[EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017]

No. 15-1177

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

PHH CORPORATION; PHH MORTGAGE CORPORATION; PHH HOME LOANS, LLC; ATRIUM INSURANCE CORPORATION; and ATRIUM REINSURANCE CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Review of an Order of the Consumer Financial Protection Bureau
(CFPB File 2014-CFPB-0002)

BRIEF *AMICI CURIAE* OF CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* current and former members of Congress represents that all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, currently serve in the leadership, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the financial crisis that precipitated the passage of Dodd-Frank, as well as the legislative plan that Congress put in place to avoid similar financial crises in the future. *Amici* are thus particularly well situated to provide the Court with insight into why Congress chose

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

the leadership structure it did when it established the Consumer Financial Protection Bureau, and they also have a strong interest in preserving the regulatory scheme that Congress established when it enacted Dodd-Frank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

All parties, intervenors, and *amici* appearing before the Consumer Financial Protection Bureau and in this Court are listed in the *en banc* Brief for Petitioners, except for any additional *amici* who intend to appear in support of Respondent at the *en banc* stage, and except for the following *amici* who first appeared in support of Petitioners at the *en banc* stage: The Cato Institute; RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Partners, LP; Roni Dersovitz; and the States of Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Nevada, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the *en banc* Brief for Petitioners.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the *en banc* Brief for Petitioners.

Dated: March 31, 2017

By: Elizabeth B. Wydra
Counsel for Amici Curiae

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
CPSC	Consumer Product Safety Commission
GAO	Government Accountability Office

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to the *en banc* Brief for Petitioners.

INTEREST OF *AMICI CURIAE*

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, currently serve in the leadership, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the critical role that the Consumer Financial Protection Bureau (CFPB) plays in the legislative plan that Congress put in place when it enacted Dodd-Frank to prevent future financial crises like the Great Recession of 2008, and they understand how critical the CFPB's leadership structure is to the Bureau's ability to play its intended role effectively. *Amici* thus have an interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted the Dodd-Frank Act in response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* ("the financial crisis has torn at the very fiber of our middle class"). After extensively studying the roots of this crisis, Congress determined that, despite an abundance of legal authority to combat the mortgage abuses that were largely responsible, the manner in which this authority was apportioned among federal regulators led to inaction and delay.

To solve this problem and prevent similar crises in the future, Congress established a consolidated federal agency, the CFPB, with the sole mission of protecting Americans from harmful practices of the financial services industry. In creating the Bureau, lawmakers determined that it needed two key attributes to fulfill its mission: independence, and the ability to act promptly and decisively in response to new threats to consumers. These requirements counseled in favor of an agency led by a single director, to avoid the delay and gridlock to which multi-member commissions are susceptible. They also counseled in favor of providing this director with some degree of independence, allowing the President to remove him or her for good cause—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—but not for policy differences alone. Since its creation, the Bureau has been markedly successful in fulfilling its mission, among other things promulgating new rules to end abusive mortgage practices and recovering billions of dollars for defrauded consumers.

Petitioners challenge the CFPB's constitutionality on the ground that its leadership structure violates the Constitution's separation of powers. This argument is wholly without merit. When the Framers drafted the Constitution, they empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, thus ensuring that future legislators would have the flexibility needed to structure the government so it could respond effectively to new challenges. As Chief Justice John Marshall later observed, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its power." *M'Culloch v. Maryland*, 17 U.S. 316, 415 (1819). Their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id*. From the earliest days of the Republic, Congress has used this discretion to vary the organization of federal agencies according to the tasks they are to perform, and to provide some agencies that implement regulatory statutes a measure of independence from presidential policy control.

Consistent with this constitutional design, the Supreme Court has long recognized that Congress may shield the heads of regulatory agencies from removal at will, at times upholding removal provisions identical to the one at issue here. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935). In so doing, the Court has explained that when Congress limits the President's removal powers, "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, and the functions of the officials in question must be analyzed in that light." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The Court has also held—repeatedly and uniformly—that the power to remove an officer for cause enables the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the President may remove any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496, 484 (2010). Those principles dictate the outcome here, and nothing in precedent or logic supports PHH's efforts to confine them to situations where an agency is led by a multimember commission instead of a single director. The CFPB, as structured by Congress, does not violate the Constitution's separation of powers.

ARGUMENT

I. Congress Has Broad Authority To Shape the Structure of the Federal Government and To Confer on Certain Officers a Degree of Independence from the President

When the Framers drafted the Constitution, they gave Congress great flexibility to determine how best to shape the federal government. Indeed, while the Framers anticipated the creation of "Departments," *see* U.S. Const. art. II, § 2, cl. 1, they left unspecified what those departments would be, how they would be organized, and what connection they would have to the President. Likewise, while the Framers envisioned that "Officers of the United States" would be "established by Law," *id*. art. II, § 2, cl. 2, they provided few details concerning their relationship with the President. *Cf. id*. art. II, § 2, cl. 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

Significantly, nowhere in the Constitution's text is the President given the power to remove these officers from their positions. Indeed, the Constitution addresses their removal only by giving Congress the power to impeach them. *See id*. art. II, § 4. Presidential removal authority was not discussed at the Constitutional Convention, and Alexander Hamilton assumed that the Senate's consent would be required. *See* The Federalist No. 77, at 459 (Clinton Rossiter ed., 1961).

That the Framers left open most questions concerning the structure of the federal government, and the President's relationship to its departments and officers, was no accident: the Convention rejected a plan that would have delineated in the Constitution itself the roles of specific executive departments and the relationships between their principal officers and the President. *See* 2 The Records of the Federal Convention of 1787, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries, all serving the President "during pleasure").

The Framers chose instead to assign Congress broad discretion over the manner in which federal laws are executed, granting it the authority to "make all

Laws which shall be necessary and proper for carrying into Execution ... all ... Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. This "is the one and only provision of the Constitution that directly addresses the establishment of the federal government," and it "gives the relevant power expressly to Congress." John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1986 (2011); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1271 n.34 (2006) ("the intention was for Congress to shape the executive departments in the exercise of its powers under the Necessary and Proper Clause"). Under the Constitution, therefore, "Congress has plenary control over the salary, duties, and even existence of executive offices," *Free Enter. Fund*, 561 U.S. at 500, wielding broad authority over the structure of federal agencies and the roles of the officers who lead them.

That power has important limits, to be sure. Congress may not structure agencies in a manner that prevents the President from ensuring the faithful execution of the laws. *Id.* at 484. Nor may Congress unduly intercede between the President and the officers who help him exercise his unique Article II powers, such as the conducting of foreign affairs. *See infra* at 23. But when Congress legislates, as it did in creating the CFPB, on "issues over which Congress would have plenary policy control—and the President none—but for Congress's decision to delegate" responsibility to a federal agency, Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 Geo. Wash. L. Rev. 596, 610 (1989), the "text and structure of the Constitution impose few limits on Congress's ability to structure administrative government," Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984).

As Chief Justice Marshall later observed, the Framers' choice reflected a practical understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *M'Culloch*, 17 U.S. at 415. "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument," resulting in "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur." *Id*.

Legislative decisions in the early Republic confirm that Congress enjoys broad freedom to shape the government's administrative structure—and to grant certain officers a measure of independence from the President. *See Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) ("actions of the First Congress" are "persuasive evidence of what the Constitution means"). In establishing the Departments of Foreign Affairs, War, and Treasury, the First Congress utilized differing structures and created offices with differing degrees of independence from presidential policy supervision. In particular, the First Congress distinguished agencies that carry out the President's inherent constitutional powers from those that do not, giving the President far more control over the former than the latter.

For example, "[t]he departments of Foreign Affairs and War were denominated 'executive' departments," and their secretaries were directed to conduct business "'in such manner as the President of the United States shall from time to time order or instruct.'" Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239 (1989) (quoting Act of July 27, 1789, 1 Stat. 28; Act of Aug. 7, 1789, 1 Stat. 49). "Matters were completely different as to the Department of Treasury," however. *Id*. at 240. It "was not referred to as an 'executive' department," and the legislation "was silent on the subject of presidential direction." *Id*. Meanwhile, an "elaborate set" of "officers and their responsibilities was spelled out in detail," *id*., and the Secretary "was given specific duties that made him in part an agent of Congress." David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161, 202 (1995).

The Treasury Department, moreover, included a Comptroller with significant statutory independence from the President. This Comptroller was empowered to make “final and conclusive” determinations of claims between the United States and its citizens. Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442. Based on the Comptroller’s duties, which partook “of a judiciary quality as well as executive,” James Madison suggested “there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government,” 1 Annals of Cong. 636 (1789) (Joseph Gales ed., 1834), explaining:

> Whatever ... may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing, as to answer the purposes for which it is prescribed.

Id. While Madison ultimately withdrew his proposal, “all thought the matter open for Congress’ determination—that is, that Congress had significant flexibility in structuring the duties of this ‘executive’ officer.” Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 18 (1994); Mashaw, *supra*, at 1303 (lawmakers “emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President”).

When Congress created a new Post Office in 1792 and a Navy Department in 1796, it followed the “two basic tracks” established earlier: the Navy Department’s structure was “sparse,” Lessig & Sunstein, *supra*, at 29-30, and its Secretary directed “‘to execute such orders as he shall receive from the President.’” *Id.*

(quoting Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553). "But the Post Office followed the opposite pattern." *Id*. at 29. "Congress did not denominate the Post Office an 'executive department,'" and it removed language "making the Postmaster General subject to the direction of the President." *Id*.; *see* Act of Feb. 20, 1792, ch. 7, § 3, 1 Stat. 232, 234. Congress thus distinguished departments "exclusively under presidential direction" from those "also directed according to law," Mashaw, *supra*, at 1289, and as to the latter "did not hesitate to create a degree of independence from presidential will," Lessig & Sunstein, *supra*, at 30.[2]

[2] PHH argues that the "Decision of 1789" acknowledged the President's inherent power to remove officers without restriction. Pet'r Br. 21. Not so. If anything, that Decision—and the surrounding debate—make the opposite point. As Congress considered legislation establishing a Foreign Affairs Secretary, a "multitude of views" were expressed regarding whether to specify that the President could remove the Secretary from office. Casper, *supra*, at 237; *see id.* at 234-35. While some legislators saw removal as an inherent presidential authority, and others thought it was jointly shared by the President and the Senate, still others maintained that "since the Constitution did not provide one way or the other, Congress was free," under the Necessary and Proper Clause, "to give the President removal power or not." Currie, *supra*, at 198; *see* 1 Annals of Cong. 392-93, 500 (1789). Madison wavered between positions. *See id*. at 389, 480-81. Ultimately, through clever drafting, Congress established the Secretary as removable by the President without signaling the source of the removal power. *See id*. at 601; *Myers v. United States*, 272 U.S. 52, 285 n.75 (1926) (Brandeis, J., dissenting) (the resolution evinced no agreement on "whether the Constitution vested an uncontrollable power of removal in the President"). Moreover, because the proposed Secretary was intended to help the President exercise his Article II foreign affairs power, "the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers." *Humphrey's Ex'r*, 295 U.S. at 631.

In sum, the Constitution's text, structure, drafting history, and early construction all tell the same story: Congress has considerable latitude when shaping the administrative structure of the government. Rather than ossify that structure and stymie innovation, the Framers wisely chose an arrangement that would enable the Constitution "to endure for ages to come," by empowering future leaders to respond effectively "to the various *crises* of human affairs." *M'Culloch*, 17 U.S. at 415.

II. Responding to the Devastating Financial Crisis of 2008, Congress Made a Considered Judgment that an Independent Consumer Protection Bureau with a Single Director Could Best Combat the Types of Abuses that Caused the Crisis

In 2008, the nation was plunged into the worst financial crisis since the Great Depression. *See supra* at 1. In the wake of this devastation, Congress held more than fifty hearings in which it "probed and evaluated" the root causes of the financial crisis in order to "assess the types of reforms needed." S. Rep. No. 111-176, at 42, 44. Based on that study, lawmakers concluded that the crisis was enabled by "a long-standing failure of our regulatory structure to keep pace with the changing financial system," particularly "the proliferation of poorly underwritten mortgages with abusive terms." *Id.* at 42, 11.

The source of this "spectacular failure ... to protect average American homeowners," *id.* at 15, was the fact that consumer financial protection was "governed by various agencies with different jurisdictions and regulatory approaches," resulting in a "disparate regulatory system" that did not "aggressive[ly] enforce[] against abusive and predatory loan products." H.R. Rep. No. 111-367, pt. 1, at 91 (2009). This fragmented structure "resulted in finger pointing among regulators and inaction when problems with consumer products and services arose." S. Rep. No. 111-176, at 168; *see Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Fin. Serv. Comm.*, 111th Cong. 2 (2009) (Rep. Frank) ("I think it is fair to say that no calluses will be found on the hands of those in the Federal bank regulatory agencies who had consumer responsibilities[.]"). Thus, as *amici* came to understand, the problem was not a lack of authority to prevent financial abuses, it was how that authority was organized and exercised. *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 33 (2012) (mortgage crisis "occurred despite the existence of a plethora of federal and state regulators with jurisdiction to enforce broad consumer financial protection regulation").

To remedy these failures and establish a regulatory framework that could "respond to the challenges of a 21st century marketplace," S. Rep. No. 111-176, at 42, Congress enacted the Dodd-Frank Act. Critical to the Act's legislative plan was the creation of the CFPB, an agency with the sole responsibility of protecting consumers from harmful practices of the financial services industry. Congress sought to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection," thereby leaving "inter-agency finger pointing in the past." *Id*. at 10-11, 168. These reforms, Congress assessed, could prevent "a recurrence of the same problems" that fostered the financial crisis and the near-collapse of the American economy. *Id*. at 42.

In establishing the Bureau, Congress determined that it needed two key attributes to fulfill its mission: freedom from political gamesmanship and undue industry influence, and the ability to act promptly and decisively in response to new threats to consumers. Those requirements counseled in favor of an independent agency led by a single director.

First, lawmakers determined that the Bureau needed to be an independent regulator to remain a vigilant guardian of consumers' interests. Before the financial crisis, the political branches intensely pressured the financial regulatory agencies at the behest of industry lobbyists to prevent robust oversight. *See, e.g.*, Fin. Crisis Inquiry Comm'n, The Financial Crisis Inquiry Report 53 (2011) (discussing industry-prompted congressional demands that consumed agency time and discouraged regulations). After the crisis, in debates over the Bureau, "consumer advocates urged a more independent agency, fearing industry capture and heavy-handed political interference by Congress and the White House." Adam J. Levitin, *The*

Consumer Financial Protection Bureau: An Introduction, 32 Rev. Banking & Fin. L. 321, 339 (2013); *see, e.g.*, S. Rep. No. 111-176, at 24 (recounting testimony recommending "improving regulatory independence"). Such independence "allow[s] an agency to protect the diffuse interest of the general public" that otherwise would be "outgunned" by "well-financed and politically influential special interests." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 17 (2010).

Heeding this imperative, Congress made the Bureau's leaders removable by the President only for good cause: "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). As *amici* well know, Congress appreciated that good-cause tenure would give the Bureau the independence necessary to regulate effectively. *See, e.g.*, *Morrison*, 487 U.S. at 687-88 ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" (quoting *Humphrey's Ex'r*, 295 U.S. at 630)); Block-Lieb, *supra*, at 38 (removal limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action"). Reflecting that principle, virtually all financial regulators are headed by officers with fixed terms who are removable only for cause. *See* Cong. Research Serv., Independence of Federal Financial Regulators: Structure, Funding, and Other Issues 15-17 (2017).

To further promote a "strong and independent Bureau," S. Rep. No. 111-176, at 174, Congress also funded the CFPB outside "the opaque horse-trading of the appropriations process," Levitin, *supra*, at 341; *see* 12 U.S.C. § 5497(a)(1). Nearly all financial regulatory agencies have this feature, Arthur E. Wilmarth, *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 951 (2012), and lawmakers explained that "the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator," S. Rep. No. 111-176, at 163; *see id.* (citing the "hard learned lesson" of the precursor to the Federal Housing Finance Agency, whose "effectiveness" was "widely acknowledged" to have been harmed by its need for congressional appropriations).

Second, Congress determined that the Bureau should be led by a single director, rather than a multimember body. A major cause of the financial crisis was the failure of regulators to use their authority "in a timely way" to address new consumer abuses, *id.* at 17; *see id*. at 16-23 (examples), and lawmakers viewed this lack of responsiveness as "underscoring the importance of creating a dedicated consumer entity" that could "respond quickly and effectively to these new threats to consumers," *id*. at 18. What was needed was a "streamlined" regulator to write new rules and "enforce those rules consistently." *Id*. at 11.

While initial proposals envisioned a multimember commission, lawmakers ultimately concluded that the Bureau's effectiveness would be hampered by the delay and gridlock to which commissions are susceptible. After all, it was regulatory paralysis that abetted the financial crisis, in the form of "inaction" and "finger pointing" when "problems with consumer products and services arose." *Id*. at 168. And as *amici* well know, that same paralysis is an all-too-common affliction of agencies led by commissions. *See* Fin. Crisis Inquiry Comm'n, *supra*, at 20 (the Federal Reserve Board's response to the proliferation of subprime mortgages was "divided from the beginning"); Wilmarth, *supra*, at 919 (scholars associate the single-director model with greater "efficiency and accountability").

Indeed, the very agency on which the Bureau was originally patterned—the Consumer Product Safety Commission (CPSC), *see* Elizabeth Warren, *Unsafe at Any Rate*, 5 Democracy J. 8, 16 (Summer 2007)—supplied a perfect example. While the CPSC had achieved some successes, its five-member structure had been shown to seriously hamper its effectiveness. In 1987, the Government Accountability Office (GAO) concluded that this structure fostered instability, delay, and a lack of independence, and suggested that the "CPSC could benefit by changing to a single administrator," which was the leadership structure of nearly all health and safety regulators. U.S. Gov't Accountability Off., GAO/HRD-84-47, Consumer Product Safety Commission: Administrative Structure Could Benefit from Change

3, 6, 9-10 (1987). That recommendation was never adopted, however, and by 2008 the CPSC had "fallen far short of its statutory mandate" and was "widely regarded as one of the least politically independent and influential agencies in government." Barkow, *supra*, at 67, 71.

While the focused mission of the CPSC was a model to emulate, therefore, its multimember leadership structure was not. And given the speed with which financial practices can evolve and new abuses materialize, Congress recognized that it was particularly important that a regulator be capable of responding "quickly and effectively" to "new threats to consumers." S. Rep. No. 111-176, at 18. Bureau proponents therefore moved their support toward a single-director structure and waged a determined effort to maintain that structure in the face of opposition.

In June 2009, the Obama Administration released a proposal for financial regulatory reform, including the creation of a consumer financial protection agency. *See* Dep't of the Treasury, Financial Regulatory Reform: A New Foundation 55-63 (2009). This proposal did not extensively discuss the agency's structure but assumed it would be led by a commission and suggested "a diverse set of viewpoints and experiences." *Id*. at 58. The Administration subsequently delivered proposed legislative text to Congress, H.R. Rep. No. 111-702, at 55-56 (2011), which in deference to the Administration was introduced with minimal changes. *See* H.R. 3126, 111th Cong. (2009); *Perspectives on the CFPA*, *supra*, at 1 (2009).

Subsequently, however, Congress considered many proposals and held additional hearings on "how best to approach various aspects of financial regulatory reform," H.R. Rep. No. 111-702, at 56, leading to considerable modification of the Administration's plan. Later that fall, revised legislation was introduced that, among other things, replaced the agency's commission structure with a single director. *Id.* at 57; *see* Discussion Draft § 112(a)(1) (Sept. 25, 2009); *Perspectives on the CFPA*, *supra*, at 1 (Rep. Frank) ("Since [the introduction of the initial legislation], we have had the benefit of a lot of conversation. Today's legislation reflects further conversation[.]").

While many opponents of the single-director model raised the same policy objections that PHH advances in this litigation, *Perspectives on the CFPA*, *supra*, at 6 (Rep. Hensarling) ("Now a single unelected bureaucrat, as opposed to five unelected bureaucrats, will have the power[.]"); *id.* at 5; *id*. at 45, the revised proposal served as the basis for the Energy and Commerce Committee's markup of the bill. H.R. Rep. No. 111-367, pt. 1, at 96. But an amendment there reverted the agency's structure to a commission, *id*. at 8-9, 98, which Bureau skeptics claimed would "ensure a more deliberative process in its decisionmaking," *id*. at 101 (dissenting views).

Nevertheless, in December 2009 new legislation was introduced that revived the single-director model. *See* H.R. 4173, 111th Cong. § 4102 (2009). Shortly thereafter, a “compromise” was reached in which the agency would begin with a single director but change to a commission after two years. 155 Cong. Rec. H14418 (daily ed. Dec. 9, 2009). This compromise passed the House. *See* H.R. 4173, 111th Cong. § 4102 (engrossed version, Dec. 11, 2009).

Over the following months, however, the House and Senate continued to hold hearings and consider how best to reform financial regulation. In the spring of 2010, *amicus* Senator Dodd introduced legislation creating a Bureau that would be permanently led by a single director. *See* S. 3217, 111th Cong. § 1011(b) (2010). After intense debate, this structure passed the Senate. And when the House and Senate later reconciled their versions of the legislation, a single-director structure prevailed. *See* H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.).

Throughout the process, Bureau opponents continually registered their objections to a single director, *see* 155 Cong. Rec. H14414 (daily ed. Dec. 9, 2009) (Rep. Paulsen) (“this legislation[] will create a new credit czar); *id.* at H14430 (Rep. Lee); 156 Cong. Rec. S3801 (daily ed. May 17, 2010) (Sen. Enzi); *id*. at S4044 (daily ed. May 20, 2010) (Sen. Corker); *id*. at S5891 (daily ed. July 15, 2010) (Sen. Gregg), and these concerns imperiled the Bureau’s very creation. Yet Congress chose to structure the agency with a single director anyway, repeatedly emphasizing the need for speed and decisiveness in rooting out financial-product abuses. *See, e.g.*, 156 Cong. Rec. S2631 (daily ed. Apr. 26, 2010) (Sen.

Whitehouse) ("We need a regulator in place who can monitor the market and act quickly when there is a consumer hazard."); *id*. at H5240 (daily ed. June 30, 2010) (Rep. Meeks) ("Led by an independent director, this office will be able to act swiftly so consumers will not need to wait ... to receive protection from unscrupulous behavior."). Congress thus opted for a "streamlined" agency that would enforce rules "consistently" and "have enough flexibility to address future problems as they arise." S. Rep. No. 111-176, at 11.[3]

In short, as *amici* well know, the Bureau's single-director structure was a considered choice, maintained in the face of vocal opposition during months of debate over the legislation that became Dodd-Frank. Exercising the discretion afforded to it by the Constitution, Congress determined that this structure would best enable the CFPB to "keep pace with the changing financial system" and thus avert another devastating regulatory failure. S. Rep. No. 111-176, at 42. As the next Section explains, Congress had every right to make that choice.

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[3] To prevent overreach and improve accountability, however, Congress incorporated other checks on the Bureau's authorities, some unprecedented among financial regulators. *See* Block-Lieb, *supra*, at 43-55; Levitin, *supra*, at 343-62; Wilmarth, *supra*, at 908-11. The CFPB, for instance, is the only financial regulator that is annually audited by GAO, forced to comply with key small-business requirements, and "whose regulations are subject to override by an appellate body composed of heads of other agencies," including the Secretary of the Treasury who is removable at will by the President. Wilmarth, *supra*, at 909-10.

III. The Bureau's Leadership Structure Is Constitutional

Consistent with the constitutional text and history discussed earlier, the Supreme Court has held—repeatedly and without exception—that Congress may limit the President's authority to remove officers at will without impeding his ability to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As the Court has explained, "good-cause tenure" leaves officers subject to "Presidential oversight," because the President is fully capable of removing an officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund*, 561 U.S. at 509, 496, 484. Thus, when an officer "may be terminated for 'good cause,' the Executive ... retains ample authority to assure that [the officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [law]." *Morrison*, 487 U.S. at 692.

Nor do such removal limits offend the "executive Power," U.S. Const. art. II, § 1, cl. 1, when applied to regulatory agencies that implement legislative policies. *Humphrey's Ex'r*, 295 U.S. at 630. Indeed, as far back as *Marbury v. Madison*, Chief Justice Marshall distinguished between officers who merely help the President exercise the unique powers granted to him by the Constitution, "in the exercise of which he is to use his own discretion," and officers who carry out "other duties" that "the legislature proceeds to impose on that officer." 5 U.S. 137, 165-66 (1803). The former officer "is the mere organ by whom [the President's] will is communicated," while the latter is "the officer of the law" and "amenable to the laws for his conduct." *Id.* With respect to a justice of the peace, therefore, "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country." *Id.* at 162.

The Court affirmed these distinctions when it first addressed the constitutionality of good-cause tenure in *Humphrey's Executor*, upholding a removal provision identical to the one that governs the CFPB Director. 295 U.S. at 627-32. And it has done so repeatedly since then. *See Morrison*, 487 U.S. at 690; *Wiener v. United States*, 357 U.S. 349, 353 (1958). Thus, the Court has never held that the President possesses "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties[.]" *Wiener*, 357 U.S. at 352.

Even *Myers*—a case on which PHH heavily relies—does not stand for so broad a proposition. In that case, the statute at issue did more than limit the President's removal power: it gave a coordinate branch of government the right to block removals entirely, by conditioning them on "the advice and consent of the Senate." *Myers*, 272 U.S. at 107. The Court found it intolerable for "Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power," because this "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id*. at 161, 164. Requiring Senate consent, in other words, could effectively operate as a *complete* barrier to an officer's removal, eliminating the President's ability to hold that officer accountable, and thus preventing the President from ensuring faithful execution of the laws. *See Morrison*, 487 U.S. at 687 n.24 ("the only issue actually decided in *Myers*" was that the President had power to remove a postmaster "'without the advice and consent of the Senate'" (quoting *Humphrey's Ex'r*, 295 U.S. at 626)); *see Bowsher v. Synar*, 478 U.S. 714, 724 (1986). As the Court has subsequently made clear, good-cause removal limits do not share this flaw, leaving "ample authority" to ensure the law is faithfully executed. *Morrison*, 487 U.S. at 692.

In sum, while the Supreme Court has suggested that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," *Morrison*, 487 U.S. at 690 (citing *Myers*, 272 U.S. at 132-34), its holdings affirm that such officials do not include the heads of agencies, like the CFPB, that implement congressionally enacted regulatory measures. *See Free Enter. Fund*, 561 U.S. at 509 (constitutional requirements are satisfied where members of the Securities and Exchange Commission and their subordinates are shielded from removal by "a single level of good-cause tenure");

Wiener, 357 U.S. at 353, 356 (given "the function that Congress vested in the War Claims Commission," the President has power to remove commissioners without cause "only if Congress ... conferred it," because "no such power is given to the President directly by the Constitution"); *Humphrey's Ex'r*, 295 U.S. at 631, 628 (the constitutionality of removal limits "will depend upon the character of the office," and such limits may be applied to the heads of the Federal Trade Commission, "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed").

These holdings and their underlying reasoning dictate the outcome here. As noted earlier, Dodd-Frank's provision for removal of the CFPB Director is identical to the one approved in *Humphrey's Executor*, *see* 15 U.S.C. § 41, and is the prototypical example of a good-cause removal limit, which leaves officers subject to "Presidential oversight," *Free Enter. Fund*, 561 U.S. at 509. It thus provides "substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696.

Moreover, conditioning the Director's removal on good cause "does not interfere with the President's exercise of the 'executive Power.'" *Id.* at 689-90. The CFPB is no more an "an arm or an eye of the executive," *Humphrey's Ex'r*, 295 U.S. at 628, than was the FTC when *Humphrey's Executor* was decided. *See*

CFPB v. Morgan Drexen, Inc., 60 F. Supp. 3d 1082, 1087 (C.D. Cal. 2014). Indeed, the Bureau's role is materially indistinguishable: "filling in and administering the details embodied by th[e] general standard[s]" set forth in a statute regulating commerce. *Humphrey's Ex'r*, 295 U.S. at 628. The CFPB Director is not an officer "restricted to the performance of executive functions" and "charged with no duty at all related to either the legislative or judicial power," *id*. at 627, which is the only type of officer whom the Supreme Court has suggested must be removable at will. *Morrison*, 487 U.S. at 690.

PHH argues that these principles apply only when Congress establishes multimember commissions, not when it establishes agencies headed by a single director, but nothing in precedent or logic supports PHH's claim. The Supreme Court has never held, or even implied, that the decisionmaking attributes of multimember bodies have anything to do with the Court's approval of removal limits in *Humphrey's Executor* or subsequent cases. In attempting to show otherwise, PHH quotes the portion of *Humphrey's Executor* that addressed the *statutory* question whether Congress intended to limit removal of FTC commissioners to the causes listed in the statute. Pet'r Br. 22-23. Only there, in attempting to discern congressional intent regarding the role to be played by the agency, did the Court comment on the agency's structural features. *See Humphrey's Ex'r*, 295 U.S. at 621-26. When the

Court turned to answering the *constitutional* question whether that removal provision violated Article II, the Court did not, even once, discuss the agency's structure. *Id*. at 626-32.

Critically, limiting the President's ability to remove an agency's director does not detract from the President's constitutional power any more than limiting his ability to remove an agency's commissioners or board members. Even the panel decision acknowledged as much, observing that "there is no meaningful difference in responsiveness and accountability to the President" between an agency led by a multimember body and one led by a single director. Op. at 56. And with good reason: a multimember board serving staggered terms is, if anything, *less* accountable to the President. After all, altering the direction of such a board requires removing several members, not just one, and replacing them with new Senate-confirmed appointees. Even the preliminary step of identifying *which* officers need to be replaced can often be challenging. A single director, by contrast, offers a clear and direct line of accountability when an agency strays from its mandate.

Thus, in every way that matters under the Constitution, the CFPB Director is indistinguishable from the officers addressed in Supreme Court precedent. That precedent teaches that the relevant distinction is not between agencies with different internal structures, but rather between agencies with different roles. When a removal limit is challenged, therefore, its validity "depend[s] upon the character of the office," *Humphrey's Ex'r*, 295 U.S. at 631, and whether, in light of the officer's "functions," the "removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. Under those standards, the CFPB Director's removal provision is plainly constitutional.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court hold that the CFPB's leadership structure is constitutional.

Respectfully submitted,

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Dated: March 31, 2017

APPENDIX:

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Clyburn, James
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Conyers, John, Jr.
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Crowley, Joe
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Cummings, Elijah
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Dodd, Chris
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Durbin, Richard
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Ellison, Keith
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Frank, Barney
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,431 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 31st day of March, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on March 31, 2017.

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Executed this 31st day of March, 2017.

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