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
Case No. 4:16-cv-03113

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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January 18, 2019

AMICUS CURIAE'S SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS PURSUANT TO FIFTH CIRCUIT RULE 29.2

No. 17-20364

PATRICK J. COLLINS, *ET AL.*,

Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, *ET AL.*,

Defendants-Appellants.

Pursuant to this Court's Rule 29.2 and Federal Rule of Appellate Procedure 26.1, amicus curiae Public Citizen, Inc., submits this supplemental certificate of interested persons to fully disclose all those with an interest in this amicus brief and provide the required information as to their corporate status and affiliations.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

A. The amicus curiae submitting this brief, and its corporate status and affiliations, are as follows: Amicus curiae **Public Citizen, Inc.**,

is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

B. Amicus curiae is represented by **Scott L. Nelson** and **Allison M. Zieve** of **Public Citizen Litigation Group**, which is a non-profit, public interest law firm that is part of **Public Citizen Foundation, Inc.**, a non-profit, non-stock corporation that has no parent corporation and in which no publicly traded corporation has an ownership interest of any kind.

Respectfully submitted,

/s/ Scott L. Nelson
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January 18, 2019

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen, Inc., is a nonprofit consumer-advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts on a wide range of issues. In addition to advocating for strong consumer financial protections, Public Citizen has a longstanding interest in issues involving the constitutional principle of separation of powers and has participated as an amicus in many separation-of-powers cases in the Supreme Court and courts of appeals. For example, Public Citizen submitted briefs as amicus curiae addressing the constitutionality of the structure of the Consumer Financial Protection Bureau (CFPB) in this Court in the pending case *CFPB v. All American Check Cashing*, No. 18-60302 (brief filed Sept. 17, 2018), and in the United States Court of Appeals for the District of Columbia Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (brief filed March 31, 2017).

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[1] Public Citizen has moved for leave to file this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amicus curiae, its members, or its counsel contributed money intended to fund the brief's preparation or submission.

Public Citizen submits this brief so that arguments supporting the constitutionality of the Federal Housing Finance Agency (FHFA) will be presented to the en banc Court for consideration.

INTRODUCTION

The plaintiffs-appellants in this case seek to set aside actions taken by the FHFA in part on the ground that the agency's structure, with a single director who may be removed by the President only for cause, violates separation of powers. The panel in this case, by two separate two-one majorities, ruled that the FHFA was unconstitutionally structured but denied the plaintiffs the relief they sought. The plaintiffs petitioned for rehearing en banc in part to challenge the limitation on the relief granted for the claimed constitutional violation. Two of the federal defendants, the FHFA and its then-acting director, also sought rehearing en banc in large part because, they explained, the panel's holding that the agency's structure violates separation-of-powers principles "conflicts with decades of Supreme Court precedent upholding the constitutionality of independent agencies," and "likewise conflicts squarely with the D.C. Circuit's recent decision involving the CFPB." FHFA Pet. for Reh'g iii–iv. The FHFA urged this Court to rehear the case en banc to "correct [the

panel's] wrong turn," *id.* at 10, and restore "Congress's constitutional prerogative to create agencies and design their structures to optimally address the myriad problems Congress confronts," *id.* at 15.

This Court granted both petitions for rehearing en banc and directed the parties to file supplemental briefs. In their supplemental brief filed January 14, 2019, however, the FHFA and its new acting director disavowed the argument in the FHFA's rehearing petition that the panel's separation-of-powers holding was erroneous. They now limit their argument on the plaintiffs' constitutional claim to the submissions that the plaintiffs lack standing to assert the claim and that it is unnecessary to reach the issue to affirm dismissal of the plaintiffs' claims. FHFA Supp. Br. 3. Thus, having successfully insisted on the "exceptional importance" of en banc review of the panel's constitutional ruling, and the need to correct it to forestall challenges to "the constitutional status of any number of agencies," FHFA Reh'g Pet. 15, the agency now presents no argument on the merits of the separation-of-powers challenge; it says only that it has "reconsidered" and changed its view. FHFA Supp. Br. 3.

The panel's constitutional holding remains not only the basis of the Court's direction that the district court, on remand, declare the FHFA's

structure unconstitutional, but also the premise of plaintiffs' argument that they are entitled to far broader relief. The correctness of that holding was one of the issues raised in the rehearing petitions granted by this Court and will be implicated in any resolution of the case by this Court unless the Court agrees with the FHFA and the Treasury Department that it is unnecessary to reach the question. Public Citizen therefore respectfully submits this brief so the Court will have a more complete presentation of both sides of a question central to the case.

SUMMARY OF ARGUMENT

As the panel's opinion recounts, the FHFA was created in the wake of the housing market's collapse and consequent recession in 2007 and 2008 to provide greater oversight over the two government-sponsored entities, the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), that dominate the secondary market for residential mortgages in the United States. Congress granted the FHFA regulatory and enforcement powers, as well as the authority to exercise conservatorship over Fannie Mae and Freddie Mac. Congress provided that the FHFA would be headed by a single expert director, appointed by the President with confirmation by

the Senate, "for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2).

The Supreme Court has long held such tenure protections constitutional for officers engaged in rulemaking and enforcement in areas that Congress believes require independence and expertise. In *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), the Court upheld legislation conferring protection against at-will presidential removal on commissioners of the Federal Trade Commission (FTC), who exercise authority significantly broader than that granted the FHFA, an agency whose powers are limited to supervision of two entities. The Court has repeatedly reaffirmed and extended that precedent, rejecting arguments that for-cause limits on removal of executive officers prevent the President from performing his constitutionally assigned functions.

The proposition that Congress may confer executive authority on an independent agency only if the agency is headed by a multi-member commission finds no support in the Supreme Court's decisions. The panel itself recognized that Congress has a range of "options" for structuring independent agencies. *See Collins v. Mnuchin*, 896 F.3d 640, 660 (5th Cir. 2018). Congressional adherence to the multi-member commission model

is not essential to the logic of the Supreme Court's repeated holdings that for-cause removal provisions do not prevent the President from performing his constitutional functions. *See PHH*, 881 F.3d at 79–80. And no provision of the Constitution requires Congress to provide additional avenues for presidential control of an agency, such as funding mechanisms or panels of presidential appointees empowered to veto the agency's actions, if it chooses to place an agency under a single, tenure-protected head.

The contention that multi-member commissions protect liberty better than agencies directed by single officers does not bear on the separation-of-powers issue. Although separation-of-powers principles derive from the Framers' conceptions of how best to protect liberty, decisions about whether a statute violates Article II do not turn on courts' assessments of what institutional arrangements are most consistent with abstract conceptions of liberty, but on whether the statute prevents the President from fulfilling his constitutional function. Generalizations about liberty are poor substitutes for traditional separation-of-powers analysis.

Congress has often constituted independent agencies as multi-member commissions, but historical novelty is not a basis for striking down a statute on separation-of-powers grounds. Conferring significant executive power on single officers is no more novel today than multi-member commissions were when the Supreme Court decided *Humphrey's Executor* in 1935. The principal difference is that the FHFA's independence is supported by 80 years of precedents upholding delegation of authority to officers protected from at-will termination by the President.

ARGUMENT

I. Long-established separation-of-powers principles support the FHFA's constitutionality.

Under Supreme Court precedent, the question whether the FHFA may be headed by an officer whose independence is protected by a for-cause limitation on his removal has a straightforward answer. The Court long ago held that providing comparable for-cause protection to the heads of another independent agency, the FTC, does not interfere with the President's ability to carry out his constitutional functions. *See Humphrey's Executor*, 295 U.S. at 629.

Humphrey's Executor and other decisions upholding statutes protecting executive officers' tenure reflect a broader principle: Proper

consideration of separation-of-powers challenges to statutes validly enacted by Congress and signed by the President requires recognition that "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). The Constitution establishes some bright-line rules—such as that Congress may legislate only in compliance with requirements of bicameralism and presentment, *INS v. Chadha*, 462 U.S. 919 (1983), that appointment of officers of the United States must comply with the Appointments Clause, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and that courts may adjudicate only cases and controversies, *e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968). Claims that legislation unduly restricts the general authority of one of the branches, however, require more nuanced analysis.

Under long-established Supreme Court authority, unless a statute improperly grants Congress or the judiciary a direct role in performing executive functions, "in determining whether [a statute] 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." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977); s*ee Collins*, 896 F.3d at 661–62; *PHH*, 881 F.3d at 79–80. Under this "pragmatic, flexible approach," *Nixon*, 433 U.S. at 442, the Supreme Court has held that Congress may assign executive functions to officers protected against at-will removal by the President, if Congress determines that "a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency or official." *Morrison v. Olson*, 487 U.S. 654, 691 n.30 (1988); *see*, *e.g.*, *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Executor,* 295 U.S. at 629–31 (1935). As the Court stated most recently, "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

In such circumstances, the President's ability (or that of a presidential subordinate) to remove an officer for cause provides "ample authority" for "the President to ensure the 'faithful execution' of the laws."

Morrison, 487 U.S. at 692. Thus, for-cause limitations on presidential removal authority do not "unduly trammel[] on executive authority." *Id*. at 691; *see also Free Enter. Fund*, 561 U.S. at 495. And Congress may delegate to officers removable only for cause (or agencies headed by such officers) functions including enforcement or prosecution, adjudication, rulemaking, or (as here) a combination of the three. *See*, *e.g.*, *Morrison*, 487 U.S. at 691; *Wiener*, 357 U.S. at 356; *Humphrey's Executor*, 295 U.S. at 628–29.

II. Arguments that the FHFA's structure is unconstitutional are unsupported by separation-of-powers principles.

The argument that the FHFA's single-director structure renders the statutory for-cause limitation on the President's removal authority constitutionally suspect misreads Supreme Court decisions to erect a principle that, in the absence of other mechanisms providing for greater presidential control over an agency, tenure-protected executive authority may be delegated only to multi-member commissions. Neither the Supreme Court's decisions nor this Court's make the use of a commission or single-director structure determinative. Congress's choice to vest the FHFA's leadership in a single, tenure-protected director, viewed together

with other features of the agency's structure, does not unduly circumscribe presidential authority.

A. Supreme Court precedents permit Congress to create independent single-director agencies.

Myers v. United States, 272 U.S. 52 (1926), holds that Congress cannot give *itself* a role in removing executive officers (outside the constitutional impeachment process) by requiring congressional consent to their removal by the President. As the Supreme Court long ago made clear, *Myers* does not establish a general rule that executive branch officers must be terminable at will by the President (or by an officer subject to at-will removal by the President). Rather, Congress has substantial authority to foster a degree of agency independence through tenure protection, and that authority is not limited to agencies headed by expert, multi-member boards or to inferior officers.

The Supreme Court has repeatedly rejected expansive readings of *Myers*. *Humphrey's Executor* emphasized that *Myers* is limited to forbidding congressional participation in removing executive officers. *See* 295 U.S. at 626. The Court expressly disapproved statements in *Myers* that seemed to go beyond that holding to suggest that officers cannot be protected against at-will removal by the President. *Id.*

In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Court reaffirmed *Humphrey's Executor*'s understanding of *Myers*. *Bowsher* held that executive functions cannot be delegated to an officer removable by Congress but did not accept the broader argument that executive officers must be removable at the President's will. *See id*. at 724.

In *Morrison*, the seven-Justice majority opinion, written by Chief Justice Rehnquist, again emphasized the narrowness of *Myers*'s holding. *See* 487 U.S. at 686. The Court noted that *Bowsher* had *rejected* broader readings of *Myers* as requiring unfettered presidential removal power. *See id.* at 689 n.26 ("[A]s Justice White noted in dissent in [*Bowsher*], the argument [that the President must have absolute discretion to discharge purely executive officials at will] was clearly not accepted by the Court at that time.").

The Supreme Court's decision in *Free Enterprise Fund* neither supports a broad reading of *Myers*, nor suggests that *Humphrey's Executor* and *Morrison* are no longer good law. Rather, Chief Justice Roberts's opinion in *Free Enterprise Fund* repeatedly acknowledges that Congress may limit presidential removal of officers performing executive functions. *See* 561 U.S. at 483, 493–95. *Free Enterprise Fund*'s "modest" holding is

that Congress may not impose *multiple* layers of tenure protection, by vesting power to remove an officer for cause in another officer who is removable by the President only for cause. 561 U.S. at 501.

Free Enterprise Fund emphasizes that an executive officer may be given tenure protection, as long as either the President, or an officer removable at will by the President, retains authority to remove the officer for cause. As the Court put it, "The point is not to take issue with for-cause limitations in general; *we do not do that*." *Id.* (emphasis added). Especially in light of that explicit statement, *Free Enterprise Fund* lends no support for a broad view of *Myers*. Indeed, *Free Enterprise Fund* remedied the violation it found by severing the unconstitutional second layer of tenure protection and vesting at-will removal power over officers of the Public Company Accounting Oversight Board (PCAOB) in the *tenure-protected* members of the Securities and Exchange Commission (SEC). *See id.* at 509. The Court thus acknowledged that the SEC's own exercise of significant executive authority poses no constitutional problem.

The Supreme Court's decisions not only reject a broad reading of *Myers*, but also are incompatible with the view that *Humphrey's Executor* and its progeny establish narrowly limited "exceptions" to *Myers*. In

particular, nothing in those opinions suggests their reasoning is limited to multi-member boards. To be sure, *Humphrey's Executor* and *Wiener* both mention that the officers in question served on multi-member commissions. *See Humphrey's Executor*, 295 U.S. at 624; *Wiener*, 357 U.S. at 350. And *Humphrey's Executor* referred to Congress's intent, in creating the FTC, to delegate authority to a "body of experts." 295 U.S. at 624, 625. In neither case did the Court identify the agency's multi-member structure as the *reason* its independence did not infringe executive authority. And in neither case did the Court suggest that the bipartisan composition of multi-member commissions, the ability of the President to appoint commission chairpersons, or the checks imposed on commissioners by the need to obtain concurrence from fellow commissioners were essential to the agency's constitutionality because they substituted for presidential supervision. Rather, the Court held that delegating independent authority to perform the functions assigned to the agency (subject to the President's power to remove its principal officers for cause) did not exceed Congress's power. *See Wiener*, 357 U.S. at 353–56; *Humphrey's Executor*, 295 U.S. at 628–32.

Morrison v. Olson confirms that the constitutionality of tenure protection does not depend on whether a protected officer sits on a multi-member commission. *Morrison* holds that the constitutionality of a special prosecutor's office headed by a single officer protected against at-will removal is governed by the same test applied in *Humphrey's Executor* and *Wiener*: whether the assignment of the functions at issue to an officer with a measure of independence from the President infringes the President's ability to perform his constitutional role. *See* 487 U.S at 691.

Further, to the extent that *Humphrey's Executor*, by describing the functions performed by the FTC as "quasi legislative" and "quasi judicial," 295 U.S. at 624, might leave doubt about the scope of its holding, *Morrison* explicitly holds that for-cause removal limitations are constitutional for officers performing purely "executive" functions as the Court currently uses that term. *See* 487 U.S. at 688–91. *Morrison* affirms that, even for an officer unquestionably performing executive functions, a "good cause" removal restriction leaves the President "ample authority" to "ensure the faithful execution of the laws." *Id*. at 692, 693; *see also Free Enter. Fund*, 561 U.S. at 495 (recognizing that the ability to remove an

officer for cause is the "most important[]" guarantee of the President's ability to carry out his Article II duties).

Morrison's recognition that for-cause removal adequately protects the President's authority over offices directed by single officers, moreover, is not limited to offices headed by inferior officers. Although the independent counsel's inferior-officer status was critical to *Morrison*'s holding that his court appointment satisfied the Appointments Clause, *see* 487 U.S. at 670–77, *Morrison*'s analysis of the constitutionality of limiting presidential removal authority did not turn on that point. The Court's separation-of-powers analysis mentioned that the independent counsel was an inferior officer, *see id.* at 691; *see also Collins*, 896 F.3d at 664 & n.179, but it did so as part of its explanation that the independent counsel's functions were not so important that they could not be vested in an independent officer. *Morrison* applied the same separation-of-powers standard *Humphrey's Executor* had used to determine the constitutionality of tenure protection for principal officers: whether "the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." 487 U.S. at 691; *see also Collins*, 896 F.3d at 664–65. Under *Morrison*, the issue for both inferior and principal

officers is whether "a measure of independence … interferes with the President's constitutional duty and prerogative to oversee the executive branch and take care that the laws be faithfully executed." *PHH*, 881 F.3d at 96 n.2. "The question whether a removal restriction unconstitutionally constrains presidential power thus does not track whether the shielded official is a principal or inferior officer." *Id.*

The Supreme Court's decisions cast no doubt on the continued viability of *Morrison*—a near-unanimous opinion by the then-Chief Justice. Although perceived excesses of the Whitewater Independent Counsel's Office later convinced some members of Congress that the independent-counsel statute was flawed as a *policy* matter and should therefore be allowed to lapse, *see* 28 U.S.C. § 599, those views do not reflect a consensus that *Morrison* was wrongly decided, much less that its approach to separation-of-powers issues was improper. In any event, the Supreme Court alone retains the prerogative of overruling its constitutional decisions. *See Agostini v. Felton*, 521 U.S. 203, 237 (1997). Doubts about a Supreme Court precedent's viability cannot justify disregarding its teachings.

Likewise, the Supreme Court's latest word on the subject, *Free Enterprise Fund*, offers no support for limiting *Humphrey's Executor* to multi-member commissions and repeatedly cites *Morrison* as established law. *Free Enterprise Fund*'s reiteration that Congress may delegate executive functions to tenure-protected officers nowhere suggests that Congress's power is limited to members of multi-member commissions or inferior officers. Rather, *Free Enterprise Fund* states without any such qualification that Congress may "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." 561 U.S. at 483.

B. The FHFA does not infringe on presidential authority.

In light of the principles discussed above, the degree of independence accorded the FHFA's director, in the context of the agency's other structural features, does not infringe on the President's Article II powers and responsibilities.

The authority the FHFA exercises—regulatory, enforcement, and statutorily defined conservatorship powers over two government-sponsored corporations that engage in one line of business—is, by nature, suitable for delegation to an entity with a degree of independence: The

agency does not perform "core executive functions" necessarily vested in officers who "must directly answer to the President's will"; it operates in an area where regulators "have long been permissibly afforded a degree of independence." *PHH*, 881 F.3d at 84.

Critically, the President retains the most important means of ensuring faithful execution of the laws—the ability to dismiss the FHFA's director for cause. *See Morrison*, 487 U.S. at 696. That authority is neither limited by multiple layers of tenure protection nor by any other impediments of the kind that troubled the Supreme Court in *Free Enterprise Fund*.

The removal power is buttressed by other mechanisms for holding the FHFA accountable. Unlike most independent agencies, the FHFA is subject to oversight from another body of executive officers: the Federal Housing Finance Oversight Board, which consists of four presidential appointees: the Secretaries of the Treasury and of Housing and Urban Development, the Chairperson of the Securities and Exchange Commission, and the FHFA's director. The Board meets regularly and must provide annual testimony to Congress concerning the FHFA's performance and the safety and soundness of Fannie Mae and Freddie Mac. Although the

Board does not exercise direct authority over the FHFA or its Director, its oversight and reporting provide information that facilitates the President's ability to ensure faithful execution of the laws by determining whether there is cause to remove the FHFA's Director. As in *Morrison*, the supervisory tools that supplement the removal authority "give the Executive Branch sufficient control … to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696. That the Board does not possess the still more extraordinary power that the Financial Stability Oversight Council has over the CFPB (the ability to veto certain of its regulations), *see Collins*, 896 F.3d at 669–70, does not render presidential oversight over the FHFA constitutionally insufficient: No precedent requires that an independent agency be subject to veto power by another executive branch entity.

In these circumstances, the agency's single-director structure does not tilt the balance against its constitutionality. That the agency can be held accountable through a single director may enhance rather than undermine a President's ability to control it and to influence its direction, including by appointing a successor when the director is removed or leaves office. *PHH*, 881 F.3d at 97–98. The President's recent

appointment of an acting director and the agency's consequent reversal of its position on its own constitutionality to conform with the administration's views strikingly illustrate this phenomenon. Indeed, the panel itself acknowledged that the various ways agencies can be structured have cross-cutting implications for presidential influence. *See* 896 F.3d at 660–61, 667–68. As long as Congress's choices do not prevent the President from performing his constitutional function, debates over which structural arrangement would render an agency marginally more or less responsive to presidential oversight do not render those choices impermissible.

Congress's choice of a funding mechanism that frees the agency from reliance on annual appropriations also respects presidential authority. Funding an agency outside the appropriations process is a legitimate way to protect its independence that principally affects Congress's power, not the President's. *PHH*, 881 F.3d at 96.[2] The funding mechanism does not undermine the features of the agency—the president's for-cause

[2] As the Supreme Court recognized in *Free Enterprise Fund*, the President's role in agency budget requests is more a matter of "bureaucratic minutiae" than a significant means of exercising Article II powers. 561 U.S. at 499–500; *see PHH*, 881 F.3d at 96.

removal authority, buttressed by the supervision of the Board—that ensure constitutionally sufficient presidential authority.

III. Separation-of-powers analysis does not rest on ad hoc judgments about "liberty."

The suggestion that members of multi-member agencies may be more readily protected from at-will presidential removal than individual agency heads rests in part on the view that single-director independent agencies create a greater risk of arbitrary decisionmaking and abuse of power than do multi-member boards whose actions require deliberative consensus. That critique in turn rests on a novel and unsupported approach to separation-of-powers analysis—one turning on ad hoc judgments about whether particular institutional arrangements sufficiently protect "liberty."

The Framers undoubtedly aimed to secure liberty in devising the Constitution—a point summed up in the first half of Justice Jackson's much-quoted observation: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). The Supreme Court's decisions, however, have never elevated the amorphous question of whether particular

institutional arrangements "secure liberty" into a separation-of-powers standard. For example, in *Free Enterprise Fund*, the only mention of "liberty" is one sentence repeating the generalization that the Framers saw "structural protections against abuse of power [as] critical to preserving liberty." 561 U.S. at 501 (quoting *Bowsher*, 478 U.S. at 730). Rather, the Court's separation-of-powers analysis has focused on whether branches are exercising powers expressly assigned to other branches, whether the authority of one branch has been aggrandized at the expense of another, and whether a branch has been prevented from performing constitutionally assigned functions. *See Mistretta v. United States*, 488 U.S. 361, 381–83 (1989).

For good reason, separation-of-powers analysis focuses on structural considerations rather than attempting to discern effects of particular arrangements on the ultimate goal of securing liberty. Framers of constitutions, like authors of statutes, rarely pursue any objective at all costs. *See Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). That long-recognized proposition was the point of Justice Jackson's observation in *Youngstown* that "[t]he actual art of governing under our Constitution" requires that the recognition that power is diffused to secure

liberty be tempered by the need to allow "practice [to] integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634.

A focus on "liberty" as the controlling factor is particularly inapt where claims of exclusive presidential authority are concerned, because *centralization* of executive power in the President is an exception to the Constitution's *diffusion* of power to secure liberty. Concentration of authority in the hands of a single, powerful chief executive poses potential threats to liberty, as exemplified by the presidential seizure of private property that triggered *Youngstown*. *See* 343 U.S. at 634, 655 (Jackson, J., concurring). The claim that presidential control of enforcement and prosecutorial authority enhances liberty is especially problematic. Direct presidential interference with prosecutorial decisions is generally regarded as improper, as is the threat (or reality) of removal of a prosecutor or other enforcement officer because of particular investigative, prosecutorial, or enforcement choices. *See*, *e.g.*, Driesen, *Firing U.S. Attorneys: An Essay*, 60 Admin. L. Rev. 707 (2009). Such misuse of presidential authority threatens liberty and the rule of law.

Adjudicatory and regulatory powers demanding expert judgment and adherence to statutory policies implicate similar considerations. Insulating officers who perform such functions from at-will presidential removal (but not removal for incompetence or malfeasance) *enhances* liberty by protecting the integrity with which public duties are performed. *See*, *e.g.*, *Humphrey's Executor*, 295 U.S. at 625; *Wiener*, 357 U.S. at 356.

Moreover, critiques that conflate separation-of-powers analysis with a free-ranging inquiry into the effects of an agency's powers and structure on liberty ignore substantial constraints on agency powers to infringe liberty—in particular, the constraints imposed by statutory limits on the agency's powers and the courts' ability to enforce those limits through judicial review. Although judicial review of the FHFA's actions as conservator is broadly precluded by statute, *see Collins*, 896 F.3d at 652–53, the agency's exercise of its regulatory and enforcement powers remains subject to judicial review, and, indeed, the agency must resort to the courts to enforce its orders. *See id.* at 647–48. The authority that is immune from review, moreover, involves actions of the FHFA in its capacity as conservator, in which it steps into the shoes of the institution it is operating and is not exercising inherently governmental authority. *See*

FHFA Supp. Br. 29. And even in that realm, the courts retain authority to determine whether the agency has taken ultra vires actions outside the bounds of its statutory authority. *See Roberts v. FHFA*, 889 F.3d 397, 402–06 (7th Cir. 2018).

To be sure, neither the judiciary nor the legislature can substitute itself for the President in performing functions constitutionally assigned to the executive branch. *See*, *e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 274–75 (1991); *Bowsher*, 478 U.S. at 734. When courts protect the people's liberties from arbitrary or unlawful agency action, however, they are not usurping executive power, but performing their assigned judicial function. *See*, *e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 194–96 (2012). And if separation-of-powers analysis is to be supplanted by an amorphous inquiry into threats to liberty, there is no reason not to consider checks imposed by other branches—just as the critique of single-director agencies proposes to substitute the constraint imposed by the need for agreement among multiple commissioners for the constraint imposed by presidential supervision. Judicial review is surely a more secure guarantee of liberty than the need for commissioners of the same agency to agree before acting.

Indeed, the principal way the Constitution diffuses power to secure liberty is by assigning power to each branch to check infringements of liberty by the other branches. The Framers believed that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher*, 478 U.S. at 722. Ignoring those checks makes little sense when one is inquiring whether a delegation of power threatens *liberty*, as distinct from threatening the President's performance of his assigned functions.

The mistake of confusing separation-of-powers analysis with a charter to inquire into the effects of a particular institutional arrangement on liberty is confirmed by such an inquiry's manipulable nature. Comparison of the FHFA with the single-director Office of Special Counsel and Social Security Administration illustrates the point. Whether placement of the FHFA under the control of a single director creates more or less of a threat to liberty than does the structure of those agencies is, at best, highly debatable.

The Office of Special Counsel has authority to police personnel practices by agencies and take enforcement actions against government employees—individuals with the full range of constitutional rights of U.S.

citizens. Among the rules the Office enforces are those prohibiting improper political activity by government employees and protecting employees from improper political pressures from agency superiors. Its actions have direct implications for the liberties of government workers and the public as a whole, which may be affected by political influences brought to bear on or by the civil service. *See Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

As for the Social Security Administration, although it is not a law-enforcement or financial regulatory agency, it administers the federal statutory scheme that most broadly affects all Americans: Social Security. The Administration makes decisions that affect access by tens of millions of Americans to statutory entitlements essential to their livelihoods. The agency has the potential to exert great power over the large majority of Americans who will never be affected directly by federal prosecutorial or enforcement authority.

By comparison, the FHFA's authority is restricted to two federally created entities, and the sphere of its authority is economic regulation, which affects "liberties" that receive minimal substantive protection under the due process clause. *See*, *e.g.*, *Williamson v. Lee Optical of Okla.,*

Inc., 348 U.S. 483, 488 (1955). *Procedural* due process rights for those affected by the FHFA's regulatory and enforcement powers are fully protected by the statute.

The suggestion that an agency that regulates economic matters to protect the mortgage market and the financial interests of the federal government poses a greater threat to liberty than agencies that affect individual rights in different ways reveals that insertion of a "liberty" criterion into separation-of-powers analysis is misguided. The constitutionality of these agencies does not turn on ad hoc judgments about whether the liberty interests they affect are significant enough to require three commissioners rather than one director; it depends on whether the functions they perform can permissibly be delegated to officers independent of the President (a test all three agencies satisfy under *Humphrey's Executor*, *Wiener*, and *Morrison*). Placing the FHFA, the Social Security Administration, or the Office of Special Counsel under the control of multiple commissioners might or might not be better policy, but *that* issue is for Congress to decide.

IV. Congress may innovate in structuring agencies.

That Congress has historically designed many independent agencies as multi-member commissions does not suggest that single-director independent agencies are unconstitutional. The Supreme Court's invocation of history in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), and *Free Enterprise Fund* provides no support for the argument that historical precedent condemns single-director agencies.

Noel Canning addressed specific constitutional text empowering the President to make appointments without Senate advice and consent during "the recess" of the Senate. The ambiguity of that specific term led the Court to consult "settled and established practice" as an aid in "determining the true construction of a constitutional provision the phraseology of which is … of doubtful meaning." *Id.* at 2559 (citations omitted). By contrast, arguments against single-director agencies do not invoke history to illuminate the meaning of specific constitutional language. And *Noel Canning* does not suggest that historical novelty of an institutional arrangement implies that it violates separation of powers.

Free Enterprise Fund's use of history also fails to support the challenge to the FHFA. *Free Enterprise Fund* began with application of

separation-of-powers principles: It analyzed whether the two-layer tenure protection afforded PCAOB members prevented the President from performing his assigned constitutional functions—by completely precluding him from determining whether there was cause for the removal of PCAOB members. The Court held that the two-layer protection "transform[ed]" the Board's independence and "subvert[ed] the President's ability to ensure that the laws are faithfully executed," 561 U.S. at 496, 498, unlike a single layer of for-cause removal protection, *see id.* at 495 (citing *Morrison*, 487 U.S. at 695–96).

Only after considering the statute under applicable separation-of-powers principles did *Free Enterprise Fund* turn to history—to address a *defense* of the two-layer structure based on "the past practice of Congress." *Id.* at 505. It was in that context that *Free Enterprise Fund* referred to the "lack of historical precedent" for two-layer tenure protection. *Id.* The opinion does not suggest that the Court would have condemned the agency's structure on grounds of novelty alone had it not concluded that the structure prevented the President from fulfilling constitutionally assigned functions.

The historical-precedent argument, moreover, proves too much. The independent commission was novel once, too. By most accounts, the most prominent early example was the Interstate Commerce Commission, which was created in 1887, was separated from the Interior Department in 1889, and was given significant ratemaking authority in 1906. *See* Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1128–30 (2000). Between that time and *Humphrey's Executor* in 1935, Congress created a few more agencies headed by tenure-protected commissions, most notably the Federal Reserve Board in 1913 and the FTC in 1914. *See id*. at 1116 n.14, 1132. But their constitutionality remained contested, especially after *Myers*. Between *Myers* and *Humphrey's Executor*, the few independent-commission statutes enacted by Congress did not include express tenure-protection provisions. *See Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting).

If the "historical precedent" approach were correct, *Humphrey's Executor* would have come out differently. At the time, the "novelty" of a tenure-protected multi-member commission was roughly similar to, if not greater than, that of the FHFA directorship. It had been used in a few

instances dating back less than 50 years, to a point in time already nearly a century into this country's constitutional history, and its constitutionality was contested for much of that time. Here, by comparison, analogous recent statutory grants of significant authority to single, tenure-protected officers date back 40 years, to the creation of the Office of Special Counsel and the independent-counsel statute in 1978, and a little over 20 years to the creation of a tenure-protected Social Security Administrator in 1994. Thus, the multi-member commission structure held constitutional in 1935 was comparable, in its asserted novelty, to the single-officer structure challenged today.

One difference, however, is striking: Unlike in 1935, it has now been repeatedly established by the Supreme Court for over 80 years that Congress may protect officers exercising significant executive authority against at-will removal by the President. In 1935, the very concept of tenure-protected officers was contested; now, the dispute concerns details of agency structure rather than the greater issue of independence from the President. And even the degree to which the details are contested is limited: The independent-counsel statute's constitutionality was settled 30 years ago in *Morrison*, and neither the Office of Special Counsel nor the

Social Security Administration appears ever to have faced a serious constitutional challenge.

The larger point, though, is that the degree of novelty should not be determinative. "Our constitutional principles of separated powers are not violated ... by mere anomaly or innovation." *Mistretta,* 488 U.S. at 385. Where the Constitution permits delegation of authority to an independent agency—here, authority to regulate and exercise conservatorship over government-sponsored entities that dominate the secondary market in residential mortgages—Congress's decision to do so is not unconstitutional because the agency does not conform to a "traditional" commission structure.

The "traditional" form has advantages and disadvantages. It may foster deliberation, or it may lead to agency paralysis due to internal division or lack of a quorum. Which form is preferable is a policy question for Congress. If an agency constituted in either way violates protected liberties, the courts may set aside its action. But the perceived novelty of the structure is not itself an infringement of presidential authority that violates constitutional separation-of-powers principles. If exercise of the authority delegated to a tenure-protected officer does not prevent the

President from performing his constitutionally assigned functions, there is no Article II violation.

CONCLUSION

This Court should vacate the panel's decision and affirm the judgment of the district court.

Respectfully submitted,

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January 18, 2019

CERTIFICATE OF SERVICE

I certify that on January 18, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font, and the word count, as determined by the word-count function of Microsoft Word 2016 is 6,492 excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson