No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA;
WILLIAM M. HITCHCOCK,

Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY;
DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY; JOSEPH M.
OTTING, ACTING DIRECTOR OF THE FEDERAL HOUSING FINANCE AGENCY,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, No. 4:16-cv-03113

BRIEF OF HAROLD H. BRUFF, GILLIAN E. METZGER, PETER M. SHANE, PETER L. STRAUSS, AND PAUL R. VERKUIL AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

Katharine M. Mapes
Jeffrey M. Bayne
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

Counsel for Amici Curiae
Separation of Powers Scholars

Dated: January 17, 2019

CERTIFICATE OF INTERESTED PERSONS

No. 18-60302

In accordance with Fifth Circuit Rule 29.2, the undersigned, counsel of record for Separation of Powers Scholars, hereby certifies that the following persons, in addition to those listed in the briefs submitted by Defendants-Appellees, are "interested persons" within the meaning of Fifth Circuit Rule 28.2.1. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

A. *Amici Curiae*

Separation of Powers Scholars. Harold H. Bruff, Gillian E. Metzger, Peter M. Shane, Peter L. Strauss, and Paul R. Verkuil are distinguished professors of constitutional and administrative law and experts in separation of powers.[1]

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.

[1] Further biographical information is provided in the attached appendix.

B. Counsel for *Amici Curiae*

Katharine M. Mapes and Jeffrey M. Bayne, of Spiegel & McDiarmid, LLP, 1875 Eye Street, NW, Suite 700, Washington, DC 20006.

Dated: January 17, 2019

/s/ Katharine M. Mapes
Katharine M. Mapes
Attorney of record for
Separation of Powers Scholars

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

FEDERAL CONSTITUTIONAL PROVISIONS

STATE CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES

FEDERAL REGULATIONS

FEDERAL COURT RULES

OTHER AUTHORITIES

IDENTITY & INTEREST OF *AMICI CURIAE*[2]

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.[3] 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 filed a merits *amicus* brief in the U.S. Court of Appeals for the D.C. Circuit on rehearing *en banc* in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), which upheld the validity of the leadership structure of the Consumer Financial Protection Bureau. They also filed an amicus brief in *CFPB v. All American Check Cashing, Inc.*, No. 18-60302 (5th Cir.). Both of those cases involved issues about the constitutionality of the structure of the Consumer Financial Protection Bureau ("CFPB"). Here, the Court granted rehearing *en banc* of a panel decision that held that the structure of the Federal Housing Finance Agency ("FHFA") violates the U.S. Constitution. Separation of Powers Scholars file this *amicus* brief to urge this Court to find that the FHFA is constitutionally structured.[4]

---

[2] Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and 29(a)(4)(D), the parties to this appeal have been informed of the intended filing of this *amicus* brief and have consented to its filing.

[3] Further biographical information is provided in the attached appendix.

[4] Separation of Powers Scholars do not address the question of whether Plaintiffs

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

Throughout the history of the United States, Congress has provided certain regulators and agencies with varying degrees of independence, particularly in the context of financial regulation. "The Supreme Court has long recognized that, as deployed as a shield to certain agencies, a degree of independence is fully consonant with the Constitution." *PHH Corp. v. CFPB*, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc). There are various mechanisms by which Congress can promote such independence, and such provisions are constitutional unless they impede the President's ability to perform his constitutional duty. In assessing specific agency structures, the Court has consistently focused on the extent to which the President may, notwithstanding limitations on his removal power or other independence-promoting provisions, carry out his constitutionally mandated duty to "take care

---

have standing to bring their constitutional claim.

that the laws be faithfully executed." *Morrison v. Olson*, 487 U.S. 654, 691 (1988) (quoting U.S. Const. art. II, § 3).

The panel's conclusion that the FHFA structure is unconstitutional is grounded in neither precedent nor the Constitution. The FHFA as constituted enables the President to ensure that the laws are faithfully executed. Moreover, the FHFA'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, courts should not second-guess such historically grounded congressional choices of agency design.

ARGUMENT

The constitutionality of the FHFA'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 impairment. The FHFA 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.

Here, the panel correctly identified that the "unifying principle" of the Supreme Court's removal-power cases is that Congress has the authority to structure agencies how it so chooses so long as it does not "impair[] the President's ability to fulfill his Article II obligations." *Collins v. Mnuchin*, 896 F.3d 640, 662 (5th Cir. 2018). The majority of the panel's analysis of the FHFA's structure, however, deviates from this principle. Instead, it focuses on characteristics that have little or no bearing on the President's ability to fulfill his Article II obligations

and instead unnecessarily analyzes questions of factual similarities to other agencies.

This analysis is contrary to both the Constitution and Supreme Court precedent. A single Director of the FHFA, removable for cause, enables the President to "take Care that the Laws be faithfully executed," and because the structure of the FHFA violates no other constitutional separation of powers safeguard, the arrangement is constitutionally permissible.

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

The FHFA's structure is consistent with the long history of congressional provision for independence of actors in the financial sphere and 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

FHFA'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").

The early independence of the Treasury Department is solidly confirmed by an 1823 opinion of Attorney General William Wirt, who served under both Presidents James Monroe and John Quincy Adams. Wirt advised the President that he had no authority to interfere in that Department's settlement of accounts with a Major Joseph Wheaton. Noting that settling such accounts was the statutory duty of Treasury auditors, Wirt wrote:

> [T]he requisition of the constitution is, that [the President] shall take care that the laws be executed. If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself.

The President & Accounting Offices, 1 U.S. Op. Atty. Gen. 624, 625 (1823).

In establishing the relative independence of the Treasury Department, the First Congress installed features similar to those found in the FHFA 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 FHFA Director to submit annual reports to Congress, 12 U.S.C. § 4521, this gave Congress a degree of oversight over the Department.

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.

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. Charles Tiefer, *The Constitutionality of Independent Officers as Check on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 74 (1983) (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 subject to less 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's 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 President Jackson's subsequent struggle with three successive heads of the Treasury Department over his insistence that all U.S. funds be removed from the Bank, it was always clear to him and to them that the discretion to do so was theirs,

and not his. Peter L. Strauss, *Overseer, or "The Decider"?: The President in Administrative Law*, 75 Geo. Wash. L. Rev. 696, 706 (2007) (citing Leonard D. White, The Jacksonians: A Study in Administrative History 1829-1861, 34-37 (1954)).

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 fact that these examples do not directly speak to the question of limits on the President's removal authority does not lessen their relevance to this case. As the panel recognized, there are numerous "other independence-promoting features" that Congress uses when structuring agencies. *Collins*, 896 F.3d at 660. The FHFA is the continuation of this long legacy.

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, state constitutions drafted around the same time as the federal Constitution—both before and after—show 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. 323 (2017). 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.[5]

This did not go unnoticed by the drafters of the federal Constitution. In defending against charges that the proposed federal Constitution unduly violated separations of powers principles, Madison noted that states had removed certain appointments powers from their respective governors, and that states had done this despite state constitutional provisions—not replicated in the federal Constitution—

[5] *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 (legislature appointed treasurer and prescribed 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 (legislature appointed treasurer); Md. Const. of 1776, art. XIII (same); Pa. Const. of 1790, art. VI, § 5 (same); N.J. Const. of 1776, para. XII (legislative council and the general assembly together appointed the attorney-general, secretary, and treasurer); S.C. Const. of 1790, art. VI, § 1 (legislature appointed commissioners of the treasury, secretary of the state, and surveyor-general); Mass. Const. of 1780, pt. 2, ch. II, § 4, art. I (legislature appointed secretary, treasurer, receiver-general, the commissary-general, notaries public, and naval officer); N.H. Const. of 1792, pt. 2, § 67 (legislature appointed secretary, treasurer, and commissary-general); N.Y. Const. of 1777, arts. XXII, XXIII (legislature appointed treasurer; and governor shared his appointment power with a council of four Senators); N.C. Const. of 1776, arts. XIII, XXII (legislature appointed 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).

explicitly providing that the legislative, executive, and judicial branches were to be kept wholly separate from each other. The Federalist No. 47 (James Madison).

The federal Constitution 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 structures for executive agencies and forms of agency leadership. 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). 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 later remarked 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 only to him, the Secretary of the Treasury was 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.

Importantly, the actual holding of *Myers* is narrow, deciding only that the Senate could not require its advice and consent for the removal of an executive official. *Myers*, 272 U.S. at 107. In effect, the decision was a delayed repudiation of the requirement in the Tenure of Office Act, ch. 154, 14 Stat. 430, Rev. Stat. § 1767 for Senatorial advice and consent for removal (and which, in the wake of the Civil War, nearly resulted in the impeachment of President Andrew Johnson). No subsequent decision concerning removal has involved a congressional effort to participate in the removal decision, and the only congressional constraint on removal the Supreme Court has found objectionable involved Congress's placing one for-cause protected institution, the Public Company Accounting Oversight Board ("PCAOB"), within another, the SEC. Importantly for the current issue, the Court accepted the protected character of SEC Commissioners' tenure even though each was unquestionably a principal officer exercising executive functions and thus subject to presidential oversight. The question for the Court, rather, was whether the president's various relationships with the SEC adequately protected his capacity to assure that not only it, but also the PCAOB faithfully executed the law. And the Court unmistakably and emphatically held that it did, sustaining the constitutionality of every PCAOB function once the "for cause" constraint on *SEC*

removal of its members had been eliminated. *See* Peter L. Strauss, *On The Difficulties Of Generalization – PCAOB in The Footsteps Of 25 Myers, Humphrey's Executor, Morrison, and Freytag*, 32 Cardozo L. Rev. 2255 (2011).

In its supplemental brief, the Treasury Department argues that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and its progeny create a narrow exception to presidential removal authority that "depends fundamentally on the nature of the [agency] as a multi-member body." Supplemental Brief for the Treasury Department at 21 ("Treasury Br."). But this argument is contrary to subsequent Supreme Court decisions.

In *Wiener v. United States*, the Supreme Court applied *Humphrey's Executor* and 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 v. United States*, 357 U.S. 349, 350 (1958). 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:

> [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.

Subsequently, 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*. The Court reiterated there that the President's removal authority "is not without limit," *Free Enterprise*, 561 U.S. at 483, but is tied to 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 decide, the actions of executive departments.[6] As discussed above, for those departments acting solely to

[6] *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

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 FHFA 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.

The panel rightly notes the Supreme Court's direction that the constitutionality of an agencies structure turns on whether that structure, in its totality, impairs the President's ability to take care that the laws be faithfully executed. Both the majority opinion and Chief Judge Stewart's dissent on the constitutional issue explain that an agency's structure is unconstitutional if it prevents the President from fulfilling this Article II responsibility. *Collins*, 896 F.3d at 662 ("The outer limit of Congress's ability to insulate independent agencies from executive oversight is the President's Article II obligation to ensure that the nation's laws are faithfully executed."), *id.* at 677 (Stewart, C.J., dissenting in part) ("Congress's use and construction of independent agencies is subject to constitutional limitations, the outer boundary of which is the President's domestic executive authority under Article II."). But, as described below, the panel erred in

---

entire Nation oversee the execution of the laws.").

concluding that the structure of the FHFA impedes the President's ability to take care that the laws be faithfully executed.

II. THE FHFA'S STRUCTURE DOES NOT IMPEDE THE PRESIDENT'S EXERCISE OF CONSTITUTIONAL FUNCTIONS.

A. A single Director, removable only "for cause," 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 mandate to ensure that the laws are faithfully executed. The Housing and Economy Recovery Act of 2008's ("HERA") for cause removal provision for the single FHFA Director, 12 U.S.C. § 4512(b)(2), is sufficient to ensure that presidential duty can be fulfilled.

Under HERA, 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 simply carries out the duties set forth in 12 U.S.C. § 4513 in a way contrary to the President's policy preferences. As discussed above, this restriction does not violate any constitutional requirement. Rather, the FHFA exemplifies one type of entity that the Framers and the earliest Congresses deemed properly insulated from the President's complete policy control.

Although Congress often does choose multi-member commissions to head independent agencies,[7] 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 be removed. And the President could revamp a lawless Federal Trade Commission only by undertaking several separate removals, but could reconstitute the FHFA 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).

B. The Constitution and HERA provide the President with ample ability to oversee the FHFA.

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."

[7] Any "anti-novelty" rhetoric is not a basis for finding the FHFA's structure unconstitutional. *See* Leah M. Litman, *Debunking Anti-Novelty*, 66 Duke L.J. 1407, 1477-79, 1487-88 (2017).

U.S. Const. art. II, § 2. HERA'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).[8] Nothing in the FHFA's structure or in HERA's removability provision impinges on these authorities, even indirectly.

[8] The Opinions Clause has rarely been litigated, but the Department of Justice has 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., 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. Ala. 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).

This fact underscores the reality that the FHFA 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.[9]

The FHFA's accountability is further reinforced by congressional and judicial oversight. The Director must report to congressional committees annually. 12 U.S.C. § 4521. And "[a]ny party to a proceeding under section 4631[,] 4513b, 4636, or 4636 of [Title 12] may obtain review of any final order issued under this chapter by filing in the United States Court of Appeals for the District of Columbia Circuit." 12 U.S.C. § 4634(a).

HERA also provides mechanisms to reinforce the FHFA's accountability to the President. The Housing Finance Oversight Board (the "Board"), which the Director chairs, is composed of two cabinet-level Executive Branch officials. 12

[9] The panel suggests that because the FHFA is not funded through "the normal appropriations process," the President loses leverage over the agency's activities. *Collins*, 896 F.3d at 669. Non-appropriated funding, however, primarily affects congressional—not executive—oversight. Moreover, independence from the congressional appropriations process is common among financial regulators. *PHH Corp.*, 881 F.3d at 81 ("Congress has provided similar independence to other financial regulators [in addition to the CFPB], like the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency, the National Credit Union Administration, and the Federal Housing Finance Agency, which all have complete, uncapped budgetary autonomy.").

U.S.C. § 4513a(c). The Director must meet with these officials and receive their advice at least once every three months, and these cabinet-level officials have authority to call additional special meetings. 12 U.S.C. § 4513a(d). The Board also must testify before Congress annually, 12 U.S.C. § 4513a(e), and, as Chief Judge Steward explains in his partial dissent, the Board "may either testify in support of the Director's leadership or testify that the Director has derogated from his duties under HERA, thereby providing grounds for the President to exercise his 'prerogative to consider whether any excesses amount to cause for removal.'" *Collins*, 896 F.3d at 678 (Stewart, C.J., dissenting in part) (quoting *PHH Corp.* 881 F.3d at 106). The panel cites the Board as an example of the President's lack of control over the FHFA. But, as described above, the Constitution and Supreme Court precedent do not require presidential control of agencies such as the FHFA—only oversight. Thus, the Board advances, rather than detracts from, the President's ability to take care that the laws be faithfully executed.[10]

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

Plaintiffs-Appellants argue that the FHFA's "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual

[10] This is not to suggest that other mechanisms, such as certain veto authority the Financial Stability Oversight Council has over the CFPB, do not provide further agency accountability to the President.

liberty, than a multimember independent agency does." Supplemental En Banc Brief of Plaintiffs-Appellants at 11 (quoting *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting)). This analysis of the relative efficacy of the FHFA's design, regardless of its merits, 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; 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 concrete manifestations of the separation of powers and its critical corollary, checks and balances. It does not do so by enabling judges to impose 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 a restriction impedes the President's particular Article II duties. This inquiry is no different from other separation of powers cases in which the Supreme Court has rested its holdings on the clear structural 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); *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)).

Arguments about whether a single-director structure is optimal as a matter of agency design are constitutionally irrelevant. *See* Treasury Br. at 21-22. 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.

CONCLUSION

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

Respectfully submitted,

/s/ Katharine M. Mapes

Katharine M. Mapes
Jeffrey M. Bayne

Counsel for Amici Curiae
Separation of Powers Scholars

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

January 17, 2019

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: *Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 1239 (2017); *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). Peter L. Strauss, Todd D. Rakoff, Gillian E. Metzger, David Barron, and Anne Joseph O'Connell are co-editors of *Gellhorn and Byse's Administrative Law: Cases and Comments* (Foundation Press, 12th ed. forthcoming 2017). Professor Metzger is a senior fellow of the Administrative Conference of the United States ("ACUS").

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, 4th ed. 2018) and *Madison's Nightmare: How Executive Power Threatens American Democracy* (University of Chicago Press 2009). Formerly the dean of the University of Pittsburgh School of Law, Professor Shane has also twice been 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). Serving as an attorney in the Office of the Solicitor General for the three years before he joined the Columbia faculty in 1971, and as the first General Counsel of the independent Nuclear Regulatory Commission on academic leave 1975-77, gave him an inside view of the President's many and influential connections with nominally independent agencies. Professor Strauss was elected in 2010 to the American Academy of Arts & Sciences.

Paul R. Verkuil is a Senior Fellow at ACUS. 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). He has been Dean of the Tulane and Cardozo Law Schools and is President Emeritus of the College of William & Mary.

CERTIFICATE OF SERVICE

I hereby certify that I have on this 17th day of January, 2019, caused the foregoing document to be electronically served through the Court's CM/ECF system, and service was accomplished on all parties.

Dated: January 17, 2019

/s/ Katharine M. Mapes

Katharine M. Mapes
Attorney of record for
Separation of Powers Scholars

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000

CERTIFICATE OF COMPLIANCE WITH RULE 32(G)

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contain 6,189 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f), as counted by the word count feature of Microsoft Word 2010, with which this brief was prepared.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: January 17, 2019

/s/ Katharine M. Mapes

Katharine M. Mapes
Attorney of record for
Separation of Powers Scholars

Law Offices of:
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000