ORAL ARGUMENT NOT YET SCHEDULED
No. 15-1177

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PHH CORPORATION, *et al.*,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Review Of An Order
Of The Consumer Financial Protection Bureau

BRIEF OF STATE NATIONAL BANK OF BIG SPRING, THE 60 PLUS ASSOCIATION, INC.; AND COMPETITIVE ENTERPRISE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Parties and *Amici*.

1. The Petitioners are PHH Corporation, PHH Mortgage Corporation, PHH Home Loans, LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation.

2. The Respondent is the Consumer Financial Protection Bureau ("CFPB")

3. The *Amici Curiae* in Support of Petitioners are State National Bank of Big Spring, the 60 Plus Association, Inc., and Competitive Enterprise Institute.

Rulings Under Review. Petitioners seek review of the final agency action of the CFPB, captioned *In the Matter of PHH Corporation*, Decision of the Director, Docket No. 2014- CFPB-0002, Dkt. 226 (June 4, 2015), and Final Order, Docket No. 2014-CFPB-0002, Dkt. 227 (June 4, 2015).

Related Cases. This matter has not previously been before this Court. Counsel is aware of no related cases currently pending in this Court or in any other court.

CERTIFICATE SUPPORTING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), *Amici Curiae* in Support of Petitioners state as follows:

Amici State National Bank of Big Spring, the 60 Plus Association, Inc., and the Competitive Enterprise Institute are jointly filing this single brief to address the constitutional issues raised by this case: to wit, whether the structure and operation of the Consumer Financial Protection Bureau ("CFPB") violates the separation of powers. Although other *amici* are participating in support of Petitioners, it is Counsel's understanding that this is the only *amicus* brief addressing the constitutional issues raised by novel structure of the CFPB. Separate briefing is warranted because these constitutional questions are distinct from the issues addressed by other *amici*, and are further quite complex.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, *Amici Curiae* in Support of Petitioners make the following disclosures:

State National Bank of Big Spring (the "Bank") is a federally-chartered bank. It has one parent company, SNB Delaware Financial, Inc., a Bank Holding Company in Dover, Delaware. SNB Delaware Financial, in turn, has one parent company, SNB Financial, Inc., a Texas Corporation and Bank Holding Company in Big Spring, Texas. No publicly held company has 10 percent or greater ownership of the Bank.

The 60 Plus Association, Inc. (the "Association") is a non-profit, non-partisan seniors advocacy group that is tax exempt pursuant to Section 501(c)(4) of the Internal Revenue Code. The Association has no parent corporation, and no publicly held company has 10 percent or greater ownership of the Association.

Competitive Enterprise Institute ("CEI") is a non-profit public interest organization that is tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. CEI has no parent corporation, and no publicly held company has 10 percent or greater ownership of CEI.

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INTEREST OF AMICI CURIAE[1]

Amici State National Bank of Big Spring, the Competitive Enterprise Institute, and the 60 Plus Association, Inc. are plaintiffs in a separate lawsuit challenging the constitutionality of the Consumer Financial Protection Bureau ("CFPB").[2] The merits of *amici*'s claim in their own case may therefore be affected by the Court's decision here.

State National Bank is a community bank that has served Big Spring, Texas and other communities for over a century. The Competitive Enterprise Institute ("CEI") is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has participated in federal court cases involving important constitutional or statutory issues. *See, e.g.*, Pet. Br., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861). The 60 Plus Association is a non-profit, non-partisan seniors advocacy group devoted to advancing free markets.

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[1] The parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund to its preparation or submission.

[2] *State Nat'l Bank of Big Spring v. Lew*, No. 1:12-cv-1032 (D.D.C. June 21, 2012).

INTRODUCTION

The CFPB was designed to be—and operates as—a government unto itself. It is vested with sweeping executive authority to make and enforce rules that affect virtually every sector of the U.S. economy. This sword is entrusted to a single individual, the Director, who serves a five-year term that is longer than the President's. But the Director does not answer to the President, who is prohibited from removing him from office except for cause. Indeed, the *President* must bow to the *Director*, as by statute the Director's view of consumer financial protection law prevails over the President's if the two disagree.

Further, unlike the President, who is checked in the exercise of his executive authority by his dependence on congressional appropriations to fund the government he runs, the CFPB is exempted from Congress's power of the purse and accompanying congressional oversight. Indeed, the CFPB is entirely self-perpetuating, empowered to take hundreds of millions of dollars from the Federal Reserve System for its own use, without approval or review from the legislative or executive branches. Nor did Congress stop at freeing the CFPB from external restraints; in the interest of fostering energy and independence, Congress also eschewed the creation of any internal checks or balances within the CFPB, such as those afforded by a deliberative multi-member commission structure.

The Constitution does not permit the creation of such an entity. Rather, to protect individual liberty, the Constitution mandates a separation of powers that imposes checks, balances, and accountability on the exercise of governmental authority. Congress was clear in creating the CFPB that it deliberately removed these restraints in the interest of expediency, efficiency, and what it perceived to be the virtues of *un*accountability in the enforcement of consumer financial protection law. But whatever the merits of Congress's policy objectives, the Constitution does not permit the amalgamation of such sweeping and unchecked authority in a single executive entity. Certain features of the CFPB viewed in isolation may or may not be constitutionally permissible, but the combination is not. Fidelity to the Constitution requires that the CFPB be invalidated.

BACKGROUND

The CFPB was created in 2010 by Title X of the Dodd-Frank Act.[3] Dodd-Frank vested the CFPB with exclusive jurisdiction to administer eighteen "Federal consumer financial law[s]" previously administered by myriad other agencies. 12 U.S.C. §§ 5481(12), (14), 5511. And Dodd-Frank further vested the CFPB with newly created authority to regulate or prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a).

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[3] Formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

The CFPB is an "independent bureau" within the Federal Reserve System. *Id.* § 5491(a); *see also* 44 U.S.C. § 3502(5) (designating the CFPB as an "independent regulatory agency," and thus excluding it from E.O. 12866's process for regulatory review by the Office of Management and Budget). Yet the CFPB is not answerable to the Federal Reserve, as the Federal Reserve cannot intervene in any CFPB matter or proceeding or appoint or remove any CFPB employee. *See* 12 U.S.C. § 5492(c). And the CFPB's Director enjoys the "defining hallmark of an independent agency": the President cannot remove him except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 16 (2010) ("defining hallmark"). Moreover, the Director serves longer than a full presidential term, being accorded a minimum term of five years, and having authority to hold over in office indefinitely until a successor is confirmed. 12 U.S.C. § 5491(c)(1)-(2).

The CFPB is also made entirely independent from Congress's power of the purse. Instead of relying on congressional appropriations to fund its activities, the CFPB is statutorily entitled to claim about $600 million annually from the Federal Reserve System.[4] Congress is prohibited even from attempting to "*review*" the

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[4] Specifically, the CFPB is entitled to up to 12 percent of Federal Reserve's operating expenses. 12 U.S.C. § 5497(a). According to the CFPB, this amounts to

CFPB's non-appropriated budget. *See* 12 U.S.C. § 5497(a)(2)(C) (emphasis added).

Dodd-Frank takes yet further steps to empower the CFPB Director to act without restraint or accountability. Eschewing the traditional, bipartisan "independent commission" model, in which several commissioners check and balance each other,[5] the Act vests the agency's power in a single Director. 12 U.S.C. § 5491(b)(1).

SUMMARY OF ARGUMENT

In a constitutional system that separates power among the legislative, executive, and judicial branches, "independent" agencies exist as a limited exception to that fundamental structural rule. The President has general power to "keep [agencies] accountable" by "removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483 (citing *Myers v. United States*, 272 U.S 52 (1926)). But Congress "can, *under certain circumstances*, create independent agencies" run

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$539 million in 2015 and $605.5 million in 2016. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* 21 (Feb. 2015), http://files.consumerfinance.gov/f/ 201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf.

[5] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013) (describing benefits of independent commissions' multimember structure).

by officers removable only for good cause. *Id.* (emphasis added) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)).

Notably, the courts have not allowed this limited exception to swallow the general rule that checks, balances, and accountability are necessary elements of governance under our constitutional structure. In *Free Enterprise Fund*, the Supreme Court stressed that *Humphrey's Executor* represents the outermost limit on agency independence. 561 U.S. at 514 ("While we have sustained in certain cases limits on the President's removal power, the act before us imposes a new type of restriction[.]"). Thus, the Sarbanes-Oxley Act violated the Constitution by creating an agency with two layers of independence from the President.

The Dodd-Frank Act crosses the constitutional line yet again. Not by giving an independent agency an extra layer of protection from the President, but rather by creating an independent agency that has substantially broader executive powers than those at issue in *Humphrey's Executor*, yet has been structured to remove all meaningful executive, legislative, and internal checks. As a result, the CFPB is far more unaccountable and unchecked than the FTC of *Humphrey's Executor*.

Simply put, our constitutional system of government does not permit Congress to create self-perpetuating executive authorities that exist outside of, and are unanswerable to, both the executive and legislative branches. *See, e.g.*, Federalist No. 9 (Hamilton) ("The regular distribution of power into distinct departments [and] the introduction of legislative balances and checks …. are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided."); *Free Enter. Fund* , 561 U.S. at 499. Yet the Dodd-Frank Act vests the CFPB with vast executive authority, exempts it from accountability to the political branches, provides no mitigating internal checks and balances, and allows it to make and execute law on its own *indefinitely* without further involvement or oversight by Congress or the President.

Congress evidently saw the CFPB's structural "independence" as a praiseworthy feature that it hoped would make it more energetic and effective. But our constitutionally prescribed separation of powers does not allow the liberty-protecting value of checks, balances, oversight, and accountability to be sacrificed at the altar of expediency. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government."). Nor is the CFPB saved by the fact that Congress and the President participated in its creation, as "[n]either Congress nor the Executive can agree to waive" the Constitution's "structural protection." *Freytag v. Comm'r*, 501 U.S. 868, 880 (1991); *Free Enter. Fund* , 561 U.S. at 498.

The Government may attempt to defend the CFPB by a piecemeal approach: pointing to a single structural feature of the CPFB (e.g., for-cause removal protection), and citing cases in which the courts have endorsed that specific feature, in isolation. Neither this Court nor the Supreme Court has ever blessed the unprecedented combination of sweeping executive powers and stripped-away constitutional restraints that is embodied in the CFPB, however. That combination must be viewed by this Court *as a whole*, and when so viewed it cannot be reconciled with the constitutionally required separation of powers. *Ass'n of Am. R.R. v. DOT*, 721 F.3d 666, 673 (D.C. Cir. 2013) ("just because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute"), *rev'd on other grounds*, 136 S. Ct. 1225 (2015); *Free Enter. Fund*, 561 U.S. at 496 ("This novel structure does not merely add to the Board's independence, but transforms it."). The CFPB is unconstitutionally constituted, and Title X of the Dodd-Frank Act must be declared invalid.

ARGUMENT

I. CONGRESS VESTED THE DIRECTOR OF THE CFPB WITH BROAD EXECUTIVE AUTHORITY BUT PLACED HIM OUTSIDE THE PRESIDENT'S AUTHORITY AND CONTROL

A. The CFPB Has Expansive Executive Authority

The CFPB is vested by statute with broad authority to exercise executive power in its designated domain. The CFPB has the power to "establish the general policies of the [CFPB] with respect to *all executive and administrative functions*," including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions"; deciding on the appropriate "use and expenditure of funds" for those purposes; "coordinat[ing] and oversee[ing] the operation of all administrative, enforcement, and research activities of the [CFPB];" and "performing such other functions as may be authorized or required by law." 12 U.S.C. § 5492(a)(4), (9), (10), (11) (emphasis added). Among these broad powers, Dodd-Frank grants the CFPB exclusive jurisdiction to administer eighteen "Federal consumer financial law[s]" previously administered by other agencies, 12 U.S.C. §§ 5481(12), (14), 5511, and further vests the CFPB with newly created authority to regulate and prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a). In sum, the core purpose of the CFPB is "to implement and, where applicable, enforce Federal consumer financial law," *id.* § 5511(a)—that is, to "take Care that the [Federal consumer financial laws] be faithfully executed," *see* U.S. Const. Art. II, § 4, cl. 4—a clear executive responsibility.

B. The CFPB Is Not Answerable To Or Restrained By The Chief Executive

"But where, in all this, is the role for oversight by an elected President?" *Free Enter. Fund*, 561 U.S. at 499. Because the CFPB performs a role constitutionally committed to the executive branch, it must remain ultimately accountable to the President as the Chief Executive. *See* U.S. Const. Art. II, § 1, cl. 1; *see also Free Enter. Fund*, 561 U.S. at 484. Yet Congress took pains to ensure this was not the case. The CFPB and its Director have been thoroughly insulated from the President's control.

In its day-to-day operations, the CFPB operates entirely outside the President's sphere of influence. The Director of the CFPB is not required to coordinate with any other executive branch official regarding "legislative recommendations, or testimony or comments on legislation." 12 U.S.C. § 5492(c)(4). Likewise, the Director is independent from the President's financial oversight. Though he must provide the Director of the Office of Management and Budget ("OMB") copies of certain financial reports, he has no "obligation … to consult with or obtain the consent or approval of the Director of the [OMB] with respect to any report, plan, forecast, or other information," and the OMB lacks "any jurisdiction or oversight over the affairs or operations of the [CFPB]." *Id.* § 5497(a)(4)(E).

Most significantly, the Director of the CFPB is protected from removal and, as a result, from ultimate accountability to the Chief Executive. Once appointed, the Director serves a five-year term and can be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). This term can extend indefinitely, until a successor is appointed. *Id.* § 5491(c)(2). The Director therefore cannot be removed by the President merely for failing to execute the law in a manner inconsistent with the President's policies and directives. *See Free Enter. Fund*, 561 U.S. at 496. And if the President and the Director disagree in the field of consumer finance, by statute the Director's view prevails. *See* 12 U.S.C. § 5512(b)(4).

In effect, the Dodd-Frank Act establishes the Director as a mini-President of consumer finance, vested with sweeping executive authority within his prescribed domain, yet entirely unaccountable in its exercise to the Chief Executive (or to the Congress). This structure cannot be reconciled with the constitutionally prescribed separation of powers, as explained by the Supreme Court in *Free Enterprise Fund*, 561 U.S. 477, and in what the Court there described as its "landmark" decision in *Myers v. United States*, 272 U.S. 52 (1926). Those cases establish that the President's constitutional responsibilities require that he have the authority to remove appointed executive officers, and that only "under certain circumstances" can even "limited restrictions" be imposed on the removal power, *Free Enter. Fund*, 561 U.S. at 483, 495.

Free Enterprise Fund and *Myers* recognize that the removal power is "perhaps *the* key means" that the President has for "appointing, overseeing, and controlling those who execute the laws.'" *Id.* at 501 (quoting 1 Annals of Cong. 463 (1789)). After all, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484. And the Constitution "requires that a President chosen by the entire Nation oversee the execution of the laws." *Id.* at 499.

Yet as is discussed in more detail below, none of the "certain circumstances" the courts have deemed sufficient to warrant even "limited restrictions" being imposed on the removal power are present in the CFPB. Its executive authority is not minor or narrow. It has no internal checks and balances. And it is accorded a perpetual funding supply outside the appropriations process that exempts it from Congress's power of the purse. This combination of features has produced a "novel structure [that] does not merely add to the [CFPB's] independence, but transforms it." *Id.* at 496. If for-cause removal restrictions can be applied to the Director of an agency with the powers and structural features of the CFPB, then *Myers*—which at minimum established that Congress cannot constitutionally prevent the President from removing Cabinet-level officials at will, 272 U.S. at 135—must be entirely overruled, and nothing prevents Congress from imposing similar removal restrictions with respect to the head of every Department of the government.[6]

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[6] Cabinet Secretaries cannot be distinguished from the Director of the CFPB on the ground that they are "purely executive," as they in fact perform a wide array of rulemaking and adjudicative functions. *See, e.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 153 (1987) ("[T]he Secretary decides more than 2 million claims for disability

To be sure, Congress has labeled the CFPB "independent." But the Constitution does not permit Congress to talismanically invoke the word "independent" to transform any agency—no matter how broad its law-executing authority—from an arm of the executive into an unaccountable bureaucratic entity. *Humphrey's Executor* did not sanction such a result. *See Humphrey's Ex'r*, 295 U.S. at 602, 630–31 (1958) (distinguishing *Myers* on the ground that it involved "purely executive officers" who were "responsible to the President"). Moreover, that Congress sought to make the CFPB "independent" to promote goals of energy and efficiency does not change the analysis. "[C]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government," and thus the "fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution" *Free Enter. Fund*, 561 U.S. at 499 (alteration in original) (quoting *Bowsher*, 478 U.S. at 736).

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benefits each year, of which more than 200,000 are reviewed by administrative law judges."); *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996) (HUD secretary's designee imposed $5,000 in damages plus $5,000 fine for hostile housing environment sexual harassment); *Beavers v. Sec'y of HEW*, 577 F.2d 383, 386 (6th Cir. 1978) ("[T]he Secretary is entrusted with the duty of making all findings of fact. . .the statutorily-mandated deference to findings of fact runs in favor of the Secretary, not the administrative law judge….")

C. The CFPB Is Unlike Other Executive Entities Approved By The Courts

This case is materially unlike others in which the Supreme Court has upheld restrictions on the President's removal power. In *Morrison v. Olson*, the Supreme Court upheld a statute that insulated a special "independent counsel" from Presidential oversight and removal, but it did so because the independent counsel had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority." 487 U.S. 654, 691, 696 (1988). Because the independent counsel had limited enforcement powers and no policy-setting role, the Court did not think that restrictions on the President's ability to remove him "unduly intefer[ed] with the role of the Executive Branch." *Id.* at 693.

Likewise, in *Humphrey's Executor v. United States*, the Court upheld a for-cause removal requirement on members of the Federal Trade Commission ("FTC"), in substantial part because the Commission was statutorily created as a "nonpartisan" entity and had almost no role in setting executive policy. 295 U.S. at 624.[7] The FTC was structured to ensure a degree of political impartiality: By statute, no more than three of the five commissioners serving on the FTC could come from the same political party. *Id.* at 611, 624. And the FTC commissioners

[7] *Amici* agree with Petitioner that *Humphrey's Executor*'s continued validity is called into question by the reasoning of *Free Enterprise Fund*, and that at a minimum *Free Enterprise Fund* requires that *Humphrey's Executor* be read narrowly. *See* Pet. Br. at 47 n.6.

were intended to act primarily "as a legislative or … judicial aid[]," using their expertise to carry out predominately ministerial and adjudicative tasks, rather than functioning as "arm[s] or … eye[s] of the executive." *Id.* at 628. Because the FTC ultimately served "as a means of carrying into operation legislative and judicial powers" and ultimately acted "as an agency of the legislative and judicial departments," Congress could impose a good-cause removal requirement to preserve some of the agency's independence from the President.[8]

D. Congress Failed To Create Any Mitigating Internal Checks And Balances Within The CFPB

Amici do not here contend that a multi-member commission structure such as the FTC's is a constitutionally required feature for "independent agencies" to be subject to for-cause removal restrictions. By design, however, the CFPB was created with *no* mitigating internal checks and balances at all. By placing a single Director at the head of the CFPB—beholden to no one, charged with running a self-perpetuating executive agency with vast enforcement authority, and able to act

[8] The current FTC has been accorded additional executive powers that go beyond the quasi-legislative and quasi-judicial functions that were identified by the Supreme Court in *Humphrey's Executor* as the basis for the FTC's for cause removal passing muster. The impact of those additional powers on the FTC's constitutionality has never been considered by the courts. Today's FTC, however, is subject to a variety of checks and balances that do not constrain the CFPB—most notably, appropriation by Congress.

unilaterally and without persuasion or deliberation—Congress has exacerbated the underlying separation of powers violation.

Courts have favorably cited multi-member commission structures as usefully providing checks, balances, and accountability. In *Humphrey's Executor*, the Supreme Court upheld for-cause removal with respect to the FTC in part because the Commission was expressly statutorily created as a "non-partisan" entity; by statute, no more than three of the five commissioners serving on the Commission could come from the same political party. 295 U.S. 602, 611, 624 (1935). Similarly, in *A.L.A. Schechter Poultry Corp. v. United States*, in striking down an impermissible delegation of authority, the Supreme Court expressly distinguished other grants of power to a variety of multi-member commissions, including the FTC, the Interstate Commerce Commission, and the Radio Commission. 295 U.S. 495 (1935).

Much has been written on the benefits of multi-member bodies relative to sole directorships. For example, one scholar has explained that a single directorship prevents "the agency from enjoying the benefits of deliberation which produces more informed judgments about the direction of regulatory policy." Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: The Two Policies at War With Each Other*, 121 Yale L.J. 2216, 2260 (2012). "[M]ultimember structures," on the other hand, foster collegiality and thereby "the potential for exposure to a variety of views and improved decisionmaking." *Id*. Others have explained that "collective governance can constrain overconfidence or cognitive errors by providing critical assessments and viewpoints of proposals," and "can also constrain shirking, self-dealing, and capture by providing multilateral monitoring and raising the number of people who need to be corrupted for improper action to occur." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash L. Rev. 856, 897-98 (2013). The bipartisan multimember commission structure has thus been the standard one for independent agencies for over 125 years. *See* Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 962-983 (explaining that discussion regarding whether to have a bipartisan commission structure is often devoid from agencies' legislative histories, because it was assumed that such a structure would be used).

II. THE CFPB ENJOYS "FULL INDEPENDENCE" FROM CONGRESS

The CFPB's independence from the Executive Branch is matched by its independence from the Legislative Branch: the Dodd-Frank Act releases the CFPB from Congress's constitutional power of the purse. 12 U.S.C. § 5497(a). This second layer of independence "ensure[s]," in the CFPB's words, the agency's "full independence" from Congress. *Consumer Financial Protection Bureau Strategic*

Plan: FY 2013-FY 2017 36 (Apr. 2013), http://files.consumerfinance.gov/f/strategic-plan.pdf.

The courts, the Framers, and myriad scholars have warned that Congress's "power of the purse" is key to its constitutional responsibility of overseeing the execution of the laws. The CFPB's conduct—repeatedly defying Congress's authority—validates those warnings.

A. The Dodd-Frank Act Frees The CFPB From Congress's "Power Of The Purse"

The CFPB is not funded by appropriations. Instead, the Dodd-Frank Act gave the CFPB a perpetual, annual entitlement to hundreds of millions of dollars from the Federal Reserve. 12 U.S.C. § 5497(a). Indeed, the Dodd-Frank Act goes so far as to expressly prohibit Congress even from attempting to "*review*" the CFPB's automatically funded budget. *See id.* § 5497(a)(2)(C) (emphasis added).

The President and Congress included this provision in the Dodd-Frank Act in order to free the CFPB from oversight by future Congresses. S. Rep. No. 111-176, at 163 (2010)). They characterized this as a salutary feature, viewing such funding as "absolutely essential" to ensuring the agency's "independent operations." S. Rep. No. 111-176, at 163. Independent, that is, from future Congresses. But this Court, the Supreme Court, and the Framers would characterize it quite differently.

B. The Constitution's "Power Of The Purse" Is Congress's Most Powerful Tool For Overseeing And Holding Accountable Agencies Exercising Federal Law

The Constitution entrusts taxpayers' money to Congress, requiring that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. As this Court recognizes, the Constitution commits that power and responsibility to Congress for a very specific reason: "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'" *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2250 (2014).

On this point, the Framers were emphatic. James Madison stressed that "[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, for obtaining a redress of every grievance, . . . for carrying into effect every just and salutary measure," and for "reducing . . . all the overgrown prerogatives of the other branches of the government." Federalist No. 58 (Madison). Alexander Hamilton was all the more blunt: "[T]hat power which holds the purse-strings absolutely, must rule." 1 *Works of Alexander Hamilton*

218-19 (Henry Cabot Lodge, ed., 1904) (Letter to James Duane).[9] Thus, while the Executive Branch "holds the sword," Congress "prescribes the rules by which the duties and rights of every citizen are to be regulated" and, to that end, also "commands the purse." Federalist No. 78 (Hamilton).

The earliest major constitutional commentators, too, reiterated the importance of Congress's power of the purse as both a check against the other parts of government and a means of accountability between Congress and the Executive to the People. "The power to control, and direct the appropriations," wrote Joseph Story, "constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation." 3 Joseph Story, *Commentaries on the Constitution* § 1342 (1833); *see also* 1 St. George Tucker, *Blackstone's Commentaries*, Appx., p. 362 (1803) ("All the expenses of government being paid by the people, it is the right of the people . . . to be actually consulted upon the disposal of the money which they have brought into the treasury….").

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[9] *See also* 2 *Works of Alexander Hamilton* 8-9 (Address to New York Ratification Convention) ("Will any man who entertains a wish for the safety of his country trust the sword and the purse with a single Assembly, organized on principles so defective?"); *id.* at 61 ("Neither [the Legislative Branch] nor the [Executive Branch] shall have both [the power of the purse and the sword]; because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger.").

Modern Congresses have often recognized the significance of its "power of the purse," not merely as an end in itself, but as a means for ensuring that the other parts of government conduct their work in a manner consistent with the law, the public interest, and the public will. "The appropriations process is the *most potent form* of congressional oversight, particularly with regard to the federal regulatory agencies." S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 *Study on Federal Regulatory Agencies* 42 (1977) (emphasis added); *see also* 1 GAO, *Principles of Federal Appropriations Law*, pp. 1-4 to 1-5 (3d ed. 2004) ("The Appropriations Clause has been described as 'the most important single curb in the Constitution on Presidential power.' . . . [T]he congressional power of the purse reflects the fundamental proposition that a federal agency is dependent on Congress for its funding."). Congress's continued recognition of the fundamental significance of its "power of the purse" is most recently evidenced by the House of Representatives' decision to file a federal lawsuit to prevent the executive branch from undertaking activities beyond the limits of Congress's appropriations—or, in the district court's words, "to preserve its power of the purse and to maintain constitutional equilibrium between the Executive and the Legislature." *U.S. House of Representatives v. Burwell*, --- Fed. Supp. 3d ----, 2015 WL 5294762, at *1 (D.D.C. Sept. 9, 2015).

Myriad modern legal scholars have highlighted the fact that the power of the purse is the foundation for "most of the oversight that Congress exercises over administration." Arthur W. Macmahon, *Congressional Oversight of Administration: The Power of the Purse I*, 58 Pol. Sci. Q. 161, 173 (1943).[10] This is all the more true with respect to the independent regulatory agencies not subject to direct presidential oversight: "The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control. . . . Viewed broadly, the financial control exercised by Congress over the [independent] commissions is a necessary and desirable form of supervision." Robert E. Cushman, *The Independent Regulatory Commissions* 674-75 (1972).

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[10] *See also, e.g.*, Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1360 (1988) ("Appropriations limitations constrain every government action and activity and, assuming general compliance with legislative prescriptions, constitute a low-cost vehicle for effective legislative control over executive activity."); Jack M. Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 84 (2006) ("One way in which Congress has supervised agencies with great particularity, both formally and informally, is through the appropriations process"); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 816 (2013) ("Congress primarily exerts influence over agency heads . . . through the power of the purse. Thus '[an] agency has an incentive to shade its policy choice toward the legislature's ideal point to take advantage of that inducement.'" (second alteration in original) (quoting Randall L. Calvert *et al.*, *A Theory of Political Control and Agency Discretion*, 33 Am. J. Pol. Sci. 588, 602 (1989)); Joseph Cooper & Ann Cooper, *The Legislative Veto & the Constitution*, 30 Geo. Wash. L. Rev. 467, 491 (1961) ("Congress constantly uses the appropriations bills to control and supervise executive decision-making with regard to both policy and operations.").

This Court and the Supreme Court share that view of the power of the purse. The Appropriations Clause is, according to this Court, nothing less than "a bulwark of the Constitution's separation of powers among the three branches of the National Government," a power that is "particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012); *see also Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

The courts' recognition of these principles is more than merely theoretical; the principles undergird doctrines respecting the Constitution's separation of powers. In decisions denying standing to parties challenging government policies, for example, the Supreme Court and this Court have stressed that recourse is better found in the purse-strings of Congress. Thus, when the Supreme Court dismissed a suit challenging Vietnam-era military surveillance, it stressed that the task of monitoring "the wisdom and soundness of Executive action" is "a role [that] is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary…." *Laird v. Tatum*, 408 U.S. 1, 15 (1972); *see also Allen v. Wright*, 468 U.S. 737, 760 (1984) (quoting *Laird* in denying standing to lawsuit against federal government to change tax-exemption policy).

More recently, when this Court denied judicial review to those challenging federal regulators' decision not to modify auto safety standards, it pointed the challengers to Congress: "[t]o the extent Congress is concerned about Executive under-regulation or under-enforcement of statutes, it also may exercise its oversight role and power of the purse." *Public Citizen v. NHTSA*, 489 F.3d 1279, 1295 (D.C. Cir. 2007).

Moreover, even when the specific question of Congress's "power of the purse" is not expressly invoked, it still can serve to silently undergird significant doctrines involving the separation of powers. In *Humphrey's Executor* itself, for example, the Supreme Court justified the FTC's independence from the President on the basis that Congress remained the agency's "master." 295 U.S. at 630; *see also id.* (describing the FTC as "wholly disconnected from the executive department" but "an agency of the legislative . . . department[]"). Freed from Congress's power of the purse, the FTC would have been no such agent, and Congress no such master.

C. The CFPB Has Demonstrated That Congress Cannot Meaningfully Oversee And Restrain An Agency Without The Power Of The Purse

Given that the Appropriations Power is a bulwark of Congress's legislative oversight authority, scholars in recent years have come to recognize that an agency's protection against the President's removal authority is not the only form of "independence" that an agency may enjoy. Protection against Congress's power of the purse is another: if an agency can rely upon "an independent funding source," then an independent agency "is insulated from Congress as well as the President." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 44 (2010); *see also id.* at 43 ("To be sure, the power of the purse is one of the key ways in which democratic accountability is served.").[11]

The CFPB proves the theory as a matter of fact. The Dodd-Frank Act's framers gave the CFPB a permanent source of non-congressional funding for the express goal of ensuring the agency's full independence from future Congresses. And the CFPB has not hesitated to assert this independence, in both word and deed. The CFPB recognizes that its legal entitlement to hundreds of millions of dollars in "funding outside the congressional appropriations process" ensures its "full independence" from Congress. *Consumer Financial Protection Bureau Strategic Plan: FY 2013-FY 2017* 36 (Apr. 2013), http://files.consumerfinance.gov/f/strategic-plan.pdf. As such, while the CFPB may sometimes agree to appear

[11] *See also* Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733 (2013); Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822 (2012); Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 782-83 (2013) (reiterating Barkow's focus on budgetary autonomy).

before congressional committees, submit reports to Congress, or undergo GAO audits, the agency faces no serious consequences for refusing to respond meaningfully to Congress's attempts to conduct oversight regarding the agency's regulatory and enforcement activities.

Congressmen and Senators can write letters to the CFPB, complaining that the agency is "wholly unresponsive to our requests for additional budget information,"[12] or that the agency "has yet to explain its basis for" controversial policies.[13] At hearings, Congress can criticize the agency's failure to answer questions about its secret "data gathering activities," and "deman[d] to know why the agency's director . . . and his staff have not yet answered roughly 200 questions sent to the agency."[14] Congress can do all of those things, but without the power

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[12] Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations, *et al*. to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012), http://www.aba.com/aba/documents/winnews/CFPB_OversightMemo_050212.pdf.

[13] Letter from Sen. Rob Portman, *et al*. to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013), http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=ad73c8d1-39c6-4c4f-80da-c13c57013b12.

[14] Rachel Witkowski, *Lawmakers Fume Over Unanswered Questions to CFPB*, Am. Banker (Sept. 12, 2013), http://www.americanbanker.com/issues/178_177/lawmakers-fume-over-unanswered-questions-to-cfpb-1062015-1.html. A year later, an investigation by the GAO revealed that the CFPB had collected information regarding over 10 million individuals' credit reports, 29 million active mortgage loans, and up to 75 million credit card accounts. GAO, *Consumer Financial Protection Bureau: Some Privacy and Security Procedures for Data Collections Should Continue Being Enhanced* 15-16 (Sept. 14, 2014),

of the purse its ability to secure answers to its questions, let alone to guide the agency's policies, is severely limited.

This dynamic was fully on display at a hearing earlier this year, at which a member of Congress asked CFPB Director Cordray for information as to who at the agency was directing renovation projects costing hundreds of millions of dollars. The Director declined to answer the question; instead, he asked the congresswoman, bluntly, "why does that matter to you?" *See* U.S. House of Representatives, Committee on Financial Services, "Committee Pushes for Accountability and Transparency at the CFPB" (Mar. 6, 2015), http://financialservices.house.gov/blog/?postid=398780.[15]

The loss of Congress's constitutional power over the CFPB is not ameliorated by the fact that a previous Congress passed the statute eliminating Congress's power of the purse. After all, an individual Congress, like an individual President, "might find advantages in tying [its] own hands." *Free Enter. Fund*, 561 U.S. at 497; *see also* James Q. Wilson, *Bureaucracy* 239 (1989) ("[P]oliticians have good reasons to tie their own hands. But once tied, they

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http://www.gao.gov/assets/670/666000.pdf. The GAO further concluded that the "CFPB lacks written procedures and documentation needed to address privacy risks and better ensure ongoing compliance with requirements." *Id.* at 37 (capitalization modified).

[15] Video of the exchange is available at https://www.youtube.com/watch?v=5IxSfJ638cs.

cannot easily be untied.”). But just as “the separation of powers does not depend on the views of individual Presidents,” *Free Enter. Fund*, 561 U.S. at 497, nor does it depend on the views of an individual Congress. And therefore, just as a single President “cannot . . . choose to bind his successors by diminishing their powers,” *id.*, nor can a single Congress choose to bind its successors by diminishing theirs.

CONCLUSION

If this Court reaches the issue of the CFPB’s constitutionality, it should hold that the agency unconstitutionally violates the separation of powers.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the Order of this Court dated December 20, 2013 (Doc. No. 1471629), because this brief contains 6,365 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii) of the Federal Rules of Appellate Procedure and Circuit Rule 32(a)(1).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionately spaced typeface using the 2010 version of Microsoft Word in fourteen-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on this 5th day of October 2015, I electronically filed the foregoing brief with the Court. I further certify that on this 5th day of October 2015, I served the foregoing brief on all counsel of record through the Court's CM/ECF system.

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