

SCHEDULED FOR ORAL ARGUMENT ON MAY 24, 2017

No. 15-1177

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

PHH CORPORATION; PHH MORTGAGE CORPORATION; PHH HOME LOANS, LLC;
ATRIUM INSURANCE CORPORATION; and ATRIUM REINSURANCE CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

*On Petition for Review of an Order
of the Consumer Financial Protection Bureau*

**BRIEF FOR THE STATES OF MISSOURI, ALABAMA, ARIZONA, ARKANSAS,
GEORGIA, IDAHO, INDIANA, KANSAS, LOUISIANA, NEVADA, OKLAHOMA,
SOUTH DAKOTA, TEXAS, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and *Amici*. The parties that appeared before the Consumer Financial Protection Bureau (“CFPB”) were PHH Corporation; PHH Mortgage Corporation; PHH Home Loans, LLC; Atrium Insurance Corporation; and Atrium Reinsurance Corporation. Those entities are Petitioners before this Court. The CFPB is a Respondent before this Court.

The States of Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Nevada, Oklahoma, South Dakota, Texas, West Virginia, and Wisconsin appear before this Court as *amici curiae* in support of Petitioners.

(B) Rulings Under Review. References to the rulings at issue appear in the Brief for Petitioners.

(C) Related Cases. This case was previously before a panel of this Court. Counsel for *amici curiae* are not aware of any other related cases pending in any other court.

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INTEREST OF *AMICI CURIAE*

Amici curiae include the States of Missouri, Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Nevada, Oklahoma, South Dakota, Texas, West Virginia, and Wisconsin.¹ *Amici* have a strong interest in preserving the federal system created by the Constitution and their role as separate sovereigns within that system. The division of power within the federal system exists not only to protect the sovereignty and authority of *amici*, but also to secure individual liberty and the opportunity for citizens to participate actively in governance. As described herein, the separation of powers within the Federal Government plays an essential role in preserving the federal system and *amici*'s role within that system. The Consumer Financial Protection Bureau's novel governance structure violates the separation of powers in ways that directly threaten critical federalism interests. Thus, *amici* have a strong interest in the outcome of this appeal.

¹ Under Fed. R. App. P. 29(a)(2) and because all *amici* are States, *amici* can file this brief without the consent of the parties. Nonetheless, *amici* has sought and received consent from all parties.

SUMMARY OF ARGUMENT

The division of sovereign power between the federal government and the States plays a central role in the Constitution’s charter for responsive, accountable, and limited government. The Constitution preserves the role of the States within the federal system through two mutually reinforcing mechanisms. First, the Constitution directly restricts the federal government’s ability to pre-empt state authority by explicitly delimiting the outer bounds of federal action. *See, e.g.*, U.S. CONST. art. I, § 8; U.S. CONST. amend. X. Second, the Constitution curbs federal action indirectly through the separation of powers between the coordinate branches of the federal government. This “horizontal” separation of powers among the branches of the federal government—including Article II’s vesting of executive power in the President of the United States—provides a structural check against the aggregation of power at the federal level, and thus it preserves the “vertical” division of power between the federal government and the States by protecting traditional state prerogatives from federal encroachment. Both divisions of power play a critical role in preserving the individual liberty of citizens.

The horizontal separation of powers protects the role of the States within the federal system in at least two primary ways. First, the separation of powers limits the range of permissible federal action, which in turn reduces the circumstances in which federal actors can preempt or displace the authority of state actors.

Moreover, federal actors ordinarily can displace state law only after completing political or deliberative processes that include opportunities for careful consideration of federalism interests. Second, the separation of powers ensures that federal power can be wielded only by officials who are politically accountable—either directly or indirectly—to state interests. This political accountability increases the incentive for federal actors to take seriously and to protect the role of the States within the federal system.

The Consumer Financial Protection Bureau’s (“CFPB’s”) novel governance structure violates the separation of powers in a manner that poses a direct threat to federalism interests. The CFPB possesses the power to preempt or displace broad swaths of state regulatory authority. But the agency’s structure permits it to exercise this broad preemptive power without undertaking the careful deliberative processes that would be required of the elected branches of the federal government or of an independent agency headed by a multi-member board. Thus, the CFPB has a significantly reduced incentive to give proper weight to federalism interests than have the political branches or multi-member agencies. This reduced incentive increases the risk of federal agency encroachment on state prerogatives.

In addition, the CFPB’s novel governance structure vests control of the agency in a single director who is not accountable to any elected officials. Thus, the CFPB’s action is not constrained by the “political safeguards of federalism,”

which the Supreme Court has treated as an essential mechanism for preserving the role of the States within the federal system.

Accordingly, the Court should subject the CFPB's governance structure to particularly exacting scrutiny. Because the CFPB violates the separation of powers—and does so in ways that directly threaten the federal system—the Court should hold that the restriction on the President's removal power over the Director of the CFPB is unconstitutional and vacate the CFPB's Decision and Order.

ARGUMENT

I. The Separation of Powers Plays a Critical Role in Preserving the Division of Authority Within the Federal System, and the CFPB's Governance Structure Violates the Separation of Powers in Ways That Directly Undermine Federalism Interests.

The allocation of governmental powers within the federal system undergirds the Constitution's charter for responsive, accountable, and limited government. "The federal system rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.'" *Bond v. United States*, 564 U.S. 211, 220-21 (2011) (quoting *Alden v. Maine*, 527 U.S. 706, 758 (1999)). "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 564 U.S. at 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). "Federalism also protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Id.* Moreover, "federalism enhances the opportunity of all citizens to participate in representative government." *FERC v. Mississippi*, 456 U.S. 742, 789 (1982) (O'Connor, J., concurring in part and dissenting in part). By preserving room for experimentation in the States, federalism also supports policy innovation that can address many of society's most pressing problems. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

Due to the fundamental importance of federalism in the constitutional system, the Constitution safeguards the federal system through several different, mutually reinforcing mechanisms. Some of these mechanisms constrain federal action directly. For example, the enumeration of congressional powers in Article I explicitly delimits the outer boundaries of federal action. *See* U.S. CONST. art. I, § 8; *Printz v. United States*, 521 U.S. 898, 919 (1997) (“Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones . . .”). Likewise, the Tenth Amendment directly limits the Federal Government’s ability to shift the balance of power within the federal system away from the States. *See Printz*, 521 U.S. at 919-20. Thus, “[t]he principles of limited national powers and state sovereignty are intertwined. . . . Impermissible interference with state sovereignty is not within the enumerated powers of the National Government, and action that exceeds the National Government’s enumerated powers undermines the sovereign interests of the States.” *Bond*, 564 U.S. at 225 (citations omitted).

In addition to these direct limitations on federal action, the Framers also imposed indirect barriers to the aggrandizement of federal power at the expense of the States. The distribution of power *within* the federal government likewise serves as a check against federal activity that diminishes the role of the States. “Apart from the limitation on federal authority inherent in the delegated nature of

Congress's Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). The Framers envisioned “a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself,” such that “the structure of the Federal Government itself . . . [would] insulate the interests of the States.” *Id.* at 552. In particular, “[t]he Constitution sought to divide the delegated powers of the new federal government into three defined categories, legislative, executive, and judicial, to assure, as nearly as possible, that each Branch of government would consign itself to its assigned responsibility.” *INS v. Chadha*, 462 U.S. 919, 951 (1983). “The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.” *Id.* The Constitution’s “Great Compromise” on the horizontal separation of powers “allayed the fears of both the large and small states.” *Id.* at 950. Thus, the separation of powers between the branches of the federal government operates to preserve the vital interests secured by federalism, as it was specifically designed to do.

As Petitioners argue and as the panel recognized, the Consumer Financial Protection Bureau’s (CFPB’s) novel governance structure violates the separation of

powers. Moreover, as described below, its structure violates the separation of powers in ways that directly undermine federalism interests and strip away protection against federal encroachment from the States. Thus, the CFPB—and any future federal agency with a similar governance structure—threatens the role of the States within the federal system, and the vital constitutional values that the federal system protects.

II. The CFPB's Novel Governance Structure Permits the Federal Agency to Preempt or Displace State Policy Judgments Without Considering the Effects of Such Action on Federalism Interests.

Whenever the Federal Government acts, there is an inherent risk that its action will encroach upon state authority. Federal actors can preempt laws enacted by the States to protect their citizens. *See* U.S. CONST. art. VI, Cl. 2 (Supremacy Clause). Indeed, under the doctrine of field preemption, federal actors can displace large swaths of state regulatory action. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (describing field preemption). And federal agency preemption of state law frequently occurs in the consumer-protection context. *See, e.g., Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735 (1996) (holding that federal agency interpretation preempted a state-law unconscionability doctrine). Federal actors can also displace the considered policy judgments of the States by imposing regulatory requirements that state officials have found unwise, unnecessary, or overly burdensome. By displacing state authority in these

situations, the federal government alters the balance of power within the federal system.

Regarding the separation of powers, “[t]he choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked.” *Chadha*, 462 U.S. at 959. This seemingly “clumsy, inefficient, even unworkable” system, *id.*, “safeguard[s] federalism by permitting designated agents of the federal government to adopt federal law only if they employ procedures” that impose deliberate obstacles to federal action. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001) (quoting *Chadha*, 462 U.S. at 959). Thus, the separation of powers “operates to preserve state governance prerogatives by making federal law more difficult to adopt.” *Id.* at 1326. Making federal action more difficult *a fortiori* makes federal action that displaces state regulatory decisions more difficult.

The Framers specifically intended that the separation of powers would have this effect. To them, making federal action more laborious was a conscious choice, and this choice was made to protect both the prerogatives of the States and the liberties of the people: “The records of the Convention and debates in the States

preceding ratification underscore the common desire to define and limit the exercise of the newly created federal powers affecting the states and the people.” *Chadha*, 462 U.S. at 959. Indeed, “our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 613 (1952) (Frankfurter, J. concurring)). “Permitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority.” Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. at 1324.

The separation of powers also preserves—indeed, mandates—a deliberative process that includes opportunities for federal decision-makers to consider the impact of their contemplated actions on federalism interests. The separation of powers prescribes that federal action result from “a step-by-step, deliberate and deliberative process.” *Chadha*, 462 U.S. at 959. This mandatory deliberative process helps to ensure that federal actors take federalism interests into account, and it also provides an opportunity for third parties—including States—to voice their concerns about any contemplated action that might undermine the federal structure. As the Supreme Court has stated, the apparently “clumsy, inefficient, even unworkable” procedures for federal action were designed to curb “the newly created federal powers affecting the states and the people.” *Id.*

The CFPB purports to possess broad authority to preempt or displace the considered policy judgments of the States. For example, the CFPB has formally declared that Tennessee's regulation of gift cards is preempted by federal law. *See* Bureau of Consumer Financial Protection, *Electronic Fund Transfers; Determination of Effect on State Laws (Maine and Tennessee)*, Docket No. CFPB-2012-0036, 78 Fed. Reg. 24386, 24389-91 (April 25, 2013). The CFPB has also proposed sweeping regulations relating to consumer installment loans that threaten to preempt important aspects of state consumer-protection laws. *See* Bureau of Consumer Financial Protection, Proposed Rulemaking, *Payday, Vehicle Title, and Certain High-Cost Installment Loans*, 81 Fed. Reg. 47864 (July 22, 2016).

The CFPB has taken these extraordinary regulatory steps while operating under a novel governance structure shielded from the limitations ordinarily imposed by the separation of powers. The CFPB is headed by a single director, over whom the President cannot exercise supervisory control, and who is not constrained by the procedural requirements that the Constitution imposes on the Executive and Legislative Branches. *See* 12 U.S.C. § 5491(b), (c). The regulation of much of the Nation's financial system has been vested in a single director accountable to no one but himself or herself. *See id.*

This arrangement contrasts starkly with the traditional model of independent regulatory agencies headed by a multi-member board. On a multi-member board,

the dynamics of group governance increase social and institutional pressure to give weight to constraints on the board's action. *See* Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 VAND. L. REV. 1, 35-38 (2002). "A hierarchy of individuals whose governance structures contemplate only vertical monitoring cannot resolve the problem of who watches the watchers. Instead, it seems the vicious circle can be broken by placing a group at the apex of the hierarchy." *Id.* Thus, a multi-member board's deliberative process constrains any "individual autocrat" through the "internal dynamics of group governance." *Id.* These constraints render a multi-member commission inherently more attentive to federalism concerns.

Moreover, the opportunity for dissent significantly checks a board's ability to violate the principles of federalism. Agency dissents can raise important federalism concerns that the majority has overlooked or underestimated. *See, e.g., Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 2007 WL 3196255, at *2-3 (Oct. 31, 2007) (Copps, Commissioner, dissenting) (raising federalism concerns regarding agency action). At a minimum, such dissents can "serve[]" as a 'fire alarm' that alerts Congress and the public at large that the agency's decision might merit closer

scrutiny.” Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 41 (2010).

In some cases, an agency dissent may identify federalism concerns that persuade a reviewing court to reverse the agency action altogether. For example, in one recent FCC proceeding, two Commissioners filed dissents raising serious federalism concerns regarding the majority’s decision to preempt state laws. *See In the Matter of City of Wilson, N.C. Petition for Preemption of North Carolina General Statutes §§ 160A-340 et seq.*, 30 FCC Rcd. 2408, 2015 WL 1120113, at *71-82 (Mar. 12, 2015) (Pai, Commissioner, dissenting); *id.* at 82-85 (O’Reilly, Commissioner, dissenting). Notably, Commissioner Pai’s dissent led with the observation that the FCC’s decision “usurps fundamental aspects of state sovereignty” and “disrupts the balance of power between the federal government and state governments that lies at the core of our constitutional system of government.” *Id.* at *71 (Pai, Commissioner, dissenting). Expressly acknowledging this dissent, the Sixth Circuit reversed the FCC’s decisions based on federalism-related grounds. *See Tennessee v. FCC*, 832 F.3d 597, 609, 610-13 (6th Cir. 2016). Echoing Commissioner Pai’s dissent, the Sixth Circuit held that the FCC had no power to preempt Tennessee law absent an exceptionally clear statement from Congress: “Precedent makes clear . . . that if Congress has the power to allocate state decision making, it must be very clear that it is doing so.”

Id. at 610. Thus, the opportunity for agency dissent can provide an important check on agency action that might undermine federalism interests.

In contrast, the CFPB's governance structure lacks these fundamental procedural safeguards that can ensure agency attention to federalism interests. The CFPB's structure "prohibits the agency from enjoying the benefits of deliberation." Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2260 (2012). "This single director leadership structure, coupled with the fact that the CFPB has a narrowly focused regulatory mission and is specifically designed to be independent of legislative control, creates a significant likelihood that the Bureau's policy goals will be subject to the whims and idiosyncratic views of a single individual." *Id.* (quotation omitted). By eliminating the deliberative-process guarantees of the separation of powers, the CFPB's structure decreases the likelihood that the agency will consider and prioritize federalism interests.

The Bureau's structure also substantially increases the risk that the agency may be "captured" by regulated entities or other special interests. "[H]aving only one person at the apex can . . . mean that the agency is more easily captured." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 38 (2010). The inherent attributes of governance by a multi-member board—vigorous deliberation, diversity of experience, and the

prospect of public dissent—play critical roles in preventing agency capture. *See id.* at 37-41; *see also, e.g., Speech of Federal Reserve Chair Janet L. Yellen at the Citizens Budget Commission* (Mar. 3, 2015), 2015 WL 992012, at *6 (observing that free and open discussion provides an important check against agency capture). The CFPB lacks all of these procedural safeguards. Thus, not only may the CFPB take sweeping regulatory action without fully accounting for federalism interests, but it may also be more likely to do so based on the wishes of special interests rather than the public good.

III. The CFPB's Governance Structure Threatens Federalism Interests Because It Purports to Insulate the CFPB from the Political Safeguards of Federalism Recognized by the Supreme Court.

The Supreme Court has emphasized that, to the extent that the States play “a role in the selection both of the Executive and the Legislative Branches of the Federal Government,” this influence provides an important safeguard against federal encroachment on State interests. *Garcia*, 469 U.S. at 551. “[T]he composition of the Federal Government was designed in large part to protect the States from overreaching by Congress.” *Id.* at 550-51. Political forces operating on both Congress and the Executive help ensure that those Branches accommodate federalism interests. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition of the National Government*, 54 COLUM. L. REV. 543, 558 (1954); Laurence H. Tribe, *Intergovernmental*

Immunities in Litigation, Taxation, and Regulation: Separation of Powers Issues in Controversies About Federalism, 89 HARV. L. REV. 682, 695 (1976) (noting that the political forces operating on Congress will often “protect the states’ interests”); *id.* at 713 (observing that political pressures help ensure that “the states [are] represented in a way that reasonably assures consideration of their institutional interests”). By ensuring that federal authority is ordinarily wielded only by those who are politically accountable—either directly or indirectly—to state interests, the separation of powers operates to guarantee that federal actors must take federalism interests seriously or face political consequences.

The Supreme Court has often invoked the “political safeguards of federalism,” *i.e.*, the fact that federal actors are politically accountable to state interests and thus held in check against federal encroachment on state prerogatives. *See, e.g., Garcia*, 469 U.S. at 555 (rejecting a Commerce Clause challenge in part because the Court believed that “the national political process systematically protects States” from federal overreach). Indeed, several Justices have expressed the view that these “political safeguards” suffice to protect the States against federal encroachment in various contexts, rendering judicial enforcement of constitutional principles unnecessary. *See, e.g., United States v. Morrison*, 529 U.S. 598, 660-61 (Breyer, J., dissenting); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 93-95 (2000) (Stevens, J., dissenting); *Printz v. United States*, 521 U.S.

898, 957 (1997) (Stevens, J., dissenting). Thus, even those Justices who have declined to extend judicial protection to federalism interests in certain contexts have done so on the express understanding that those interests receive robust protection through the political process. *See, e.g., id.* (arguing that the “political safeguards of federalism identified in *Garcia*” suffice to protect the States from intrusion by federal authority). Absent judicial protection, such “political safeguards of federalism” serve as the principal, or only, bulwark against federal encroachment.

On this view, the CFPB is particularly problematic. As noted, some Justices and authorities have stated that judicial protection of federalism interests is unnecessary because the “political safeguards of federalism” suffice. *Id.* But here, Congress has purported to insulate the CFPB entirely from such political safeguards. Accordingly, judicial review of the CFPB’s purported independence is all the more imperative, and the CFPB’s insulation from political control should be subject to particularly exacting scrutiny. The CFPB’s novel governance structure vests broad regulatory authority in a single director who faces no political checks, whether direct or indirect. *See* 12 U.S.C. § 5491(b), (c). The political safeguards of federalism do not constrain the CFPB, and they would not constrain any future federal regulatory agency with a similar governance structure. This novel

governance structure poses a significant threat to the separation and balance of governmental authority within the federal system.

In sum, the Supreme Court has long recognized the close relationship between the horizontal separation of powers among the coordinate branches of the federal government, and the vertical division of power between the federal government and the States. Both divisions of authority reinforce each other, and both serve to preserve the liberty of the people. “Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.” *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The CFPB’s novel governance structure—combining single-director leadership with strict limitations on the President’s removal power—violates the horizontal separation of powers. In doing so, it also threatens the vertical division of power between the federal government and the States.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners’ Petition for Review and vacate the CFPB’s Decision and Order.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This document complies with Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,854 words, as determined by the word count function of Microsoft Word.

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/s/ D. John Sauer
Attorney for *Amici Curiae*
Dated: March 10, 2017

CERTIFICATE OF SERVICE

On March 10, 2017, this brief was served via CM/ECF on all registered counsel and was transmitted to the Clerk of the Court. In addition, thirty paper copies were sent overnight delivery via a third-party commercial carrier to the Clerk of the Court.

/s/ D. John Sauer

D. John Sauer