

**ORAL ARGUMENT EN BANC 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

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**BRIEF OF SEPARATION OF POWERS SCHOLARS AS AMICI CURIAE  
IN SUPPORT OF CONSUMER FINANCIAL PROTECTION BUREAU**

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Dated: March 31, 2017

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

In accordance with Rule 28(a)(1) of the Circuit Rules of this Court, the undersigned, counsel of record for Separation of Powers Scholars, hereby certifies as follows:

**A. *Parties and Amici***

All parties, intervenors, and *amici* appearing before the Consumer Financial Protection Bureau and in this Court are listed in the *en banc* Brief for Petitioners, except for the state Attorneys General (for Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia) who filed a brief in support of Respondent on March 30, 2017; Public Citizen, Inc., Consumers Union, National Association of Consumer Advocates, and Tzedek DC who filed a brief in support of Respondents on March 31, 2017; and members of Congress, who filed a brief in support of Respondents on March 31, 2017; except for any additional *amici* who intend to appear in support of Respondent at the *en banc* stage; and except for the following *amici* who first appeared in support of Petitioners at the *en banc* stage: The Cato Institute; RD Legal Funding, LLC; RD Legal Finance, LLC; RD Legal Partners, LP; Roni Dersovitz; and the States of Missouri, Alabama, Arizona, Arkansas,

Georgia, Idaho, Indiana, Kansas, Louisiana, Nevada, Oklahoma, South Carolina, South Dakota, Texas, West Virginia, and Wisconsin.

***B. Rulings Under Review***

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

***C. Related Cases***

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

## **CORPORATE DISCLOSURE STATEMENT**

Separation of Powers Scholars state that no signatory to the brief is a nongovernmental corporate party, nor do they issue any stock, thus they are not subject to the corporate disclosure statement requirement of Rule 26.1 of the Federal Rules of Appellate Procedure and Local Rule 26.1 of this Court.

## **STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING**

All parties have consented to the filing of this brief. Pursuant to Circuit Rule 29(d), counsel for the Separation of Powers Scholars state that a separate brief is necessary to provide their unique perspective and expertise on the separation of powers legal issues raised in this case. Separation of Powers Scholars are aware of other planned amici briefs in support of Respondent in this case, but they believe that the breadth of the issues presented and the expertise of the other amici and anticipated topics to be covered warrant separate briefing. Separation of Powers Scholars submit this brief specifically concerning the issue of whether the structure of the Consumer Financial Protection Bureau runs afoul of the constitutional separation of powers. A joint brief is not feasible because other amici have interests and opinions regarding this case that go beyond providing the constitutional and historical framework of the separation of powers that is the focus of the Separation of Powers Scholars' brief. Counsel for Separation of Powers Scholars have coordinated with counsel for other amici in support of Respondent to avoid duplication or other burdens on the Court.

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## GLOSSARY OF TERMS

Bureau	Consumer Financial Protection Bureau
Dodd-Frank	Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010)
FTC	Federal Trade Commission
OMB	Office of Management and Budget
Panel Op.	<i>PHH Corp. v. CFPB</i> , 839 F.3d 1 (D.C. Cir. 2016), <i>vacated and reh'g en banc ordered</i> , No. 15-1177 (D.C. Cir. Feb. 16, 2017).
SEC	Securities and Exchange Commission

## **IDENTITY & INTEREST OF AMICI CURIAE**

Amici curiae—Harold H. Bruff, Gillian E. Metzger, Peter M. Shane, Peter L. Strauss, and Paul R. Verkuil—are distinguished professors of administrative and constitutional law who are experts in separation of powers issues.<sup>1</sup> They have a strong interest in ensuring that the Court’s decision in this case upholds the separation of powers principles found in the Constitution. They thus file this amicus brief to urge the Court to find that the Consumer Financial Protection Bureau is constitutionally structured.

### **RULE 29(a)(4) STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Separation of Powers Scholars represent that their counsel drafted this brief. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their counsel contributed money that was intended to fund preparing or submitting this brief.

### **SUMMARY OF ARGUMENT**

In upholding legislative restrictions on a President’s removal of administrative officers, the Supreme Court has never based its analysis on the number of administrative officers assigned to a particular task. Rather, such provisions are constitutional unless they impede the President’s ability to perform

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<sup>1</sup> Further biographical information is provided in the attached appendix.

his constitutional duty. In assessing specific removal limitations, the Court's focus has consistently been on the extent to which the President may, notwithstanding limitations on his removal power, carry out his constitutionally mandated duty to "take care that the laws be faithfully executed." *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (quoting U.S. Const. art. II, § 3).

This Court's panel decision rejecting the constitutionality of the Consumer Financial Protection Bureau's ("Bureau") structure is thus grounded in neither precedent nor the Constitution. The Bureau as constituted enables the President to ensure that the laws are faithfully executed. Moreover, the Bureau's independence is consistent with governmental structures dating back to the earliest days of the Republic. At that time, the first Congress distanced the Department of the Treasury from the President's direct control, in stark contrast to its choices for the Departments of State and War. Around the same time, Congress created the relatively independent Office of the Comptroller and the National Bank. Thus began a long national history of granting independence to financial institutions and regulators, which has continued through the present day.

When disputes arise about agency independence, the role of courts is to enforce constitutional safeguards for the separation of powers. Beyond that, absent the clearest of indications, courts, lacking judicially identifiable and manageable

standards, should not second-guess such historically grounded congressional choices of agency design.

### ARGUMENT

The constitutionality of the Bureau's structure rests on the question of whether it impedes the exercise of the President's constitutional duties. In its most recent decision examining removal restrictions, *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) ("*Free Enterprise*"), the Supreme Court considered a statute empowering only the Securities and Exchange Commission ("SEC"), not the President, to remove members of a statutorily created board "for cause." Interposing a "for cause" protection to be administered by an independent agency, the Court held, unconstitutionally restricted the President's ability to "take Care that the Laws be faithfully executed," because "he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484 (quoting U.S. Const. art. II, § 3).

Here, there is no such interposition. The Bureau's Director is directly accountable to the President, who can remove him for cause. This situation, then, is identical to that enjoyed by the SEC Commissioners whose exposure to presidential oversight was adequate to sustain the constitutionality of the inferior tribunal once its members' "for cause" protection had been severed.



As that case shows, in a dispute of this kind, “the real question is whether the removal restrictions are of such a nature that they impede the President’s ability to perform his constitutional duty.” *Morrison*, 487 U.S. at 691. Under this standard, the panel decision erred in finding the Bureau’s leadership arrangement unconstitutional. *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016) (“Panel Op.”), *vacated and reh’g en banc ordered*, No. 15-1177 (D.C. Cir. Feb. 16, 2017). A single Director of the Bureau, removable for cause, enables the President to “take Care that the Laws be faithfully executed.” Because the structure of the Bureau violates no other constitutional separation of powers safeguard, the arrangement is constitutionally permissible.

**I. THE CONSTITUTIONAL NECESSITY OF AT-WILL PRESIDENTIAL REMOVAL TURNS EXCLUSIVELY ON THE NATURE OF THAT OFFICER’S FUNCTION AND NOT ON THE NUMBER OF OFFICERS PERFORMING IT.**

The panel decision’s focus on the Bureau’s single-director leadership ignores the long history of congressional provision for independence of actors in the financial sphere and is inconsistent with the Supreme Court’s repeated prior approvals of congressional choices about agency structure.

**A. *A longstanding history supports limited presidential oversight of important executive actors and, particularly, financial regulators.***

From nearly the beginning of the United States, Congresses—including the First Congress, staffed by many drafters of the Constitution—have created

financial regulators shielded from presidential direction. This has included public-private partnerships like the National Bank, as well as institutions run by single individuals, such as the Department of the Treasury and its Comptroller. The Bureau's structure thus reflects a long national tradition, endorsed even by James Madison, Alexander Hamilton, and other advocates of a strong executive.

1. Early financial departments and officers were given significant discretion.

The First Congress created three departments: Foreign Affairs, War, and Treasury. Congress charged the Secretaries of Foreign Affairs and War to “perform and execute such duties as shall from time to time be enjoined on or entrusted to [them] by the President of the United States.” Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28-29 (Department of Foreign Affairs); Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 49-50 (Department of War). Both Secretaries were thus required to carry out the direction of the President, in essence serving as his “mouthpiece.” Conversely, Congress specified the offices and functions of the Department of the Treasury in detail and gave its Secretary specified responsibilities, not “such duties as shall from time to time be enjoined on or entrusted to him by the President.” *Compare* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65 *with* Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28-29 *and* Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 49-50; *see also* Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 40-42

(2012) (“The independent functions of officers within the Treasury . . . interrupt the line of hierarchical control that might be thought to run from the President through department heads to lesser officials.”) (citation omitted); Lawrence Lessing & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 26 (1994); Gerhard Casper, *An Essay in the Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239-40 (1989) (describing that, for instance, “disbursement could be made only by the Treasurer, upon warrants signed by the Secretary, countersigned by the Comptroller, and recorded by the Register”).

In doing so, the First Congress installed in that Department features remarkably similar to those found in the Bureau today. For instance, the statute creating the Treasury Department made it “the duty of the Secretary of the Treasury . . . to make a report, and give information to either branch of the legislature, in person or in writing (as he may be required).” Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 65-66. Like the statutory provisions requiring the Bureau to make biannual reports to Congress, this gave Congress a degree of oversight over the Department. And, in fact, the House of Representatives regularly used that provision to challenge decisions made by the first Secretary of the Treasury, Alexander Hamilton. Charles Tiefer, *The Constitutionality of Independent Officers as Check on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 61, 72 (1983).

Congress followed a similar structure in creating other early financial institutions. Congress established the Office of the Comptroller within the Department of the Treasury and, in 1797, gave it power “to institute suit for the recovery of” a “sum or balance reported to be due to the United States, upon the adjustment of [a tax officer’s] account.” Act of Mar. 3, 1797, ch. 20, § 1, 1 Stat. 512, 512. In addition, the Comptroller was to superintend accounts and countersign warrants drawn by the Secretary of the Treasury. Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 65, 66. In short, the Comptroller was one of the first officials in the United States given federal prosecutorial authority. And, by design, the Comptroller was given a measure of independence. James Madison, who had argued *for* Cabinet Officers being subject to presidential removal, went so far as to argue that “there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.” 1 Annals of Cong. 612 (1789) (Joseph Gales ed., 1834); *see also Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631 (1935); Tiefer, *supra*, at 74.

Congress chose in that case to allow the Comptroller to be removed by presidential mandate—but it protected him from that removal in much the way that Dodd-Frank protects the Bureau’s Director. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1964 (2010) (“Dodd-Frank”) (protection from removal codified at 12 U.S.C.

§ 5491(c)(3)). The Act creating the Comptroller stated that “if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office.” Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67. Moreover, in 1795, Congress provided that his decisions against claimants in disputes referred by statute to him would be “final and conclusive,” indicating that the Comptroller was independent of presidential direction. Tiefer, *supra*, at 74 (quoting Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442). The Comptroller’s ultimate decisions to prosecute were likewise independent. Akhil Reed Amar & Jonathan L. Marcus, *Double Jeopardy Law After Rodney King*, 95 Colum. L. Rev. 1, 18 (1995).

The First Bank of the United States, meanwhile, was structured by Congress in such a manner that the President’s authority—and indeed, the authority of the government over the Bank at all—was explicitly limited. The Bank’s operating policies were left to the Bank’s Directors who, in turn, were selected by shareholder vote. And the United States was allowed to subscribe to no more than a fifth of the Bank’s stock and thus would inherently be a minority shareholder. When the Bank was re-chartered in 1816, the United States’ minority status was cemented: the President was to appoint five directors, not even enough for a quorum. Private shareholders chose the remaining twenty. Act of Feb. 25, 1791, ch. 10, §§ 4, 11, 1 Stat. 191, 192-93, 194-95 (providing for election of directors

according to a plurality of voting shares and limiting the United States' subscription to no more than two million dollars out of the Bank's total ten million dollar capitalization).

Under both versions of the Bank statute, the Treasury Department—which, as discussed above, was itself less subject to presidential control than other contemporaneously created departments—had limited supervisory authority over the Bank. The Secretary could demand reports and inspect Bank records. But there was no provision for the President or the Secretary to direct the Bank in its operations.

The constitutionality of the Bank was hotly debated. James Madison vigorously opposed it on the ground that the Constitutional Convention had specifically declined to give Congress an express power of incorporation in order to avoid the establishment of a National Bank. James Madison, “Speech in Congress Opposing the National Bank,” in *James Madison: Writings 1772-1836*, at 480, 482 (1999). And before signing the bill, President Washington sought the opinion of his Attorney General and Secretaries of State and Treasury—thus in addition to Madison, three leading contemporary figures weighed in on the Bank's constitutionality: Alexander Hamilton, Thomas Jefferson, and Edmund Randolph. No one at the time objected to the creation of the Bank on the grounds of separation of powers or the lack of presidential control. Nor did Andrew Jackson

some forty years later when he sent an 8,000-word message to Congress accompanying his veto of a bill to re-charter the Bank. Veto Message from Pres. Jackson Regarding the Bank of the United States (July 10, 1832), *in* 3 *A Compilation of the Messages and Papers of the Presidents* 1139 (1897).

In short, that the United States' financial institutions and regulators would be insulated from direct presidential control seems to have been accepted by the Nation's founders and early political figures. The Bureau is the continuation of a long legacy of independent financial regulators.

2. State constitutions drafted around the time of the Federal Constitution support Congress's authority to create offices relatively independent from presidential policy control.

The context surrounding the drafting of the Constitution further supports the view that officers need not necessarily be under the direct control of the chief executive. For example, an examination of state constitutions drafted around the same time as the federal Constitution—both before and after—shows that the vesting of power in a chief executive was seen as consistent with removing certain areas of administration from that person's policy control. *See generally* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 18 U. Pa. J. Const. L. (forthcoming 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735094](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735094).

Most relevant here, almost all states that drafted constitutions around the time of

the federal Constitution excluded the state's treasurer from close gubernatorial supervision.<sup>2</sup>

This did not go unnoticed by the drafters of the federal Constitution. In his Federalist Papers defense against charges that the proposed federal Constitution unduly violated separations of powers principles, Madison pointed out that states had removed certain appointments powers from their respective governors. The Federalist No. 47 (James Madison). In fact, he noted, states had done this in spite

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<sup>2</sup> See, e.g., Conn. Const. of 1818, art. IV, §§ 17-20 (making the state's treasurer and secretary elected officials); Del. Const. of 1792, art. VIII, §§ 3, 6 (providing that the legislature appointed the treasurer and that the legislature prescribe methods of appointment for "[a]ttorneys at law, all inferior officers in the treasury department, election officers, officers relating to taxes, to the poor, and to highways, constables and hundred officers"); Ky. Const. of 1792, art. VI, § 7 (providing that the legislature appointed the treasurer); Md. Const. of 1776, art. XIII (providing that the legislature appointed the treasurer); Pa. Const. of 1790, art. VI, § 5 (providing that the legislature appointed the treasurer); N.J. Const. of 1776, para. XII (providing that a legislative council and the general assembly together would appoint the attorney-general, secretary, and treasurer); S.C. Const. of 1790, art. VI, § 1 (providing for legislative appointment of the commissioners of the treasury, secretary of the state, and surveyor-general); Mass. Const. of 1780, pt. 2, ch. II, § 4, art. I (providing for legislative appointment of the secretary, treasurer, receiver-general, the commissary-general, notaries public, and naval officer); N.H. Const. of 1792, pt. 2, § 67 (providing for legislative appointment of the secretary, treasurer, and commissary-general); N.Y. Const. of 1777, arts. XXII, XXIII (providing for legislative appointment of the treasurer; and that the governor shared his appointment power with a council of four Senators); N.C. Const. of 1776, arts. XIII, XXII (providing for legislative appointment of the state treasurer and attorney general); Ohio Const. of 1802, art. II, § 16, art. VI, § 2 (legislature appointed treasurer, secretary of state, and auditor); Va. Const. of 1776, paras. 35, 40 (legislature appointed treasurer, attorney general, secretary).



of state constitutional provisions—not replicated in the federal Constitution—explicitly providing that the legislative, executive, and judicial branches were to be kept wholly separate from each other. *Id.*

The federal Constitution, of course, did vest appointment power in the President—with a requirement of Senate advice and consent for principal officers. It did *not* go any further in requiring or prohibiting particular forms for executive agencies and their heads. In light of state constitutions that themselves limited the control given to state governors, it should not be presumed that the Framers intended Article II of the Constitution to require Congress to subject all federal administrators to the President’s complete control.

Indeed, the history of the Constitutional Convention affirms the Framers’ commitment to congressional discretion in agency design. The Convention rejected a plan that would have called for a council composed of particular, enumerated departments. Instead, the Framers of the Constitution were “desirous of the advantages of congressional flexibility in defining the structure of government” within the constraints they laid out. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 600 (1984). This left as an open question what agencies would be created and whether each agency would be headed by a single person or by a commission. Congress, through the Necessary and Proper Clause, was given

discretion to shape the form of the executive branch in accordance with the needs of the country as they would develop. U.S. Const. art. I, § 8, cl. 18.

***B. The Supreme Court's analyses of presidential removal power have never turned on the number of officials involved.***

The Supreme Court first discussed the President's relationship to principal officers in the landmark case *Marbury v. Madison*, 5 U.S. 137 (1803). Chief Justice Marshall there drew a strong distinction between political officers and officers of the law, placing the Secretary of State (in his predominant, foreign affairs role) in the former category, as one of "the political or confidential agents of the executive." *Id.* at 166. "[A]s his duties were prescribed by that act, [he] is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated." *Id.* Accordingly, "[t]he acts of such an officer, as an officer, can never be examinable by the courts." *Id.* As Chief Justice Taft would later remark in *Myers v. United States*, 272 U.S. 52 (1926), that very fact rendered essential the President's unconstrained authority over such an officer's tenure in office.

But if the Secretaries of Foreign Affairs and War were "to conform precisely to the will of the President," *Marbury*, 5 U.S. at 166, and hence must be accountable to no one but him, the Secretary of the Treasury had been established as an officer of the law. The legality of his behavior was not a political question that "can never be examinable by the courts." *Id.* Such an officer, exercising "a

specific duty . . . assigned by law,” is “amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.” *Id.* As such, his actions were both subject to a degree of independence from the President and susceptible to judicial review.

The panel’s decision largely ignores this distinction, citing *Myers* for the proposition that the President must be granted the exclusive power of removal at will over certain executive officers. Panel Op. at 13. But the holding of *Myers* is narrow. It decided only that the Senate could not require its advice and consent for the removal of a postmaster, a minor executive official. *Myers*, 272 U.S. at 107. Every subsequent decision of the Supreme Court has effectively acknowledged that, for such officers, it is the “nature of the function that Congress vested in” the subject agency that is “the most reliable factor” for determining removal. *Wiener v. United States*, 357 U.S. 349, 353 (1958). (It is notable in this regard that, in 1970, Congress reauthorized the United States Postal Service itself “as an independent establishment of the executive branch of the Government of the United States.” 39 U.S.C. § 201.)

In fact, less than a decade after *Myers*, the Supreme Court was faced again with the constitutionality of “for cause” limitations on the President’s removal authority. *See Humphrey’s Ex’r*, 295 U.S. at 602. The Court upheld the constitutionality of such a restriction on the commissioners of the Federal Trade

Commission (“FTC”), finding “[t]he office of a postmaster” to be “so essentially unlike” that of a Federal Trade Commissioner that “the *Myers* case cannot be accepted as controlling.” *Id.* at 627. In contrast, and as contemplated in *Marbury*, the duties of the FTC “are performed without executive leave and, in the contemplation of the statute, must be free from executive control.” *Id.* at 628.<sup>3</sup> Accordingly, the Court unanimously upheld the constitutionality of the structure of the FTC.

Later, applying that decision, the Court again unanimously found commissioners of the War Claims Commission protected from at-will removal, although its constituting statute contained *no* provision for removal of a commissioner. *Wiener*, 357 U.S. at 350. The Court determined that there was no inherent removal power given to the President by the Constitution; nor did the relevant statute, the War Claims Act, imply one. *Id.* at 352-56. The Court noted that:

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<sup>3</sup> The Court in *Humphrey’s Executor* states that Congress intended “to create a body of experts . . . which shall be independent of executive authority *except in its selection*,” 295 U.S. at 625, as noted in the panel opinion. Panel Op. at 6, 14-15, 31; *see also* Br. for U.S. as Amicus Curiae at 12 (en banc). However, this characterization is best understood as referring to the expertise exercised by administrative agencies, not to a requirement that there be an otherwise-undefined “body” taken to mean a multi-member leadership structure. *See* Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 Stan. L. Rev. 395, 434 (1995) (“The Court viewed *Humphrey* as an ‘expert’ exercising a technical, rather than political, expertise.”).

[t]he assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure. The versatility of circumstances often mocks a natural desire for definitiveness.

*Id.* at 352. The decision in *Wiener* did not mention, let alone turn on, the leadership structure of the War Claims Commission.

Since then, the Supreme Court has clarified that its analysis centers on whether Congress “interfere[s] with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.” *Morrison*, 487 U.S. at 690. As noted, this analytical framework was preserved in the Court’s most recent removal decision, *Free Enterprise*. There the Court held that the multi-level protections from removal for members of the Public Company Accounting Oversight Board prevented the President from taking care that the laws be faithfully executed. *Free Enterprise*, 561 U.S. at 484. The Court reiterated that the President’s removal authority “is not without limit,” *Free Enterprise*, 561 U.S. at 483, but is tied to his specific Article II responsibilities. For example, because of the faithful execution obligation, the President must be able to “oversee the faithfulness of the officers who execute” the laws. *Id.* at 484.

But every reference to presidential powers in *Free Enterprise* invokes the President's prerogative to oversee, not to decide, the actions of executive departments.<sup>4</sup> For those departments that, as discussed above, are meant solely to communicate the President's will, the President of necessity has full control. But for officers who execute the law—and who are subject to judicial review regarding that execution—the President has, by design, an oversight role rather than a directive one. The Bureau is precisely the kind of agency over which the President's role is of overseer; that it is headed by a single director does not change that fact.

## **II. THE RESTRICTIONS ON THE REMOVABILITY OF THE BUREAU'S DIRECTOR DO NOT IMPEDE THE PRESIDENT'S EXERCISE OF CONSTITUTIONAL FUNCTIONS.**

### **A. *The "Removal for Cause" provision of Dodd-Frank enables the President to "take care that the laws be faithfully executed."***

While the President has no constitutional entitlement to direct independent agencies, he does have a constitutional entitlement—and mandate—to ensure that

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<sup>4</sup> See *Free Enterprise* at 496 (“Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct.”); *id.* at 498 (the people “look to the President to guide the ‘assistants or deputies . . . subject to his superintendence’”) (quoting *The Federalist* No. 72, at 487 (Alexander Hamilton) (J. Cooke ed., 1961)); *id.* (“By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure that the laws are faithfully executed.”); *id.* at 499 (“The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.”).

the laws are faithfully executed. Dodd-Frank's for cause removal provisions are sufficient to ensure that presidential duty can be fulfilled. The limited grounds on which the Bureau's Director may be removed, "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3), are *identical* to the statutory restrictions on Federal Trade Commissioners' removability upheld in *Humphrey's Executor*, 295 U.S. at 619.

Under Dodd-Frank, the President may remove a Director who fails to follow the law, carry it out, or carry it out in a timely manner, but not a Director who carries out the Bureau's duty to "regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws," 12 U.S.C. § 5491(a), in a way contrary to the President's policy preferences. As discussed above, this restriction does not violate any constitutional requirement. Rather, the Bureau exemplifies one type of entity that the Framers and the earliest Congresses deemed properly insulated from the President's complete policy control.

The panel essentially concedes this precise point—that the Bureau is not the type of entity that must be headed by a director serving at the pleasure of the President. Panel Op. at 25-26, 38-39. *Humphrey's Executor* is conclusive on this issue. The panel nonetheless concluded that the Bureau must be directed by a

multi-member body if Dodd-Frank is to limit the removability of its head. There is no constitutional anchor for this ruling.

Although Congress often does choose multi-member commissions to head independent agencies,<sup>5</sup> there is no inherent reason why multi-member commissions are more suited to enabling the President to ensure the law is faithfully executed. On the contrary, presidents should find it easier, not harder, to ensure the faithful execution of the laws by a single-headed agency. Should a multi-member agency take an act that the President believes is not in accordance with law, it might be difficult to determine which members of that body should actually be removed. And the President could revamp a lawless FTC only by undertaking five separate removals, but could reconstitute the Bureau through only one—surely a lower bar. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1088 & n.3 (C.D. Cal. 2014) (also discussing relative term length).

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<sup>5</sup> Congress does not *always* do so. For instance, the Social Security Administration and the Federal Housing Finance Agency are headed by single people on whom Congress has placed removal restrictions. In other cases, the President must report his reasons for removing an agency's director to Congress. 12 U.S.C. § 2. While we demonstrate here that the Bureau's structure is not contrary to traditional agency design, we also note that any "anti-novelty" rhetoric is not a basis for finding the Bureau's structure unconstitutional. *See Leah M. Litman, Debunking Anti-Novelty*, 66 Duke L.J. (forthcoming 2017) (manuscript at 56-57, 64), <https://ssrn.com/abstract=2843763>.



Indeed, the accountability advantages of vesting responsibility in a single person were lauded at the time of the writing of the Constitution. The Constitutional Convention rejected the concept of a plural executive in favor of a single president whom the people could hold accountable. Alexander Hamilton wrote in *The Federalist Papers* that:

[O]ne of the weightiest objections to a plurality in the executive, . . . is that it tends to conceal faults, and destroy responsibility. . . . It often becomes impossible, amidst mutual accusations, to determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.

*The Federalist No. 70*, at 245-46 (Alexander Hamilton) (J. & A. M'Lean, 1788). He wrote later that "[t]he sense of responsibility is always strongest in proportion as it is divided," *The Federalist No. 74*, at 269 (Alexander Hamilton) (J. & A. M'Lean, 1788), and added that "[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." *The Federalist No. 76*, at 279 (Alexander Hamilton) (J. & A. M'Lean, 1788).

That logic applies no less to a single director, accountable to the President, than to a single President, accountable to the people. Any malfeasance, neglect, or inefficiency exhibited by the Bureau would be attributable to the single Director, who would be subject to presidential removal on those grounds.

***B. The Director's limited removability does not impede the President's supervisory authority under the Opinions Clause.***

Article II also vests the President with significant supervisory authority over administrative agencies through the Opinions Clause. The President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” U.S. Const. art. II, § 2. Dodd-Frank’s removability provision does not restrict this authority.

Since President Clinton issued Executive Order No. 12,866, presidents have relied on the Opinions Clause to require even independent agencies to keep the Office of Management and Budget (“OMB”) informed as to their regulatory agendas. 3 C.F.R. 638 (1994). President Obama likewise implicitly relied on the Opinions Clause in requiring independent agencies to inform OMB of their plans for engaging in the retrospective analysis of the continuing appropriateness of existing regulations. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).<sup>6</sup> Nothing in

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<sup>6</sup> The Opinions Clause has rarely been litigated, but the Department of Justice has also opined positively on this authority over independent agencies. *Summary and Analysis of Public Comments on Executive Order No. 12,044*, 43 Fed. Reg. 12,665, 12,670 (Mar. 24, 1978) (explaining that the Department of Justice’s view that most of President Carter’s Executive Order on Improving Government Regulations could be made binding on independent regulatory agencies); U.S. Dep’t of Justice, Memorandum re Proposed Executive Order on Federal Regulation 7-13 (Feb. 12, 1981), reprinted in *Role of OMB in Regulation: Hearings Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce, 97th Cong.*,

the Bureau's structure or in Dodd-Frank's removability provision impinges on these authorities, even indirectly.

This fact underscores the reality that the Bureau and its director do not pose any threat of tyrannical behavior, much less one that would have alarmed the Framers. The Opinions Clause guarantees the President virtually unlimited transparency vis-à-vis all administrative units, so that he may effectively *influence* their behavior, even when he cannot *command* particular decisions.

The Bureau's accountability is further reinforced by the oversight roles of Congress and the courts.<sup>7</sup> The Director must appear before congressional committees semi-annually. 12 U.S.C. § 5496. And the Director's final agency actions are subject to judicial review.<sup>8</sup> Supervisory and accountability mechanisms

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1st Sess. 158-64 (1981) (addressing the question of the legality of applying proposed Executive Order No. 12,291 to the independent regulatory agencies). *See also State v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (holding that the President's constitutional authority to seek the advice of the Secretary of Interior could not be burdened by the National Environmental Policy Act).

<sup>7</sup> Additionally, the Financial Stability Oversight Council has the authority to set aside a final regulation prescribed by the Bureau if it finds that the regulation "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. § 5513.

<sup>8</sup>The power of the judicial branch to exercise a check on agency action via judicial review likewise does not turn on how many agency heads direct its actions and whether the agency is led by a single director or a multi-member commission. *See* 12 U.S.C. §§ 5563(b)(4), 5513(d) (providing for judicial review of Bureau rules and enforcement actions).

work as, if not more, robustly for single-headed agencies as for multi-member commissions.

### **III. THERE IS NO FREESTANDING CONSTITUTIONAL BASIS FOR EVALUATING THE EFFICACY OF AN AGENCY'S DESIGN IN PROTECTING INDIVIDUAL LIBERTY.**

Petitioners argue that the Bureau's structure poses a greater threat to individual liberty and lacks democratic accountability compared to multi-member independent agencies, and therefore conclude that it is constitutionally invalid.

Pet'r Br. at 19-29 (en banc). This analysis of the relative efficacy of the Bureau's design, regardless of its merits,<sup>9</sup> is untethered from the Constitution. The Constitution does not permit courts to invalidate the design of a particular agency based on a court's analysis of how well it protects liberty in the abstract.

The Supreme Court has explained that the Framers did not enshrine “[t]he principle of separation of powers” as “an abstract generalization.” *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). That principle appears in the Constitution, instead, through its concrete details: the assignment of executive, legislative, and judicial powers to three co-equal branches, *see* U.S. Const. arts. I, § 1; II, § 1; III, § 1, and, in certain critical respects, a specification of the processes by which those powers are to be exercised. *See, e.g.*, Presentment Clauses, U.S. Const. art. I, § 7, cls. 2, 3;

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<sup>9</sup> Arguments disputing the merits of this contention are addressed above, by Respondent, and by other Amici Curiae.

Ineligibility and Incompatibility Clause, U.S. Const. art. I, § 6, cl. 2; Appointments Clause, U.S. Const. art. II, § 2, cl. 2. Insofar as the Constitution protects liberty—as well as other goals, such as government efficiency and effectiveness—through structure and process, it does so through these concrete manifestations of the separation of powers and its critical corollary, checks and balances. It does not do so by enabling judges to enforce their subjective views of what institutional arrangements best protect liberty.

As discussed above, judicial review of restrictions on the President’s removal authority thus turns on the specific issue of whether or not a restriction impedes the President’s ability to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, or to carry out other specific Article II responsibilities. This inquiry is no different from other separation of powers cases in which the Supreme Court has rested its holdings on the direct implications of specific constitutional provisions. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 448-49 (1998) (Line Item Veto Act violated the Presentment Clause, U.S. Const. art. I, § 7, cl. 2, “find[ing] it unnecessary to consider the District Court’s alternative holding that the Act ‘impermissibly disrupts the balance of powers among the three branches of government.’”) (citation omitted); *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (Sentencing Reform Act of 1984 is constitutional because Congress’s actions were not prohibited by either “[t]he Constitution’s structural

protections” or “our system of checked and balanced authority”); *INS v. Chadha*, 462 U.S. 919, 946 (1983) (one-House veto provision unconstitutional, explaining “[j]ust as we relied on the textual provision of Art. II, § 2, cl. 2, to vindicate the principle of separation of powers in *Buckley*, we find that the purposes underlying the Presentment Clauses, Art. I, § 7, cls. 2, 3, and the bicameral requirement of Art. I, § 1, and § 7, cl. 2, guide our resolution of the important question presented in this case”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 443 (1977) (“[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the *extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions.*”) (emphasis added) (citing *United States v. Nixon*, 418 U.S. 683, 711-12 (1974)).

Petitioner’s argument strays from these concrete constitutional moorings. Whether a single-director structure is optimal as a matter of agency design, *see* Panel Op. at 44-53, is constitutionally irrelevant. None of the benefits that may follow from a multi-member structure pertain to the President’s ability to exercise his constitutional functions. Nor is a multi-member structure mandated either implicitly or explicitly by the specific constitutional provisions that address issues of government structure and process. Absent constitutional constraints, issues of institutional design are up to Congress. It is not the role of the courts to second-

guess Congress's policy choices in designing an agency or to impose their own views of what agency structures best advance individual liberty.

Various briefs in this proceeding have debated the pros, cons, and trade-offs associated with the design of the Bureau in general, and the single-director structure in particular. The arguments thus highlight the complex and competing policy considerations involved in agency design. So many structural variations exist, even among administrative units headed by a single official, that a comparison of single-member versus multi-member agencies in the abstract cannot possibly yield a constitutionally binding conclusion.<sup>10</sup> So long as Congress acts within its constitutional bounds and does not impede the President's constitutional duties, balancing these competing considerations is a task for Congress and not the courts.

Because neither the Constitution nor Supreme Court precedent provide for a freestanding, judicially enforceable constitutional metric for the efficacy of agency

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<sup>10</sup> For example, multi-member agencies may be headed by a chairperson that holds distinct responsibilities with a certain degree of control over their agencies' agendas, either by statute or by agency tradition and history. See Marshall J. Bregar & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1174-80 (2000). Chairpersons dissent "with far less frequency than their colleagues in substantive, collegial decisions," suggesting that "decisionmaking even at multi-member agencies is 'relatively centralized.'" *Id.* at 1177 (quoting David M. Welborn, *Governance of Federal Regulatory Agencies* 20, 109 (1977)).

design in protecting liberty, and because the Bureau's structure aligns with constitutional separation of powers requirements, the single-director structure of the Bureau is constitutionally valid.

### CONCLUSION

For these reasons, amici Separation of Powers Scholars support the Bureau's request that its structure be upheld as constitutional.

Respectfully submitted,

*/s/ Katharine M. Mapes*

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March 31, 2017



**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because its textual portions, including headers, quotations, and footnotes, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and the rules of this Court, contain 6,440 words, as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

Respectfully submitted,

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March 31, 2017

**APPENDIX A**  
**BIOGRAPHIES OF SEPARATION OF POWERS SCHOLARS**

**Harold H. Bruff** is the Rosenbaum Professor of Law Emeritus at the University of Colorado School of Law, where he was Dean from 1996-2003. His numerous writings on constitutional and administrative law include *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press 2006), and *Untrodden Ground: How Presidents Interpret the Constitution* (University of Chicago Press 2015), examining how presidents have interpreted their constitutional powers. He has served in the Office of Legal Counsel in the U.S. Department of Justice and has testified before Congress many times on public law issues.

**Gillian E. Metzger** is the Stanley H. Fuld Professor of Law at Columbia Law School, where she is also the faculty director of Columbia's Center for Constitutional Governance. She writes and teaches in the areas of constitutional law, administrative law, and federal courts, with specialization in separation of powers and federalism. Selected recent publications on the separation of powers include: *Internal Administrative Law*, 115 Mich. L. Rev. (with Kevin Stack, forthcoming June 2017); *Agencies, Polarization, and the States*, 115 Colum. L. Rev. 1739 (2015); and *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836 (2015). She is also a co-editor, with Peter L. Strauss, David Barron, Anne Joseph

O’Connell, and Todd D. Rakoff, of *Gellhorn and Byse’s Administrative Law: Cases and Comments* (Foundation Press, 12th ed. forthcoming 2017). Professor Metzger has been a public member of the Administrative Conference of the United States (“ACUS”) since 2010.

**Peter M. Shane** is the Jacob E. Davis Chair in Law at the Ohio State University’s Moritz College of Law. Among his many writings, he has co-authored or edited eight books, including *Separation of Powers Law: Cases and Materials* (Carolina Academic Press, 3d ed. 2011) and *Madison’s Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2009), and he is a public member of ACUS. Before entering full-time teaching in 1981, Professor Shane served as an attorney-adviser in the Office of Legal Counsel in the U.S. Department of Justice and as an assistant general counsel in the Office of Management and Budget.

**Peter L. Strauss** is the Betts Professor of Law at Columbia Law School. His many influential articles bearing on separation of powers issues include *Overseer or “The Decider”?: The President in Administrative Law*, 75 *Geo. Wash. L. Rev.* 696 (2007), and *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573 (1984). He served as the first general counsel to the U.S. Nuclear Regulatory Commission while on leave from

Columbia, and as an attorney in the Office of the Solicitor General before his joining the Columbia faculty in 1971. Professor Strauss was elected in 2010 to the American Academy of Arts & Sciences.

**Paul R. Verkuil** is a Senior Fellow at the Center for American Progress and President Emeritus of the College of William & Mary. He is the last Senate-confirmed Chairman of ACUS (2010-2015). ACUS is the federal agency devoted to matters of administrative procedure and policy that has long produced recommendations of value to the judiciary, Congress, and the executive. Mr. Verkuil is a well-known administrative law scholar and the co-author of the treatise *Administrative Law and Process* (Foundation Press, 6th ed. 2014). He has served as special master to the U.S. Supreme Court in the original jurisdiction case of *New Jersey v. New York*, 523 U.S. 767 (1998).

**CERTIFICATE OF SERVICE**

I hereby certify that I have on this 31st day of March, 2017, caused the foregoing documents to be electronically served through the Court's CM/ECF system, if they are registered CM/ECF users, or if they are not, by serving a true and correct copy by first-class U.S. Postage paid mail, upon:

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