No. 18-60302

In the

United States Court of Appeals

for the

Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

Plaintiff-Appellee,

– v. –

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE, INCORPORATED; MICHAEL E. GRAY, Individually,

Defendants-Appellants.

On appeal from an interlocutory order of the United States District Court for the Southern District of Mississippi
Case No. 3:16-cv-356, Hon. William H. Barbour, Jr.

UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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Pursuant to Federal Rules of Appellate Procedure 27 and 29, The Chamber of Commerce of the United States of America respectfully moves this Court for leave to file the attached brief as *amicus curiae* supporting Defendants-Appellants. Defendants-Appellants have consented to the filing of this brief. Plaintiff-Appellee Consumer Financial Protection Bureau ("CFPB") does not consent to the filing of the brief, but has stated that it will not oppose this motion.

The Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community, including at the panel and en banc stages in *PHH Corp. v. Consumer Financial Protection Bureau* (D.C. Cir. No. 15-1177), which presented the same constitutional question before the Court in this case.

This case is of particular interest to the Chamber's members, many of whom are regulated by the CFPB. It is essential for these businesses

that the courts take action to remedy the unconstitutional features of the Bureau, which have made the agency unaccountable to the people and their elected representatives.

The Chamber submits that its brief, which explains in detail how the unconstitutional features of the Bureau have led to harmful consequences for the businesses that the Bureau regulates, will be helpful to the Court as it considers the issue presented on appeal. The Court should therefore grant the Chamber leave to file the attached brief as *amicus curiae*.

CONCLUSION

The Chamber's unopposed motion for leave to file a brief as *amicus curiae* supporting Defendants-Appellants should be granted.

Respectfully submitted,

Dated: July 9, 2018

/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amicus curiae* certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 317 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that that on July 9, 2018, I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*

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CERTIFICATE OF INTERESTED PERSONS

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

1. The Chamber of Commerce of the United States of America, *amicus curiae*, has no parent corporations, and no publicly held company has any ownership interest therein;

2. Mayer Brown LLP (Andrew J. Pincus, Stephen C.N. Lilley, Matthew A. Waring), U.S. Chamber Litigation Center (Steven P. Lehotsky), counsel for *amicus curiae* The Chamber of Commerce of the United States of America.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau is unique:

- its broad regulatory authority is concentrated in a single Director—the "head of the Bureau" (12 U.S.C. § 5491(b)(1))—who single-handedly decides whether to bring enforcement actions, adjudicates administrative enforcement actions, and issues regulations (*id.* §§ 5512(b)(1), 5563(a))—and has exclusive au-

[1] Defendants-Appellants consented to the filing of this brief; Plaintiff-Appellee did not consent but will not oppose *amicus*' motion for leave to file the brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made a monetary contribution to fund the preparation or submission of the brief.

thority to appoint his Deputy and all other Bureau staff (*id.* §§ 5491(a)(5)(A), 5493(a)(1)(A));[2]

- the Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office" (12 U.S.C. § 5491(c)(3));
- the Bureau's rulemaking and adjudicatory authority extends broadly throughout the economy, affecting numerous types of businesses in addition to financial services companies—"the Director unilaterally implements and enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices" (*PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J. dissenting); and
- the Director may spend nearly $650 million dollars each year without seeking or obtaining the approval of Congress and the President. (The Bureau is funded by periodic transfers of money from the Federal Reserve in amounts "determined by the Director to be reasonably necessary" to fund the Bureau's op-

[2] The Bureau is located within the Federal Reserve as an organizational matter, but the Federal Reserve Board is expressly precluded from reviewing any action of the Director. *See* 12 U.S.C. § 5492(c).

erations, limited by a statutory cap that in fiscal year 2017 is $646.2 million. 12 U.S.C. § 5497(a)(1), (a)(2); *see also* CFPB, *The CFPB strategic plan, budget and performance plan and report* 9 (Feb. 2016), https://goo.gl/Rk5zue.)

Most other independent regulatory agencies are headed by bipartisan, multi-member bodies[3]; when 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.

[3] *See, e.g.*, 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners, with no more than three from any political party); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); *id.* § 1752a(b)(1) (National Credit Union Administration headed by three-member bipartisan board); *id.* § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five bipartisan Commissioners); *id.* § 78d(a) (Securities and Exchange Commission composed of five bipartisan Commissioners); *id.* § 2053(a) (Consumer Product Safety Commission composed of five Commissioners); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission composed of five bipartisan Commissioners); 47 U.S.C. § 154(a) (Federal Communications Commission composed of five bipartisan Commissioners). *See generally PHH Corp. v. Consumer Fin. Protection Bureau*, 881 F.3d 75, 173 (D.C. Cir. 2018) (Kavanaugh, J. dissenting).

There are a few exceptions to each of these generalizations—for example, other government entities funded outside the appropriations process. But no other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who can spend funds without obtaining an annual appropriation.

That unprecedented structure violates the Constitution. It conflicts fundamentally with the self-governance principle on which the Constitution rests, and the absence of any historical precedent in our history for a federal agency with the Bureau's structure and regulatory power provides strong additional evidence of its unconstitutionality. Three members of the D.C. Circuit dissented from that court's en banc holding and concluded that the Bureau's structure violates the Constitution,[4] as has a district court in the Southern District of New York.[5] This Court should do the same.

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[4] *See PHH*, 881 F.3d at 164 (Henderson, J., dissenting); *id.* at 198 (Kavanaugh, J., joined by Randolph, J., dissenting).

[5] *See Consumer Fin. Prot. Bureau v. RD Legal Funding, LLC*, 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (holding that the Director's for-cause removal protection was not severable from the rest of the statute and invalidating the whole of Title X of the Dodd-Frank Act).

The Bureau's lack of accountability has caused harm to the community that it regulates virtually from the Bureau's creation. Unanswerable to the President or to Congress, the Bureau has pursued enforcement actions that exceed its jurisdiction and issued vague regulatory pronouncements that maximize its own authority while denying businesses the certainty they need to operate. It is imperative for this Court to provide a permanent check on such abuses by holding that the Bureau's insulation from political control is unconstitutional.

ARGUMENT

I. THE BUREAU'S STRUCTURE VIOLATES THE CONSTITUTION.

The Bureau's unprecedented structure violates the Constitution in two separate, but related, ways. *First*, the complete insulation of the Bureau from accountability to citizens' elected representatives (the President and Congress) for the Director's entire five-year term is inconsistent with the Constitution's fundamental principle of self-governance. *Second*, the grant of broad power to a single Director unaccountable to the President violates basic separation-of-powers principles. The Supreme Court has repeatedly looked to history in construing the Constitution's structural protections, and these conclusions are therefore bolstered by the complete ab-

sence of any historical precedent for a federal agency resembling the Bureau.

A. The Bureau Is Not Accountable To The Elected Branches Of Government.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). 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.").

For that reason, 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 Enterprise Fund*, 561 U.S. at 499). Conferring legislative and executive authority directly, and solely, on the representatives chosen by the people is essential for accountability

to the people—and therefore to the self-government on which the 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. *Free Enterprise Fund*, 561 U.S. 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 was expressly intended to achieve the opposite result: unprecedented insulation of the Director's actions from control by Congress or the President. That insulation violates the Constitution.

To begin with, the Director's authority is extremely broad. It extends to any person or business who engages in any of ten specified activities that are common throughout the economy, as well as service providers to such businesses.[6] And the Director may initiate enforcement actions; adjudicate enforcement actions brought administratively; and issue regula-

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

tions—not just under the Dodd-Frank Act but also under eighteen other federal laws.

The Director's exercise of this broad authority is not subject to any of the mechanisms for accountability to the people's elected representatives that apply to other agencies. Most pertinently, the President may not remove the Director at will to ensure the implementation of his policy priorities, and Congress may not use its "power of the purse" to circumscribe the Director's exercise of his authority. (The Framers recognized the importance of the appropriations power to 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.

The majority opinion of the divided en banc D.C. Circuit in *PHH*, on which the district court relied, dismissed any concerns about the Director's removal protection and the agency's budgetary independence. The court there held that these two features of the Bureau are each "unproblematic"

in isolation and concluded that they do not "amplify each other in a constitutional way" because they insulate the Bureau from different branches of government (the President and Congress respectively). *PHH*, 881 F.3d at 96. But that is precisely the problem: the Bureau's unprecedented insulation from *both* of the political branches of government give it a degree of power and autonomy that is unknown in administrative law.[7]

And in any event, the features that contribute to the Bureau's lack of accountability go beyond merely the Director's removal protection and the agency's budgetary independence. 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 any

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[7] The *PHH* majority cited the Federal Reserve and the Office of the Comptroller of the Currency ("OCC") as examples of agencies with heads who are removable only for cause and who have budgetary autonomy. 881 F.3d at 96. But the features of the Federal Reserve—which in any event makes policy through a multimember board and not a single individual—"reflect [its] unique function . . . with respect to monetary policy" and offer no precedent for creating a powerful, unaccountable regulatory and prosecutorial agency like the CFPB. *Id.* at 192 n.17 (Kavanaugh, J., dissenting). And the OCC Comptroller is removable at will by the President. *Id.* at 177 n.4.

The *PHH* dissents explain why the D.C. Circuit majority erred in concluding that the Dodd-Frank Act imposes meaningful review on the Director's exercise of the CFPB's broad authority that substitute for the unprecedented insulation from control by the elected Branches. 881 F.3d at 157-60 (Henderson, J., dissenting); *id.* at 171-73 (Kavanaugh, J., dissenting).

approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2).[8] 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 absence of a Director. *Id.* § 5491(a)(5).

The combination of *all* of these provisions 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 disconnection of federal executive and legislative power from all of the mechanisms for ensuring accountability, and therefore self-government, is unconstitutional.

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[8] This provision not only provides the Bureau with another source of funding exempt from the accountability provided by the appropriations process; it also gives the Bureau a disturbing self-interest in pursuing remedies in enforcement actions—harkening back to a discredited era in law enforcement. *See* Margaret H. Lemos & Max Minzer, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 862 (2014) (describing the rejection of "bounty-based public enforcement" by most U.S. jurisdictions by the turn of the twentieth century).

B. The Bureau's Structure Violates Fundamental Separation of Powers Principles.

The Constitution charges the President with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In order to exercise the entire executive power of the federal government, the President necessarily must act with "the assistance of subordinates." *Myers v. United States*, 272 U.S. 52, 117 (1926).

But, because "[t]he buck stops with the President" under Article II (*Free Enter. Fund*, 561 U.S. at 493), the President remains responsible for supervising and controlling the actions of his subordinates. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 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 his subordinates, the President must be able to remove them. *See, e.g.*, *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*, 272 U.S. at 119 ("[T]hose in charge of and responsible for administering functions of government, who select their

executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.").

To be sure, in *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935), the Supreme Court held that Congress could create administrative agencies 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.

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 it surely does not reach the Bureau, whose 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. That is because every agency that regulates the private sector and is headed by officials whom the President may remove only for cause has a

multi-member commission structure.[9] Because the terms of such commission members are staggered, a President inevitably will have the ability to influence the commission's deliberations by appointing one or more members. And, of course, many of these statutes establishing these agencies expressly require bipartisan membership. Those features provide at least some accountability to the President.

In addition, as Judge Kavanaugh explained in detail in his *PHH* dissent, 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 can affirmatively do much of anything. Before the agency can infringe your liberty in some way – for example, by enforcing a law against you or by 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.

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[9] Apart from the Bureau, the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel ("OSC"), and the Social Security Administration ("SSA") also have single heads who are removable only for cause. But these agencies do not enforce laws against private persons—FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship with the FHFA as the conservator. 12 U.S.C. § 4511(b); FHFA, *History of Fannie Mae & Freddie Mac Conservatorships*, goo.gl/XzeAYr; *see also PHH*, 881 F.3d at 174-76 (Kavanaugh, J., dissenting).

PHH, 881 F.3d at 183-84. The Bureau's single-Director structure thus finds no support in *Humphrey's Executor*.

The en banc *PHH* court thought that this argument "flies in the face" of the Supreme Court's decision in *Morrison v. Olson*, 487 U.S. 654 (1988), which it considered to be precedent for an individual agency head not removable at will. *PHH*, 881 F.3d at 96. But the independent counsel whose removal protection was upheld in *Morrison* is in no way comparable to the Bureau. The *Morrison* Court stressed that the independent counsel had "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority," making it hard for the Court to imagine "how the President's need to control [the independent counsel] is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Morrison*, 487 U.S. at 691-92. By contrast, the Bureau is a permanent entity; the Director can serve for at least five years (and longer if a successor cannot be confirmed (12 U.S.C. § 5491(c)); and the Bureau unquestionably wields both "policymaking [and] significant administrative authority." *Morrison* accordingly offers no basis for upholding the problematic structure of the Bureau.

Even less does the Bureau resemble the War Claims Commission at issue in *Wiener v. United States*, 357 U.S. 349 (1958), which the *PHH* majority also cited as precedent for the Director's removal protection. The War Claims Commission, as the *Wiener* Court noted, was an adjudicative agency whose sole function—ruling on personal-injury and property-damage claims arising out of World War II—had an "intrinsic judicial character." *Id.* at 355. The Bureau and the Director, by contrast, do not have an "intrinsic judicial character"; while the Director may adjudicate certain matters, he also has substantial legislative and enforcement powers. *See PHH*, 881 F.3d at 154 (Henderson, J., dissenting) ("Adjudicative power is only a fraction of [the Director's] entire authority. He is no less than the czar of consumer finance."). Insulating such a powerful officer from presidential control squarely violates the separation of powers.

C. Longstanding Historical Practice Confirms That The Bureau Is Unconstitutional.

The Supreme Court has repeatedly emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2594 (2014); *see PHH*, 881 F.3d at 179-81 (Kavanaugh, J., dissenting) (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem

. . . is [a] lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (internal quotation marks omitted).

The lack of *any* historical precedent for an agency with a structure like the Bureau's—set forth in detail in Judge Kavanaugh's *PHH* dissent (881 F.3d at 173-79)—is therefore telling proof that it violates the Constitution. 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.

* * * *

The *PHH* majority defended its holding on the ground that the Constitution permits "a degree of independence" for heads of administrative agencies. 881 F.3d at 78. Proponents of the Bureau's unprecedented structure are clearer in asserting—as they likely will argue in this Court—that the Bureau was designed intentionally to "insulat[e]" the Bureau from any "political influence." Brief of Americans for Financial Reform, *et al.*, as *Amici Curiae* in Support of Respondent at 12, *PHH* (No. 15-1177). That is what the statute achieves: "when measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction, the Director of the CFPB is even more powerful than the President.

The Director's view of consumer protection law and policy prevails over all others. In essence, the Director of the CFPB is the President of Consumer Finance." 881 F.3d at 172 (Kavanaugh, J., dissenting).

But that purpose and effect is wholly antithetical to the Constitution's design. And it is the precise argument rejected by the Supreme Court 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 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.*

Here, where the insulation from accountability to either of the elected Branches is much greater, and the reach of the Director's power far broader, this Court should reach the same conclusion: the Bureau's structure violates the Constitution.

II. THE BUREAU'S UNCONSTITUTIONAL STRUCTURE HAS HAD HARMFUL CONSEQUENCES FOR THE BUSINESSES IT REGULATES.

"[S]tructural protections against abuse of power," the Supreme Court has explained, are "critical to preserving liberty." *Bowsher*, 478 U.S. at 730. The Bureau's short history already has confirmed the truth of this principle—its unconstitutional structure has led to unfair, unjustified actions that have inflicted significant harm on the many businesses in the large sectors of the economy within the Bureau's jurisdiction.

A. The Bureau Has Ignored or Avoided Statutory Limits on Its Jurisdiction.

Although the Bureau's statutory authority is extremely broad, the Bureau's prior Director made a practice of circumventing the few limits that Congress imposed.

For example, the Consumer Financial Protection Act ("CFPA") expressly forbids the Bureau from exercising *any* authority over auto dealers (12 U.S.C. § 5519(a)), but the Bureau sought to end run this restriction by bringing enforcement actions under the Equal Credit Opportunity Act against indirect auto lenders (*i.e.*, banks or other lenders who purchase installment sales agreements from dealers who have extended financing to car buyers) on the theory that the dealers with whom they do business have engaged in discrimination.

As of January 2017, the Bureau had extracted some $200 million in penalties in these actions without ever having to defend in court its disparate-impact legal theory—which has been heavily criticized elsewhere. *See* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part III: The CFPB's Vitiated Legal Case Against Auto-Lenders* at 3 (Jan. 18, 2017). *See also* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part I: CFPB Junk Science and Indirect Auto Lending* at 46 (Nov. 14, 2015) (explaining that "internal [CFPB] documents reveal that the Bureau's objective from the beginning has been to eliminate dealer discretion and dealer reserve"). This roundabout means of imposing the Bureau's dictates on auto dealers flouted the clear limitation in the CFPA.

Similarly, the Bureau has used its Civil Investigative Demand ("CID") power (12 U.S.C. § 5562(c)) to probe college accreditation bodies. These organizations are outside the Bureau's jurisdiction because they do not offer or provide consumer financial products or services. *See* Br. of Chamber of Commerce of the U.S. as *Amicus Curiae* 4–16, *Consumer Fin. Protection Bureau v. Accrediting Council for Indep. Colleges & Schs.*, 854 F.3d 683 (D.C. Cir. 2017) (No. 16–5174). A unanimous D.C. Circuit panel threw out one such CID, explaining that it failed to comply with Dodd-

Frank's requirements because it gave "no description whatsoever of the conduct the CFPB is interested in investigating." *Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colleges & Schs.*, 854 F.3d 683, 691 (D.C. Cir. 2017).

The Bureau also has asserted jurisdiction over businesses that purchase structured settlement or annuity payments. Although such businesses offer no consumer financial product or service, the Bureau has relied on the theory that such businesses may provide "financial advisory services" subject to Bureau regulation by possibly representing to consumers that a sale of their structured payments is "in their best interest." Decision and Order 3, *In re J.G. Wentworth, LLC*, 2015-MISC-J.G. Wentworth, LLC-0001 (Feb. 11, 2016). After the Bureau's civil investigative demand ("CID") in that case was contested in court, the Bureau withdrew it. *See* Notice, *Consumer Fin. Protection Bureau v. J.G. Wentworth, LLC*, No. 16-cv-02773 (E.D. Pa. June 5, 2017), ECF No. 33 (notice of withdrawal of CID). But the Bureau could pursue similar CIDs in the future.

Next, although the CFPA expressly denies the Bureau the authority to enforce the data security requirements of the Graham-Leach-Bliley Act (*see* 12 U.S.C. § 5481(12)(J)), the Bureau nonetheless has claimed the authority to fine companies for allegedly failing to protect customer data. *See*

Consent Order at 1, *In re Dwolla, Inc.*, 2016-CFPB-0007 (Mar. 2, 2016). To justify this end run around the specific limitations on its authority under the governing Graham-Leach-Bliley Act, the Bureau has relied on its catch-all authority under the CFPA to prosecute unfair, deceptive or abusive acts or practices. *Id.*

Finally, the Bureau has pursued vicarious liability theories that ignore corporate forms, and the standards for disregarding them, that are long recognized under state law. For example, at least one court has rejected the Bureau's "common enterprise" theory, which would hold a company liable for the acts of its affiliates—*see Pennsylvania v. Think Fin., Inc.*, 2016 WL 183289, at *26 (E.D. Pa. Jan. 14, 2016) (holding that the "common enterprise theory" is unavailable under the CFPA)—yet the Bureau has continued to advance that theory in enforcement actions. Not only is there no statutory language supporting the theory, but the statute reflects Congress' decision to take another approach to the liability of affiliated companies. *See* 12 U.S.C. § 5481(6)(B) (subjecting affiliated companies to direct liability when they serve as service providers).

Unchecked by political processes, these aggressive assertions of authority have harmed regulated businesses and the consumers they serve. The courts, which have the power to invalidate Bureau actions when the

agency exceeds its jurisdiction, stand as a check on the Bureau's overreach. But even where the courts rebuff overreach by the Bureau, companies are put to unnecessary effort and expense in defending themselves—and the Bureau may continue to employ the legal theories that courts invalidate.

B. The Bureau Has Deviated Significantly From The Norms Followed By Other Federal Regulatory Agencies.

The Director's unchecked power also has repeatedly resulted in deviations from the consistent approaches of other federal regulatory agencies—in the form of unfair, arbitrary actions.

The Bureau, unlike other regulators, has published unverified consumer complaint data on its public website. *See, e.g.*, Disclosure of Consumer Complaint Narrative Data, 80 Fed. Reg. 15572 (Mar. 24, 2015). But it has done so "[w]ithout attempting to verify" the complaints, which it acknowledges "may be misleading or flat wrong." *PHH*, 881 F.3d at 149 (Henderson, J., dissenting). The Bureau accordingly knows "it is providing a 'megaphone' for debtors who needlessly damage business reputations." *Id.*

The Federal Trade Commission, by contrast, limits complaint database access to law enforcement agencies. *See* Federal Trade Comm'n, *The FTC's Consumer Sentinel Network*, goo.gl/5ctOlk. *See generally PHH*, 881

F.3d at 150 (Henderson, J., dissenting) ("One cannot help but think that the difference in the FTC's policy owes at least in part to the difference in its design.")

Next, unlike its fellow regulators, the Bureau has failed to take reasonable steps to reduce regulatory uncertainty. Other agencies employ robust advisory opinion and no-action letter processes to enable regulated businesses to clarify the rules of the road (*see, e.g.*, 17 C.F.R. § 140.98 (Commodity Futures Trading Commission)), but the CFPB has created an extremely restrictive no-action letter process that the Bureau expects will be used only in "exceptional circumstances"—and result in a mere *one to three actionable requests each year*. *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686, 8691 (Feb. 22, 2016); *see also id.* at 8693 (requiring a company to explain, among other things, why the company cannot avoid regulatory uncertainty by modifying its product).

Similarly, the Bureau has refused to institute a public proceeding to clarify the scope of its power under 12 U.S.C. § 5531(a) to prosecute "unfair, deceptive, or abusive act[s] or practice[s]"—even though the former Director himself testified to Congress that the "unreasonable advantage" element of the cause of action for "abusiveness" was "something of a vague term that needs definition." *How Will the CFPB Function Under Richard*

Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs, 112th Cong. 112-107, at 70 (2012).

This state of affairs is exactly the opposite of what Congress sought to accomplish when it created the Bureau. The Bureau was intended to "set and enforce clear rules of the road across the financial marketplace." Statement by the President on Financial Regulatory Reform (Mar. 22, 2010), perma.cc/Q2EC-MC2P; *see also* Pub. L. No. 111-203 § 1061(b)(7), 124 Stat. 1376, 2038 (2010) (transferring financial regulatory functions from other agencies to the Bureau). The Court should open the Bureau up to greater political accountability by invalidating the unconstitutional structure that insulates it from responsibility to the people.

III. THE COURT SHOULD ADDRESS THE CFPB'S CONSTITUTIONAL INFIRMITY NOW.

The Bureau's present Acting Director has indicated "frustrations" with the extent to which the Dodd-Frank Act "insulates the Bureau from virtually any accountability to the American people" or to Congress and has indicated his desire to "improve on the Bureau's record" in that regard. *See* Letter from Mick Mulvaney, Acting Director, CFPB, to The Hon. Elizabeth Warren, U.S. Senate, at 2 (Apr. 4, 2018), https://www.scribd.com/document/375624268/Read-Mulvaney-

letter#from_embed. He has also informed Congress that "the Bureau is far too powerful, and with precious little oversight of its activities," and has proposed legislative reforms that would address these issues. *See* CFPB, *Semi-Annual Report of the Bureau of Consumer Financial Protection* 1-2 (Apr. 2018), https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf.

But notwithstanding the Bureau's apparent change in approach, this Court should decide whether the Bureau's current structure complies with the Constitution now. The President has nominated an individual to serve as the new Director of the Bureau. *See* The White House, *Seven Nominations Sent to the Senate Today* (June 20, 2018), perma.cc/34D9-LDC8. Once a new Director is confirmed, that officer will be protected in her tenure by otherwise unconstitutional limits on the power of the President—whether the current incumbent of the Oval Office or another President within the next five years. In the meanwhile, the questions regarding the constitutionality of the Bureau's structure will loom over every action the Bureau takes. Any business subject to an enforcement action or regulation will raise the issue—with the risk that a huge number of administrative decisions would be invalidated if the structure is later held unconstitutional.

A court confronted with "'a constitutional flaw in a statute'" should generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enterprise Fund*, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006)). But that approach is not permissible when "it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid]." *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted). It may be implausible to think here that Congress would have enacted a statute giving an official serving at the pleasure of the President sole authority to spend more than $650 million annually without congressional approval: the proposal submitted by President Obama and the bill enacted by the House of Representatives adopted the traditional multi-member commission structure. *See PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). The more appropriate course, therefore, may be to leave to Congress the task of repairing the Bureau's unconstitutional structure. *See id.* at 160-64 (Henderson, J., dissenting).

CONCLUSION

The district court's decision denying defendants' motion for judgment on the pleadings should be reversed.

Respectfully submitted,

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/s/ *Andrew J. Pincus*

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amicus curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,420 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*

CERTIFICATE OF SERVICE

I hereby certify that that on July 9, 2018, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

Dated: July 9, 2018 /s/ *Andrew J. Pincus*