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 AMICI CURIAE PUBLIC CITIZEN, CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, CONSUMER REPORTS, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, TZEDEK DC, AND U.S. PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND SUPPORTING APPELLANTS AND REVERSAL

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March 22, 2019

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8. Amicus curiae U.S. Public Interest Research Group Education Fund, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes and Regulations

Legislative History

Other

INTEREST OF AMICI CURIAE[1]

The amici curiae joining this brief are consumer organizations with an interest in the constitutional analysis that should guide this Court in determining whether the structure of the Consumer Financial Protection Bureau (CFPB) is consistent with constitutional separation-of-powers principles.

Public Citizen is a nonprofit consumer-advocacy organization that appears on behalf of its nationwide membership before Congress, administrative agencies, and courts. In addition to advocating for strong consumer financial protections, Public Citizen has participated as an amicus in numerous separation-of-powers cases in the Supreme Court and courts of appeals.

The Center for Responsible Lending (CRL) is a nonprofit organization dedicated to eliminating abusive practices in the market for consumer financial services and ensuring that consumers benefit from the

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[1] All parties have consented to the filing of this brief. The brief was not authored in whole or part by counsel for a party; no party or counsel for a party contributed money that was intended to fund this brief's preparation or submission; and no person other than the amici curiae, their members, or their counsel contributed money intended to fund the brief's preparation or submission.

full range of consumer-protection laws designed to prohibit unfair and deceptive practices by financial-services providers. CRL's research and policy reports and recommendations have addressed numerous issues concerning the CFPB's mission and activities.

The Consumer Federation of America (CFA) is an association of nearly 300 nonprofit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education on consumer issues. Ensuring a fair financial marketplace has long been a top priority for CFA.

Consumer Reports is an expert, independent, non-profit organization, founded in 1936, that works side by side with consumers for a fair, transparent, truthful, and safe marketplace. It is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. It has been active for decades in a wide range of policy issues affecting consumers, including steadfast support for the CFPB and its mission.

The National Association of Consumer Advocates (NACA) is a nonprofit corporation whose members are lawyers, law professors, and

students whose practice or area of study involves consumer protection. NACA's mission is to promote justice for consumers through information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

The National Consumer Law Center (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. NCLC has served on the Federal Reserve System Consumer-Industry Advisory Committee and as the Federal Trade Commission's designated consumer representative. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member formerly served on the CFPB's Consumer Advisory Board.

Tzedek DC is a nonprofit public-interest organization dedicated to safeguarding legal rights and interests of low-income District of Columbia residents facing debt-related crises, through litigation, policy advocacy, and preventative education programs. Tzedek DC and its client communities have a substantial interest in the continued, robust work of

the CFPB, the only federal agency dedicated solely to consumer financial protection.

U.S. Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is an independent, non-partisan 501(c)(3) organization that works for consumers and the public interest. U.S. PIRG Education Fund supported the creation of the CFPB, arguing for a robust, independent federal agency whose sole mission is to protect consumers from harmful financial products and services.

INTRODUCTION AND SUMMARY OF ARGUMENT

Inattention by federal financial regulatory agencies and limitations on their authority contributed significantly to the 2008 financial crisis that destabilized the American economy and caused grave hardship and loss to consumers. *See PHH Corp. v. CFPB*, 881 F.3d 75, 77–78 (D.C. Cir. 2018). Responding to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1326. To ensure that consumer financial protections would have the undivided attention of an agency able to withstand political pressure and avoid capture by industries it was charged with regulating, Congress

created the Consumer Financial Protection Bureau (CFPB) and gave it significant autonomy to provide "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced." H.R. Conf. Rep. No. 111-517, at 874 (2010).

Congress transferred authority from other agencies to the CFPB to ensure consistent and vigorous consumer protection, and gave the new agency rulemaking and enforcement authority under consumer-protection statutes including the Truth in Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, and Fair Debt Collection Practices Act. Congress also granted the CFPB regulatory and enforcement authority to combat unfair, deceptive, and abusive consumer financial products and practices. The CFPB has exercised these powers to provide over $12 billion in relief to more than 31 million consumers. *See* https://www.consumerfinance.gov/.

Protecting the agency's independence and effectiveness was critical to Congress's objectives of ensuring the agency's dedication to consumer protection and avoiding the failures of existing regulatory agencies. *See*, *e.g.*, H.R. Conf. Rep. No. 111-517, at 874; S. Rep. No. 111-176, at 10–11

(2010). Those failures, Congress determined, were largely attributable to agencies' focusing on interests of the financial industry they regulated, while giving insufficient attention to consumers' needs. *See id*. As Senator Cardin put it, "This legislation will create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure." 156 Cong. Rec. S5871 (July 15, 2010). To that end, Congress placed the agency under a director appointed by the President, confirmed by the Senate, and removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

The Supreme Court has long held such tenure protections constitutional for officers engaged in rulemaking and enforcement in areas that Congress believes require independence and expertise. In *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), the Court upheld legislation conferring protection against at-will presidential removal on commissioners of the Federal Trade Commission, who exercise authority similar to the CFPB's. The Court has repeatedly reaffirmed and extended that precedent, rejecting arguments that for-cause limits on removal of

executive officers prevent the President from performing his constitutionally assigned functions.

The proposition that Congress may confer executive authority on an independent agency only if the agency is headed by a multi-member commission finds no support in the Supreme Court's decisions. Adherence to the multi-member commission model is not essential to the logic of the Supreme Court's repeated holdings that for-cause removal provisions do not prevent the President from performing his constitutional functions. *See PHH*, 881 F.3d at 79–80.

The assertion that multi-member commissions protect liberty better than agencies directed by single officers does not bear on the separation-of-powers issue. Although separation-of-powers principles derive from the Framers' conceptions of how best to protect liberty, decisions about whether a statute violates Article II do not turn on courts' assessments of what institutional arrangements are most consistent with abstract conceptions of liberty, but on whether the statute prevents the President from fulfilling his constitutional function. Generalizations about liberty are poor substitutes for traditional separation-of-powers analysis.

Congress has often constituted independent agencies as multi-member commissions, but historical novelty is not a basis for striking down a statute on separation-of-powers grounds. Conferring significant executive power on single officers is no more novel today than multi-member commissions were when the Supreme Court decided *Humphrey's Executor* in 1935. The principal difference is that the CFPB's independence is supported by 80 years of precedents upholding delegation of authority to officers protected from at-will termination by the President.

ARGUMENT

I. Long-established separation-of-powers principles support the CFPB's constitutionality.

Under Supreme Court precedent, the question whether the CFPB may be headed by an officer whose independence is protected by a for-cause limitation on his removal has a straightforward answer. The Court long ago held that delegation of similar powers to another independent agency, the FTC, does not interfere with the President's ability to carry out his constitutional functions. *See Humphrey's Executor*, 295 U.S. at 629.

Humphrey's Executor and other decisions upholding statutes protecting executive officers' tenure reflect a broader principle: Proper

consideration of separation-of-powers challenges to statutes validly enacted by Congress and signed by the President requires recognition that "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring); *see also Samuels, Kramer & Co. v. Comm'r of Internal Rev.*, 930 F.2d 975, 987–88 (2d Cir. 1991).

The Constitution establishes some bright-line rules—such as that Congress may legislate only in compliance with requirements of bicameralism and presentment, *INS v. Chadha*, 462 U.S. 919 (1983), that appointment of federal officers must comply with the Appointments Clause, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *Samuels*, 930 F.2d at 988, and that courts may adjudicate only cases and controversies, *e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968). But claims that legislation unduly restricts the general authority of one of the branches or aggrandizes another require more nuanced analysis: Courts must "balance the pragmatic concerns associated with the operation of an effective and efficient government with the institutional concern of remaining faithful to the fundamental

governmental structure that the Framers incorporated into the Constitution." *Samuels*, 930 F.2d at 987.

Under long-established Supreme Court authority, unless a statute improperly grants Congress or the judiciary a direct role in performing executive functions, "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977); s*ee PHH*, 881 F.3d at 79–80. This "pragmatic, flexible approach," *Nixon*, 433 U.S. at 442, allows Congress to assign executive functions to officers protected against at-will removal by the President, if Congress determines that "a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency or official." *Morrison v. Olson*, 487 U.S. 654, 691 n.30 (1988); *see*, *e.g.*, *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Executor,* 295 U.S. at 629–31 (1935). Thus, "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free*

Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 483 (2010).

In such circumstances, the President's ability (or that of a presidential subordinate) to remove an officer for cause provides "ample authority" for "the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692. For-cause limitations on presidential removal authority therefore do not "unduly trammel[] on executive authority." *Id.* at 691; *see also Free Enter. Fund*, 561 U.S. at 495. The functions Congress may delegate to officers removable only for cause, or agencies headed by such officers, include enforcement or prosecutorial functions, adjudicatory functions, rulemaking functions, or a combination of the three. *See*, *e.g.*, *Morrison*, 487 U.S. at 691; *Wiener*, 357 U.S. at 356; *Humphrey's Executor*, 295 U.S. at 628–29. The CFPB performs exactly such functions.

II. Arguments that the CFPB's structure is unconstitutional distort separation-of-powers principles.

The view adopted by the district court misreads Supreme Court decisions to erect a rigid principle that tenure-protected executive authority may be delegated only to multi-member commissions. The Supreme Court's decisions, however, do not suggest that the use of a commission or single-director structure is determinative. Congress's choice to vest the

CFPB's leadership in a single, tenure-protected director, viewed together with other features of the agency's structure, does not unduly circumscribe presidential authority.

A. Supreme Court precedents permit Congress to create independent single-director agencies.

Myers v. United States, 272 U.S. 52 (1926), holds that Congress cannot give *itself* a role in removing executive officers (outside the constitutional impeachment process) by requiring congressional consent to their removal by the President. *See PHH*, 881 F.3d at 78. The *PHH* dissent whose arguments the district court adopted read *Myers* overbroadly to establish a general rule that executive branch officers must be terminable at will by the President (or an officer subject to at-will removal by the President). *See id.* at 164 (Kavanaugh, J., dissenting). That rule, the dissent contended, is subject at most to two narrow exceptions, established by *Humphrey's Executor* and *Morrison*, for agencies headed by expert, multi-member boards and for inferior officers. *See id.* at 164–65, 176. The Supreme Court, however, has repeatedly rejected that expansive reading of *Myers*.

To begin with, *Humphrey's Executor* emphasizes that *Myers* is limited to forbidding congressional participation in removing executive

officers. *See* 295 U.S. at 626. *Humphrey's Executor* expressly disapproved statements in *Myers* that seemed to go beyond that holding to suggest that officers cannot be protected against at-will removal by the President. *Id*.

In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Supreme Court reaffirmed *Humphrey's Executor*'s understanding of *Myers*. *Bowsher* held that executive functions cannot be delegated to an officer removable by Congress but did not accept the broader argument that executive officers must be removable at the President's will. *See id*. at 724.

In *Morrison*, the seven-Justice majority opinion, written by Chief Justice Rehnquist, again emphasized the narrowness of *Myers*'s holding. *See* 487 U.S. at 686. The Court noted that *Bowsher* had *rejected* broader readings of *Myers*, as requiring unfettered presidential removal power. *See id.* at 689 n.26 ("[A]s Justice White noted in dissent in [*Bowsher*], the argument [that the President must have absolute discretion to discharge purely executive officials at will] was clearly not accepted by the Court at that time.").

The Supreme Court's decision in *Free Enterprise Fund* neither supports the *PHH* dissent's broad reading of *Myers*, nor suggests that

Humphrey's Executor and *Morrison* are no longer good law. Rather, Chief Justice Roberts's opinion in *Free Enterprise Fund* repeatedly acknowledges that Congress may limit presidential removal of officers performing executive functions. *See* 561 U.S. at 483, 493–95. *Free Enterprise Fund*'s "modest" holding is that Congress may not impose *multiple* layers of tenure protection, by vesting power to remove an officer for cause in another officer who is removable by the President only for cause. 561 U.S. at 501.

Moreover, *Free Enterprise Fund* goes out of its way to emphasize that an executive officer may be given tenure protection, as long as either the President, or an officer removable at will by the President, retains authority to remove the officer for cause. As the Court put it, "The point is not to take issue with for-cause limitations in general; *we do not do that*." *Id*. (emphasis added). Especially in light of that explicit statement, *Free Enterprise Fund* lends no support for the district court's broad reading of *Myers*. Indeed, *Free Enterprise Fund* remedied the violation it found by severing the unconstitutional second layer of tenure protection and vesting at-will removal power over officers of the Public Company Accounting Oversight Board (PCAOB) in the *tenure-protected* members

of the Securities and Exchange Commission (SEC). *See id.* at 509. The Court thus acknowledged that the SEC's own exercise of significant executive authority poses no constitutional problem.

The *PHH* dissent adopted below not only overstated *Myers*'s sway, but also posited unwarranted limits on what it called the "exception" to *Myers* established by *Humphrey's Executor* and its progeny. *PHH*, 881 F.3d at 164 (Kavanaugh, J., dissenting). Nothing in the Supreme Court's opinions suggests their reasoning is limited to multi-member boards. *Humphrey's Executor* and *Wiener* do both mention that the officers in question served on multi-member commissions. *See Humphrey's Executor*, 295 U.S. at 624; *Wiener*, 357 U.S. at 350. And *Humphrey's Executor* referred to Congress's intent, in creating the FTC, to delegate authority to a "body of experts." 295 U.S. at 624, 625. But in neither case did the Court identify the agency's multi-member structure as the reason its independence did not infringe executive authority. Nor did the Court suggest that checks imposed on commissioners by the need to obtain concurrence from fellow commissioners were essential to the agency's constitutionality because they substituted for presidential supervision. Rather, the Court held that delegating independent authority to perform the

functions assigned to the agency (subject to the President's power to remove its principal officers for cause) did not exceed Congress's power. *See Wiener*, 357 U.S. at 353–56; *Humphrey's Executor*, 295 U.S. at 628–32.

Morrison v. Olson confirms that the constitutionality of tenure protection does not depend on whether a protected officer sits on a multi-member commission. *Morrison* holds that the constitutionality of a special prosecutor's office headed by a single officer protected against at-will removal is governed by the same test applied in *Humphrey's Executor* and *Wiener*: whether assigning the functions at issue to an officer with a measure of independence from the President infringes the President's ability to perform his constitutional role. *See* 487 U.S at 691.

Further, to the extent that *Humphrey's Executor*, by describing the functions performed by the FTC as "quasi legislative" and "quasi judicial," 295 U.S. at 624, might leave doubt about the scope of its holding, *Morrison* explicitly holds that for-cause removal limitations are constitutional for officers performing purely "executive" functions as the Court currently uses that term. *See* 487 U.S. at 688–91; *see also PHH*, 881 F.3d at 87. *Morrison* affirms that, even for an officer unquestionably performing executive functions, a "good cause" removal restriction leaves the

President "ample authority" to "ensure the faithful execution of the laws." 487 U.S. at 692, 693. *See also Free Enter. Fund*, 561 U.S. at 495 (recognizing that the ability to remove an officer for cause is the "most important[]" guarantee of the President's ability to carry out his Article II duties).

Morrison's recognition that for-cause removal adequately protects the President's authority over offices directed by single officers is not limited to inferior officers. Although the independent counsel's inferior-officer status was critical to *Morrison*'s holding that his court appointment satisfied the Appointments Clause, *see* 487 U.S. at 670–77, *Morrison*'s analysis of the constitutionality of limiting presidential removal authority did not turn on that point. The Court's separation-of-powers analysis mentioned that the independent counsel was an inferior officer, *see* 487 U.S. at 691, but it did so as part of its explanation that the independent counsel's functions were not so critical to presidential authority that they could not be vested in an independent officer. *Morrison* applied the same separation-of-powers standard *Humphrey's Executor* had used to determine the constitutionality of tenure protection for principal officers: whether "the removal restrictions are of such a nature that they impede

the President's ability to perform his constitutional duty." 487 U.S. at 691; *see also PHH*, 881 F.3d at 87–88. Under *Morrison*, the issue for both inferior and principal officers is whether "a measure of independence … interferes with the President's constitutional duty and prerogative to oversee the executive branch and take care that the laws be faithfully executed." *Id.* at 96 n.2. "The question whether a removal restriction unconstitutionally constrains presidential power thus does not track whether the shielded official is a principal or inferior officer." *Id.*

The *PHH* dissent's doubts about *Morrison*'s continued viability, 881 F.3d at 176 n.3 (Kavanaugh, J., dissenting), are insubstantial. Although perceived excesses of the Whitewater Independent Counsel's Office later convinced Congress that the independent-counsel statute was flawed as a *policy* matter and should therefore be allowed to lapse, *see* 28 U.S.C. § 599, those views do not reflect a consensus that *Morrison*—a near-unanimous opinion by the then-Chief Justice—was wrongly decided, much less that its approach to separation-of-powers issues was improper. In any event, the Supreme Court alone retains the prerogative of overruling its constitutional decisions. *See Agostini v. Felton*, 521 U.S. 203,

237 (1997). Doubts about a Supreme Court precedent's correctness cannot justify disregarding its teachings.

The Supreme Court's latest word on the subject, *Free Enterprise Fund*, offers no support for limiting *Humphrey's Executor* to multi-member commissions, or for limiting or disregarding *Morrison*. *Free Enterprise Fund* repeatedly cites *Morrison* as established law. See 561 U.S. at 483, 494, 495, 502. And *Free Enterprise Fund*'s reiteration that Congress may delegate executive functions to tenure-protected officers nowhere suggests that Congress's power is limited to members of multi-member commissions or inferior officers. *Free Enterprise Fund* states without any such qualification that Congress may "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." 561 U.S. at 483.

B. The CFPB does not infringe presidential authority.

The degree of independence accorded the CFPB's director, in the context of the agency's other structural features, does not infringe the President's Article II powers and responsibilities. The authority the CFPB exercises—regulation of consumer financial transactions under a defined set of statutes—is, by nature, suitable for delegation to an entity

with a degree of independence: The agency does not perform "core executive functions" necessarily vested in officers who "must directly answer to the President's will"; it operates in an area where regulators "have long been permissibly afforded a degree of independence." *PHH*, 881 F.3d at 84.

Critically, the President retains the most important means of ensuring faithful execution of the laws—the ability to dismiss the CFPB's director for cause. *See Morrison*, 487 U.S. at 696. That authority is neither limited by multiple layers of tenure protection nor by any other impediments of the kind that troubled the Supreme Court in *Free Enterprise Fund*.

Other mechanisms for holding the CFPB accountable buttress the removal power. When the CFPB engages in policymaking by promulgating regulations, its regulations are subject to review and, under statutorily defined circumstances, veto by the Financial Stability Oversight Council, a body dominated by presidential appointees. *See Collins v. Mnuchin*, 896 F.3d 640, 673 (5th Cir.), *reh'g en banc granted*, 908 F.3d 151 (5th Cir. 2018); *PHH*, 881 F.3d at 98; *id.* at 120 (Wilkins, J., concurring). This constraint, allowing "[t]he Executive Branch [to] directly

control the CFPB's actions," *Collins*, 896 F.3d at 673, reinforces the supervisory authority inherent in the President's for-cause removal power. And it is not the only means of reinforcement: The agency is required to coordinate and consult with other executive agencies in carrying out its duties. *See PHH*, 881 F.3d at 119 (Wilkins, J., concurring). As in *Morrison*, these features, on top of the critical for-cause removal power, "give the Executive Branch sufficient control … to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696.

The agency's single-director structure does not tilt the balance against its constitutionality. That the agency can be held accountable through a single director may enhance rather than undermine a President's ability to control it and to influence its direction by appointing a successor if the director resigns or is terminated for cause. *PHH*, 881 F.3d at 97–98. Congress has a range of "options" for structuring independent agencies, with cross-cutting implications for presidential influence. *See Collins*, 896 F.3d at 660–61, 667–68. As long as Congress's choices do not prevent the President from performing his constitutional functions, debates over which structural arrangement would render an agency

marginally more or less responsive to presidential oversight do not render those choices impermissible.

Congress's choice of a funding mechanism that, within limits, frees the agency from reliance on annual appropriations also respects presidential authority. Funding an agency outside the appropriations process is a legitimate way to protect its independence that principally affects Congress's power, not the President's. *PHH*, 881 F.3d at 96.[2] The funding provision—under which the agency's access to funding outside the appropriations process is capped, may always be changed in annual spending bills, and is subject to reporting requirements to ensure oversight by Congress and the President—does not undermine the features of the agency that ensure constitutionally sufficient presidential authority.

[2] The President's role in agency budget requests is more a matter of "bureaucratic minutiae" than a significant means of exercising Article II powers. *Free Enter. Fund* 561 U.S. at 499–500; *see PHH*, 881 F.3d at 96. And nothing in the statute prevents the President from proposing in his budgest requests that Congress constrain the CFPB's funding or from exercising his veto if Congress does not do so.

III. Separation-of-powers analysis does not rest on ad hoc judgments about "liberty."

The assertion that only members of multi-member agencies may be protected from at-will presidential removal rests in part on a novel approach to separation-of-powers analysis—one turning on ad hoc judgments about whether particular institutional arrangements sufficiently protect "liberty." *See PHH*, 881 F.3d at 166 (Kavanaugh, dissenting). Under this view, single-director independent agencies violate separation-of-powers principles because they supposedly create a greater risk of arbitrary decisionmaking and abuse of power than do multi-member boards whose actions require deliberative "consensus." *Id.* at 184.

The Framers undoubtedly aimed to secure liberty in devising the Constitution—a point summed up in the first half of Justice Jackson's much-quoted observation: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). The Supreme Court's decisions, however, have never elevated the amorphous question of whether particular institutional arrangements "secure liberty" into a separation-of-powers standard. For example, in *Free Enterprise Fund*, the only mention of "liberty"

is one sentence repeating the generalization that the Framers saw "structural protections against abuse of power [as] critical to preserving liberty." 561 U.S. at 501 (quoting *Bowsher*, 478 U.S. at 730). Rather, the Court's separation-of-powers analysis has focused on whether branches are exercising powers expressly assigned to other branches, whether the authority of one branch has been aggrandized at the expense of another, and whether a branch has been prevented from performing constitutionally assigned functions. *See Mistretta v. United States*, 488 U.S. 361, 381–83 (1989).

There are good reasons for focusing separation-of-powers analysis on structural considerations rather than attempting to discern effects of particular arrangements on the ultimate goal of securing liberty. Framers of constitutions, like authors of statutes, rarely pursue any objective at all costs. *See Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). That long-recognized proposition was the point of Justice Jackson's observation in *Youngstown* that "[t]he actual art of governing under our Constitution" requires that the recognition that power is diffused to secure liberty be tempered by the need to allow "practice [to] integrate the

dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634; *accord*, *Samuels*, 930 F.2d at 987.

Focusing on "liberty" as the controlling factor is particularly inapt where claims of exclusive presidential authority are concerned, because *centralization* of executive power in the President is an exception to the Constitution's *diffusion* of power to secure liberty. Concentration of authority in the hands of a single, powerful chief executive poses potential threats to liberty, as exemplified by the presidential seizure of private property that triggered *Youngstown*. *See* 343 U.S. at 634, 655 (Jackson, J., concurring). The claim that presidential control of enforcement and prosecutorial authority enhances liberty is especially problematic. Direct presidential interference with prosecutorial decisions is generally regarded as improper, as is the threat (or reality) of removal of a prosecutor or other enforcement officer because of particular investigative, prosecutorial, or enforcement choices. *See*, *e.g.*, Driesen, *Firing U.S. Attorneys: An Essay*, 60 Admin. L. Rev. 707 (2009). Such misuse of presidential authority threatens liberty and the rule of law.

Adjudicatory and regulatory powers demanding expert judgment and adherence to statutory policies implicate similar considerations.

Insulating officers who perform such functions from at-will presidential removal (but not removal for incompetence or malfeasance) *enhances* liberty by protecting the integrity with which public duties are performed. *See*, *e.g.*, *Humphrey's Executor*, 295 U.S. at 625; *Wiener*, 357 U.S. at 356.

Moreover, even while conflating separation-of-powers analysis with a free-ranging inquiry into the effects of an agency's powers and structure on liberty, the critique of the CFPB ignores substantial constraints on the agency's power to infringe liberty—in particular, constraints imposed by statutory limits on the agency's powers and the courts' ability to enforce those limits through judicial review. *See*, *e.g.*, 12 U.S.C. § 5563(b)(4).

To be sure, neither the judiciary nor the legislature can substitute itself for the President in performing functions constitutionally assigned to the executive branch. *See*, *e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 274–75 (1991); *Bowsher*, 478 U.S. at 734. When courts protect the people's liberties from arbitrary or unlawful agency action, however, they are not usurping executive power, but performing their assigned judicial function. *See*, *e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 194–96 (2012). And if separation-of-powers analysis is to be supplanted by an amorphous inquiry into threats to

liberty, there is no reason not to consider checks imposed by other branches—just as the *PHH* dissent proposed to "substitute" the constraint imposed by the need for agreement among multiple commissioners for the constraint imposed by presidential supervision. *See* 881 F.3d at 183 (Kavanaugh, J., dissenting). Judicial review is surely a more secure guarantee of liberty than the need for commissioners of the same agency to agree before acting.

The principal way the Constitution diffuses power to secure liberty is by assigning power to each branch to check infringements of liberty by the other branches. The Framers believed that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher*, 478 U.S. at 722. Ignoring those checks makes little sense when one is inquiring whether a delegation of power threatens *liberty*, as distinct from threatening the President's performance of his assigned functions.

The mistake of confusing separation-of-powers analysis with a charter to inquire into the effects of a particular institutional arrangement on liberty is confirmed by such an inquiry's manipulable nature. The *PHH* dissent's attempts to distinguish the single-director Office of

Special Counsel and Social Security Administration from the CFPB illustrate the point. In the dissenters' view, those agencies are more acceptable from a separation-of-powers standpoint because their powers threaten liberty less than those the CFPB wields. *See* 881 F.3d at 174–75 (Kavanaugh, J., dissenting).

The Office of Special Counsel, however, has authority to police personnel practices by agencies and take enforcement actions against government employees—individuals with the full range of constitutional rights of U.S. citizens. Among the rules the Office enforces are those prohibiting improper political activity by government employees and protecting employees from improper political pressures from agency superiors. Its actions have direct implications for the liberties of government workers and the public as a whole, which may be affected by political influences brought to bear on or by the civil service. *See Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

The Social Security Administration, though not a law-enforcement agency, administers the federal statutory scheme that most broadly affects all Americans: Social Security. The Administration makes decisions that affect access by tens of millions of Americans to statutory

entitlements essential to their livelihoods. The agency has the potential to exert great power over the large majority of Americans who will never be affected directly by federal prosecutorial or enforcement authority.

By comparison, the CFPB's sphere of authority is economic regulation, which affects "liberties" that receive minimal substantive protection under the due process clause. *See*, *e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). And *procedural* due process rights for those affected by such regulation are fully protected by judicial review of CFPB actions.

The suggestion that an agency that regulates economic matters to protect consumers poses a greater threat to liberty than agencies that affect individual rights in other ways reveals that the effort to insert a "liberty" criterion into separation-of-powers analysis is misguided. The constitutionality of these agencies does not turn on ad hoc judgments about whether the liberty interests they affect are significant enough to require three commissioners rather than one director; it depends on whether the functions they perform can permissibly be delegated to officers independent of the President (a test all three agencies satisfy under *Humphrey's Executor*, *Wiener*, and *Morrison*). Placing the CFPB, the

Social Security Administration, or the Office of Special Counsel under control of multiple commissioners might or might not be better policy, but *that* issue is for Congress to decide.

IV. Congress may innovate in structuring agencies.

The *PHH* dissent asserted that Congress has historically designed independent agencies as multi-member commissions, and that what it called the absence of "historical precedent" is a key indicator of the agency's unconstitutionality. 881 F.3d at 166 (Kavanaugh, J., dissenting). That form of reliance on historical precedent, however, lacks support in the recent Supreme Court decisions the dissent invoked: *Free Enterprise Fund* and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Noel Canning addressed specific constitutional text empowering the President to make appointments without Senate advice and consent during "the recess" of the Senate. The ambiguity of that specific term led the Court to consult "settled and established practice" in "determining the true construction of a constitutional provision the phraseology of which is … of doubtful meaning." *Id.* at 2559 (citations omitted). By contrast, the argument against the CFPB's constitutionality does not invoke history to illuminate ambiguous constitutional language. And *Noel*

Canning does not suggest that historical novelty of an institutional arrangement implies that it violates separation of powers.

Free Enterprise Fund's use of history is also very different from that of the CFPB's critics. *Free Enterprise Fund* began with application of separation-of-powers principles: It analyzed whether the two-layer tenure protection afforded PCAOB members prevented the President from performing his assigned constitutional functions—by completely precluding him from determining whether there was cause for the removal of PCAOB members. The Court held that the two-layer protection "transform[ed]" the Board's independence and "subvert[ed] the President's ability to ensure that the laws are faithfully executed," 561 U.S. at 496, 498, unlike a single layer of for-cause removal protection, *see id.* at 495 (citing *Morrison*, 487 U.S. at 695–96).

Only after considering the statute under applicable separation-of-powers principles did *Free Enterprise Fund* turn to history—to address a *defense* of the two-layer structure based on "the past practice of Congress." *Id.* at 505. It was in that context that *Free Enterprise Fund* referred to the "lack of historical precedent" for two-layer tenure protection. *Id.* The opinion does not suggest that the Court would have condemned

the agency's structure on grounds of novelty alone had it not concluded that the structure prevented the President from fulfilling constitutionally assigned functions.

The historical-precedent argument, moreover, proves too much. The concededly constitutional independent commission was novel once, too. By most accounts, the most prominent early example was the Interstate Commerce Commission, which was created in 1887, was separated from the Interior Department in 1889, and received significant ratemaking authority in 1906. *See* Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1128–30 (2000). Between that time and *Humphrey's Executor* in 1935, Congress created a few more agencies headed by tenure-protected commissions, most notably the Federal Reserve Board in 1913 and the FTC in 1914. *See id.* at 1116 n.14, 1132. But their constitutionality remained contested, especially after *Myers*. Between *Myers* and *Humphrey's Executor*, the few independent-commission statutes enacted by Congress did not include express tenure-protection provisions. *See Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting).

If the *PHH* dissenters' "historical precedent" approach were correct, *Humphrey's Executor* would have come out differently. At the time, the "novelty" of a tenure-protected multi-member commission was similar to, if not greater than, that of the CFPB directorship. It had been used in a few instances dating back less than 50 years, to a point in time already nearly a century into this country's constitutional history, and its constitutionality was contested for much of that time. Here, by comparison, analogous recent statutory grants of significant authority to single, tenure-protected officers date back over 40 years, to the creation of the Office of Special Counsel and the independent-counsel statute in 1978, and about 25 years to the creation of a tenure-protected Social Security Administrator in 1994. Thus, the multi-member commission structure held constitutional in 1935 was comparable, in its asserted novelty, to the single-officer structure challenged today.

One difference, however, is striking: Unlike in 1935, it has now been repeatedly established by the Supreme Court for over 80 years that Congress may protect officers exercising significant executive authority against at-will removal by the President. In 1935, the very concept of tenure-protected officers was contested; now, the dispute concerns details of

agency structure, not the greater issue of independence from the President. And even the degree to which the details are contested is limited: The independent-counsel statute's constitutionality was settled 30 years ago in *Morrison*, and neither the Office of Special Counsel nor the Social Security Administration appears ever to have faced a serious constitutional challenge.

The larger point, though, is that the degree of novelty should not be determinative. "Our constitutional principles of separated powers are not violated ... by mere anomaly or innovation." *Mistretta,* 488 U.S. at 385. Where the Constitution permits delegation of authority to an independent agency—here, authority to regulate and enforce the fairness of commercial practices—Congress's decision to do so is not unconstitutional because the agency does not conform to a "traditional" commission structure.

The "traditional" form has advantages and disadvantages. It may foster deliberation, for example, or it may lead to agency paralysis due to internal division or lack of a quorum. Which form is preferable is a policy question for Congress. If an agency constituted in either way violates protected liberties, the courts may set aside its action. But the perceived

novelty of the structure is not itself an infringement of presidential authority that violates constitutional separation-of-powers principles. If exercise of the authority delegated to a tenure-protected officer does not prevent the President from performing his constitutionally assigned functions, there is no Article II violation.

CONCLUSION

This Court should reverse the judgment of the district court.

Respectfully submitted,

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March 22, 2019

CERTIFICATE OF SERVICE

I certify that on March 22, 2019, I caused the foregoing to be filed with the Clerk of the Court through the Court's ECF system, which will serve notice of the filing on all filers registered in the case.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-face and volume limitations set forth in Federal Rules of Appellate Procedure 32(a)(7)(B) and 29 as follows: The type face is fourteen-point Century Schoolbook font (except for the cover, which is in fourteen-point Times New Roman), and the word count, as determined by the word-count function of Microsoft Word 2016 is 6,417, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and the rules of this Court.

/s/ Scott L. Nelson
Scott L. Nelson