**IN THE UNITED STATES DISTRICT COURT**
**FOR THE SOUTHERN DISTRICT OF TEXAS**
**HOUSTON DIVISION**

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| J. PATRICK COLLINS, *et al.*,<br><br>Plaintiffs,<br><br>vs.<br><br>THE FEDERAL HOUSING FINANCE AGENCY, *et al.*,<br><br>Defendants. | No. 4:16-cv-03113 |

# PLAINTIFFS' COMBINED REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON CONSTITUTIONAL CLAIM

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# NATURE AND STAGE OF PROCEEDING

As detailed in Plaintiffs' previous filing, Pls.' Mem. of Law in Opp'n to Defs.' Motions to Dismiss and in Supp. of Pls.' Mot. for Summ. J. on Constitutional Claim at 3–9 (Feb. 9, 2017), Doc. 32 ("MTD Br."), this case concerns the Net Worth Sweep—a joint decision by FHFA and Treasury that expropriated for the federal government the entire value of Plaintiffs' investments in Fannie Mae and Freddie Mac. Among other things, Plaintiffs contend that the Court should vacate the Net Worth Sweep because FHFA's structure violates the separation of powers. FHFA moved to dismiss this constitutional claim, Plaintiffs cross-moved for summary judgment, and FHFA has now filed its own motion for summary judgment. FHFA's motions to dismiss and for summary judgment are redundant; both present purely legal defenses to Plaintiffs' constitutional claim. Plaintiffs incorporate by reference their previous response to FHFA's motion to dismiss and in this brief respond only to the new arguments introduced in FHFA's most recent constitutional brief.

# STATEMENT OF ISSUES AND STANDARD OF REVIEW

The issues this Court must decide are whether FHFA's status as an independent agency headed by a single Director who is removable by the President only for cause violates the separation of powers and, if so, whether this constitutional infirmity in FHFA's structure requires vacatur of the Net Worth Sweep. On a motion for summary judgment, the Court must "draw all reasonable inferences in favor of the nonmoving party." *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 212 (5th Cir. 2017). There is no presumption in favor of constitutionality in separation of powers cases. *See NLRB v. New Vista Nursing*

*& Rehab.*, 719 F.3d 203, 240–41 (3d Cir. 2013).

## SUMMARY OF ARGUMENT

Despite FHFA's many arguments to the contrary, the Court cannot avoid reaching the merits of Plaintiffs' constitutional claims. No court has endorsed FHFA's novel theory that final agency actions are immune from attack on separation of powers grounds, and the de facto officer doctrine does not apply to Plaintiffs' substantial constitutional challenge to the statute that established the FHFA Director's office. Merely labeling the Net Worth Sweep as the act of a statutory "conservator" cannot free FHFA from the constraints of the constitutional separation of powers when it expropriates private property for the benefit of the federal government. FHFA is an independent agency headed by a single Director even when the individual who serves as Director does so in an acting capacity. And Plaintiffs are not required to show prejudice to have standing to assert their claim based on a structural violation of the Constitution.

On the merits, the Court should rule that FHFA's status as an independent agency headed by a single individual violates the separation of powers. While the Framers consciously divided power to better protect individual liberty from arbitrary governmental decisions, HERA does the opposite—concentrating broad authority over a substantial portion of the Nation's economy in the hands of a single, unaccountable FHFA Director.[1] This arrangement is virtually without precedent in American history, and it is antithetical to the

[1] As Plaintiffs explained in their previous filing, FHFA oversees "the largest conservatorships in U.S. history" and is responsible for oversight of the $10 trillion secondary mortgage market. MTD Br. 66–67 (quoting Declaration of Melvin L. Watt).

principles of limited and divided government that underlie the Supreme Court's separation of powers precedents.

## ARGUMENT

### I. FHFA's Decision To Impose the Net Worth Sweep Is Subject to Scrutiny Under the Separation of Powers.

#### A. The Net Worth Sweep Must Be Vacated Because It Was Imposed by an Agency Head Who Was Unconstitutionally Unaccountable to the President.

Despite the Constitution's commitment to the principle that "structural protections against abuse of power [are] critical to preserving liberty," *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010), FHFA argues that past actions by an official who is unconstitutionally unaccountable to the President cannot be vacated and are thus immune from legal challenge. FHFA & Watt Mem. in Opp'n to Pls.' Mot. for Summ. J. and in Supp. of Defs.' Cross-Mot. for Summ. J. on Constitutional Claim at 5–7 (Feb. 27, 2017), Doc. 36 ("FHFA SJ Br."). No court has ever adopted FHFA's cramped understanding of the federal courts' remedial authority in separation-of-powers cases, and this Court should not be the first.

The only authority FHFA cites in support of its theory is the Supreme Court's decision in *Free Enterprise Fund v. PCAOB*. But as FHFA acknowledges, the plaintiffs in that case challenged an *ongoing* investigation that had not yet resulted in final agency action. Once the Supreme Court struck down the unconstitutional for-cause removal provision at issue, a restructured agency was thus free to decide whether to proceed with or terminate the investigation. *See FEC v. Legi-Tech*, 75 F.3d 704, 708 (D.C. Cir. 1996) (civil enforce-

ment action brought by unconstitutionally composed FEC did not warrant dismissal because enforcement action was later ratified by constitutionally restructured agency). With the matter still pending before the agency in *Free Enterprise Fund*, it is hardly surprising that the plaintiffs agreed to a final order implementing the Supreme Court's decision without insisting on the empty formalism of "vacating" an investigation that the restructured agency was in all events free to continue.

In contrast to the agency investigation that was still pending after the Supreme Court ruled in *Free Enterprise Fund*, FHFA's Director cannot reconsider his agency's final decision to impose the Net Worth Sweep in a way that comports with the separation of powers unless this Court: (1) strikes down the Director's unconstitutional for-cause removal protection; and (2) vacates the Net Worth Sweep so that FHFA's Director may reconsider it *de novo*. Far from contending that no relief is available to the plaintiffs in cases that concern an agency's final decision, the Solicitor General in *Free Enterprise Fund* argued that the plaintiffs should have been required to *await* final agency action before pursuing their constitutional claims. Brief of the United States, *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010) (No. 08-861), 2009 WL 3290435, at *15–*23. And although the Supreme Court rejected that argument, in doing so it made clear that the plaintiffs could have also raised their separation of powers claims as a basis for seeking vacatur of a final decision by the agency to levy sanctions. 561 U.S. at 490–91. The D.C. Circuit reached the same conclusion in *Kuretski v. Commissioner*, 755 F.3d 929, 938 (D.C. Cir. 2014), holding that the plaintiffs had standing to argue that the Tax Court's structure violates the separation of

powers because a ruling in their favor would have resulted in vacatur of a Tax Court decision ordering them to pay taxes and penalties.

Plaintiffs' previous brief cited a host of cases in which the Supreme Court, the Fifth Circuit, and other courts have vacated decisions by agency officials who held their positions in violation of the Appointments Clause or the separation of powers. MTD Br. 68–69. FHFA does not appear to dispute that those cases provide the correct rule of decision in Appointments Clause cases, but it argues that nothing in their reasoning "suggests that action by an official who *is lawfully serving* becomes void on account of statutory removal protection enjoyed by that official." FHFA SJ Br. 7. But an agency head who is unconstitutionally unaccountable to the President is no more "lawfully serving" than one who unconstitutionally holds office in violation of the Appointments Clause. In both situations, the agency official exercises authority in violation of the Constitution's separation of powers, and if anything unconstitutional restrictions on the President's removal power cast a greater constitutional cloud over an agency official's actions than do often-technical violations of the Appointments Clause.

Nor does precedent support FHFA's argument for withholding a remedy in removal cases that courts routinely deploy in cases that concern unconstitutional appointments. In *IBC v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), for example, the D.C. Circuit cured an Appointments Clause violation by striking down a for-cause removal provision, thereby making members of the Copyright Royalty Board "inferior" rather than "principal" officers. In adopting that remedy, the D.C. Circuit heavily relied on *Free Enterprise Fund*—a case about removal restrictions, 561 U.S. at 415–16—and it explained

that it was vacating the Board decision at issue "[b]ecause the Board's structure was unconstitutional at the time it issued its determination," *id.* at 417. The *IBC* court's approach comports with Supreme Court precedent, which has long recognized the close relationship between the President's appointment and removal powers. *See In re Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839) ("[I]t would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment."); *see also Myers v. United States*, 272 U.S. 52, 119 (1926) ("[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.").

Moreover, to whatever extent the Court has discretion in fashioning remedies for violations of the Constitution, it would be a serious abuse of that discretion to deny Plaintiffs all relief. The Supreme Court has repeatedly vacated agency decisions by officials who held their positions in violation of federal statutes. *See, e.g.*, *New Process Steel, LP v. NLRB*, 560 U.S. 674, 688 (2010); *Nguyen v. United States*, 539 U.S. 69, 83 (2003). A violation of the separation of powers merits no lesser remedy, especially when there is no "alternative way of curing the constitutional violation." *Legi-Tech*, 75 F.3d at 708 (quoting *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 759 (1995)).

### B. The De Facto Officer Doctrine Does Not Bar Plaintiffs' Claim that FHFA's Director Occupies a Constitutionally Defective Office.

In support of its contention that the Court should withhold from Plaintiffs any benefit of a favorable constitutional ruling, FHFA also invokes the de facto officer doctrine—an "ancient" doctrine that has fallen out of favor in recent decades. *United States v. Gantt*,

194 F.3d 987, 998 (9th Cir. 1999); *see* FHFA SJ Br. 7–9. Under the de facto officer doctrine, "where there is an office to be filled and one, acting under color of authority, fills the office and discharges its duties, his actions are those of an officer de facto, and binding upon the public." *Glidden Co. v. Zdanok*, 370 U.S. 530, 535 (1962) (plurality opinion of Harlan, J.) (quoting *McDowell v. United States*, 159 U.S. 596, 602 (1895)). Because Plaintiffs challenge FHFA's constitutional authority to impose the Net Worth Sweep while its structure violates the separation of powers, the de facto officer doctrine has no application to this case.

1. It is well settled that in order for a putative governmental official to be considered a de facto officer, he must, at a minimum, occupy a de jure office—that is, a valid office created pursuant to a constitutional act.[2] This proposition was central to the Supreme Court's holding in the leading case of *Norton v. Shelby County*, 118 U.S. 425 (1886). There, in the course of declining to apply the de facto officer doctrine, the Court stated that "the idea of an officer implies the existence of an office which he holds. It would be a misapplication of terms to call one an 'officer' who holds no office, and a public office can exist only by force of law." *Id.* at 442. And in response to the plaintiff's argument that "a legislative act, though unconstitutional, may in terms create an office, and nothing further than its apparent existence is necessary to give validity to the acts of its assumed incumbent[s],"

[2] *See* ALBERT CONSTANTINEAU, A TREATISE ON THE DE FACTO DOCTRINE § 28 at 41 (1910) ("[T]he existence of a de jure office is a condition precedent to the existence of an officer de facto, and . . . without such an office the pretended officer can never be afforded any legal recognition."); Kathryn A. Clokey, Note, *The De Facto Officer Doctrine: The Case for Continued Application*, 85 COLUM. L. REV. 1121, 1122–23 (1985).

*id.*, the Court stated: "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Id.*; *see also United States v. Royer*, 268 U.S. 394, 397 (1925) ("Of course, there can be no incumbent de facto of an office if there be no office to fill.") (citing *Norton*); *McDowell*, 159 U.S. at 601 (similar).[3] The doctrine thus distinguishes between actions taken by individuals occupying an invalid "office" that was created by an unconstitutional act, and those taken by an individual who was unlawfully elected or appointed to a valid, or de jure, office; the official actions of the latter, but never of the former, may be accorded de facto validity.[4]

It follows, therefore, that if the Court concludes that FHFA's structure is unconstitutional, then FHFA's prior actions in connection with the Net Worth Sweep cannot be validated under the de facto officer doctrine. Wholly ignoring this prerequisite to the application of that doctrine, FHFA argues, in effect, that the equities of this case warrant its application. But while it is true that the doctrine "is founded upon considerations of policy

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[3] *See also* Clifford L. Pannam, *Unconstitutional Statutes and De Facto Officers*, 2 FED. L. REV. 37, 51 (1966) ("*Norton v. Shelby County* thus states a very serious limitation on the operation of the de facto doctrine. It operates to deny the status of a de facto officer to any person who purports to fill an office which has been created by an unconstitutional statute.").

[4] *See Norton*, 118 U.S. at 444 (noting that certain cases cited by counsel in support of applying the doctrine "apply only to the invalidity, irregularity, or unconstitutionality of the mode by which the party was appointed or elected to a legally existing office. None of them sanctions the doctrine that there can be a de facto office under a constitutional government . . . ."); *see also Ryan v. Tinsley*, 316 F.2d 430, 432 (10th Cir. 1963); *Leary v. United States*, 268 F.2d 623, 633 n.11 (9th Cir. 1959); *Annoni v. Blas Nadal's Heirs*, 94 F.2d 513, 514 (1st Cir. 1938); Pannam, *supra* note 2, 2 FED. L. REV. at 48–50.

and necessity, for the protection of the public and individuals whose interests may be affected thereby," *Norton*, 118 U.S. at 441, *Norton* itself makes clear that these equitable considerations must give way when the application of the doctrine would permit the government to evade constitutional constraints.[5] The answer to FHFA's complaint that it will work a great hardship to require it to revisit its prior (constitutionally unauthorized) actions is, then, that the constitutional separation of powers is a weightier consideration than administrative convenience.

2. Quite apart from the absence of a de jure office, the de facto officer doctrine is inapplicable for another reason: Plaintiffs' substantive challenge to FHFA's authority to impose the Net Worth Sweep is "based upon nonfrivolous constitutional grounds." *Glidden*, 370 U.S. at 536. The de facto officer doctrine operates *only* where the substantive ground for the challenge is some "merely technical" defect in the incumbent's title to the office. *Nguyen*, 539 U.S. at 77; *accord D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 353 (5th

[5] While Plaintiffs do not agree that the equities here weigh in favor of applying the doctrine, the Court need not address that question. In *Norton*, for example, the Court's refusal to apply the de facto officer doctrine permitted Shelby County to avoid any obligation in connection with bonds that, while not authorized by a constitutional body, nonetheless benefitted the County's treasury. Weighing this seemingly harsh result against the rule of law adopted by the Court in that case, a leading commentator concluded as follows:

> [I]f a legislative body, whose powers are limited by a written instrument, be permitted to create offices in violation of such instrument, and the courts are to condone such wrongdoing by holding the incumbents thereof officers de facto, it is easily seen that the paramount rights of the people are unduly sacrificed to avoid occasional evils to a few individuals or to a small portion of the community. To sanction such usurpation of power, is to allow the legislature to ignore and override the sovereign will and authority of their masters.

CONSTANTINEAU, § 40 at 60–61. That reasoning applies with equal force here.

Cir. 2013) (record did not make clear whether challenged action occurred before or after noon, when agency official's term expired); *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 82 (D.C. Cir. 2015) (technical violation of Federal Vacancies Reform Act).

*Glidden* illustrates this point clearly. There, the Solicitor General argued that the petitioners, having failed to raise below their Article III objection to the judges who decided their cases, ought to be precluded by the de facto officer doctrine from raising that claim for the first time on appeal. Justice Harlan noted first that the doctrine did not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business," 370 U.S. at 535–36, and held that "[a] fortiori is this so when the challenge is based upon nonfrivolous constitutional grounds." *Id.* at 536.

The rule stated in *Glidden* is not limited to instances in which a litigant provides notice and raises a "timely" objection to an official's authority to act. In *Glidden* itself the petitioners waited until the case was on appeal to advance their constitutional argument for the first time. So too in *Nguyen*, the petitioners did not object to the composition of the court of appeals panel that decided their cases until they petitioned the Supreme Court for certiorari. Synthesizing the de facto officer doctrine precedents, the *Nguyen* Court explained that "violations of a statutory provision that embodies a strong policy concerning the proper administration of judicial business" are not protected by the de facto officer doctrine "even though the defect was not raised in a timely manner." 539 U.S. at 78; *accord Wrenn v. District of Columbia*, 808 F.3d 81, 84 (D.C. Cir. 2015) (refusing to apply de facto officer doctrine where district judge sitting by designation exceeded his authority to hear

specific cases even though "no party challenged the judge's authority until after the decision issued"). If violations of important *statutory* policies are not subject to a timeliness requirement, as the Supreme Court expressly stated in *Nguyen*, it necessarily follows that the same is true for violations of the constitutional separation of powers. Regardless, Plaintiffs filed suit within the six-year statute of limitations, *see* 28 U.S.C. § 2401, and no more should be required for Plaintiffs' nonfrivolous constitutional claim to be deemed "timely."

### C. FHFA's Status as the Companies' Statutory "Conservator" Does Not Empower It To Violate the Constitutional Separation of Powers.

As the briefing on Plaintiffs' APA claims makes clear, the Net Worth Sweep, which transferred the net value of the Companies' assets and future profits in perpetuity to the federal government, is the act of no ordinary conservator. A divided D.C. Circuit panel could only sustain the Net Worth Sweep by concluding—incorrectly, in Plaintiffs' view—that "FHFA is not your grandparents' conservator." *Perry Capital LLC v. Mnuchin*, 848 F.3d 1072, 1094 (D.C. Cir. 2017) (majority opinion). But if the Court accepts that flawed reading of HERA, which it must to uphold the Net Worth Sweep under the APA, then cases in which courts declined to apply constitutional constraints to the routine decisions of a traditional "conservator" provide little guidance. *See United States v. Beszborn*, 21 F.3d 62, 68 (5th Cir. 1994) (Double Jeopardy Clause did not apply where receiver collected penalties that would "not go to the United States Treasury" but instead "benefit all stockholders and creditors of the bank"). Rather than the applicability of the statutory label of "conservator," the Court must consider the *substance* of FHFA's actions when deciding whether the separation of powers applies.

Confronted with similar allegations that a federal receiver had retained for the Government's benefit a liquidation surplus that receivers ordinarily distribute to shareholders, the Federal Circuit concluded that the receiver was amenable to suit under the Tucker Act for a Fifth Amendment taking. *Slattery v. United States*, 583 F.3d 800, 826–29 (Fed. Cir. 2009). As in *Slattery*, the facts here are "unlike the standard receivership situation in which the receiver is enforcing the rights or defending claims and paying the bills of the seized bank," *id.* at 827–28, and the Court should accordingly treat the Net Worth Sweep as attributable to the federal government for purposes of the separation of powers.

FHFA dismisses *Slattery* and the other authorities cited in Plaintiffs' previous brief as so many cases concerning whether conservators and receivers are the United States "for various non-constitutional purposes." FHFA SJ Br. 11. But the plaintiff in *Slattery* was permitted to proceed with a claim against the receiver for just compensation *under the Fifth Amendment*. And while sovereign immunity may be waived by statute, whether a federal conservator or receiver has sovereign immunity in the first place is a question that, like the claim at issue here, turns on the structural provisions of the Constitution. *See Williamson v. United States Dep't of Agric.*, 815 F.2d 368, 373 (5th Cir. 1987).

To whatever extent the President's removal powers are limited to officials who serve an "executive function," FHFA's Director clearly satisfies this requirement when he expropriates private property for the benefit of the United States Treasury. In any event, the Supreme Court has rejected the argument that the scope of the President's constitutional removal power depends on whether a given official's responsibilities are narrowly classified as "purely executive." *Morrison v. Olson*, 487 U.S. 654, 689 (1988); *see also id.* at

689 n.28 (noting "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials"). And there was no hint of any such requirement in *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1228 (2015), which held that "Amtrak is a governmental entity" for purposes of "questions implicating the Constitution's structural separation of powers." Consistent with that holding, on remand the D.C. Circuit treated Amtrak as the United States for purposes of the plaintiffs' Article II Appointments Clause claim. *See Association of American R.R. v. U.S. Dep't of Transp.*, 821 F.3d 19, 36–39 (D.C. Cir. 2016).

But even if the Court concludes that FHFA's decision as conservator to impose the Net Worth Sweep is not *itself* subject to the constitutional separation of powers, FHFA cannot deny that its actions as conservator depend on the authorization and continuing supervision of FHFA as regulator. MTD Br. 70. Under these circumstances, the constitutional infirmity in FHFA's regulatory authority infects its decisions as conservator, which accordingly must be vacated. This argument neither rewrites Plaintiffs' claim nor is time barred. Plaintiffs ultimately request that the Court vacate an action FHFA took *as conservator* because its authority to act as it did was predicated on a violation of the separation of powers.[6] The injuries that provide the basis for Plaintiffs' constitutional claim occurred no sooner than August 2012, when FHFA announced the Net Worth Sweep, and accordingly Plaintiffs' claims are well within the six-year statute of limitations. 28 U.S.C.

[6] To the extent the Court concludes that this or any of Plaintiffs' other arguments are meritorious but not fairly encompassed within the Complaint, Plaintiffs respectfully request that the Court grant leave to amend the Complaint.

§ 2401.[7]

### D. FHFA's Acting Director Was Only Removable By the President For Cause or upon Confirmation of a Senate-Confirmed Successor.

FHFA's argument that acting Director DeMarco was removable by the President at will fails for the same reason that its reliance on the de facto officer doctrine fails: "an unconstitutional act . . . creates no office," *Norton*, 118 U.S. at 442, and accordingly there was no lawful office of FHFA Director which Mr. DeMarco could occupy in an acting capacity. An acting Director can no more exercise powers of an unconstitutional office—one that does not exist in the eyes of the Constitution—than can a confirmed and appointed director. Like his predecessor, all of acting Director DeMarco's actions as Director were thus *ultra vires*, and for that reason the Net Worth Sweep must be vacated notwithstanding Mr. DeMarco's status as acting Director.

In any event, FHFA is wrong when it argues that an acting Director does not enjoy for-cause removal protection. HERA's text identifies only one way in which the powers of FHFA's acting Director differ from those of any other Director: the acting Director "serve[s] . . . until the return of the Director, or the appointment of a [Senate-confirmed] successor." 12 U.S.C. § 4512(f). Nothing in the text of this provision suggests that an acting FHFA Director, who in all other respects succeeds to the full powers of the Director, does

[7] The 30-day statute of limitations contained in 12 U.S.C. § 4617(a)(5) only applies to suits: (1) brought by "the regulated entit[ies]," i.e., the Companies themselves; *and* that (2) challenge an initial decision to impose conservatorship or receivership. Plaintiffs plainly were not required to sue FHFA four years before they were injured in August 2012. Any other reading of Section 4617(a)(5) would make the statute of limitations unconstitutional by entirely foreclosing judicial review of Plaintiffs' constitutional claim.

not also enjoy the Director's authority to exercise those powers free from the threat of early Presidential removal without cause. Indeed, it is hardly surprising in light of this straight-forward statutory text that the Obama Administration did not believe that the President could fire acting Director DeMarco, who also enjoyed civil service protection. MTD Br. 75.[8]

FHFA resists this reading of the statute by arguing that the acting Director succeeds to the "substantive actions and authorities" of the Director but not "the circumstances under which [he or she] can be removed from office." FHFA SJ Br. 13 n.5. But the scope of an official's "substantive authorities" is inextricably intertwined with that official's ability to act free from Presidential control; the acting Director would have less than the full powers of the Director if he were required to answer to the President. In any event, FHFA does not deny that the acting Director's "substantive" powers are in all respects identical to those of the Director. *See United States v. Guzek*, 527 F.2d 552, 560 (8th Cir. 1975); *see also, e.g.*, *Keyser v. Hitz*, 133 U.S. 138, 145–46 (1890). "The most reliable factor for drawing an inference regarding the President's power of removal . . . is the nature of the function that Congress vested in" the officer in question. *Wiener v. United States*, 357 U.S. 349, 353 (1985). With Congress having vested in the acting Director the very same responsibility for running an independent agency that is otherwise assigned to the Director, the only reasonable inference is that Congress intended for the acting Director to enjoy the Director's

[8] Despite FHFA's assertions to the contrary, Plaintiffs' suit challenges the constitutionality of an independent agency headed by a single Director—not the civil service laws more generally.

removal protections.

Other aspects of HERA's text confirm this interpretation. Section 4512(f) expressly limits who the President may designate as acting Director to a list of three individuals who are themselves chosen by the independent Director. That restriction on the President's designation authority is a strong indication that Congress intended for FHFA to operate as an independent agency even when there is no Senate-confirmed Director. This is a key contextual clue as to the President's statutory removal power over an acting Director, and FHFA misses the point when it attempts to recast the argument as a freestanding challenge to the President's selection of acting Director DeMarco. FHFA SJ Br. 13–14.

It is also significant that Section 4512(f) lists "the death, resignation, sickness, or absence of the Director"—but not the President's firing of an acting Director—as the circumstances under which the President may appoint a new acting Director. Congress plainly did not intend for FHFA to be left without a head, and its failure to provide for the replacement of a fired acting Director further shows that it intended to confer on the acting Director the same removal protection otherwise enjoyed by the Director.

More broadly, HERA says that FHFA must act as "an independent agency of the Federal Government," 12 U.S.C. § 4511(a), and FHFA is an "independent regulatory agency" for purposes of the Paperwork Reduction Act, *see* 44 U.S.C. § 3502(5). These provisions admit of no exception for when FHFA is headed by an acting Director, and implying any such exception would enable the President to retain permanent control over FHFA by simply declining to nominate a permanent Director. *See* MTD Br. 75.

In defending its alternative reading of the statute, FHFA places great weight on the

semantic argument that the acting Director is "designated" rather than "appointed" and contends that "removal presupposes an antecedent *appointment*." FHFA SJ Br. 13 (emphasis added). But "removal" is "[t]he immediate termination of an officeholder's privilege to serve in that office," BLACK'S LAW DICTIONARY (10th ed. 2014), and the term applies equally to the President's decision to fire FHFA's head regardless of whether that official serves in a permanent or acting capacity.

### E. Plaintiffs Need Not Prove That They Were Prejudiced by FHFA's Unconstitutional Structure To Proceed with Their Separation of Powers Claim.

As FHFA acknowledges, courts do not normally require that separation of powers plaintiffs prove that they would not have suffered their injury had the Constitution's structural requirements been obeyed. FHFA SJ Br. 15 n.6 (citing *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 824 (D.C. Cir. 1993)); *see also, e.g.*, *Free Enterprise Fund*, 561 U.S. at 512 n.12 ("We cannot assume . . . that the Chairman would have made the same appointments acting alone; and petitioners' standing does not require precise proof of what the Board's policies might have been in that counterfactual world."). That is because violations of the separation of powers are "structural" and thus require "automatic reversal" of the challenged action without regard to prejudice. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000); *see also id.* ("There is certainly no rule that a party claiming constitutional error in the vesting of authority must show a direct causal link between the error and the authority's adverse decision."); *United States v. Davila*, 133 S. Ct. 2139, 2149 (2013) (describing "structural" errors "that trigger automatic reversal [or criminal convictions] because they undermine the fairness of a criminal proceeding as a whole").

Relying exclusively on a D.C. Circuit decision from 1985, FHFA attempts to avoid this rule on the ground that Plaintiffs are not "directly subject to the governmental authority" of FHFA. FHFA SJ Br. 15 n.6 (quoting *Committee for Monetary Reform v. Board of Governors of Fed. Reserve Sys.*, 766 F.2d 538, 543 (D.C. Cir. 1985)); *see also* FHFA SJ Br. 4 n.1. But in 1991 the Supreme Court held that a group of property owners had standing to challenge the constitutional structure of a federal Board of Review that enjoyed veto power over a Board of Directors' master plan to expand the operations of a nearby airport. *Metropolitan Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264–65 (1991). "[B]ecause knowledge that the master plan was subject to the veto power undoubtedly influenced [the] . . . Board of Directors when it drew up the plan," the property owners satisfied Article III's traceability requirement. *Id.* at 265. Likewise in this case, it is sufficient for Plaintiffs to show that an unconstitutionally structured FHFA "influenced" the terms of the Third Amendment, and there is no doubt that it did. *See* Complaint ¶ 131 (Oct. 20, 2016), Doc. 1 ("The Net Worth Sweep is just one example of FHFA's efforts to use its status as the Companies' conservator and regulator to reform the Nation's housing finance system by eliminating Fannie and Freddie."). Moreover, in other litigation FHFA has strenuously argued that the Net Worth Sweep was the product of its arms' length negotiations with Treasury, and FHFA should be judicially estopped from claiming otherwise here. *See* FHFA & Watt Reply in Supp. of Motion to Dismiss at 12–13, *Saxton v. FHFA*, No. 15-47 (N.D. Iowa Aug. 1, 2016) ECF No. 87 (arguing that allegation that Treasury forced FHFA to agree to the Net Worth Sweep was "facially implausible in light of this (and related) litigation, wherein the Conservator—for years—has

vigorously defended in courts across the country the very same amendment that Plaintiffs maintain the Conservator was forced to execute against its will").

This case, in any event, is nothing like *Committee for Monetary Reform*, in which the plaintiffs' only injuries were mediated through uncertainty over how changes in monetary policy would affect the national economy and ultimately the plaintiffs' investments. Plaintiffs here, in contrast, challenge an FHFA diktat that *directly* transferred the entire economic value of their investments to Treasury. Moreover, as FHFA has emphasized in this case, HERA's succession provision entitles FHFA to exercise Plaintiffs' "rights, titles, powers, and privileges" as shareholders during conservatorship. 12 U.S.C. § 4617(b)(2)(A); *see* FHFA & Watt Mem. in Supp. of Motion to Dismiss at 23–29 (Jan. 9, 2017), Doc. 24. The Court need not accept FHFA's unbounded understanding of the scope of that provision to conclude that it makes Plaintiffs "directly subject to [FHFA's] authority." *Committee for Monetary Reform*, 766 F.2d at 543.

## II. FHFA's Status as an Independent Agency Headed by a Single Director Violates the Separation of Powers.

Plaintiffs' previous brief explained at length why their constitutional claim is meritorious, MTD Br. 61–68, and, as further explained below, the arguments FHFA introduces in its latest filing are unpersuasive.

1. With the D.C. Circuit having agreed to rehear the *PHH* case en banc, FHFA declares that Judge Kavanaugh's thorough and scholarly opinion for the panel majority is now "out of the picture" and says nothing more about it. FHFA SJ Br. 18. But the en banc D.C. Circuit vacated the panel's judgment, not its opinion, and in all events FHFA is wrong

when it says that the D.C. Circuit's decision to rehear the case deprives the panel majority's opinion of any "persuasive force." *Id.* at 17. The last time the Supreme Court decided a case about the President's removal power, it vindicated—and repeatedly quoted from—an opinion Judge Kavanaugh wrote in dissent. *See Free Enterprise Fund*, 561 U.S. at 505 ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." (quoting *Free Enterprise Fund v. PCAOB*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)). Notably, the United States recently filed a brief in the *PHH* case embracing the *PHH* panel majority's reasoning and arguing that the CFPB's structure violates the separation of powers. *See* Brief for the United States as Amicus Curiae, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. Mar. 17, 2017) (attached as Exhibit A, hereinafter "United States Br."). Judge Kavanaugh's opinion for the *PHH* panel majority is correct and has now been endorsed by the Executive Branch. The Court should not follow FHFA's lead by simply ignoring it.

2. FHFA argues that it would be "illogical" to conclude that its structure is unconstitutional because this structure merely combines two constitutionally permissible features: (1) an agency headed by a single individual; and (2) an agency that is headed by individuals who are removable by the President only for cause. FHFA SJ Br. 17–18. This argument was considered and rejected in *Free Enterprise Fund*, 561 U.S. at 483–84, which held that separately permissible layers of for-cause removal protection violated the separation of powers when combined.

3. FHFA also invokes the presumption in favor of constitutionality, FHFA SJ Br. 18, but the Supreme Court does not apply that presumption in separation of powers cases,

*see NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 240–41 (3d Cir. 2013) (collecting cases). Where, as here, the competing powers of the Legislative and Executive branches are set against each other, a doctrine that counsels deference to the political branches can provide no guidance. *See Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (emphasizing that majority did not invoke presumption of constitutionality and explaining that "it does not apply" in separation of powers cases); United States Br. 3 ("[L]imitations on the President's authority to remove a single agency head are a recent development to which the Executive Branch has consistently objected.").

4. FHFA is wrong when it argues that the President has no less ability to influence the decisions of an independent agency headed by a single individual rather than a multi-member commission. FHFA SJ Br. 21. Because the terms of commission members are staggered, a President inevitably will have the ability to influence the deliberations of a multi-member commission such as the FDIC by appointing one or more members.[9] And, of course, many statutes establishing independent agencies expressly require bipartisan membership, thus guaranteeing that at least some members will belong to the President's party. Those features of independent multi-member commissions provide at least some accountability to the President. Multi-member commissions also must deliberate and compromise in ways that reduce the risk that they will adopt policies that are inconsistent with those of the President. The reduced extent of presidential control and increased risk of

[9] Although HERA was modeled on the statute that created the FDIC, it departed from that statute in providing that FHFA should be headed by a single individual. *See Perry Capital*, 848 F.3d at 1127 (Brown, J., dissenting).

departures from presidential policy associated with an independent agency headed by a single individual "makes a difference" for separation of powers purposes. *See Free Enterprise Fund*, 561 U.S. at 495.

Moreover, while FHFA dismisses as an irrelevant "policy judgment[ ]" the fundamental threat that the concentration of power in the hands of a single unaccountable Director poses to individual liberty, FHFA SJ Br. 22, the very purpose of the separation of powers is to safeguard individual liberty from arbitrary government action, *see PHH Corp. v. CFPB*, 839 F.3d 1, 6, 25–26 (D.C. Cir. 2016). The separation of powers protects individual liberty by requiring that federal action result from "a step-by-step, deliberate and deliberative process." *INS v. Chadha*, 462 U.S. 919, 959 (1983). That is why the Supreme Court took care in *Humphrey's Executor v. United States* to emphasize that the limited exception it was recognizing to the President's removal power permitted an independent agency that would "be nonpartisan," "act with entire impartiality," and apply "the trained judgment of a body of experts appointed by law and informed by experience." 295 U.S. 602, 624 (1935) (quotation marks omitted). Even if such an independent agency, headed by a multi-member body, can sufficiently replicate the deliberative and democratically accountable process otherwise assured by presidential control, an independent agency headed by a single individual cannot. *See PHH*, 839 F.3d at 26–28.[10]

5. FHFA also errs when it argues that HERA's restrictions on judicial review of its

[10] While a ruling in Plaintiffs' favor would be entirely consistent with the Supreme Court's decision in *Humphrey's Executor*, Plaintiffs respectfully preserve the argument that the Supreme Court should revisit that decision.

actions make no difference to the separation of powers analysis. FHFA SJ Br. 23. In the absence of judicial review, Presidential control is a more important safeguard against the threat that arbitrary agency decisionmaking poses to individual liberty. *See PHH*, 839 F.3d at 35–36. This consideration is especially significant if the Court adopts the *Perry Capital* panel majority's interpretation of 12 U.S.C. § 4617, which reads out of the statute all congressional guidance as to how FHFA should exercise its conservatorship powers. *See Perry Capital, LLC v. Mnuchin*, 848 F.3d 1072, 1087–90 (D.C. Cir. 2017). The *Perry Capital* majority's decision leaves FHFA as conservator with "literally no guidance for the exercise of discretion"—thus raising grave doubts about HERA's constitutionality under the nondelegation doctrine. *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 472 (2001). If the separation of powers means anything, it does not permit a single government official to exercise broadly defined powers with no guidance from Congress, no accountability to the President, and no prospect of review by the courts. *See Chadha*, 462 U.S. at 959 ("The choices . . . made in the Constitutional Convention . . . were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.").

6. The Supreme Court has repeatedly emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (quotation marks omitted); *see PHH*, 839 F.3d at 21–25 (collecting quotations). None of the four examples FHFA identifies supports its position. *See* FHFA SJ Br. 23–25.

Plaintiffs explained in their previous brief that the *PHH* court correctly concluded

that the Comptroller of the Currency is removable by the President at will. MTD Br. 64; *see PHH*, 839 F.3d at 20 n.6. In support of its contrary interpretation of the provision of an 1864 statute that is now codified at 12 U.S.C. § 2, FHFA cites dicta from an 1868 district court decision and Judge Kavanaugh's dissenting opinion in *Free Enterprise Fund*. FHFA SJ Br. 24 (citing *Case of the Dist. Att'y*, 7 F. Cas. 731, 737 (E.D. Pa. 1868), and *Free Enterprise Fund*, 537 F.3d at 713 & n.27 (Kavanaugh, J., dissenting)). But both of those opinions refer in relevant part to an *1863* statute, the predecessor to the 1864 law on which FHFA relies, which provided that the Comptroller of the Currency was removable "by the President, by and with the advice and consent of the Senate." Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 665–66 (1863). To be sure, the 1863 act restricted the President's authority to remove the Comptroller of the Currency, but it was also unconstitutional. Statutes authorizing the Senate to veto a presidential removal decision were "widely regarded as unconstitutional" in the nineteenth century, and they are universally so regarded today. *Free Enterprise Fund*, 561 U.S. at 494 n.3 (citing *Myers v. United States*, 272 U.S. 52, 167–68 (1926)). Ultimately FHFA is left with no authority to support its argument with respect to the *1864* statute, which requires only that the President communicate to the Senate his "reasons" for dismissing the Comptroller of the Currency.

The other examples FHFA mentions in passing likewise fail to support the conclusion that Congress may establish an independent agency headed by a single individual and give it broad authority over an important sector of the national economy. The CFPB was created two years *after* FHFA and obviously does not provide historical precedent for FHFA's structure. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub.

L. 11-203 (2010). The Office of Special Counsel "has a narrow jurisdiction" mainly involving government personnel rules, its current structure was only established in 1978, and the Reagan and Carter Administrations both argued against the current structure on separation of powers grounds. *PHH*, 839 F.3d at 19; *see also* Presidential Appointees, 2 Op. O.L.C. 120, 120 (1978) (concluding that the Special Counsel "must be removable at will by the President"). The Social Security Administration was headed by a multi-member board until 1994, and when it was restructured President Clinton issued a signing statement arguing that the change was constitutionally problematic. *PHH*, 839 F.3d at 18–19; *see* President William J. Clinton, Statement on Signing the Social Security Independence and Program Improvements Act of 1994 (Aug. 15, 1994), https://goo.gl/odVumQ ("[I]n the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question."). Because the structure of each of these agencies is of recent vintage and has been constitutionally contested by the Executive Branch, they do not demonstrate a "longstanding practice" of independent agencies headed by a single individual. *Noel Canning*, 134 S. Ct. at 2560. Accordingly, these "few scattered examples" are at most "anomalies" set against the backdrop of an otherwise uniform practice throughout our Nation's history. *Id.* at 2567.

## CONCLUSION

Plaintiffs' motion for summary judgment on their constitutional claim should be granted, and FHFA's motions to dismiss and for summary judgment on that claim should be denied.

Date: March 20, 2017

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**CERTIFICATE OF SERVICE**

I certify that this filing was served on all parties' counsel by the Court's Electronic Filing System on March 20, 2017.

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# EXHIBIT A

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

**No. 15-1177**

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

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PHH CORPORATION, et al.,
Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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ON PETITION FOR REVIEW OF AN ORDER OF THE
CONSUMER FINANCIAL PROTECTION BUREAU

---

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

---

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

### A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing in this Court are listed in the Opening En Banc Brief for Petitioners.

After this Court granted rehearing en banc, the following newly appeared as amici before this Court: 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.

The following have filed a notice of intent to participate as amicus: The Attorneys General of the States of Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont and Washington, and the District of Columbia.

### B. Ruling Under Review

This is a petition for review of a Final Order in *In the Matter of PHH Corporation*, Docket No. 2014-CFPB-0002 (June 4, 2015) [JA 1]. The Bureau's decision is unreported.

### C. Related Cases

Counsel are unaware of any related cases within the meaning of Rule 28(a)(1)(C).

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## GLOSSARY

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|---|---|
| CFPB | Consumer Financial Protection Bureau |
| FHFA | Federal Housing Finance Agency |
| FTC | Federal Trade Commission |
| HUD | Department of Housing and Urban Development |

## INTRODUCTION AND SUMMARY

The United States respectfully submits this brief as amicus curiae pursuant to Federal Rule of Appellate Procedure 29(a), in order to address the issues posed by the Court in its order granting rehearing en banc.

In 2010, Congress created the Consumer Financial Protection Bureau (CFPB) as part of the Dodd-Frank Act, giving the CFPB authority to enforce U.S. consumer-protection laws that had previously been administered by seven different government agencies, as well as new provisions added by Dodd-Frank itself. *See* 12 U.S.C. § 5581(b). The CFPB is headed by a single Director who is appointed by the President, with the advice and consent of the Senate, for a term of five years, *id.* § 5491(b), (c)(1), and who may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office," *id.* § 5491(c)(3).

The panel in this case held that this "for cause" removal provision violates the constitutional separation of powers. Op. 9-10. The panel explained—and neither party disputes—that, as a general matter, the President has "Article II authority to supervise, direct, and remove at will subordinate [principal] officers in the Executive Branch" in order to exercise his vested power and duty to faithfully execute the laws. Op. 4. The panel recognized as well that *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935), established an exception to that rule, holding that Congress may "forbid [the] removal except for cause" of members of the Federal Trade

Commission (FTC)—a holding that has been understood to cover members of other multi-member regulatory commissions that share certain features and functions with the FTC. Op. 4.

The principal constitutional question in this case is whether the exception to the President's removal authority recognized in *Humphrey's Executor* should be extended by this Court beyond multi-member regulatory commissions to an agency headed by a single Director. While we do not agree with all of the reasoning in the panel's opinion, the United States agrees with the panel's conclusion that single-headed agencies are meaningfully different from the type of multi-member regulatory commission addressed in *Humphrey's Executor*.

The Supreme Court's analysis in *Humphrey's Executor* was premised on the nature of the FTC as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. A single-headed agency, of course, lacks those critical structural attributes that have been thought to justify "independent" status for multi-member regulatory commissions. Moreover, because a single agency head is unchecked by the constraints of group decision-making among members appointed by different Presidents, there is a greater risk that an "independent" agency headed by a single person will engage in extreme departures from the President's executive policy. And as the panel recognized, while

multi-member regulatory commissions sharing the characteristics of the FTC discussed in *Humphrey's Executor* have existed for over a century, limitations on the President's authority to remove a single agency head are a recent development to which the Executive Branch has consistently objected.

We therefore urge the Court to decline to extend the exception recognized in *Humphrey's Executor* in this case. In addition, in our view, the panel correctly applied severability principles and therefore properly struck down only the for-cause removal restrictions.

## STATEMENT

Congress created the CFPB in 2010, as part of the Dodd-Frank Act, directing the Bureau to "seek to implement and, where applicable, enforce Federal consumer financial law" in order to ensure that "all consumers have access to markets for consumer financial products and services" and that the markets for such products and services are "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB has authority to regulate the consumer-finance industry, including loans, credit cards, and other financial products and services offered to consumers. It has power to prescribe rules implementing consumer-protection laws; to conduct investigations of market actors; and to enforce consumer-protection laws in administrative proceedings and in federal court, including through civil monetary penalties. *See, e.g.*, *id.* §§ 5511(c), 5562, 5563, 5565. Congress transferred to the CFPB the authority to exercise functions that

had previously been spread among seven different federal agencies. *Id.* § 5581(b). Although some of the powers transferred to the CFPB came from multi-member commissions whose members are not subject to removal at will by the President, functions at issue in this case were transferred from the Department of Housing and Urban Development (HUD), a Cabinet agency. The CFPB is also tasked with enforcing new statutory requirements related to consumer finance. *See, e.g.*, *id.* § 5531.

This case involves a petition for review of a CFPB order requiring PHH Corporation to pay $109 million in disgorgement. A panel of this Court vacated the order on several statutory and constitutional grounds.

The CFPB (acting through its own attorneys, *see* 12 U.S.C. § 5564(b)), sought rehearing. This Court invited the Solicitor General to respond to the rehearing petition. The brief of the United States supported rehearing en banc, and took issue with aspects of the panel's analysis. The brief did not take a position on the constitutionality of the CFPB's structure, but observed that the "conferral of broad policymaking and enforcement authority on a single person below the President, whom the President may not remove except for cause, . . . raises a significant constitutional question that the Supreme Court has not yet squarely confronted." U.S. Resp. Br. 2. The brief urged that the Court's analysis should focus on "preserving (or appropriately limiting) the powers and roles of each Branch," rather

than on a particular structure's "impact on individual liberty as a freestanding basis for finding a separation-of-powers violation." *Id.* at 10, 12.[1]

This Court granted the petition for rehearing en banc, instructing the parties to address various specified issues.

## ARGUMENT

### I. *Humphrey's Executor* Upheld Removal Restrictions For Members Of Multi-Headed Commissions And Should Not Be Extended By This Court To The CFPB, Which Is Headed By A Single Director

#### A. Under the Constitution and Supreme Court precedent, the general rule is that the President must have authority to remove Executive Branch agency heads at will.

Article II of the Constitution provides that the "[t]he executive Power shall be vested" in the President, and that he shall "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. These provisions reflect the Framers' intention to create a strong, unitary Executive. *See Myers v. United States*, 272

[1] The CFPB has authority to represent itself in federal district courts and courts of appeals, and typically does so. 12 U.S.C. § 5564(b). In one case filed against several federal agencies and departments, however, the Department of Justice represented all government defendants, including the CFPB. The government's district court briefs in that case argued that, based on the Supreme Court's decision in *Humphrey's Executor*, the CFPB's for-cause removal provision is consistent with the Constitution. *See State National Bank of Big Spring v. Mnuchin*, No. 1:12-cv-1032 (D.D.C.). After reviewing the panel's opinion here and further considering the issue, the Department has concluded that the better view is that the provision is unconstitutional. The Department is working with the CFPB to substitute the CFPB's own attorneys in that litigation.

U.S. 52, 116 (1926); *see also The Federalist No. 70*, at 472-73 (J. Cooke ed., 1961) (Hamilton). Of particular relevance here, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)). "[A]s part of his executive power," the President "select[s] those who [are] to act for him under his direction in the execution of the laws." *Myers*, 272 U.S. at 117; *see also* U.S. Const. art. II, § 2, cl. 2. Just as the President's ability to "select[] . . . administrative officers is essential" to the exercise of "his executive power," so too is his ability to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see also Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (quotation marks omitted)).

Accordingly, "[s]ince 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enterprise Fund*, 561 U.S. at 483. Indeed, the First Congress—many of whose members took part in the Constitution's framing—extensively debated the President's removal authority when creating the Department of Foreign Affairs (which later became the Department of State). "The view that

'prevailed' . . . was that the executive power included a power to oversee executive officers through removal; because that traditional power was not 'expressly taken away, it remained with the President.'" *Id.* at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 *Documentary History of the First Federal Congress* 893 (2004)). This view "soon became the 'settled and well understood construction of the Constitution.'" *Id.* (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

Affirming this established understanding, the Supreme Court held in *Myers* that the President's executive power necessarily includes "the exclusive power of removal." *Myers*, 272 U.S. at 122. "[T]o hold otherwise," the Court explained, "would make it impossible for the President . . . to take care that the laws be faithfully executed." *Id.* at 164. The Court thus invalidated a statutory provision that "denied . . . the President" the "unrestricted power of removal" of officers appointed by the President with the advice and consent of the Senate. *Id.* at 176; *see also id.* at 107.

In sum, as the Supreme Court recently reaffirmed, the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enterprise Fund*, 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly

diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70*, at 478).

Although the Supreme Court has upheld certain "limited restrictions" on the President's general removal power with respect to inferior officers, *Free Enterprise Fund*, 561 U.S. at 495, the Court has recognized only one such restriction with respect to principal officers who head agencies: the exception recognized in *Humphrey's Executor*. *See id.* at 492-95. As demonstrated below, that exception does not apply to the CFPB's Director, and it should not be so extended.

### B. *Humphrey's Executor* created an exception to the general rule only for multi-member regulatory commissions.

In *Humphrey's Executor*, the Supreme Court upheld a provision of the Federal Trade Commission Act establishing that FTC commissioners could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor*, 295 U.S. at 620 (quoting 15 U.S.C. § 41 (1934)). The Court's conclusion rested on its view at the time that the FTC "cannot in any proper sense be characterized as an arm or an eye of the executive," but rather "acts in part quasi-legislatively and in part quasi-judicially." *Humphrey's Executor*, 295 U.S. at 628.[2]

[2] Since that time, the Supreme Court has observed that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988).

That characterization of the FTC was based not only on its substantive functions, but also on its structural features as an "administrative body." *See Humphrey's Executor*, 295 U.S. at 628. The FTC had five members with staggered terms, and no more than three of them could be of the same political party. *See id.* at 619-20. The Court thus emphasized early in its opinion that the FTC was "called upon to exercise the trained judgment of a body of experts" and was "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Indeed, the direct relationship perceived between those structural features and the restriction on the President's removal power was underscored by the fact that they all were enacted in the same statutory section. 15 U.S.C. § 41 (1934), *quoted in Humphrey's Executor*, 295 U.S. at 620.

The holding in *Humphrey's Executor* has been understood to encompass other multi-member commissions with features and functions similar to those of the FTC. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (holding that "[t]he philosophy of *Humphrey's Executor*" precludes at-will removal of members of the War Claims Commission, a three-member body that was charged with adjudicating war-related compensation claims); *see also Free Enterprise Fund*, 561 U.S. at 483 ("In *Humphrey's Executor*, we held that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." (citation omitted));

*Morrison v. Olson*, 487 U.S. 654, 724-25 (1988) (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking . . . ." (citations omitted)).

As the panel noted, it is "not merely accidental or coincidental" that the "independent agencies" that were established and understood to be covered by *Humphrey's Executor* have been "multi-member" bodies. Op. 48. Rather, it has been generally recognized that the removal restriction is a concomitant of—indeed, "inextricably bound together" with—a continuing deliberative body. Op. 48-49 (citing various sources). Thus, as an extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded, "[t]he size of the commission, the length of the terms, and the fact that they do not all lapse at one time are key elements of the independent structure." S. Comm. on Governmental Affairs, *Study on Federal Regulation*, S. Doc. No. 95-91, vol. 5, at 35 (1977). These features, typically accompanied by a limitation on the President's removal authority, were "the basic structural features which [had] marked every independent regulatory commission, beginning with the" Interstate Commerce

Commission in the 1880s. *Id.* at 36; *see also* Interstate Commerce Act, ch. 104, § 11, 24 Stat. 379, 383 (1887); Act of Mar. 2, 1889, ch. 382, § 6, 25 Stat. 855, 861-62.

The structure of multi-member agencies with staggered-term memberships was designed to promote long-term continuity and expertise, and that goal was thought to be furthered by restricting the President's power to remove the members of such agencies. As the 1977 Senate study observed, "regulatory policies would tend to be more permanent and consistent to the extent that they were not identified with any particular administration or party," and "[a]brupt change would therefore be minimized." *Study on Federal Regulation*, vol. 5, at 29-30; *see also* 51 Cong. Rec. 10,376 (1914) (contemplating that Federal Trade Commission "would have precedents and traditions and a continuous policy and would be free from the effect of . . . changing incumbency").

In addition, the structure of multi-member agencies was designed to facilitate deliberative group decision-making, and that goal too was thought to be furthered by removal restrictions. In fact, the Senate study concluded that the "[c]hief" consideration in determining whether to create an independent commission, rather than a standard executive agency, "is the relative importance to be attached to group decision-making." *Study on Federal Regulation*, vol. 5, at 79. Similarly, Professor Kenneth Culp Davis expressed the view that independent commissions are created primarily because they exercise adjudicative functions, and that these bodies should

have multiple members "just as we want appellate courts to be made up of plural members, to protect against the idiosyncracies of a single individual." Kenneth Culp Davis, *Administrative Law of the Seventies* 15 (1976); *see also* Op. 45 (noting that "unlike single-Director independent agencies, multi-member independent agencies 'can foster more deliberative decision making'" (quoting Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013)).

### C. *Humphrey's Executor* should not be extended to the CFPB.

**1.** A single-headed independent agency is not covered by an essential aspect of the rationale underlying *Humphrey's Executor* and independent multi-member commissions. The CFPB lacks the structural features that the Supreme Court relied upon in part when characterizing the FTC as a "quasi-legislative," "quasi-judicial" "administrative body." *Humphrey's Executor*, 295 U.S. at 628. A multi-member commission with staggered-term memberships is established as "a body of experts" that by its nature operates in an interactive and deliberative manner, and is "so arranged that the membership would not be subject to complete change at any one time." *Id.* at 624. Restricting the President's power to remove the members of such commissions is thus thought to facilitate deliberative group decision-making and promote an inherent institutional continuity.

An agency headed by a single officer has none of those attributes. To the contrary, it embodies a quintessentially executive structure. "The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known." *Printz v. United States*, 521 U.S. 898, 922 (1997); *see also Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multi-member bodies). It has long been recognized that "[d]ecision, activity, secre[c]y, and d[i]spatch will generally characterise the proceedings of one man in a much more eminent degree[] than the proceedings of a greater number." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1414, at 283 (1833). The Constitution itself specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. The principles animating the exception in *Humphrey's Executor* do not apply when Congress carves off a portion of that quintessentially executive power and vests it in a single principal officer below the President who is not subject to the President's control.

Insofar as the Supreme Court has retreated from its rationale in *Humphrey's Executor* in sustaining the FTC structure as "quasi-legislative" and "quasi-judicial," it is particularly significant that the CFPB does not possess the structural features that

characterized the FTC. As the Court acknowledged in *Morrison*, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28. Consequently, it is imperative that an executive agency still seeking to be characterized as "quasi-legislative" or "quasi-judicial" under *Humphrey's Executor* at least have a multi-member structure, with its attributes of a deliberative body designed to have accumulated and collective insights and expertise as well as inherent institutional continuity. Indeed, given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials," *Morrison*, 487 U.S. at 689 n.28, extending the "limited" *Humphrey's Executor* exception for multi-member commissions to single agency heads could threaten to swallow the "general" rule of *Myers* and Article II. *See Free Enterprise Fund*, 561 U.S. at 495, 513.[3]

**2.** Moreover, a single-headed independent agency creates concerns regarding the dispersion of executive power that are greater than those created by a multi-member independent commission. Although the President's removal authority is identical in the two cases, a single-headed independent agency presents a greater risk

[3] Although *Morrison* upheld a "good cause" removal restriction for an independent counsel who was a "purely executive" official, the Court reasoned that the President's duty to faithfully execute the laws was not impermissibly impaired because the prosecutor was "an inferior officer … with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison*, 487 U.S. at 689-91. That holding obviously does not apply to any principal officer who heads an executive agency, especially the CFPB Director.

than a multi-member independent commission of taking actions or adopting policies inconsistent with the President's executive policy. That is so for two related reasons.

*First*, whereas a multi-headed commission generally must engage in at least some degree of deliberation and collaboration, which tend toward compromise, a single Director can decisively implement his own views and exercise discretion without these structural constraints. *See* Op. 46. It is for such reasons that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. Vesting such power in a single person not answerable to the President constitutes a stark departure from that framework.

*Second*, the difference in decision-making is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multi-headed commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the bipartisan-membership requirement that is common for such commissions further increases the likelihood that at least some of the holdover members share the President's views. *See* Op. 58. By contrast, where a single Director has a term greater than four years (as is true for the CFPB), a President may never get to appoint the Director. *See id.* An agency where a President lacks control over both back-end removal and front-end appointment represents a further departure from the constitutional design.

To be sure, the frequency with which the threat of extreme departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a difference." *See Free Enterprise Fund*, 561 U.S. at 495. Whereas the interference with executive power was mitigated in *Morrison* by the independent counsel's limited authority, and mitigated in *Humphrey's Executor* by the FTC's multi-member nature, the CFPB's interference with executive power is exacerbated by both its single-headed nature and its wide-ranging policy making and enforcement authority over private conduct.

**3.** Furthermore, unlike multi-member independent commissions, single-headed independent agencies are a relatively novel innovation. In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enterprise Fund*, 561 U.S. at 505; *see also NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014) ("'[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." (quoting *The Pocket Veto Case*, 279 U.S. 655, 689 (1929))). In *Free Enterprise Fund*, for instance, because "historical practice had settled on one level of for-cause removal for a President to remove the head of an independent agency," Op. 42, the Court declined to extend *Humphrey's Executor* to a "novel structure": two layers of for-cause removal. *Free Enterprise Fund*, 561 U.S. at 496. The

Supreme Court has thus been reluctant to expand *Humphrey's Executor* to "new situation[s] not yet encountered by the Court." *Id.* at 483.

Here, as the panel explained, until relatively recently all independent agencies have been structured as multi-member commissions. Op. 27-35. Congress has created agencies with a single head subject to for-cause removal on only three other occasions.

*First*, in 1978, Congress established the Office of Special Counsel as an entity with a single head subject to removal only for cause. Op. 31. Among other functions, the Office of Special Counsel can seek corrective action through the Merit Systems Protection Board for violations of federal civil service personnel principles. The Office of Legal Counsel opposed the for-cause removal provision, Mem. Op. for the Gen. Counsel, Civil Serv. Comm'n, 2 Op. O.L.C. 120 (1978), and President Reagan vetoed subsequent legislation regarding the Office of Special Counsel, citing "serious constitutional concerns" about the agency's independent status. *See* Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 Pub. Papers 1391, 1392 (Oct. 26, 1988). As the panel noted, moreover, the Office's "narrow jurisdiction" over "government employers and employees" provides no historical support for creating a very different single-headed independent agency exercising general regulatory and enforcement power over private parties operating in a large sector of the economy, such as the CFPB. Op. 31-32.

*Second*, in 1994, Congress made the Social Security Administration a separate agency headed by a single Commissioner appointed for a term of six years and removable only for cause. Op. 30; *see also* 42 U.S.C. § 902(a). When appraising the bill, President Clinton issued a signing statement noting that "in the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question." Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994). Moreover, as the panel recognized, the Social Security Administration overwhelmingly engages in "supervision of the adjudication of private claims for benefits," not in bringing enforcement actions against private citizens, which makes it an inapposite precedent for the CFPB. Op. 30-31.

*Third*, the Federal Housing Finance Agency (FHFA), which Congress created during the 2008 financial crisis to oversee Fannie Mae and Freddie Mac, is also headed by a single Director subject to removal only for cause. Op. 33. We are not aware of any Executive Branch comment on its single-director structure at the time of enactment of that emergency legislation. In any event, the FHFA is a safety and soundness regulator for specified government-sponsored enterprises, namely Fannie Mae and Freddie Mac—for which the agency has acted as conservator since its inception—as well as federal home loan banks. *Compare* 12 U.S.C. § 4502(20)

(defining "regulated entit[ies]" within jurisdiction of FHFA), *with id.* § 5481(6) (defining "covered person" regulated by the CFPB as "any person that engages in offering or providing a consumer financial product or service").[4]

Thus, to date, the Supreme Court has sanctioned a limitation on the power to remove principal officers of the United States only for members of multi-member bodies. Neither history nor precedent suggests that *Humphrey's Executor* should be extended to the CFPB.

In sum, a removal restriction for the Director of the CFPB is an unwarranted limitation on the President's executive power. This Court should not extend the exception established by the Supreme Court in *Humphrey's Executor* to undermine the general constitutional rule that the President may remove principal officers at will.

## II. The Panel Correctly Concluded That The For-Cause Removal Provision Is Severable From The Remainder Of The CFPB Statutory Scheme

The panel correctly concluded (Op. 65-69) that the proper remedy for the constitutional violation is to sever the provision limiting the President's authority to remove the CFPB's Director, not to declare the entire agency and its operations unconstitutional.

[4] The panel in this case appropriately did not address the application of its ruling to other agencies not before the Court.

This conclusion follows directly from the Supreme Court's decision in *Free Enterprise Fund*, which applied the familiar principle that, when "'confronting a constitutional flaw in a statute,'" courts 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 England*, 546 U.S. 320, 328-29 (2006)). Even though Congress had not enacted a severability clause, the Court there held unconstitutional only the removal restrictions pertaining to members of the Public Company Accounting Oversight Board, and went on to hold that the proper remedy was to invalidate the removal restrictions, leaving the board members removable at will. *Id.* at 509. The Court reasoned that the Sarbanes-Oxley Act would "remain[] fully operative as a law with these tenure restrictions excised," and that no evidence suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Id.* (quotation marks omitted).

Similarly, in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board*, 684 F.3d 1332 (D.C. Cir. 2012), this Court held that copyright royalty judges, who are charged with setting royalty rates for digital transmissions of recorded music, were principal officers who had not been appointed by the President and confirmed by the Senate. The Court held that the proper remedy was to invalidate only a provision that limited the Librarian of Congress's ability to remove the judges. *Id.* at 1340-41. The

Court concluded that this remedy "eliminates the Appointments Clause violation and minimizes any collateral damage." *Id.* at 1340.

Here, as in those cases, severing the removal restriction is the proper remedy. Absent the for-cause removal provision, the Dodd-Frank Act and its CFPB-related provisions will remain "fully operative." *Free Enterprise Fund*, 561 U.S. at 509. And, as in *Free Enterprise Fund,* there is no evidence that Congress would have preferred no Bureau at all to a Bureau whose Director was removable at will. *See id.* Citing one legislator's statement that Congress sought to create a "completely independent" agency, PHH Br. 30, PHH speculates that Congress would have preferred to have no agency at all in the absence of a for-cause removal provision. But Congress never expressed this sentiment, and the Dodd-Frank Act's severability clause underscores that Congress would not have intended this result. 12 U.S.C. § 5302; *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987) (noting that severability clause "creates a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision," and "unless there is strong evidence that Congress intended otherwise, the objectionable provision can be excised from the remainder of the statute"). While it may be possible to conceive of other ways to remedy the constitutional violation, "[s]uch editorial freedom . . . belongs to the Legislature, not the Judiciary." *Free Enterprise Fund*, 561 U.S. at 510.

## III. The Court Has Discretion To Reach The Constitutionality Of The Bureau's For-Cause Removal Provision, And May Appropriately Do So Here

We previously noted (U.S. Resp. Br. 12-14) that this Court may avoid deciding the separation-of-powers question in light of the panel's ruling on the statutory issues, which were the focus of the panel-stage briefing. The United States takes no position on the statutory issues in this case, but in the event that the ultimate resolution of those issues results in vacatur of the CFPB's order, it is within this Court's discretion to avoid ruling on the constitutional question. *See Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009); *see also* Op. of Henderson, J., at 8. That said, as the case has now been set for plenary briefing and en banc argument on the separation-of-powers question, and as that question is likely to recur in pending and future cases, it would be appropriate for the Court to provide needed clarity by exercising its discretion to resolve the separation-of-powers issue now.

## IV. The Court's Decision In *Lucia* Should Not Affect The Disposition Of This Case

This Court has granted rehearing en banc in *Lucia v. SEC,* 832 F.3d 277 (D.C. Cir. 2016), to consider whether administrative law judges of the Securities and Exchange Commission are officers of the United States within the meaning of the Appointments Clause. If the Court concludes that these administrative law judges are not officers, its holding will not affect the Court's treatment of the other issues in this case. If the Court reaches a different conclusion in *Lucia*, its decision need not bear

on the proper disposition of this case. In addition to deciding the separation-of-powers question, the panel vacated the CFPB's order on due process and statutory grounds; a conclusion that the administrative law judge who heard PHH's case was unconstitutionally appointed could only provide an additional, independent ground for vacatur. If the CFPB pursues sanctions against PHH in new proceedings on remand, such proceedings will, of course, need to be consistent with the outcome in *Lucia*. That prospect should not affect this Court's determination whether to reach the separation-of-powers question at this time.

## CONCLUSION

For the foregoing reasons, the for-cause removal provision should be invalidated and severed from the remainder of the Dodd-Frank Act.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief satisfies the type-volume requirements of Rule 29(a)(5). This brief contains 5,410 words.

*s/ Daniel Tenny*
Daniel Tenny

**CERTIFICATE OF SERVICE**

I hereby certify that on March 17, 2017, I filed and served the foregoing with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. Participants in the case are registered CM/ECF users and will be served via the CM/ECF system. I also caused 30 paper copies of the brief to be hand delivered to the Court.

*s/ Daniel Tenny*
Daniel Tenny