EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1177

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS, LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Petition for Review of an Order of the
Consumer Financial Protection Bureau

BRIEF ON REHEARING EN BANC OF AMICI CURIAE PUBLIC CITIZEN, INC., CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, AND TZEDEK DC IN SUPPORT OF RESPONDENT.

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March 31, 2017

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici. All parties and intervenors appearing before the Consumer Financial Protection Bureau and in this Court to date are listed in the en banc Brief for Petitioners or the March 17, 2017, brief for the United States as Amicus Curiae. Those briefs also list all amici curiae who had participated in this Court as of the time the briefs were filed. Additional amici curiae not listed in those briefs and joining in this brief are Public Citizen, Inc., Consumers Union, National Association of Consumer Advocates, and Tzedek DC. The required corporate disclosure statement for each amicus curiae joining this brief is set forth below.

B. Ruling Under Review. This is a petition for review of a Final Decision and Order of the CFPB in *In the Matter of PHH Corporation*, Docket No. 2014-CFPB-0002 (June 4, 2015) [JA 1-40]. That decision is unreported.

C. Related Cases. This matter was not before this Court until the filing of the petition for review in this case. Counsel are unaware of any related cases within the meaning of Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, amici curiae Public Citizen, Inc., Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Consumer Law Center, and Tzedek DC state that they are nonprofit, non-stock corporations. They have no parent corporations, and no publicly traded corporations have an ownership interest in them. Each organization is devoted to protection of consumer interests.

STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP, FINANCIAL CONTRIBUTIONS, AND SEPARATE BRIEFING

Petitioners and respondent have consented to the filing of this brief. Amici Public Citizen, Consumer Federation of America, Consumers Union, National Association of Consumer Advocates, National Consumer Law Center, and Tzedek DC filed their notice of intent to participate as amici curiae at the en banc stage on March 30, 2017.

Pursuant to Circuit Rule 29(d), counsel for amici Public Citizen, *et al.*, certify that a separate brief is necessary to provide a perspective informed by Public Citizen's long history of involvement in significant separation-of-powers cases, as well as the perspective of organizations similarly devoted to advancing interests of consumers—the people that the Consumer Financial Protection Bureau (CFPB) was created to protect—regarding the constitutional considerations governing Congress's authority to provide for the CFPB's independence and protect its ability to carry out its statutory mission of ensuring that consumer protection laws and regulations are comprehensive, fair, and vigorously enforced.[*]

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[*] No counsel for a party authored this brief in whole or in part, and no person other than the amici curiae, their members, or their counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

TABLE OF CONTENTS

Page

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES i

CORPORATE DISCLOSURE STATEMENT ii

STATEMENT REGARDING CONSENT TO FILE, AUTHORSHIP, FINANCIAL CONTRIBUTIONS, AND SEPARATE BRIEFING iii

TABLE OF AUTHORITIES vi

GLOSSARY ix

STATUTES AND REGULATIONS 1

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 9

I. Long-established separation-of-powers principles support the constitutionality of the CFPB's structure. 9

II. The argument that the CFPB's structure is unconstitutional distorts separation-of-powers principles. 12

A. Supreme Court precedents permit Congress to create independent single-director agencies. 13

B. Separation-of-powers analysis does not rest on ad hoc judgments about "liberty." 20

C. Congress has power to innovate in structuring agencies 29

CONCLUSION 35

CERTIFICATE OF COMPLIANCE 37

CERTIFICATE OF SERVICE.. 38

TABLE OF AUTHORITIES

Cases: **Page(s)**

Agostini v. Felton,
521 U.S. 203 (1997) 18, 19

* *Bowsher v. Synar*,
478 U.S. 714 (1986) 1, 14, 15, 21, 24, 25

Buckley v. Valeo,
424 U.S. 1 (1976) 10

Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers,
413 U.S. 548 (1973) 27

Flast v. Cohen,
392 U.S. 83 (1968) 10

* *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*,
561 U.S. 477 (2010) 12, 15, 16, 19, 21, 29, 30, 31, 32

* *Humphrey's Executor v. United States,*
295 U.S. 602 (1935) 7, 9, 10, 11, 12, 14, 15, 16, 17,
.... 18, 19, 21, 23, 29, 30, 32

INS v. Chadha,
462 U.S. 919 (1983) 1, 10

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise,
501 U.S. 252 (1991) 1, 25

Mistretta v. United States,
488 U.S. 361 (1989) 1, 21, 34

* *Morrison v. Olson*,
487 U.S. 654 (1988) 11, 12, 14, 15, 17, 18, 19, 21, 29, 30, 31

* Authorities upon which we chiefly rely are marked with asterisks.

Myers v. United States,
272 U.S. 52 (1926) 13, 14, 15, 16, 32

* *Nixon v. Admin. of Gen. Servs.*,
433 U.S. 425 (1977) 11

NLRB v. Noel Canning,
134 S. Ct. 2550 (2014) 29, 30

Raines v. Byrd,
521 U.S. 811 (1997) 1

Rodriguez v. United States,
480 U.S. 522 (1987) 22

* *Wiener v. United States*,
357 U.S. 349 (1958) 11, 12, 15, 16, 17, 21, 23, 29, 30

Williamson v. Lee Optical of Okla., Inc.,
348 U.S. 483 (1955) 28

* *Youngstown Sheet & Tube Co. v. Sawyer*,
343 U.S. 579 (1952) 10, 20, 22

Zivotofsky v. Clinton,
566 U.S. 189 (2012) 25

Statutes and Regulations:

12 U.S.C. § 5491(c)(3) 7

Dodd-Frank Wall Street Reform & Consumer Financial
Protection Act, Pub. L. No. 111-203, 124 Stat. 1326
(2010) 5

Legislative History:

H.R. Conf. Rep. No. 111-517 (2010) 5, 6

S. Rep. No. 111-176 (2010) 6, 7

156 Cong. Rec. S5871 (July 15, 2010) 7

Other:

Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000) 32

Driesen, *Firing U.S. Attorneys: An Essay*, 60 Admin. L. Rev. 707 (2009) 23

GLOSSARY

CFA—Consumer Federation of America

CFPB—Consumer Financial Protection Bureau

FTC—Federal Trade Commission

NACA—National Association of Consumer Advocates

NCLC—National Consumer Law Center

STATUTES AND REGULATIONS

Pertinent statutes and regulations are in petitioners' addendum.

INTEREST OF AMICI CURIAE

The amici curiae joining this brief are consumer organizations with an interest in addressing the constitutional analysis that should guide this Court in answering the first question posed in the order granting en banc review: "Is the CFPB's structure as a single-Director independent agency consistent with Article II of the Constitution …?"

Founded in 1971, amicus curiae Public Citizen, Inc., is a nonprofit consumer-advocacy organization that appears on behalf of its nationwide members and supporters before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen's attorneys have long been active in separation-of-powers cases, representing parties in cases including *INS v. Chadha*, 462 U.S. 919 (1983), *Bowsher v. Synar*, 478 U.S. 714 (1986), *Mistretta v. United States*, 488 U.S. 361 (1989), *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252 (1991), and *Raines v. Byrd*, 521 U.S. 811 (1997). Public Citizen has also submitted amicus curiae briefs in many other cases raising related issues.

The Consumer Federation of America (CFA) is an association of nonprofit consumer organizations established in 1968 to advance the consumer interest through research, advocacy, and education. Nearly 300 of these groups participate in the federation and govern it through representatives on its Board of Directors. As a research organization, CFA investigates consumer issues, behavior, and attitudes through surveys, focus groups, investigative reports, economic analysis, and policy analysis. CFA's research findings are published in reports that assist consumer advocates and policymakers as well as individual consumers. As an advocacy organization, CFA works to advance pro-consumer policies before Congress, the White House, federal and state regulatory agencies, state legislatures, and the courts. As an education organization, CFA disseminates information on consumer issues to the public and news media, as well as policymakers and other public interest advocates. Ensuring a fair financial marketplace has long been a top priority for CFA.

Consumers Union is the policy and mobilization arm of Consumer Reports, an independent, nonprofit organization that works side by side with consumers to create a fairer, safer, and healthier world. As the

world's largest independent product-testing organization, Consumer Reports uses its more than 50 labs, auto test center, and survey research center to rate thousands of products and services annually. Founded in 1936, Consumer Reports has over 7 million subscribers to its magazine, website, and other publications. Consumers Union has been active over the years on policy issues affecting consumer rights in the marketplace, including support for the Consumer Financial Protection Bureau (CFPB) and its mission.

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 by maintaining a forum for 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. Since its founding in 1969, NCLC has been a resource center addressing

consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee, as the Federal Trade Commission's designated consumer representative, and on committees of the National Conference of Commissioners on Uniform State Laws. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member serves 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 predatory debt collectors, including in litigation, as well as other consumer financial crises. Headquartered as an independent center at the University of the District of Columbia David A. Clarke School of Law, its work is aided by students and legal volunteers. 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. In 2016, according to the CFPB's website, debt collection was the topic on which the CFPB received the most complaints from DC households.

INTRODUCTION AND SUMMARY OF ARGUMENT

Inattention by federal financial regulatory agencies, along with limitations on their authority, contributed significantly to the 2008 financial crisis that destabilized the American economy and caused grave hardship and loss to American consumers. Responding to market and regulatory failures that fueled this "Great Recession," Congress in 2010 enacted the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act, Pub. L. No. 111-203, 124 Stat. 1326 (2010). As part of this reform, Congress sought to ensure that consumer financial protections would get undivided attention from an agency able to withstand political pressure and avoid capture by the industries whose practices it was charged with regulating. Thus, Congress created the Consumer Financial Protection Bureau (CFPB) and gave it significant autonomy to guarantee it "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 significant authority from other federal regulatory agencies to the CFPB to ensure consistent and vigorous enforcement of consumer protection, and it gave the new agency rulemak-

ing and enforcement authority under such important consumer-protection statutes as 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 prevent and redress unfair, deceptive, and abusive consumer financial products and practices. The CFPB has exercised these powers to return nearly $12 billion to more than 29 million consumers victimized by unlawful and fraudulent activity. *See* https://www.consumerfinance.gov/. Congress also tasked the CFPB with studying arbitration agreements that deprive consumers of judicial remedies, and empowered it to condition or prohibit use of such agreements in consumer financial transactions.

Critical to Congress's objectives was providing for the independence and effectiveness of the agency, to ensure its dedication to consumer protection and avoid failures that had plagued existing agencies charged with regulating the financial sector. *See*, *e.g.*, H.R. Conf. Rep. No. 111-517, at 874; S. Rep. No. 111-176, at 10-11 (2010). Congress determined that failures of existing regulatory agencies were largely attributable to their focusing on the interests and needs of the financial

industry they regulated, while giving insufficient attention to the interests and needs of consumers. *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 and 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 that such tenure protections are constitutional for officers engaged in rulemaking and enforcement in areas where Congress believes that independence and expertise are required. The Court upheld legislation conferring protection against at-will presidential removal on the commissioners of the Federal Trade Commission, who exercise substantially similar authority, in *Humphrey's Executor v. United States,* 295 U.S. 602, 629-31 (1935). The Court has repeatedly reaffirmed and extended that precedent, rejecting arguments that for-cause limits on presidential removal of executive officers

violate separation-of-powers principles by preventing the President from performing his constitutionally assigned functions.

The proposition that Congress may confer 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 and the separation-of-powers analysis they embody. None of the Supreme Court's decisions suggest that a commission structure is essential to the Court's reasoning, and the logic of the Court's repeated holdings that for-cause removal provisions do not prevent the President from performing his constitutionally assigned functions does not support that proposition.

Nor does the assertion that multi-member commissions are better protectors of liberty than agencies directed by single officers bear on the separation-of-powers issue. Although separation-of-powers principles derive from the Framers' conceptions of how best to protect liberty, judicial resolution of claims that a statute infringes on presidential authority under Article II have not rested on judicial assessments of what institutional arrangements are most consistent with abstract conceptions of liberty, but rather on whether the statute infringes on the powers of the executive. Indeed, the concentration of executive authority in

the President is a highly dubious protection for liberty, and judicial generalizations about liberty are poor substitutes for traditional separation-of-powers analysis.

That Congress has often relied on multi-member commissions when creating independent agencies does not limit it to that approach. Historical novelty is not a basis for striking down a statute on separation-of-powers grounds, and the Supreme Court's use of history in its recent separation-of-powers opinions does not suggest otherwise. Moreover, conferring significant executive power on single officers is little more novel now than multi-member commissions were when the Supreme Court decided *Humphrey's Executor*. The principal difference today 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 constitutionality of the CFPB's structure.

Under the Supreme Court's precedents, whether the CFPB may be headed by an officer whose independence is protected by a for-cause limitation on his removal is a relatively straightforward question. The

Court long ago upheld delegation of exactly the same kinds of powers to another independent agency, the FTC. *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). The constitutional structure 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 appointments of officers of the United States must comply with the Appointments Clause, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), 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 require a more nuanced analysis.

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).

Under that "pragmatic, flexible approach," *id*. at 442, the Supreme Court has held that Congress may 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). As the Court stated most recently, "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).

Under such circumstances, the President's ability (or that of a presidential subordinate) to remove an officer for cause provides "ample authority" allowing "the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692. Thus, for-cause limitations on presidential removal authority do not "unduly trammel[] on executive authority." *Id*. at 691; *see also Free Enter. Fund*, 561 U.S. at 495.

The Supreme Court has held that the functions Congress may delegate to officers removable only for cause, or agencies headed by such officers, include enforcement or prosecutorial functions, adjudicatory functions, regulatory 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. The argument that the CFPB's structure is unconstitutional distorts separation-of-powers principles.

The panel majority's opinion radically reinterpreted separation-of-powers principles in concluding that the CFPB's single-director structure renders the statutory for-cause limitation on the President's re-

moval authority unconstitutional. That view misreads Supreme Court decisions to erect a principle that tenure-protected executive authority may be delegated only to multi-member commissions.

Compounding that error, the panel majority devised a new, and unsupported, separation-of-powers analysis—one based not on whether a statute impermissibly interferes with the executive's performance of its constitutional function, but instead on a court's ad hoc judgment about whether an agency structure poses a threat to "liberty." The panel majority also placed excessive weight on historical considerations and arrived at a rule under which perceived novelty in an agency's design condemns it.

Together, these analytical errors led the panel majority to a result that does not square with established separation-of-powers principles.

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 of the constitutional impeachment process) by requiring congressional advice and consent to their removal by the President. The panel majority, by contrast, overbroadly read *Myers* to establish a general rule that all ex-

ecutive branch officers must be terminable at the will of the President (or of an officer subject to at-will removal by the President). That rule, the panel majority held, is subject only to a narrow exception, established by *Humphrey's Executor* and its progeny, for agencies headed by expert, multi-member boards.

The Supreme Court has repeatedly rejected that reading of *Myers*. *Humphrey's Executor* emphasized that *Myers* is limited to forbidding congressional participation in removing executive officers. *See* 295 U.S. at 626. The Court 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 Court reaffirmed that understanding of *Myers*. *Bowsher* held that executive functions cannot be delegated to an officer subject to removal by Congress but did not accept the broader argument advanced in that case that executive officers must be removable at the will of the President. *See id.* at 724.

In *Morrison*, the seven-Justice majority opinion, written by Chief Justice Rehnquist, again emphasized the narrowness of *Myers*' holding. *See* 487 U.S. at 686. The Court explicitly noted that broader readings of

Myers, as requiring unfettered presidential removal power, had been *rejected* by the *Bowsher* Court. *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 panel majority's broad reading of *Myers*, nor suggests that *Humphrey's Executor*, *Wiener*, and *Morrison* are no longer good law. Chief Justice Roberts' opinion in *Free Enterprise Fund* repeatedly acknowledges that those cases hold that Congress may limit presidential removal of officers performing executive functions. *See* 561 U.S. at 483, 493-95.

Free Enterprise Fund stresses that its "modest" holding is only that Congress may not impose multiple layers of tenure protection, by vesting power to remove for cause in an officer who is herself removable by the President only for cause. 561 U.S. at 501. The opinion 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). In light of that explicit statement, *Free Enterprise Fund* lends no support for the broad view of *Myers* adopted by the panel majority.

The panel majority not only overstated the sway of *Myers*, but also imposed unwarranted limits on what it saw as an "exception" to *Myers* established by *Humphrey's Executor* and its progeny. Contrary to the panel majority's view, nothing in those opinions suggests their reasoning is limited to multi-member boards.

To be sure, *Humphrey's Executor* and *Wiener* 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's separation-of-powers analysis discuss the multi-member character of the agency at issue as a reason agency independence did not unconstitutionally infringe executive authority. Still less 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 Humphrey's Executor*, 295 U.S. at 628-32; *Wiener*, 357 U.S. at 353-56.

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 any doubt, *Morrison v. Olson* confirmed that for-cause removal limitations are also constitutional for officers performing purely "executive" functions as the Court currently uses that term. *See* 487 U.S. at 688-91. *Morrison* likewise refutes the panel majority's essential premise that the constitutionality of tenure protection depends on whether the protected officer is part of a multi-member commission.

Rather, *Morrison* holds that the constitutionality of establishing a special prosecutor's office headed by a *single officer* protected against at-will removal is governed by the same consideration the Court derived from *Humphrey's Executor* and *Wiener*: whether the assignment of the

particular 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 id.* at 691.

The panel majority's erroneous limitation of *Humphrey's Executor* rests significantly on its assertion that *Morrison*, a near-unanimous opinion by the then-Chief Justice, should be disregarded because there is supposedly now universal agreement that the decision is wrong. But although perceived excesses of the Whitewater Independent Counsel's Office may have convinced some in Congress that the independent counsel statute was flawed as a *policy* matter and to allow the statute to lapse, those views do not reflect a consensus that *Morrison* was wrongly decided, much less that its approach to separation-of-powers issues was improper.

In any event, Congress cannot override a constitutional decision of the Supreme Court by not renewing a statute upheld by the Court. The panel majority's suggestion that informal remarks by Justice Kagan complimenting the writing in Justice Scalia's *Morrison* dissent effectively overrule *Morrison* is likewise off-base. The Supreme Court alone retains the prerogative of overruling its decisions. *See Agostini v. Felton*,

521 U.S. 203, 237 (1997). Neither a lower court's perception of a consensus that a decision was erroneous, nor its attempt to discern views of particular Justices from equivocal out-of-court remarks, justifies disregarding Supreme Court precedent.

Free Enterprise Fund again offers no support for the panel majority's attempt to limit *Humphrey's Executor* to multi-member commissions, nor for its derogation of *Morrison*. *Free Enterprise Fund* repeatedly cites *Morrison* and recognizes it as established law. And *Free Enterprise Fund*'s reiteration that Congress may delegate executive functions to officers not removable at will by the President nowhere suggests that Congress's power is limited to members of multi-member commissions (or inferior officers).

Free Enterprise Fund recites the rule established by *Humphrey's Executor* and later cases without any such qualification. The opinion does not state that Congress may create independent agencies run by *commissions* of tenure-protected presidential appointees. It says 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. Separation-of-powers analysis does not rest on ad hoc judgments about "liberty."

The panel majority's holding that only members of multi-member agencies may receive protection against at-will presidential removal rested not only on misreading of Supreme Court precedent, but also on creation of a novel approach to separation-of-powers analysis—one turning on a court's ad hoc judgments about whether particular institutional arrangements sufficiently protect "liberty." The panel majority based its analysis on the generalization that our constitutional framework is derived in part from the Framers' view that a government of separated powers is conducive to preservation of liberty—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 Framers undoubtedly aimed to secure liberty. But the Supreme Court's decisions have never elevated the amorphous question of whether particular institutional arrangements "secure liberty" into a separation-of-powers standard. The Court's major separation-of-powers

decisions do not turn on analysis of the effect of the challenged laws on liberty. For example, in *Free Enterprise Fund*, the only mention of "liberty" is a single 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 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—particularly where the question is whether executive authority has been infringed—whether a branch has been prevented from performing constitutionally assigned functions. *See Mistretta v. United States*, 488 U.S. 361, 381-83 (1989).

The latter standard, which is the one applicable here, received scant attention from the panel majority. Its proper application, under *Humphrey's Executor*, *Wiener*, and *Morrison*, would have led the panel majority to the opposite outcome.

There are good reasons for focusing separation-of-powers analysis on structural considerations rather than attempting to discern the effects of particular arrangements on the ultimate goal of securing liber-

ty. Framers of constitutions, like authors of statutes, rarely pursue any one isolated 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 statement about diffusing power to secure liberty, which the panel majority repeatedly quoted in truncated form. As Jackson warned, "[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.

A focus on "liberty" as the controlling factor is particularly inapt where claims of exclusive presidential authority are at issue, because *centralization* of executive power in the President is something of an exception to the notion that the Constitution *diffuses* power to secure liberty. Indeed, concentration of authority in the hands of a single, powerful chief executive itself poses potential threats to liberty, as exemplified by the circumstances of the *Youngstown* case—an unauthorized presidential seizure of private property.

In particular, the idea that presidential control of enforcement and prosecutorial authority enhances liberty is problematic. Direct presidential interference with prosecutorial decisions is generally regarded as highly improper, as is the use of 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 practices are viewed so unfavorably precisely because of the concern that misuse of presidential authority in that manner *threatens* liberty and the rule of law.

The same considerations are present where adjudicatory and regulatory powers demanding expert judgment and adherence to statutory policies are at issue. Insulation of officers who perform such functions from at-will removal by the President (but not from removal for incompetence or malfeasance) *enhances* liberty by protecting the integrity with which public duties are carried out. *See*, *e.g.*, *Humphrey's Executor*, 295 U.S. at 625; *Wiener*, 357 U.S. at 356.

The panel majority's conflation of separation-of-powers analysis with a free-ranging inquiry into the effects of an agency's powers and

structure on liberty also led it to ignore actual constraints on the agency's power to infringe liberty. In particular, the panel majority disregarded constraints imposed by the limits of statutory delegation of power to the agency and the courts' ability to enforce those limits through judicial review. The panel majority brushed aside such limits as irrelevant to separation-of-powers analysis on the ground that "the probability of judicial review of some agency action has never excused or mitigated an otherwise extant Article II problem in the structure of the agency." 839 F.3d at 36.

It is true that, when separation-of-powers analysis properly concerns itself with whether one or both of the other branches have prevented the executive branch from performing constitutionally assigned functions, the other branches cannot attempt to substitute for the President in performing those functions. As the panel majority notes, such attempts not only cannot remedy a violation, but "would exacerbate, rather than mitigate, any Article II problem with the structure of the agency," *id.*, because the other branches are prohibited from taking on powers assigned to the executive. *See*, *e.g.*, *Bowsher*, 478 U.S. at 734;

Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, 501 U.S. 252, 274-75 (1991).

If traditional separation-of-powers analysis is to be supplanted by an amorphous inquiry into threats to liberty, however, there is no reason why checks imposed by other branches should not be considered. When courts protect the liberties of the people from arbitrary or unlawful executive action, for example, 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).

More generally, the principal way the Constitution diffuses power to secure liberty is by assigning powers to different branches that may be exercised 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 into whether a particular delegation of power threatens *liberty*, as distinct from threatening the President's performance of his assigned functions.

The panel majority's mistake, in confusing separation-of-powers analysis with a charter to inquire into the effects of a particular institutional arrangement on abstract conceptions of liberty, is confirmed by the such an inquiry's manipulable nature. The panel majority's attempts to distinguish potential separation-of-powers issues posed by statutes vesting control of the Office of Special Counsel, and of the Social Security Administration, in a single, tenure-protected principal officer illustrate the point.

In the panel majority's view, both the Office of Special Counsel and the Social Security Administration pose less threat to liberty than does the CFPB because of the nature of the powers granted to them, which the panel majority viewed as less sweeping or coercive, or less "core" to Article II, than those wielded by the CFPB.

The Office of Special Counsel, however, has authority both to take enforcement actions directed at a specific set of individuals, government employees, and to police personnel practices by agencies. Government employees are human beings possessing the full range of constitutional rights of U.S. citizens, although the application of those rights to specif-

ic circumstances depends in part on their status as government employees.

Among the rules enforced by the Office 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 both government workers and the public as a whole, which may be affected by improper 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) ("[I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

And although the Social Security Administration is not primarily engaged in law enforcement, it exercises the equally "core" executive function of administering the federal statutory scheme that most broadly affects all Americans: Social Security. The Administration makes decisions that critically affect access by 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.

The CFPB, by comparison, exercises powers that protect consumers by regulating corporations involved in consumer financial transactions. Its sphere of authority is economic regulation, which affects corporate "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). Although *procedural* due process protections for those affected by such regulation may be significant, those rights are fully protected against infringement by judicial review of CFPB actions.

The panel majority's conclusion, that an agency engaged in regulation of economic matters to protect consumers may pose a greater threat to liberty than other agencies that affect individual rights in different ways, is an indication that the "liberty" criterion it has substituted for the separation-of-powers analysis required by the Supreme Court's precedents is misguided. It might or might not be better policy for the CFPB, the Social Security Administration, or the Office of Special Counsel to be controlled by multiple commissioners, but *that* issue is for Congress to decide.

A mode of analysis under which these agencies' *constitutionality* turns on an untethered assessment of whether the liberty interests they affect are significant enough that they need three commissioners rather than one director, instead of on whether the particular functions the agencies perform can permissibly be delegated to officers independent of the President (a criterion that *Humphrey's Executor*, *Wiener*, and *Morrison* indicate that all three agencies satisfy), cannot be correct.

C. Congress has power to innovate in structuring agencies.

The panel majority's reliance on history as a primary basis for its separation-of-powers analysis also is misplaced. The panel's opinion observes that Congress has "traditionally" designed independent agencies as multi-member commissions, and it treats the CFPB's "departure from settled historical practice" as grounds for condemnation. 839 F.3d at 8. But the panel opinion's use of "history and tradition" (*id.* at 7) lacks support in the two decisions on which it principally relies for its "history-based approach" (*id.* at 8): *Free Enterprise Fund* and *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

Noel Canning concerned interpretation of specific constitutional text empowering the President to make appointments without Senate

advice and consent during "the recess" of the Senate. Ambiguity concerning what constitutes a recess within the meaning of that specific clause led the Supreme Court to consult "settled and established practice" as an aid to "determining the true construction of a constitutional provision the phraseology of which is … of doubtful meaning." *Id.* at 2559 (citations omitted). Here, by contrast, history is not invoked to assist in determining the meaning of specific constitutional language. *Noel Canning* in no way suggests that mere historical novelty of an institutional arrangement itself implies that it violates separation of powers.

Free Enterprise Fund also uses history very differently from the way the panel majority did. *Free Enterprise Fund* begins with application of separation-of-powers principles: It analyzes whether the multilayer tenure protection afforded the Public Company Accounting Oversight Board prevented the President from performing his assigned constitutional functions—by completely precluding him from determining whether there was cause for the removal of the Board's members. The statute at issue instead limited the President to considering whether there might be cause to remove members of the Securities and Exchange Commission, who *oversaw* the Board.

The Court held that this additional layer of insulation differentiated the case from decisions upholding for-cause removal limits on executive officers, such as *Humphrey's Executor*, *Wiener*, and *Morrison*. It "transform[ed]" the Board's independence, and thus "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 the Court in *Free Enterprise Fund* turn to historical analysis—to address a historically based *defense* of the two-layer structure based on "the past practice of Congress." *Id*. at 505. Only in that context did *Free Enterprise Fund* cite the statement, from the dissent in this Court's opinion in the case, about the "lack of historical precedent" for two-layer tenure protection for executive-branch officers. *Id*. The opinion does not suggest that the Court would have condemned the agency's structure on grounds of novelty had it not already concluded that the statute prevented the President from fulfilling constitutionally assigned functions.

The historical-novelty argument, moreover, proves too much. The independent commission, which the panel majority concedes is constitutional under existing precedents, was novel once, too. By most accounts, the most prominent early example of an independent, multi-member regulatory commission was the Interstate Commerce Commission, which was created in 1887, was separated from the Interior Department in 1889, and was given significant new authority (over ratemaking) 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 such independent 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 a contested issue, especially after *Myers*. Indeed, during the interim 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 panel majority's version of a "history-based" approach were correct, *Humphrey's Executor* would have come out differently. The "novelty" of the multi-member commission protected against at-will presidential removal by the President was similar to that of the CFPB directorship as described by the panel majority. It dated back less than 50 years, and to a point in time already nearly a century into this country's constitutional democracy. The structure had been used in a few instances, and its constitutionality had been "contested" for much of that time.

Here, by comparison, the most analogous instances, identified by the panel majority, of statutory grants of significant authority to tenure-protected officers outside of multi-member commissions date back some 40 years, to the creation of the Office of Special Counsel and the authorization of independent counsels in 1978, and a little over 20 years to the creation of a tenure-protected Social Security Administrator in 1994. Although the constitutionality of each of those offices has been "contested" to some extent, the constitutionality of the independent counsel statute has been settled for nearly 30 years, and neither the Office of Special Counsel nor the Social Security Administration appears

ever to have faced a serious constitutional challenge. Thus, the multi-member commission structure held constitutional in 1935 was comparable, in terms of supposed novelty and deviation from "traditional" practices, to the single-officer structure being challenged today.

One difference, however, is very striking: It has now been firmly and 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, which was not the case in 1935. At that time, the very concept of tenure-protected officers was contested; now, the "novelty" concerns details of agency structure rather than the greater issue of independence from the President.

Still, the larger point is that the relative degree of novelty should not be determinative in the first place. As the Supreme Court has emphasized, "[o]ur 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 a particular type of authority to an independent agency—here, authority to regulate the fairness of commercial practices and take enforcement actions concerning those practices—Congress's decision to do so should not be struck down

because the agency does not conform to a "traditional" multi-member commission structure. If exercise of such authority by tenure-protected officers does not prevent the President from performing his constitutionally assigned functions, there is no Article II violation.

The "traditional" form, to be sure, may have advantages and disadvantages. It may foster deliberation, but make it more likely that the agency will be paralyzed by internal division or lack a quorum. Which form is preferable is a policy question for Congress. To the extent an agency constituted in either way, or in some other fashion, takes specific actions that violate protected liberties, the courts may set aside those actions. But the perceived novelty of the structure, like speculation about whether it is generally more or less conducive to liberty, does not demonstrate an infringement of presidential authority that violates constitutional separation-of-powers principles.

CONCLUSION

For the foregoing reasons, this Court should hold that the prohibition on presidential removal of the CFPB's director without cause is constitutional, and should deny petitioners any relief with respect to their constitutional challenge to the CFPB's structure.

Respectfully submitted,

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March 31, 2017

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, and the word count, as determined by the word-count function of Microsoft Word 2010 is 6,412, 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

CERTIFICATE OF SERVICE

I certify that on March 31, 2017, 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