18-2743(L)

18-3033(Con), 18-2860 (XAP), 18-3156 (XAP)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellant-Cross-Appellee,

PEOPLE OF THE STATE OF NEW YORK,
by Letitia James, Attorney General for the State of New York,
Plaintiff-Appellant-Cross-Appellee,

v.

RD LEGAL FUNDING, LLC; RD LEGAL FUNDING PARTNERS, LP; RD LEGAL FINANCE, LLC; and RONI DERSOVITZ,
Defendants-Appellees-Cross-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

OPENING BRIEF OF THE CONSUMER FINANCIAL PROTECTION BUREAU

Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Christopher Deal
David A. King Jr.
Counsel
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552
(202) 435-9582
christopher.deal@cfpb.gov

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INTRODUCTION

For more than 130 years, the executive branch has included independent agencies headed by individuals who may be removed by the President only for cause. In 1887, Congress established the Interstate Commerce Commission, whose commissioners, like the Director of the Consumer Financial Protection Bureau, could be removed only for inefficiency, neglect of duty, or malfeasance in office. *See* An Act to Regulate Commerce, ch. 104, § 11 (1887). Since then, Congress has provided for-cause removal protection for the heads of many other agencies. And "[i]n every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the [Supreme] Court has sustained Congress's decision, reflecting the settled role that independent agencies have historically played in our government's structure." *PHH Corp. v. CFPB*, 881 F.3d 75, 93 (D.C. Cir. 2018) (en banc).

The question in this case is whether Congress transgressed the separation of powers when it gave the Bureau's Director the same for-cause removal protection that the Supreme Court sustained for the commissioners of the Federal Trade Commission more than eighty years ago. Nearly every court to have addressed the question, including the en banc D.C. Circuit, has held that the for-cause removal provision in the

Consumer Financial Protection Act of 2010 (CFPA) is constitutional under controlling Supreme Court precedent. The district court was wrong to hold this provision unconstitutional. The district court erred further when it concluded, contrary to an express statutory severability clause, that the for-cause removal provision could not be severed from the rest of the CFPA. These errors led the district court to dismiss a Bureau enforcement action that properly alleged that the defendants engaged in substantial violations of the Federal consumer financial laws. This Court should reverse and remand.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this enforcement action pursuant to 12 U.S.C. § 5565(a)(1) and 28 U.S.C. §§ 1331 and 1345. The district court dismissed the Bureau's claims, *see* Special Appendix (SA) 1, and granted the Bureau's request for entry of final judgment against it on August 23, 2018, *see* Joint Appendix (JA) 792. The Bureau filed a notice of appeal on September 14, 2018, *see* JA 797, and, at the Bureau's request, the district court entered final judgment against the Bureau on October 29, 2018, *see* SA 122. The appeal is timely. *See* Fed. R. App. Proc. 4(a)(2) ("A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of

and after the entry."). This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. As it has done with the heads of many other agencies, Congress provided that the President can remove the Bureau's Director only for cause. Does this removal restriction, which is identical to the one that the Supreme Court approved for the Federal Trade Commission, violate the Constitution?

2. Congress specified that if "any provision" of the Act that established the Bureau "is held to be unconstitutional," the rest of the Act "shall not be affected thereby." 12 U.S.C. § 5302. If this Court holds the for-cause removal restriction in the Bureau's organic statute unconstitutional, should the Court hold that the Bureau's entire organic statute is invalid, contrary to this express severability provision?

STATEMENT OF THE CASE

The Consumer Financial Protection Bureau and the People of the State of New York, by Letitia James, Attorney General for the State of New

York,[1] filed this civil enforcement action pursuant to the CFPA in the United States District Court for the Southern District of New York (Preska, J.). The complaint alleged that the defendants engaged in deceptive and abusive acts and practices in extending credit to consumers entitled to money from compensation funds or settlements. The district court concluded that the CFPA is unconstitutional in its entirety and dismissed the enforcement action. *See* SA 1, 109, 116, 117, 119, 120, 122; *CFPB v. RD Legal Funding, LLC*, 332 F. Supp. 3d 729 (S.D.N.Y. 2018).

A. Statutory Background

The 2008 financial crisis forced millions of American families from their homes and wiped out trillions in household wealth. S. Rep. No. 111-176, at 9 (2010). "In Congress's view, the 2008 crash represented a failure of consumer protection." *PHH*, 881 F.3d at 80. At the time, seven different federal regulators—many with missions other than consumer protection—administered the Federal consumer financial laws. *See* S. Rep. No. 111-176, at 10.

[1] When this action was commenced, Eric T. Schneiderman was Attorney General for the State of New York. Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Attorney General Letitia James is automatically substituted for the former Attorney General.

To end this "fragmentation" and "thereby ensur[e] accountability," *id.* at 11, Congress enacted the CFPA as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act. The CFPA consolidated the administration of the Federal consumer financial laws in the Bureau. *Id.*; *see also* 12 U.S.C. § 5491(a). Congress directed the Bureau "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services" and that such markets "are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

When Congress created the Bureau, it drew from its experience with other financial regulators and independent agencies. As it did with the Office of the Comptroller of the Currency (OCC), Congress provided that the Bureau would have a single Director who served a five-year term. *See id.* § 2 (OCC); § 5491(c)(1) (Bureau). As it did with the leaders of the Federal Trade Commission (FTC) and the Federal Energy Regulatory Commission (FERC) (among others), Congress provided that the Bureau's Director would be removable by the President only for cause—specifically,

"inefficiency, neglect of duty, or malfeasance in office."[2] *See* 15 U.S.C. § 41 (FTC); 42 U.S.C. § 7171(b)(1) (FERC); 12 U.S.C. § 5491(c)(3) (Bureau); *see also PHH*, 881 F.3d at 91-92 (collecting other examples). And as it did with other financial regulators, such as the Federal Reserve Board (FRB), the Federal Deposit Insurance Corporation (FDIC), and the OCC, Congress chose to fund the Bureau primarily outside of the annual appropriations process. *See* 12 U.S.C. § 243 (FRB); §§ 1815(d), 1820(e) (FDIC); § 16 (OCC); § 5497 (Bureau).

Like many other financial regulators, the Bureau is authorized to write rules, *id.* § 5512, examine financial institutions, *id.* §§ 5514-5516, and bring enforcement actions, *id.* §§ 5563, 5564. The Bureau also conducts research, monitors markets, educates the public, and responds to consumer complaints. *Id.* § 5511(c). As most relevant here, Congress granted the Bureau authority, subject to certain limitations, to "commence a civil action against" "any person [who] violates a Federal consumer financial law." *Id.*

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[2] The CFPA's for-cause removal provision applied to Director Richard Cordray, who served until his resignation on November 24, 2017. This provision also applies to the Bureau's current Director, Kathleen Kraninger, who took office on December 10, 2018. This provision did not, however, apply to Acting Director Mick Mulvaney, who served as Acting Director pursuant to the Federal Vacancies Reform Act after Director Cordray's resignation. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. ___, 2017 WL 6419154 (Nov. 25, 2017).

§ 5564(a). The CFPA, which is itself one of the "Federal consumer financial laws" that the Bureau enforces, *id.* § 5481(14), makes it illegal for a "covered person … to engage in any unfair, deceptive, or abusive act or practice." *Id.* § 5536(a)(1)(B); *see also id.* § 5531(c), (d) (setting forth elements of "unfair" and "abusive" conduct). And the CFPA makes it illegal for any person "to knowingly or recklessly provide substantial assistance" to any covered person who engages in unfair, deceptive, or abusive acts or practices. *Id.* § 5536(a)(3). "Covered person[s]" under the CFPA include those who offer or provide "credit," which is "the right granted by a person to a consumer to defer payment of a debt, incur debt and defer its payment, or purchase property or services and defer payment for such purchase." *Id.* § 5481(6), (7), (15)(A)(i).

The CFPA also empowers state attorneys general and state regulators to enforce the CFPA's provisions, including the statute's prohibition on acts and practices that are unfair, deceptive, or abusive. *See id.* § 5552(a).

B. The Compensation Funds

This case arises from contracts between RD Legal Funding, LLC; RD Legal Finance, LLC; and RD Legal Funding Partners, LLP (collectively, RD) and consumers who are eligible to receive compensation from either the

September 11th Victim Compensation Fund or the NFL Concussion Settlement.

1. The September 11th Victim Compensation Fund

Congress created the September 11th Victim Compensation Fund of 2001 "to provide compensation to any individual (or relatives of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes of September 11, 2011." Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, § 403, 115 Stat. 230, 237 (2001) (codified as amended 49 U.S.C. § 40101 note). In 2011, President Obama signed into law the James Zadroga 9/11 Health and Compensation Act of 2010 (Zadroga Act), Pub. L. No. 111-347, 124 Stat. 3623 (2011). The Zadroga Act reactivated the Victim Compensation Fund for those who suffered physical harm or death as a result of the September 11th attacks, and it made those who suffered physical harm or death as a result of the subsequent debris removal eligible for compensation as well. *See* 76 Fed. Reg. 54112 (Aug. 31, 2011); H.R. Rep. No. 111-648, at 3-4 (2010).[3]

[3] In 2015, Congress again reauthorized the Fund, extended the time period for filing claims, and made other changes. *See* James Zadroga 9/11 Victim Compensation Fund Reauthorization Act, Pub. L. No. 114-113, 129 Stat. 2242 (2015); *see also* 81 Fed. Reg. 60617 (Sept. 2, 2016).

The Victim Compensation Fund is administered by a Special Master. *See* 49 U.S.C. § 40101 note (§§ 404, 405). The Special Master is authorized to make payments only to a "claimant," that is, "an individual filing a claim for compensation," who provides information concerning either "the physical harm that the claimant suffered," or, for a claim "filed on behalf of a decedent," "information confirming the decedent's death." 49 U.S.C. § 40101 note (§§ 402(5), 405(a)(1), 405(a)(2)(B), 406(a)). Claimants can assign their claims only in accordance with the Anti-Assignment Act. Under that Act, a claimant may assign "any part of a claim against the United States Government," including by granting authorization to receive payment for any part of the claim, only if the assignment is made "after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued." 31 U.S.C. § 3727.

2. The NFL Concussion Settlement

In February of 2015, Judge Brody of the Eastern District of Pennsylvania approved a settlement agreement between National Football League entities and a class of former NFL players (NFL Concussion Settlement). JA 586. The NFL Concussion Settlement resolved lawsuits alleging that former NFL players suffered mild traumatic brain injury as a result of concussive and sub-concussive impacts sustained while playing in

the NFL and that the NFL concealed and misrepresented the link between concussions and chronic brain injury. JA 589. Among other things, the Concussion Settlement created a fund to pay monetary awards to class members who receive certain medical diagnoses and then complete a claims administration process. JA 619-26.

The NFL Concussion Settlement expressly prohibits class members from assigning their claims to third parties. *See* JA 680. In response to a question referred by the district court during this litigation, Judge Brody explained that "[t]he purpose of the anti-assignment provision is to protect the interests of Class Members by recognizing that Class Members receiving monetary awards are by definition cognitively impaired," and reiterated that "under the Settlement Agreement, Class Members are prohibited from assigning or attempting to assign any monetary claims, and any such purported assignment is void, invalid and of no force and effect." JA 770-71, 773. Accordingly, "Class Members simply cannot enter into a binding agreement that assigns or attempts to assign their claims." JA 773.

C. RD Legal

As alleged in the complaint, RD offers to advance funds to consumers who are entitled to awards from settlement or compensation funds. JA 28, 31-32. Roni Dersovitz, the founder and owner of RD, "has substantial

control over and involvement in the establishment of RD's business policies and practices." JA 32. While consumers wait for payment of their awards, RD offers to advance them money in exchange for their promise to repay a considerably larger sum once they have received their awards. JA 29, 32-34. "After the fund or settlement has received final approval and the consumer has received notice of the amount of a forthcoming payment, RD enters into an agreement with the consumer that purports to take a security interest in the consumer's award." JA 32-33. As relevant here, RD transacted with consumers who have received award letters from the September 11th Victim Compensation Fund and with retired NFL players entitled to compensation from the NFL Concussion Settlement because they have been diagnosed with neurodegenerative diseases. JA 28-29, 33.

Notwithstanding the Anti-Assignment Act and the terms of the NFL Settlement, Part B *supra*, RD told consumers that these transactions were "assignments." Because such assignments are prohibited by applicable law, RD's transactions actually resulted in consumers receiving a lump sum of money in exchange for consumers' promise to directly repay a larger sum after they receive their awards. JA 33-34. In some instances, this means consumers pay the equivalent of interest rates over 250%. JA 34.

D. The Proceedings Below

The Bureau and New York filed a complaint in the Southern District of New York on February 7, 2017, jointly asserting four counts of deception and one count of abusiveness under the CFPA against RD and Roni Dersovitz (collectively, Defendants). JA 39-44. The complaint alleged that RD misled consumers about the nature of their transactions and the validity of the purported assignments of consumers' awards to RD. JA 39-40, 42-44. By telling consumers that the transactions were assignments rather than credit, RD made it difficult for consumers to understand the transactions or to compare their options. *See* JA 36, 39-41. And by telling consumers that the contracts were valid assignments, when, in fact, they were void under New York law, RD deceived consumers into thinking that these contracts created debts that could be collected lawfully. JA 38, 44. The complaint further alleged that RD claims that it "cuts through red tape" and speeds the payment of consumers' awards when, in fact, it does not do so, JA 36-37, 42, and that in some instances RD did not even deliver the funds it agreed to provide consumers by the date promised, JA 37-38, 43. For each of these counts, the Bureau and New York asserted that Roni Dersovitz knowingly or recklessly provided substantial assistance to RD. JA 40-44. (New York also asserted six state law counts.)

Defendants moved to dismiss on statutory and constitutional grounds. JA 51-52. In a June 21, 2018, Opinion and Order, the district court found that the complaint stated claims against Defendants. The court rejected Defendants' argument that RD was not subject to the CFPA. SA 60. Instead, the court concluded that the complaint properly alleged that RD's purported assignments were invalid, SA 21-45, and that—contrary to what it told consumers—RD extended credit, and was therefore a covered person subject to the CFPA. SA 45-60. The district court further concluded that each of the five counts asserted by the Bureau and New York adequately stated a claim. SA 74-90.[4]

Nonetheless, the district court dismissed the complaint. It concluded that, because the Bureau was headed by a single Director who was removable by the President only for cause, its structure was unconstitutional and it lacked authority to bring this action. SA 107. In reaching this conclusion, the district court rejected the holding of the en banc D.C. Circuit in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018). The court instead "adopt[ed] Sections I-IV of Judge Brett Kavanaugh's dissent" in that case. SA 104. The district court disagreed, however, "with Section V

[4] The court concluded that New York properly alleged that Defendants violated state law as well. SA 92-103.

of Judge Kavanaugh's opinion wherein he determined the remedy to be to invalidate and sever the for-cause removal provision and hold that the Director of the CFPB may be supervised, directed, and removed at will by the President," and instead "adopt[ed] Section II of Judge Karen LeCraft Henderson's dissent" in *PHH*, which concluded that the CFPA was invalid "in its entirety." SA 104 (quotation marks omitted).[5]

After further briefing, the court ultimately determined that because the court had concluded that the entire CFPA was invalid, "this remedy invalidates the statutory basis for [New York's] independent litigating authority under the CFPA and its CFPA claims in this case." SA 114. The

[5] Below, the Bureau argued that the court should not reach Defendants' constitutional argument. At that time, the Bureau was headed by Acting Director Mick Mulvaney. As Acting Director, Mr. Mulvaney was not subject to the challenged for-cause removal provision and was therefore removable by the President at will. Under Acting Director Mulvaney's direction, the Bureau ratified its prior decision to bring this suit. JA 780. The Bureau argued that this ratification cured any constitutional problem with the Bureau's initiation of the case at a time when its Director was removable only for cause. JA 782. The district court rejected the Bureau's argument, reasoning that, despite the ratification, the "relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." SA 106. Because the Bureau is once more led by a Director who is removable only for cause, the Bureau believes that the Court should address Defendants' constitutional claims notwithstanding the ratification of this action under Acting Director Mulvaney's leadership.

district court therefore dismissed the federal and state law[6] claims brought by New York. SA 109. The district court entered final judgment against both the Bureau and New York, and this appeal followed. SA 109, 116, 117, 119, 120, 122.

SUMMARY OF ARGUMENT

When Congress created the Bureau, it specified that the President may remove the Bureau's Director only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). In *Humphrey's Executor v. United States*, the Supreme Court unanimously upheld the constitutionality of identical for-cause removal protection for the commissioners of the Federal Trade Commission. 295 U.S. 602, 619-20, 623 (1935). The question here is whether this same "limited restriction[] on the President's removal power," *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495 (2010), is unconstitutional when applied to the Bureau's Director. Under controlling Supreme Court precedent,[7] the answer is no.

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[6] Because the court declined to exercise supplemental jurisdiction over New York's state law claims, it dismissed those claims without prejudice. SA 109.

[7] The Bureau does not take a position on whether existing Supreme Court precedent was correctly decided, or whether the President has independent authority to determine whether the Bureau's structure is constitutional.

The for-cause removal restriction in the Consumer Financial Protection Act is constitutional because it does not "impede the President's ability to perform his constitutional duty" to take care that the laws are faithfully executed. *Morrison v. Olson*, 487 U.S. 654, 691 (1988). As with other "ordinary for-cause removal restrictions" that the Supreme Court has "consistently upheld," the CFPA's removal restriction preserves for the President "'ample authority to assure' that the [Director] 'is competently performing his or her statutory responsibilities.'" *PHH*, 881 F.3d at 79, 85 (quoting *Morrison*, 487 U.S. at 692). Because the President can remove the Director for cause, he can oversee the Director and hold her accountable, thereby ensuring the faithful execution of the Federal consumer financial laws. *See Free Enterprise*, 561 U.S. at 495-96, 513-14. Congress's decision to head the Bureau with a single Director does not undermine the President's oversight. If anything, the Bureau's single-director structure enhances the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Id.* at 495-96.

That is why nearly every court to consider the question has upheld the constitutionality of the Bureau's statutory structure. The district court, however, reached the opposite conclusion. The district court was wrong.

Most significantly, the district court (through its adoption of then-Judge Kavanaugh's dissent in *PHH*) did not properly apply the controlling legal test—whether the removal restriction impedes the President's ability to perform his constitutional duty. The court concluded that the Bureau's single-director structure diminishes the President's power in comparison to "traditional" multi-member agencies because a new President has free reign to designate a member of a multi-member commission to serve as chair. But when the Supreme Court unanimously upheld for-cause protection for FTC commissioners in *Humphrey's Executor*, the President had no power to pick the chair of the FTC. The commission did. So even if the President's power to designate an agency's chair were constitutionally relevant, the FTC's structure at the time of *Humphrey's Executor* would confirm that the Bureau's structure is within constitutional bounds.

The district court (in adopting then-Judge Kavanaugh's dissent) focused instead on an alternative constitutional theory based on "history" and "liberty." Under controlling Supreme Court precedent, this analysis is beside the point. The problem is that the court's analysis depends on the faulty premise that because multi-member independent agencies are not accountable to the President, they are constitutionally permissible only because their multi-member structure serves as a substitute check to

safeguard liberty. This analysis is inconsistent with the Supreme Court's decision in *Free Enterprise*. That case makes clear both that the President can hold accountable those officials he can remove for cause and that it is the President who must bear ultimate responsibility for the conduct of executive officials.

Finally, if this Court nevertheless determines that the for-cause removal provision is unconstitutional, it should sever that provision in accordance with the statute's express severability clause. It should not hold that the entire Consumer Financial Protection Act is invalid, as the district court did. In light of the statutory severability provision, concluding that the entire Act is invalid would be permissible only if there were strong evidence that Congress would have preferred no Bureau at all to a Bureau led by an official who is removable at will. No such evidence exists. This Court should therefore remedy any constitutional problem with the for-cause removal provision by holding that provision inoperative and remanding so that the Bureau can continue to pursue this consumer protection action under a Director who is removable at will.

STANDARD OF REVIEW

This Court reviews de novo the grant of a motion to dismiss pursuant to Rule 12(b)(6). *Mantikas v. Kellogg Co.*, 910 F.3d 633, 636 (2d Cir. 2018).

ARGUMENT

I. The Bureau's Structure Is Constitutional Under Controlling Supreme Court Precedent.

As nearly every court to consider the question has held, the Bureau's statutory structure is constitutional under controlling Supreme Court precedent. The district court departed from that precedent when it held the Bureau's structure unconstitutional.[8]

A. The for-cause removal provision in the Bureau's organic statute does not impede the President's ability to perform his constitutional duties.

The test for whether restrictions on the President's removal authority violate the constitutional separation of powers is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to faithfully execute the laws. *Morrison*, 487 U.S. at 691; *see also Free Enterprise*, 561 U.S. at 496-98 (assessing impact of removal restriction on President's ability to ensure that the laws are faithfully executed). Applying this test requires considering both the nature of the removal protections themselves and the functions performed

[8] Because the district court "adopt[ed]" Sections I-IV of Judge Kavanaugh's *PHH* dissent and Section II of Judge Henderson's *PHH* dissent, this brief refers to the analysis in those Sections as the district court's analysis.

by the agency or official so protected. *See Morrison*, 487 U.S. at 690-92; *PHH*, 881 F.3d at 78.

Under controlling Supreme Court precedent, Congress does not impede the President's ability to ensure the faithful execution of the laws when it provides ordinary for-cause removal protection for the head of an agency like the Bureau. In *Humphrey's Executor*, the Court approved for-cause removal protection for FTC commissioners identical to that afforded the Bureau's Director. 295 U.S. at 619-20, 623. As *Morrison* later explained, *Humphrey's Executor* reflected the Court's "judgment" that, in light of the FTC's functions, "it was not essential to the President's proper execution of his Article II powers that [the agency] be headed up by individuals who were removable at will." 487 U.S. at 691. This is because the ability to remove an official for cause gives the President "ample authority to assure that the [official] is competently performing his or her statutory responsibilities." *Id.* at 692. In *Free Enterprise*, the Supreme Court reaffirmed that its approval of the "limited" for-cause removal restrictions in *Humphrey's Executor* and *Morrison* "preserved" the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Free Enterprise*, 561 U.S. at 495-96.

Congress gave the President the authority required to assure that the Director of the Bureau is competently performing her statutory responsibilities. The removal restriction in the Bureau's organic statute and the Bureau's functions as a regulator are not materially different from those of the FTC and similar independent agencies. As a result, under binding Supreme Court precedent, the removal restriction here does not impermissibly interfere with the President's ability to meet his Article II responsibilities.

First, the restriction on removal of the Bureau's Director is identical to the limit on the removal of FTC commissioners that the Supreme Court upheld in *Humphrey's Executor*. *Compare* 15 U.S.C. § 41 (1934) ("Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office."), *with* 12 U.S.C. § 5491(c)(3) ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."). As the Supreme Court has recognized, "[t]hese terms are very broad." *Bowsher v. Synar*, 478 U.S. 714, 729 (1986).

Unlike other removal provisions that the Court has found unconstitutional, the CFPA's removal provision gives Congress no role to play in removing the Director. *See id.* at 720 (removal required joint resolution of Congress); *Myers v. United States*, 272 U.S. 52, 107 (1926)

(removal required advice and consent of the Senate). And the Bureau's Director is separated from the President by only one layer of for-cause removal protection, unlike the "highly unusual" arrangement struck down by the Court in *Free Enterprise*, where certain officials were separated from the President by two layers of for-cause removal protection. *See Free Enterprise*, 561 U.S. at 502-03, 505. In that case, the Court held it was unconstitutional for officials charged with regulating the accounting industry to be removable only under "a sharply circumscribed definition of what constitutes 'good cause'" and only by SEC commissioners who were themselves removable by the President only for cause. The *Free Enterprise* Court declined, however, "to take issue with for-cause limitations in general," and, indeed, ordered a remedy that left in place the prevailing understanding that SEC commissioners could be removed only for cause. *Id.* at 501, 505, 508-09.

The Bureau's for-cause protection "is therefore unlike any removal restriction that the Court has ever invalidated as impermissibly restricting executive authority. In every case reviewing a congressional decision to afford an agency ordinary for-cause protection, the Court has sustained Congress's decision." *PHH*, 881 F.3d at 93.

Second, while "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," *Morrison*, 487 U.S. at 690, the Bureau's Director is not such an official, *see PHH*, 881 F.3d at 80, 84 (holding that "[w]ide margins separate the validity of an independent CFPB from any unconstitutional effort to attenuate presidential control over core executive functions," like "those entrusted to a Secretary of State or other Cabinet officer").

Rather, the Director leads a financial regulatory agency entrusted with the sort of oversight, enforcement, and regulatory duties that the Supreme Court has long recognized as appropriate for independent regulators. *See, e.g.*, *Morrison*, 487 U.S. at 692 n.31 (explaining that "various federal agencies whose officers are covered by 'good cause' removal restrictions exercise civil enforcement powers" and citing the FTC and the Consumer Product Safety Commission as examples); *id.* at 724-25 (Scalia, J., dissenting) (noting that "removal restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,'" including the FTC and the Interstate Commerce Commission, "which engage substantially" in rulemaking); *Free Enterprise*, 561 U.S. at 508-09 (holding that Public Company Accounting Oversight Board—even with its authority to conduct inspections, issue rules, and seek penalties—

could be separated from the President by a "single level of good-cause tenure").

Moreover, as the en banc D.C. Circuit explained, the Bureau's "function is remarkably similar to that of the FTC, a consumer protection agency that has operated for more than a century with the identical for-cause protection, approved by a unanimous Supreme Court." *PHH*, 881 F.3d at 94. Like the FTC, the Bureau is a regulator with a mandate to oversee numerous consumer protection laws. *Compare* 12 U.S.C. §§ 5511, 5481(14) (tasking the Bureau to implement and enforce its organic statute and rules issued thereunder as well as eighteen enumerated consumer laws, some of which the FTC also enforces), *with* 15 U.S.C. § 45 (authorizing the FTC to prevent unfair and deceptive practices in or affecting commerce), *and* FTC.gov, *Statutes Enforced or Administered by the Commission* (listing more than 70 laws the FTC plays a role in enforcing or administering), www.ftc.gov/enforcement/statutes. Like the FTC, the Bureau may define and prevent "unfair" and "deceptive" acts or practices. But the Bureau enforces the prohibition on such practices—as well as its related authority over "abusive" acts or practices—only against "covered persons" or "service providers" that engage in those practices in connection with consumer financial products and services, while the FTC exercises its

unfairness and deception authority over virtually the entire economy. *Compare* 12 U.S.C. § 5531 (Bureau), *with* 15 U.S.C. § 45 (FTC).

The FTC pursues its statutory mandate by issuing rules, 15 U.S.C. §§ 57a, 57b-3; conducting administrative enforcement proceedings, *id.* § 45(b); filing suit in federal court, *id.* § 53; seeking civil penalties, *id.* § 45(l)-(m); and gathering and publishing information about commercial practices, *id.* § 46(f). So does the Bureau. *See* 12 U.S.C. § 5512 (rulemaking), § 5563 (administrative proceedings), § 5564 (suits in federal court), § 5565(c) (civil penalties), § 5512(c) (information gathering and publication). Some provisions in the Bureau's organic statute even track the FTC Act verbatim. *Compare* 12 U.S.C. § 5562(c) (authorizing the Bureau to issue administrative subpoenas in aid of its investigations), *with* 15 U.S.C. § 57b-1 (same for FTC).

In short, the Bureau's Director is subject to the same statutory protection that Congress has traditionally granted to the heads of independent agencies and that the Supreme Court approved for the FTC in *Humphrey's Executor*. And the Bureau's functions as a financial regulator are materially similar to those of the FTC and other agencies that the Supreme Court has held may be granted limited independence without impermissibly burdening the President's Article II powers. *See Free*

Enterprise, 561 U.S. at 496; *Humphrey's Executor*, 295 U.S. at 628-29. Controlling precedent compels the conclusion that the Bureau's statutory structure is constitutional, as nearly every court to consider the question has held.[9]

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[9] In addition to the en banc D.C. Circuit's decision in *PHH*, ten decisions addressing the constitutionality of the Bureau's for-cause removal provision have upheld the provision, while only two (including the decision on appeal) have held the provision invalid. *Compare*

- *CFPB v. Think Finance, LLC*, No. 17-cv-127, 2018 WL 3707911 (D. Mont. Aug. 3, 2018) (upholding the constitutionality of the Bureau);
- *CFPB v. All American Check Cashing, Inc.*, No. 3:16-cv-356 (S.D. Miss. March 21, 2018) (same), *interlocutory appeal granted*, No. 18-60302 (5th Cir. Apr. 24, 2018);
- *CFPB v. Nationwide Biweekly Admin., Inc.*, No. 15-cv-2106, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017) (same), *appeal docketed*, No. 18-15431 (9th Cir. Mar. 15, 2018);
- *CFPB v. TCF Nat'l Bank*, No. 17-cv-00166, 2017 WL 6211033 (D. Minn. Sept. 8, 2017) (same);
- *CFPB v. Seila Law, LLC*, No. 8:17-cv-01081, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017) (same), *stayed pending appeal*, No. 17-56324 (9th Cir. Sept. 13, 2017);
- *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530 (M.D. Pa. Aug. 4, 2017) (same);
- *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017) (same), *appeal dismissed as moot*, No. 17-55721 (9th Cir. Oct. 18, 2018);
- *CFPB v. CashCall, Inc.*, No. 2:15-cv-7522, 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016) (same), *appeal docketed*, No. 18-55479 (9th Cir. Apr. 12, 2018);
- *CFPB v. ITT Educ. Servs., Inc.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015) (same); *and*

B. The Bureau's single-director structure does not impede the President's ability to perform his constitutional duties.

Congress's decision that the Bureau be headed by a single person instead of a group does not change the fact that the Director's for-cause protection is constitutional under the controlling legal test. If anything, Congress's decision to head the Bureau with a single Director rather than a commission serves to *increase* the President's "ability to execute the laws—by holding his subordinates accountable for their conduct," *Free Enterprise*, 561 U.S. at 496. As a result, the "constitutional distinction" in the district court's opinion "between the CFPB's leadership structure and that of multi-member independent agencies is untenable" under Supreme Court precedent. *PHH*, 881 F.3d at 79.

1. "Fundamentally, Congress's choice—whether an agency should be led by an individual or a group—is not constitutionally scripted and has not played any role in the Court's removal-power doctrine." *PHH*, 881 F.3d at 97. *Morrison*, for example, upheld for-cause protection for the independent

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- *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014) (same);

with

- *CFPB v. D&D Mktg.*, No. 2:15-cv-09692, 2016 WL 8849698 (C.D. Cal. Nov. 17, 2016) (Bureau's structure is unconstitutional), *interlocutory appeal granted*, No. 17-55709 (9th Cir. May 17, 2017)).

counsel, a single official with significant powers to prosecute "high-ranking Government officials for violations of federal criminal laws." 487 U.S. at 660. Nowhere did the *Morrison* Court—or even the dissent—suggest that the fact that the independent counsel's office was run by one person instead of a group had any relevance to the constitutional analysis. *See, e.g.*, *PHH*, 881 F.3d at 113 (Tatel, J., concurring) ("[T]o uphold the constitutionality of the Bureau's structure we need scarcely go further than *Morrison* itself, which approved a powerful independent entity headed by a single official and along the way expressly compared that office's 'prosecutorial powers' to the 'civil enforcement powers' long wielded by the FTC and other independent agencies." (quoting *Morrison*, 487 U.S. at 692 n.31)).[10] Nor did *Humphrey's Executor* mention the FTC's multi-member structure in assessing the constitutionality of its for-cause removal provision, or suggest that this structure mattered. 295 U.S. at 626-32. If the Court in

[10] The district court sought to distinguish the analysis in *Morrison* on the basis that the independent counsel was an "inferior officer" while the Director of the Bureau is a principal officer. *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting). But that distinction is a red herring—whether a removal restriction is constitutional turns on whether it "interferes with the President's constitutional duty and prerogative to oversee the executive branch and take care that the laws are faithfully executed" *PHH*, 881 F.3d at 96 n.2 (en banc). "The degree of removal constraint effected by a single layer of for-cause removal protection is the same whether that protection shields a principal or inferior officer." *Id.*

Humphrey's Executor—or any case after it—believed that the number of officials who lead an agency makes a difference to the constitutionality of removal limitations, the Court would surely have said so. Indeed, it would have been a natural way for *Humphrey's Executor* to distinguish the Court's earlier decision in *Myers*, which disapproved removal protection for a (single) postmaster.

The Supreme Court's analysis in *Free Enterprise* confirms that the number of officials that lead an agency is irrelevant to the constitutionality of a removal restriction. Instead, what matters is whether the President retains the ability to see that the laws are faithfully executed by holding his subordinates accountable for their conduct. *Free Enterprise*, 561 U.S. at 496. *Free Enterprise* involved removal restrictions applicable to the Public Company Accounting Oversight Board, which the Court described as "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Id.* at 508. The removal restrictions in that case shielded members of the Board from the President with two layers of for-cause removal protection. Board members could be removed only by a formal order of the SEC upon a finding of "a sharply circumscribed definition of what constitutes 'good cause,'" *PHH*, 881 F.3d at 89, and SEC commissioners, it was assumed, could be removed by the President only for

inefficiency, neglect of duty, or malfeasance in office. The Supreme Court held this arrangement unconstitutional because it "impaired" the President's "ability to execute the laws—by holding his subordinates accountable for their conduct." *Free Enterprise*, 561 U.S. at 496. With two layers of for-cause protection (as opposed to just one), the President lacked "the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee [*i.e.*, the SEC commissioners]." *Id.* "The result is a Board that is not accountable to the President, and a President who is not responsible for the Board." *Id.* at 495.

The Court solved this problem by severing one layer of for-cause protection (the one that limited the SEC's ability to remove Board members) and retaining the other (the one that limited the President's ability to remove SEC commissioners). *Id.* at 509. Although the petitioners in that case sought broader relief, the Court held that severing one of the two layers of for-cause protection was "sufficient to ensure that the reporting requirements and auditing standards to which [the petitioners] are subject w[ould] be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. The Court's remedy ensured that the SEC "would be fully responsible for what the Board does," and that the President could "hold the Commission to account for its supervision of the Board, to

the same extent that he may hold the Commission to account for everything it does." *Id.* at 495-96; *see also id.* at 509.

Because the Bureau's Director is as at least as accountable to the President as are FTC or SEC commissioners, the Bureau's single-director structure is constitutional under controlling law. In contrast to a multi-member body, where responsibility is more diffuse, "the CFPB Director's line of accountability to the President is clear and direct." *PHH*, 881 F.3d at 98. "[I]f the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn," and he need only replace a single official to change the direction of the agency rather than undertake the more difficult task of effectuating multiple for-cause removals. *Id.* "What is more, in choosing a replacement, the President is unhampered by partisan balance or *ex-officio* requirements; the successor replaces the agency's leadership wholesale." *Id.* at 93.

2. The district court, through its adoption of Parts I-IV of then-Judge Kavanaugh's dissent in *PHH*, nevertheless concluded that the Bureau's single-director structure "diminishes the President's power to influence the direction of the CFPB, as compared to the President's power to influence the direction of traditional multi-member agencies." *PHH*, 881 F.3d at 188

(Kavanaugh, J., dissenting).[11] According to the district court, this is because at "traditional multi-member agencies, the President may designate the chair of the agency, and the President may remove a chair at will from the chair position." *Id.* This argument is mistaken.

The Supreme Court has never suggested that the "existence, strength, or particular term of agency chairs" is "relevant to the constitutionality of an independent agency." *PHH*, 881 F.3d at 100 (en banc). When the Supreme Court unanimously upheld for-cause removal protection for FTC commissioners, the *Commission*, not the President, chose the agency's chair. *See Humphrey's Executor*, 295 U.S. at 620 ("The commission shall choose a chairman from its own membership" (quoting 15 U.S.C. § 41 (1934)). Congress did not give the President power to designate the FTC's chair until 1950. *See* Reorg. Plan No. 8 of 1950, § 3, 64 Stat. 1264, 1265. So the power to designate and remove chairs at will cannot support the district court's conclusion that the for-cause removal restriction that applies to the

[11] The district court did not (and could not) conclude that giving the Bureau's Director for-cause removal protection makes the Director less *accountable* to the President than the leaders of multi-member agencies like the FTC, SEC, or Federal Reserve Board. As explained above, the touchstone of the Supreme Court's removal precedent is the President's power to oversee officials and hold them to account for their conduct in executing the laws, not the President's power to attempt to "influence" the agency's direction through appointments.

Bureau's Director diminishes the President's power any more than the identical restriction the Supreme Court approved for FTC commissioners in *Humphrey's Executor*.

The district court's chair theory not only conflicts with *Humphrey's Executor*, but also with longstanding practice. Congress has restricted the President's ability to designate the chair at other independent agencies, such as the Federal Reserve Board, 12 U.S.C. § 242 (chair serves a fixed four-year term and may be selected only with the advice and consent of the Senate), and the Federal Election Commission, 52 U.S.C. § 30106(a)(5) (chair rotates among members annually, without formal presidential input), among others.[12]

The district court's reference to the staggered terms at multi-member agencies fares no better. *See PHH*, 881 F.3d at 190 (Kavanaugh, J., dissenting). While it is true that, because the Director is appointed to a five-year term, a Director appointed by one president might serve through the term of another, "[n]one of the leaders of independent financial-regulatory

[12] The President's power to designate the chair is similarly restricted at the National Mediation Board, 45 U.S.C. § 154 (chair designated annually by the Board), and the United States Postal Service Board of Governors, 39 U.S.C. § 202(a)(1) (chair elected by the Governors). And while the President currently has the power to designate the chair of the SEC, the President did not have power until 1950. *See* 15 U.S.C. § 78d note.

agencies serves a term that perfectly coincides with that of the President, and many have longer terms than the CFPB Director." *PHH*, 881 F.3d at 99 (en banc). Indeed, because the five FTC commissioners serve staggered terms of seven years, 15 U.S.C. § 41, the President is more likely to have an opportunity to appoint the Bureau's Director in a single term than he is to appoint a controlling majority of the FTC, *see CFPB v. Navient*, 2017 WL 3380530, at *17 (80% of the time the President will have an opportunity to appoint the Bureau's Director, but only 57% of the time will the President be guaranteed an opportunity to appoint a controlling majority of the FTC). And because the seven members of the Federal Reserve Board serve staggered fourteen-year terms, 12 U.S.C. § 242, the President will *never* have the chance to appoint a majority in a single term if Board members serve their full terms in office.[13]

[13] The district court also suggested that "Congress's ability to check the CFPB is less than its ability to check traditional independent agencies," because the Bureau is not funded through the annual appropriations process. *PHH*, 881 F.3d at 197 n.19 (Kavanaugh, J., dissenting). But Congress is not required to fund agencies through that process. *See PHH*, 881 F.3d at 95-96 (en banc). And, in fact, Congress has long funded financial regulators, including some "traditional" independent agencies, outside the annual appropriations process. *See, e.g.*, 12 U.S.C. § 243 (Federal Reserve Board); §§ 1815(d), 1820(e) (FDIC). Because Congress authorized the Bureau's funding by law, and can change that funding at any time by enacting a new law, the Bureau's funding does not present a constitutional concern.

C. The district court's analysis of history and liberty conflicts with Supreme Court precedent.

The district court, through its adoption of Parts I-IV of then-Judge Kavanaugh's dissent, held in the alternative that even if the for-cause removal provision satisfied the test for removal provisions that the Supreme Court set forth in *Morrison* and *Free Enterprise*, the provision would still be unconstitutional because Congress lacks "permission to create independent agencies that depart from history and threaten individual liberty." *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting). But under binding Supreme Court precedent, there is no alternative constitutional test for removal provisions. So this Court need not address the district court's alternative assessment of history and liberty. *PHH*, 881 F.3d at 105-06 (en banc) ("Once the Supreme Court is satisfied that a removal restriction leaves the President adequate control of the executive branch's functions, the Court does not separately attempt to re-measure the provision's potential effect on liberty or any other separation-of-powers objective.").

In any event, as the en banc D.C. Circuit explained, the district court's history and liberty theory "lacks grounding in precedent or principle." *PHH*, 881 F.3d at 108. According to the district court, independent agencies "historically have been headed by *multiple* commissioners or board

members," which "mitigate[s] the risk to individual liberty." *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). The district court posited that even though independent agencies are "not accountable to or checked by the President," they are constitutional so long as there are multiple members who are "accountable to and checked by" one another. *Id.*

This Court should reject the district court's alternative constitutional theory. First, the district court's theory that members of a commission provide a "substitute check" in the place of Presidential oversight is inconsistent with the Supreme Court's decisions in *Free Enterprise* and *Morrison*. Those cases make clear that the *President* is ultimately responsible for overseeing the faithful execution of the laws, and that the power to remove an official for cause (either directly or through subordinates he can remove at will) preserves the President's ability to meet that responsibility. *Free Enterprise*, 561 U.S. at 495-97; *Morrison*, 487 U.S. at 692. Second, the history cited by the district court is entirely consistent with the Supreme Court's existing removal case law; it provides no basis for this Court to develop an alternative constitutional test to assess the familiar for-cause removal protection that Congress gave the Bureau's Director.

1. Liberty

Under the theory the district court adopted: (1) for-cause removal protection prevents the President from controlling independent agencies; (2) a multi-member structure "serves as a critical substitute check on the excesses of any individual independent agency head"; and (3) because the Bureau's powers are vested in a single Director rather than in a multi-member commission, it lacks a "substitute check," which threatens individual liberty. *PHH*, 881 F.3d at 183 (Kavanaugh, J., dissenting); *see also id.* at 166. The district court is mistaken on all three fronts. *See PHH*, 881 F.3d at 80 (en banc) ("The relevance of 'internal checks' as a substitute for at-will removal by the President is no part of the removal-power doctrine, which focuses on executive control and accountability to the public, not the competing virtues of various internal agency design choices.").

First, as discussed above, *Humphrey's Executor*, *Morrison*, and *Free Enterprise* establish that the power to remove officials for cause provides the President ample authority to control independent agencies.

Second, if the President's power to remove an official for cause did not give the President sufficient authority to control independent agencies, no "substitute check" could cure that constitutional problem. The

Constitution charges the *President*, not the members of a multi-member agency, with the duty to take care that the laws be faithfully executed. And the Constitution makes the *President*, not the members of a multi-member agency, accountable to the people. *See Free Enterprise*, 561 U.S. at 497-98 ("The people do not vote for the 'Officers of the United States.'" (quoting U.S. Const. Art. II, § 2, cl. 2)). So when it comes to supervising executive officers in our system of separated powers, "[o]nly Presidential oversight" suffices. *Id.* at 500.

Third, that the Bureau lacks a multi-member structure (and the "substitute check" that such a structure ostensibly provides) does not threaten individual liberty under the separation of powers. If anything, the Bureau's single-director structure enhances the President's ability to oversee the Bureau's Director and hold her accountable. Because it subjects the Director's exercise of "executive power" to "the Executive's oversight," the CFPA's removal provision preserves both "the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 498. Under the Constitution, it is this "structural protection[] against abuse of power" that "preserv[es] liberty"—not the alleged benefits derived from group decision-making by "*unelected* officials." *Id.* at 500, 501 (quotation marks omitted).

Nor does the exercise of "unilateral" power by the Bureau's Director, pose a threat to liberty. *See, e.g.*, *PHH*, 881 F.3d at 165-66, 171-72, 188 (Kavanaugh, J., dissenting). According to the district court, the Director has more "unilateral" power than any government official save the President. *See id.* at 166, 171-72. This claim rests on an assessment that the President cannot "check" the Bureau's Director, but controlling Supreme Court precedent makes clear that the President's power to remove the Director for cause gives the President "ample authority" to oversee the Director's exercise of her statutory responsibilities and to hold her accountable. *Morrison*, 487 U.S. at 692; *see also Free Enterprise*, 561 U.S. at 508-09, 513 (holding one level of for-cause protection left agency "accountable to the Executive"). In other words, controlling precedent establishes that the President's for-cause removal power gives him a constitutionally sufficient check over the Bureau's Director. As a result, the concentration of power in the Bureau's Director only makes her more accountable to the President than would be the case for a multi-member commission. *See Free Enterprise*, 561 U.S. at 497 ("The diffusion of power carries with it a diffusion of accountability.").

2. History

The district court contended—in reliance on *Free Enterprise*'s similar assessment of the Public Company Accounting Oversight Board—that "[p]erhaps the most telling indication of a severe constitutional problem with the CFPB is the lack of historical precedent for this entity." *PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting); *see also id.* at 183. But *Free Enterprise* does not support the creation of an alternative constitutional test to account for the Bureau's alleged novelty. Indeed, *Free Enterprise* discussed the lack of historical precedent for an agency led by officials protected by two layers of for-cause removal restrictions only in response to the government's argument that the removal protections at issue in that case were in fact consistent with "the past practice of Congress," 561 U.S. at 505, and only after applying the legal test set out in *Morrison*. *Free Enterprise* confirms that the separation of powers test that *Morrison* announced (and *Free Enterprise* applied) controls here—not any general rule against novelty.

And the Bureau's single-director structure is not even particularly anomalous. There are currently at least three other federal agencies led by such officials: the Office of Special Counsel (since 1978), 5 U.S.C. § 1211; the Social Security Administration (since 1994), 42 U.S.C. § 902(a); and the

Federal Housing Finance Agency (since 2008), 12 U.S.C. § 4512.[14] These agencies "perform important and far-reaching functions that are ordinarily characterized as executive." *PHH*, 881 F.3d at 104 (en banc). Most notably, "[t]he Social Security Administration runs one of the largest programs in the federal government … handling millions of claims and trillions of dollars." *Id.* at 104-05. And contrary to the suggestion that the Social Security Administration's function of administering the Social Security Act is outside "the core of the executive power," *see PHH*, 881 F.3d at 174-75 (Kavanaugh, J., dissenting), the Supreme Court has made clear that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law," *Bowsher*, 478 U.S. at 733.

In any event, that Congress has often chosen to create independent agencies with multiple members does not prove that those are the only kinds of independent agencies Congress may establish. This is because

[14] In addition, for more than 150 years the Office of the Comptroller of the Currency has been led by a single official with a fixed term of office who is removable only if the President sends the Senate "reasons" for removing him. 12 U.S.C. § 2. The OCC is classified as an "independent regulatory agency" under 44 U.S.C. § 3502(5) and while it is a part of the Treasury Department, the Secretary of the Treasury is prohibited from interfering with certain OCC functions, 12 U.S.C. § 1. *See also PHH*, 881 F.3d at 91-92 (analyzing the OCC).

"[o]ur constitutional principles of separated powers are not violated … by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989); *accord PHH*, 881 F.3d at 103 ("Other constitutional principles beyond novelty must establish why a specific regime is problematic."). Indeed, in both *Humphrey's Executor* and *Morrison*, the Court upheld then-novel forms of removal restriction that it had not previously considered.

Moreover, contrary to the district court's suggestion, the constitutional holding in *Humphrey's Executor* was not implicitly based on Congress's intention for the FTC to be "nonpartisan" and "to exercise the trained judgment of a body of experts appointed by law and informed by experience." *PHH*, 881 F.3d at 170 (Kavanaugh, J., dissenting); *see also id.* at 194 ("*Humphrey's Executor* drew (at least implicitly) the same distinction between multi-member agencies and single-Director agencies that I am drawing in this case."). The district court's assessment leaves out that the Court made its observations about the FTC as a "body of experts" only in its *statutory* analysis, which asked whether the removal provision of the FTC Act—a provision that had not previously been interpreted—was intended "to limit the executive power of removal to the causes enumerated [therein]." *Humphrey's Executor*, 295 U.S. at 624, 626.

The *Humphrey's Executor* Court did not rely on the FTC's multi-member structure at all in its constitutional analysis. *Id.* at 626-31; *see also PHH*, 881 F.3d at 98-99. Instead, the Court's constitutional analysis focused on the FTC's functions and responsibilities, not the number of officers charged with leading the agency. While the Court in *Humphrey's Executor* did refer to the FTC as an "administrative body" in its constitutional analysis, the Court's use of that term provides no support for the district court's theory that the Court was implicitly endorsing a constitutional distinction based on whether an agency is led by one as opposed to multiple officers. For instance, in another case decided the same year as *Humphrey's Executor*, the Supreme Court repeatedly referred to the Oregon Department of Agriculture as an "administrative body" even though it was led by a single "Director of Agriculture." *Pac. States Box & Basket Co. v. White*, 296 U.S. 176, 178, 182, 185-86 (1935); *see also Gray v. Powell*, 314 U.S. 402, 404, 412 (1941) (referring to the single-director Bituminous Coal Division within the Department of Interior as an "administrative body").

II. Any Constitutional Defect with the For-Cause Removal Provision Would Be Remedied by Severance and Remand.

If this Court concludes that the for-cause removal provision is unconstitutional, it should sever that provision, consistent with the Dodd-

Frank Act's severability provision and the Supreme Court's decision in *Free Enterprise*. The Court should then remand this action to the district court to permit the Bureau to continue this action under the leadership of a Director who is removable by the President at will.

1. As the Supreme Court explained in *Free Enterprise*, "[b]ecause the unconstitutionality of a part of an Act does not necessarily defeat or affect the validity of its remaining provisions, the normal rule is that partial, rather than facial, invalidation is the required course." 561 U.S. at 508 (citations, quotation marks, and alterations omitted). In *Free Enterprise*, the Supreme Court applied this rule to reject a request to enjoin the continued operations of the Public Company Accounting Oversight Board. The Court reasoned that although the statutory removal restrictions were unconstitutional, "the existence of the Board does not violate the separation of powers." *Id.* at 508-09. So the Court "limit[ed] the solution to the problem," and held the removal restrictions were invalid but left the rest of the Board's organic statute intact. *See id.* at 508-09, 513 (quotation marks omitted).

This principle of restraint applies with even greater force in this case. Unlike the statute in *Free Enterprise,* Congress expressly provided in the Dodd-Frank Act (of which the CFPA is one part) that "if any provision of

this Act … is held to be unconstitutional," the rest of the Act "shall not be affected thereby." 12 U.S.C. § 5302. Congress's decision to include this severability clause "creates a presumption that Congress did not intend the validity of the statute … to depend on the validity of the constitutionally offensive provision." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). To overcome this presumption, there must be "strong evidence" that Congress would have preferred no Bureau at all to a Bureau led by an official who is removable at will.[15] *See id.*

There is no evidence, let alone strong evidence, that Congress would have preferred that the Bureau, let alone the CFPA as a whole, not exist. *See PHH*, 881 F.3d at 198-200 (Kavanaugh, J., dissenting) (opining that "the Supreme Court's case law requires us to impose the narrower remedy of simply severing the for-cause removal provision"). Instead, the legislative record makes plain that invalidating the entire CFPA would not vindicate Congress's intent, but defeat it. Congress's primary goal in creating the Bureau was to consolidate the administration and enforcement of Federal consumer financial law in a single agency with a dedicated consumer

[15] Although the district court doubted that the CFPA's severability clause means what it says, the court appears to have conceded that the clause created a presumption of severability that can only be rebutted by strong evidence. *See PHH*, 881 F.3d at 163 (Henderson, J., dissenting).

protection mission. *See* 12 U.S.C. §§ 5491(a), 5511(a)-(b); S. Rep. No. 111-176, at 10-11. Before the Bureau was created, the administration of those laws was spread among seven different federal regulators—many with the mission of ensuring the safety and soundness of regulated institutions, a mission that potentially conflicts with the goals of the Federal consumer financial laws. *See* S. Rep. No. 111-176, at 10. This meant that different actors in the same consumer financial marketplace were subject to differing levels of oversight and accountability. Many in Congress believed that this system of "conflicting regulatory missions, fragmentation, and regulatory arbitrage" had catastrophic consequences: It "helped bring the financial system down." *Id.* at 10, 166.

In response, Congress created the Bureau as a stand-alone agency to focus exclusively on consumer protection. Congress directed the Bureau to use its consolidated authority to enforce the law "consistently" across the consumer financial marketplace so that consumers have access to markets that are fair, transparent, and competitive. 12 U.S.C. § 5511(a), (b)(3). The CFPA also gave the Bureau new powers to supervise nonbanks, to stop abusive acts and practices, and to issue rules governing mortgages and debt collection (among other topics). *See, e.g.*, 12 U.S.C. § 5514 (nonbank

supervision), § 5531 (abusive practices); 15 U.S.C. § 1604 (integrated mortgage disclosure rule), § 1692*l*(d) (debt collection rules).

Congress delegated these powers to the Bureau without regard to whether the Bureau was headed by a Senate-confirmed Director removable only for cause, an Acting Director removable at will, or a Senate-confirmed Director who has held over past the end of her term under 12 U.S.C. § 5491(c)(2), and is therefore removable at will, *see Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996) (concluding that holdover members of the Board of the National Credit Union Administration would not have removal protection, even if they would have such protection during their terms).

Nevertheless, the district court, through its adoption of Part II of Judge Henderson's *PHH* dissent, held that the for-cause removal provision could not be severed from the rest of the CFPA. The district court speculated that the CFPA would have been too "controversial" to pass the 111th Congress if the Bureau's Director could be removed by the President at will. *PHH*, 881 F.3d at 163 (Henderson, J., dissenting).

As evidence for this contention, the district court relied first on the fact that at the beginning of the CFPA, Congress "established" the Bureau as "an independent bureau." *Id.* at 161 (quoting 12 U.S.C. § 5491(a)). According to the district court, because independent agencies are

commonly understood as ones run by principal officers who are removable only for cause, "section 5491(a) ties the CFPB's very existence to its freedom from the President" and therefore presents "powerful evidence the Congress opposed the idea of a CFPB answerable to him." *Id.*

But section 5491(a) says nothing about for-cause removal. Instead, it "establishe[s] in the Federal Reserve System, an independent bureau … which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws." 12 U.S.C. § 5491(a). In this context, Congress's reference to the Bureau as an "independent bureau" is better understood as describing the Bureau's place within the Federal Reserve System, and not as an overarching statement about for-cause removal.[16] At a minimum, this is not "strong evidence" sufficient to overcome the statute's express severability clause.

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[16] For instance, this Court and others have referred to the IRS's Office of Appeals as an "independent bureau of the IRS," *Larson v. United States*, 888 F.3d 578, 586 (2d Cir. 2018) (quoting *Our Country Home Enters., Inc. v. Comm'r of Internal Revenue*, 855 F.3d 773, 789 (7th Cir. 2017)), in recognition of the "measure of independence between Appeals and other arms of the IRS," *Tucker v. Comm'r of Internal Revenue*, 676 F.3d 1129, 1131 (D.C. Cir. 2012). And courts have often referred to the OCC—whose head the district court elsewhere concluded did not have for-cause protection, *see PHH*, 881 F.3d at 177 n.4 (Kavanaugh, J., dissenting)—as an independent bureau in the Treasury Department, *see, e.g.*, *In re Beach First Nat'l Bancshares, Inc.*, 702 F.3d 772, 775 n.1 (4th Cir. 2012) ("OCC is

What is more, section 5491(c)(3) specifies that the President can remove the Bureau's Director only for cause, but does not grant such protection to an Acting Director or to a Director who holds over after the expiration of her term. So section 5491 as a whole contradicts the district court's conclusion that Congress tied the Bureau's "very existence" to the application of the for-cause provision.

The district court likewise erred in relying on evidence that, at most, showed that Congress wanted the Bureau's Director to have for-cause removal protection. For instance, the district court pointed to evidence that the CFPA's supporters believed that protecting the Bureau's Director from at-will removal was a valuable feature of the statute. *PHH*, 881 F.3d at 162. There is no dispute that Congress wanted the Bureau's Director to have for-cause protection—that's why Congress included a for-cause removal provision. The real question is whether there is strong evidence that Congress would rather have the Bureau not exist than have it led by a

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an independent bureau of the U.S. Department of the Treasury ...."); *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. FDIC*, 132 F. Supp. 3d 98, 106 (D.D.C. 2015) ("Defendant OCC is an independent Bureau within the U.S. Department of the Treasury ...."). Congress likewise established the Office of Personnel Management and Peace Corps as "independent" establishments without giving their Directors for-cause removal protection. 5 U.S.C. § 1101 (OPM); 22 U.S.C. § 2501-1 (Peace Corps).

Director who is removable at will. And on that score, even the legislative history that the district court cited shows that the CFPA's supporters were focused less on establishing for-cause removal protection for the Director (after all, many of the existing consumer financial regulators were independent in this sense),[17] and more on ensuring that the Bureau would be independent from other institutional missions besides consumer protection.[18] Similarly, the district court emphasized that the CFPA's "strongest backers" had filed briefs in *PHH* highlighting the importance of

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[17] The district court thought that because independent agencies had previously exercised some of the Bureau's authorities, Congress would have opposed severance of the for-cause removal provision on the grounds that severance "would by judicial decree transfer to the executive branch" powers previously exercised by independent agencies. *PHH*, 881 F.3d at 161-62 (Henderson, J., dissenting). The district court did not explain, however, why Congress would have preferred that the court invalidate the entire CFPA by "judicial decree" rather than simply sever the for-cause removal provision.

[18] *See, e.g.*, 156 Cong. Rec. H5239 (Rep. Maloney) (explaining Bureau would have "an independently appointed director, an independent budget, and an autonomous rulemaking authority"—which would mean consumers "will have a Federal agency on their side to protect them"—in contrast to the prior regime, where "any concerns about consumer protection came in a distant second or a third"); *id.* at S3187 (Sen. Kaufman) ("Most importantly, the head of this agency must not be subject to the authority of any regulator responsible for the 'safety and soundness' of the financial institutions."); *id.* at S7481 (Sen. Dodd) ("[B]y setting up this agency in the Federal Reserve, we are giving them independent rulemaking authority, appointed by the President, confirmed by the Senate … so we don't end up with a conflict between … safety and soundness … and the consumer protection issues.").

for-cause removal protection to the Bureau's achievement of its statutory mission. *PHH*, 881 F.3d at 162 (Henderson, J., dissenting). But these briefs, filed by consumer groups, current and former members of Congress (including Senator Warren, former Senator Dodd, and former Congressman Frank), and separation-of-powers scholars argued that for-cause protection is constitutional; they did not argue that they would have preferred no Bureau to one led by a Director who is removable at will. Indeed, the members of Congress emphasized in their brief that "the creation of the CFPB" as an "agency with the sole responsibility of protecting consumers from harmful practices of the financial services industry" was "[c]ritical to the Act's legislative plan." Brief Amici Curiae of Current and Former Members of Congress in Support of Respondent at 12, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (No. 15-1177), 2017 WL 1196117.[19]

Moreover, the district court's speculation that Congress would not have passed the CFPA without for-cause removal protection for the

[19] In any event, statements made by the CFPA's supporters (many of whom are not even members of Congress) years after the law was enacted provide limited insight into the intent of the Congress that enacted the CFPA. *See Graham Cty. Soil & Water Conservation Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 298 (2010) (determining that post-enactment letter by statute's primary sponsors "does not qualify as legislative 'history'" and was "consequently of scant or no value" in interpreting statutory provision).

Bureau's Director is belied by the fact that the CFPA does more than just create the Bureau. The CFPA also empowers states to enforce its provisions, 12 U.S.C. § 5552(a), as happened in this case. The district court gave no reason to think that if the Bureau's Director were removable at will, Congress would not have wanted state enforcement of the CFPA. So too with respect to the many provisions of the CFPA that only concern other federal regulators. *See, e.g.*, Pub. L. No. 111-203, § 1044 (codified at 12 U.S.C. § 25b) (setting standards for OCC preemption determinations); *id.* § 1075 (codified at 15 U.S.C. § 1693*o*-2) (authorizing FRB to issue rules concerning interchange fees for debit card transactions); *id.* § 1079A(b) (codified at 18 U.S.C. § 3301) (extending statute of limitations for securities fraud offenses).

In sum, the district court failed to identify evidence, let alone strong evidence, that Congress would have preferred that there be no Bureau (and no CFPA more broadly) than have the Bureau led by a Director who is removable at will. If this Court finds a constitutional problem with the CFPA, the proper course would be to "invalidate the smallest possible portion of the statute," not to hold that the entire statute is invalid. *Velazquez v. Legal Servs. Corp.*, 164 F.3d 757, 772-73 (2d Cir. 1999), *aff'd on other grounds*, 531 U.S. 533 (2001); *see also Red Earth LLC v. United*

States, 657 F.3d 138, 145 (2d Cir. 2011) ("The Supreme Court has instructed courts to refrain from invalidating more of the statute than is necessary." (quotation marks omitted)). So if the for-cause removal provision is unconstitutional, this Court should follow the CFPA's express severability provision and sever that provision.[20]

2. With the for-cause removal provision severed, the Bureau would continue to administer and enforce the consumer laws. *See PHH*, 881 F.3d at 199-200 (Kavanaugh, J., dissenting); *see also Free Enterprise*, 561 U.S. at 508-09, 513. Therefore, if this Court concludes that the removal provision is unconstitutional, it should declare that provision inoperative and remand this case to the district court to permit a reconstituted Bureau to continue to pursue this action. *Cf. Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (remanding for a "new 'hearing before a properly appointed' official"

[20] Depending on the nature of any constitutional flaw that the Court identifies with the for-cause removal provision, the Court may apply a narrower remedy still. For instance, if the Court found the for-cause removal provision unconstitutional on the theory that it limits a new President's influence over a Director appointed by a prior President, *see, e.g.*, *PHH*, 881 F.3d at 166-67, 192-93 (Kavanaugh, J., dissenting), the Court should, consistent with the severability clause, find this application of the for-cause removal provision unconstitutional "while leaving other applications in force." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006); *accord* 12 U.S.C. § 5302 (providing that if any "application" of the Act's provisions "to any person or circumstance is held to be unconstitutional, the remainder of this Act … and the application of the provisions of such to any person or circumstance shall not be affected").

(quoting *Ryder v. United States*, 515 U.S. 177, 188 (1995))); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996) (holding that ratification by a reconstituted agency cured constitutional defect resulting from agency's initiation of enforcement action when it was improperly constituted). Remand would be particularly appropriate because the Bureau's complaint has already been approved under the direction of an official (Acting Director Mulvaney) who was removable by the President at will. *See* JA 780.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court's dismissal of the Bureau's complaint and remand this action to the district court for further proceedings.

Respectfully submitted,

/s/ Christopher Deal
Mary McLeod
General Counsel
John R. Coleman
Deputy General Counsel
Steven Y. Bressler
Assistant General Counsel
Christopher Deal
David A. King Jr.
Counsel
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552
(202) 435-9582 (telephone)
(202) 435-7024 (facsimile)
christopher.deal@cfpb.gov

Counsel for
Plaintiff-Appellant-Cross-Appellee
Consumer Financial Protection Bureau

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,895 words, excluding exempt material, according to the count of Microsoft Word.

/s/ Christopher Deal
Christopher Deal
Counsel for Plaintiff-Appellant-Cross-Appellee Consumer Financial Protection Bureau

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Christopher Deal
Christopher Deal
Counsel for Plaintiff-Appellant-Cross-Appellee Consumer Financial Protection Bureau