No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS CURIAE*[1]

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

The Chamber's members include numerous financial institutions, financial services companies, and many other businesses in other sectors subject to the regulatory and enforcement authority of the Consumer Financial Protection Bureau (the "Bureau"). The Chamber's members have a strong interest in ensuring that the Bureau is structured in accordance with the Constitution.

In addition, because the Chamber and its members sometimes are in the position of challenging actions by government officials whose appointments or terms of office violate the Constitution, *e.g.*, *NLRB* v. *Noel Canning*, 573 U.S. 513 (2014), the Chamber has an interest in the availability of meaningful relief

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties have consented to the filing of this brief.

where a party brings a meritorious separation-of-powers claim. And the Chamber has a strong interest in ensuring that the Court's remedy for the Bureau's unconstitutional structure will promote certainty regarding the legal obligations of the millions of businesses that are subject to the Bureau's authority.

SUMMARY OF ARGUMENT

The structure of the Consumer Financial Protection Bureau is unprecedented—and unconstitutional.

The Bureau is endowed with broad regulatory and enforcement authority. Its jurisdiction encompasses not just consumer financial services companies but also individuals or businesses that engage in any of ten specified consumer financial activities that are common throughout the economy. In addition, Congress transferred to the Bureau rulemaking authority with respect to eighteen federal laws (12 U.S.C. § 5581(b))—and also endowed the Bureau with new authority to declare unlawful any "unfair, deceptive or abusive acts or practices." *Id.* § 5531(b). Finally, the Bureau has wide-ranging enforcement power—to conduct investigations, institute and adjudicate administrative proceedings, file enforcement actions in court, and seek myriad forms of relief, including civil penalties of up to $1 million per day.

All of this governmental power is concentrated in a single individual—the Bureau's Director—who serves a five-year term and may be removed from office only for cause. Which is to say that Congress entrenched these significant powers in an officer unaccountable to the President, the elected official who is solely vested with "the executive Power," U.S. Const. Art. II, § 1, Cl. 1, and the duty to "take Care that the Laws be faithfully executed," *id.* Art. II, § 2, Cl. 2.

Not only does the Director wield the Bureau's substantial regulatory and enforcement powers, including with respect to the enforcement of the capacious civil investigative demand ("CID") at issue here, the Director also has sole authority over the Bureau's spending. She is entitled to obtain vast sums from the Federal Reserve, up to approximately $700 million, and spend them as she sees fit, without the approval of Congress or the President. The Director also appoints all of the Bureau's officers and employees, again without any need for the President's approval.

The Bureau's unique structure violates the Constitution's structural separation of powers. The Court has made clear that "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power * * * to remove those who assist him in carrying out his duties." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–514 (2010).

Some restrictions on the President's removal power have been held to be permissible. *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). But the Bureau's structure is far different than any restriction this Court has approved—indeed, it differs from every prior federal agency. And that is significant, because "[p]erhaps the most telling indication of [a] severe constitutional problem * * * is [a] lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (internal quotation marks omitted).

Other independent agencies that regulate private parties are headed by multi-member commissions. When agencies or departments are headed by a single individual, that person almost always serves at the pleasure of the President. And most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws.

Some exceptions to each of these generalizations exist, but no other federal agency with power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who can spend funds without obtaining an annual appropriation. The absence of any historic analog to the Bureau is strong evidence of its unconstitutionality.

In addition, under the traditional multi-member commission structure, the President still has the ability to influence the agency. He may remove a current chairman and designate a new one, who sets the agency's agenda and selects employees. Due to the staggering of terms he has the opportunity to appoint at least some commissioners, if not a majority of them. And in most cases, the agency is subject to the appropriations process and therefore must obtain, pursuant to the Constitution's Recommendations Clause, the President's approval of its budget and his approval of the legislation containing the agency's appropriation. But the Bureau is exempt from all of these controls.

Finally, multi-member commissions incorporate checks against arbitrary government action that protect individual liberty. No one commissioner can make a decision, the deliberative process is likely to promote reasoned decisionmaking, and the possibility of a public dissent provides an additional check. Again, the Bureau's single-Director structure excludes all of these protections.

The Court should therefore hold that the Bureau's structure violates the Constitution and declare that the statutory limitations upon the President's authority to remove the Director are invalid. In addition, the Court should reverse the judgment of the Ninth Circuit and thus deny the Bureau's petition to enforce the CID issued to petitioner. That CID was issued while the Bureau's Director was protected by an unconstitutional limit on her removal from office. And, for that reason, the demand was unlawful and must be set aside.

Although the Court usually presumes that Congress tries to avoid, rather than create, a constitutional problem, there is little doubt that with respect to the Bureau, Congress did precisely what the Constitution forbids. Whether Congress would want the Bureau to exist with a single Director removable at will by the President is a counterfactual that Congress may address if it desires.

ARGUMENT

I. The Bureau's Structure Violates The Constitution.

The Bureau's unprecedented structure violates the Constitution's structural protections of individual liberty embodied in its separation of powers.

A. The Bureau Is Insulated From Accountability To The People's Elected Representatives.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enterprise Fund*, 561 U.S. 477, 499 (2010). It embodies "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The Federalist No. 39, p. 250 (James Madison) (J. Cooke ed. 1961); see also, *e.g.*, *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514, 548 (1830) ("The power of self government is a power absolute and inherent in the people.").

The Constitution implements this ideal by vesting "[a]ll legislative Powers" in Congress, a body consisting of the people's elected Representatives and Senators (U.S. Const. Art. I, § 1); and "[t]he executive Power * * * in a President of the United States" (U.S. Const. Art. II, § 1, Cl. 1), who is "chosen by the entire Nation" (*Free Enterprise Fund*, 561 U.S. at 499).

Conferring legislative and executive authority directly, and solely, on the representatives chosen by the people is essential to ensure accountability to the people—and therefore is a critical element of the self-government principle on which the constitutional structure rests. That is because "[t]he diffusion of power carries with it a diffusion of accountability," which "subverts * * * the public's ability to pass judgment on" the efforts of those whom they elect. *Free Enterprise Fund*, 561 U.S. at 497–498.

The Bureau's structure was expressly intended to, and does, produce the precise opposite of the Framers' vision: unprecedented insulation of the Director's exercise of her extraordinarily broad regulatory and enforcement powers from control by the people's representatives in Congress and from control by the elected President. See, *e.g.*, *PHH Corp.* v. *CFPB*, 881 F.3d 75, 145 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting) ("[t]he proposed agency was to be 'independent' of 'national politic[s],' the 'financial * * * industry lobby' and 'legislative micromanaging'" (quoting Elizabeth

Warren, *Unsafe at Any Rate*, Democracy (Summer 2007), perma.cc/52X3-892V)).

The Bureau's structure was born from a dream of creating an apolitical, European-style technocracy that would set consumer finance policy. Indeed, parties defending the Bureau's structure have emphasized that the Bureau was designed intentionally to "insulat[e]" the Bureau from any "political influence." Brief of Americans for Financial Reform, *et al.*, as Amici Curiae in Support of Respondent at 12, *PHH*, 881 F.3d 75 (No. 15-1177); see also Brief on Rehearing En Banc of Financial Regulation Scholars, as Amici Curiae in Support of Respondent at 15–16, *PHH*, 881 F.3d 75 (No. 15-1177) (arguing that the CFPB's core proponents emphasized the need for independence of the CFPB).

But that desire to insulate vast governmental power from political accountability is an American nightmare. As the Court said in *Free Enterprise Fund*, "[o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." 561 U.S at 499.

The Bureau's authority to issue regulations and institute—and adjudicate—enforcement actions is extremely broad. That authority is not limited to financial services companies, but rather extends to any person or business that engages in any of ten specified activities that are common throughout the economy, as well as to service providers to such persons or businesses. For example:

- "[E]xtending credit and servicing loans," 12 U.S.C. § 5481(15)(A)(i);
- "[E]ngaging in deposit-taking activities, transmitting or exchanging funds, or otherwise acting as a custodian of funds or any financial instrument for use by or on behalf of a consumer," *id.* § 5481(15)(A)(iv); and
- "[C]ollecting debt related to any consumer financial product or service," *id.* § 5481(15)(A)(x).[2]

In addition, the Bureau is authorized to issue rules implementing eighteen federal statutes relating to consumer protection. 12 U.S.C. § 5512(b)(1); see also *id.* § 5581(a)(1)(A), (b) (transferring relevant rulemaking authorities of seven other agencies to the Bureau). These include broadly applicable laws such as the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*), the Fair Debt Collection Practices Act (15 U.S.C. § 1692 *et seq.*), the Gramm-Leach-Bliley Act (15 U.S.C. §§ 6802–6809), the Truth in Lending Act (15 U.S.C. § 1601 *et seq.*), and the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. § 2601 *et seq.*). 12 U.S.C. § 5481(12).

[2] See also 12 U.S.C. § 5481(15)(A) (defining "financial product[s] or service[s]" within the Bureau's authority, as well authorizing the Bureau to include "other financial product[s] or service[s]" in this definition by regulation).

The statute's exclusions from the Bureau's authority are quite narrow. See*, e.g.*, 12 U.S.C. § 5517(d) (exclusion for accountants and tax preparers); *id.* § 5517(e) (exclusion for the practice of law). Even the exclusion for extensions of credit by retailers for purchases of nonfinancial goods or services from the retailer is hedged with restrictions. See *id.* § 5517(a)(2).

Separately, Congress conferred upon the Bureau new authority to issue rules identifying as unlawful any "unfair, deceptive, or abusive acts or practices." 12 U.S.C. § 5531(b).

Next, the Bureau has extremely broad power to enforce the full range of federal consumer financial laws. This enforcement authority empowers the Bureau to conduct investigations, including issuing subpoenas and CIDs (12 U.S.C. § 5562(a)–(c)); initiate administrative adjudications, which ultimately are decided by the Director (*id.* § 5563(a), (b)(3)); and commence civil actions in federal court seeking civil penalties and legal and equitable relief (*id.* § 5564). The civil penalties may range up to $1 million "for each day during which such violation continues." *Id.* § 5565(c).

All of this regulatory and enforcement authority is concentrated in a single individual—the "Director" who is the "head of the Bureau." 12 U.S.C. § 5491(b)(1).

And the Director is not accountable to the President or to any other elected official:

- The Director may not be removed by the President because of a policy disagreement, but only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).
- The Director has exclusive authority to appoint her Deputy and all other Bureau staff (*id.* §§ 5491(b)(5)(A), 5493(a)(1)(A))—the President has no authority to appoint any other Bureau officials.
- The Director also has sole authority to determine the Bureau's budget, without any need

for approval or even review by the President or Congress. The Director requests, and the Federal Reserve must provide, the amount that the Director determines is "reasonably necessary to carry out" the Bureau's duties, with a cap based on the Federal Reserve's total operating expenses—which, most recently, amounted to nearly $700 million dollars. 12 U.S.C. § 5497(a)(1), (a)(2); see also CFPB, *Fiscal Year 2019: Annual Performance Plan and Report, and Budget Overview* 7 (Feb. 2019), https://bit.ly/2YlY0Iv.

- Any penalties and fines collected by the Bureau are deposited into a separate account and, if not used to compensate affected consumers, may be expended by the Director—without any approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2).
- The Bureau is also expressly exempt from "any jurisdiction or oversight" by the Office of Management and Budget. 12 U.S.C. § 5497(a)(4)(E). And the Director is specifically empowered to provide "legislative recommendations, or testimony, or comments on legislation" to Congress without prior review by "any officer or agency of the United States." *Id.* § 5492(c)(4).

The combined effect of these unprecedented grants of authority is to confer on the Director "significantly more *unilateral* power than any other single member of any other independent agency." *PHH*, 881 F.3d at 171 (Kavanaugh, J., dissenting).[3]

Indeed, no other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who also can spend hundreds of millions of dollars without obtaining an annual appropriation. *PHH*, 881 F.3d at 171–172, 197 n.19 (Kavanaugh, J., dissenting); *Enhanced Consumer Financial Protection After the Financial Crisis: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs*, 112th Cong., 1st Sess. 78–81, 84–85, 101 (2011) (statement of Andrew J. Pincus).

Other independent agencies that exercise analogous regulatory and enforcement authority over private individuals and businesses are headed by multi-

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[3] Defenders of the Bureau's structure point to appearances of the Director at congressional hearings, the Bureau's responses to congressional requests for information, the statutory requirement of reports to the Office of Management and Budget, the Bureau's inability to exceed its budget cap without congressional and presidential approval, and the Financial Stability Oversight Council's limited ability to set aside certain Bureau regulations as ways in which Congress and the President are able to exercise oversight with respect to the Bureau's operations. See Appellee Br. at 35–37, *CFPB* v. *All Am. Check Cashing, Inc.*, No. 18-60302 (5th Cir. Sept. 10, 2018).

But the ability to require reports or testimony does not in any way enable Congress or the President to exercise control over the Bureau's decisions. And the Oversight Council's authority is so limited that it "rarely" could ever be invoked "in practice." *PHH*, 881 F.3d at 172 (Kavanaugh, J., dissenting) (quoting Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 875 (2013)).

member commissions. *PHH*, 881 F.3d at 178, 183–86 (Kavanaugh, J., dissenting). Where a single individual heads a comparable department or agency, that person almost always serves at the pleasure of the President. And most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws.

The unique combination of these exemptions from the core means of congressional and presidential control effectively frustrates the Founder's design that the people would exercise their sovereign power over the myriad matters within the Bureau's jurisdiction. As Madison noted, the appropriations power of the Congress "over the purse may, in fact be regarded as the most comple[te] and effectual weapon with which any constitution can arm the immediate representatives of the people," because those representatives "can not only refuse, but they alone can propose the supplies requisite for the support of government." The Federalist No. 58, p. 394 (James Madison) (J. Cooke ed. 1961). And as Hamilton explained, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Free Enterprise Fund*, 561 U.S. at 498 (quoting The Federalist No. 70, p. 476 (Alexander Hamilton) (J. Cooke ed. 1961)).

Therefore, the comprehensive insulation of the Bureau's broad enforcement and regulatory power from the Constitution's principal means of ensuring accountability simply cannot be reconciled with the Framers' vision—that "'[a] dependence on the people' would be the 'primary control on the government.'" *Free Enterprise Fund*, 561 U.S. at 501 (quoting The

Federalist No. 51, p. 349 (James Madison) (J. Cooke ed. 1961)).

B. The Limits On The Removal Of The Director Violate The Constitution's Separation Of Powers.

Even if the legality of the CFPB's structure is viewed solely through the lens of the constitutional limits upon the President's authority to remove officers of the United States, it plainly violates the Constitution. The Bureau finds no support in history or in the Court's precedents, and presents an even greater intrusion on presidential authority—and substantially greater threat to individual liberty—than the independent agency structures previously upheld by this Court.

The Constitution vests "[t]he executive Power" bestowed by the Constitution solely upon the President (U.S. Const. Art. II, § 1, Cl. 1), and it imposes upon the President the duty to "take Care that the Laws be faithfully executed" (*id.* Art. II, § 3). In order to exercise the entire executive power of the federal government, the President necessarily must act with "the assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926).

But, because "[t]he buck stops with the President" under Article II (*Free Enterprise Fund*, 561 U.S. at 493), the President remains responsible for supervising and controlling the actions of his subordinates. Article II therefore "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 63 (2015).

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

The Court recently explained that

> [t]he removal of executive officers was discussed extensively in Congress [in 1789] when the first executive departments were created. The view that "prevailed, as most consonant to the text of the Constitution" and "to the requisite responsibility and harmony in the Executive Department," was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not "expressly taken away, it remained with the President."

Free Enterprise Fund, 561 U.S. at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 *Documentary History of the First Federal Congress* 893 (2004)). That "soon became the 'settled and well understood construction of the Constitution.'" *Id*. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

In sum, "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power * * * to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513–514.

To be sure, the Court has not rejected all limits upon the President's removal power. In *Humphrey's Executor*, the Court held that Congress could create administrative agencies whose officers were protected from presidential removal except for cause—in that case, the Federal Trade Commission ("FTC"). *Humphrey's Executor* v. *United States*, 295 U.S. 602, 632 (1935). But the Court based this exception upon the understanding that the FTC's officers would "be nonpartisan," exercise "neither political nor executive" duties, and apply "the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (internal quotation marks omitted). The Court reasoned that such an expert body was not truly executive and thus could be insulated from presidential control. *Id*. at 628.

The Chamber takes no position on whether *Humphrey's Executor* is or should be good law. But it surely does not reach the Bureau, whose Director bears no resemblance to the multi-member FTC before the Court in *Humphrey's Executor*.[4]

[4] Proponents of the Bureau's single-Director structure also point to *Morrison* v. *Olson*, where the Court upheld a law permitting the Department of Justice to appoint a single, independent counsel. 487 U.S. 654, 691 (1988). Setting aside whether *Morrison* v. *Olson* remains good law—it may be doubtful that a majority of this Court would come to the same conclusion today—the case involved a narrower grant of power (to investigate the truthfulness of testimony given in a particular proceeding) to accommodate conflict-of-interest concerns within the Department of Justice. *Id.* at 677. As this Court explained, the independent counsel was "an inferior officer under the Appointments Clause with lim-

First, the Court has emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. *Noel Canning*, 573 U.S. at 574; see *PHH*, 881 F.3d at 179–181 (Kavanaugh, J., dissenting) (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem * * * is [a] lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (internal quotation marks omitted).

There is no historical precedent for an agency with a structure like the Bureau's. Every agency that regulates the private sector and is headed by officials whom the President may remove only for cause has a multi-member commission structure.[5] The uniqueness of the Bureau's structure in history is therefore

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ited jurisdiction and tenure and lacking policy making or significant administrative authority." *Id.* at 691. None of those limitations apply to the Director of the Bureau.

[5] *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); *id.* § 1752a(b)(1) (National Credit Union Administration headed by three-member board); *id.* § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five Commissioners); *id.* § 78d(a) (Securities and Exchange Commission composed of five Commissioners); *id.* § 2053(a) (Consumer Product Safety Commission composed of five Commissioners); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission composed of five Commissioners); 47 U.S.C. § 154(a) (Federal Communications Commission composed of five Commissioners).

Apart from the Bureau, the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel ("OSC"), and the Social Security Administration ("SSA") also have single heads who are removable only for cause. But these agencies do not enforce laws against private persons—the FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship weighty evidence that the Bureau's structure violates the Constitution.

Second, the Bureau's structure gives the President significantly less influence than the multi-member commission upheld in *Humphrey's Executor*, for several reasons.

In the typical multi-member commission (like the FTC), terms are staggered. That enables the President to influence the agency through regular appointments. The Director's five-year term, by contrast, will often expire well into the President's four-year term, creating the possibility of a Bureau Director appointed by a prior President working directly at odds with the sitting President for much or all of the President's term.

Moreover, the President has authority to designate the agency's Chairman of a multi-member commission, which gives the President significant control over the agency's activities and policy agenda. *PHH*, 881 F.3d at 189–190 & n.15 (Kavanaugh, J., dissenting).

The President also is able to exercise budgetary control over a number of independent agencies through the appropriations process, which requires the agency's budget to be approved by the President. The FTC, for example, "is and always has been subject to the appropriations process." *PHH*, 881 F.3d at 146

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with the FHFA as the conservator. 12 U.S.C. § 4511(b); FHFA, *History of Fannie Mae & Freddie Mac Conservatorships*, (last visited Dec. 13, 2019), http://bit.ly/38DHLcl; see also *PHH*, 881 F.3d at 174–176 (Kavanaugh, J., dissenting). And the en banc Fifth Circuit recently concluded that FHFA's for-cause removal restriction violates the Constitution. *Collins* v. *Mnuchin*, 938 F.3d 553 (5th Cir. 2019), petition for cert. pending, No. 19-422.

(Henderson, J., dissenting). The Bureau, of course, is exempt from that process.

Third, to the extent *Humphrey's Executor* remains good law, the Bureau's structure threatens individual liberty far more than a multi-member commission.

The Court has made clear that the Constitution's separation-of-powers requirements are "in the long term, * * * critical to preserving liberty." *Bowsher*, 478 U.S. at 730; see also *Stern* v. *Marshall*, 564 U.S. 462, 483 (2011) ("[t]he structural principles secured by the separation of powers protect the individual as well"). Here, the risk is the arbitrary exercise of executive power independent of the President and therefore unchecked by the people.

In a multi-member commission, no single commissioner can take action that would affirmatively infringe on individual liberty without the consent of a majority of the commission. See*, e.g.*, *PHH*, 881 F.3d at 183 (Kavanaugh, J. dissenting) ("[N]o single commissioner or board member can affirmatively do much of anything."). The need for consensus among a majority guards against the unilateral exercise of power in a biased, self-interested, or arbitrary way. Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 Yale L.J. 2216, 2260 (2012) (in a single-Director structure, an agency's policy goals "will be subject to the whims and idiosyncratic views of a single individual" (internal quotation marks omitted)).

A multi-member commission structure also encourages more deliberative decision-making—another check against arbitrary assaults on individual liberties. The requirement that discussion of a "body of experts" precede decision-making increases the likelihood that the costs and downsides of any contemplated action will be aired and weighed. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1113 (2000) (internal quotation marks omitted); see also Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 Admin. L. Rev. 689, 696 (2013). Each commissioner's views are "informed by fellow commissioners who have years of collective experience as commissioners." *PHH*, 881 F.3d at 150 (Henderson, J., dissenting).

And even when a majority of a commission agrees on a course of action, minority votes still play a constitutionally significant role. They supply a "built-in monitoring system for interests on both sides because that type of body is more likely to produce a dissent if the agency goes too far in one direction." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 41 (2010). That dissent can provide an important external check, by prompting judicial or congressional action if the agency has chosen an arbitrary path. *Cf.* Elizabeth Warren, *Unsafe at Any Rate*, Democracy, (Summer 2007), perma.cc/52X3-892V.

To be sure, members of a commission appointed by the same President or the same party may tend to hold similar values, and therefore may often vote in similar ways. But history demonstrates that this is not always true. And any criticism that even multimember boards are susceptible to political capture, or may vote in blocks, would only apply with *greater* force to an agency headed by a single Director.

For all of these reasons, "when an independent agency is structured as a multi-member agency rather than as a single-Director agency, the agency can better protect individual liberty because it can better prevent arbitrary enforcement actions and unlawful or otherwise unreasonable rules." *PHH*, 881 F.3d at 185–186 (Kavanaugh, J., dissenting).

In sum, when it created the Bureau, Congress systematically eliminated numerous traditional checks on the Director's power. Simultaneously, it abandoned a modern structural requirement—the non-partisan, multi-member structure of so-called independent agencies since the 1930s—that the Court found critical in *Humphrey's Executor*. Those diversions from historical practice violate the Constitution's structural protections, unconstitutionally infringing on the President's removal authority protected by Article II.

C. The Bureau's Short History Confirms The Importance Of The Constitution's Safeguards.

Although the Bureau has been in existence only a relatively short time, a number of its actions demonstrate why the Founders viewed "structural protections against abuse of power" as essential to "preserving liberty." *Bowsher*, 478 U.S. at 730. The lack of any meaningful check on the Director has resulted in unjustified enforcement actions and investigations far outside the agency's authority.

The Bureau's recent action against PHH Corporation is a case in point. There, the "Director discarded the Government's longstanding interpretation of the relevant statute, adopted a new interpretation for that statute, applied that new interpretation *retroactively*, and then imposed massive sanctions on PHH for violation of the statute—even though PHH's relevant acts occurred *before* the Director changed his interpretation of the statute." *PHH*, 881 F.3d at 185 n.13 (Kavanaugh, J., dissenting). The court of appeals sitting en banc properly rejected that illegitimate approach. See *id.* at 83 (reinstating "[t]he panel opinion, insofar as it related to the interpretation of RESPA and its application to PHH and Atrium in this case").

The Director similarly breached clear statutory limits on the Bureau's authority in a series of enforcement actions intended to change automobile dealers' role in the financing of automobile purchases. Congress expressly forbade the Bureau from exercising *any* authority over auto dealers. 12 U.S.C. § 5519(a). Yet the Bureau effected an end run around this restriction by bringing enforcement actions under the Equal Credit Opportunity Act against indirect auto lenders (*i.e.*, banks or other lenders that purchase installment sales agreements from dealers who have extended financing to car buyers). The goal of these actions was to end dealer discretion in setting a component of the interest rate.

As of January 2017, the Bureau had extracted some $200 million in penalties in these actions without ever having to defend in court its disparate-impact legal theory—which has been discredited elsewhere. See Republican Staff of the H. Comm. on Fin. Servs., 115th Cong., 1st Sess., *Unsafe at Any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders* at 3 (Jan. 18, 2017); Republican Staff of the H. Comm. on Fin. Servs., 1114th Cong., 1st Sess., *Unsafe at Any Bureaucracy, Part I: CFPB Junk Science and Indirect Auto Lending* at 46 (Nov. 14, 2015) (explaining that "internal [CFPB] documents reveal that the Bureau's objective from the beginning has been to eliminate dealer discretion and dealer reserve”). This roundabout effort to change auto-dealers’ conduct flouted the clear limitation imposed by Congress.

Similarly, the Bureau has misused its CID power (12 U.S.C. § 5562(c)) against entities outside of its jurisdiction. For example, it has probed college accreditation bodies even though they do not offer or provide consumer financial products or services. Unsurprisingly given the Bureau’s overreach, the D.C. Circuit confirmed that the Bureau’s demand at issue “fail[ed] to state adequately the unlawful conduct under investigation or the applicable law.” *CFPB* v. *Accrediting Council for Indep. Colleges & Schs.*, 854 F.3d 683, 690 (D.C. Cir. 2017); see also *CFPB* v. *J.G. Wentworth*, 2:16-cv-02773-CDJ (E.D. Pa. June 7, 2017), Dkt. No. 35 (denying as moot the Bureau’s petition to enforce its CID after the Bureau ultimately withdrew the demand challenged as beyond the CFPB’s jurisdiction).

These aggressive assertions of authority harm regulated businesses and the entire economy by generating uncertainty regarding the legal standards with which businesses must comply. Although the courts provide a check on agency overreach, recourse to judicial review carries significant costs—and the uncertainty persists while the court action is under review, and perhaps even longer as an agency may decide to adhere to its view of the law in subsequent cases.

II. The Court Should Reverse The Judgment Below And Deny Enforcement Of The Bureau’s Civil Investigative Demand.

The Ninth Circuit erred in affirming the District Court’s judgment in favor of the Bureau on its petition to enforce the CID issued to petitioner. The Court should reverse the judgment of the Ninth Circuit, and hold that the Bureau is unconstitutionally structured. It should deny the Bureau's petition for enforcement of its CID because the issuance of that demand was an unlawful agency action taken by an agency acting with unconstitutional insulation from accountability to the political branches.

This Court has always provided a directly responsive remedy for a prevailing party in separation-of-powers cases. The successful party in such a case is entitled to an order setting aside as void *ab initio* the particular action taken by the unlawfully constituted agency. See, *e.g.*, *Lucia* v. *S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (invalidating challenged proceeding and remanding for new adjudication before a different, properly appointed ALJ); *Noel Canning*, 573 U.S. at 521 (setting aside a challenged agency order issued by an unconstitutionally appointed adjudicative board); *Stern* v. *Marshall*, 564 U.S. 462, 469 (2011) (invalidating bankruptcy court order issued in violation of Article III); *Nguyen* v. *United States*, 539 U.S. 69, 83 (2003) (where appellate panel included a non-Article III judge who lacked jurisdiction, returning the challenged "cases to the Ninth Circuit for fresh consideration * * * by a properly constituted panel"); *Ryder* v. *United States*, 515 U.S. 177, 188 (1995) (invalidating the decision of an unconstitutionally constituted panel and remanding for a new "hearing before a properly appointed panel").

Petitioner here, like the parties in all of those other separation-of-powers cases, is entitled to relief because the challenged CID was issued by a Director protected by an unconstitutional limitation on his removal from office. The Director was politically unaccountable to the President due to the removal limitation, and the resulting constitutional defect was a structural error that infected the agency's decision to issue and enforce the CID.

It is true that in addition to the Bureau's action under review here, there are other actions taken by the Bureau that may still be subject to judicial review by aggrieved parties under the applicable statute of limitations on separation-of-powers claims asserting—like petitioner's claim here—that the actions are invalid *ab initio* and are subject to vacatur by the courts. See *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 90 (1993) (courts may not issue non-retroactive rulings on direct review of civil matters). There accordingly may be additional litigation concerning whether other actions taken by the Bureau when laboring under the (unconstitutional) for-cause removal limitations are invalid. For example, this Court's decision in *Noel Canning* eventually implicated the validity of more than 1,000 decisions by the National Labor Relations Board. See Elizabeth Wydra, *Four reasons why* Noel Canning *still matters in a post-nuclear world*, Constitution Daily (Nat'l Constitution Ctr.) (Jan. 13, 2014), perma.cc/M8MV-N7ED.

There may not be as many adjudications, regulations, and other enforcement-related matters by the Bureau implicated here. If the Court severed the for-cause removal restriction, the Director, once no longer free from all accountability and now subject to the yoke of presidential control, may be able to execute a valid ratification with respect to some prior actions of the Bureau. And even absent a valid ratification, if the government still wants to proceed with a particular agency action (with a rule, with a timely adjudication or enforcement action, or with some other agency action), then it may cure the constitutional violation and reinitiate the action. But whatever the number and extent of actions subject to further legal question, the courts and parties already have ample tools to be able to navigate whatever may come.

There remains the question of whether the entirety of Title X of the Dodd-Frank Act is rendered invalid by virtue of the constitutional flaws in the Bureau's structure. It is well established that a court confronted with "'a constitutional flaw in a statute'" should generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enterprise Fund*, 561 U.S. at 508 (quoting *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–329 (2006)). If the Court severed the for-cause removal restriction, both Title X of the Dodd-Frank Act (known as the Consumer Financial Protection Act) and the Dodd-Frank Act more broadly would remain fully operative even if the Director were removable at will by the President. The Bureau may continue to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws," 12 U.S.C. § 5491(a), with a Director whose tenure in office comports with the structural requirements of the Constitution's separation of powers.

Whether Congress would wish that is a far different matter. The Dodd-Frank Act contains a severability clause—a legislative living will—regarding how the Act is to be interpreted in the event any provision of the Act is held unconstitutional. See 12 U.S.C. § 5302. And perhaps Congress would still have wanted to create a new consumer financial protection agency, even if that agency was not "independent," 12

U.S.C. § 5491(a), of all political control, but instead was subject to direct presidential control.

But perhaps not. See *supra* page 7. At a minimum, it may be implausible to think that Congress would have enacted a statute giving an official serving at the pleasure of the President sole authority to spend up to $700 million annually without congressional approval. Indeed, the proposal submitted by President Obama and the bill enacted by the House of Representatives adopted the traditional multi-member commission structure. See *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Thus, whatever the Court does on this score, Congress is best positioned to address whether and how to revise the Bureau's structure. See *PHH*, 881 F.3d at 160–164 (Henderson, J., dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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