EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15-1177

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION, ET AL., Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, Respondent.

On Petition for Review of an Order of the Consumer Financial Protection Bureau
(CFPB File 2014-CFPB-0002)

BRIEF OF AMERICANS FOR FINANCIAL REFORM, CALIFORNIA REINVESTMENT COALITION, CENTER FOR RESPONSIBLE LENDING, CONSUMER ACTION, DEMOS, HOUSING AND EQUAL RIGHTS ADVOCATES, LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, NATIONAL COMMUNITY REINVESTMENT COALITION, NATIONAL COUNCIL OF LA RAZA, NATIONAL FAIR HOUSING ALLIANCE, SELF-HELP CREDIT UNION, UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., AND WOODSTOCK INSTITUTE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES

Except for the state Attorneys General (for Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, Washington, and the District of Columbia) who filed a brief in support of respondent on March 30, 2017, all parties, intervenors, and amici appearing in this Court as of this filing are listed in petitioners' en banc brief.

References to the rulings at issue appear in petitioners' en banc brief.

We are not aware of any related cases.

/s/Thomas C. Goldstein

March 31, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1, amici state as follows:

Americans for Financial Reform (AFR) is a project of the Leadership Conference on Civil and Human Rights (described below) and The Leadership Conference Education Fund, a 501(c)(3) organization that has no parent company and no stock. AFR is not separately incorporated.

California Reinvestment Coalition has no parent company and no publicly traded company owns 10% or more of its stock.

Center for Responsible Lending (CRL) is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. CRL is a supporting organization of the Center for Community Self-Help, which is a non-profit organization under section 501(c)(3) of the Internal Revenue Code. Neither CRL nor the Center for Community Self-Help has issued shares or securities.

Consumer Action is a non-profit 501(c)(3) that has no parent company and no stock.

Demos: A Network for Ideas and Action, Ltd. is a non-profit corporation, incorporated in the State of New York. It has no parent corporation, and no publicly held corporation owns 10 percent or more of Demos' stock.

Housing and Economic Rights Advocates has no parent organization and issues no stock.

Leadership Conference on Civil and Human Rights is a 501(c)(4) organization that engages in legislative advocacy. It has no parent company and no stock.

National Community Reinvestment Coalition has no parent company and no publicly traded company owns 10% or more of its stock.

The National Council of La Raza is a 501(c)(3) non-profit organization. It has no parent company and issues no stock.

National Fair Housing Alliance has no parent company and issues no stock.

Self-Help Credit Union has no parent company and no publicly traded company owns 10% or more of its stock.

United States Public Interest Research Group Education Fund, Inc. is a 501(c)(3) non-profit organization. It has no parent company and issues no stock.

Woodstock Institute has no parent company and no publicly traded company owns 10% or more of its stock.

The general nature and purpose of these organizations is that they advocate on behalf of American consumers, and were instrumental in shaping the development of the Consumer Financial Protection Bureau. Self-Help Credit Union is also regulated by the Bureau. Some of the amici filed an amicus brief earlier in the case, and some of the amici filed motions for leave to intervene in the case.

/s/ Thomas C. Goldstein
March 31, 2017

STATEMENT REGARDING CONSENT AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure, amici state that no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel made a monetary contribution to its preparation or submission.

Pursuant to D.C. Circuit Rule 29(d), amici state that a separate brief is necessary to present the amici's unique perspective on the need for the CFPB to retain an independent structure—which is informed by amici's experience in advocating for the creation of the CFPB and their ongoing participation in the CFPB's programs.

/s/ Thomas C. Goldstein

March 31, 2017

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GLOSSARY

Bureau – Consumer Financial Protection Bureau

CFPB – Consumer Financial Protection Bureau

FRB – Federal Reserve Board

FTC – Federal Trade Commission

OCC – Office of the Comptroller of the Currency

PCAOB – Public Company Accounting Oversight Board

SEC – Securities and Exchange Commission

INTEREST OF THE AMICI

Amici are consumer and civil rights organizations who advocated for the CFPB's creation. Since the Bureau was created, amici have continued to support the structural features crucial to its independence and effectiveness. Amici also frequently engage with the CFPB—participating in its rulemakings and providing feedback through advisory mechanisms like the Consumer Advisory Board. Through their extensive experience with consumer and civil rights issues generally and appearing before the CFPB in particular, amici have gained a unique perspective on the virtues of the CFPB's single-director structure and the contrasts between the CFPB and the previous regulatory approach. Several amici also sought leave to intervene in this litigation in order to defend the constitutionality of the CFPB's structure. A more complete description of each of the amici appears in the appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This brief addresses the first and second questions identified by this Court in its order granting rehearing en banc:

1. Is the CFPB's structure as a single-director independent agency consistent with Article II of the Constitution?

2. May the court appropriately avoid deciding that constitutional question given the panel's ruling on the statutory issues in this case?

With respect to the first question, the Supreme Court's precedents recognize that when Congress determines that a regulatory agency must be independent in order to achieve its statutory purposes, it has the power to make the agency's directors removable only for cause. Congress made precisely that determination with respect to the CFPB. By vesting authority in a single Director—and ensuring that the Director has the independence necessary to protect consumers in a rapidly evolving marketplace—Congress ensured that the CFPB would be nimble enough to respond to dangers before they result in widespread consumer harm. Through the CFPB's independent structure, Congress also guarded the Director and the Bureau from capture by the powerful interests that threaten the wellbeing and financial security of the American people.

At the same time, Congress recognized the need for accountability, which is why it made the Director removable for specified causes and provided for numerous additional safeguards—many of them unique to the CFPB among bank regulators—that prevent the Bureau from overreaching. These include a cap on the CFPB's independent funding, multi-agency and small business reviews of its rulemakings, and regular audits and reports to Congress, in addition to the normal structural checks on agency action, including judicial review.

This combination of agility and accountability has worked. The CFPB has recouped $11.8 billion for more than 29 million Americans. The Bureau's

independence has been critical to its ability to remain a steadfast enforcer of the consumer protection laws despite massive political opposition from the financial industry.

The Supreme Court's precedents uniformly recognize the value and validity of the approach Congress took. Time and again, the Court has held that as long as the President has the authority to remove the head of a regulatory agency for cause, the structure of the agency does not offend the constitutional authority of the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The fact that the CFPB has a single-director structure, as opposed to a multi-member one, does not suggest a different result because the CFPB remains fundamentally accountable to the President and the people.

The panel opinion disregarded this framework—established by the Supreme Court and rooted in the text of the Constitution—in favor of its own assessment of whether the CFPB's structure is conducive to liberty. No authority empowers this Court to make such a free-floating assessment of the wisdom of an agency's statutory structure. Even if the Court were to entertain such an inquiry, there is no reason to believe that an agency bound by strict statutory limits, with its enforcement and rulemaking subject to judicial review, poses any threat to individual liberty. In fact, the CFPB safeguards liberty by protecting millions of individual Americans from

the predations of powerful businesses that would otherwise undermine their economic self-sufficiency, and thus their ability to exercise self-determination.

With respect to the second question, the en banc Court should resolve the constitutional question. The now-vacated panel opinion has been employed to cast a cloud over the CFPB. The Bureau can surely expect that regulated parties will continue to challenge the constitutionality of its structure until the matter is resolved—and in the absence of clear guidance from this Court, the President may use the panel decision to rationalize removing the Director without cause. Further constitutional litigation will be costly to private parties, the courts, and the CFPB, and will, therefore, interfere with the CFPB's mission to the detriment of the people. The panel's opinion created this untenable situation, this Court is in a position to resolve it immediately, and it should do so.

ARGUMENT

I. The CFPB's Structure Is Constitutional And Important To Its Mission.

The CFPB's single-director structure is a constitutional exercise of Congress's power to create independent agencies. The CFPB's structure fosters its independence, which is critical to the agency fulfilling its statutory purpose of protecting American consumers against powerful financial interests that would otherwise exploit them. And the fact that the President may remove the Director for cause adequately preserves his ability to take care that the laws be enforced.

1. In *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935), the Supreme Court held that Congress may grant tenure to commissioners on the Federal Trade Commission, subject only to removal for "inefficiency, neglect of duty, or malfeasance in office." The Court deferred to Congress's determination "that a fixed term was necessary to the effective and fair administration of the law." *Id*. at 624. Thus, the Court recognized that the "length and certainty of [commissioners'] tenure would vitally contribute" to the accomplishment of the statutory purposes, and further recognized that a holding subjecting those commissioners to termination at will could "thwart, in large measure, the very ends which Congress sought to realize." *Id*. at 626.

In holding that Congress had the power to design the FTC this way, the Court distinguished between independent officers like FTC commissioners, on the one hand, and purely executive officers like the postmaster, who are "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Id*. at 627. With respect to independent officers, the Court thought "it plain under the Constitution that illimitable power of removal is not possessed by the President." *Id*. at 629.

> The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another

> cannot be depended upon to maintain an attitude of independence against the latter's will.

Id.

This reasoning applies with full force here. Just like the FTC, the CFPB is an independent agency with quasi-legislative (rulemaking), quasi-judicial (adjudicatory), and enforcement powers. Indeed, most of the FTC's power to regulate financial conduct was transferred to the CFPB. *See* 12 U.S.C. § 5581(b)(5). Just like FTC commissioners, the CFPB's Director may be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id*. § 5491(c)(3). And as with the FTC, Congress deliberately chose this structure to achieve a particular legislative purpose. Specifically, the CFPB's structure was a direct response to what Congress identified as "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable" mortgages before the 2008 financial crisis. S. Rep. No. 111-176, at 15 (2010). Among other vulnerabilities, these disparate regulators were susceptible to capture by the powerful influence of the financial industry, which led them to overlook predatory consumer lending practices that should have been seen as alarming. As the Financial Crisis Inquiry Commission found, industry lobbying "played a key role in weakening regulatory constraints on institutions, markets, and products," and "the nation was deprived of the necessary strength and independence of the oversight necessary to safeguard financial stability." Financial Crisis Inquiry Commission

Report xviii (2011). Thus, federal banking agencies "routinely sacrificed consumer protection" while adopting policies that promoted the "short-term profitability" of large banks, nonbank mortgage lenders, and Wall Street securities firms. S. Rep. No. 111-176, at 15 (quoting testimony of Patricia McCoy). Congress's verdict was harsh: "[I]t was the failure by the [federal] prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166.

To prevent this catastrophic regulatory failure from recurring, Congress created the CFPB as an independent agency in the Federal Reserve but made it "clear that the Bureau is to operate without any interference by the Board of Governors." S. Rep. No. 111-176, at 161; 12 U.S.C. § 5492(c) (providing for the CFPB's autonomy).[1] Congress also ensured that the CFPB would have an independent source of funding, outside of the Congressional appropriations process—which was "absolutely essential" to the CFPB's "independent operations." S. Rep. No. 111-176, at 163; 12 U.S.C. § 5497.[2] "The institutional framework for the CFPB was a

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[1] A similar statutory provision establishes the independence of the Office of the Comptroller of the Currency from the Department of Treasury. *See* 12 U.S.C. § 1(b).

[2] All federal regulators of banks and credit unions are funded outside the Congressional appropriations process. In fact, those agencies—other than the CFPB—effectively set their own funding levels. *See* Arthur E. Wilmarth Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer*

hotly contested issue from the beginning. And because capture was an obvious concern, many [agency design issues] were expressly debated as industry groups fought to avoid powerful equalizing measures." Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 71 (2010); *see* Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics*, 127 Harv. L. Rev. 1991, 2056 (2014) (the CFPB "was specifically intended to free consumer protection from the particular capture problems that plagued prudential bank regulators").

To ensure that the CFPB would be both nimble and proactive, Congress also provided that the Bureau shall be headed by a single Director, appointed by the President for a term of five years, and removable for cause. *See* 12 U.S.C.

Financial Protection Bureau, 31 Rev. Banking & Fin. L. 881, 906 (2012). The Office of the Comptroller of the Currency sets its own fee schedule, while the Federal Deposit Insurance Corporation and National Credit Union Administration fund their operations through deposit insurance assessments that they each set. Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 27 (Feb. 28, 2017), *available at* https://fas.org/sgp/crs/misc/R43391.pdf. Similarly, the Federal Reserve Board (FRB) is funded by investment returns, with the FRB retaining discretion regarding the amount of its operating expenses. *Id.* By contrast, the amount of the CFPB's funding is statutorily capped. 12 U.S.C. § 5497(a)(2). Given this well-established practice of funding bank regulatory agencies outside of appropriations, it is no surprise that the courts have flatly rejected arguments that the CFPB's funding is unconstitutional. *See CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082, 1089 (C.D. Cal. 2014); *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-cv-00292-SEB-TAB, 2015 U.S. Dist. LEXIS 28254 (S.D. Ind. Mar. 6, 2015).

§ 5491(b), (c). The Director's mandate is the same as that of the Bureau itself: "to provide a single point of accountability for enforcing federal consumer financial laws and protecting consumers in the financial marketplace"—and not to serve the whims of any particular President. CFPB, The Bureau, https://www.consumerfinance.gov/about-us/the-bureau/; *see also* 12 U.S.C. § 5511(a) (explaining that the purpose of the Bureau is "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive"). And the single-director structure facilitates responsiveness and independence by allowing a single, expert decision-maker to direct the Bureau's efforts, free from political influence. The Director's protected tenure is also valuable because it facilitates recruitment of high-quality candidates for the job.

In creating the CFPB and the Director position, Congress also created robust and novel mechanisms to ensure the Bureau's accountability. *See* Enhanced Consumer Financial Protection After the Financial Crisis: Hearing before the S. Comm. On Banking, Housing, & Urban Affairs, 112th Cong. 14 (2011) (Statement of Prof. Adam Levitin) (explaining that the CFPB is subject to "extensive and unprecedented oversight"). For example, while the CFPB—like every other bank regulator—has a

budget that is independent from Congress, only the CFPB's budget is subject to a statutory cap. *See* 12 U.S.C. § 5497(a)(2); S. Rep. No. 111-176, at 163 ("By comparison with other financial regulatory bodies, the CFPB budget is modest."). The CFPB is subject to mandatory annual audits by the Government Accountability Office. 12 U.S.C. § 5496a(b). The CFPB is also required to coordinate its efforts with other regulators "to promote consistent regulatory treatment of consumer financial and investment products and services," *id*. § 5495, and to consult a nonpartisan Consumer Advisory Board, *id*. § 5494—and its regulations are subject not only to review under the Administrative Procedure Act, but also to veto by a newly created Financial Stability Oversight Council, *id*. § 5513. The CFPB is also the only independent agency required to conduct reviews under the Small Business Regulatory Enforcement Fairness Act of 1996. *See* Small Business Administration, CFPB SBREFA Panels, https://www.sba.gov/category/advocacy-navigation-structure/cfpb-sbrefa-panels. The Director is also required to testify before Congress and to prepare reports in connection with those meetings—which must, among other things, justify the Bureau's budget requests, list all significant rules and initiatives undertaken by the Bureau, and provide detailed information about consumer issues and complaints. 12 U.S.C. § 5496. CFPB enforcement actions can be appealed to courts—as this one was. *See id.* § 5563. And the Bureau has no power to initiate criminal proceedings; it can only make referrals to the Attorney General. *Id*. § 5566.

From all available evidence, the CFPB's design is working: the agency has stayed true to its mission and "has taken pains" to avoid capture. Rob Blackwell, *How Specter of Regulatory Capture Shaped CFPB's First Year*, Am. Banker (Jul. 9, 2012). Consequently, the Bureau has proven to be highly effective in identifying violations of consumer-protection law and remedying problems with precision and agility. The Bureau has recovered nearly $12 billion for consumers through cancelled debts and consumer refunds,[3] including $3.48 billion from companies that defrauded consumers into accepting unnecessary and expensive credit card products,[4] $80 million from Ally Financial, which discriminated against minority car buyers,[5] and $530 million from now-bankrupt Corinthian Colleges, Inc., which swindled students into taking on unsustainable debt.[6] *See also* Christopher Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90

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[3] CFPB, Consumer Financial Protection Bureau: By the numbers (2016), http://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf.

[4] *See* Consumers Union, The Consumer Financial Protection Bureau: Protecting Consumers & Helping Them Make Smarter Choices (2017), http://consumersunion.org/wp-content/uploads/2017/02/The-CFPB-Protecting-Consumers.pdf.

[5] *Id.*

[6] *See* Press Release, CFPB Wins Default Judgment Against Corinthian Colleges for Engaging in a Predatory Lending Scheme (Oct. 28, 2015), https://www.consumerfinance.gov/about-us/newsroom/cfpb-wins-default-judgment-against-corinthian-colleges-for-engaging-in-a-predatory-lending-scheme/.

Tulane L. Rev. 1057, 1093-95, 1097 (2016) (examining all publicly announced CFPB enforcement actions between 2012 and 2015 and finding: that the agency did not lose a single case; that no bank had contested any CFPB enforcement action; and that 90% of all CFPB cases in which consumer relief was awarded involved evidence that defendants had illegally deceived consumers). These statistics are eye-opening, but they also understate the CFPB's true value—which manifests not only when the Bureau responds to violations, but also when it prevents them from occurring by promulgating sensible rules to govern the marketplace, and also by deterring potential violators. In each of these areas, the CFPB's effectiveness is attributable, in part, to its leadership by a single director and its insulation from political influence and industry capture.

2. Under the Supreme Court's precedents, Congress had every right to design the agency this way. No case decided after *Humphrey's Executor* casts any doubt on the Court's holding that Congress has the power to create independent regulatory agencies whose directors are subject to removal by the President only for good cause.

In *Morrison v. Olson*, 487 U.S. 654, 691 (1988), for example, the Court held that "the real question" is not whether an official works in a "purely executive" role, as opposed to a quasi-legislative or quasi-judicial one, but instead "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty" to take care that the laws be enforced. Applying that test to

the position of an independent counsel removable only for cause, the Court held that "because the independent counsel may be terminated for 'good cause,' the Executive . . . retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities." *Id*. at 692; *see also id.* at 691 ("[W]e cannot say that the imposition of a 'good cause' standard for removal by itself unduly trammels on executive authority."). This was so even though "the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Id*. at 691.

Indeed, every relevant Supreme Court case confirms that when, as here, the President has the power to directly remove an independent officer for cause, he has all the power he needs to perform his Article II duties. *See Wiener v. United States*, 357 U.S. 349, 356 (1958) (holding that the Constitution did not give the President the power to remove a member of the War Claims Commission at will); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 495, 499 (2010) (explaining that "[n]o one doubts Congress's power to create a vast and varied federal bureaucracy" and "restrictions on the President's removal power" are permissible when "only one level of protected tenure separated the President from an officer exercising executive power," *i.e.*, when the President "decided whether the officer's conduct merited removal under the good-cause standard.").

3. The fact that the CFPB is headed by a single director, instead of a group of commissioners, does not raise a constitutional issue. Restrictions on the removal power have been struck down when the President's "ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired." *Free Enter. Fund*, 561 U.S. at 496. But a single-director structure gives the President greater capacity to personally "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, than a multi-member commission because the President only needs to persuade—or in the worst case scenario remove and replace—a single official. In any event, whether a single-director structure or a multi-member structure is preferable is a policy question, and it is exactly the sort of issue that Congress should answer on an agency-by-agency basis; it is not the sort of proposition that ought to become ossified in constitutional doctrine. Moreover, under the Supreme Court's precedents, whether a single-director structure or a multi-member structure is *more* accountable to the President is irrelevant because in either case, the President has *adequate* power to ensure that the agency remains accountable to the people.

Any analysis of the CFPB's accountability also cannot overlook the other features of the agency's design that enhance accountability and prevent overreaching, discussed *supra* at 9-10. These include the budget cap, the Financial Stability Oversight Council veto, and mandatory audits by the Government Accountability Office—all of which are unique to the CFPB among bank regulators.

The CFPB is also required by statute to coordinate its activities with other regulators, 12 U.S.C. § 5495. Its Director is required to provide regular reports and testimony to Congress. 12 U.S.C. § 5496. And, of course, the CFPB is also subject to all of the ordinary constraints on administrative agencies, including suasion by the White House, judicial review under the Administrative Procedure Act, and amendments to its organic statute if Congress concludes that the Bureau's structures need revisiting.

There also is nothing unprecedented about Congress's use of single-director agencies, with the directors removable only for cause, to oversee critically important federal functions. The Director of the Federal Housing Finance Agency, for example, is "appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U.S.C. § 4512(b)(2). That director wields tremendous control over Fannie Mae and Freddie Mac, who collectively oversee trillions of dollars in mortgage assets. *See* Federal Housing Finance Agency, About FHFA, https://www.fhfa.gov/AboutUs. The Social Security Administration is overseen by the Commissioner, who "shall be appointed for a term of 6 years" and "may be removed from office only pursuant to a finding by the President of neglect of duty or malfeasance in office." 42 U.S.C. § 902(a)(3). That Commissioner oversees one of the most important welfare programs in the nation. The Office of the Comptroller of the Currency has also been headed by a single director since its founding in 1863. Like the CFPB Director, the Comptroller is appointed by the

President with the advice and consent of the Senate for a five-year term. 12 U.S.C. § 2. Although the statute does not explicitly say that the Comptroller may be removed only for cause, it does provide that, in order to remove the Comptroller, "*reasons*" for the removal must be "communicated [by the President] to the Senate." *Id*. (emphasis added).[7]

Moreover, to the extent the CFPB's structure is different from other bank regulators, it is worth remembering that the structural features of those regulators failed to prevent—and may have contributed to—the 2008 financial crisis. "[G]iven these other bank regulators' abysmal performance in allowing the financial crisis, it

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[7] The panel opinion contended that the Comptroller is removable at will—but that conclusion is contrary to precedent. When considering similar statutes that are silent about the criteria for removing officers, the Supreme Court and this Court have assumed that removal was only permissible for cause. For example, in *Free Enterprise Fund*, the Supreme Court assumed that members of the Securities and Exchange Commission are removable only for cause, despite the statute's silence on that point. 561 U.S. at 487; 15 U.S.C. § 78d(a). That conclusion was essential to the Court's holding: if commissioners were removable at will, there would have been no "added layer of tenure protection" for members of the Public Companies Accounting Oversight Board, which the Court found constitutionally defective. 561 U.S. at 498. Similarly, in *Wiener*, the Supreme Court held that the statute creating the War Crimes Commission, which was silent on removal, did not empower the President to remove a commissioner at will. 357 U.S. at 356. *See also Swan v. Clinton*, 100 F.3d 973, 981, 983 (D.C. Cir. 1986) (assuming without deciding that National Credit Union Association "Board members have removal protection during their appointed terms" despite lack of statutory basis in part because "[i]ndependence from presidential control is arguably important if agencies charged with regulating financial institutions . . . are to successfully fulfill their responsibilities"); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1996) (assuming removal protections without textual basis).

is not clear why we would want to replicate them. Their oversight structures have not worked." Enhanced Consumer Financial Protection After the Financial Crisis: Hearing before the S. Comm. On Banking, Housing, & Urban Affairs, 112th Cong. 14 (2011) (Statement of Prof. Adam Levitin).

4. Finally, a word is in order about the panel opinion's contention that the President needs the unfettered ability to remove the CFPB's Director in order to protect "individual liberty." *PHH Corp. v. CFPB*, 839 F.3d 1, 5 (D.C. Cir. 2016), *reh'g en banc granted, order vacated* (Feb. 16, 2017). Others have explained—convincingly and in detail—why such a free-ranging inquiry into liberty interests is not properly included in the separation of powers analysis, and we will not belabor those points here. Instead, we add that for three reasons, the panel's appeal to liberty fails on its own terms.

First, reason and experience belie the panel's speculative fears for banks' and financiers' lost liberties. The panel did not identify a single person who has lost his or her liberty as a result of the CFPB's structure, nor did it address why the many safeguards that Congress imposed on the CFPB are insufficiently protective. For example, the panel alluded to the risk of "arbitrary decisionmaking"—but did not explain why the Administrative Procedure Act's prohibition of "arbitrary" agency conduct was an insufficient safeguard. *See* 839 F.3d at 8. Instead, the panel held that, *ipso facto*, any independent agency with a single director who can only be removed

for cause poses an impermissible threat to individual liberty—regardless of statutory limits on the agency's authority, and regardless of the other checks and balances that exist to stop agency overreach. There is no plausible explanation for why this one feature of an agency's structure is so critical to liberty that everything else must fall by the wayside—especially in the absence of any credible evidence suggesting that during its six-year existence, the CFPB has undermined individual liberty.

Second, given the firm, judicially enforceable limits on the CFPB's power, the greatest risk is that the CFPB makes discretionary decisions *not* to enforce the law. If an independent single director would pursue meritorious cases when an agency with a different structure would bury them, the only "liberty" preserved by such an alternative structure would be financial companies' ability to illegally deceive or overcharge their customers. But there is no legitimate liberty interest in such unlawful behavior.

Finally, the panel's argument rests on a misguided notion of liberty that privileges the absence of governmental limits on financial companies above the ability of real people to experience self-determination and control over their lives. In reality, a robust and independent consumer advocate safeguards individual liberty by protecting the people from predatory lending, deceptive contracts, abusive debt collection practices, poverty, and homelessness—all of which threaten the people's liberty by undermining their self-sufficiency. Without an independent CFPB capable

of standing up to powerful financial interests, there is no doubt that these threats to liberty would persist and expand. Indeed, that is precisely what happened to millions of Americans before the CFPB was created—and it is why the people's elected representatives created the CFPB and protected it from capture and undue political influence. This Court should not use an unfounded argument about theoretical threats to abstract notions of liberty to negate Congress's efforts to protect the rights, livelihoods, and freedom of the American people.

II. The Court Should Decide The Constitutional Question.

There is a sound argument that the panel in this case should have refrained from passing upon the constitutionality of the CFPB's structure. But now that the question has been passed upon by the panel and fully briefed by the parties and their amici, this Court should take the opportunity to settle it.

The status quo is rife with uncertainty because the vacated panel opinion is being employed to suggest doubt about every action taken by the CFPB. Regulated parties are raising constitutional challenges as a matter of course—including as defenses to enforcement actions and in preemptive complaints. *See, e.g.*, Complaint at 1, *John Doe Co. v. CFPB*, No. 1:17-cv-00049-RC (D.D.C. Jan. 10, 2017). Moreover, in the absence of further guidance from this Court, the President could attempt to use the panel's reasoning to justify unilateral termination of the Director without cause, in contravention of the statute. *See, e.g.*, Aditya Bamzai, *The President's Removal*

Power & the PHH Litigation, Notice & Comment Blog (Nov. 22, 2016), http://yalejreg.com/nc/the-presidents-removal-power-and-the-phh-litigation-by-aditya-bamzai/ (arguing that the President may remove the Director prior to this Court's decision).

Moreover, if this Court does not address the question in this case, it is highly likely that it will arise again. *See State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015) (holding that the plaintiff's challenge to the CFPB's structure is justiciable; this case remains pending in the district court). Resolving the issue now would provide certainty to the CFPB and regulated parties alike, and would conserve valuable judicial, agency, and party resources. If the issue is resolved—as it ought to be—in the Bureau's favor, then the resolution will also ameliorate any concern within the CFPB that a politically unpopular enforcement action or rule will trigger the Director's removal.

Importantly, the rule against deciding constitutional questions in favor of alternative grounds is prudential only, and this Court has the discretion to recognize appropriate exceptions. For example, in qualified immunity cases, the Court has the discretion to decide whether to adjudicate underlying constitutional questions or simply resolve cases on immunity grounds—and, when appropriate, the Court has not hesitated to clarify the law by reaching the constitutional question. *See, e.g.*, *Jones v. Kirchner*, 835 F.3d 74, 87 (D.C. Cir. 2016). This Court has also decided

"fully briefed, purely legal questions" that relate to structural constitutional issues—even when those questions were otherwise not properly presented or preserved. *See Assoc. of Am. R.R.s v. U.S. Dep't of Transp.*, 821 F.3d 19, 26 (D.C. Cir. 2016).

In this case, because the now-vacated panel opinion has brought the issue to the forefront, the most prudent course would be for this Court to address the constitutionality of the CFPB's structure.

CONCLUSION

This Court should uphold the constitutionality of the CFPB's structure.

Respectfully submitted,

/s/Thomas C. Goldstein

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March 31, 2017

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), amici certify that this brief complies with the type-volume limitation of Rule 29(a)(5) because it contains 4958 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f) and Circuit Rule 32(e). Amici further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

/s/Thomas C. Goldstein

March 31, 2017

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit using the appellate CM/ECF system on March 31, 2017.

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

/s/Thomas C. Goldstein

March 31, 2017

APPENDIX: DESCRIPTION OF THE AMICI

Americans for Financial Reform (AFR) is a coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups that works through policy analysis, education, advocacy, and outreach to lay the foundation for a strong, stable, and ethical financial system. AFR was formed to advocate for the passage of the legislation that became Dodd-Frank and continues to protect and advance the reforms in that legislation, including a strong and independent CFPB.

California Reinvestment Coalition (CRC) is a nonprofit organization that has been advocating for consumer protection and fair and equal access to credit for all California communities since 1986. CRC builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner. Over its 30 years, the CRC has grown into the largest state community reinvestment coalition in the country with a membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color.

The Center for Responsible Lending (CRL) is a nonprofit, nonpartisan research and policy organization affiliated with the Self-Help Credit Union. It is dedicated to protecting homeownership and family wealth by working to eliminate

abusive financial practices. CRL's research and policy reports and recommendations have addressed numerous issues within the mission and activities of the CFPB, including auto loans, debt collection, mortgage lending, payday lending, and student loans. CRL also has advocated rules to be issued by the CFPB and commented on the agency's rulemaking. As a result, CFPB has a direct and immediate interest in the independence and agility of the CFPB and its Director.

Consumer Action has been a champion of underrepresented consumers nationwide since 1971. A non-profit 501(c)(3) organization, Consumer Action focuses on consumer education and advocacy that empowers low- and moderate-income and limited-English-speaking consumers to financially prosper. By providing consumer education materials in multiple languages, a free national hotline, a comprehensive website (www.consumer-action.org) and surveys of financial and consumer services, Consumer Action helps consumers assert their rights in the marketplace and make financially savvy choices.

Consumer Action has advocated for the creation of the Consumer Financial Protection Bureau and has worked to support its role as a thoughtful, independent regulator with a commitment to fair and transparent consumer financial transactions since its inception. Consumer Action has engaged with the CFPB regularly sharing consumer perspectives and advocating for reasonable rules and agency actions

related to credit cards and credit reporting, mortgages, debt collection, student loans, financial services, and the CFPB complaint process and public complaint database.

Demos is a public policy organization working for an America where we all have an equal say in our democracy and an equal chance in our economy. The CFPB's work to protect Americans from predatory and deceptive financial practices is critical to economic security. Demos advocated for the creation of the CFPB and has engaged in research and advocacy around several of the agency's core issues, including credit card lending, student loans, and credit reporting.

Housing and Equal Rights Advocates (HERA) is a non-profit law office with a broad economic justice and anti-discrimination mission. Since 2005, we have provided free legal services across the State of California, serving vulnerable residents experiencing debt and credit problems and financial abuses. The mission and work of the Consumer Financial Protection Bureau is critically important to our clients.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. Its members include organizations that represent people of color, women, children, older Americans, LGBT people, individuals with disabilities, labor unions, major religious groups, and civil liberties and human rights groups. It has advocated for every major civil

rights statute since the Civil Rights Act of 1957, including the Community Reinvestment Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among other issues, the Leadership Conference works to address the continuing problem of housing and financial discrimination in the United States.

The National Community Reinvestment Coalition (NCRC) is a nonpartisan, nonprofit coalition of 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development, and vibrant communities for America's working families. Its members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority- and women-owned business associations, and social service providers from across the nation.

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective. Its Wealth-Building Initiative develops and promotes a policy agenda that creates economic opportunities for Latino families, including consumer finance

regulation. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization serving all Hispanic subgroups in all regions of the country.

National Fair Housing Alliance (NFHA) is a national organization dedicated to ending discrimination in housing. NFHA is a consortium of private, non-profit, fair-housing organizations, state and local civil rights groups, and individuals. NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, advocacy, and enforcement. NFHA and its members have undertaken important fair housing enforcement initiatives in cities and states across the country; those efforts have contributed significantly to the nation's efforts to eliminate discriminatory housing practices.

Self-Help Credit Union (SHCU) was founded in 1983 and is chartered and supervised by the state of North Carolina Credit Union Division. SHCU has 23 branches, $650 million in assets, and provides financial services to its 60,000 members. These services include residential mortgages, consumer credit cards, personal loans, individual deposit accounts, and other consumer financial services that are subject to regulation by the CFPB. SHCU and its members are directly impacted by regulations and enforcement that produce a fair, transparent and competitive consumer financial marketplace, and it supports such measures. This is furthered by having a CFPB Director that is removable only for cause. Without this

independence, too often regulations and enforcement are weakened by special interests, and harmful practices proliferate.

United States 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 advocated and worked for the creation of the CFPB, urging Congress to create "a robust, independent federal Consumer Financial Protection Agency to protect consumers from unfair credit, payment, and debt management products."[1]

U.S. PIRG Education Fund now continues to collaborate with the CFPB to ensure that its mission is fulfilled. For example, U.S. PIRG Education Fund has used the CFPB's Consumer Complaint Database to write in-depth reports (eight, thus far) that uncover patterns in the problems that consumers are experiencing with financial products.[2] The most recent report, published in December 2016, documents the dramatic increase in the amount of overdraft fees that consumers are charged every

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[1] *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation*, Before the H. Comm. on Financial Services, 111th Cong. 120 (2009) (Testimony of Travis Plunkett & Edmund Mierzwinski).

[2] These reports are available at: U.S. PIRG, *Reports: The CFPB Gets Results For Consumers*, http://uspirg.org/page/usp/reports-cfpb-gets-results-consumers (updated Dec. 2016).

year—a problem that disproportionately impacts low-income consumers.[3] In addition, U.S. PIRG Education Fund has worked with the CFPB to protect students from unfair financial practices that have occurred when colleges and universities have partnered with financial institutions. Thus, in May 2012, U.S. PIRG Education Fund released a report that analyzed the campus card marketplace and surveyed practices at 120 colleges and universities.[4] Prompted in part by U.S. PIRG Education Fund's work, the CFPB released in December 2015 the Safe Student Account Scorecard, which is a resource to assist colleges and universities that are seeking to select college-sponsored financial accounts. U.S. PIRG Education Fund strongly supported the release of the Safe Student Account Scorecard.[5]

Woodstock Institute is a nonprofit research and policy organization in the areas of equitable lending and investments; wealth creation and preservation; and safe and affordable financial products, services, and systems. Through applied research, policy development, coalition building, and technical assistance, Woodstock

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[3] *See* U.S. PIRG, *Big Banks, Big Overdraft Fees* (2016), http://uspirg.org/sites/pirg/files/reports/USP%20Overdraft%20Fees%20Report%20Dec16%201.1.pdf.

[4] U.S. PIRG Education Fund, The Campus Debit Card Trap (2012), http://www.uspirg.org/sites/pirg/files/reports/thecampusdebitcardtrap_may2012_uspef.pdf?_ ga=1.113343758.827135679.1483730865.

[5] U.S. PIRG, Press Release, *U.S. PIRG Lauds Consumer Guide for Safe Bank Accounts on Campus* (Dec. 16, 2015), http://uspirg.org/news/usp/us-pirg-lauds-consumer-guide-safe-bank-accounts-campus.

Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Woodstock Institute was founded in 1973 near Woodstock, Illinois.