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, INC., MID-STATE FINANCE, INC., and MICHAEL E. GRAY,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of Mississippi
Case No. 3:16-cv-00356-WHB-JCG

Appellants' Principal Brief

Dale Danks, Jr.
Michael V. Cory, Jr.
DANKS, MILLER & CORY
213 S. Lamar Street
P.O. Box 1759
Jackson, MS 39215-1759
Phone: (601) 957-3101
Fax: (601) 957-3160
ddanks@dmc-law.net

Bentley E. Conner
P.O. Box 563
Canton, MS 39046-5630
Phone: (601) 859-6306
Fax: (601) 859-6307
connerbentleye@bellsouth.net

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Joshua S. Lipshutz
Lochlan F. Shelfer
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 955-8500
Fax: (202) 530-9575
tolson@gibsondunn.com
hwalker@gibsondunn.com
jlipshutz@gibsondunn.com
lshelfer@gibsondunn.com
jchristiansen@gibsondunn.com

Attorneys for Defendants-Appellants

CERTIFICATE OF INTERESTED PERSONS

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, INC., MID-STATE FINANCE, INC.,
and MICHAEL E. GRAY,

Defendants-Appellants.

The undersigned counsel of record certifies that the following interested persons and entities described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

There are no corporations that are either parents of any defendant-appellant or that own 10% or more stock in any defendant-appellant.

A. Plaintiff-Appellee

Consumer Financial Protection Bureau

B. Current and Former Attorneys for Plaintiff-Appellee

Current Attorneys:

Lawrence De-Mille-Wagman
Emily Hope Mintz
Christopher Deal
Michael Philip Favretto
Stephanie C. Brenowitz
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552

Former Attorneys:

Daniel David McDonough Abraham
Edward Keefe
CONSUMER FINANCIAL PROTECTION BUREAU
1700 G Street NW
Washington, DC 20552

Mitzi Dease Paige
Gregory K. Davis
U.S. ATTORNEY'S OFFICE - JACKSON
501 East Court Street
Suite 4.430
Jackson, MS 39201
Phone: (601) 965-4480

C. Defendants-Appellants

1. All American Check Cashing, Inc.
2. Mid-State Finance, Inc., d/b/a Thrifty Check Advance
3. Michael E. Gray

D. Current and Former Attorneys for Defendants-Appellants

Current Attorneys:

Theodore B. Olson
Counsel of Record
Helgi C. Walker
Joshua S. Lipshutz
Lochlan F. Shelfer
Jeremy C. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036

Dale Danks, Jr.
Michael V. Cory, Jr.
Kenneth C. Miller
DANKS, MILLER & CORY
213 S. Lamar Street
P.O. Box 1759
Jackson, MS 39215-1759

Bentley E. Conner
P.O. Box 563
Canton, MS 39046-5630

Former Attorneys

Robin H. Rasmussen
Peter D. Baskind
Megan B. Ross
DINKELSPIEL, RASMUSSEN & MINK, PLLC
1669 Kirby Parkway, Suite 106
Memphis, TN 38120

E. Other Interested Persons

None.

s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 955-8500

Attorney of Record for
Defendants-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fifth Circuit Rule 28.2.3, counsel for All American Check Cashing Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") states as follows:

This appeal presents an issue of extraordinary significance: whether the Consumer Financial Protection Bureau's structure violates Article II of the Constitution and the separation of powers. Oral argument will substantially aid the Court in this case. Courts across the country are divided on the CFPB's constitutionality, and the position of the United States is that the CFPB is unconstitutionally structured. This case presents an issue of first impression for this Court. All American thus respectfully requests that the Court hold argument.

TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

I. The CFPB's Unconstitutional Structure and Powers 2

II. The Unlawful Enforcement Action Against All American 4

SUMMARY OF THE ARGUMENT 6

ARGUMENT 11

I. The CFPB Is Unconstitutionally Structured........................ 11

A. The Constitution requires that the President must generally have the power to remove executive officers at will.. 12

B. Under the Supreme Court's precedents, the CFPB is unconstitutionally structured 16

C. The CFPB's structure fails to satisfy the only two "limited" exceptions to the general rule regarding at-will removal 27

1. *Humphrey's Executor* concerned the FTC, an agency that bears no resemblance to the CFPB, and thus does not control........................ 28

2. Inferior officers, such as the independent counsel in *Morrison v. Olson*, bear even less resemblance to the CFPB's Director 36

3. No other federal agency serves as a historical precedent for the CFPB 38

TABLE OF CONTENTS

(continued)

Page

D. The CFPB's other features exacerbate its constitutional defects 42

II. This Enforcement Action Is Invalid And Must Be Vacated 48

A. The proper remedy is to grant judgment to All American 49

B. The Acting Director's purported "ratification" has no effect 51

1. Structural constitutional violations cannot be ratified 53

2. Ratification is impossible here 55

3. In no event is this case moot 60

C. Severance is an inadequate remedy 62

CONCLUSION 66

STATUTORY ADDENDUM 70

TABLE OF AUTHORITIES

Page(s)

Cases

Advanced Disposal Servs. E., Inc. v. NLRB,
820 F.3d 592 (3d Cir. 2016) 58

In re Aiken Cty.,
645 F.3d 428 (D.C. Cir. 2011) 28

Alaska Airlines v. Brock,
480 U.S. 678 (1987) 62, 64

Allstate Ins. Co. v. Abbott,
495 F.3d 151 (5th Cir. 2007) 12

Already, LLC v. Nike, Inc.,
568 U.S. 85 (2013) 62

Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.,
721 F.3d 666 (D.C. Cir. 2013) 47

Bowsher v. Synar,
478 U.S. 714 (1986) 15

Burgess v. FDIC,
871 F.3d 297 (5th Cir. 2017) 51

Bute v. Illinois,
333 U.S. 640 (1948) 12

Catholic Leadership Coal. of Tex. v. Reisman,
764 F.3d 409 (5th Cir. 2014) 60

CFPB v. Accrediting Council for Indep. Colleges & Sch.,
854 F.3d 683 (D.C. Cir. 2017) 3

CFPB v. Gordon,
819 F.3d 1179 (9th Cir. 2016) 55, 56

TABLE OF AUTHORITIES
(continued)

Page

CFPB v. Navient Corp.,
No. 3:17-cv-101, 2017 WL 3380530
(M.D. Pa. Aug. 4, 2017)......31

CFPB v. RD Legal Funding, LLC,
No. 17-CV-890, 2018 WL 3094916
(S.D.N.Y. June 21, 2018) 8, 9, 11, 55, 60, 62

Clinton v. Jones,
520 U.S. 681 (1997)......14

Doolin Sec. Sav. Bank, F.S.B. v. OTS,
139 F.3d 203 (D.C. Cir. 1998)......58

Edmond v. United States,
520 U.S. 651 (1997)......53

FEC v. Legi-Tech, Inc.,
75 F.3d 704 (D.C. Cir. 1996)......56

FEC v. NRA Political Victory Fund,
513 U.S. 88 (1994)...... 56, 57, 58, 59

FEC v. NRA Political Victory Fund,
6 F.3d 821 (D.C. Cir. 1993)...... 10, 49, 51, 57

Franklin Sav. Ass'n v. Dir. of Office of Thrift Supervision,
740 F. Supp. 1535 (D. Kan. 1990)......57

Free Enterprise Fund v. PCAOB,
561 U.S. 477 (2010)......7, 12, 13, 14, 15, 16, 19, 20, 21, 27,
32, 34, 35, 36, 38, 41, 42, 44, 45, 47, 48, 49, 63

Freytag v. Comm'r,
501 U.S. 868 (1991)......48

TABLE OF AUTHORITIES
(continued)

Page

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.,
528 U.S. 167 (2000)..61, 62

Heater v. FTC,
503 F.2d 321 (9th Cir. 1974)..31

Hill v. Wallace,
259 U.S. 44 (1922)..65

Honig v. Doe,
484 U.S. 305 (1988)..61

Humphrey's Executor v. United States,
295 U.S. 602 (1935)..........................8, 18, 19, 27, 29, 30, 31, 32, 42, 45

Judicial Watch, Inc. v. Dep't of Energy,
412 F.3d 125 (D.C. Cir. 2005)..14

Kingdomware Techs., Inc. v. United States,
136 S. Ct. 1969 (2016)..61

Lucia v. SEC,
No. 17-130, 2018 WL 3057893 (U.S. June 21, 2018)..........................49

Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission,
138 S. Ct. 1719 (2018)..50, 53

McCulloch v. Maryland,
17 U.S. (4 Wheat.) 316 (1819)..12

Morrison v. Olson,
487 U.S. 654 (1988)..8, 28, 36, 37

Murphy v. NCAA,
138 S. Ct. 1461 (2018)..62, 65

TABLE OF AUTHORITIES
(continued)

Page

Myers v. United States,
272 U.S. 52 (1926) 7, 13, 15, 17, 18, 37

N. Pipeline Constr. Co. v. Marathon Pipe Line Co.,
458 U.S. 50 (1982) 50

Nasewaupee v. Sturgeon Bay,
251 N.W.2d 845 (Wis. 1977) 58

National Petroleum Refiners Ass'n v. FTC,
482 F.2d 672 (D.C. Cir. 1973) 30

Newman v. Schiff,
778 F.2d 460 (8th Cir. 1985) 56

Nguyen v. United States,
539 U.S. 69 (2003) 53

NLRB v. Noel Canning,
134 S. Ct. 2550 (2014) 38, 39, 42

Noel Canning v. NLRB,
705 F.3d 490 (D.C. Cir. 2010) 44

PHH Corp. v. CFPB,
839 F.3d 1 (D.C. Cir. 2016) 3, 11

PHH Corp. v. CFPB,
881 F.3d 75 (D.C. Cir. 2018) 6, 7, 9, 23, 25, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 41, 44, 47, 63, 64, 65

Plaut v. Spendthrift Farm, Inc.,
514 U.S. 211 (1995) 54

Ryder v. United States,
515 U.S. 177 (1995) 49, 50, 51, 54

TABLE OF AUTHORITIES
(continued)

Page

Stern v. Marshall,
564 U.S. 462 (2011) 54

SW Gen., Inc. v. NLRB,
796 F.3d 67 (D.C. Cir. 2015) 50

Synar v. United States,
626 F. Supp. 1374 (D.D.C.) 30

U.S. Dep't of Navy v. FLRA,
665 F.3d 1339 (D.C. Cir. 2012) 43

U.S. Term Limits, Inc. v. Thornton,
514 U.S. 779 (1995) 12

United States v. Jackson,
390 U.S. 570 (1968) 65

Whitman v. Am. Trucking Ass'ns,
531 U.S. 457 (2001) 47

Wilkes-Barre Hosp. Co. v. NLRB,
857 F.3d 364 (D.C. Cir. 2017) 55

Constitutional Provisions

U.S. Const. art. I, § 9, cl. 7 43

U.S. Const. art. II, § 1 .... 7, 13

U.S. Const. art. II, § 3 13

U.S. Const. pmbl. 12

Statutes

5 U.S.C. § 1201 22

TABLE OF AUTHORITIES
(continued)

Page

5 U.S.C. § 1203 22

5 U.S.C. § 1211 39

5 U.S.C. § 3345 5

5 U.S.C. § 3346(a) 61

5 U.S.C. § 7104 22

7 U.S.C. § 2(a)(2) 23

12 U.S.C. § 2 41

12 U.S.C. § 242 22

12 U.S.C. § 243 45

12 U.S.C. § 1752a(b)(1) 23

12 U.S.C. § 1812(a)(1) 23

12 U.S.C. § 1812(b)(1) 23

12 U.S.C. § 1812(e) 41

12 U.S.C. § 4511(b) 40

12 U.S.C. § 5302 64

12 U.S.C. § 5481(6) 46

12 U.S.C. § 5481(12) 2

12 U.S.C. § 5481(26) 46

12 U.S.C. § 5491(a) 2, 63

12 U.S.C. § 5491(b) 2

TABLE OF AUTHORITIES
(continued)

Page

12 U.S.C. § 5491(c) 2, 7, 35, 65
12 U.S.C. § 5492(b) 46
12 U.S.C. § 5492(c)(4) 45
12 U.S.C. § 5493(a) 46
12 U.S.C. § 5497(a) 2, 8, 43
12 U.S.C. § 5512 46
12 U.S.C. § 5531(a) 2, 32, 38
12 U.S.C. § 5531(b) 2, 32
12 U.S.C. § 5536(a) 2, 46
12 U.S.C. § 5564(g)(1) 59
12 U.S.C. § 5581 2
15 U.S.C. § 41 .... 22, 34
15 U.S.C. § 78d(a) 23
15 U.S.C. § 2053(a), (c) 22
25 U.S.C. § 2704(b) 22
28 U.S.C. § 509 52
28 U.S.C. § 5497(a)(1) 44
29 U.S.C. § 153(a) 22
29 U.S.C. § 661(a) 22
30 U.S.C. § 823(a) 22

TABLE OF AUTHORITIES
(continued)

Page

39 U.S.C. § 202(a)(1) 22

39 U.S.C. § 502(a) 22

39 U.S.C. § 502(d) 22

42 U.S.C. § 902(a) 39

42 U.S.C. § 1975(b) 22

42 U.S.C. § 1975(d)(2) 22

42 U.S.C. § 5841(a)(1) 22

42 U.S.C. § 5841(b)(2) 22

42 U.S.C. § 7171(b)(1) 22

42 U.S.C. § 7412(r)(6)(B) 22

44 U.S.C. § 3502(5) 23, 63

45 U.S.C. § 154 22

46 U.S.C. § 301 22

47 U.S.C. § 154(a) 23

47 U.S.C. § 154(b)(5) 23

49 U.S.C. § 1111(b) 22

49 U.S.C. § 1301(a)(1) 22

49 U.S.C. § 1301(c)(1) 22

52 U.S.C. § 30106(a)(1) 23

Ala. Code § 5-18A-12(b) 4

TABLE OF AUTHORITIES
(continued)

Page

Ala. Code § 5-18A-13(c) 4

La. Stat. Ann. § 9:3578.4 4

Miss. Code Ann. § 75-67-517 4

Miss. Code Ann. § 75-67-519(5) 4

Other Authorities

1 Annals of Cong. (1789) 41

156 Cong. Rec. H5239 (2010) 63

Akhil Reed Amar, *America's Constitution: A Biography* (2005) 13

Akhil Reed Amar, *America's Unwritten Constitution* (2012) 31

CFPB Semi-Ann. Rep. (Apr. 2018) 9, 16, 21, 43

The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124 (1996) 36

Exec. Order No. 12,146, § 1-402 (July 18, 1979) 52

The Federalist (Clinton Rossiter ed., 1961) 11, 14

Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238 (1988) 23

House Financial Services Committee, *Hearings and Meetings* (Mar. 17, 2015) 43

TABLE OF AUTHORITIES
(continued)

Page

How Will The CFPB Function Under Richard Cordray Before the H. Subcomm. on TARP, Fin. Servs. & Bailouts of the H. Comm. on Oversight & Gov. Reform, 112th Cong. (2012) 3

Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769 (2013) 22

1 Max Farrand, *The Records of the Federal Convention of 1787* (1911) 14

Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 Pub. Papers 1391 (Oct. 26, 1988) 40

Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. O.L.C. 120 (1978) 40

Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018) 4

President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts (June 18, 2018) 5

Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, 108 Stat. 1465 (Aug. 15, 1994) 39

Statement by President William J. Clinton Upon Signing H.R. 4277, 2 Pub. Papers 1471 (Aug. 15, 1994) 39

Treatises

Restatement (Second) of Agency (Am. Law Inst. 1958) 58

JURISDICTIONAL STATEMENT

The Consumer Financial Protection Bureau ("CFPB") brought suit against All American Check Cashing, Inc., Mid-State Finance, Inc., and Michael E. Gray (collectively, "All American") under 12 U.S.C. § 5565(a)(1). The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1345.

The district court denied All American's motion for judgment on the pleadings on March 21, 2018. ROA.7206. All American timely filed a motion for interlocutory review under 28 U.S.C. § 1292(b), which was granted on March 27, 2018. ROA.7244. This Court granted All American's timely petition for permission to appeal on April 24, 2018. ROA.7252. Jurisdiction is proper under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE

Whether the CFPB's structure violates Article II and the separation of powers.

STATEMENT OF THE CASE

I. The CFPB's Unconstitutional Structure and Powers

The Consumer Financial Protection Act ("CFPA") established the CFPB as an "independent" agency responsible for overseeing 18 consumer-protection statutes previously administered by other agencies. *See* 12 U.S.C. §§ 5481(12), 5491(a), 5581. Additionally, the CFPB may bring enforcement actions for what it considers "unfair, deceptive, or abusive act[s] or practice[s]," 12 U.S.C. § 5531(a); *see id.* § 5536(a), and "may prescribe rules" to define those terms, *id.* § 5531(b). The CFPB is headed by a single Director who serves a five-year term and may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(b), (c).

The Director may unilaterally request over half a billion dollars a year in funds from the Federal Reserve without any review by Congress. *See* 12 U.S.C. § 5497(a). The President has no input on the CFPB's funding, since the Office of Management and Budget ("OMB") lacks "any jurisdiction or oversight over the affairs or operations of the Bureau." *Id.* § 5497(a)(4)(E).

The CFPB has used its sweeping authority just as one would expect for an agency headed by a single individual with so much authority and so little accountability: arbitrarily. The CFPB has refused to give regulated parties fair notice about the meaning of key statutory terms that it administers, such as "abusive."[1] Instead, the agency regulates by enforcement action, springing new interpretations on defendants during litigation. Courts have repeatedly chastened the CFPB for such lawless tactics, stating that the CFPB's "gamesmanship"—such as reversing a decades-old agency interpretation and "applying its changed interpretation" retroactively in an enforcement action—failed "Rule of Law 101." *PHH Corp. v. CFPB*, 839 F.3d 1, 48–49 (D.C. Cir. 2016), *reinstated in relevant part*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). In other cases, the CFPB has issued "perfunctory" civil investigative demands that "fail[] to address" the scope of its investigation, and that courts have refused to enforce. *CFPB v. Accrediting Council for Indep. Colleges & Sch.*, 854 F.3d

[1] *See How Will The CFPB Function Under Richard Cordray Before the H. Subcomm. on TARP, Fin. Servs. & Bailouts of the H. Comm. on Oversight & Gov. Reform*, 112th Cong. at 69 (2012) (statement of Richard Cordray), https://oversight.house.gov/wp-content/uploads/2012/06/01-24-12-Subcommittee-on-TARP-Financial-Services-and-Bailouts-of-Public-and-Private-Programs-Hearing-Transcript.pdf.

683, 690 (D.C. Cir. 2017). Acting Director Mulvaney has acknowledged that the CFPB has engaged in far too much "regulation by enforcement" and too little "formal rule making." Mick Mulvaney, *The CFPB Has Pushed Its Last Envelope*, Wall St. J. (Jan. 23, 2018), https://www.wsj.com/articles/the-cfpb-has-pushed-its-last-envelope-1516743561).

II. The Unlawful Enforcement Action Against All American

For nearly two decades, All American, a company founded by Michael Gray, offered check-cashing and lending services in Mississippi, Louisiana, and Alabama. Its business practices are heavily regulated by state law. *See*, *e.g.*, Miss. Code Ann. § 75-67-517; *id.* § 75-67-519(5); La. Stat. Ann. § 9:3578.4; Ala. Code §§ 5-18A-12(b), 5-18A-13(c). In 2014, All American became the subject of a state regulatory enforcement action. On May 11, 2016, the CFPB brought an enforcement action against All American as well, based largely on the same grounds as the state enforcement action, for allegedly engaging in "unfair," "deceptive," and "abusive" acts and practices under 12 U.S.C. § 5331(a). *See* ROA.43–.66. For instance, the CFPB alleged that All American "formulated and carried out

a program aimed at subverting … consumer protections" under Mississippi and Louisiana law. ROA.48. The state enforcement matter was settled on June 8, 2017, ROA.2620, with All American paying $889,350 in fines and closing its Mississippi stores. ROA.2626. Mr. Gray subsequently sold the rest of his business and no longer works in the banking industry.

All American moved for judgment on the pleadings, arguing that the CFPB's enforcement action was void because, among other reasons, the CFPB's structure violates the Constitution. While that motion was pending, the CFPB Director, Richard Cordray, resigned and the President appointed Mick Mulvaney, the OMB Director, as Acting Director of the CFPB under the Federal Vacancies Reform Act, 5 U.S.C. §§ 3345 *et seq*. ROA.7177. The CFPB then purported to "ratify" this enforcement action on the theory that because Acting Director Mulvaney is removable at will by the President during his limited tenure as head of the CFPB, his purported ratification "remedied any constitutional problem with the initiation of this case." ROA.7179.[2]

[2] On June 18, 2018, President Trump nominated Kathy Kraninger to head the CFPB. *President Donald J. Trump Announces Intent to Nominate and Appoint Personnel to Key Administration Posts*,

The district court denied All American's motion, adopting the reasoning of the D.C. Circuit's en banc majority in *PHH*, 881 F.3d 75, which upheld the CFPB's structure against a constitutional challenge, ROA.7206.[3]

All American moved to certify this case for interlocutory appeal. The district court, acknowledging that this "case would not be able to proceed in the event the CFPB is not a constitutionally authorized entity," ROA.7246, certified the case for interlocutory review, and stayed all proceedings, ROA.7248. This Court accepted the interlocutory appeal. ROA.7252.

SUMMARY OF THE ARGUMENT

I. The Constitution requires that executive officers must generally be subject to the plenary removal power of the President of the United

WhiteHouse.gov (June 18, 2018), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-appoint-personnel-key-administration-posts-11/.

[3] All American will refer to the majority en banc opinion in *PHH* as "*Majority Op.*," while referring to the dissenting opinions of Judges Henderson and Kavanaugh as "*Henderson Op.*" and "*Kavanaugh Op.*," with page citations to the official reporter version.

States. *See* U.S. Const. art. II, § 1, cl. 1. That is the default rule established by the text and history of the Constitution, as recognized in the Supreme Court's decisions *Myers v. United States*, 272 U.S. 52 (1926), and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010). And *Free Enterprise Fund* makes clear that novel structures that insulate executive officers from the President's control and diminish political accountability are unconstitutional. *See id*. at 486.

The CFPB fails these standards. Never in the history of the Republic has an independent agency with such vast power been lorded over by a *single* unelected official rather than a multi-member commission. In creating the CFPB, Congress wrested vast enforcement powers from the Executive Branch and placed them in the hands of an agent entirely unaccountable to the President, to Congress, or to the People. The CFPB's Director is the most powerful official in the United States when it comes to consumer finance law—more powerful than the President himself. *Kavanaugh Op.* 172. That is because the President cannot remove the Director except for cause. *See* 12 U.S.C. § 5491(c)(3). Thus, the President is impotent to direct the enforcement of 19 federal statutes in the face of

policy and enforcement disagreements with the CFPB. Moreover, Congress's traditional power of the purse provides no constraining influence on the Director, as the CFPB is placed outside the ordinary appropriations process. *Id.* § 5497(a)(2)(A), (C).

The CFPB does not qualify for the Supreme Court's two narrow exceptions to the general rule of presidential at-will removal, as it bears no resemblance either to the Federal Trade Commission ("FTC") upheld in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), or to the independent counsel upheld in *Morrison v. Olson*, 487 U.S. 654 (1988). The constitutionally anomalous blueprint of the CFPB is exacerbated by its insulation from Congress's appropriations process, leaving the Director to write laws, enforce them, and adjudicate them free from influence of anyone elected by the people.

All American is not alone in this conclusion. The only court to reach the issue since the D.C. Circuit issued its en banc opinion in *PHH* has concluded that the dissents of Judges Henderson and Kavanaugh are most persuasive. *CFPB v. RD Legal Funding, LLC*, No. 17-CV-890, 2018 WL 3094916 (S.D.N.Y. June 21, 2018). Judge Preska adopted Judge Ka-

vanaugh's dissent, concluding, "based on considerations of history, liberty, and presidential authority," that "the CFPB is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director." *Id.* at *35.

The United States, too, believes that the CFPB's structure constitutes "a stark departure from" the "constitutional design." Brief for the United States as Amicus Curiae at 15, *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) (No. 15-1177), 2017 WL 1035617 ("U.S. Br."). So does Acting Director Mulvaney, who believes that the CFPB's "structure and powers … are not something the Founders and Framers would recognize." CFPB Semi-Ann. Rep. 1 (Apr. 2018) ("*Mulvaney Report*"). The agency's unfettered powers "prime" it "to ignore due process and abandon the rule of law." *Id*. at 2.

That is just what the CFPB has done to All American, insisting on continuing this enforcement action against the company and Mr. Gray even after state banking officials took away his licenses, he paid a significant settlement, and he was forced to sell his business. Mr. Gray is no longer in the banking sector, and the state proceeding that was the basis for this enforcement matter has been resolved. It is difficult to see what

the point of imposing duplicative federal penalties are in this situation, except to break him personally.

II. Because the CFPB is unconstitutionally structured, it "lacks authority to bring [an] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993). Any enforcement action initiated by an unconstitutional agency is therefore void *ab initio*. The proper remedy is therefore to strike down Congress's unconstitutional scheme *in toto*, vacate this unlawful enforcement action, and remand with instructions to grant judgment in favor of All American.

The Acting Director's efforts to dodge the constitutional issue presented by this case by "ratifying" this suit are fruitless. The Acting Director lacks authority to ratify this action—structural constitutional violations cannot be ratified; even if they could, the CFPB never had authority to bring this enforcement in the first place; and the Acting Director cannot ratify this action now because the statute of limitations has run. Finally, the CFPB's purported ratification cannot moot All American's challenge because this case presents a paradigmatic voluntary cessation, and the CFPB's actions are capable of repetition yet evading review. There is little question that the Acting Director's tenure will soon be over

and All American will again be subjected to the actions of an unconstitutional Director.

For these reasons, Judge Preska has followed Judge Henderson in holding that the CFPA's removal provision cannot be severed from the rest of the statute, and instead the CFPA must be struck down "in its entirety." *RD Legal*, 2018 WL 3094916, at *35. That court also correctly held that "the constitutional issues presented by the structure of the CFPB are not cured by the appointment of Mr. Mulvaney" because "the relevant provisions of the Dodd-Frank Act that render the CFPB's structure unconstitutional remain intact." *Id.* at 102.

ARGUMENT

I. The CFPB Is Unconstitutionally Structured.

The CFPA places sweeping and unprecedented Legislative, Executive, and Judicial power "in the same hands," a dangerous anomaly that the Framers recognized as "the very definition of tyranny." *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961). Worse, the Director is unaccountable and unfettered by any meaningful checks and balances. But the Constitution requires that executive officers such as the head of the CFPB be removable at will by the President. And the

CFPB fails to meet the few narrow and limited exceptions in Supreme Court precedent to the general rule requiring at-will removal. Finally, the CFPB's other structural features, together with the limitation on the President's removal power, combine to exacerbate its constitutional defects. It must be invalidated.[4]

A. The Constitution requires that the President must generally have the power to remove executive officers at will.

Our Republic was conceived on the premise that the government should "deriv[e] [its] just powers from the consent of the governed." *Bute v. Illinois*, 333 U.S. 640, 651 (1948). "We the people" established this constitutional government, U.S. Const. pmbl.; "it emanates from" us, and "[i]ts powers are granted by" us, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819). It must therefore remain "directly responsible to" us. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995). For this reason, we "adopted" a system "to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010).

---

[4] "A district court's judgment concerning a statute's constitutionality is reviewed de novo." *Allstate Ins. Co. v. Abbott*, 495 F.3d 151, 160 (5th Cir. 2007).

The Constitution therefore places the executive power of the United States in the hands of a single individual who is directly accountable to the people. *See Free Enter. Fund*, 561 U.S. at 499 ("Constitution requires that a President chosen by the entire Nation oversee the execution of the laws"). Article II "vests" "[t]he executive Power" "in a President" who alone has the duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. These provisions "make emphatically clear from start to finish" that the President is "personally responsible for his branch." Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005).

But the President cannot act alone. He depends on executive officers to help discharge his constitutional duties. So, to preserve the principle of accountability to the people for the faithful execution of the laws, the Constitution also requires that the President possess "unrestricted power of removal" over those officers. *Myers v. United States*, 272 U.S. 52, 176 (1926); *see also Free Enter. Fund*, 561 U.S. at 484 (President must be able to "oversee the faithfulness of the officers who execute them"—by removal, if necessary). This means that the President must possess the "importan[t]" power to "remov[e]" based even on "simple disagreement"

over "policies or priorities." *Id*. at 492, 499, 502. This direct accountability is the only way "We the People" can ensure that "the Executive Branch, which now wields vast power and touches almost every aspect of daily life," does not "slip from the Executive's control, and thus from that of the people." *Id.* at 499.

This system was deliberately chosen over competing structures of executive power. The Framers "rejected" the "idea of a 'plural executive,'" instead "placing power in one person, in order to gain the advantages of accountability fixed on a single source." *Judicial Watch, Inc. v. Dep't of Energy*, 412 F.3d 125, 130 (D.C. Cir. 2005). The reason for this choice was that dividing the executive authority "tends to conceal faults and destroy responsibility," whereas a single executive would be "dependen[t] on the People." *The Federalist No. 70*, at 424, 427 (Alexander Hamilton). Such "unity in the Executive," the Framers knew, "would be the best safeguard against tyranny." 1 Max Farrand, *The Records of the Federal Convention of 1787*, at 66 (1911) (James Wilson); *see also Clinton v. Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (Framers "consciously decid[ed] to vest Executive authority in one person rather than several"

to "focus, rather than to spread, Executive responsibility thereby facilitating accountability"). When Congress interferes with this system, it upsets these "structural protections against the abuse of power [that are] critical to preserving liberty." *Free Enter. Fund*, 561 U.S. at 501.

This principle is illustrated by one of the First Congress's earliest and most extensive debates. The "Decision of 1789," which provides "contemporaneous and weighty evidence" of the Constitution's meaning, *Bowsher v. Synar*, 478 U.S. 714, 723 (1986), concerned the Executive-Branch position that would eventually become the Secretary of State. Congress struck the phrase "removable by the President" from the proposed legislation related to the position, lest it be suggested that Congress had *any* authority to limit the President's removal power. *See Myers*, 272 U.S. at 113.

The text and history of the Constitution thus demonstrate that the President must generally have the power to remove at will those executive officers on whom he relies to help him take care that the laws are faithfully executed. As the United States has recognized, the CFPB's structure constitutes "a stark departure from" the "constitutional design." U.S. Br. 15. And only a few months ago, Acting Director Mulvaney

admitted to Congress that the CFPB's "structure and powers … are not something the Founders and Framers would recognize." *Mulvaney Report* at 1. In his own words, the agency's unheard-of "structur[e]" "prime[s]" it "to ignore due process and abandon the rule of law." *Id.* at 2. All American agrees that the CFPB is entirely lacking in any structural accountability to the President or Congress and thus to the people, and is therefore unconstitutional.

B. Under the Supreme Court's precedents, the CFPB is unconstitutionally structured.

For almost a century, the Supreme Court has recognized that officers of the United States who exercise executive authority must normally be removable at will by the President. As the Supreme Court recently reiterated, the "landmark" decision of *Myers* firmly established the "general" rule on this matter: The Constitution grants the President "the power to oversee executive officers through removal," and "the Legislature has no right to diminish or modify" this "Presidential oversight." *Free Enter. Fund*, 561 U.S. at 492, 500.

1. "The landmark case of *Myers*" reaffirmed that the Constitution's grant of "executive power included a power to oversee executive officers through removal." *Free Enter. Fund*, 561 U.S. at 492. The *Myers* Court

held that the Constitution gives Presidents the "exclusive power of removal" over officers, to ensure that those officers have the requisite "loyalty" to the President's policies. 272 U.S. at 122. Without the at-will removal power, the President would have officers "forced on him whom he considered as unfaithful," and the Executive Branch "would be subject to perpetual discord." *Id.* at 124. As Madison put it, it is contrary to "the true principles of the Constitution" for Congress to "limit or modify" the President's "power of displacing from office." *Id*. at 125–26.

Congress therefore lacks the "power to regulate removals," and cannot "thwart[ ] the executive in the exercise of his great powers and in the bearing of his great responsibility by fastening upon him, as subordinate executive officers," those who lack "loyalty" or who have "different views of policy," which would "make his taking care that the laws be faithfully executed most difficult or impossible." *Myers*, 272 U.S. at 128, 131. Otherwise, Congress could "abolish" the "unity and responsibility in the executive department, which was intended for the security of liberty and the public good." *Id.*; *see also id*. at 132 (if an officer is "saddled upon the President," remains in office "against the will of the President," and can-

not be removed for acting "unfaithfully," then the President loses "responsibility" for the executive branch and "the strength and beauty of [the constitutional] system" is "weaken[ed] and destroy[ed]").

The President therefore must be able to "supervise and guide" the actions of the officers who execute federal laws, and "must have the power to remove [those officers] without delay" as soon as he "loses confidence" in their "loyalty." *Myers*, 272 U.S. at 134–35.

2. A decade later, the Supreme Court established an exception to the "general" *Myers* rule. In *Humphrey's Executor*, the Supreme Court confronted a for-cause removal restriction insulating the five commissioners of the FTC from presidential influence. The FTC was established as a "nonpartisan" "body of experts" that was meant to act with "entire impartiality." 295 U.S. at 624. The Supreme Court held that the FTC—a "quasi legislative and quasi judicial" multi-member commission that exercises "no part of the executive power vested by the Constitution in the President"—may constitutionally be insulated from at-will removal by the President. *Id*. at 627, 629.

As the *Humphrey's Executor* Court recognized, however, there is a "field of doubt" between the *Myers* rule that executive officers are subject

to the President's "unrestrictable," "exclusive[,] and illimitable power of removal," on the one hand, and the FTC on the other. 295 U.S. at 627, 632. The Court accordingly "le[ft] such cases as may fall within it for future consideration and determination as they may arise." *Id.* at 632.

3. Most recently, in *Free Enterprise Fund*, the Supreme Court conducted the very "future consideration" that *Humphrey's Executor* contemplated. There, the Supreme Court struck down Congress's attempt to depart from the structure of traditional independent agencies led by a multi-member commission whose members are protected by a single level of for-cause removal. 561 U.S. at 483. The *Free Enterprise* Court declined to extend *Humphrey's Executor* to "a new situation" it had "not yet encountered." *Id.*; *see also* U.S. Br. 17 ("The Supreme Court has … been reluctant to expand *Humphrey's Executor* to new situations not yet encountered by the Court.") (brackets omitted).

Free Enterprise Fund established the rule that, when a court confronts a "novel structure" that the Supreme Court has not yet directly addressed, the court must examine whether that structure results in a "diffusion of authority" that prevents "the President" from being "held fully accountable" to the people for the actions of the Executive Branch.

Id. at 496, 514. Democratic accountability is the touchstone. "The people do not vote for the 'Officers of the United States.'" *Id.* at 497–98. Rather, they "look to the President to guide" those "subject to his superintendence." *Id.* at 498. Where novel acts of Congress diminish the ordinary "clear and effective chain of command," the public is stripped of the ability to place "blame" where it belongs, and such measures violate the separation of powers. *Id.* Under this test, Congress may not "immuni[ze] from Presidential oversight" the "regulator of first resort" over "a vital sector of our economy." *Id.* at 497, 508.

4. The CFPB is precisely such a "new situation" resulting in not just an "[un]clear" and "[in]effective chain of command," but *no accountability at all*. This Court should decline to extend *Humphrey's Executor*'s "limited" exception here, where, as in *Free Enterprise Fund*, the Court is faced with a "novel structure" that does not merely "add" to the independence of a multi-member commission, but rather "transforms" a single-member agency head into the supreme leader of consumer finance in the United States. *Free Enter. Fund*, 561 U.S. at 496.

In *Free Enterprise Fund*, Congress strayed from *Humphrey's Executor*'s "limited" exception to the "general" *Myers* rule by insulating the

PCAOB's members with two levels of for-cause removal, instead of the one level that *Humphrey's Executor* had authorized. In the same way, Congress here has exceeded the *Humphrey's Executor* exception by granting sweeping rulemaking, enforcement, and adjudicative powers to a single individual who is removable only for cause instead of dispersing that authority across multiple members of a commission, as *Humphrey's Executor* would have allowed.

This change makes a difference for accountability. Because "[t]he people do not vote for" the CFPB's director, *Free Enter. Fund*, 561 U.S. at 497, if the electorate objects to the way the Director wields these awesome powers, they have no recourse, because no democratically elected actor has any modicum of influence over the agency. The Director is an "executive officer" who has "the power" to "destroy business, or arbitrarily remake American financial markets" with no "meaningful accountability" to the President or the people. *Mulvaney Report* at 1–2.

The CFPB's single-director status diminishes presidential power by depriving Presidents of two key tools of influence that they wield over multi-member independent agencies: (1) the presidential power to name the commission's chair; and (2) the bipartisan balance requirement,

which ensures that the President's political party is represented on the commission. Of the 18 main independent agencies headed by multi-member commissions,[5] two have bipartisan balance requirements alone,[6] five have presidentially designated chairs alone,[7] and the remaining eleven have *both* features.[8] Thus, for every multi-member independent agency, either the President has the power to designate the chair, or the President's party is well-represented on the commission, or (most commonly)

---

[5] *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 784–85 n.90 (2013) (listing agencies).

[6] 45 U.S.C. § 154 (National Mediation Board); 39 U.S.C. § 202(a)(1) (United States Postal Service Board of Governors).

[7] 42 U.S.C. § 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 12 U.S.C. § 242 (Federal Reserve); 30 U.S.C. § 823(a) (Federal Mine Safety and Health Review Commission); 29 U.S.C. § 153(a) (National Labor Relations Board); 29 U.S.C. § 661(a) (Occupational Safety and Health Review Commission).

[8] 42 U.S.C. § 1975(b), (d)(2) (Commission on Civil Rights); 15 U.S.C. § 2053(a), (c) (Consumer Product Safety Commission); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 46 U.S.C. § 301 (Federal Maritime Commission); 5 U.S.C. § 7104 (Federal Labor Relations Authority); 15 U.S.C. § 41 (FTC); 5 U.S.C. §§ 1201, 1203 (Merit Systems Protection Board); 25 U.S.C. § 2704(b)(1)(A), (3) (National Indian Gaming Commission); 42 U.S.C. § 5841(a)(1), (b)(2) (Nuclear Regulatory Commission); 49 U.S.C. § 1111(b) (National Transportation Safety Board); 39 U.S.C. § 502(a), (d) (Postal Regulatory Commission); 49 U.S.C. § 1301(a)(1), (c)(1) (Surface Transportation Board).

both.[9] Each of these features ensures that the President will have a healthy measure of influence over the agency's policy choices.

First, the power to designate an agency chair is a powerful tool for incoming Presidents to assert their influence over independent agencies. "The ability of the President to retain policy influence through the selection of the chair is important because the chair of a multimember agency is ordinarily its most dominant figure." *Kavanaugh Op.* 189 (quoting Datla & Revesz, *supra* note 5, at 819) (ellipsis omitted). Agency chairs "can and usually do exercise nearly total control over that agency's basic policy agenda." *Id.* at 190 (quoting Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238,

---

[9] Additionally, there are four agencies that do not have any statutory protection from presidential removal, but which Congress still classifies as "independent agencies." 44 U.S.C. § 3502(5). *All* of these agencies are subject *both* to bipartisan balance requirements *and* to presidential designation of the chair. 7 U.S.C. § 2(a)(2) (Commodity Futures Trading Association); 47 U.S.C. § 154(a), (b)(5) (Federal Communications Commission); 15 U.S.C. § 78d(a) (Securities and Exchange Commission); 12 U.S.C. § 1812(a)(1), (b)(1) (Federal Deposit Insurance Corporation). And of the two remaining agencies that some assume are independent, despite the absence of statutory indication, one has a bipartisan balance requirement, 52 U.S.C. § 30106(a)(1) (Federal Election Commission), and the other has both a bipartisan balance requirement and a presidentially designated chair, 12 U.S.C. § 1752a(b)(1) (National Credit Union Administration).

245 n.24 (1988)). The chair of a commission "both controls the agenda and may *prevent* certain actions from occurring," making the President's power to designate the chair "valuable," even when the agency is "controlled" by individuals who "oppose the President's views." *Id.* "[I]t is not plausible to say that a President could have more indirect ongoing influence over (i) a single Director who has policy views contrary to the President's than that President has over (ii) a multi-member independent agency headed by a chair who is appointed by the President and shares the same policy views as the President." *Id.* at 192. Thus, whereas Presidents almost always have a degree of immediate control over multi-member agencies, there is "zero" presidential influence over the CFPB, "and the zero remains zero until the Director's term expires." *Id.*

Second, "[f]or a multi-headed commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the bipartisan-membership requirement … further increases the likelihood that at least some of the holdover members share the President's views." U.S. Br. 15. But "where a single Director has a term greater than four years (as is true for the CFPB), a President may never get to appoint the Director." *Id.* In fact, "there is a twenty per

cent chance the President will have no at-will opportunity to replace the agency's leader—and no real policy influence over the agency—for the *entirety* of the President's four-year term," and "the odds grow ever larger that the President will have no such opportunity or influence during his first three years, first two years, first year and first hundred days." *Henderson Op.* 156.

The CFPB Director is thus far more insulated from presidential influence than any multi-member independent agency. In fact, it is "a much starker case of unconstitutionality than *Free Enterprise Fund*." *Kavanaugh Op.* 189. There, "the second for-cause provision did not afford PCAOB members all that much additional insulation from the President" because the PCAOB was only a "*marginal* additional diminution of Presidential authority." *Id.* at 190–91. But here there is a *complete and total* diminution of presidential authority.

The United States agrees. "[A] single-headed independent agency presents a greater risk than a multi-member independent commission of taking actions or adopting policies inconsistent with the President's executive policy." U.S. Br. 14–15. For instance, "whereas a multi-headed commission generally must engage in at least some degree of deliberation

and collaboration, which tend towards compromise, a single Director can decisively implement his own views and exercise discretion without these structural constraints," and thus "[v]esting such power in a single person not answerable to the President constitutes a stark departure from that framework." *Id.* at 15.

In light of the CFPB Director's massive powers, it is striking that the CFPB has failed to ever identify any limiting principle on the range of executive authority that Congress could assign to "independent" agencies. For example, the CFPB has never attempted to show how its separation-of-powers theory would prevent Congress from making the Treasury Secretary, or any other cabinet position, removable only for cause. The logic of the CFPB's position necessarily suggests that there could be a for-cause restriction for the Secretary of the Treasury, or the Secretary of the Labor Department, or the Secretary of Health and Human Services. Equally, sustaining the CFPB's structure would mean that "the FTC, SEC, FEC, NLRB and CFPB" could each be "headed by a fast-acting partisan director with fourteen years of tenure" who does not "hav[e] to answer to the executive"; this "would be too much for Article II to bear," yet it is the natural and unavoidable consequence of the CFPB's position.

Henderson Op. 157. In fact, why not divest the President of the power to execute a whole range of laws, from environmental to financial, and place that authority in the hands of a single unelected and democratically insulated Director? Allowing this dramatic expansion of the *Humphrey's Executor* rule would "invite[ ] aggregation," and there would be no principled stopping point. *Id.* The absence of any discernible limiting principle is a telling indication that the CFPB's view of the separation of powers is wrong.

This Court should follow *Free Enterprise Fund* and strike down the novel structure of the CFPB, which radically reduces the President's powers and influence while erasing any modicum of political accountability.

C. The CFPB's structure fails to satisfy the only two "limited" exceptions to the general rule regarding at-will removal.

The Supreme Court has carved out only two "limited" exceptions to the "general" rule laid out in *Myers* that apply only "under certain circumstances" (*Free Enter. Fund*, 561 U.S. at 483, 495, 513): (1) a multimember "body of experts," *Humphrey's Ex'r*, 295 U.S. at 624; and (2) certain inferior officers with limited tenure and a narrow scope of powers,

see Morrison v. Olson, 487 U.S. 654, 671–73, 695–97 (1988).[10] Neither of them, nor any other agency that Congress has created over the centuries, is anything like this concentrated mass of rulemaking, enforcement, adjudicative, and punitive power in the hands of a single individual who is untouchable by the electorate. "*Humphrey's Executor* and *Morrison* represent what up to now have been the outermost constitutional limits of permissible restrictions on the President's removal power," and courts must "hold the line and not allow encroachments beyond what *Humphrey's Executor* and *Morrison* already permit." *Kavanaugh Op*. 196.

1. *Humphrey's Executor* concerned the FTC, an agency that bears no resemblance to the CFPB, and thus does not control.

In *Humphrey's Executor*, the Supreme Court upheld the FTC's for-cause removal restriction because the FTC was structured to be a "non-partisan" "body of experts" that would act with "entire impartiality." 295

[10] The continued viability of *Humphrey's Executor* and *Morrison* after *Free Enterprise Fund* has been rightly questioned. *See*, *e.g.*, *In re Aiken Cty*., 645 F.3d 428, 444, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring). *Free Enterprise Fund* makes clear that, at minimum, *Humphrey's Executor* and *Morrison* should be read narrowly and not extended. Further, Petitioners respectfully preserve the argument that the Supreme Court should revisit and overturn either or both *Humphrey's Executor* and the relevant portion of *Morrison*.

U.S. at 624. The commissioners serve staggered, seven-year terms, so that each could acquire "expertness" and so that the FTC's membership would not be "subject to complete change at any one time." *Id.* The Supreme Court concluded that, although the President possesses an "unrestrictable" and "illimitable power of removal" over "executive officers," an "administrative body" of the FTC's "character"—*i.e.*, a "legislative agency" "such as that here involved" headed by "officers of th[is] kind"—is not considered "executive"; instead, it is a "commission" that "acts in part quasi legislatively and in part quasi judicially." *Id.* at 627–28, 631–32. The FTC was "a legislative or … a judicial aid" that "exercise[d] no part of the executive power vested by the Constitution in the President." *Id*. at 628. For that reason, the Court sustained the for-cause removal provision. *Id.* at 632.

The FTC's structure as a multi-member commission was crucial to the holding of *Humphrey's Executor*. "The Court repeatedly referenced the [FTC's] status as a body of experts in concluding that Congress could permissibly insulate the FTC commissioners from Presidential removal," *Kavanaugh Op.* 194, reasoning that "[s]uch a body" as the FTC "cannot

in any proper sense be characterized as an arm or an eye of the executive," *Humphrey's Ex'r*, 295 U.S. at 628. The United States agrees that "[t]he Supreme Court's analysis in *Humphrey's Executor* was premised on the nature of the FTC as a continuing deliberative body," and on its "structural features as an 'administrative body'" of multiple members with staggered terms. U.S. Br. 2, 9.

The CFPB is "not even a distant cousin of the FTC blessed by *Humphrey's Executor*." *Henderson Op.* 146. The CFPB is "an agency like no other," headed by a single Director who wields "immense power to," among other things, "define elastic concepts of unfairness, deception and abuse in an array of consumer contexts"; "enforce his rules in administrative proceedings overseen by employees he appoints"; "adjudicate such actions himself if he chooses"; and "decide which penalties fit the violation." *Id.* at 137–38. "No independent agency exercising substantial executive authority has ever been headed by *a single person*. Until now." *Kavanaugh Op.* 165.[11]

[11] The CFPB's powers also dwarf those exercised by the FTC in 1935. "[T]he 'quasi-legislative' powers referred to in *Humphrey's Executor* were not substantive rulemaking powers, which the [FTC] itself did not assert it possessed until 1962." *Synar v. United States*, 626 F. Supp. 1374, 1397 n.24 (D.D.C.), *aff'd*, 478 U.S. 714 (citing *National*

The CFPB's structure bears no resemblance to the FTC's. The Director is not "called upon to exercise the trained judgment of a body of experts" who are "informed by experience." *Humphrey's Ex'r*, 295 U.S. at 624. Unlike the FTC's staggered multi-member structure, the Director "is a speedy unitary actor," which means that "he cannot also be a 'quasi-legislative and quasi-judicial'" multi-member commission acting "by considered consensus." *Henderson Op.* 151 (quoting *Humphrey's Ex'r*, 295 U.S. at 624, 629). This fundamentally different structure undermines all logic of *Humphrey's Executor*. That case did not purport to contradict "the Decision of 1789," which continues to control, at the very least, to the extent that it "established that in all one-headed departments, the department head must be removable at will by the president." Akhil Reed Amar, *America's Unwritten Constitution* 323 (2012).

Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973)). Instead, the 1935 FTC had "the responsibility to conduct investigations for the purpose of recommending legislation to Congress." *Id.* And the FTC in 1935 had only "non-retroactiv[e]" authority and could not order any "retrospective" remedy. *See Heater v. FTC*, 503 F.2d 321, 321–26 (9th Cir. 1974); *CFPB v. Navient Corp.*, No. 3:17-cv-101, 2017 WL 3380530, at *15 (M.D. Pa. Aug. 4, 2017) ("Unlike the CFPB, … in 1935 the FTC could not bring a civil action in a district court for monetary penalties."). The en banc majority in *PHH* had essentially no response to this point. *See* 881 F.3d at 94.

Moreover, multi-member commissions contain their own internal checks to avoid arbitrary decision-making. Indeed, "[a]gency independence" itself is, in part, "a function of" the "multimember bipartisan board" composition. *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting). But while the FTC's multi-member structure serves as an additional check on arbitrary decision-making, the CFPB is headed by one Director whose choices can neither be outvoted nor used to remove the Director from office. "[T]he CFPB's sole Director does not have to bother with the give and take required of a bipartisan multimember body." *Henderson Op*. 139. Unlike the FTC, the CFPB's directorship *is* "subject to complete change at any one time." *Humphrey's Ex'r*, 295 U.S. at 624. Nor was the CFPB structured to be a "nonpartisan" and "entire[ly] impartial[ ]" commission. *Id*. Just the opposite. The CFPB Director has "latitude to define and punish" the "malleable" statutory terms "'unfair, deceptive, or abusive acts or practices' broadly or narrowly, depending on his policy preferences." *Henderson Op*. 148 (quoting 12 U.S.C. § 5531(a), (b)).

The result is a grave threat to individual liberty. "[A] single unaccountable, unchecked Director poses a far greater risk of arbitrary deci-

sionmaking and abuse of power" than do individual commissioners, *Kavanaugh Op.* 166, each of whom is checked by the others and cannot take action without deliberative consensus. "In the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual agency head. But in this new agency, the CFPB, that critical check is absent," *id.* at 183, thereby posing a serious danger to individual liberty.

The United States has taken the same position, arguing that the CFPB is unconstitutional under *Humphrey's Executor* because it "lacks those critical structural attributes that have been thought to justify 'independent' status for multi-member regulatory commissions." U.S. Br. 2. For this reason, "the exception recognized in *Humphrey's Executor*" should not be "extend[ed]" to the CFPB. *Id*. at 3. Congress's ability to shield agency heads with a restriction of the President's removal power is "inextricably bound together with" the agency's structure as "a continuing deliberative body." *Id*. at 10. "The CFPB," by contrast, "lacks the structural features that the Supreme Court relied upon in part" in *Humphrey's Executor*. *Id*. at 12. "An agency headed by a single officer … embodies a quintessentially executive structure" that promotes vigor and

dispatch. *Id.* at 13. Those features are essential to the President's ability to effectively carry out his job, but they also can be dangerous, which is why the Framers placed a check on those powers by making the President directly accountable to the people. But when those features—along with immense governmental authority—are handed to an individual that is entirely insulated from the democratic process, the government has started down the path to tyranny. Thus, the United States concluded, "[t]he principles animating the exception in *Humphrey's Executor* do not apply when Congress carves off a portion of the quintessentially executive power and vests it in a single principle officer below the President who is not subject to the President's control." *Id.* To hold otherwise would "swallow the 'general' rule of *Myers* and Article II." *Id.* at 14 (quoting *Free Enter. Fund*, 561 U.S. at 513).

In contrast to the CFPB, the President in one term will always be able to nominate multiple FTC Commissioners (owing to their staggered terms), and has always been assured that at least two of the five commissioners will be from his party. 15 U.S.C. § 41. Here, by contrast, the President is left no way to "faithfully execute[ ]" the 19 federal consumer-finance statutes; they are instead executed exclusively by the Director,

who can autonomously dictate the federal policy for consumer finance law. Moreover, the Director exercises all of this power over a lengthy term of five years. *See* 12 U.S.C. § 5491(c)(1)–(2). Therefore, "for much of the President's term—sometimes all of it—the sole 'regulator of first resort for a vital sector of our economy' might well be faithful to the policies of the last President, not the views of the current one." *Henderson Op.* 139 (ellipsis omitted) (quoting *Free Enter. Fund*, 561 U.S. at 508). A President could serve an entire four-year term powerless even to remove the CFPB's leader or name a successor, and, given the other barriers to presidential control, he would thus be unable even to influence the agency in its execution of a wide body of federal law.

While "the FTC is a deliberative expert nonpartisan agency that reports to the Congress[,][t]he CFPB is a unitary inexpert partisan agency that reports to no one. Because the former is no precedent for the latter, *Humphrey's Executor*"—which "remains the exception, not the rule"—"does not control here." *Henderson Op.* 138, 151.

2. Inferior officers, such as the independent counsel in *Morrison v. Olson*, bear even less resemblance to the CFPB's Director.

Cases treating inferior officers such as *Morrison v. Olson*—which upheld the Independent Counsel statute—are "even further afield." *Kavanaugh Op.* 195; *see also Henderson Op.* 151 ("As for *Morrison*, that case and this are not on the same jurisprudential planet.").

Inferior officers generally have much more limited authority and discretion than principal officers. For this reason, *Morrison*'s ruling regarding the independent counsel, which was an "inferior officer," *Morrison*, 487 U.S. at 691, applies only to other "inferiors," *Free Enter. Fund*, 561 U.S. at 483. As President Clinton's administration explained, the *Morrison* majority "had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive-branch policy formulation." *The Constitutional Separation of Powers Between the President and Congress*, 20 Op. O.L.C. 124, 169 (1996). The current administration agrees that *Morrison* "obviously does not apply to any principal officer who heads an executive agency," especially the CFPB's Director. U.S. Br. 14 n.3.

Indeed, it makes "good sense" to limit *Morrison*'s holding to inferior officers because "[t]he more important the officer's assignments, the more directly his actions implicate the President's responsibility to faithfully execute the laws." *Henderson Op.* 152. "Each head of a department is and must be the President's *alter ego*" in carrying out the laws of the United States. *Myers*, 272 U.S. at 132–33. "*Morrison* did not hold—or even hint—that a single *principal* officer could be the sole head of an independent regulatory agency with broad enforcement, rulemaking, and adjudication powers." *Kavanaugh Op.* 195.

Moreover, unlike the independent counsel in *Morrison*, the Director does not have "limited jurisdiction and tenure" or "lac[k] policymaking or significant administrative authority" or "any authority to formulate policy." 487 U.S. at 671, 691. The independent counsel had "no ongoing responsibilities," and that "temporary" office "terminated" as soon as the investigation or prosecution was complete. *Id*. at 672. In contrast, the Director has lengthy tenure, and wields sweeping enforcement authority over "American businesses, American consumers, and the overall U.S. economy." *Kavanaugh Op.* 165. The Director thus "poses a more permanent threat to the President's faithful execution of the laws." *Henderson*

Op. 153. He has the exclusive authority to promulgate and enforce regulations pursuant to 19 separate statutes, including the power to define and punish "unfair, deceptive, or abusive acts or practices," 12 U.S.C. § 5531(a), terms that are "cabined by little more than [the Director's] imagination," *Henderson Op.* 153. *Morrison* is entirely inapposite and provides no support for the CFPB.

3. No other federal agency serves as a historical precedent for the CFPB.

"The concentration of massive, unchecked power in a single Director marks a dramatic departure from settled historical practice and makes the CFPB unique among independent agencies." *Kavanaugh Op.* 172–73. Historically, "independent" agencies almost exclusively have been headed not by a single individual but by multi-member commissions, *id.*, and this "[l]ong settled and established practice" is given "great weight" in constitutional interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). Indeed, "[p]erhaps the most telling indication of the severe constitutional problem" with the CFPB's structure "is the lack of historical precedent for this entity." *Free Enter. Fund*, 561 U.S. at 505. The few "scattered" examples to which the CFPB has in the past pointed

are mere "anomalies," *Noel Canning*, 134 S. Ct. at 2567, that do not come close to establishing the CFPB's constitutionality.

The Social Security Administration's current structure, in which it is headed by a single Commissioner removable only for cause, 42 U.S.C. § 902(a), is relatively recent. After existing for decades as a multi-member independent agency, Congress changed the structure to a single Director in 1994. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, Title I, § 102, 108 Stat. 1465 (Aug. 15, 1994). In fact, President Clinton thought that the for-cause removal provision "raises a significant constitutional question." *Statement by President William J. Clinton Upon Signing H.R. 4277*, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994). In any event, the powers of the Social Security Administration are nothing like those of the CFPB, because the Commissioner "does not possess unilateral authority to bring law enforcement actions against private citizens." *Kavanaugh Op.* 174.

Similarly, the Office of Special Counsel is relatively recent and has narrow jurisdiction, as it enforces personnel rules governing federal employees, but, unlike the CFPB, has no authority to enforce laws or impose fines or penalties against private citizens. 5 U.S.C. § 1211; *see* U.S. Br.

17 (the Office of Special Counsel's "narrow jurisdiction over government employers and employees provides no historical support for creating a very different single-headed independent agency exercising general regulatory and enforcement power over private parties operating in a large sector of the economy"). Under President Carter, the Department of Justice opined that the Special Counsel "must be removable at will by the President," and opposed the for-cause removal restriction. *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 120 (1978). Later, President Reagan vetoed a bill because of "serious constitutional concerns" with the Office's independence. *Memorandum of Disapproval on a Bill Concerning Whistleblower Protection*, 2 Pub. Papers 1391, 1392 (Oct. 26, 1988).

The Federal Housing Finance Agency ("FHFA"), created in 2008, is almost as recent as the CFPB, and thus cannot provide any historical precedent. Moreover, the FHFA covers only quasi-governmental, not private, entities. 12 U.S.C. § 4511(b); *see also* U.S. Br. 18 ("[T]he FHFA is a safety and soundness regulator for specified government-sponsored enterprises, namely Fannie Mae and Freddie Mac—for which the agency

has acted as a conservator since its inception—as well as federal home loan banks.”).[12]

The Comptroller of the Currency provides no help to the CFPB because the President may remove that officer at will for any “reasons” “communicated” “to the Senate,” without limitation. 12 U.S.C. § 2; *see also Kavanaugh Op.* 177 n.4; *Post Employment Restriction of 12 U.S.C. § 1812(e)*, 25 Op. O.L.C. 184–87 (2001) (assuming the Comptroller serves at the President’s pleasure). And its predecessor, the Comptroller of the Treasury, likewise served at the President’s pleasure: As the Supreme Court recently explained, Madison’s proposal was that the Comptroller would hold office for a term “unless sooner removed by the President,” which would ensure that he was “dependent upon the President.” *Free Enter. Fund*, 561 U.S. at 500 n.6 (quoting 1 Annals of Cong. 612); *see also Kavanaugh Op.* 177 n.4. And even if there were any ambiguity, Madison withdrew his proposal the very next day after his colleagues pointed out that the Comptroller must serve only “during [the President’s] pleasure.” 1 Annals of Cong. 614, 615 (Benson).

[12] A separation-of-powers challenge to the FHFA is currently pending. *See Collins v. Mnuchin*, No. 17-20364 (5th Cir. argued Mar. 7, 2018).

In short, none of the agencies described above support the constitutionality of the CFPB's structure. This "handful of isolated" examples from recent decades pales in comparison to an otherwise unbroken historical record, *Free Enter. Fund*, 561 U.S. at 505—a "historical practice" entitled to "significant weight" "[in] separation-of-powers case[s]" such as this one, *Noel Canning*, 134 S. Ct. at 2559–60.

D. The CFPB's other features exacerbate its constitutional defects.

The CFPB has additional features that render it even more clearly unconstitutional when combined with its single unaccountable Director.

1. In *Humphrey's Executor*, the Supreme Court allowed diminished presidential control in light of increased *congressional control*, as the FTC was to "report" to Congress and act "quasi legislatively" and "in aid of legislative power … as a legislative agency." 295 U.S. at 628. Here, by contrast, Congress eliminated *all* checks on the Director by abdicating its *own* core responsibilities over the CFPB. Whereas the FTC, like nearly all other administrative agencies, has always been subject to the appropriations process, the Director has sole authority to set the CFPB's budget and to demand more than half a billion dollars from the Federal

Reserve System's operating expenses, 12 U.S.C. § 5497(a)(2)(A)—a demand *exempt* from "review by [Congress's] Committees on Appropriations," *id.* § 5497(a)(2)(C). The CFPB has no need to provide any transparency to Congress. For instance, in response to a representative's question about the CFPB's budget during a 2015 hearing, the CFPB Director retorted: "Why does that matter to you?" House Financial Services Committee, *Hearings and Meetings* (Mar. 17, 2015); *see also Mulvaney Report* at 1–2 (CFPB is not accountable to "*any* representative branch of government" and an additional means of fixing the problem would be to "[f]und the Bureau through Congressional appropriations") (emphasis added).

Under the Constitution, however, Congress has the exclusive power of the purse, and "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). Congress's "power over the purse" is "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people" and provides a "bulwark" that is "particularly important as a restraint on Executive Branch officers." *U.S. Dep't of Navy v. FLRA*, 665 F.3d 1339, 1347 (D.C. Cir. 2012). Indeed, "[t]he Framers placed the power of the purse in the Congress in large

part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2010), *aff'd*, 134 S. Ct. 2550.

The Director's ability to requisition his own funds also limits his accountability to the President. "Lest it be forgotten, the Presentment Clause gives the President the power to veto" appropriations bills. *Henderson Op.* 147. And whereas the President may use the OMB and the "annual budget to influence the policies of independent agencies, including the FTC," *id.*, the CFPB is completely independent of the President and OMB, 28 U.S.C § 5497(a)(1). The CFPB's independent funding mechanism thus frees it not only from "Congress's most effective means [of oversight] short of restructuring the agency," but also "from a powerful means of *Presidential* oversight." *Henderson Op.* 138 (emphasis added).

Indeed, the CFPB is uniquely insulated from budgetary oversight because it is protected by a dual layer of exemption from the appropriations power. *Cf. Free Enter. Fund*, 561 U.S. at 495. The CFPB demands

funds from the Federal Reserve, which itself is funded not by appropriations but by assessing fees on Federal Reserve banks. 12 U.S.C. § 243. This added layer of insulation further shields the CFPB from any public accountability.

There are, accordingly, no "circumstances" here that could justify encroaching on the President's removal power. *Free Enter. Fund*, 561 U.S. at 483–84. Unlike the FTC, the CFPB is free from the congressional appropriations process, is not "an agency of the legislative … department[ ]," and Congress is not its "master." *Humphrey's Ex'r*, 295 U.S. at 630. Quite the opposite, the CFPB combines vast authority for the Director with unprecedented insulation. *See Free Enter. Fund*, 561 U.S. at 498 (striking down removal limitations because "the public c[ould not] determine on whom the blame … ought really to fall").

2. The CFPA's problematic features do not end there. The statute also limits the President's ability to control the CFPB's communications with Congress, 12 U.S.C. § 5492(c)(4), and precludes the President from overruling the Director's interpretation of a consumer-protection statute where that law is administered by both the CFPB and another agency.

Id. § 5512(b)(4). And the Director has extraordinarily sweeping authority to unilaterally hire, fire, and compensate CFPB employees, *id*. § 5493(a)(1), (2), to whom he may delegate his immense powers, *id.* § 5492(b).

Within his vast realm, the Director wields sweeping Legislative, Executive, and Judicial powers—including the power to issue far-reaching regulations, independently litigate in the government's name, and seek punishments against businesses and individuals. *See* 12 U.S.C. §§ 5512 (rulemaking authority for consumer finance law); 5531(b) (rulemaking authority for "unfair, deceptive, or abusive acts or practices"); 5562 (investigative authority); 5563 (adjudicative authority); 5564 (independent litigation and enforcement authority); 5565 (power to impose sweeping legal and equitable relief and penalties). The Director has vast power and broad jurisdiction over nearly every person that offers a consumer-financial product or service. *Id.* §§ 5481(6), (26); 5536(a). Never before has so much federal power been concentrated in the hands of one individual so thoroughly shielded from constitutional accountability. "[O]ther than the President, the Director of the CFPB is the single most

powerful official in the entire U.S. Government, at least when measured in terms of unilateral power." *Kavanaugh Op.* 171.

3. This Court should not examine these structural infirmities in isolation. Sometimes, "a number of statutory provisions" can "work[ ] together" to "produce a constitutional violation." *Free Enter. Fund*, 561 U.S. at 509. "[J]ust because two [or more] structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013), *vacated on other grounds*, 135 S. Ct. 1225 (2015). "The apt analogy is not math but chemistry: even if innocuous in isolation, some elements are toxic in combination." *Henderson Op.* 155. The constitutionality of agency "independence" must be examined holistically, and "the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001).

* * *

The CFPA creates an agency with vast powers and frees the Director from accountability to the people by exempting his decisions from essential constitutional checks and balances. While the Supreme Court has

"previously upheld limited restrictions" on particular checks and balances, the combination of restrictions in the CFPB's "novel structure does not merely add to the [agency's] independence, but transforms it." *Free Enter. Fund*, 561 U.S. at 495, 496. The public must be able to "ensure that those who wield[ ]" power are "accountable to political force and the will of the people." *Freytag v. Comm'r*, 501 U.S. 868, 884 (1991). The CFPB's unprecedented insulation from *all* democratic checks and accountability cannot be reconciled with that constitutional mandate. This Court should hold that the CFPB's structure violates the separation of powers.

II. This Enforcement Action Is Invalid And Must Be Vacated.

Because this enforcement action was brought by a constitutionally defective agency, the proper remedy is to strike down the CFPA *in toto* and remand with instructions to grant judgment to All American. The Acting Director's attempt to "ratify" this action is entirely without effect, and severance is inappropriate because Congress was clear that it wanted an entirely independent CFPB.

A. The proper remedy is to grant judgment to All American.

When an agency's structure "violates the Constitution," that agency "lacks authority to bring [an] enforcement action." *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993); *see also Free Enter. Fund*, 561 U.S. at 513 ("ensur[ing]" that the statute is "enforced only by a constitutional agency accountable to the Executive"). This case is just such an action, and when parties "raise [a] constitutional challenge as a defense to an enforcement action," there is "no theory that would permit [a court] to declare the [agency's] structure unconstitutional without providing relief to [the regulated party]." *NRA Political Victory Fund*, 6 F.3d at 828.

Instead, the court must "cure the constitutional error" and "design[ ]" a "remed[y]" "to create incentives to raise" structural constitutional challenges. *Lucia v. SEC*, No. 17-130, 2018 WL 3057893, at *8 & n.5 (U.S. June 21, 2018) (alterations omitted). "[O]ne who makes a timely challenge to the constitutional validity of" a government official's authority "is entitled to a decision on the merits of the question and whatever relief may be appropriate." *Ryder v. United States*, 515 U.S. 177, 182–83 (1995). The *Ryder* Court noted that, in an earlier case, it had struck down

a statute granting authority to bankruptcy judges as unconstitutional, and that "in doing so, [the Court] affirmed" the district court's "dismiss[al]" of the action because the court lacked authority. *Id*. at 184 n.3 (citing *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)).

The Supreme Court has recently indicated that this is the proper remedy for a constitutionally invalid enforcement action. In *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, the Supreme Court held that, because the adjudicators of an enforcement action had violated a baker's free-exercise right, the "order" holding the baker in violation of state law "must be invalidated." 138 S. Ct. 1719, 1732 (2018) (emphasis added).

Here, because the CFPB is unconstitutionally structured, this enforcement action is void *ab initio* and must be dismissed. "Issues of separation of powers are structural errors" that require "automatic reversal." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 79 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017). Unconstitutional statutes always "have some impact" on how the unconstitutionally structured entity "decides matters before

it"—here, the decision to bring this enforcement action against All American—and a plaintiff "need not show that" a particular entity "would have acted differently if it were constitutionally composed." *NRA Political Victory Fund*, 6 F.3d at 825; *see also Burgess v. FDIC*, 871 F.3d 297, 304 (5th Cir. 2017) (finding likelihood of success on the merits in Appointments Clause case and staying civil penalty order because "the constitutionality of the structure of the fact-finding procedure on which the FDIC relies lies at the heart of this motion"). All American made a "timely challenge to the constitutional validity" of the CFPB's authority, and it is entitled to judgment. *Ryder*, 515 U.S. at 182–84, 184 n.3.

B. The Acting Director's purported "ratification" has no effect.

The CFPB has argued that the Acting Director's presence solves the constitutional defects in the CFPB's structure, and that his purported ratification of the agency's decision to bring this enforcement action, ROA.7177–.7183, cures the unconstitutional taint of that *ultra vires* action. This is wrong.[13]

[13] As an initial matter, it is not at all clear that the CFPB is currently accountable to the President. An agency that is actually "subject to the authority of the President" may not take a legal position "contrary

First, the CFPB errs in assuming that *constitutional* structural violations can be ratified. Neither the Supreme Court nor this Court has ever held any such thing. But even if this action were subject to the limited ratification doctrine for violations of *statutory* authority, the Acting Director fails to meet the relevant test: The CFPB lacked authority to bring this action in the first place *and* the Acting Director lacked authority to ratify with respect to causes of action on which the statute of limitations had already run. Finally, the Acting Director's ratification certainly cannot "moot" this constitutional challenge because the issue is clearly capable of repetition yet evading review and the ratification is little more than an attempted voluntary cessation of unlawful action.

---

to the position of the United States." 7 Op. O.L.C. 57 (1983). And the Attorney General has final authority on legal positions for "agencies whose heads serve at the pleasure of the President." Exec. Order No. 12,146, § 1-402 (July 18, 1979), *reprinted in* 28 U.S.C. § 509 note. By contrast, the CFPB continues to defend its constitutionality in this case and others, even though the United States believes that it is invalid. *See* U.S. Br. 19. This present-day conflict suggests that the CFPB's deep structural flaws remain even now.

1. Structural constitutional violations cannot be ratified.

To permit temporary agency leadership to "cure" structural constitutional deficiencies via ratification would nullify the "significant structural safeguards" of liberty served by our Constitution's separation of powers. *Edmond v. United States*, 520 U.S. 651, 659 (1997). The CFPB's position transforms these vital constitutional protections into mere "etiquette or protocol," *id.*, to be maneuvered around with impunity.

The CFPB cannot cite any authority from the Supreme Court or this Court ever allowing the ratification of actions originally taken in violation of the Constitution's structural protections. Indeed, the Supreme Court's treatment of similar situations involving core constitutional and even statutory defects demonstrates that the CFPB is entirely wrong on its ratification theory. *See Masterpiece Cakeshop*, 138 S. Ct. at 1732 ("order" of enforcement agency that committed constitutional violation during adjudication "must be invalidated" despite *de novo* review by later court); *Nguyen v. United States*, 539 U.S. 69, 78 (2003) (decision made in "violation[ ] of a statutory provision" will not be afforded de facto valid-

ity); *Ryder*, 515 U.S. at 180–83 (remedy for Appointments Clause violation was vacatur because petitioner "entitled to a hearing before a properly appointed panel").

The reason that structural constitutional violations cannot be ratified is that "the doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). "[I]t is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.* Since "[s]light encroachments create new boundaries from which legions of power can seek new territory to capture," and "illegitimate and unconstitutional practices get their first footing … by silent approaches and slight deviations from legal modes of procedure," courts cannot "overlook" even the "mildest and least repulsive" violation of the "system of separated powers." *Stern v. Marshall*, 564 U.S. 462, 503 (2011). "Any other rule would create a disincentive to raise" structural challenges. *Ryder*, 515 U.S. at 183.

This Court should decline the CFPB's invitation to apply ratification principles at all.

2. Ratification is impossible here.

The Acting Director's attempt to "ratify" the unconstitutional actions of his predecessor—including the initiation and litigation of this enforcement action—cannot remedy the CFPB's constitutional deficiencies in any event because ratification of this suit at this time is impossible.

First, the doctrine of ratification has no relevance here. "Ratification addresses situations in which an agent was without authority at the time he or she acted and the principal later approved of the agent's prior unauthorized acts." *RD Legal*, 2018 WL 3094916, at *36; *see also Wilkes-Barre Hosp. Co. v. NLRB*, 857 F.3d 364, 371 (D.C. Cir. 2017) ("[R]atification occurs when a principal sanctions the prior actions of its purported agent."). But unlike an Appointments Clause challenge, All American has challenged "the structure and authority of the CFPB itself, not the authority of an agent to make decisions on the CFPB's behalf." *RD Legal*, 2018 WL 3094916, at *36. In *CFPB v. Gordon*, an Appointments Clause challenge, the Ninth Circuit allowed ratification only "[b]ecause the CFPB had the authority to bring the action at the [relevant] time." 819

F.3d 1179, 1192 (9th Cir. 2016). But here, All American has argued that the *CFPB itself* is and always has been unconstitutionally structured and therefore lacked the authority to initiate this action in the first place. All American's constitutional challenge does not implicate ratification principles at all. *See Newman v. Schiff*, 778 F.2d 460, 467 (8th Cir. 1985) ("Ratification serves to authorize that which was unauthorized. Ratification cannot, however, give legal significance to an act which was a nullity from the start.").[14]

Assuming the ratification doctrine applies at all, there are two independent requirements: "[I]t is essential that the party ratifying should be able" (1) "to do the act ratified at the time the act was done," and (2) to do the act "also at the time the ratification was made." *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 98 (1994) (emphasis omitted). The CFPB cannot satisfy *either* requirement.

[14] *FEC v. Legi-Tech, Inc.*, 75 F.3d 704 (D.C. Cir. 1996), is not to the contrary. *Legi-Tech* never even mentioned *NRA Political Victory Fund*, 513 U.S. at 98, likely because the defendant never challenged the ratification at all. Moreover, in *Legi-Tech* the FEC had cured the constitutional violation, whereas here, the CFPB is trying to use Acting Director Mulvaney's temporary position to shield its permanent constitutional defects.

First, the CFPB "lack[ed] authority to bring this enforcement action" in the first place because it has been unconstitutionally structured from its inception. *NRA Political Victory Fund*, 6 F.3d at 822. Therefore, it did not have the power "to do the act ratified"—namely filing this enforcement action—"at the time th[at] act was done" on May 11, 2016, and so the Acting Director cannot ratify it now. *NRA Political Victory Fund*, 513 U.S. at 98; *see also Franklin Sav. Ass'n v. Dir. of Office of Thrift Supervision*, 740 F. Supp. 1535, 1539–40 (D. Kan. 1990) (OTS Director "lacked the power" to ratify the actions of his unconstitutionally appointed predecessor because current Director "had no power to" take the act at the time of the original act).

Second, the Acting Director lacked authority "at the time the ratification was made" on February 5, 2018. *NRA Political Victory Fund*, 513 U.S. at 98. "If an act to be effective in creating a right against another or to deprive him of a right must be performed before a specific time, an affirmance is not effective against the other unless made before such time." *Id*. Thus, if the right to bring an action "has been terminated by lapse of time," such as the running of a statute of limitations, then "[t]he bringing of an action … can not be ratified" because the ratification

"simply came too late in the day to be effective." *Id*. The Supreme Court derived this principle from *Nasewaupee v. Sturgeon Bay,* 251 N.W.2d 845, 848–49 (Wis. 1977), in which the Wisconsin Supreme Court refused "to uphold [a] town board's ratification of [a] private attorney's unauthorized commencement of" litigation "after the statute of limitations had run." 513 U.S. at 98. This is because, as expressed by the Second Restatement of Agency, ratification is allowed only "if the affirmance comes before a statute of limitations has run on the claim." *Restatement (Second) of Agenc*y § 90 cmt. c (Am. Law Inst. 1958). Accordingly, courts applying the Supreme Court's decision in *NRA Political Victory Fund* have allowed ratification only after confirming that the statute of limitations would not prevent the government from taking the action at the time of the ratification. *See*, *e.g.*, *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 604 (3d Cir. 2016) ("There is no statutory or administrative limitation preventing" the governmental officer's action "at the time he ratified it; thus the *NRA* 'timing issue' is not implicated here."); *Doolin Sec. Sav. Bank, F.S.B. v. OTS*, 139 F.3d 203, 213 (D.C. Cir. 1998) (allowing ratification because "[t]he timing problem posed in *NRA* is not present here," as "[n]o statute of limitations would have barred" the valid

officer "from reissuing the Notice of Charges himself and starting the administrative proceedings over again").

Here, the CFPB may not ratify this enforcement action because the statute of limitations has run. The CFPB may not bring an action under its statute "more than 3 years after the date of discovery of the violation to which an action relates." 12 U.S.C. § 5564(g)(1). As is apparent from the CFPB's own pleadings and motions—*see*, *e.g.*, ROA.46–.47, .52, .54, .58 (Complaint ¶¶ 9, 16, 33, 42, 55); ROA.6512, .6523–.6524, .6532 (CFPB Summ. J. Mem.)—the CFPB's suit is based almost entirely on acts that allegedly occurred between 2011 and 2014, well before February 5, 2015, three years before the date of ratification. Indeed, the CFPB's Count V is explicitly limited to alleged conduct that ended in "June 2014." ROA.6511–.6512. And the CFPB "discover[ed]" (12 U.S.C. § 5564(g)(1)) the alleged conduct more than three years ago, as is evident from the fact that the agency's first Civil Investigatory Demand was issued against All American on September 3, 2014. *See* ROA.3332. Thus, the Acting Director lacks authority to engage in "after-the-fact" ratification of the filing of this action. *NRA Political Victory Fund*, 513 U.S. at 98.

3. <u>In no event is this case moot.</u>

Finally, to the extent the CFPB tries to suggest that the Acting Director's "ratification" could moot All American's challenge, All American is virtually assured to be subjected to the same unlawful behavior in the near future, and any mootness would be a classic case of voluntary cessation. The President has already nominated a new Director, *see supra* pp. 5–6, note 2, who, upon confirmation, "will be subject to the for-cause removal provision," so the issue is certainly not "moot," *RD Legal*, 2018 WL 3094916, at *36.

First, All American's challenge cannot be moot because it is "capable of repetition yet evading review." *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 420 (5th Cir. 2014). All American's challenge meets both prongs of this mootness-exception: "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.* at 422.

As to the first prong, there can be little question that circumstances beyond All American's control have prevented it from having its challenge to the CFPB's structure "fully litigated" before the CFPB Director

resigned and the President appointed an Acting Director. *Cf. Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1976 (2016) (noting, in procurement context, that a "period of two years is too short to complete judicial review").

And for the second prong, litigants need show only that the controversy is "*capable* of repetition," or "a reasonable expectation" that the illegality will reoccur. *Honig v. Doe*, 484 U.S. 305, 318 n.6 (1988). Given the inherently temporary nature of the Acting Director's tenure, the controversy is certainly "capable" of arising again in these proceedings. The Acting Director's position is temporary, *see* 5 U.S.C. § 3346(a), and as soon as the President's recent nominee is confirmed, the CFPB will revert to its original structure, and All American will again be subjected to the whims of an agency headed by a single, unaccountable individual (among other constitutional problems with the agency).

Second, and independently, the Acting Director's temporary presence is at most classic "voluntary cessation" of an unlawful practice. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). And the Acting Director's actions cannot meet the "stringent" standard of showing that it is "absolutely clear" that All American

will no longer be subjected to actions by the CFPB's unlawful Director. *Id*. To the contrary, the Acting Director's ratification proves the opposite: The CFPB clearly intends to continue litigating this unconstitutional action against All American even after the Acting Director is gone and the new Director has been confirmed. The CFPB cannot simply "have the case declared moot," and then have a Senate-confirmed Director, who is indisputably protected by Dodd-Frank's for-cause removal provision, "pick up where [it] left off." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

C. Severance is an inadequate remedy.

The CFPA must be struck down as a whole. As Judge Preska recently held, *RD Legal*, 2018 WL 3094916, at *35–*36, the Director's removal provision cannot be severed without inflating the President's power at the expense of Congress and transforming the CFPB into something Congress never would have created.

Severability turns on whether "the statute will function in a manner consistent with the intent of Congress," *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted), and whether it will result in legislation that Congress "would not have enacted," *Murphy v. NCAA*,

138 S. Ct. 1461, 1482 (2018). In *Free Enterprise Fund*, for instance, the Supreme Court severed the removal provision only because it was able to conclude that "nothing in the statute's text or historical context" suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." 561 U.S. at 509. Here, on the other hand, there is ample evidence that Congress never would have created an entity like the CFPB without insulating it from all democratic influence, in particular the influence of the President. Congress sought to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." 156 Cong. Rec. H5239 (2010) (Rep. Maloney); *see also Henderson Op.* 162 (listing numerous other examples from Dodd-Frank's legislative history). Accordingly, the U.S. Code defines the CFPB as "an independent bureau." 12 U.S.C. § 5491(a); *see* 44 U.S.C. § 3502(5) ("independent regulatory agency"). "In other words, section 5491(a) ties the CFPB's very existence to its freedom from the President." *Henderson Op.* 161.

Moreover, Congress's willingness to insulate the agency from congressional control depended on insulating it from presidential control as

well. There is no reason to think that Congress would have given up its own appropriations and oversight powers while at the same time granting the President *increased* power over 18 preexisting federal consumer-protection statutes. But that is exactly what severing the statute would do. In fact, most of those statutes were previously administered not by the President but exclusively by independent agencies like the Federal Reserve and the FTC, so severing would *increase* the President's authority beyond the level it was at before the CFPB's creation. *See Henderson Op*. 162. "Some delegations of power to the Executive or to an independent agency may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Here, severing only the for-cause removal provision would fundamentally "alter[ ] the balance of powers between the Legislative and Executive Branches" in a manner that Congress did not intend. *Id*.

To be sure, Dodd-Frank's severability clause makes clear that Congress would have wanted the provisions of Dodd-Frank that are *unrelated* to the CFPB to survive the agency's invalidation. 12 U.S.C. § 5302. That clause, however—"[a]ppearing in the mega Dodd-Frank legislation

574 pages before section 5491(c)(3)," *Henderson Op.* 163—says little about whether Congress would have wanted a CFPB with a Director removable at will by the President. While a severability clause creates a rebuttable "presumption" that Congress did not want the validity of an entire statute to depend on the constitutionality of each individual part, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency, but create a new one.

Moreover, simply severing the CFPB's removal restriction would not address the CFPB's many other structural flaws, such as concentrating sweeping executive, rulemaking, and adjudicative powers in an agency immune from the Appropriations process. The Court "cannot rewrite a statute." *Murphy*, 138 S. Ct. at 1482. And a severability clause "does not give the court power to amend" a statute. *Hill v. Wallace*, 259 U.S. 44, 71 (1922). "Nor is it a license to cut out the heart of a statute." *Henderson Op.* 164.

Accordingly, the correct remedy is to strike down the CFPA as a whole.

CONCLUSION

This Court should hold that the CFPB's structure violates the Constitution and reverse the district court's denial of All American's motion for judgment on the pleadings.

Dated: July 2, 2018

Respectfully submitted,

/s/ Theodore B. Olson
Theodore B. Olson
Counsel of Record
Helgi C. Walker
Joshua S. Lipshutz
Lochlan F. Shelfer
Jeremy M. Christiansen
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 955-8500
Fax: (202) 530-9575
Email: tolson@gibsondunn.com

Dale Danks, Jr.
Michael V. Cory, Jr.
DANKS, MILLER & CORY
213 S. Lamar Street
P.O. Box 1759
Jackson, MS 39215-1759
Phone: (601) 957-3101
Fax: (601) 957-3160
Email: ddanks@dmc-law.net

Bentley E. Conner
P.O. Box 563
Canton, MS 39046-5630
Phone: (601) 859-6306
Fax: (601) 859-6307
Email: connerbentleye@bellsouth.net

Attorneys for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, an electronic copy of the foregoing Brief was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and service will be accomplished on the following parties by the appellate CM/ECF system:

Lawrence W. DeMille-Wagman
Consumer Financial Protection Bureau
Legal Division
1700 G Street, N.W.
Washington, DC 20552
Phone: 202-435-7957
Email: lawrence.wagman@cfpb.gov

Christopher J. Deal
Consumer Financial Protection Bureau
1700 G Street, N.W.
Washington, DC 20552
Phone: 202-435-9582
Email: christopher.deal@cfpb.gov

s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 955-8500
Email: tolson@gibsondunn.com

Counsel of Record for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, it contains 12,922 words.

Undersigned counsel certifies that this Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point New Century Schoolbook.

Dated: July 2, 2018

s/ Theodore B. Olson
Theodore B. Olson
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036
Phone: (202) 955-8500
Email: tolson@gibsondunn.com

Counsel of Record for Defendants-Appellants

ADDENDUM

STATUTORY ADDENDUM

12 U.S.C. § 5491. Establishment of the Bureau of Consumer Financial Protection

(a) Bureau established

There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title **5,** shall apply to the exercise of the powers of the Bureau.

(b) Director and Deputy Director

(1) In general

There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment

Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification

The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation

The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of title 5.

(5) Deputy Director

There is established the position of Deputy Director, who shall—

(A) be appointed by the Director; and

(B) serve as acting Director in the absence or unavailability of the Director.

(c) Term

(1) In general

The Director shall serve for a term of 5 years.

(2) Expiration of term

An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause

The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

(d) Service restriction

No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.

(e) Offices

The principal office of the Bureau shall be in the District of Columbia. The Director may establish regional offices of the Bureau, including in cities in which the Federal reserve banks, or branches of such banks, are located, in order to carry out the responsibilities assigned to the Bureau under the Federal consumer financial laws.

12 U.S.C. § 5492. Executive and administrative powers

(a) Powers of the Bureau

The Bureau is authorized to establish the general policies of the Bureau with respect to all executive and administrative functions, including—

(1) the establishment of rules for conducting the general business of the Bureau, in a manner not inconsistent with this title;

(2) to bind the Bureau and enter into contracts;

(3) directing the establishment and maintenance of divisions or other offices within the Bureau, in order to carry out the responsibilities under the Federal consumer financial laws, and to satisfy the requirements of other applicable law;

(4) to coordinate and oversee the operation of all administrative, enforcement, and research activities of the Bureau;

(5) to adopt and use a seal;

(6) to determine the character of and the necessity for the obligations and expenditures of the Bureau;

(7) the appointment and supervision of personnel employed by the Bureau;

(8) the distribution of business among personnel appointed and supervised by the Director and among administrative units of the Bureau;

(9) the use and expenditure of funds;

(10) implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions; and See References in Text note below.

(11) performing such other functions as may be authorized or required by law.

(b) Delegation of authority

The Director of the Bureau may delegate to any duly authorized employee, representative, or agent any power vested in the Bureau by law.

(c) Autonomy of the Bureau

(1) Coordination with the Board of Governors

Notwithstanding any other provision of law applicable to the supervision or examination of persons with respect to Federal consumer financial laws, the Board of Governors may delegate to the Bureau the authorities to examine persons subject to the jurisdiction of the Board of Governors for compliance with the Federal consumer financial laws.

(2) Autonomy

Notwithstanding the authorities granted to the Board of Governors under the Federal Reserve Act [§12 U.S.C. 221 et seq.], the Board of Governors may not—

(A) intervene in any matter or proceeding before the Director, including examinations or enforcement actions, unless otherwise specifically provided by law;

(B) appoint, direct, or remove any officer or employee of the Bureau; or

(C) merge or consolidate the Bureau, or any of the functions or responsibilities of the Bureau, with any division or office of the Board of Governors or the Federal reserve banks.

(3) Rules and orders

No rule or order of the Bureau shall be subject to approval or review by the Board of Governors. The Board of Governors may not delay or prevent the issuance of any rule or order of the Bureau.

(4) Recommendations and testimony

No officer or agency of the United States shall have any authority to require the Director or any other officer of the Bureau to submit legislative recommendations, or testimony or comments on legislation, to any officer or agency of the United States for approval, comments, or review prior to the submission of such recommendations, testimony, or comments to the Congress, if such recommendations, testimony, or comments to the Congress include a statement indicating that the views expressed therein are those of the Director or such officer, and do not necessarily reflect the views of the Board of Governors or the President.

(5) Clarification of autonomy of the Bureau in legal proceedings

The Bureau shall not be liable under any provision of law for any action or inaction of the Board of Governors, and the Board of Governors shall not be liable under any provision of law for any action or inaction of the Bureau.

12 U.S.C. § 5302. Severability

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance

is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.