# 18-2743(L)

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

## In the United States Court of Appeals for the Second Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,

*Plaintiff-Appellant–Cross-Appellee*,

PEOPLE OF THE STATE OF NEW YORK, by Letitia James, Attorney General for the State of New York,

*Plaintiff-Appellant–Cross-Appellee*,

v.

RD LEGAL FUNDING, LLC, RD LEGAL FUNDING PARTNERS, LP, RD LEGAL FINANCE, LLC, RONI DERSOVITZ,

*Defendants–Third-Party-Plaintiffs–Third-Party-Defendants–Appellees–Cross-Appellants*.

On Appeal from the United States District Court for the Southern District of New York

**BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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## INTEREST OF *AMICI CURIAE*[1]

*Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376. Specifically, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies, currently serve in the leadership, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the critical role that the Consumer Financial Protection Bureau (CFPB) plays in the legislative plan that Congress put in place to prevent future financial crises like the Great Recession of 2008, and they understand how critical the CFPB's leadership structure is to the Bureau's ability to play its intended role effectively. *Amici* thus have an interest in this case.

A full listing of *amici* appears in the Appendix.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted the Dodd-Frank Act in response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176,

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

at 39 (2010). After extensively studying the roots of this crisis, Congress determined that, despite an abundance of existing legal authority to combat the mortgage abuses that were largely responsible, the manner in which this authority was apportioned among federal regulators led to inaction and delay.

To solve this problem and prevent similar crises in the future, Congress established a federal agency, the CFPB, with the sole mission of protecting Americans from harmful practices of the financial services industry. Lawmakers determined that two key attributes would help the Bureau fulfill its mission most effectively: independence, and the ability to act promptly and decisively in response to new threats to consumers. Those imperatives counseled in favor of an agency led by a single director, to avoid the delay and gridlock to which multimember commissions are susceptible. They also counseled in favor of providing this director with some degree of independence, allowing the President to remove the director for good cause ("inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)), but not for policy differences alone—ensuring accountability while shielding the agency from undue political pressure.

Through these means, Congress sought to enable the new agency to fulfill its statutory mandate and robustly enforce the law. And since its creation, the Bureau has done just that: it has been markedly successful in fulfilling its mission, among other things promulgating new rules to end abusive mortgage practices and

recovering billions of dollars for defrauded consumers.

The CFPB's leadership structure is fully consonant with the constitutional separation of powers. The Framers empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, thus ensuring that future legislators would have the flexibility needed to structure the government so it could respond effectively to new challenges. As Chief Justice John Marshall observed, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its power." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.* From the nation's earliest days, Congress has used this discretion to vary the organization of federal agencies and to provide officers who implement regulatory statutes a measure of independence from the President.

Consistent with this constitutional design, the Supreme Court has long recognized that Congress may shield the heads of regulatory agencies from removal without cause, at times upholding removal provisions identical to the CFPB's. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935). In so doing, the Court has explained that when Congress sets conditions on removal by the President, "the real question is whether the removal restrictions are of such a nature

that they impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The Court has also held—repeatedly and uniformly—that the power to remove an officer for cause enables the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the President can remove any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly," *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496, 484 (2010). Simply put, an officer whom the President can remove for cause is subject to "Presidential oversight." *Id.* at 509.

That precedent dictates the outcome here. The President's ability to remove the CFPB Director for cause gives the President "substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696. Whether the Bureau is headed by one person or several makes no difference. If the CFPB fails to execute the law faithfully, the solution is simple: the President can remove its Director.

Arguments to the contrary misinterpret Supreme Court precedent. Most significantly, they confuse the accountability that Article II requires with policymaking influence—the ability to steer an agency's agenda and affect the choices it makes among permissible policy options. So long as the President can bring an agency in line if it shirks or exceeds its mandate, Article II's requirements are satisfied, and the judiciary may not second-guess the wisdom of an agency's structure. The Constitution assigns that judgment squarely to Congress.

## ARGUMENT

### I. Congress Has Broad Authority To Shape the Structure of the Federal Government and To Give Certain Officers a Degree of Independence from the President.

The Framers of the Constitution gave Congress great flexibility to determine how best to shape the federal government. Indeed, while the Framers anticipated the creation of "Departments," *see* U.S. Const. art. II, § 2, cl. 1, they left unspecified what those departments would be, how they would be organized, and what connection they would have to the President. Likewise, while the Framers envisioned that "Officers of the United States" would be "established by Law," *id.* art. II, § 2, cl. 2, they provided few details concerning those officers' relationship with the President, *cf. id*. art. II, § 2, cl. 1 (the Opinion Clause).

Significantly, nowhere in the Constitution is the President given the power to remove these officers from their positions. The Constitution addresses their removal only by giving Congress the power to impeach them. *See id*. art. II, § 4. Presidential removal authority was not discussed at the Constitutional Convention, and Alexander Hamilton assumed that the Senate's consent would be required. *The Federalist No. 77*, at 459 (Clinton Rossiter ed., 1961).

It was no accident that the Framers left open most questions concerning the federal government's departments and officers. The Convention deliberately rejected a plan that would have delineated in the Constitution itself the roles of

specific executive departments and the relationship between their principal officers and the President. *See* 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries, all serving the President "during pleasure").

The Framers chose instead to assign Congress broad discretion over the manner in which federal laws are executed, granting it the authority to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. This "is the one and only provision of the Constitution that directly addresses the establishment of the federal government," and it "gives the relevant power expressly to Congress." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1986 (2011); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1271 n.34 (2006) ("the intention was for Congress to shape the executive departments in the exercise of its powers under the Necessary and Proper Clause"). Under the Constitution, therefore, "Congress has plenary control over the salary, duties, and even existence of executive offices." *Free Enter. Fund*, 561 U.S. at 500.

That power has important limits, to be sure. Congress may not structure agencies in a manner that prevents the President from ensuring the faithful execution

of the laws. *Id.* at 484. Nor may Congress unduly intercede between the President and the officers who help him exercise his unique Article II powers. *See infra* at 19-20. But when Congress legislates on "issues over which Congress would have plenary policy control—and the President none—but for Congress's decision to delegate" responsibility to a federal agency, Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 Geo. Wash. L. Rev. 596, 610 (1989), the "text and structure of the Constitution impose few limits on Congress's ability to structure administrative government," Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984).

Early legislative decisions confirm that Congress enjoys broad freedom to grant certain officers a measure of independence from the President. *See Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) ("actions of the First Congress" are "persuasive evidence of what the Constitution means"). In establishing the Departments of Foreign Affairs, War, and Treasury, the First Congress created offices with differing degrees of independence from the President. In particular, the First Congress gave the President far more control over agencies that carry out the President's inherent constitutional powers than over those that do not.

For example, "[t]he departments of Foreign Affairs and War were denominated 'executive' departments," and their secretaries were directed to

conduct business "'in such manner as the President of the United States shall from time to time order or instruct.'" Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239 (1989) (quoting Act of July 27, 1789, 1 Stat. 28, and Act of Aug. 7, 1789, 1 Stat. 49). "Matters were completely different as to the Department of Treasury," however. *Id.* at 240. It "was not referred to as an 'executive' department," and the legislation "was silent on the subject of presidential direction." *Id.* Meanwhile, an "elaborate set" of "officers and their responsibilities was spelled out in detail," *id.*, and the Secretary "was given specific duties that made him in part an agent of Congress," David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 202 (1995).[2]

The Treasury Department, moreover, included a Comptroller with significant statutory independence from the President. This Comptroller was empowered to make "final and conclusive" determinations of claims between the United States and its citizens. Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442. Based on the Comptroller's duties, which partook "of a judiciary quality as well as executive,"

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[2] When Congress created the Post Office in 1792 and the Navy Department in 1796, it followed the same "two basic tracks" established earlier, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 29-30 (1994), by distinguishing those departments "exclusively under presidential direction" from those "also directed according to law," Mashaw, *supra*, at 1289, and giving the latter greater independence.

James Madison suggested "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government," 1 Annals of Cong. 636 (1789) (Joseph Gales ed., 1834), explaining:

> Whatever ... may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing, as to answer the purposes for which it is prescribed.

*Id*. While Madison ultimately withdrew his proposal, "all thought the matter open for Congress' determination—that is, that Congress had significant flexibility in structuring the duties of this 'executive' officer." Lessig & Sunstein, *supra*, at 18; *see* Mashaw, *supra*, at 1303 (lawmakers "emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President").

The so-called "Decision of 1789" was not to the contrary. As Congress considered legislation establishing a Foreign Affairs Secretary, a "multitude of views" were expressed regarding whether to specify that the President could remove the Secretary from office. Casper, *supra*, at 237; *see id.* at 234-35. Some legislators saw removal as an inherent presidential authority, but others thought it was shared by the President and the Senate, and still others maintained that "since the Constitution did not provide one way or the other, Congress was free ... to give the President removal power or not." Currie, *supra*, at 198; *see* 1 Annals of Cong. 392-

93, 500 (1789). Ultimately, legislation established the Secretary as removable by the President without signaling the source of the removal power. *See id.* at 600-01. The debate did not address, much less resolve, whether Congress may condition the President's removal of officers on good cause. *See Myers v. United States*, 272 U.S. 52, 119 (1926) ("the real point which was considered and decided" was whether the Senate's role in appointments "make[s] the Senate part of the removing power"); *id.* at 285 n.75 (Brandeis, J., dissenting) (the decision did not address "whether the Constitution vested an uncontrollable power of removal in the President").

Moreover, because the proposed Secretary was intended to help the President exercise his Article II foreign affairs power, "the office under consideration by Congress was not only purely executive, but the officer one who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers." *Humphrey's Ex'r*, 295 U.S. at 631; *see Myers*, 272 U.S. at 124 (quoting debate participant: "The Departments of Foreign Affairs and War are peculiarly within the powers of the President, and he must be responsible for them ....").

In sum, the Constitution's text, structure, drafting history, and early construction all tell the same story: Congress has considerable latitude when shaping the government's administrative structure. Rather than ossify that structure

and stymie innovation, the Framers empowered future leaders to respond effectively "to the various *crises* of human affairs." *McCulloch*, 17 U.S. at 415.

## II. Responding to the Devastating Financial Crisis of 2008, Congress Made a Considered Judgment that an Independent Consumer Protection Bureau with a Single Director Could Best Combat the Types of Abuses that Caused the Crisis.

In 2008, the nation was plunged into the worst financial crisis since the Great Depression. *See supra* at 1-2. In response, Congress held more than fifty hearings in which it evaluated the causes of the financial crisis to "assess the types of reforms needed." S. Rep. No. 111-176, at 44. Based on that study, lawmakers concluded that the crisis was enabled by "a long-standing failure of our regulatory structure to keep pace with the changing financial system," particularly "the proliferation of poorly underwritten mortgages with abusive terms." *Id.* at 42, 11.

The source of this "spectacular failure ... to protect average American homeowners," *id.* at 15, was the fact that consumer financial protection was "governed by various agencies with different jurisdictions and regulatory approaches," resulting in a "disparate regulatory system" that did not "aggressive[ly] enforce[] against abusive and predatory loan products," H.R. Rep. No. 111-367, pt. 1, at 91 (2009). This fragmented structure "resulted in finger pointing among regulators and inaction when problems with consumer products and services arose." S. Rep. No. 111-176, at 168; *see Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Fin. Serv. Comm.*, 111th Cong. 2 (2009) (Rep. Frank)

("I think it is fair to say that no calluses will be found on the hands of those in the Federal bank regulatory agencies who had consumer responsibilities ...."). Thus, as *amici* came to understand, the problem was not a lack of authority to prevent financial abuses, it was how that authority was organized and exercised. *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 33 (2012) (the mortgage crisis "occurred despite the existence of a plethora of federal and state regulators with jurisdiction to enforce broad consumer financial protection regulation").

To remedy these failures and establish a regulatory framework that could "respond to the challenges of a 21st century marketplace," S. Rep. No. 111-176, at 42, Congress enacted the Dodd-Frank Act. Critical to the Act was the creation of the CFPB, an agency with the sole responsibility of protecting consumers from harmful practices of the financial services industry. Congress sought to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection," leaving "inter-agency finger pointing in the past." *Id*. at 10-11, 168. These reforms, Congress assessed, could prevent "a recurrence of the same problems" that fostered the financial crisis and the near-collapse of the American economy. *Id*. at 42.

Congress also determined that two key attributes would help the Bureau fulfill its mission most effectively: freedom from political gamesmanship and undue

industry influence, and the ability to act promptly and decisively in response to new threats to consumers. Those imperatives counseled in favor of an independent agency led by a single director.

*First*, "Congress determined that, to prevent problems that had handicapped past regulators, the new agency needed a degree of independence." *PHH Corp. v. CFPB*, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc). Before the crisis, the political branches intensely pressured the financial regulatory agencies at the behest of industry lobbyists to prevent robust oversight. *See, e.g.*, Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 53 (2011). In debates over the Bureau, "consumer advocates urged a more independent agency, fearing industry capture and heavy-handed political interference by Congress and the White House." Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 339 (2013); *see, e.g.*, S. Rep. No. 111-176, at 24 (recounting testimony recommending "improving regulatory independence"). Such independence "allow[s] an agency to protect the diffuse interest of the general public" that otherwise would be "outgunned" by "well-financed and politically influential special interests." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 17 (2010).

Heeding this imperative, Congress made the Bureau's leaders removable by the President for good cause—"inefficiency, neglect of duty, or malfeasance in

office," 12 U.S.C. § 5491(c)(3)—but not for policy differences alone. As *amici* well know, Congress appreciated that good-cause tenure would give the Bureau the independence necessary to regulate effectively. *See, e.g.*, *Morrison*, 487 U.S. at 687-88 ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" (quoting *Humphrey's Ex'r*, 295 U.S. at 630)); Block-Lieb, *supra*, at 38 (removal limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action"). Reflecting that principle, virtually all financial regulators are headed by officers who are removable only for cause. *See* Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15-17 (2017).[3]

*Second*, Congress determined that the Bureau should be led by a single director. A major cause of the financial crisis was the failure of regulators to use their authority "in a timely way" to address new consumer abuses, S. Rep. No. 111-176, at 17; *see id*. at 16-23 (examples), and lawmakers viewed this lack of responsiveness as "underscoring the importance of creating a dedicated consumer

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[3] To further promote a "strong and independent Bureau," S. Rep. No. 111-176, at 174, Congress also funded the CFPB outside "the opaque horse-trading of the appropriations process," Levitin, *supra*, at 341, an "absolutely essential" feature, S. Rep. No. 111-176, at 163, shared by nearly all financial regulators, Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest To Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 951 (2012).

entity" that could "respond quickly and effectively to these new threats to consumers," *id*. at 18. What was needed was a "streamlined" regulator to write new rules and "enforce those rules consistently." *Id*. at 11.

After all, as *amici* well know, the same regulatory paralysis that abetted the financial crisis, *id.* at 168, is an all-too-common affliction of agencies led by commissions. *See* Fin. Crisis Inquiry Comm'n, *supra*, at 20 (the Federal Reserve Board's response to the proliferation of subprime mortgages was "divided from the beginning"); Wilmarth, *supra*, at 919 (scholars associate the single-director model with greater "efficiency and accountability").

Indeed, the very agency on which the Bureau was originally patterned—the Consumer Product Safety Commission (CPSC), *see* Elizabeth Warren, *Unsafe at Any Rate*, 5 Democracy J. 8, 16 (Summer 2007)—supplied a perfect example. While the CPSC had achieved some successes, its five-member structure seriously hampered its effectiveness. In 1987, the U.S. Government Accountability Office concluded that this structure fostered instability and delay, and suggested that the agency "could benefit by changing to a single administrator," which was the leadership structure of nearly all health and safety regulators. U.S. Gov't Account. Off., GAO/HRD-84-47, *Consumer Product Safety Commission: Administrative Structure Could Benefit from Change* 3, 6, 9-10 (1987). That recommendation was never adopted, however, and by 2008 the CPSC had "fallen far short of its statutory

mandate" and was "widely regarded as one of the least politically independent and influential agencies in government." Barkow, *supra*, at 67, 71.

Thus, while initial legislative proposals envisioned a multimember commission, *see* H.R. 3126, 111th Cong. § 112 (2009), Congress subsequently held additional hearings on "how best to approach various aspects of financial regulatory reform," H.R. Rep. No. 111-702, at 56 (2011), and revised legislation was introduced that replaced the agency's commission structure with a single director, *id.* at 57; *see* Discussion Draft § 112(a)(1) (Sept. 25, 2009); *Perspectives on the CFPA*, *supra*, at 1 (Rep. Frank) ("Since [the introduction of the initial legislation], we have had the benefit of a lot of conversation. Today's legislation reflects further conversation ....").

Opponents of the single-director model raised the same policy objections that have since been reframed as constitutional defects, *see Perspectives on the CFPA*, *supra*, at 6, 45, but the revised proposal served as the basis for a committee markup of the bill, H.R. Rep. No. 111-367, pt. 1, at 96. Although an amendment there reverted the agency's structure to a commission, *id*. at 8-9, 98, new legislation was introduced in December 2009 that revived the single-director model, *see* H.R. 4173, 111th Cong. § 4102 (2009). Shortly thereafter, a "compromise" was reached in which the agency would begin with a single director but change to a commission after two years. 155 Cong. Rec. H14418 (daily ed. Dec. 9, 2009).

This compromise passed the House, *see* H.R. 4173, 111th Cong. § 4101(b) (engrossed version, Dec. 11, 2009), but over the following months both houses continued to assess how best to reform financial regulation. In the spring of 2010, Senator Dodd introduced legislation creating a Bureau that would be permanently led by a single director. *See* S. 3217, 111th Cong. § 1011(b) (2010). After intense debate, this structure passed the Senate. And when the House and Senate later reconciled their versions of the legislation, the permanent single-director structure prevailed. *See* H.R. Rep. No. 111-517, at 874 (2010) (Conf. Rep.).

Throughout the process, Bureau opponents continually registered their objections to a single director. *See* 155 Cong. Rec. H14414 (daily ed. Dec. 9, 2009) (Rep. Paulsen); *id.* at H14430 (Rep. Lee); 156 Cong. Rec. S3801 (daily ed. May 17, 2010) (Sen. Enzi); *id*. at S4044 (daily ed. May 20, 2010) (Sen. Corker); *id*. at S5891 (daily ed. July 15, 2010) (Sen. Gregg). Yet Congress chose to retain this structure, with lawmakers repeatedly emphasizing the need for speed and decisiveness in rooting out financial-product abuses. *See, e.g.*, 156 Cong. Rec. S2631 (daily ed. Apr. 26, 2010) (Sen. Whitehouse) ("We need a regulator … who can monitor the market and act quickly when there is a consumer hazard."); *id*. at H5240 (daily ed. June 30, 2010) (Rep. Meeks) ("Led by an independent director, this office will be able to act swiftly so consumers will not need to wait ... to receive protection from unscrupulous behavior."). Congress thus opted for a "streamlined" agency that

would enforce rules "consistently" and "have enough flexibility to address future problems as they arise." S. Rep. No. 111-176, at 11.

In short, the Bureau's single-director structure was a considered choice, maintained in the face of vocal opposition during months of debate. Exercising the discretion afforded to it by the Constitution, Congress determined that this structure would best enable the CFPB to "keep pace with the changing financial system" and thus avert another devastating regulatory failure. *Id.* at 42. As the next Section explains, Congress had every right to make that choice.

## III. Congress Acted Well Within Its Constitutional Authority in Structuring the CFPB with a Director Whom the President May Remove for Cause.

Consistent with the Constitution's text and history, the Supreme Court has held—repeatedly and without exception—that Congress may condition the President's removal of certain officers on good cause. Any attempt to carve out an exception for the CFPB Director "flies in the face of the Supreme Court's removal-power cases." *PHH*, 881 F.3d at 93.

**A.** The Supreme Court has explained that officers who may be removed for cause are "subject ... to Presidential oversight," because the President can remove any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund*, 561 U.S. at 509, 496, 484. Thus, when an officer "may be terminated for 'good cause,' the Executive ... retains ample authority to assure that [the officer] is competently performing his or her statutory

responsibilities in a manner that comports with the provisions of the [law]." *Morrison*, 487 U.S. at 692. In short, the ability to remove an officer for cause enables the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

For-cause tenure is also consistent with the President's exercise of the "executive Power," U.S. Const. art. II, § 1, cl. 1, particularly when applied to regulatory agencies that implement legislative policies. *Humphrey's Ex'r*, 295 U.S. at 630. Indeed, as far back as *Marbury v. Madison*, Chief Justice Marshall distinguished between officers who merely help the President exercise the unique powers granted to him by the Constitution, "in the exercise of which he is to use his own discretion," and officers who carry out "other duties" that "the legislature proceeds to impose on that officer." 5 U.S. 137, 165-66 (1803). The former officer "is the mere organ by whom [the President's] will is communicated," while the latter is "the officer of the law." *Id.* at 166. With respect to an officer in the latter category, Marshall concluded that "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable." *Id.* at 162.

The Supreme Court affirmed these distinctions when it first addressed the constitutionality of good-cause tenure. *See Humphrey's Ex'r*, 295 U.S. at 627-32 (contrasting officers who are "restricted to the performance of executive functions"

with those who "carry into effect legislative policies embodied in [a] statute"). And the Court has done so repeatedly since then. *See Wiener v. United States*, 357 U.S. 349, 353 (1958) (relying on the "sharp line of cleavage" between these categories); *Morrison*, 487 U.S. at 691 (explaining that "the functions of the officials in question must be analyzed" when deciding whether removal conditions "impede the President's ability to perform his constitutional duty"). The Court has *never* held that the President has "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties." *Wiener*, 357 U.S. at 352.

Not even *Myers v. United States* stands for so broad a proposition. The statute at issue there did more than limit the President's removal power: it gave a coordinate branch of government the right to block removals entirely, by conditioning them on "the advice and consent of the Senate." 272 U.S. at 107. This, the Court recognized, could operate as a *complete* barrier to an officer's removal, which "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 164; *accord Bowsher v. Synar*, 478 U.S. 714, 726 (1986). *Myers* did not address whether Congress may require good cause for the removal of officers. *See Morrison*, 487 U.S. at 687 n.24 ("the only issue actually decided in *Myers*" was that the President had power to remove a postmaster "'without the advice and consent of the Senate'"

(quoting *Humphrey's Ex'r*, 295 U.S. at 626)); *Myers*, 272 U.S. at 126 ("*In the absence of any specific provision to the contrary*, the power of appointment to executive office carries with it, as a necessary ingredient, the power of removal." (emphasis added)).

In sum, while the Supreme Court has suggested that there are "some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role," *Morrison*, 487 U.S. at 690 (citing *Myers*, 272 U.S. at 132-34), such officials do not include the heads of agencies, like the CFPB, that implement congressionally enacted regulatory measures. *See Free Enter. Fund*, 561 U.S. at 509 (constitutional requirements are satisfied where officers within the Securities and Exchange Commission are shielded from removal by "a single level of good-cause tenure"); *Wiener*, 357 U.S. at 353 (good-cause tenure is permissible given "the function that Congress vested in the War Claims Commission").

That precedent dictates the outcome here. Simply put, when the President may remove an officer for good cause, that officer is subject to "Presidential oversight." *Free Enter. Fund*, 561 U.S. at 509; *see Myers*, 272 U.S. at 135 ("Finding such officers to be negligent and inefficient, the President should have the power to remove them."). Dodd-Frank's removal standard for the CFPB Director is a prototypical example of good-cause tenure. As such, it gives the President

"substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696.

Likewise, conditioning the Director's removal on good cause "does not interfere with the President's exercise of the 'executive Power.'" *Morrison*, 487 U.S. at 689-90. The CFPB is no more "an arm or an eye of the executive," *Humphrey's Ex'r*, 295 U.S. at 628, than the FTC was when *Humphrey's Executor* was decided. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1087 (C.D. Cal. 2014). Indeed, the Bureau's role is materially indistinguishable: "filling in and administering the details embodied by th[e] general standard[s]" set forth in a statute regulating commerce. *Humphrey's Ex'r*, 295 U.S. at 628. While such duties may be executive in nature "to some degree," *Morrison*, 487 U.S. at 689 n.28, they do not represent any "core executive function" under Article II, *id.* at 688; *see PHH*, 881 F.3d at 84 ("the functions of the CFPB and its Director are not core executive functions").

In any event, the CFPB Director surely is not an officer "restricted to the performance of executive functions" and "charged with no duty at all related to either the legislative or judicial power." *Humphrey's Ex'r*, 295 U.S. at 627. And that is the *only* type of officer whom the Supreme Court has even suggested must be removable without cause. *Morrison*, 487 U.S. at 690.

**B.** Whether an agency is led by one person or several makes no difference.

The Supreme Court has never even implied that the decision-making attributes of multimember bodies have anything to do with the Court's approval of good-cause tenure. In *Humphrey's Executor*, for instance, the Court commented on the FTC's structure only while addressing a *statutory* question: whether Congress intended to limit removal of its commissioners to the causes listed in the statute. *See* 295 U.S. at 621-26. When the Court turned to answering the *constitutional* question—whether the removal provision violated Article II—the Court did not, even once, discuss the agency's structure. *Id*. at 626-32. Attempts to distinguish single-director agencies on this basis simply have "no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power." *PHH*, 881 F.3d at 79-80.

Moreover, limiting the President's ability to remove a single director does not detract from his power any more than limiting his ability to remove the members of a board or commission. If anything, a multimember body serving staggered terms is *less* accountable to the President: Bringing such a body in line may require replacing several members, not just one, after identifying which members are to blame for the agency's shortcomings. A single director, by contrast, offers a "clear and direct" line of accountability when an agency strays from its mandate. *Id.* at 98.

Thus, in every way that matters under the Constitution, the CFPB Director is indistinguishable from the officers addressed in Supreme Court precedent. That

precedent teaches that the relevant distinction is not between agencies with different structures but rather between agencies with different roles. *See Myers*, 272 U.S. at 132 ("The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act."). In other words, the validity of removal conditions "depend[s] upon the character of the office," *Humphrey's Ex'r*, 295 U.S. at 631, and on whether, in light of that character, the removal conditions "impede the President's ability to perform his constitutional duty," *Morrison*, 487 U.S. at 691.

Here they do not. If the CFPB Director fails to execute the law faithfully, the solution is simple: the President can "remov[e] [her] from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483.

**C.** Arguments against the Bureau overlook this point because they conflate two distinct concepts: the accountability and oversight required by Article II (the ability to ensure that an agency is faithfully executing the law), and policymaking influence (the ability to affect which options an agency selects among the range of permissible policy choices). By confusing true accountability, as the Supreme Court has defined it, with the success of "the President's policy views," *PHH*, 881 F.3d at 193 (Kavanaugh, J., dissenting), these arguments demand more than what the Constitution requires—that every regulatory agency adhere to "the same policy views as the President," *id*. at 192.

The Supreme Court has never required that. In *Free Enterprise Fund*, for example, the Court was not concerned about the President's ability to influence the policies of an agency operating within its lawful mandate. Rather, the Court was concerned about the President's ability to hold an agency accountable if it shirks or exceeds that mandate. As the Court explained, the second layer of good-cause tenure shielding the Public Company Accounting Oversight Board did *"not merely add to the Board's independence, but transform[ed] it." Free Enter. Fund*, 561 U.S. at 496 (emphasis added). Because of how the two layers worked together, the President was "powerless" to remove a Board member even if he were "neglecting his duties or discharging them improperly." *Id.* at 496, 484.

This created the same situation as in *Myers* and *Bowsher*: even if the President had cause to remove an officer, he could not do so without the acquiescence of others. The option of firing a rogue officer was taken entirely out of the President's hands—and with it "his ability to execute the laws." *Id.* at 496. That is why the Court observed that "[t]he President is stripped of the power our precedents have preserved." *Id.* Throughout the opinion, every reference to accountability concerns the President's ability to guarantee the faithfulness of the officers who execute the laws. *See, e.g.*, *id.* at 484, 495, 496, 498. Nothing suggests that, beyond this threshold, the President must have some nebulous degree of influence over a

regulatory agency's priorities or agenda.[4] And the Court's remedy confirms this interpretation. With "the President separated from Board members by only a single level of good-cause tenure," the Board became "subject ... to Presidential oversight." *Free Enter. Fund*, 561 U.S. at 509; *see id.* at 496 (the President may "hold the Commission fully accountable for the Board's conduct").

Tellingly, it was the *dissent* in *Free Enterprise Fund* that "dismisse[d] the importance of removal as a tool of supervision" and focused instead on various factors that bear on "the President's 'power to get something done.'" *Id.* at 499 (quoting dissent). The dissent canvassed matters such as "'who controls the agency's budget requests and funding,'" "'the relationships between one agency or department and another,'" and "whether ... officials support or 'resist' the President's policies." *Id.* at 499-500 (quoting dissent); *see also PHH*, 881 F.3d at 189 (Kavanaugh, J., dissenting) (placing weight on agency "budget, personnel, and agenda control" (quotation and citation omitted)). But the Court rejected all this as irrelevant: "The Framers did not rest our liberties on such bureaucratic minutiae." *Free Enter. Fund*, 561 U.S. at 500.

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[4] Notably, however, Congress did incorporate checks on the CFPB that enable presidents to influence even the Bureau's discretionary policy choices, and some of these checks are unprecedented for financial regulators. *See* Block-Lieb, *supra*, at 43-55; Levitin, *supra*, at 343-62; Wilmarth, *supra*, at 908-11. For instance, CFPB regulations "are subject to override by an appellate body composed of heads of other agencies," including the Secretary of the Treasury. Wilmarth, *supra*, at 910.

At root, objections to the CFPB rest on a false premise—that the Constitution requires presidents to have some unspecified degree of policymaking influence over regulatory agencies beyond the ability to ensure faithful execution of the laws. With respect to such agencies, however, the Supreme Court has *always* held that the power to remove an officer for cause provides the accountability that enables the President to fulfill his constitutional role.

In sum, the CFPB is plainly constitutional.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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Dated: March 22, 2019

# **APPENDIX:**
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**U.S. Senate**

Brown, Sherrod
Senator of Ohio

Blumenthal, Richard
Senator of Connecticut

Dodd, Christopher J.
Former Senator of Connecticut

Klobuchar, Amy
Senator of Minnesota

Menendez, Robert
Senator of New Jersey

Merkley, Jeffrey A.
Senator of Oregon

Reed, Jack
Senator of Rhode Island

Warren, Elizabeth
Senator of Massachusetts

**U.S. House of Representatives**

Waters, Maxine
Representative of California

Adams, Alma
Representative of North Carolina

Clay, Wm. Lacy
Representative of Missouri

LIST OF *AMICI* – cont'd

Cleaver, Emanuel
Representative of Missouri

Foster, Bill
Representative of Illinois

Frank, Barney
Former Representative of Massachusetts

García, Jesús "Chuy"
Representative of Illinois

Green, Al
Representative of Texas

Himes, Jim
Representative of Connecticut

Lawson, Al
Representative of Florida

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Meeks, Gregory W.
Representative of New York

Pelosi, Nancy
Representative of California

Porter, Katie
Representative of California

San Nicolas, Michael
Representative of Guam

LIST OF *AMICI* – cont'd

Tlaib, Rashida
Representative of Michigan

Vargas, Juan
Representative of California

Velázquez, Nydia M.
Representative of New York

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6486 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached brief *amici curiae* complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 22nd day of March, 2019.

*/s/ Brianne J. Gorod*
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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on March 22, 2019.

I certify that all parties in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 22nd day of March, 2019.

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