the Dodd-Frank Act established the CFPB as “a new, streamlined independent consumer entity,” *id.* at 11, and charged it with enforcing eighteen preexisting consumer protection laws, which had previously been overseen by seven different federal agencies, *see* 12 U.S.C. § 5481(12); S. Rep. No. 111-176, at 11. “These laws seek to curb fraud and deceit and to promote transparency and best practices in consumer loans, home mortgages, personal credit cards, and retail banking.” *PHH*, 881 F.3d at 81.

In devising the CFPB’s structure and powers, Congress drew on its experience with existing agencies. Among other things, Congress wanted to ensure that the CFPB had the “requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance.” *Id.*; *see also* S. Rep. No. 111-176, at 11. Thus, like other federal agencies that must respond quickly to rapidly changing contexts, Congress provided for a

single director to lead the agency rather than a multimember board.³ *See* 12 U.S.C. § 5491(b)(1). The CFPB’s Director is appointed for a five-year term by the President with the advice and consent of the Senate. *See id.* § 5491(b)(2), (c)(1).

Congress also recognized “the distinctive danger of political interference with financial affairs.” *PHH*, 881 F.3d at 91. Thus, as with the leaders of the Federal Trade Commission (FTC), the Federal Reserve Board, and other financial regulators, Congress endeavored to give the CFPB a measure of independence by providing that the CFPB’s Director be removable by the President only for cause—i.e., “for inefficiency, neglect of duty, or malfeasance in office”—rather than at will. 12 U.S.C. § 5491(c) (3); *see id.* § 242 (Federal Reserve Board); 15 U.S.C. § 41 (FTC).⁴

³ *See also* 5 U.S.C. § 1211 (Office of Special Counsel); 12 U.S.C. § 2 (Office of the Comptroller of the Currency); *id.* § 4512(a) (Federal Housing Finance Agency (FHFA)); 42 U.S.C. § 902(a)(1) (Social Security Administration).

⁴ *See also* 12 U.S.C. § 4512(b)(2) (FHFA); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (Securities and Exchange Commission); *cf.* 12 U.S.C. § 2 (Comptroller of the Currency can be terminated “by the President, upon reasons to be communicated by him to the Senate”). *See generally* Henry B. Hogue et al., Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15 (2017) (“Although not always specified in statute, it

To further strengthen the CFPB's independence, Congress exempted the CFPB from the annual appropriations process and instead authorized it "to draw from a statutorily capped pool of funds in the Federal Reserve system." *PHH*, 881 F.3d at 81. The Federal Reserve is required to transfer "the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau," up to twelve percent of the Federal Reserve's total operating expenses. 12 U.S.C. § 5497(a)(1)-(2). Only if the Bureau requires funds beyond this allotment must it obtain a congressional appropriation. *Id.* § 5497(e). Congress has provided similar financial independence to a number of other financial regulators.⁵

The CFPB is empowered to take enforcement action when it identifies a violation of the consumer protection laws, either by initiating an administrative proceeding or by bringing an enforcement action

appears that the heads of financial regulators, in contrast with Cabinet Secretaries, typically do not serve at the pleasure of the President ("at will").

⁵ *See, e.g.*, 12 U.S.C. § 16 (Office of the Comptroller of Currency funded by assessments); *id.* § 243 (Federal Reserve Board funded through semiannual assessments on regulated banks); *id.* §§ 1815(d), 1820(e) (Federal Deposit Insurance Corporation funded by assessments).

directly in district court. *See* 12 U.S.C. §§ 5511(c)(4), 5563-64 (CFPB); *see also* 15 U.S.C. § 57b (FTC); *id.* § 78u-1 (Securities and Exchange Commission (SEC)). Like other financial regulators, the CFPB is also authorized to write rules, *see* 12 U.S.C. § 5512 (CFPB); *see also* 15 U.S.C. § 57a (FTC); *id.* § 78w (SEC), and to examine financial institutions, 12 U.S.C. §§ 5514-16 (CFPB); *see also id.* § 248 (Federal Reserve Board); *id.* § 1756 (National Credit Union Administration); *id.* § 1828 (Federal Deposit Insurance Corporation (FDIC)).⁶

Although Congress devised the CFPB as an independent agency, it provided a number of features to ensure its effective oversight. For example, the CFPB's budget is subject to an annual audit, both by the Comptroller General and an independent auditor. 12 U.S.C. § 5496a(a)-(b). And the Bureau must, on a semi-annual basis, submit a report to Congress justifying "the budget request of the previous year." *Id.* § 5496(c)(2). The Director is required to appear regularly before Congress

⁶ The CFPB is also responsible for "conducting financial education programs"; "collecting, investigating, and responding to consumer complaints"; and "collecting, researching, monitoring, and publishing information relevant to the function of markets for consumer financial products." 12 U.S.C. § 5511(c)(1)-(3).

to report on, among other things, the “significant rules and orders adopted by the Bureau,” as well as other “significant initiatives conducted by the Bureau, during the preceding year.” *Id.* § 5496(c)(3). And regulations issued by the CFPB are subject to review by the Financial Stability Oversight Council (FSOC), a multimember council comprised of representatives from other financial regulatory agencies. *See id.* §§ 5321, 5513. The FSOC “may set aside a final regulation prescribed by the Bureau, or any provision thereof,” if the Council determines that “the regulation or provision would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.” *Id.* § 5513(a).

2. Congress strengthens the States’ authority to enforce consumer protection laws

In addition to creating the CFPB, Title X reinforced the role of the States in enforcing consumer protection laws. Prior to the enactment of the Dodd-Frank Act, Congress heard testimony from a number of experts on the vital role of the States in enforcing consumer protection laws, especially in the years preceding the financial crisis, when there were serious deficiencies in federal consumer protection enforcement. *See*

S. Rep. No. 111-176, at 16.⁷ In enacting Title X, Congress sought to augment the States' role in consumer protection in a number of ways.

First, Title X clarifies that federal law does not preempt state consumer protection laws to the extent those laws afford greater protections than federal law. *See* 12 U.S.C. § 5551(a); *see also* S. Rep. No. 111-176, at 174 (“[T]he Consumer Financial Protection Act . . . will not preempt State law if the State law provides greater protection for consumers.”).

Second, Title X establishes a complementary role for the States in enforcing *federal* law, authorizing any state attorney general to “bring a civil action in the name of such State . . . to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law.”

12 U.S.C. § 5552(a)(1). When a State intends to bring a lawsuit under this provision, it must, if feasible, provide written notice to the CFPB

⁷ *See also, e.g., Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 37 (2009) (statement of William Francis Galvin, Secretary of the Commonwealth of Massachusetts); *id.* at 39-41 (statement of Lisa Madigan, Attorney General of Illinois).

before filing, or otherwise as soon as possible thereafter. *See id.* § 5552(b)(1). The CFPB may (but is not required to) intervene as a party in any state action and remove the action to federal court, *see id.* § 5552(c), but the CFPB's participation in a case does not displace or otherwise substitute for the State's role. Since the enactment of the Dodd-Frank Act in 2010, States have initiated at least twenty lawsuits under § 5552(a), several of which were multistate actions.⁸

3. Congress authorizes the CFPB and the States to take enforcement action against a broad range of unfair and abusive consumer practices

In addition to remedying the structural enforcement gaps in consumer protection, the Dodd-Frank Act expanded the scope of actionable misconduct. Thus, in addition to the existing federal prohibition on “unfair or deceptive acts or practices,” the Dodd-Frank Act

⁸ Recent cases include *Alabama v. PHH Mortgage, Corp.*, No. 18-cv-0009 (D.D.C. filed Jan. 3, 2018), in which the Attorneys General for 49 States and the District of Columbia sued PHH Mortgage for engaging in unfair and deceptive mortgage servicing and foreclosure practices, and *Pennsylvania v. Navient Corp.*, No. 17-cv-1814 (M.D. Pa. filed Oct. 5, 2017), in which Pennsylvania alleged that Navient engaged in unfair practices in the course of originating and servicing student loans. A list of active § 5552 matters is available in the CFPB's semi-annual report, which is available on the Bureau's website. *See CFPB, Research and reports* (last visited Mar. 12, 2019).

added a prohibition on “*abusive*” acts and practices. *See* 12 U.S.C. § 5531(a) (emphasis added). As Congress explained, this additional prohibition would enable regulators to prevent and prosecute “practices where providers unreasonably take advantage of consumers.” S. Rep. No. 111-176, at 172.

Under the Act, the CFPB and the States are authorized to “prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service.” 12 U.S.C. § 5531(a); *id.* 5552(a) (state authority). A “covered person” includes “any person that engages in offering or providing a consumer financial product or service.” *Id.* § 5481(6)(A). A “consumer financial product or service” includes “any financial product or service” that is “offered or provided for use by consumers primarily for personal, family, or household purposes.” *Id.* § 5481(5)(A). As relevant here, this definition of a product or service covered by Title X includes “extending credit and servicing loans.” *Id.* § 15(A)(i).⁹

⁹ The statute defines “credit” as “the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment,

B. Factual Background

The facts below are drawn from the allegations of the complaint.

1. RD Legal's business model targets the beneficiaries of various statutory and settlement funds

The RD Legal entities are finance companies that offer to advance payments to individuals who are waiting for awards from statutory funds or settlement agreements. The basic business model of RD Legal is to provide immediate cash payments to individuals in exchange for the assignment of their rights to the ultimate proceeds of a settlement or judgment.

As relevant here, RD Legal advances funds to two groups. First, RD Legal enters agreements with the beneficiaries of the National Football League's (NFL) settlement of a massive class action arising from the repetitive brain trauma suffered by former NFL players. Many of these individuals suffer from chronic health problems, including chronic traumatic encephalopathy, Alzheimer's disease, and Parkinson's disease.

or purchase property or services and defer payment of such purchase.”
12 U.S.C. § 5481(7).

Players with a qualifying diagnosis or their dependents are eligible to receive a monetary award based on, among other things, the player's age and the severity of his illness. (J.A. 32-33, 592, 619-627.)

Second, RD Legal enters agreements with claimants who are eligible for compensation from the September 11 Victim Compensation Fund (VCF), which Congress created to provide compensation to individuals and the family members of those who were injured or killed as a result of the September 11, 2001, terrorist attacks and subsequent recovery efforts.¹⁰ Many of the claimants who have been approved for awards by the VCF—including medical workers, firefighters, and police officers—suffer from respiratory illnesses and cancers related to their exposure to dust and debris at the World Trade Center site. Many also suffer from post-traumatic stress disorder, depression, and anxiety. (J.A. 32-33.) With certain limits, claimants are entitled to compensation from the VCF for their economic and noneconomic losses resulting from the attack. *See* 49 U.S.C. § 40101 note (VCF Act § 405).

¹⁰ *See* September 11th Victim Compensation Fund of 2001 (VCF Act), Pub. L. No. 107-42, tit. IV, 115 Stat. 230, 237-241 (codified as amended at 49 U.S.C. § 40101 note).

RD Legal’s business practices take advantage of the fact that not all of the awards from the NFL settlement and VCF are immediately available to beneficiaries, even after their claims are approved and they are notified of the amount of their awards. Typically, RD Legal contacts beneficiaries while they are waiting for their awards and offers to immediately advance a portion of their award in exchange for purported “assignments” to RD Legal of a much greater amount when the moneys are ultimately paid out.¹¹ For example, one VCF beneficiary was awarded \$65,000. While she waited for her payment, RD Legal advanced her \$18,590. When the award was paid out six months later, she was required to pay RD Legal \$33,800 from that award—thus essentially handing RD Legal \$15,210 on top of the advance payment of \$18,590. (J.A. 32-33.)

RD Legal typically offers two types of repayment terms. Under one type of contract, RD Legal will advance a fraction of the award in exchange for the consumer promising to pay a much larger, fixed amount

¹¹ After the contracts are signed, RD Legal contacts the relevant claims administrator demanding that payment of the consumer’s award be made directly to RD Legal. When the claims administrator refuses to honor the assignment, RD Legal seeks funds directly from the consumer. (J.A. 32-33; *see also, e.g.*, J.A. 71, 92-93.)

when she ultimately receives her award, regardless of when that might be. Depending on how quickly the consumer receives the award, the effective interest rate on RD Legal's advances sometimes exceeds 250 percent. For example, a severely disabled first responder received an advance of \$35,000 but was required to pay RD Legal \$63,636—or \$28,636 over the advance—when he received his compensation check only three months later. Alternatively, RD Legal offers to advance a fraction of the award in exchange for the consumer's promise to make payments to RD Legal in amounts that increase every month that the award is delayed. (J.A. 34-35; *see also, e.g.*, J.A. 56, 399 (sample contracts).)

Roni Dersovitz is the founder and owner of RD Legal, and he retains substantial control over RD Legal and its business policies and practices. Among other things, Dersovitz has authority and responsibility for dictating the terms of all of RD Legal's contracts. (J.A. 34, 37-38.)

2. RD Legal deploys abusive and deceptive marketing tactics to induce settlement and fund beneficiaries to assign the rights to their awards

RD Legal engages in a number of deceptive and abusive marketing practices to induce consumers to enter into purported “assignment” agreements that are, in effect, usurious loans.

First, RD Legal misleads consumers into thinking that the contracts represent true “assignments” of the consumers’ interest in their awards—i.e., outright transfers of rights or property. RD Legal expressly labels each contract with a consumer as an “assignment and sale agreement.” RD Legal’s website has likewise characterized the contracts as “assignments” rather than loans. (J.A. 35-37; *see also, e.g.*, J.A. 56, 75, 95 (sample agreements).)

Yet RD Legal knows that the purported “assignments” are void and that it is effectively offering loans to consumers—at usurious rates. Specifically, RD Legal knows that the assignments are invalid under the plain terms of both the NFL Settlement and the VCF. The NFL Settlement agreement provides that any assignment or attempted assignment of a class member’s rights “will be void, invalid, of no force and effect and the Claims Administrator shall not recognize any such

action.” (J.A. 35, 680.) And the statute authorizing the VCF permits the Special Master to make payments only to a “*claimant*,” which, under the statutory definition, excludes third party legal financiers like RD Legal. 49 U.S.C. § 40101 note (VCF Act § 406(a)) (emphasis added); *id.* (§ 405(c)) (defining an eligible claimant).¹² Moreover, the VCF is governed by the federal Anti-Assignment Act (AAA), 31 U.S.C. § 3727, which prohibits the “transfer or assignment of any part of a claim against the United States Government or of an interest in the claim” except in narrow circumstances not applicable here.

It is also clear to RD Legal that the assignments are not valid because no credit risk is actually transferred to RD Legal—the awards have already been determined from funds set aside for that purpose. (J.A. 32-34; S.A. 57.) Under New York contract law, an agreement is a valid assignment only “[w]hen payment or enforcement rests on a contingency.” *Colonial Funding Network, Inc. ex rel. TVT Capital, LLC*

¹² The VCF Policies and Procedures confirm that the Special Master “generally will not accept or recognize any effort on [a claimant’s] part to assign [the claimant’s] claim or [the claimant’s] award to someone else and will not pay anyone other than the claimant, the Personal Representative, or an authorized law firm.” September 11th Victim Compensation Fund, *Policies and Procedures* 73 (2019).

v. Epazz, Inc., 252 F. Supp. 3d 274, 281 (S.D.N.Y. 2017) (quotation marks omitted) (collecting cases); *see also, e.g., Singer Asset Fin. Co. v. Bachus*, 294 A.D.2d 818, 820 (4th Dep’t 2002).

Recognizing the likelihood that the transactions are loans rather than true assignments, RD Legal includes a provision in every contract providing an interest rate and reserving the right to file a U.C.C. financing statement in the event that a court determines that the arrangements constitute a loan rather than a valid assignment. (J.A. 35-36; *see also, e.g., J.A. 57, 76, 96, 117.*)

Second, RD Legal misleads consumers into thinking it can expedite receipt of their awards. For example, RD Legal promises consumers it can “cut through the red tape” to expedite consumers’ receipt of their awards.¹³ (J.A. 37.) But RD Legal enters into contracts with consumers

¹³ *See also* RD Legal Funding, *Zadroga Bill Settlement Funding* (as of Mar. 3, 2016) (explaining that VCF awards would not be paid in a timely manner and that RD Legal could “cut through the red tape on your behalf and provide you immediate access to your funds”). As of February 13, 2019, RD Legal’s online advertisement for the VCF was no longer available. The cited URL is a snapshot of RD Legal’s website as of the reported dates.

only *after* they have received a final award letter, and it is powerless to affect the timing of consumers' awards. (J.A. 37.)

Third, RD Legal misrepresents how quickly it will advance the payments to consumers. On its website, RD Legal has promised that consumers will receive funds "within several days" after it receives the necessary documentation. In some instances, RD Legal promises funds by a specific date. In many instances, however, consumers do not receive funds for several months, and RD Legal sometimes fails to deliver funds on promised dates. (J.A. 37-38.)

C. Procedural History

For the purposes of this appeal, the district court issued two orders relevant to the NYAG's claims. In its initial order, dated June 21, 2018, the district court held that the entirety of Title X of the Dodd-Frank Act was invalid—including its creation of the CFPB—but the order contemplated that the NYAG could continue pursuing its federal and state-law claims. In a subsequent order, dated September 12, 2018, the court clarified that, as a result of its decision to invalidate Title X, the NYAG could not pursue its federal claims, and that the court lacked

jurisdiction over the NYAG's state-law claims. The combined effect of the two orders was the dismissal of all of the NYAG's claims.

1. State and federal authorities bring an enforcement action, and the district court invalidates Title X of the Dodd-Frank Act

On February 7, 2017, the NYAG, on behalf of the People of the State of New York, along with the CFPB, sued RD Legal in the U.S. District Court for the Southern District of New York. The NYAG and CFPB brought parallel claims for deceptive and abusive conduct in violation of provisions of Title X of the Dodd-Frank Act. *See* 12 U.S.C. §§ 5531, 5536. In addition, the NYAG asserted claims under state law for civil and criminal usury, deceptive conduct, false advertising, fraud, and violations of New York General Obligation Law § 13-101(1), which prohibits the sale or assignment of personal injury claims.¹⁴ On May 15, 2017, RD Legal moved to dismiss all claims. (J.A. 39-48, 52.)

¹⁴ When Plaintiffs filed this action, two other actions involving the same parties and conduct were already pending in the same court. On January 3, 2017, RD Legal sued the CFPB (S.D.N.Y. Dkt. No. 17-cv-10), and on January 5, 2017, RD Legal sued the NYAG in New York State Supreme Court, New York County (Index No. 150080/2017), an action that was removed to the district court on January 30, 2017 (S.D.N.Y. Dkt. No. 17-cv-681). In both actions, RD Legal sought declaratory judgments

On June 21, 2018, the district court (Preska, J.) issued a decision dismissing only the claims brought by the CFPB and not the claims brought by the NYAG. The court rejected RD Legal's claims that its alleged conduct was not prohibited by Title X, but concluded that Congress's decision to provide for-cause removal protection to the CFPB Director was unconstitutional, and that this flaw invalidated the entirety of Title X, and therefore required dismissal of the CFPB from the action. The June 21, 2018, opinion and order permitted the NYAG to proceed with its claims under both federal and state law. (S.A. 90-103, 107.)

In addressing the constitutionality of the CFPB Director's for-cause removal protection, the district court acknowledged that the en banc D.C. Circuit had concluded otherwise. *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018).¹⁵ The district court, however, disagreed with the

that its conduct was lawful. On March 27, 2017, the district court (Preska, J.) approved stipulations (a) dismissing RD Legal's action against the CFPB without prejudice (Dkt. No. 17-cv-10, ECF No. 16), and (b) staying RD Legal's action against the NYAG pending resolution of RD Legal's then-anticipated motion to dismiss the present action or other further order of the court. (Dkt. No. 17-cv-681, ECF No. 13.)

¹⁵ Most of the district courts that have addressed this question have also upheld the constitutionality of the for-cause removal provision. *See, e.g., CFPB v. Think Fin., LLC*, No. 17-cv-127, 2018 WL 3707911 (D. Mont.

en banc majority and instead adopted as its opinion Parts I through IV of then-Judge Kavanaugh's dissent, *see id.* at 167-98, which would have invalidated the for-cause removal provision as an intrusion on the President's executive power, *see id.* at 200. (*See also* S.A. 103-104.)

The district judge here declined, however, to follow Judge Kavanaugh in concluding that the proper remedy for this unconstitutional provision was to strike only the for-cause removal provision in 12 U.S.C. § 5491(c)(3). *See PHH*, 881 F.3d at 198 (Kavanaugh, J., dissenting). Instead, the district court announced that she was adopting Section II of Judge Henderson's separate dissent, which concluded that the for-cause removal provision was not severable from the rest of Title X, and required striking down the entirety of Title X, including not only provisions establishing the CFPB, but also provisions enhancing federal consumer protections, and authorizing the States to

Aug. 3, 2018); Opinion and Order at 4-5, *CFPB v. All Am. Check Cashing, Inc.*, No. 16-cv-356 (S.D. Miss. Mar. 21, 2018), ECF No. 236, *appeal pending*, No. 18-60302 (5th Cir.); *CFPB v. Seila Law, LLC*, No. 17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017), *appeal pending*, No. 17-56324 (9th Cir.). At least one district court has held that the CFPB's structure is unconstitutional. *See CFPB v. D & D Mktg.*, No. 15-cv-9692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016).

enforce federal consumer protection laws. (S.A. 104.) *See also PHH*, 881 F.3d at 160-64.

2. In subsequent orders, the district court dismisses all of the NYAG's claims

Initially, the district court issued an opinion and order dismissing only the claims brought by the CFPB. It ultimately entered a final judgment with respect to the CFPB's claims. The court initially indicated that the NYAG could continue to pursue its claims under both federal and state law, staying the proceedings as to the remaining claims pending CFPB's appeal. (S.A. 90-104, 122, 795.)

An exchange of letter briefs ensued, in which RD Legal pointed out that the district judge's refusal to dismiss the NYAG's claims was not consistent with the dissent of Judge Henderson she had purported to adopt. As a result, the district court amended its decision by order dated September 12, 2018, ruling that the NYAG could not pursue its federal claims in light of the court's conclusion that the entirety of Title X was invalid. The district court then declined to exercise jurisdiction over the NYAG's state-law claims, finding that they failed to present a substantial federal question sufficient to independently support federal jurisdiction,

and that it was inappropriate to exercise supplemental jurisdiction over those claims. The court therefore dismissed the NYAG's federal claims with prejudice and its state-law claims without prejudice.¹⁶ (S.A. 109-115, 119; J.A. 790.)

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

Although the district court correctly rejected RD Legal's statutory and pleadings-based grounds for dismissal, it erred in resolving RD Legal's constitutional and jurisdictional objections in three fundamental respects. Each of these errors is reviewed de novo. *See, e.g., City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392 (2d Cir. 2008) (questions of statutory interpretation and constitutionality of statutes); *D'Allessio v. New York Stock Exchange, Inc.*, 258 F.3d 93, 98 (2d Cir. 2001) (district court's legal conclusions); *Kirsh v. United States*, 258 F.3d 131, 132 (2d

¹⁶ On November 1, 2018, the NYAG filed a complaint against RD Legal in New York State Supreme Court, New York County, alleging claims solely under state law based on the same violations addressed in the complaint filed here. RD Legal's motion to dismiss is currently pending in that proceeding. *See People of the State of New York v. RD Legal Funding, LLC*, NYSCEF No. 452091/2018.

Cir. 2001) (per curiam) (grant of motion to dismiss for lack of subject matter jurisdiction).

First, the court erred in finding unconstitutional Congress's provision of for-cause removal protection to the CFPB's Director. As the en banc D.C. Circuit correctly held in *PHH*, an uninterrupted line of Supreme Court precedents dating back to *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has recognized that Congress has the power to create an independent agency, like the CFPB, which is led by a principal officer who is removable only by the President for cause. Contrary to the district court's suggestion, the CFPB's structure and functions are essentially indistinguishable from those of other financial regulators of unquestioned constitutionality.

Second, even if the for-cause removal provision were unconstitutional, the court should have simply excised the for-cause removal provision and not invalidated the entirety of Title X. Congress included a broad severability clause in the Dodd-Frank Act that is controlling here. *See* 12 U.S.C. § 5302. And preserving the substantive provisions of Title X—including a strong consumer protection agency with a complementary enforcement role for the States—would be most consistent with

Congress's purpose to expand the consumer protection regime to prevent another financial crisis.

Third, the court erred when it concluded that it lacked federal question jurisdiction over the NYAG's state-law claims. Interpreting the federal Anti-Assignment Act is an essential predicate to resolving some of the State's claims, and the court's interpretation directly implicates the federal government's broader financial interests. Thus, there was a sufficiently substantial federal question embedded in the state-law claims to establish jurisdiction.

ARGUMENT

POINT I

CONGRESS CONSTITUTIONALLY CONFERRED FOR-CAUSE REMOVAL PROTECTION ON THE CFPB'S DIRECTOR

In *PHH*, the en banc D.C. Circuit squarely held that the "federal law providing the Director of the CFPB with a five-year term in office, subject to removal by the President only for 'inefficiency, neglect of duty, or malfeasance in office,' is consistent with the President's constitutional authority" under Article II. 881 F.3d at 84 (en banc). The court supported that holding with an extensive discussion of precedents upholding "for-

cause removal restrictions like the one at issue here” and a canvass of similar removal protections that Congress has enacted both historically and today. *Id.* at 85. *PHH*'s reasoning strongly supports reversal of the district court's contrary conclusion below.

A. Longstanding Precedent Establishes Congress's Authority to Protect Independent Agency Heads from Removal Except for Cause.

The Supreme Court has long recognized that Article II's vesting of executive power in the President does not bar Congress from enacting legislation that allows presidential removal of certain administrative agency heads only for cause. More than eighty years ago, in *Humphrey's Executor*, the Court upheld legislation permitting the President to remove members of the FTC from office only for “inefficiency, neglect of duty, or malfeasance in office,” 15 U.S.C. § 41 (1934)—the same removal protection at issue here, *see* 12 U.S.C. § 5491(c)(3). As the *Humphrey's Executor* Court explained, such provisions are fully consistent with the Constitution—specifically, it is well within the “authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control.” 295 U.S. at 629. An “illimitable power of removal” by the President would

thwart such independence, “[f]or it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter’s will.” *Id.*

Humphrey’s Executor thus squarely upheld Congress’s power to create independent agencies and to protect that independence by fixing their principal officers’ terms of office and “forbid[ding] their removal except for cause in the meantime.” *Id.* To be sure, the Court noted, Congress cannot extend for-cause removal protection to an officer who is “merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid [sic] he is.” 295 U.S. at 627; *cf. Myers v. United States*, 272 U.S. 52, 176 (1926) (invalidating statute requiring Senate consent for President to remove post-master). But that description does not apply to officers of agencies such the FTC, “an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid.” *Humphrey’s Ex’r*, 295 U.S. at

628. “Such a body cannot in any proper sense be characterized as an arm or an eye of the executive.” *Id.*

In the decades since *Humphrey’s Executor*, the Supreme Court has repeatedly upheld for-cause removal provisions “specifically crafted to prevent the President from exercising coercive influence over independent agencies.” *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989) (quotation marks omitted). In 1958, the Court applied *Humphrey’s Executor* to bar the President from removing at will the members of a War Claims Commission charged with deciding claims for compensation for personal injury and property damage caused by the enemy during World War II. *See Wiener v. United States* 357 U.S. 349, 355-56 (1958). And in 1988, the Court upheld legislation creating an independent counsel who was tasked with investigating and (if necessary) prosecuting certain high-ranking federal officials, and who was removable only by the Attorney General and only for cause. *Morrison v. Olsen*, 487 U.S. 654, 660, 696-97 (1988).

Morrison reaffirmed the essential premises of *Humphrey’s Executor* and explained that Congress can extend for-cause removal protection even to an officer who performs a core executive function, such as

criminal prosecution. As Chief Justice Rehnquist observed, *Humphrey's Executor* and *Wiener* had used “the terms ‘quasi-legislative’ and ‘quasi-judicial’” to describe federal officers who could be granted for-cause removal protection, but “the determination of whether the Constitution allows Congress to impose a ‘good cause’-type restriction on the President’s power to remove an official cannot be made to turn on whether or not that official is classified as ‘purely executive.’” *Morrison*, 487 U.S. at 689; *see also id.* at 689 n.28 (noting 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”). Rather, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.” *Id.* at 691 (quotation marks omitted). For-cause removal provisions are thus constitutional absent a showing that the President’s need to control a protected officer’s discretion is “so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the [officer] be terminable at will by the President.” *Id.* at 691-92.

These precedents remain good law. While the Supreme Court has from time to time invalidated removal provisions as improper intrusions

on the President’s Article II powers, it has never done so for the type of commonplace for-cause removal protections at issue here and routinely upheld in its past cases. In 1986, for instance, the Court invalidated a statutory scheme that allowed the Comptroller General to be removable only by Congress, leaving no role whatsoever for the President. *See Bowsher v. Synar*, 478 U.S. 714, 732, 736 (1986). And in 2010, the Supreme Court found unconstitutional a “dual for-cause” protection in which an independent agency was made up of members who were removable only for cause not by the President, but instead by members of *another* independent agency who were themselves removable (by the President) only for cause. *See Free Enter. Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 514 (2010). As the Court explained, unlike the for-cause removal provisions upheld in *Humphrey’s Executor*, *Wiener*, or *Morrison*, the legislation before it involved “a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power.” *Id.* By contrast, the for-cause removal protections that Congress conferred on the CFPB’s Director do not depart from the familiar model of independence upheld in *Humphrey’s Executor*, *Wiener*, and *Morrison*. The district court erred in concluding otherwise.

B. The Legislation at Issue Here Falls Within Congress’s Well-Established Authority to Protect Independent Agency Heads from Removal Except for Cause.

Numerous courts around the country have upheld Congress’s decision to forbid the President from removing the CFPB director except for cause, including the only federal appellate court to address the issue. *See PHH*, 881 F.3d at 77 (en banc); *see also supra* at 24-25 n.15. The district court nevertheless relied on a dissenting opinion in *PHH* to hold the CFPB’s structure unconstitutional. (S.A. 103-104.) That decision was wrong. Contrary to the district court’s conclusion, the CFPB is the type of financial regulator the Supreme Court has long recognized Congress may create as an independent agency with principal officers removable only for cause, and its purportedly distinguishing features—leadership by a single director and funding through Federal Reserve revenues—do not remove it from that class.

1. The CFPB is typical of independent agencies whose principal officers are validly protected from removal by the President except for cause.

The Supreme Court has directed courts to consider the functions performed by an agency to determine the validity of for-cause removal restrictions, with a view toward determining whether those restrictions

will “impede the President’s ability to perform his constitutional duty.” *Morrison*, 487 U.S. at 691 (quotation marks omitted); *see also Wiener*, 357 U.S. at 353. A consideration of the CFPB’s functions demonstrates that Congress permissibly exercised its authority to adopt a for-cause removal restriction here.

In fact, the CFPB’s functions today are remarkably similar to those of the FTC at the time of *Humphrey’s Executor*. The FTC then had the power to prohibit “unfair methods of competition in commerce” by “persons, partnerships, or corporations,” except banks and certain common carriers. 15 U.S.C. § 45 (1934). To carry out that power, the FTC had “wide powers of investigation,” *Humphrey’s Ex’r*, 295 U.S. at 621, into the practices of “any corporation engaged in commerce,” 15 U.S.C. § 46(a) (1934). The agency could bring an administrative cease-and-desist proceeding against parties engaged in unfair competition and enforce any resulting order in court. *Id.* § 45. The FTC could also gather information regarding corporate practices and report that information to Congress. *See id.* § 46(f). These powers allowed the FTC to exert “a powerfully regulatory effect on those business practices subject to its supervision.”

National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973).

The CFPB performs much the same functions today, albeit within a narrower slice of the economy. It enforces the “[f]ederal consumer financial laws” that pertain to “consumer financial products and services.” 12 U.S.C. §§ 5481(14), 5511. Like the FTC, it may prohibit “unfair” (as well as deceptive and abusive) practices against “covered person[s]” or “service provider[s]”—i.e., those whose practices relate to consumer financial products or services. *Id.* §§ 5531(a), 5536(a). The CFPB also may initiate administrative proceedings or actions in court to enforce the laws within its authority. *Id.* §§ 5563, 5564. And it may collect and publish information on consumer financial markets; conduct financial education; handle consumer complaints; and issue rules to implement consumer financial laws. *Id.* § 5511(c).

These functions closely resemble not only those of the FTC at the time of *Humphrey's Executor*, but also those of other independent agencies today, including the SEC and the Federal Election Commission (FEC), both of whose powers have been upheld against separation-of-powers attacks. *See PHH*, 881 F.3d at 94-95; *see also FEC v. NRA*

Political Victory Fund, 6 F.3d 821, 826 (D.C. Cir. 1993); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988). And the heads of still other financial regulators similarly enjoy for-cause removal protections similar to the CFPB Director's, including the Federal Reserve, the Commodity Futures Trading Commission, the FDIC, and the FHFA. See *supra* at 8. As the *PHH* Court explained, the choice to adopt for-cause removal restrictions in establishing such agencies “makes sense because Congress has consistently deemed insulation from political concerns to be advantageous in cases where it is desirable for agencies to make decisions that are unpopular in the short run but beneficial in the long run, such as, for example, the Fed’s monetary policy decisions.” 881 F.3d at 92 (quotation marks and brackets omitted). There is thus nothing exceptional about Congress’s choice to make the CFPB an independent agency protected by a for-cause removal restriction.

2. The CFPB’s leadership by a single director does not make it constitutionally infirm.

The *PHH* dissent adopted by the district court purported to distinguish the Supreme Court’s longstanding approval of for-cause removal provisions by noting that the Court’s cases typically involved a

multi-member board or commission, while the CFPB is led by a single director. *See* 881 F.3d at 165-66 (Kavanaugh, J., dissenting). But that feature does not make the CFPB constitutionally infirm.

The critical error in the *PHH* dissent is its flawed assumption that the President has less authority over an agency with a *single* director removable only for cause than over an agency with *several* members removable only for cause. As the *PHH* majority pointed out, however, the opposite is true: “[i]t is surely more difficult to fire and replace several people than one,” particularly if every single one of those individuals is protected by a for-cause removal provision. *Id.* at 93 (en banc). By contrast, “[t]he President need only remove and replace a single officer in order to transform the entire CFPB and the execution of the consumer protection laws it enforces.” *Id.* at 98. “[I]f anything, the Bureau’s consolidation of regulatory authority” previously shared by several independent agencies “allows the President more efficiently to oversee the faithful execution of consumer protection laws,” as there is now “one, publicly identifiable face of the CFPB who stands to account” for enforcement of those laws. *Id.* at 93; *see also id.* at 97-98. In sum, “[t]he CFPB led by a single Director is as consistent with the President’s

constitutional authority as it would be if it were led by a group.” *Id.* at 100; *see also id.* at 119 (Wilkins, J., concurring) (“[T]he assumption that the single-director structure gives the President *less* control over the agency is dubious at best.”).

The *PHH* dissent purported to distinguish the CFPB from other independent agencies by asserting that the members of multimember commissions “are at least accountable to and checked by their fellow commissioners or board members.” *Id.* at 165 (Kavanaugh, J., dissenting). But even assuming that individual members would check and balance *each other*, that fact would have no relevance to the “relevant doctrinal inquiry—whether an agency’s independence impermissibly interferes with *presidential* power,” *id.* at 98 (en banc) (emphasis added). And the Supreme Court has never suggested that the presence of multiple members at the head of a commission or agency affected its constitutional analysis. Indeed, in *Morrison*, the Court approved the creation of a special counsel who was in effect “an individual agency head who exercised substantial executive authority.” *Id.* at 96. And while the Supreme Court in *Humphrey’s Executor* noted that the FTC was a “body of experts,” 295 U.S. at 624, it made that observation only in addressing

the statutory-construction question of whether the removal provision was intended “to limit the executive power of removal to the causes enumerated,” *id.* at 626.

Moreover, even if institutional checks on agency action besides presidential oversight were relevant to the constitutional analysis here, Congress in fact “created a multi-member body of experts to check the CFPB Director: the Financial Stability Oversight Council (FSOC).” *PHH*, 881 F.3d at 98; *see also* 12 U.S.C. § 5321. The FSOC “brings together the nation’s leading financial regulators, including the Secretary of the Treasury and the Chairman of the Federal Reserve, to constrain risk in the financial system,” and it “may stay or veto any CFPB regulation that threatens the safety and soundness of the national economy.” *PHH*, 881 F.3d at 99 (en banc) (quotation marks omitted) (citing 12 U.S.C. §§ 5321(b), 5513).

In addition, Congress required the CFPB to create a Consumer Advisory Board staffed with experts and to coordinate and consult with other agencies in several respects when exercising its regulatory authority. *See id.* at 119-20 (Wilkins, J., concurring). These “stringent statutory requirements” ensure that the CFPB director receives ample

expert input, in addition to providing bases for his or her removal on grounds of neglect of duty or inefficiency should he or she disregard these oversight mechanisms. *Id.* at 121. The fact that the CFPB is headed by a single director accordingly does not mean that the Director’s or agency’s authority is wholly unchecked or constitutionally suspect.

3. The CFPB’s funding mechanism also does not make it constitutionally infirm.

Defendants argued below that the CFPB was unconstitutionally structured because of the way Congress funded it—namely, by authorizing it to obtain funds reasonably necessary to carry out its mission from the earnings of the Federal Reserve System, up to specified annual limits. *See* 12 U.S.C. § 5497(a). Congress’s choice of funding mechanism for the CFPB received only passing mention in the *PHH* dissent adopted by the district court, however, *see PHH*, 881 F.3d at 197 n.19 (Kavanaugh, J., dissenting), and does not present a constitutional problem in any event.

As the *PHH* majority explained, Congress “has consistently exempted financial regulators” like the CFPB from the annual appropriations process, instead choosing to fund them through fees,

assessments, or other sources. *See id.* at 95 (en banc) (noting budgetary autonomy of Federal Reserve, FDIC, Office of the Comptroller of the Currency, National Credit Union Administration, and FHFA). The Supreme Court has made clear that such budgetary independence does not impermissibly impede presidential authority in violation of Article II. *See Free Enter. Fund*, 561 U.S. at 499-500 (Article II separation-of-powers inquiry does not depend on “such bureaucratic minutiae” as “who controls the agency’s budget requests and funding” (quotation marks omitted)); *accord American Fed’n of Gov’t Emps., Local 1647 v. Federal Labor Relations Auth.*, 388 F.3d 405, 409 (3d Cir. 2004). Indeed, Congress’s decision to fund an independent agency outside the annual appropriations process “primarily affects Congress” itself, “which has the power of the purse.” *PHH*, 881 F.3d at 96 (en banc). It therefore “does not intensify any effect” on presidential authority so as to create a separation-of-powers violation. *Id.*

POINT II

IF THE COURT REACHES THE QUESTION, IT SHOULD HOLD THAT THE FOR-CAUSE REMOVAL PROVISION IS SEVERABLE FROM THE REMAINDER OF TITLE X

Even if Congress acted unconstitutionally in providing for-cause removal protection for the CFPB's Director (which it did not), the district court erred in going beyond this narrow constitutional error to invalidate the *entirety* of Title X—thereby not only eliminating the CFPB as an agency, but also nullifying Congress's enhancements to federal consumer protections and its strengthening of state authority to enforce both federal and state consumer protection laws. *See* 12 U.S.C. §§ 5551(a), 5552(a). This blunderbuss approach is at odds with basic tenets of the law of severability.

The Kavanaugh dissent found only “one specific constitutional flaw in the Dodd-Frank Act,” *PHH*, 881 F.3d at 198—the for-cause removal provision in 12 U.S.C. § 5491(c)(3). While that provision was important to Congress, it is implausible that Congress would have preferred to eliminate *all* of the benefits of Title X—including its expansion of the States' enforcement authority—rather than make the CFPB's Director removable at will. The proper remedy for the specific constitutional

violation identified by the dissent was thus to excise that violation and no more.

A. Courts Consistently Find Improper Removal Protections to Be Severable.

The Supreme Court has repeatedly held that, “when confronting a constitutional flaw in a statute,” a court must “try to limit the solution to the problem,’ severing any ‘problematic portions while leaving the remainder intact.” *Free Enter. Fund*, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006)); see also, e.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). Because a “ruling of unconstitutionality frustrates the intent of the elected representatives of the people,” *Ayotte*, 546 U.S. at 329 (quotation marks omitted), “the ‘normal rule’ is ‘that partial, rather than facial, invalidation is the required course,” *Free Enter. Fund*, 561 U.S. at 508 (quoting *Brockett*, 472 U.S. at 504).

Courts have repeatedly applied this rule in separation-of-powers cases involving removal protections such as the one here. See *John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017) (collecting examples)). For example, in *Free Enterprise Fund*, the Supreme Court held

unconstitutional only the for-cause removal provision applicable to members of the agency at issue there. *See* 561 U.S. at 509. As the Court explained, the agency and its implementing statute would remain “fully operative as a law’ with these tenure restrictions excised.” *Id.* (quoting *New York v. United States*, 505 U.S. 144, 186 (1992)). Moreover, “nothing in the statute’s text or historical context makes it ‘evident’ that Congress, faced with the limitations imposed by the Constitution, would have preferred no [agency] at all to [an agency] whose members are removable at will.” *Id.*

In *Intercollegiate Broadcasting System v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), the D.C. Circuit similarly held that severance was the appropriate remedy for an Appointments Clause violation. There, the court held invalid a provision of the Copyright Royalty and Distribution Reform Act of 2004 (CRDRA), Pub. L. No. 108-419, 118 Stat. 234 (codified at 17 U.S.C. § 801 *et seq.*), that permitted the Librarian of Congress to appoint copyright royalty judges. As the court explained, the judges were principal officers who were constitutionally required to be appointed by the President with the advice and consent of the Senate. *See Intercollegiate Broadcasting Sys.*, 684 F.3d at 1337-40.

The court held that the proper remedy was not to invalidate the entire CRDRA but instead to strike down only the provision that limited the Librarian of Congress's ability to remove the judges, thereby rendering the judges inferior officers for constitutional purposes. *See id.* at 1340-41.¹⁷

As these and other cases demonstrate, courts consistently conclude that statutory provisions governing the manner in which officials are appointed or removed are severable because the remainder of the statutory scheme is typically capable of functioning independently, and preserving that larger scheme is generally consistent with the legislature's objectives in enacting the statute. *See Free Enter. Fund*, 561 U.S. at 508-09; *see also United States v. Booker*, 543 U.S. 220, 258-59 (2005). The same result is warranted here.

¹⁷ *See also, e.g., Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987) (invalidating one-house veto provision that allowed the Department of Labor to establish rules for first-right-of-hire requirement); *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating the Immigration and Nationality Act's one-house veto provision, which allowed a single house of Congress to override a determination of the U.S. Attorney General not to remove a deportable alien).

B. The District Court Erred In Holding That the For-Cause Removal Provision Is Inseverable.

As the Supreme Court made clear in *Free Enterprise Fund*, a case raising a constitutional challenge similar to the one that RD Legal makes here, a court should find a provision inseverable only if it is “evident” that Congress “would have preferred” to abandon the entire statutory scheme rather than accept the court’s narrow constitutional invalidation. 561 U.S. at 509 (quotation marks omitted). The reasoning of the Henderson dissent fell well short of demonstrating that Congress would have preferred no Title X at all—thereby restoring the fragmented and unfocused enforcement regime “that helped bring the financial system down,” S. Rep. No. 111-176, at 166—to a regime in which the CFPB Director is subject to removal at will by the President.

1. The Dodd-Frank Act’s severability clause explicitly confirms that the for-cause removal provision is severable.

Congress made express its preference for Title X to survive a constitutional challenge to its provisions by including in the Dodd-Frank Act a broad severability clause, which provides that “[i]f *any* provision of this Act, an amendment made by this Act, or the application of such

provision or amendment to *any* person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.” Pub. L. No. 111-203, § 3, 124 Stat. 1376, 1390 (codified at 12 U.S.C. § 5302) (emphasis added). “[I]nclusion of such a clause creates a presumption that Congress did not intend the validity of” Title X “to depend on the validity of” the for-cause removal provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987); *see also, e.g., Evergreen Ass’n v. City of New York*, 740 F.3d 233, 243 (2d Cir. 2014).

Judge Henderson’s dissent dismissed the severability clause in § 5302 because it is not specific to Title X and appears in a different title of the Dodd-Frank Act. *See PHH*, 881 F.3d at 163. But the Supreme Court has repeatedly given effect to severability clauses in similar circumstances. For example, in *National Federation of Independent Businesses v. Sebelius (NFIB)*, the Supreme Court held that it could sever the application of a provision of the Medicaid Act that allowed the Secretary of Health and Human Services to deny Medicaid funding to a State that chose not to participate in the Medicaid expansion mandated

by the Affordable Care Act (ACA). *See* 567 U.S. 519, 585-86 (2012). The severability clause at issue in *NFIB*, 42 U.S.C. § 1303, was nearly identical to § 5302.¹⁸ And § 1303 was not only located in a different subchapter of the U.S. Code from the challenged provision, *see* 42 U.S.C. 1396c, but it was not enacted as part of the ACA at all. Rather, it had been enacted as part of the original Social Security Act, approximately 75 years before the enactment of the ACA. *See* Pub. L. No. 74-271, § 1103, 49 Stat. 620, 648 (1935). Nonetheless, the Court found that § 1303 constituted “explicit textual instruction” from Congress “to leave unaffected the remainder” of the ACA. *NFIB*, 567 U.S. at 586 (quotation marks omitted).

Likewise, in *INS v. Chadha*, the Supreme Court held that the severability clause in the “Miscellaneous Provisions” of the Immigration and Nationality Act (INA), Pub. L. No. 82-414, § 406, 66 Stat. 163, 281

¹⁸ Section 1303 of Title 42 of the U.S. Code provides that “[i]f any provision of this chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby.” Like the severability clause at issue here, § 1303 is located in a subchapter of the U.S. Code that provides the “General Provisions” for the other subchapters of the Medicaid program.

(1952) (codified as amended at 8 U.S.C. § 1101 note), supported severing a provision of the INA that allowed either house of Congress to override a decision by the U.S. Attorney General to suspend the deportation of certain aliens. *See* 462 U.S. 919, 931-32 (1983). The severability clause in *Chadha* is similar to the one at issue here. *See id.* at 932. And, as here, it was enacted as part of a different title of the INA from the challenged provision. *Compare* Pub. L. No. 82-414, tit. IV § 406 (severability clause), *with id.* tit. II § 244 (one-house veto). Nonetheless, the Court concluded that “Congress could not have more plainly authorized the presumption that the provision for a one-House veto . . . is severable.” *Chadha*, 462 U.S. at 932.

Judge Henderson’s dissent mistakenly concluded that the presumption of severability was rebutted by Congress’s use of the term “independent” to describe the CFPB in § 5491(a). *See PHH*, 881 F.3d at 161. That single word comes nowhere close to establishing that Congress would have had no interest in establishing the CFPB absent the for-cause removal provision. For one thing, the for-cause removal provision is just one of the ways that Congress made the CFPB independent; Congress also gave the CFPB financial independence from the appropriations

process, and nothing in the court’s analysis calls into question that measure of independence from political influence. *See* 12 U.S.C. § 5497(a)(1)-(2). Moreover, in the same statutory provision that calls the CFPB “independent,” Congress also made clear its intent for the CFPB to pursue important substantive goals, including the regulation of “consumer financial products or services under the Federal consumer financial laws,” 12 U.S.C. § 5491(a)—an objective the Bureau remains fully able to advance if its Director is removable by the President at will. It simply does not follow from Congress’s description of the CFPB as “independent” that Congress regarded the for-cause removal provision alone as so important that Congress would have chosen to abandon the whole statutory scheme if it had known there would be a successful constitutional challenge to that provision.

2. Congress would not have wanted the entirety of Title X to fall if the for-cause removal provision were invalidated.

Even ignoring the Dodd-Frank Act’s express severability clause, Judge Henderson’s dissent was mistaken in concluding that the for-cause removal provision is inseverable from the substantive provisions of the statute. When determining whether Congress intended for a provision of

a statute to be severable, the relevant question is whether “the policies Congress sought to advance by enacting [the invalid provision] can be effectuated even though the [provision] is unenforceable.” *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion). Here, the existence of the CFPB as an agency dedicated to consumer protection will advance Congress’s objectives, regardless of whether its Director can be removed by the President at will.

As an initial matter, the Henderson dissent did not and could not dispute that Title X can remain “fully operative as a law” without § 5491(c)(3)’s for-cause removal provision. *Free Enter. Fund*, 561 U.S. at 509 (quotation marks omitted). A CFPB with a Director subject to at-will removal by the President will still be able achieve the core “[o]bjectives” of the agency, including “responding to consumer complaints,” “supervising covered persons for compliance with Federal consumer financial law,” and “taking appropriate enforcement action.” 12 U.S.C. § 5511(b), (c)(1), (2), (4); *see also PHH*, 881 F.3d at 199-200 (Kavanaugh, J., dissenting). And neither the anti-preemption provision, nor the provision authorizing States to bring their own enforcement suits, is dependent on the for-cause removal provision for its operation.

The history and stated purpose of Title X make it implausible that Congress would have abandoned the entire statutory regime simply because the Director could be removed at will by the President. Congress enacted Title X due to serious deficiencies in the prior consumer protection regime, which “suffer[ed] from a number of serious structural flaws,” including a “lack of focus” and regulatory “fragmentation.” S. Rep. No. 111-176, at 10. And this dysfunction had catastrophic consequences: “the failure by the prudential regulators to give sufficient consideration to consumer protection . . . helped bring the financial system down.” *Id.* at 166. In creating the CFPB, Congress sought to “end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability.” *Id.* at 11.

The anti-preemption provision and the provision authorizing States to bring their own enforcement actions under federal law also advance Congress’s objectives in enacting Title X, even if the for-cause removal provision is excised. In enacting Title X, Congress recognized that States play a vital role in consumer protection. *See, e.g.*, S. Rep. No. 111-176, at 16. Among other things, “State initiatives can be an important signal to

Congress and Federal regulators of the need for Federal action.” *Id.* States are also “much closer to abuses and are able to move more quickly when necessary to address them.” *Id.* at 174. The States can continue to execute these functions by enacting consumer protection laws and bringing enforcement actions regardless of the CFPB Director’s removability. It makes no sense that Congress would abandon this important enhancement of state powers simply because of a limitation in its ability to insulate the CFPB’s Director from political influence.

Judge Henderson’s dissent wrongly relied on a handful of cherry-picked floor statements to contend that the CFPB’s independence was a dispositive factor in Congress’s enactment of Title X. *See PHH*, 881 F.3d at 162. As a general matter, these kinds of isolated floor statements “rank among the least illuminating forms of legislative history.” *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 943 (2017). And here, none of the statements cited by the dissent even hints that any particular member of Congress—much less Congress as a whole—would have preferred to lose all of the provisions of Title X rather than accept a Director subject to at-will

removal by the President.¹⁹ By contrast, the congressional record abounds with other statements emphasizing the importance of creating a centralized agency to enforce consumer protection laws to remedy the fragmented regulatory structure—without any suggestion that this important policy objective was conditioned on the continued survival of the for-cause removal provision.²⁰ As the Act’s sponsor recognized, merely having “someone watching out there” would be “a major step forward.” 156 Cong. Rec. 7,485 (2010) (statement of Sen. Dodd).

¹⁹ Some of the statements advocate for an independent bureau but also stress the importance of creating the CFPB itself. *See, e.g.*, 156 Cong. Rec. 2,052 (2010) (statement of Rep. Tsongas) (advocating for an independent agency, but emphasizing the importance of a “*strong* consumer rights agency” (emphasis added)). The other statements merely recognize that the Act would create an independent bureau without opining on the importance of independence. *See, e.g., id.* at 6,240 (statement of Sen. Franken). None of the statements specifically discusses the for-cause removal provision, which is only one of several provisions designed to establish the CFPB’s independence.

²⁰ *See, e.g.*, S. Rep. No. 111-176, at 11 (“The legislation ends the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability.”); 156 Cong. Rec. 13,180 (statement of Sen. Reed) (“[The Act] consolidates the existing responsibilities of many regulators to ensure that there is a less fragmented, more comprehensive, and fully accountable approach to protecting consumers.”).

In any event, Judge Henderson’s dissent was also mistaken when it concluded that excising the for-cause removal provision would eliminate the CFPB’s independence. *See PHH*, 881 F.3d at 163. As noted above, see *supra* at 9, apart from the for-cause removal provision, Congress also provided the CFPB with a substantial degree of independence by exempting it from the normal congressional appropriations process. *See* 12 U.S.C. § 5497; *see also PHH*, 881 F.3d at 95-96 (en banc).

Judge Henderson’s dissent was also mistaken when it concluded that severing the for-cause removal provision would so alter the balance of power between the legislative and executive branches that Congress would have preferred not to enact Title X or create the CFPB at all. *See PHH*, 881 F.3d at 163. As an initial matter, the dissent cited no evidence that Congress was so focused on balance-of-power issues that a CFPB with a Director subject to at-will removal would have been “too ‘controversial’ to pass the 111th Congress.” *Id.* But more fundamentally, Judge Henderson’s dissent erred in describing a Title X without the for-cause removal provision as one in which the President has sole control of the agency but Congress has none. While Congress, by design, lacks day-to-day control over the CFPB’s operations, Title X retained for Congress

important powers to supervise the CFPB in other ways, such as the requirement that the Director justify the CFPB's yearly budget and regularly explain the Bureau's most significant actions. *See* 12 U.S.C. § 5496. Thus, there is no indication that giving the President additional discretion to remove the CFPB's Director would so radically alter the balance of power between the legislative and executive branches that Congress would prefer to simply abandon the CFPB altogether.

In any event, the Supreme Court has routinely held that severability is the appropriate remedy for a constitutional infirmity even when the effect of severing a provision of a statute would alter the constitutional balance of powers. In *Chadha*, for example, the Supreme Court recognized that Congress may have been "reluctant" to relinquish "final authority over cancellation of deportations," but "such reluctance [was] not sufficient to overcome the presumption of severability raised by [the severability clause]."²¹ 462 U.S. at 932. Thus, the balance-of-powers concerns raised by Judge Henderson's dissent do not support inseverability here.

²¹ *See also Alaska Airlines*, 480 U.S. at 683-96 (severing one-house veto provision, even though severability gave the executive more authority over a duty-to-hire program).

C. At a Minimum, the Court Should Preserve the Provisions of Title X That Expand the Substantive Protections of Federal Law and the States' Enforcement Authority.

Even if this Court were to conclude that the for-cause removal provision could not be severed from the other provisions creating the CFPB, it still should not invalidate the provisions of Title X that expand the substantive protections of federal law or address state authority to enforce both state and federal consumer protection laws. As explained above, Title X expands the substantive scope of federal consumer protection by adding a prohibition on “*abusive*” acts and practices to the existing prohibitions on acts and practices that are “unfair” or “deceptive.” 12 U.S.C. § 5531(a) (emphasis added); *see also* S. Rep. No. 111-176, at 172. Title X also includes an anti-preemption provision that expressly confirms the continued applicability of state consumer protection regimes, *see* 12 U.S.C. § 5551(a), and further authorizes the States to bring their own actions to enforce federal law, *see id.* § 5552(a). The Director’s for-cause removal provision is wholly unrelated to each of these provisions, and there is no basis to invalidate them even if this Court were to conclude that provisions describing the structure of the CFPB are inseverable from one another.

In enacting the new prohibition on abusive practices, Congress sought to remedy the serious deficiencies in the prior consumer protection regime, including limitations on the ability of federal regulators to prevent circumstances in which “providers unreasonably take advantage of consumers.” S. Rep. No. 111-176, at 172. Nothing about the prohibition on abusive practices depends on the for-cause removal provision for its effect. And in light of Congress’s conclusion that the financial crisis was precipitated, in part, by the proliferation of abusive credit practices, *see id.* at 11-12, 17-23, there is every reason to believe Congress would have preferred for this new substantive protection to survive, regardless of the constitutionality of other provisions of Title X.

In enacting the Dodd-Frank Act, Congress also expressed plainly its interest in expanding the role of the States in consumer protection enforcement. Congress recognized that States play a vital role in enforcing consumer protection laws, especially during periods of federal inaction. *See, e.g., id.* at 16 (“Where federal regulators refused to act, the states stepped into the breach.”). Given Congress’s conclusion that the financial crisis was attributable, in part, to “the failure by the prudential regulators to give sufficient consideration to consumer protection,” *id.* at

166, Congress would have preferred to preserve a robust enforcement role for the States, even if the CFPB's Director were not terminable by the President at will, or the CFPB itself were no longer in existence.

Although Congress also provided for some involvement by the CFPB in state-initiated suits to enforce the expanded federal consumer protections in Title X, the CFPB's role in state enforcement efforts is neither paramount nor fatal to the severability analysis.²² For example, § 5552(b)(1) requires the States to provide advance notice to the CFPB of a forthcoming suit bringing federal-law claims, but only if doing so would be "practicable." 12 U.S.C. § 5552(b)(1)(A)-(B). The CFPB is permitted to intervene in any State-initiated suit, but intervention is entirely discretionary. *See id.* § 5552(b)(2)(A) (the Bureau "*may* intervene in the action as a party" (emphasis added)). Moreover, as a practical matter, the Bureau has never exercised its intervention powers under § 5552(b)(2)(A), preferring instead to bring actions jointly with the States, as it did here.

²² Congress has routinely granted States authority to enforce federal law, especially in the area of consumer protection. *See, e.g.*, 15 U.S.C. § 1194(a) (authorizing States to enforce flame retardant rules); *id.* § 1477 (packaging of household substances); *id.* § 2073(b) (consumer products).

Even if the CFPB were to intervene, it would lack the authority to direct the litigation, veto a State action, or displace the State as a party.

Congress thus plainly viewed the CFPB's involvement as a helpful adjunct to state enforcement actions raising federal consumer protection claims—not as a prerequisite to such state enforcement efforts. In sharp contrast, other regimes make clear that federal intervention is at the core of the statutory scheme. Under the False Claims Act, for example, the federal government is not only entitled to prior notice of a suit, but the complaint must be served on the government before the defendant, the government can take over litigation of the claim, and the government can dismiss or settle the action notwithstanding the objections of the relator who initiated the case. *See* 31 U.S.C. § 3730(b)(2), (4), (c)(2)(A).²³ The CFPB possesses no similar powers here. There is thus no indication that Congress intended to condition its separate enhancement of state

²³ Other federal laws that authorize state-enforcement actions provide additional restrictions on state action not present here. *See, e.g.*, 15 U.S.C. § 2073(b) (requiring States to file suit in federal court and prohibiting States from bringing actions for violations of consumer product safety rules when the United States already has a pending action).

consumer protection efforts on the CFPB Director's independence or even on the CFPB's continued existence.

POINT III

THE NEW YORK ATTORNEY GENERAL'S STATE-LAW CLAIMS DEPEND ON A QUESTION OF FEDERAL LAW SUFFICIENT TO INDEPENDENTLY ESTABLISH SUBJECT MATTER JURISDICTION

Even if this Court concludes that the CFPB is unconstitutionally structured, and even if this Court agrees that Title X is unconstitutional in its entirety, it must still reverse the district court's decision to dismiss the NYAG's state-law claims for lack of subject matter jurisdiction. Federal courts have jurisdiction to entertain any action that "aris[es] under" federal law, including "all cases in which a federal question is an ingredient of the action." *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1570 (2016) (quotation marks omitted). A federal ingredient may exist not only when federal law provides a cause of action, but also when state-law claims contain an embedded federal issue that is "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court." *Gunn v. Minton*, 568 U.S.

251, 258 (2013). The district court erred in concluding that the NYAG's claims do not satisfy this test.

As the district court implicitly acknowledged, the NYAG's state-law claims necessarily raise a disputed federal issue—namely, whether RD Legal's purported “assignment” agreements with VCF beneficiaries were valid under the federal Anti-Assignment Act (AAA), a federal law that prohibits the assignment of federal awards except in limited circumstances not applicable here.²⁴ (S.A. 110.) *See also Nicodemus v. Union Pac. Corp.*, 440 F.3d 1227, 1235 (10th Cir. 2006) (complaint raised a federal issue where it was necessary to interpret a federal land grant statute to determine whether a certain type of land use was prohibited). The district court erred, however, in concluding that the federal issue raised by the NYAG's state-law claims was not “substantial.” (S.A. 111-112.)

A federal question is “substantial” when it has “broader significance . . . for the Federal Government.” *Gunn*, 568 U.S. at 260; *see also*

²⁴ *See* 31 U.S.C. § 3727(b) (“An assignment may be made *only* after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued.” (emphasis added)); *see also United States v. Kim*, 806 F.3d 1161, 1169 (9th Cir. 2015) (“[I]t is all but impossible for *any* assignment to comply with the strictures of the Anti-Assignment Act, because the Treasury no longer uses warrants.”).

NASDAQ OMX Grp., Inc. v. UBS Secs., LLC, 770 F.3d 1010, 1024 (2d Cir. 2014). That is the case here. The AAA plays an important role in protecting the public fisc. *See, e.g., United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 371 (1949). As this Court has explained, the AAA serves to: (1) “prevent persons of influence from buying up claims against the United States, which might then be improperly urged upon officers of the Government”; (2) “prevent possible multiple payment of claims, to make unnecessary the investigation of alleged assignments, and to enable the Government to deal only with the original claimant”; and (3) to “save the United States defenses which it has to claims by an assignor by way of set-off, counter claim, etc., which might not be applicable to the assignee.” *Saint John Marine Co. v. United States*, 92 F.3d 39, 48 (2d Cir. 1996) (quotation marks omitted). Given the importance of the AAA in protecting the federal government’s financial interests, ensuring a broad, uniform interpretation of the AAA “justif[ies] resort to the experience, solicitude, and hope of uniformity that a federal forum offers on federal issues.” *Grable & Sons Metal Prods., Inc. v. Darue Engineering & Mfg.*, 545 U.S. 308, 312 (2005); *see also NASDAQ OMX Grp.*, 770 F.3d at 1024 (national significance of stock exchange supported

substantiality in suit about whether the exchange violated federal securities law during initial public offering).

The district court was wrong to conclude that its construction of the AAA in this case did not implicate broader federal interests. (S.A. 111-112.) The dispositive federal legal question embedded in New York’s state-law claims is whether the AAA voids only the assignment of a *substantive claim* against the United States, or whether it also voids the assignment of the *proceeds* of such a claim in a private contract. (S.A. 33.) The answer to that question implicates not only the validity of RD Legal’s agreements with VCF beneficiaries, but the beneficiaries of other federal settlement funds, *see, e.g.*, 34 U.S.C. § 20144 (Victims of State Sponsored Terrorism Fund), as well as any settlement with the federal government where the beneficiary may attempt to assign the proceeds of her award. The broader implications of the court’s interpretation of the AAA “strongly signal[] the substantial importance of these federal issues, not simply to the parties in this action, but to the development of” a uniform body of law under the AAA, “and thus to the federal system as a whole.”

NASDAQ OMX, 770 F.3d at 1025 (quotation marks removed).²⁵ That the question is a pure issue of law further supports its importance. *See Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700-01 (2006).

The district court mistakenly reasoned that recognizing jurisdiction over the NYAG's state-law claims would upset the federal-state balance because those claims are predicated on state laws governing consumer protection, contract, and usury. (S.A. 112.) In cases involving an embedded federal question, state law will almost always provide the underlying cause of action. But “[a]bsent a special state interest in a category of litigation, or an express congressional preference to avoid federal adjudication, federal questions that implicate substantial federal interests will often be appropriately resolved in federal rather than state court.” *New York ex rel. Jacobson v. Wells Fargo Nat’l Bank, N.A.*, 824 F.3d 308, 316 (2d Cir. 2016). Given that federal courts routinely resolve state-law contract, usury, and consumer protection disputes, adjudication

²⁵ *Smith v. Grimm*, 534 F.2d 1346 (9th Cir. 1976), which RD Legal relied on below, is not binding on this Court and is, in any event inapposite. In *Smith*, unlike in this case, the AAA question was “clearly collateral to [the plaintiff]’s claim.” 534 F.2d at 1351.

of the NYAG's claims in federal court would have no unique consequences for the federal-state balance.²⁶

Below, RD Legal argued that the complaint did not "necessarily" raise a federal question because it does not explicitly mention the AAA. The district court did not accept this argument, and it is meritless. The complaint alleges that the purported assignments were invalid as a matter of federal law and of the VCF's Policies and Procedures, which incorporate federal law by reference. (J.A. 35-36.) Because the AAA is the basis for such invalidity, the complaint's incorporation of the AAA by reference is sufficient. *See Rhode Island Fishermen's Alliance, Inc. v. Rhode Island Dep't of Env'tl. Mgmt.*, 585 F.3d 42, 50-51 (1st Cir. 2009) ("Here, the entitlement to a federal forum rests not on the reference in the complaint to Addendum VII, but, rather, on the express incorporation of federal law into the state statute on which the plaintiffs' cause of action is grounded.").

²⁶ *See, e.g., Mantikas v. Kellogg Co.*, 910 F.3d 633 (2d Cir. 2018) (false advertising and deceptive practices); *In re Venture Mortg. Fund, L.P.*, 282 F.3d 185 (2d Cir. 2002) (civil and criminal usury law); *Nick's Garage, Inc. v. Nationwide Mut. Ins. Co.*, 715 F. App'x 31 (2d Cir. 2017) (summary order) (deceptive practices and breach of contract).

RD Legal also argued that the AAA question is not “necessarily” raised because the NYAG also argues that the assignments are void under state law. But the mere fact that the NYAG contends that RD Legal’s purported assignments were void under both federal and state law does not render them “alternative” theories such that the AAA issue was not necessarily raised. It is enough that the NYAG’s state-law claims were predicated on the invalidity of the assignments under the AAA. *See Board of Comm’rs of Se. La. Flood Prot. Auth.-E., v. Tennessee Gas Pipeline Co.*, 850 F.3d 714, 722 (5th Cir.), *cert. denied*, 138 S. Ct. 420 (2017) (“[I]t is not the case that just because some of these sources are drawn from state law and some from federal law that the two sources are redundant and therefore ‘alternative.’”).

CONCLUSION

For the reasons stated above, the decision of the district court should be reversed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Will Sager, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 13,878 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7).

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