No. 18-307

IN THE
# Supreme Court of the United States

STATE NATIONAL BANK OF BIG SPRING, *ET AL.*,

*Petitioners,*

v.

STEVEN T. MNUCHIN,
SECRETARY OF THE TREASURY, *ET AL.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF AMICUS CURIAE THE BUCKEYE INSTITUTE FOR PUBLIC POLICY SOLUTIONS IN SUPPORT OF PETITIONERS


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## QUESTIONS PRESENTED

1. Whether Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act violates the Constitution's separation of powers by creating the Bureau of Consumer Financial Protection ("CFPB") as an independent agency that exercises expansive executive authority over private citizens but is led by a single Director that the President cannot remove from office for policy reasons, is exempted from Congress's power of the purse and accompanying congressional oversight, and has no internal checks or balances (such as those afforded by a deliberative multi-member commission structure) to mitigate this lack of accountability and restraint.

2. Whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overturned.

3. Whether the Appropriations Clause, in conjunction with the Constitution's separation of powers, permits Congress to create perpetual, on-demand funding streams for executive agencies that are unreviewably drawn from the coffers of other independent agencies.

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## STATEMENT OF AMICUS CURIAE

This amicus brief is submitted by the Buckeye Institute for Public Policy Solutions.[1] The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. Through its Legal Center, the Buckeye Institute engages in litigation in support of the principles of federalism and separation of powers as enshrined in the U.S. Constitution. Here, the Buckeye Institute appeals to this Court to ensure that an agency already invested with great power to set national rules in consumer protection law—long the domain of the states—is, at a minimum, accountable to the democratically elected Executive.

## SUMMARY OF ARGUMENT

Like most agencies, the CFPB is empowered to make the rules it enforces. But unlike most agencies, the CFPB operates with almost no Presidential or Congressional oversight. A single director wields the agency's rulemaking power. 12 U.S.C. §§ 5491(b)(1), 5492. That Director receives a five-year term and can be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

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[1] All parties were notified of the Buckeye Institute's intention to file this brief at least 10 days prior to its filing, and all parties have consented to the filing. *See* Sup. Ct. R. 37.2(a). No counsel for any party in this case authored this brief in whole or in part, and no person or entity aside from the Buckeye Institute, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

As a result, a President could serve a full term without ever having any say in who runs this powerful agency. On top of all this, Congress has no power to influence the CFPB through the appropriations process, because the CFPB is funded automatically outside that process. *Id.* at § 5497.

The D.C. Circuit affirmed the constitutionality of the CFPB's structure in its summary opinion below, relying on its earlier decision in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). *PHH* is wrong. The dissents in that case, and the certiorari petition in this one, persuasively demonstrate that the Constitution's separation of powers does not allow Congress to vest immense power in a single individual insulated from Presidential and Congressional oversight.

Rather than rehashing those arguments, this brief explores the threat that *PHH*'s logic poses to the preservation of a federalist system. The Constitution separates power between multiple actors, subjecting each to oversight by the others. This makes it harder to create federal law, which leaves space for the state governments to legislate free from federal intervention, including intervention that preempts state action. Already, the rise of the administrative state—with the power to promulgate rules, enforce rules, and adjudicate violations—has led to a dramatic nationalization of regulation, to the detriment of traditional state experimentation. *PHH*, by allowing an independent agency to be headed by a Director subject to no meaningful oversight by the democratically elected President and Congress, dramatically amplifies and worsens this trend.

The Court should intervene now, because a renewed appreciation for federalism principles has

never been so needed. Our nation is large and ideologically diverse. Partly as a result, it is highly polarized. Why, then, do we try to resolve so many issues at the national level? If this Court strictly enforces the structural limits on federal rulemaking and enforcement—or if it at least keeps those limits from being eroded any further—more areas of law will be left to the states. Within those areas, the states can experiment and compete to the benefit of the country. Given the ideological and regional diversity in this country, it is generally far better to have "fifty-one imperfect solutions"—one for each state and D.C.—"than one imperfect solution." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 216 (2018).

## ARGUMENT

"This is a case about executive power and individual liberty." *PHH*, 881 F.3d at 164 (Kavanaugh, J., dissenting). It is also a case about the "two great structural principles of the Constitution—federalism and separation of powers." Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B. U. Law Rev. 205 (1985). The second of these pillars is covered at length elsewhere. But the importance of federalism, and its relationship to the separation of powers, has received less attention. This brief aims to fill the gap.

### I. THE CONSTITUTION'S STRUCTURAL LIMITS ON CONSOLIDATED POWER PROTECT FEDERALISM

Concentrating power in one person or group is incompatible with individual liberty. That is the "fundamental insight" behind the Constitution's separa-

tion of legislative, executive, and judicial power. *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). By dividing these powers among three co-equal branches, and by empowering each branch to check the others, the founding generation created the tools for resisting the "concentration of the several powers in the same department." The Federalist No. 51, p. 321 (J. Cooke, ed. 1961) (J. Madison). Under our Constitution, no one acts free of meaningful oversight.

The founding generation did more than divide power among the branches. It also divided power among the states and the federal government, splitting "the atom of sovereignty." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The result? One federal government to which the states delegated a limited number of powers, and numerous state governments with all the powers not surrendered. *See* U.S. Const. amend. X. By preventing governmental authority from being concentrated in one level of government, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 564 U.S. 211, 221 (2011) (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). This lets states manage local affairs without federal assistance, intervention, or preemption, thus allowing for a diversity of policy approaches to our diverse set of circumstances. *See* Heather K. Gerken, *The Loyal Opposition*, 123 Yale L.J. 1958, 1988 (2014).

Talk of federalism's safeguards tends to focus on the limits of federal power: the reach of the Commerce Clause, the authority to commandeer state officials, and so on. *See, e.g.*, *United States v. Lopez*, 514 U.S.

549, 552 (1995); *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1475 (2018). Courts and commentators pay less attention to the connection between federalism and the structural limits on concentrated power. That is a mistake. One important function of dividing federal power among the branches is to "safeguard federalism by making federal legislation more difficult to pass." *Collins v. Virginia*, 138 S. Ct. 1663, 1679 (2018) (Thomas, J., concurring); *accord* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1326 (2001); Michael D. Ramsey, *The Supremacy Clause, Original Meaning, and Modern Law*, 74 Ohio St. L. J. 559, 565 (2013).

If federal power were consolidated in one branch—if, for example, the Executive could promulgate the laws it is charged with enforcing—it would be far easier to make federal law. If it were far easier to make federal law, the federal government would more often do so, leaving fewer issues to the states. The Constitution's separation of powers thus protects state prerogatives "by requiring agreement among multiple actors," Clark, *Separation of Powers*, 79 Tex L. Rev. at 1330–31. This increases the "difficulty of getting anything done at the federal level," and thus leaves more to the states. Ramsey, *The Supremacy Clause*, 74 Ohio St. L.J. at 565.

To illustrate, consider the difficulty of enacting binding laws and treaties. Laws are valid only if they pass both houses of Congress and receive the President's signature (or following a veto, pass by the two-thirds majority needed for an override). U.S. Const. art. I, § 7, cl. 3. And treaties, after being negotiated by the President, go into effect only if two-thirds of the

Senate votes for ratification. U.S. Const. art. II, § 2. Only laws and treaties made in the constitutionally prescribed mode become "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. Thus, under the Constitution's original design, only such laws and treaties can displace state law. *Id.* These constitutionally prescribed processes are cumbersome. Intentionally so: they are "calculated to restrain the excess of lawmaking, and to keep things in the same state in which they happen to be at any given period." The Federalist, No. 73, p. 444 (A. Hamilton). These hurdles thus "safeguard federalism by constraining the federal government's ability to displace state law." Clark, *Separation of Powers*, 79 Tex. L. Rev. at 1331.

The Constitution vests the legislative power in Congress alone. U.S. Const. art. I, § 1. But for years now, "the sheer amount of law—the substantive rules that regulate private conduct and direct the operation of government—made by [executive] agencies has far outnumbered the lawmaking engaged in by Congress through the traditional process." *I.N.S. v. Chadha*, 462 U.S. 919, 985–86 (1983) (White, J., dissenting). None of these rules are subject to the Constitution's bicameralism and presentment requirements. As a result, permitting executive agencies to promulgate the Law of the Land "is an affront to the" Constitution's structural protection of federalism. David S. Rubenstein, *Administrative Federalism As Separation of Powers*, 72 Wash. & Lee L. Rev. 171, 219–20 (2015).

One solution to this is to reconsider the constitutionality of executive lawmaking. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1254 (2015) (Thomas, J., concurring in the judgment); *see also*

Philip Hamburger, *Is Administrative Law Unlawful?* (2014) (arguing that administrative law has consolidated power in ways that the Constitution sought to prevent); Robert Alt, *The Administrative Threat to Civil Liberties*, 2018 Bradley Symposium Lecture at 32:45 (May 15, 2018), *available at* https://tinyurl.com/AdminThreat (arguing that executive lawmaking, in addition to raising grave constitutional issues, poses unique challenges to civil liberties).

But even if there is little appetite for that, the Court should at least insist on strict adherence to the structural protections through which the President and Congress can check administrative agencies. The Constitution provides any number of tools for doing so. Congress, for example, can use its power over appropriations to withhold agencies' funding. The President has the power to appoint executive officers that run these agencies, all of whom must be confirmed by the Senate. U.S. Const. art. II, § 2, cl. 2. Upon confirmation, the President can generally remove those officers, either at will or "for cause," if he disapproves of their conduct. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). Even when one of these constitutional tools is limited, Congress and the judiciary have generally offset the limitation to a degree. For example, when removal may be only "for cause," the agency is ordinarily structured as a multi-member body where "the President may designate the chair of the agency" and "no single commissioner or board member can *affirmatively* do much of anything." *PHH Corp.*, 881 F.3d at 183, 188 (Kavanaugh, J., dissenting); *accord Collins v. Mnuchin*, 896 F.3d 640, 667–68 (5th Cir. 2018). As long as the President and Congress have these tools,

they have at least *some* ability to constrain the rule-making power of executive agencies. In other words, they have some (albeit limited) tools for preventing the "concentration of the several powers in the same department," The Federalist No. 51, p. 321 (J. Madison), and the federal intrusion on state prerogatives that necessarily results.

The same structural protections that make passing federal laws difficult also make the legislative process "more responsive to state interests." *Collins*, 138 S. Ct. at 1679 (Thomas, J., concurring). For example, the equal representation of states in the Senate is specifically designed to give state interests a greater voice than a proportional system of representation, even though it also serves as an "impediment" to legislation. The Federalist, No. 32, p. 417 (J. Madison). What is more, "America elects a federal President, not a national President"; citizens "live in the states, vote in the states, and [their] voices are channeled through the states." Joy McAfee, *2001: Should the College Electors Finally Graduate? The Electoral College: An American Compromise from Its Inception to Election 2000*, 32 Cumb. L. Rev. 643, 671 (2002). Thus, "with the President, as with Congress, the crucial instrument of the selection—whether through electors or, in the event of failure of majority, by the House voting as state units—is again the states." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546 (1954). Ensuring that binding rules pass through the cumbersome constitutional process—a process in which the Senate and the President both participate—increases the odds that federal rules reflect state interests.

## II. THE CFPB'S STRUCTURE IS INCOMPATIBLE WITH THE STRUCTURAL PROTECTIONS THAT SAFEGUARD FEDERALISM.

"It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to rest of the country." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)). Thus, in the system the founding generation ratified, states serve as "laboratories for devising solutions to difficult legal problems"—not passive bystanders to an unelected administrative state. *Oregon v. Ice*, 555 U.S. 160, 171 (2009).

The D.C. Circuit threatened this balance by upholding the constitutionality of the CFPB Director's independence. The CFPB Director is perhaps the most extreme example of administrative independence to date. The Director is statutorily authorized to promulgate binding rules of private conduct and to adjudicate alleged violations. And the Director does so almost entirely free of Presidential or Congressional oversight. Power concentrated in one independent individual can be wielded much more easily. And power that can be wielded more easily threatens to leave fewer issues to the states. *See Collins*, 138 S. Ct. at 1679 (Thomas, J., concurring); Clark, *Separation of Powers*, 79 Tex. L. Rev. at 1326; Ramsey, *The Supremacy Clause*, 74 Ohio St. L.J. at 565. This Court would thus promote a healthier federalism by recognizing that separation-of-powers principles meaningfully

limit the independence that can be given to administrative agencies. It should grant certiorari to do so.

### A. The CFPB Director wields broad power and is almost entirely unaccountable to the President and Congress.

**1.** "[O]ther than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power. That is not an overstatement." *PHH*, 881 F.3d at 171 (Kavanaugh, J., dissenting). The Director has "all but exclusive power to make and enforce rules under eighteen preexisting consumer laws and a nineteenth in Title X itself." *Id.* at 153 (Henderson, J., dissenting) (citing 12 U.S.C. §§ 5481(12), 5512(b)(4), 5562–5565, 5581(a)(1)(A)). The last power is particularly important, as it allows the Director to define and punish "unfair, deceptive, or abusive acts or practices" relating to consumer products, a broad phrase "cabined by little more than his imagination." *Id.* And the Director is not constrained only to enforcement proceedings in federal court or before administrative law judges: he may "adjudicate disputes" himself and "impose a wide range of legal and equitable relief." *PHH*, 881 F.3d at 171 (Kavanaugh, J., dissenting) (citing 12 U.S.C. § 5565(a)(2)).

There are remarkably few structures for keeping the Director in check. For one thing, he might not even be hired by the President under whom he nominally serves. Each Director receives a five-year term. Thus, while the Constitution provides that the "executive Power shall be vested in a President of the United States of America," U.S. Const. art. II, § 1, a President could serve a full term without having any

control over the person in charge of an agency wielding part of that power.

Once confirmed, the Director answers to essentially no one. Executive officials in general are accountable to the President because he can fire them. *See Free Enter. Fund*, 561 U.S. at 483. But the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—not "at will," and not even for any appropriate cause. The only putative supervision in the Executive branch comes from the Financial Stability Oversight Council, a ten voting-member body of experts that includes the Director himself. 12 U.S.C. § 5321(b)(1). Its oversight isn't much. The Council can set aside *only* CFPB regulations (not adjudications), *only* if they threaten "the safety and soundness of the United States banking system or the stability of the financial system of the United States," and *only* by a two-thirds majority. 12 U.S.C. § 5513(a) & (c).

Given the Director's insulation from meaningful Executive supervision, one would expect that Congress would hold a fair amount of oversight authority. If nothing else, one would think, Congress could exercise its power of the purse to defund the CFPB through the normal appropriations process. One would be wrong: the Director can obtain up to 12 percent of the Federal Reserve's budget (well over half a billion dollars) without Congress's approval. *See PHH*, 881 F.3d at 146 (Henderson, J., dissenting) (citing 12 U.S.C. § 5497 and CFPB, Semiannual Report 122 (Spring 2017)). To defund the agency, Congress would have to pass a law repealing the CFPB's entitlement to be funded outside the appropriations process.

**2.** In *PHH*, the D.C. Circuit held that all of this passed constitutional muster. *See* 881 F.3d at 77–80. Its reasoning demonstrates the need to recognize the important relationship between separation-of-powers principles and federalism.

For example, the *PHH* majority dismissed the characterization of "the CFPB as somehow too powerful" because "nothing about the focus or scope of the agency's mandate renders it constitutionally questionable." *PHH*, 881 F.3d at 101. Why? Because the exercise of those powers "does not interfere with the President's constitutional role." *Id.* Likewise, the majority noted, "[t]he CFPB's budgetary independence primarily affects Congress[;] . . . it does not intensify any effect on the President," the relevant overseer of Executive power. *Id.* at 96; *see* U.S. Const. art. II, §§ 1, 3.

This analysis ignores entirely the connection between federalism and the separation of powers. The Congress that created the CFPB delegated to one individual a massive amount of power to regulate a significant portion of the economy, and coupled that delegation with a grant of financial independence. At the same time, it set the Director apart from any meaningful form of democratic accountability by which the states (or their citizens) might assert any influence over his decisions. All this lowers the costs, and so increases the frequency, of regulation. Since much of that regulation will relate to areas otherwise left to the states, this structure diminishes "the role of the States as laboratories for devising solutions to difficult legal problems." *Ice*, 555 U.S. at 171.

### B. The CFPB's history illustrates how unaccountable federal actors can interfere with state prerogatives.

"[C]onsumer protection law is a field traditionally regulated by the states." *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 41 (2d Cir. 1990). It falls within their "historic police powers." *Castro v. Collecto, Inc.*, 634 F.3d 779, 785 (5th Cir. 2011) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). But in its short history, the CFPB has promulgated a number of consumer-protection rules. Many involve exactly the kind of "difficult legal problems" that benefit from state-by-state experimentation. *Ice*, 555 U.S. at 171. Yet the CFPB, because of its independence, is able to stifle that experimentation much more easily than Congress can.

Some examples help illustrate the point.

***Payday Loans.*** Even before the states were states, they regulated interest rates. *See, e.g.*, Christopher L. Peterson, *Usury Law, Payday Loans, and Statutory Sleight of Hand: Salience Distortion in American Credit Pricing Limits*, 92 Minn. L. Rev. 1110, 1117 (2008). They have been experimenting ever since. *Id.* at 1116–22. Striking the right balance is inherently tricky. On the one hand, regulators are concerned that if they limit the terms lenders can offer too much, those with bad credit will be either unable to obtain financing or pushed into the black market. On the other hand, regulators express concern that if they leave the lenders completely free to set the terms they wish, some debtors may be taken advantage of.

This centuries-old dilemma arose again in the form of payday loans: short-term high-interest loans

to individuals who might not otherwise be able to access credit. States and localities undertook a variety of approaches to what some perceived as unfairly high terms. *See, e.g.*, Short-Term Lender Act, 2008 Ohio Laws File 91 (Sub. H.B. 545). Approximately three-quarters of the states "have specific statutes that allow for payday lending," subject to extensive regulation that varies from state to state. *See* Payday Lending State Statutes, National Conference of State Legislatures (Jan. 23, 2018), *available at* http://www.ncsl.org/research/financial-services-and-commerce/payday-lending-state-statutes.aspx.

Today, the power of states to experiment in this field—and to adjust their rules to accommodate regional and local circumstances—is limited by CFPB regulation. The agency requires that payday lenders "reasonably determin[e] that the consumers will have the ability to repay the loans according to their terms," 12 C.F.R. §§ 1041.4, 1041.5—an underwriting requirement that payday lenders contend is inconsistent with how consumers use payday loans and that the CFPB's own simulations showed could decrease storefront payday loan volume by over 90 percent. *See* 82 Fed. Reg. 54,472, 54,826 (Nov. 17, 2017). "Depending on how the CFPB interprets the definition of 'abusive'" within its power to prohibit abusive practices, "payday lending could be forbidden entirely" at a later date. Nathalie Martin & Joshua Schwartz, *The Alliance Between Payday Lenders and Tribes*, 69 Wash. & Lee L. Rev. 751, 796 (2012).

This greatly limits the power of states and localities to adjust payday loan policy to fit local circumstances. To see why they might want to do so, con-

sider the evidence that limiting the availability of payday loans does not stop people from borrowing—people use payday lending not because they want to, but because "they have an urgent need for credit and because no less-expensive option is available." *See* Todd Zywicki, *The Case Against New Restrictions on Payday Lending* 9, Mercatus Center Working Paper No. 09-28 (July 2009), *available at* https://perma.cc/4G9K-MTTB. So if payday loans are unavailable, they will look to other local alternatives for financing, including illegal black-market lenders. *Id.* at 17–19. They might also look to legal options that are (according to some) less advantageous, such as pawn shops, credit-card cash advances, bank overdraft fees, and defaults on other obligations. *Id.* at 15–16.

If a state or locality determines that restrictions on payday lending will lead to these results in its area, it has good reason to permit payday loans even in circumstances where the prospects of repayment are not "reasonable" as judged by the CFPB, perhaps subject to some other, more flexible mix of consumer protections. Even the CFPB's supporters concede that its "efforts to protect consumers from unfair or abusive practices may result in decreased lending or limit the ability of financial companies to innovate and provide new products to consumers." Jared Elosta, *Dynamic Federalism and Consumer Financial Protection*, 89 N.C. L. Rev. 1273, 1292–93 (2011).

The point here is not to argue the superiority of any particular payday-loan policy. Rather, the point is that allowing state and local governments to experiment with imperfect solutions permits more robust consideration of the tradeoffs that vary with local or regional circumstances. Policymaking on this issue

better belongs to state and local government, as "a decentralized government . . . will be more sensitive to the diverse needs of a heterogeneous society." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). At a minimum, the decision should belong to a democratically accountable actor or branch subject to pressure from the states.

***Qualified Mortgages.*** The Dodd-Frank Act allows lenders to issue residential mortgage loans only upon "a reasonable and good faith determination" of the borrower's ability to repay. 15 U.S.C. § 1639c(a)(1). The CFPB has offered the "qualified mortgage" as a complex "safe harbor" from suit under that very general provision—which scholars have noted renders "mortgages without" the qualified-mortgage designation "more vulnerable to lawsuit." Adam C. Smith & Todd Zywicki, *Behavior, Paternalism, and Policy: Evaluating Consumer Financial Protection*, 9 NYU J.L. & Liberty 201, 219 (2015); *see also* Kevin P. Diduch, *Close, but No Cigar: How the Ability to Repay Rule Creates A "Disparate Impact" on the American Dream*, 43 Real Est. L.J. 298, 312 (2014).

A "qualified mortgage," among other things: (1) may not exceed thirty years; (2) must avoid both "interest-only" schedules and "balloon payments" (larger principal payments at the end of a loan); and (3) cannot raise the consumer's debt-to-income ratio above 43 percent when considering all other debts. *See* Smith & Zywicki, *Behavior, Paternalism, and Policy*, 9 NYU J.L. & Liberty at 218; Diduch, *Close, but No Cigar*, 43 Real Est. L.J. at 311. The goal, plainly, is to avoid a series of damaging defaults as occurred in the late-2000s.

But this approach comes with tradeoffs that vary by region and demographics. Scholars have noted that the racial income gap "makes it apparent that African Americans and Hispanics will be disadvantaged" under the debt-to-income ratio regulation. Diduch, *Close, but No Cigar*, 43 Real Est. L.J. at 315. With private lenders hewing to the qualified-mortgage standards, lower-income borrowers may be directed to government-sponsored loans that are "costlier than conventional loans." Patrick T. O'Keefe, *Qualified Mortgages & Government Reverse Redlining: How the CFPB's Qualified Mortgage Regulations Will Handicap the Availability of Credit to Minority Borrowers*, 21 Fordham J. Corp. & Fin. L. 413, 428 (2016). The result is that "a larger percentage of Black and Hispanic borrowers may be forced to pay more money to obtain government-sponsored loans than both Asian and White borrowers" will pay for conventional loans. *Id.*

Similarly, "lawmakers from both sides of the political divide" indicated concern that the CFPB's regulation of "balloon payment[s]" will hurt "rural lenders (and borrowers)" who rely on low up-front payment structures. Smith & Zywicki, *Behavior, Paternalism, and Policy*, 9 NYU J.L. & Liberty at 219; *see* Steven Harras, *Cordray seeks to reassure rural lenders on QM rule at Senate hearing*, CQ Roll Call, 2013 WL 6038491 (Nov. 15, 2013).

Again, the issue is not the wisdom of the CFPB's regulation. The issue is that concerns particular to states and regions shape the relevant tradeoffs. State regulation may therefore be preferable to having the CFPB Director create a one-size-fits-all rule possibly followed by a patchwork of exemptions. *See* Harras,

*supra*, 2013 WL 6038491 (Director discussing how to define a "rural" exception). But even if a federal rule is required for the health of the national mortgage market, it should be made by the ordinary bicameral, Constitutional process to assure that the multiplicity of tradeoffs can be considered through a politically accountable process. Such a rule should not be set forth by an actor unaccountable, even indirectly, to state electoral voices.

***Arbitration Rules.*** A final example illustrates how the CFPB's independence inverts federalism protections; it creates roadblocks to federal *in*action.

In July 2017, the CFPB tried to prohibit class-action waivers in arbitration agreements—a move that would have substantially weakened the ability of states to experiment with laws encouraging arbitration. The regulation did not go into effect. But that was only because the Senate managed narrowly to pass a resolution of disapproval by a slim 51 to 50 vote—requiring the Vice President's intervention—which the House then passed and the President signed. *See* Alan S. Kaplinsky *et al.*, *A Swirl of Regulatory and Judicial Activity for Consumer Arbitration in 2017*, 73 Bus. Law. 575, 576 (2018). Under the Congressional Review Act, this had the effect of nullifying the CFPB's rule. *See* 5 U.S.C. § 802.

Reasonable minds can disagree as to whether the legality of class-action waivers should be left to the states. But in a federalist system, the issue should not be taken from them through the unilateral action of an unchecked individual. The CFPB's arbitration rule failed only through a bizarre inversion of democratic processes: a rule regulating private conduct and promulgated by one unaccountable member of the

executive branch would have gone into effect but for both houses of Congress and the President taking affirmative action to stop it. The states did not ratify a Constitution through which their powers could be so easily usurped.

* * *

By splitting the atom of sovereignty, the Constitution allows for "novel social and economic experiments" that help the country innovate in the long term. *Liebmann*, 285 U.S. at 311 (Brandeis, J., dissenting). Today, there is not even serious dispute that "it is desirable to have multiple levels of government all with the capability of dealing with the countless social problems that face the United States." Erwin Chemerinsky, *The Values of Federalism*, 47 Fla. L. Rev. 499, 504 (1995). They can do so, however, only if the federal government leaves them with space to innovate. It is thus key that the federal government intervene in areas left to the states only in strict compliance with the various restrictions on federal action. At the very least, no agency should be able to unilaterally seize issues from the states without meaningful oversight from the democratically elected branches. That is exactly what the CFPB's structure has allowed it to do.

## III. FEDERALISM IS DUE FOR A REEMERGENCE

Federalism is perhaps more needed today than ever before. A country of 50 states and 325 million people is bound to face a diverse set of problems. The federal government cannot possibly manage them all. And it ought not try; as illustrated above, even national problems may be influenced by regional factors

that those closer to the situation are better positioned to fix. *See* The Federalist No. 17, p. 107 (A. Hamilton). What reason is there to assume that the cost-benefit calculus of payday lending comes out the same way in Maine and Minnesota, or California and the Carolinas?

The case for federalism is even stronger when one considers how the political ideologies within our nation have become both more diverse and more incompatible. For much of the mid-20th century, the population as a whole and the two main political parties in particular agreed on quite a bit. *See* David W. Brady & Hahrie Han, *Our politics may be polarized. But that's nothing new*, Wash. Post (Jan 16, 2014), *available at* https://perma.cc/MX5U-8BCE. Some of the most famous laws touching on some of the most sensitive issues passed with bipartisan support: the Social Security Act, the Taft-Hartley Act, and the Civil Rights Act of 1964, to name just a few. Such bipartisan support for major legislation seems unimaginable today. Americans are politically polarized, and that polarization is reflected in the views of the men and women they send to represent them in Washington. The result is a legislative branch often unable to compromise. Without compromise, the major legislation that manages to pass amounts to half the country imposing its will on the other. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 Harv. L. Rev. 1077, 1078 (2014) ("not a single Republican member of Congress voted for" the Affordable Care Act).

One solution to gridlock is simply to remove questions from the political process and leave their resolution to the administrative state. Some advocates for a flexible approach to separation-of-powers problems

take this view. Modern-day problems, they say, are simply too numerous and too complex to leave to Congress—especially a gridlocked Congress incapable of action. *See, e.g.*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 85 (2017).

There are many problems with this argument, but one is especially relevant here: gridlock is a feature of our system, not a bug. *See* Alt, *The Administrative Threat to Civil Liberties* at 34:05 ("The constitutional system devised by the Founders was not built to promote efficiency. It was built to protect liberty."). The many roadblocks to the enactment of federal law protect the prerogatives of states, permitting citizens to pursue local solutions to local problems free from federal interference. Ideas that are unpopular nationally may be quite popular at the state or local level. Thus, "decentralized decision making is better able to reflect the diversity of interests and preferences of individuals in different parts of the nation." Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1493 (1987). All else equal, isn't it a good thing if political minorities can hold sway in some part of the system? *See* Heather K. Gerken, *Foreword: Federalism All The Way Down*, 124 Harv. L. Rev. 4, 45 (2010).

In addition, channeling difficult policy questions to more local levels of government may produce more effective self-governance. Those who share neighborhoods and cities, or counties and states, are more likely to share perspectives and agree on potential solutions to shared problems. Those solutions may work or they may fail. But it is far better to fail at the state or local level. State laws—and even constitutions—

are easier to change than their federal counterparts. And when it comes to voting with your feet, it is a lot easier for our "mobile citizenry" to change states than to change nations. *Arizona State Legislature*, 135 S. Ct. at 2673.

Preserving a federalist structure is also critical "for generating discourse." Gerken, *The Loyal Opposition*, 123 Yale L.J. at 1988. For one thing, "allocation of decision making authority to a level of government no larger than necessary [can] prevent mutually disadvantageous attempts by communities to take advantage of their neighbors." McConnell, *Federalism*, 54 U. Chi. L. Rev. at 1493. And, at least with respect to issues for which a national solution is not required, deciding issues at lower levels of government would reduce the number of national zero-sum games in which, given the difficulty of passing federal law, debates that end in legislation tend to end for good. By contrast, legislating at the state and local level makes it easier to keep policy debates open.

Rather than debating issues in a high-stakes setting, and "on an impossibly large national scale," federalism allows citizens to do so "on a smaller scale in an iterative fashion and in a myriad of political contexts." Heather K. Gerken, *Federalism 3.0*, 105 Cal. L. Rev. 1695, 1719 (2017). And instead of having those debates "in the airy and abstract realm of political speech, where ideologues and intellectual purity hold sway," they can do so "through governance, where pragmatism dominates and accommodation is necessary." *Id.* When allowed to flourish, these debates can even "tee up national debates." *Id.* Indeed, it was precisely this model of debate that led to vary-

ing state models of welfare reforms in the 1990s, leading up to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (commonly termed the Welfare Reform Act). *See* David Fontana, *Relational Federalism*, 48 Tulsa L. Rev. 503, 508–09 (2013).

None of this is to say that federalism, and particularly the reservation of issues to the states, is the solution to all our ills. If it were, the Articles of Confederation would still be in effect. The point is that federalism has much to offer, and that strict adherence to separation-of-powers principles is necessary for it to do so.

## CONCLUSION

This Court should grant the petition for a writ of certiorari.

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