IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN BANKERS ASSOCIATION, AMERICAN FINANCIAL SERVICES ASSOCIATION, CONSUMER BANKERS ASSOCIATION, FINANCIAL SERVICES ROUNDTABLE, TEXAS ASSOCIATION OF BUSINESS, TEXAS BANKERS ASSOCIATION, GRAND PRAIRIE CHAMBER OF COMMERCE, GREATER IRVING LAS COLINAS CHAMBER OF COMMERCE, GRAPEVINE CHAMBER OF COMMERCE, LUBBOCK CHAMBER OF COMMERCE, BAY CITY CHAMBER OF COMMERCE, GREATER NEW BRAUNFELS CHAMBER OF COMMERCE, LONGVIEW CHAMBER OF COMMERCE, MCALLEN CHAMBER OF COMMERCE, NORTH SAN ANTONIO CHAMBER OF COMMERCE, PARIS-LAMAR CHAMBER OF COMMERCE, and PORT ARTHUR CHAMBER OF COMMERCE, Plaintiffs, v. CONSUMER FINANCIAL PROTECTION BUREAU; RICHARD CORDRAY, in his official capacity as director of the Consumer Financial Protection Bureau, Defendants.	Case No. 3:17-cv-02670-D

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

This lawsuit challenges the legality of the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") new regulation banning pre-dispute arbitration agreements ("the Arbitration Rule" or "the Rule"). *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017). As the complaint explains, the Rule is both constitutionally infirm and inconsistent with the governing statutes, the Dodd-Frank Wall Street Reform and Consumer Protection Act ("the Dodd-Frank Act"), Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 500 *et seq*. Recognizing the legal problems that would result from retroactive application of an arbitration rule to pre-existing contracts—and that the tens of thousands of companies subject to an arbitration regulation imposed by the Bureau would need considerable time to decide upon new dispute resolution procedures and adapt their forms and procedures for entering into contracts—Congress provided that any arbitration regulation imposed by the CFPB could be applied only to new contracts entered into 180 or more days after the rule's effective date. Plaintiffs seek a preliminary injunction to stop the running of that 180-day period during the pendency of this litigation.

Financial institutions, financial services firms, and other business entities that provide consumer financial products and services and therefore are "covered persons" subject to the Arbitration Rule—including many of plaintiffs' members—have for decades used arbitration to reduce litigation costs and provide quick and efficient dispute resolution for their customers. These businesses routinely include arbitration agreements in their customer contracts. Because the Rule became effective on September 18, 2017 (82 Fed. Reg. at 33,210), and applies to pre-dispute arbitration agreements entered into on or after March 19, 2018 (*id.* at 33,429), plaintiffs' members will incur substantial, unrecoverable costs if they are forced to comply with the Rule while this Court

considers the case. In these circumstances, the familiar four-part test for issuance of a preliminary injunction (*Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008)) is easily satisfied here.

First, plaintiffs are "likely to succeed on the merits" of their challenge to the Arbitration Rule. *Winter*, 555 U.S. at 20. The Bureau's structure is unconstitutional, an infirmity that makes this Rule promulgated by the Bureau invalid. The substantial nature of plaintiffs' constitutional challenge is manifest: a panel of the D.C. Circuit recently held that the Bureau's structure is invalid under Article II of the Constitution because the Bureau's Director is unconstitutionally insulated from control by the elected branches of government. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 26, 30-32 (D.C. Cir. 2016), *reh'g en banc granted, order vacated*, Feb. 16, 2017.

Second, plaintiffs' members are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter*, 555 U.S. at 20. Plaintiffs' members will suffer irreparable injury if they are subject to a rule promulgated by an unconstitutionally structured independent bureau. Plaintiffs' members also will not be able to recover either the significant administrative costs that they will have to expend to come into compliance with the Rule or the increased dispute-resolution costs that will result if they are forced to comply with the Rule while this suit is pending. Once plaintiffs are subject to the Rule, they also will experience a spike in unrecoverable litigation settlement costs.

Third, "the balance of equities tips in . . . favor" of a preliminary injunction. *Winter*, 555 U.S. at 20. Although plaintiffs would suffer severe, irreparable injury if an injunction were withheld, the Bureau will experience no harm at all if an injunction is issued. The injunction would simply preserve the status quo permitting pre-dispute arbitration agreements—a status quo that existed for *decades* prior to the issuance of the Rule, including the more than five years during which the Bureau considered whether and how to regulate arbitration. Particularly in light of the Bureau's own five-year review process, there is no credible argument that the Bureau would be harmed by a short

additional delay while this Court considers the important constitutional and statutory issues presented by this case.

Fourth, a preliminary injunction "is in the public interest." *Winter*, 555 U.S. at 20. Maintaining the availability of arbitration would benefit not only businesses like plaintiffs' members, but also consumers. Arbitration often provides consumers the *only* realistic mechanism for the resolution of disputes with providers of financial services, while the cost savings that businesses achieve through the use of arbitration are passed through to customers in the form of lower prices. Indeed, the Treasury Department's Office of the Comptroller of the Currency has concluded that implementation of the Rule will result in greater costs for consumers.

Courts in this Circuit and around the Nation faced with similar circumstances have routinely issued preliminary injunctions against new regulatory requirements. Plaintiffs respectfully request that this Court take that step here.

BACKGROUND

A. The Dodd-Frank Act and the CFPB's Aberrant Structure.

In 2010, Congress in the Dodd-Frank Act created the CFPB as one of the newest agencies in the federal government. *See* Pub. L. No. 111-203, tit. X, 124 Stat. 1376, 1955 (2010).

The Dodd-Frank Act purports to establish the Bureau as an independent agency within the Federal Reserve System. *See* 12 U.S.C. § 5491(a).[1] The Bureau is headed by a sole Director, appointed by the President and confirmed by the Senate (*see id.* § 5491(b)), who serves for a term of five years. *Id.* § 5491(c)(1). The Act imposes significant limits on the President's authority to oversee the Director, who the President may remove from office only "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

[1] The Bureau is located within the Federal Reserve as an organizational matter, but the Federal Reserve Board may not review any action of the Bureau's Director. *See* 12 U.S.C. § 5492(c).

In addition to this essentially complete independence from presidential policy oversight, the Director possesses extraordinarily broad power to, among other things: issue binding rules under the Dodd-Frank Act and eighteen other federal statutes (*id.* § 5512(b)(1)); conduct examinations of covered persons and entities for the purpose of assessing their compliance with federal consumer financial laws (*id.* §§ 5514(b)(1), 5515(b)(1), 5516); issue "civil investigative demand[s]" to persons believed to have information relevant to a violation of federal consumer financial laws (*id.* § 5562(c)); institute enforcement actions and conduct "hearings and adjudication proceedings" (*id.* § 5563(a)); issue orders imposing civil penalties and other monetary obligations (which can amount to hundreds of millions of dollars) and well as injunctive relief (*id.* § 5565); and bring lawsuits in state or federal court to enforce federal consumer financial laws (*id.* § 5564).

The Bureau has other novel features that further insulate it from oversight by, and accountability to, both the President and Congress. It is not funded through regular congressional appropriations; instead, each year the Federal Reserve is required to "transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." *Id.* § 5497(a)(1). The Dodd-Frank Act authorizes the Director to request up to 12% of the Federal Reserve's operating expenses in 2009, indexed for inflation. *Id.* § 5497(a)(2). In 2017, that amounted to almost $650 million. *See* Consumer Fin. Protection Bureau, *The CFPB strategic plan, budget, and performance plan and report* 9 (May 2017)**,** http://files.consumerfinance.gov/f/documents/201705_cfpb_report_strategic-plan-budget-and-performance-plan_FY2017.pdf.

These characteristics make the Bureau exceptional in the federal system. Most other independent regulatory agencies are headed by bipartisan, multi-member bodies; where a department or agency is headed by a single individual, that person almost always serves at the pleasure of the

President; and most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws. *See PHH Corp.*, 839 F.3d at 26, 18-21. As a consequence, the CFPB is unique among federal agencies exercising regulatory authority over the private sector in the extent to which it is insulated from control by elected officials in the executive and legislative branches.

B. The Arbitration Study and Rule.

1. The Dodd-Frank Act provides that the Bureau may issue a rule "prohibit[ing] or impos[ing] conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties"—but it may do so only in defined circumstances and when specified conditions are met. 12 U.S.C. § 5518(b).[2]

In particular, the Act requires the Bureau, before issuing any such rule, to "conduct a study of," and "provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services." *Id.* § 5518(a). The Bureau is authorized to regulate or restrict the use of pre-dispute arbitration agreements if, and only if, it finds that "a prohibition or imposition of conditions or limitations [on pre-dispute arbitration agreements] is in the public interest and for the protection of consumers." *Id.* § 5518(b). The Act further requires that the Bureau's findings regarding whether its rule is in the public interest and for the protection of consumers "be consistent with the study" mandated by the Act. *Id.*

[2] The Federal Arbitration Act's mandate that arbitration agreements be "enforce[d] … according to their terms" may be displaced only by an express "contrary congressional command" in another federal statute. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 98 (2012) (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987)). The Bureau's authority to restrict arbitration therefore may not exceed the scope of the authorization granted it by the Dodd-Frank Act.

The Bureau also must consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule"; "the impact of proposed rules on" smaller banks, savings associations, and credit unions; and "the impact on consumers in rural areas." *Id.* § 5512(b)(2)(A).

2. The Bureau commenced the arbitration study process mandated by the Dodd-Frank Act in April 2012. *See* Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25,148 (Apr. 27, 2012). Following this initial Request for Information, however, the Bureau failed to engage meaningfully with the general public for the entire remainder of the study period.

The Bureau published its "Preliminary Results" in December 2013 and a final Arbitration Study in March 2015, all without requesting any additional public comment. *See* Consumer Fin. Prot. Bureau, *Arbitration Study: Report to Congress 2015* (Mar. 2015), https://goo.gl/wcKw1f ("Final Study"). As explained in the complaint (Compl. ¶¶ 60-72), notwithstanding repeated requests from members of Congress and the public—including many of the plaintiffs in this lawsuit—the Bureau did not seek public comment on the findings of the study before issuing the Arbitration Rule.

3. Having completed its study, in May 2016 the Bureau published a notice of proposed rulemaking to prohibit the use by "covered persons" of arbitration agreements that preclude class-action lawsuits. *See* Arbitration Agreements, 81 Fed. Reg. 32,830 (May 24, 2016) (the "Proposed Rule"). As relevant here, the Proposed Rule "prohibit[ed] providers from using a predispute arbitration agreement to block consumer class actions in court and . . . require[d] providers to insert language into their arbitration agreements reflecting this limitation." *Id.*

The Bureau completed its rulemaking process by publishing the final Arbitration Rule on July 19, 2017. *See* Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017). The Rule

categorically bars providers from relying on pre-dispute arbitration agreements in any way with respect to class-action lawsuits brought by consumers. *See id.* at 33,429 (to be codified at 12 C.F.R. § 1040.4(a)). The Arbitration Rule became effective on September 18, 2017 (*id.* at 33,210), and—pursuant to the statutory provision requiring a 180-day period to enable regulated businesses to implement new procedures for contracting with their customers (*see* 12 U.S.C. § 5518(d))—applies to pre-dispute arbitration agreements entered into on or after March 19, 2018. *Id.* at 33,430.

In the final Arbitration Rule, the Bureau acknowledged that the Rule would impose increased costs on providers of financial services, including in the form of increased litigation costs, and it acknowledges that some of these costs might well be passed on to consumers. . 82 Fed. Reg. at 33,280. The Bureau found these burdens justified, however, because unleashing more class actions would "better enable consumers to enforce their rights . . . and obtain redress," and that would "strengthen the incentives for companies to avoid legally risky or potentially illegal activities." *Id.*

ARGUMENT

Under 5 U.S.C. § 705, a court, "to the extent necessary to prevent irreparable injury, … may issue all necessary and appropriate process"—including a preliminary injunction—"to preserve status or rights pending conclusion of the review proceedings" on a challenge to an agency's rule. The standard for issuing such a preliminary injunction is well established. A party is entitled to a preliminary injunction if it shows that (1) it "is likely to succeed on the merits"; (2) it is "likely to suffer irreparable harm in the absence of preliminary relief"; (3) "the balance of equities tips in [its] favor"; and (4) "an injunction is in the public interest." *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). *Accord, e.g.*, *Burgess v. FDC*, 2017 WL 3928326, at *1 (5th Cir. Sept. 7, 2017); *Humana Ins. Co. v. Tenet Health Sys.*, 2016 WL 6893629, at *10 (N.D. Tex. Nov. 21, 2016). Each element of this test favors the grant of a preliminary injunction here.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE ARBITRATION RULE

As a matter of law, the Bureau's structure is unconstitutional, a defect that necessarily infects and invalidates the Arbitration Rule.[3]

The Bureau's unprecedented structure violates the Constitution in two separate, but related, ways. First, the grant of broad executive power to a single Director who is unaccountable to the President is inconsistent with Article II of the Constitution: this structure "represents a gross departure from settled historical practice" that poses a "risk of arbitrary decisionmaking and abuse of power." *PHH Corp.*, 839 F.3d at 8**.** Second, the general insulation of the Bureau from accountability to the peoples' elected representatives (the President and Congress) is inconsistent with the broader and fundamental understanding that "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Indeed the Department of Justice has concluded that the Bureau's structure is unconstitutional. *See* App. 1-33 (The Department's brief in *PHH Corp*.).

A. Violation of Article II

The U.S. Constitution provides that "[t]he executive Power [of the United States] shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. The Supreme Court has explained, quoting James Madison, that "'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)). Although the Court has "upheld limited

[3] Plaintiffs also contend that the Rule is invalid because it inconsistent with the governing statutory provisions in at least three respects: (1) the study upon which the Rule is based did not comply with the requirements stated in the Dodd-Frank Act; (2) the Rule is so poorly reasoned and unsupported by the rulemaking record as to be arbitrary and capricious under the APA; and (3) the Rule violates the Dodd-Frank Act because it is not "in the public interest and for the protection of consumers." To speed the Court's consideration of this motion, however, plaintiffs rely only on the constitutional argument to establish their likelihood to succeed on the merits.

restrictions" on the President's authority to remove executive branch officials, it has rejected limits on presidential removal authority that produce an agency "that is not accountable to the President, and a President who is not responsible for the [agency]." *Id.* at 495.

Such an agency structure is impermissible, at least when the agency is directed by a single official, because it "subverts 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." *Free Enter. Fund*, 561 U.S. at 498. That is "incompatible with the Constitution's separation of powers." *Id*. *See PHH Corp.*, 839 F.3d at 26, 30-32.

In short, because "[t]he buck stops with the President" under Article II (*Free Enter. Fund*, 561 U.S. at 493), the President must be able to supervise and control the actions of his subordinates. *See Dep't of Transp. v. Ass'n of Am. R.R.s*, 135 S. Ct. 1225, 1238 (2015) (explaining that Article II "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people"). And in order effectively to control those subordinates, the President must be able to remove them. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (internal quotation marks omitted); *see also, e.g., Myers v. United States*, 272 U.S. 52, 119 (1926). "Without such power, … the buck would stop somewhere else." *Free Enter. Fund*, 513 U.S. at 513-14.

To be sure, in *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), the Supreme Court held that Congress could create independent, multi-member administrative agencies (there, the Federal Trade Commission) whose officers were protected from presidential removal except for cause. But the Court based this exception to the general rule of unfettered presidential control on the understanding that such officers would "be nonpartisan," "act with entire impartiality," exercise

"neither political nor executive" duties, and apply "the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* at 624. The Court reasoned that such an expert body was not truly executive and thus could be insulated from presidential control. *Id.* at 628. *See PHH Corp.*, 839 F.3d at 14.

Moreover, as a panel of the D.C. Circuit explained in detail while holding the CFPB's structure unconstitutional, a multi-member commission structure means that members have the ability to check each other and thus guard against the arbitrary exercise of power:

> [N]o single commissioner or board member possesses authority to do much of anything. Before the agency can infringe your liberty in some way—for example, initiating an enforcement action against you or issuing a rule that affects your liberty or property—a majority of commissioners must agree. That in turn makes it harder for the agency to infringe your liberty.

PHH Corp., 839 F.3d at 26. *See id*. at 6 (commission members "act as checks on one another").

The extent to which the rationale of *Humphrey's Executor* extends to the labyrinth of administrative agencies established since 1935 is far from clear. But—as the only two federal appellate judges to address the issue concluded in the *PHH* panel decision—it surely does not reach the Bureau, whose sole Director bears no resemblance to the multi-member Federal Trade Commission before the Court in *Humphrey's Executor*—or to any other federal regulatory agency.[4] In short, "there is no settled historical practice of independent agencies headed by single Directors who possess the substantial executive authority that the Director of the CFPB enjoys. The CFPB is

[4] Apart from the Bureau, only three other independent agencies—the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel, and the Social Security Administration—also have single heads who are removable only for cause. *See PHH Corp.*, 839 F.3d at 20. But the FHFA was created about the same time (2008) as the Bureau and cannot provide a historical precedent for the Bureau's structure. *See id.* The other two agencies, meanwhile, "do not exercise the core Article II executive power of bringing law enforcement actions or imposing fines and penalties against private citizens for violation of statutes or agency rules," and thus are "different in kind from the" Bureau. *Id.* at 18.

exceptional in our constitutional structure and unprecedented in our constitutional history." *PHH Corp.*, 839 F.3d at 21.

In fact, any doubt about the constitutionally dubious nature of the Bureau's structure is dispelled by an examination of "history and tradition," which "are important guides in separation of powers cases like this one." *PHH Corp.*, 839 F.3d at 21. The Supreme Court has repeatedly emphasized the importance of "longstanding practice" in identifying the Constitution's structural protections. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (internal quotation marks omitted); *see also PHH Corp.*, 839 F.3d at 22-23 (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem" in the structure of a government entity "is [a] lack of historical precedent." *Free Enter. Fund*, 561 U.S. at 505.

Here, the lack of *any* historical precedent for a structure like the Bureau's—set forth in detail by a panel of the D.C. Circuit in *PHH Corp.* (839 F.3d at 17-21)—is a telling indication that the insulation of the Director from control by the elected branches violates the Constitution: "The concentration of massive, unchecked power in a single Director marks a departure from settled historical practice and makes the CFPB unique among traditional independent agencies." *Id*. at 17.

Moreover, the promulgation of the Rule itself demonstrates that the Bureau's constitutional defects are not merely technical or theoretical. The Bureau promulgated the Rule six months after the inauguration of a new President. The new administration opposes the Rule—as evidenced by the Statement of Administration Policy urging the Congress to invalidate the Rule under the Congressional Review Act. *See Statement of Administration Policy – H.J. Res. 111 – Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule* (July 24, 2017), https://goo.gl/LW5W46. But because of the extraordinary structure given the CFPB and the unusual powers given the CFPB's Director by the Dodd-Frank Act, the

President cannot prevent the Rule from being promulgated, or even appoint one or more commissioners who might produce a different outcome. Such a result is not consistent with Article II of the Constitution.

B. Violation of the Constitutional Separation of Powers

In addition, and apart from the particular ways in which the Bureau's structure undermines the authority granted the President under Article II, the peculiar organization of the CFPB departs more generally from principles of constitutional self-governance.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund*, 561 U.S. at 499. It embodies "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The Federalist No. 39 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed39.asp; *see also, e.g.*, *Providence Bank v. Billings*, 29 U.S. (4 Pet.) 514, 548 (1830) ("The power of self government is a power absolute and inherent in the people.").

Thus, to assure that government is accountable to the people, all "legislative Powers" of the federal government are "vested in a Congress of the United States," consisting of the people's elected Representatives and Senators. U.S. Const. art. I, § 1. And "[t]he executive Power" is "vested in a President of the United States" (Art. II, § 1), who is "chosen by the entire Nation" (*Free Enter. Fund*, 561 U.S. at 499). Conferring legislative and executive authority directly, and solely, on officials chosen by the people is essential for accountability to the electorate—and therefore for the self-government on which our constitutional structure rests. That is because "[t]he diffusion of power carries with it a diffusion of accountability," which "subverts . . . the public's ability to pass judgment on" the efforts of those whom they elect. *Id.* at 497-98; *see also id.* at 498 ("[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the

punishment of a pernicious measure, or series of pernicious measures ought really to fall'" (quoting The Federalist No. 70, p. 476 (Alexander Hamilton) (J. Cooke ed. 1961))).

The Bureau's structure, however, was intended to achieve the *opposite* result: unprecedented *insulation* of the Director's actions from control by *either* the President *or* Congress. In fact, the drafters of the Dodd-Frank specifically intended to create a Bureau and Director with an unprecedented degree of independence from the political branches: Congress repeatedly emphasized that feature of the Bureau as critical to the structure it envisioned for the agency and as having a significant impact on the Bureau's actions. *See, e.g.*, 12 U.S.C. § 5491(a) (creating an "independent bureau"); S. Rep. No. 111-176, at 174 (identifying the CFPB as a "strong and independent Bureau"); 156 Cong. Rec. E1262 (July 1, 2010) (Rep. Jackson Lee) ("One of the strongest provisions . . . in this legislation is the formation of an independent Consumer Financial Protection Bureau"); 156 Cong. Rec. H5239 (June 30, 2010) (Rep. Maloney) ("[The Bureau] will be completely independent, with an independently appointed director."); 156 Cong. Rec. H5214 (June 30, 2010) (Rep. Castor) (calling the Bureau "a new independent watchdog").

And Dodd-Frank achieved its goal. As already noted, the President may not remove the Director at will so as to ensure the implementation of his policy priorities. At the same time, Congress also is severely limited in the extent to which it may use its "power of the purse" to circumscribe the Director's exercise of authority.

The Framers recognized the importance of the appropriations power in ensuring accountability to the people: "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people," because those representatives "cannot only refuse, but they alone can propose, the supplies requisite for the support of government." The Federalist No. 58 (James Madison) (Lillian

Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed58.asp. Yet the Bureau does not depend upon annual congressional appropriations, instead drawing its funding directly from earnings of the Federal Reserve System. *See PHH Corp.*, 839 F.3d at 36 & n.16.

The goal of insulating the Director, and the Bureau, from accountability to the President and Congress also is apparent in a number of less sweeping provisions of the Dodd-Frank Act. Any penalties and fines collected by the Bureau are deposited into a separate account and, if not used to compensate affected consumers, may be expended by the Director—without approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2). The Director is specifically empowered to provide "legislative recommendations, or testimony, or comments on legislation" to Congress without prior review by "any officer or agency of the United States." *Id.* § 5492(c)(4). And the Director is authorized to appoint his own Deputy, who serves as Acting Director in the Director's absence. *Id.* § 5491(b)(5).

The Dodd-Frank Act allows the Director to exercise this substantially unconstrained authority over innumerable private individuals and a substantial portion of the U.S. economy. That authority extends to any person or business who engages in any of ten specified activities that are common throughout the economy, as well as to service providers to such businesses.[5] And the Director may initiate enforcement actions; adjudicate enforcement actions brought administratively; and issue regulations—not just under the Dodd-Frank Act but also under eighteen other federal laws.

This regime is antithetical to the Constitution's design. The Supreme Court reached just that conclusion in *Free Enterprise Fund*, where the Public Company Accounting Oversight Board was defended on the ground that its mission was "said to demand both 'technical competence' and 'apolitical expertise,' and its powers . . . exercised by 'technical experts.'" 561 U.S. at 498. The

[5] *See, e.g.*, 12 U.S.C. §§ 5481(15) & (26), 5514, 5531, 5536. The statute's exemptions (*see id.* § 5517) are quite narrow.

Court asked, "where, in all this, is the role for oversight by an elected President?" *Id.* at 499. "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Id.*

Accordingly, the Dodd-Frank Act creates an extraordinarily attenuated "chain of command" that uniquely limits the people's ability to exercise their right to self-government with respect to matters within the Bureau's jurisdiction. That unprecedented disconnect of federal executive and legislative power from all of the mechanisms for ensuring accountability, and therefore self-government, is unconstitutional. Congress may not vest such sweeping executive power in the hands of a single person who is not accountable to the President, Congress, or the American people. There is a substantial likelihood that plaintiffs will prevail on the merits of their constitutional claim.

C. The Bureau's Actions Are Invalid

A finding that the Bureau is unconstitutionally constituted necessarily will lead to the conclusion that its actions undertaken prior to the cure of that unconstitutionality are invalid. For the reasons we have explained, it is both presumptively and actually the case that a Bureau established in conformity with the requirements of the Constitution would not have issued the Rule. The Rule therefore must be treated as *ultra vires*, as are all regulations and governmental orders issued in violation of law. And just as affected parties "are entitled to declaratory relief sufficient to ensure that" the requirements and standards "to which they are subject will be enforced only by a constitutional agency accountable to the Executive" (*Free Enterprise Fund*, 561 U.S. at 513), the covered persons subject to the Arbitration Rule are entitled to "whatever relief may be appropriate" (*Ryder v. United States*, 515 U.S. 177, 182-83 (1995)—which is reconsideration of the Rule by a properly constituted CFPB.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IN THE ABSENCE OF A PRELIMINARY INJUNCTION

If the Bureau is allowed to enforce its Arbitration Rule while this litigation is pending, plaintiffs' members will suffer irreparable harm. As the Fifth Circuit has recognized, "[w]hen determining whether injury is irreparable, 'it is not so much the magnitude but the irreparability that counts.'" *Texas v. EPA*, 829 F.3d 405, 433-34 (5th Cir. 2016) (quoting *Enter. Int'l, Inc. v. Corp. Estatal Petrolera Ecutoriana*, 762 F.2d 464, 472 (5th Cir. 1985)). "In general, harm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). And here, monetary damages plainly are unavailable to compensate plaintiffs for the substantial injuries they will suffer if they must comply with the Rule, if only because the federal government has sovereign immunity from damages claims. *See Warner v. Cox*, 487 F.2d 1301, 1304-05 (5th Cir. 1974) ("the APA is not a waiver of sovereign immunity" in "suits seeking money damages against the United States"); *Lulac E. Park Place Tr. v. Dep't of Housing & Urban Dev.*, 32 F. Supp. 2d 418, 420 (W.D. Tex. 1998) (same).

A. Constitutional Injury

Before addressing the concrete injuries that compliance with the Rule would impose on plaintiffs' members, it should be noted that a constitutional violation that inflicts harm *inherently* constitutes irreparable injury: The Fifth Circuit has held it "well settled" that the loss of constitutional protections "cannot be undone by monetary relief" and is presumed irreparable. *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981). *See also, e.g.*, *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("'a prospective violation of a constitutional right constitutes irreparable injury for these purposes'") (citation omitted); *Viet Anh Vo v. Gee*, 2017 WL 1091261, at *6 (E.D. La. Mar. 23, 2017) ("[T]he Fifth Circuit has held that the denial of constitutional rights 'for even minimal periods of time constitutes irreparable injury justifying the

grant of a preliminary injunction'"); *cf. Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"). That principle applies with full force in this case, where the claim is directed at unconstitutional government action. But any doubt on that score is dispelled by an examination of the tangible and substantial set of injuries—catalogued below—that compliance with the Rule also would impose on plaintiffs' members.

B. Compliance Costs

If the Court does not issue preliminary relief, plaintiffs' members will have to modify their business operations to ensure that they are in compliance with the Rule, at substantial expense. The Rule has a compliance date of March 19, 2018; after that date, providers of financial services must include in their customer contracts provisions that limit the use of pre-dispute arbitration agreements. Compl. ¶ 118. Failure to comply with the Rule exposes an offending business to the imposition of potentially crushing civil penalties of up to $1 million per violation per day. *See* 12 U.S.C. § 5565(c)(2)(C). The financial and reputational risks of noncompliance—as well as the enormous costs of mounting a defense to any action for civil penalties—mean that there is no practical choice for plaintiffs' members but to comply with the Rule, even if they believe it is contrary to law.

And coming into compliance with the Rule will be expensive. Even though the Act's compliance date is still several months off, plaintiffs' members will have to begin immediately to adapt their businesses to the new requirements. *Cf. Texas v. EPA*, 829 F.3d at 433 ("Because plant emission controls take several years to install, the regulated companies will have to begin installation almost immediately.") They will have to review and restructure their consumer contracts, re-train or hire new staff, modify their business practices and procedures, and expend legal and compliance resources to review and oversee these changes. This process will take time and money to implement. Given the sweeping range of products and the number of consumer contracts affected by the Rule,

the aggregate costs will be substantial. For example, there are many millions of credit cards in the United States; merely providing customers with notice of a change in terms for credit card agreements could cost plaintiffs' members millions of dollars in the aggregate. *See* App. 36-38, at ¶¶ 8-13; App. 42-44, at ¶¶ 8-13.

The Bureau's own analysis estimates these unrecoverable costs at $19 million (82 Fed. Reg. at 33407), which surely constitutes significant irreparable injury. And the Bureau recognized that this burden will fall very heavily on providers with multiple consumer contracts, acknowledging one commenter's statement that it would have to alter more than 100 online contracts as well as physical documents in its retail locations. *Id*. Indeed, plaintiffs' individual members will be forced to absorb compliance costs ranging from many thousands to as much as one million dollars. *See* App. 44, at ¶ 14.

Despite the significant costs of compliance, moreover, there is no mechanism by which plaintiffs' members may recover these costs if, as plaintiffs' fully expect, the Rule ultimately is set aside. To the contrary, those costs will simply be wasted—and a whole new set of administrative and compliance costs imposed on businesses that must again revise their practices, and modify contracts, merely to return to the status quo ante.

C. Legal Costs and Liability

If subject to the Arbitration Rule, plaintiffs' members also will suffer irreparable harm in the form of increased legal costs incurred defending against claims in court, including class-action claims, once the compliance date passes. Although the Rule purports to prohibit only *pre*-dispute arbitration, as a practical matter the Rule will eliminate consumer arbitration entirely in the affected category of cases. *See* Compl. ¶¶ 101-105. And even if arbitration mechanisms nevertheless somehow remain in place, once a dispute has started, psychological and strategic factors—coupled with attorneys' self-interested desire to avoid the procedurally simpler and more efficient pathway of

arbitration—mean that the possibility of agreeing to arbitration after a dispute arises generally "amount[s] to nothing but a beguiling mirage." Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. Mich. J.L. Reform 783, 790 (2008).

This substitution of litigation for arbitration will force plaintiffs' members to incur very substantial legal costs that otherwise would have been avoided through the arbitration mechanism. In addition to the direct costs of litigation,[6] these will include the payment of coerced settlements: As the Supreme Court and numerous other courts have observed, "when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011); *see also, e.g.*, *Matter of Rhone-Poluenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (noting Judge Friendly's characterization of "settlements induced by a small probability of an immense judgment in a class action [as] 'blackmail settlements'"). The Fifth Circuit, too, has observed this "*in terrorem* power of [class action] certification." *Oscar Private Equity Invs. v. Allegiance Telecom, Inc.*, 487 F.3d 261, 267 (5th Cir. 2007).[7]

[6] There is no dispute that arbitration "is usually cheaper and faster than litigation." *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

[7] Once businesses start implementing the Rule, costs related to increased class-action exposure are likely to persist for some time even if the Rule subsequently is invalidated. Even if this action proceeds expeditiously, absent an injunction it is likely that, while the case is pending, millions of customers will enter into contracts with plaintiffs' members that do not contain arbitration agreements. If the Rule is later set aside, those contracts will remain binding. And even if businesses seek to modify the contract terms after ultimate invalidation of the Rule, customers may be unwilling to do so at that time, or may be more willing to opt out of arbitration than they otherwise would have been. Moreover, if cases are certified as class actions while this litigation in pending, there will be no mechanism to seek decertification in the event the Rule is ultimately reversed.

There can be no serious doubt about plaintiffs' members being subjected to this increased liability: The Bureau's own researchers have estimated that the Rule will result in some 501 federal class action cases a year that produce no benefit for class members, but will inflict $76 million in new litigation costs on companies subject to the Rule. 82 Fed. Reg. at 33,404. They acknowledge that a similar number of state class actions will be filed each year and produce no recovery for class members, but never estimate a defense cost for those actions because of an asserted absence of "nationally representative data." *Id.* Although the Bureau's researchers declare that this state litigation "will likely be significantly cheaper for providers" (*id.*), even if these state cases are only half as expensive as the federal ones, the total will be *$100 million per year to defend against meritless class action cases*. 82 Fed. Reg. at 33,404. In addition, the Bureau estimates 103 additional class settlements, with $342 million in settlement payments and $39 million in defense fees for those cases each year after it is enacted. *Id*. at 33,403. The experience of plaintiffs' members confirms the likelihood of these increased expenditures. *See* App. 38, at ¶¶ 15-16; App. 44-45, at ¶¶ 16-17.

* * *

These unrecoverable costs amount to irreparable injury. In *Texas v. EPA*, the Fifth Circuit explained that regulations that "impose a substantial financial injury" on regulated entities can be "sufficient to show irreparable injury." 829 F.3d at 433. "Indeed," the Court explained, "complying with a regulation later held invalid almost *always* produces the irreparable harm of nonrecoverable compliance costs." *Id*. (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 220-21 (1994) (Scalia J, concurring in part and in the judgment)). Particularly where, as here, "[n]o mechanism . . . exists" for regulated entities "to recover the compliance costs they will incur if the Final Rule is invalidated on the merits," substantial compliance costs suffice to show irreparable injury. *Id*. at 434.

Thus, in *American Health Care Association v. Burwell*, 217 F. Supp. 3d 921 (N.D. Miss. 2016), addressing circumstances quite similar to those in this case, the court enjoined the enforcement of a Center for Medicare and Medicaid Services rule that would have barred nursing homes receiving federal funds from entering into pre-dispute arbitration agreements with their residents. The court thought it "obvious" that as a result of the rule, nursing homes would "lose signatures on arbitration contracts which they will likely never regain." *Id*. at 942. And the court agreed that the "immediate, substantial administrative expenses" that care providers would incur if the rule were to go into effect constituted irreparable injury. *Id*. Accordingly, the court held, the irreparable injury factor "clearly favor[ed]" the entry of an injunction. *Id*.

Likewise, in *Dialysis Patient Citizens v. Burwell*, 2017 WL 365271 (E.D. Tex. Jan. 25, 2017), the court found that plaintiffs moving to enjoin a Department of Health and Human Services regulation for dialysis providers demonstrated irreparable harm where, among other things, providers would incur compliance costs that could not "be recovered later from the government if the Rule is invalidated on the merits." *Id*. at *6 (citing *Texas v. EPA*, 829 F.3d at 434). And in *Texas Food Industry Ass'n v. Department of Agriculture*, 842 F. Supp. 254 (W.D. Tex. 1993), the court enjoined a food-labeling regulation that "impose[d] significant costs on the affected industry, especially the small business owners"—and "consequently . . . [on] the consumers" as well—deeming these injuries sufficient to establish irreparable injury. *Id*. at 260-61.[8]

[8] Chief Judge Lynn's recent decision in *Chamber of Commerce of the United State of America v. Hugler*, 2017 WL 1062444 (N.D. Tex. Mar. 20, 2017), is not to the contrary. In *Hugler*, the court rejected claims of irreparable injury based on compliance costs where the plaintiffs argued that they had "incurred compliance costs before and throughout this litigation, and that the industry has *already done* much preparing to comply." *Id*. at *2 (emphasis added). Because the preliminary injunction standard is "inherently prospective," and because the plaintiffs did not identify substantial "additional compliance costs" on top of those already incurred, Chief Judge Lynn did not believe the irreparable injury standard was satisfied in that case. Here, plaintiffs' members seek to avoid solely *prospective* costs related to both compliance and class-action liability.

The approach is the same in courts outside the Fifth Circuit. *See, e.g.*, *Chamber of Commerce of United States v. Edmondson*, 594 F.3d 742, 756, 770-71 (10th Cir. 2010) (state regulation that "effectively force[d]" businesses to incur "implementation and training expenses, which . . . may total well more than a thousand dollars per business per year," was enough to show a risk of irreparable harm absent a preliminary injunction); *Wyoming v. United States Dep't of the Interior*, 136 F. Supp. 3d 1317, 1347-48 (D. Wyo. 2015) (preliminary injunction of a Bureau of Land Management rule regarding hydraulic fracking on federal and Indian lands where "the Fracking Rule will impose compliance costs . . . that cannot later be recovered," which "constitute[s] irreparable injury"), *appeal dismissed as moot*, 2016 WL 3853806 (10th Cir. July 13, 2016); *see also Direct Mktg. Ass'n v. Huber*, 2011 WL 250556, at *6 (D. Colo. Jan. 26, 2011) (enjoining Colorado Department of Revenue from enforcing obligation on out-of-state retailers, finding that "first-year compliance costs ranging from about 3,100 dollars to 7,000" are enough to show irreparable injury).

Like the plaintiffs in *American Health Care Association* and the other cases cited above, plaintiffs here have shown irreparable injury. These harms can be averted only by preliminarily enjoining enforcement of the Rule while this case proceeds.

III. THE BALANCE OF EQUITIES TIPS IN FAVOR OF A PRELIMINARY INJUNCTION

In stark contrast to the irreparable injury that plaintiffs will suffer absent a preliminary injunction, the Bureau will suffer *no* harm if one is granted. The Arbitration Rule violates the Constitution and exceeds the Bureau's statutory authority, and "[t]here is no harm in delaying implementation of an invalid rule." *Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 WL 3766121, at *45 (N.D. Tex. June 27, 2016); *see also, e.g.*, *Bayou Lawn & Landscape Servs. v. Sec'y of Labor*, 713 F.3d 1080, 1085 (11th Cir. 2013) ("DOL argues that it is harmed by having 'its entire regulatory

program called into question.' This is not an appealing argument. If the 'entire regulatory program' is *ultra vires*, then it should be called into question.").

And in any event, there would be no harm to the Bureau from staying the Rule's ban on arbitration, even if the Rule were ultimately found to be lawful. As explained above, arbitration agreements have long been used in the financial-services industry. *See* p. 1, *supra*. Thus, "[a] preliminary injunction would merely maintain the status quo that has been in place" until the merits of the Arbitration Rule can be definitively adjudicated. *Perez*, 2016 WL 3766121, at *45.

Moreover, the Bureau has devoted more than five years to considering whether to promulgate an arbitration rule. It cannot contend that a brief additional delay will produce significant harm, let alone harm outweighing the irreparable injury to plaintiffs' members.

Accordingly, the balance of hardships decisively favors a preliminary injunction here.

IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

Finally, the public interest also weighs heavily in favor of a preliminary injunction. Allowing the Arbitration Rule to go into effect would not only burden plaintiffs' members, but also would injure consumers, who both would be denied access to arbitration—which in many cases offers the *only* practical method to resolve disputes with providers—and would pay higher prices as businesses pass a portion of their increased litigation costs through to customers. *See* 82 Fed. Reg., at 33,280.

Indeed, the Executive Branch of the Federal Government has determined, as a matter of official policy, that the Rule will "harm consumers by denying them the full benefits and efficiencies of arbitration; and hurt financial institutions by increasing litigation expenses and compliance costs (particularly for community and mid-sized institutions)." This analysis added that "[i]n many cases, these increased costs would be borne, not by the financial institutions, but by their consumers."

Statement of Administration Policy – H.J. Res. 111 – Disapproving the Rule, Submitted by the Consumer Financial Protection Bureau, Known as the Arbitration Agreements Rule, supra.

Moreover, the Office of the Comptroller of the Currency ("OCC")—the component of the Treasury Department responsible for bank regulation—has determined that "[c]onsumers face significant risk of a substantial rise in the cost of credit" as a result of the Rule. See *OCC Review: Probable Cost to Consumers Resulting from the CFPB's Final Rule on Arbitration Agreements* at 1 (Sept. 20, 2017), https://www.occ.gov/publications/publications-by-type/other-publications-reports/occ-arbitration-study.pdf. The OCC independently analyzed a study relied on by the CFPB, and concluded: "[t]he data, analysis, and results reported [in the study], and used by the CFPB, confirmed independently by the OCC, indicate a strong probability of a significant increase in the cost of credit cards as a result of eliminating mandatory arbitration clauses. The magnitude of the likely effect on pricing is uncertain, but there is a high probability that [the total cost of credit to consumers] will increase"—with an "expected increase" of 3.43 percentage points. *Id*. at 4. Indeed, the head of the OCC has publicly stated that the Rule will harm the public interest if it is permitted to take effect.[9]

The public has a powerful interest in preventing these consequences. No countervailing public interest weighs against injunctive relief. To the contrary, as the D.C. Circuit noted in

[9] Keith Noreika, *Senate should vacate the harmful consumer banking arbitration rule***,** The Hill (Oct 12, 2017), http://thehill.com/opinion/finance/355274-cfpb-rule-increases-consumer-costs-and-makes-banks-less-safe.

The CFPB disputes the conclusions of the OCC study. Letter from Richard Cordray, Dir., Consumer Fin. Protection Bureau, to Keith A. Noreika, Acting Comptroller of the Currency, at 2 (July 12, 2017), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/07/July-12-Director-Cordray-Letter-to-Acting-Comptroller-Noreika.pdf. But that does nothing to negate the view of the Executive Branch, expressed by OMB, that the Rule harms the public interest. Rather, it at the very most indicates that there are views on both sides of the public interest factor, which therefore cannot weigh against granting preliminary relief.

"acknowledg[ing] the obvious: enforcement of an unconstitutional law is *always* contrary to the public interest." *Gordon*, 721 F.3d at 653 (emphasis added).

For these reasons, the Court should issue a preliminary injunction staying the 180-day compliance period specified in the statute (*see* 12 U.S.C. § 5518(d)). If the Arbitration Rule were upheld at the conclusion of this case, the compliance period could commence running at that time. The Bureau cannot point to any urgent reason why its arbitration ban must go into effect immediately. There is no prospect that harm will result; if any particular arbitration agreement actually is unfair, it can be invalidated under normal unconscionability principles. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 531-33 (2012). In sum, the case for a preliminary injunction here is compelling—and the case against it is nonexistent.

CONCLUSION

Plaintiffs respectfully request entry of a preliminary injunction that (1) enjoins the Rule's 180-day implementation period, which commenced on the date the Rule became effective, so that—if the Rule ultimately is upheld—plaintiffs' members will have the full 180-day implementation period established by the Rule to come into compliance; and (2) prohibits defendants from implementing or enforcing the Arbitration rule pending the completion of judicial review.

Dated: October 19, 2017

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Plaintiffs conferred with counsel for Defendants on October 19, 2017 as to the substance of this motion. Christopher Deal, counsel for Defendants, stated that Defendants are opposed to the relief requested. Agreement could not be reached because Defendants belief that the challenged Arbitration Rule is lawful and thus should not be enjoined.

/s/ Kevin Ranlett
Kevin Ranlett

CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel of record and constitute service on such counsel and their represented parties pursuant to FED. R. CIV. P. 5(b)(2)(E) and Local Rule 5.1(d). In addition, by agreement of the parties, I caused the foregoing to be served by email on counsel for Defendants as follows:

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