No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,
Petitioner,
v.
CONSUMER FINANCIAL PROTECTION BUREAU,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE
STATE NATIONAL BANK OF BIG SPRING,
THE COMPETITIVE ENTERPRISE INSTITUTE,
AND THE 60 PLUS ASSOCIATION
IN SUPPORT OF PETITIONER

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, DC 20005
(202) 331-1010

GREGORY JACOB
(*Counsel of Record*)
gjacob@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

C. BOYDEN GRAY
ADAM R.F. GUSTAFSON
JAMES R. CONDE
T. ELLIOT GAISER
BOYDEN GRAY & ASSOCIATES
801 17th Street NW, Suite 350
Washington, DC 20006

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

The questions presented are:

1. Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

2. Whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. 5491(c)(3) can be severed from the remainder of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici State National Bank of Big Spring, the Competitive Enterprise Institute, and the 60 Plus Association, Inc. were plaintiffs in the first lawsuit challenging the constitutionality of the Consumer Financial Protection Bureau ("CFPB"). *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 54 (D.C. Cir. 2015).

State National Bank is a community bank that has served Big Spring, Texas and other communities for over a century, and is directly subject to numerous CFPB regulations. The Bank offers many consumer financial services, including remittance transfers, checking accounts, and agricultural and vehicle loans.

The Competitive Enterprise Institute ("CEI") is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has participated in federal court cases involving important separation of powers issues. *See, e.g.*, Pet. Br., *Free Enter. Fund v. Pub. Co.*

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for Amicus Curiae provided notice to counsel for parties of its intention to file this brief, and the parties have consented to the filing. No person other than Amicus Curiae, its members or its counsel made a monetary contribution to its preparation or submission.

Accounting Oversight Bd., 561 U.S. 477 (2010) (No. 08-861).

The 60 Plus Association is a non-profit, non-partisan seniors advocacy group devoted to advancing free markets.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CFPB was designed to be—and operates as—a government unto itself. It is vested with sweeping executive authority to make and enforce rules that affect virtually every sector of the U.S. economy. This authority is entrusted to a single individual, the Director, who serves a five-year term that is longer than the President's. But the Director does not answer to the President, who is prohibited from removing him from office except for cause. To the contrary, the Director stands above the President, as by statute the Director's view of consumer financial protection law prevails over the President's if the two disagree.

Further, unlike the President, who is checked in the exercise of his executive authority by his dependence on congressional appropriations to fund the government he runs, the CFPB is exempted from Congress's power of the purse and accompanying congressional oversight. Indeed, the CFPB is entirely self-perpetuating, empowered to designate at will hundreds of millions of dollars from the Federal Reserve System for its own use, without any approval or review from the legislative or executive branches. Nor did Congress stop at freeing the CFPB from external restraints; in the interest of fostering efficiency and independence, Congress also eschewed the creation of any internal checks or balances within the CFPB, such as those afforded by a deliberative multi-member commission structure.

The Constitution does not permit the creation of such an entity. Rather, to protect individual liberty, the Constitution mandates a separation of powers that imposes checks, balances, and accountability on the exercise of governmental authority. Congress was clear in creating the CFPB that it deliberately removed these restraints in the interest of expediency, efficiency, and what it perceived to be the virtues of *un*accountability in the enforcement of consumer financial protection law. The CFPB's short existence, however, provides numerous concrete examples of its unaccountable power being abused, bearing out the wisdom of the Framers in establishing a separation of powers that requires that the exercise of government power be checked and bounded.

Whatever the merits of Congress's policy objectives in creating the CFPB, the Constitution does not permit the amalgamation of such sweeping and unchecked authority in a single executive entity. Certain features of the CFPB viewed in isolation may or may not be constitutionally permissible, but the combination most definitely is not. Fidelity to the Constitution requires that the CFPB's novel structure be invalidated.

Furthermore, faithfulness to the Constitution, and to the appropriate role of the judiciary, requires that the Court refrain from implementing a jerry-rigged and inadequate fix to the CFPB's unconstitutionality by simply striking Title X's for-cause removal provision. Rewriting statutes is a legislative function that does not lie within the judicial power. And this particular cure to the CFPB's unconstitutionality would be *worse* than the disease, because severing the CFPB's tenure protection would place a fully self-funded enforcement agency under the President's direction and control. Congress could never have intended such a result. Such a regulatory agency—answerable to the President yet immune to Congress's power of the purse—is unknown to our republic and completely at odds with the Constitution's system of checks and balances. It would grant to the Executive both the sword and the purse and "destroy," in Hamilton's words, "that division of powers on which political liberty is founded."

ARGUMENT

Our constitutional system of government does not permit Congress to create self-perpetuating executive authorities that exist outside of, and are unanswerable to, both the Executive and Legislative Branches. *See, e.g.*, Federalist No. 9 (Hamilton) ("The regular distribution of power into distinct departments [and] the introduction of legislative balances and checks … are means, and powerful means, by which the excellences of republican government may be retained and its imperfections lessened or avoided."). Yet the Dodd-Frank Act vests the CFPB with vast executive authority, exempts it from accountability to the political branches, provides no mitigating internal checks and balances, and allows it to make and execute law on its own *indefinitely* without further involvement or oversight by Congress or the President. Unsurprisingly, the CFPB's unaccountable and unchecked structure has resulted in not merely theoretical, but actual examples of abuse of power that threaten the liberty of all who are subject to its unprecedentedly concentrated power. The CFPB is unconstitutionally constituted, and only Congress can remedy the separation-of-powers violation.

I. Congress Vested The Director Of The CFPB With Broad Executive Authority But Placed Him Outside The President's Authority And Control

A. The CFPB Has Extremely Expansive Executive Authority

The CFPB is vested by statute with broad authority to exercise executive power in its designated domain. The CFPB has the power to "establish the general policies of the [CFPB] with respect to *all executive and administrative functions*," including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions"; deciding on the appropriate "use and expenditure of funds" for those purposes; "coordinat[ing] and oversee[ing] the operation of all administrative, enforcement, and research activities of the [CFPB];" and "performing such other functions as may be authorized or required by law." 12 U.S.C. § 5492(a)(4), (9), (10), (11) (emphasis added). Among these broad powers, Dodd-Frank grants the CFPB exclusive jurisdiction to administer eighteen "Federal consumer financial law[s]" previously administered by other agencies, *id.* §§ 5481(12) & (14), 5511, and gives the Director's statutory interpretations priority over Executive Branch interpretations for the purpose of assigning *Chevron* deference. *See id.* § 5512(b)(4)(B). Dodd-Frank further vests the CFPB with newly created authority to regulate and prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a). In sum, the core purpose of the CFPB is "to implement and, where applicable, enforce Federal consumer financial law," *id.* § 5511(a)—that is, to "take Care that the [Federal consumer financial laws] be faithfully executed," *see* U.S. Const. Art. II, § 4, cl. 4—a clear executive responsibility.

B. The CFPB Is Not Answerable To Or Restrained By The Chief Executive

"But where, in all this, is the role for oversight by an elected President?" *Free Enter. Fund*, 561 U.S. at 499. Because the CFPB performs a role constitutionally committed to the Executive Branch, it must remain ultimately accountable to the President as the Chief Executive. *See* U.S. Const. Art. II, § 1, cl. 1; *see also Free Enter. Fund*, 561 U.S. at 484. Yet Congress took pains to ensure this was not the case. The CFPB and its Director have been thoroughly insulated from the President's control.

In its day-to-day operations, the CFPB operates entirely outside the President's sphere of influence. And the Director of the CFPB is not required to coordinate with any other Executive Branch official regarding "legislative recommendations, or testimony or comments on legislation." 12 U.S.C. § 5492(c)(4). Likewise, the Director is independent from the President's financial oversight. Though he must provide the Director of the Office of Management and Budget ("OMB") copies of certain financial reports, he need not "obtain the consent" of the OMB Director, and OMB lacks "any jurisdiction or oversight over the affairs or operations of the [CFPB]." *Id.* § 5497(a)(4)(E).

Most significantly, the Director of the CFPB is protected from removal and, as a result, from ultimate accountability to the Chief Executive. Once appointed, the Director serves a five-year term and can be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). This term can extend indefinitely, until a successor is appointed. *Id.* § 5491(c)(2). The Director therefore cannot be removed by the President merely for failing to execute the law in a manner consistent with the President's policies and directives. *See Free Enter. Fund*, 561 U.S. at 496. And if the President and the Director disagree in the field of consumer finance, by statute the Director's view prevails. *See* 12 U.S.C. § 5512(b)(4).

In effect, the Dodd-Frank Act establishes the Director as a mini-President of consumer finance, vested with sweeping executive authority within his prescribed domain, yet entirely unaccountable in its exercise to the Chief Executive (or to the Congress). This structure cannot be reconciled with the constitutionally prescribed separation of powers, as explained by the Supreme Court in *Free Enterprise Fund*, 561 U.S. 477, and in what the Court there described as its "landmark" decision in *Myers v. United States*, 272 U.S. 52 (1926). Those cases establish that the President's constitutional responsibilities require that he have the authority to remove appointed executive officers, and that only "under certain circumstances" can even "limited restrictions" be imposed on the removal power. *Free Enter. Fund*, 561 U.S. at 483, 495. These holdings recognize that the removal power is "perhaps *the* key means" that the President has for "appointing, overseeing, and controlling those who execute the laws.'" *Id.* at 501 (quoting 1 Annals of Cong. 463 (1789)). Yet as is discussed in more detail below, none of the "certain circumstances" the courts have deemed sufficient to warrant even "limited restrictions" on the removal power are present in the CFPB. Its executive authority is not minor or narrow. It has no internal checks and balances. And it is accorded a perpetual funding supply outside the appropriations process that exempts it from Congress's power of the purse. This combination of features has produced a "novel structure [that] does not merely add to the [CFPB's] independence, but transforms it." *Id.* at 496.

C. The CFPB Is Materially Unlike Other "Independent" Executive Entities Approved by the Courts

In a constitutional system that separates power among the legislative, executive, and judicial branches, "independent" agencies exist as a limited exception to that fundamental structural rule. The President has general power to "keep [agencies] accountable" by "removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483 (citing *Myers v. United States*, 272 U.S 52 (1926)).

This case is materially unlike others in which this Court has upheld restrictions on the President's removal power. In *Humphrey's Executor v. United States*, the Court upheld a for-cause removal requirement on members of the Federal Trade Commission ("FTC") in substantial part because the Commission was statutorily created as a "nonpartisan" entity and had almost no role in setting executive policy. 295 U.S. at 624.[2] The FTC was structured to ensure a degree of political impartiality: By statute, no more than three of the five commissioners serving on the FTC could come from the same political party. *Id.* at 620, 624. And the FTC commissioners were intended to act primarily "as a legislative or … judicial aid[]," using their expertise to carry out predominately ministerial and adjudicative tasks, rather than functioning as "arm[s] or … eye[s] of the executive." *Id.* at 628. Because the FTC, as it existed in 1935, ultimately served "as a means of carrying into operation legislative and judicial powers" and ultimately acted "as an agency of the legislative and judicial departments," Congress could impose a good-cause removal requirement to preserve some of the agency's independence from the President.

In *Morrison v. Olson*, this Court upheld a statute that insulated a special "independent counsel" from Presidential oversight and removal. Unlike the FTC, the office of the independent counsel was run by a single individual who was plainly exercising purely executive power. The Court nevertheless up-

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[2] *Amici* agree with Petitioner that *Humphrey's Executor*'s continued validity is called into question by the reasoning of *Free Enterprise Fund*.

held the applicable removal restriction on the grounds that the independent counsel had only "limited jurisdiction and tenure and lack[ed] policymaking or significant administrative authority." 487 U.S. 654, 691, 696 (1988). Because the independent counsel had limited enforcement powers and no policy-setting role, the Court did not think that restrictions on the President's ability to remove him "unduly intefer[ed] with the role of the Executive Branch." *Id.* at 693.

The courts have not allowed the narrow exceptions of *Humphey's Executor* and *Morrison* to swallow the general rule that checks, balances, and accountability are necessary elements of governance under our constitutional structure. In *Free Enterprise Fund v. PCAOB*, the Supreme Court stressed that *Humphrey's Executor* represents the outermost limit on agency independence. 561 U.S. 477, 514 (2010) ("While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction[.]"). Thus, the Sarbanes-Oxley Act violated the Constitution by creating an agency with two layers of independence from the President.

The Dodd-Frank Act crosses the constitutional line yet again. It does so not by giving an independent agency an extra layer of protection from the President, but rather by creating an independent agency headed by a single Director who has substantially broader executive powers than those at issue in *Humphrey's Executor*, yet has been structured to remove all meaningful executive, legislative, and internal checks. As a result, the CFPB is far more unaccountable and unchecked than the FTC of *Humphrey's Executor*.

Indeed, by design, the CFPB was created with *no* mitigating internal checks and balances at all. At the time of Justice Breyer's *Free Enterprise Fund* dissent, it could be said that independent agencies "are *all* subject to presidential direction in significant aspects of their functioning." *Free Enter. Fund*, 561 U.S. at 524 (Breyer, J., dissenting) (emphasis is Breyer, J.'s), *quoting* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 583 (1984). After the creation of the CFPB, that is no longer true. It is as though when drafting Title X of Dodd-Frank, Congress used Justice Breyer's dissent as a checklist of independent agency features that permit a President to exert some modicum of policy influence, and then undertook to systematically eliminate each.

Congress lauded the CFPB's structural "independence" as a praiseworthy feature that it hoped would make it more energetic and effective. But "[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government," and thus "[t]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution." *Free Enter. Fund*, 561 U.S. at 499 (alteration in original) (quoting *Bowsher v. Synar*, 478 U.S. 714, 736 (1986)).

II. The CFPB Enjoys "Full Independence" From Congress

The CFPB's independence from the Executive Branch is matched by its independence from the Legislative Branch: the Dodd-Frank Act frees the CFPB from Congress's constitutional power of the purse. 12 U.S.C. § 5497(a). The courts, the Framers, and myriad scholars have warned that Congress's "power of the purse" is key to its constitutional responsibility of overseeing the execution of the laws. The CFPB's conduct—repeatedly defying Congress's authority—validates those warnings.

The CFPB's independence from Congress is not "just extra icing on an unconstitutional cake already frosted." *PHH Corp. v. CFPB*, 839 F.3d 1, 36 n.16 (D.C. Cir. 2016) (quotation omitted). It must be viewed in combination with all of the other features of the agency that distinguish it from independent agencies that have been upheld against constitutional challenges in the past. *See Ass'n of Am. R.R. v. U.S. Dep't of Trans.*, 721 F.3d 666, 673 (D.C. Cir. 2013) ("[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute."). And critically, preserving a self-appropriating agency like the CFPB within the Executive Branch would raise its own significant separation-of-powers problems. *See infra* Part IV.

A. The Dodd-Frank Act Frees The CFPB From Congress's "Power Of The Purse"

The CFPB is not funded by appropriations. Instead, the Dodd-Frank Act gave the CFPB a perpetual, annual entitlement to hundreds of millions of dollars from the Federal Reserve. 12 U.S.C. § 5497(a). The President and Congress included this provision in the Dodd-Frank Act in order to free the CFPB from oversight by future Congresses. S. Rep. No. 111-176, at 163 (2010)). They characterized this as a salutary feature, viewing such funding as "absolutely essential" to ensuring the agency's "independent operations." *Id.* at 163. Independent, that is, from future Congresses. But, as shown below, the Framers would characterize it quite differently.

B. The Constitution's Text, Structure, And History Show That Congress May Not Delegate Its "Power Of The Purse" To Agencies

The Constitution commits "[a]ll legislative powers herein granted" to a "Congress of the United States." U.S. Const. art. I, § 1. "This text permits no delegation of those powers." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001). Accordingly, this Court has long recognized that "Congress may not "delegate ... powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825). The Constitution's text, structure, and history show that no power is more strictly and exclusively legislative than the power to decide how to spend public money.

The Constitution entrusts taxpayers' money to Congress, granting it the power to tax and spend and requiring that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. This means that "not a dollar of [public funds] can be used in the payment of any thing not ... previously sanctioned" by a congressional appropriation. *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1850). Or as Alexander Hamilton put it, "no money can be expended, but for an object, to an extent, and out of a fund, which the laws have prescribed." Alexander Hamilton, *Explanation*, *in* 8 The Works of Alexander Hamilton 122, 128 (Henry Cabot Lodge ed., 1904) (emphasis omitted).

On this point, the Framers were emphatic. James Madison stressed that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, ... for carrying into effect every just and salutary measure," and for "reducing ... all the overgrown prerogatives of the other branches of the government." Federalist No. 58 (Madison).

Alexander Hamilton was all the more blunt: "[T]hat power which holds the purse-strings absolutely, must rule." Letter to James Duane, 1 *Works of Alexander Hamilton* 218-19 (Henry Cabot Lodge, ed., 1904). Thus, while the Executive Branch "holds the sword," Congress "prescribes the rules by which the duties and rights of every citizen are to be regulated" and, to that end, also "commands the purse." Federalist No. 78 (Hamilton).

Given this text, structure, and history, there can be no doubt that the power to appropriate funds is a core legislative power vested exclusively in Congress. It follows that Congress may not divest itself of this power by granting to an executive agency (even one that is nominally designated "independent") a perpetual right to spend public money. "Congress abdicates, rather than exercises, its power of the purse if it creates permanent or other open-ended spending authority that effectively escapes periodic legislative review and limitation." Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1345 (1988).

C. Congress's Power Of The Purse Remains Critical To Ensure Agency Accountability

Two centuries of political experience have proven the Framers right: the power of the purse is a critical tool to restrain and control the Executive Branch. Indeed, it is more important than ever given Congress' broad delegations of regulatory and enforcement authority in recent decades.

Modern Congresses have often recognized the significance of its "power of the purse," not merely as an end in itself, but as a means for ensuring that the other parts of government conduct their work in a manner consistent with the law, the public interest, and the public will. "The appropriations process is the *most potent form* of congressional oversight, particularly with regard to the federal regulatory agencies." S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 *Study on Federal Regulatory Agencies* 42 (1977) (emphasis added).

Many modern legal scholars have highlighted the fact that the power of the purse is the foundation for "most of the oversight that Congress exercises over administration." Arthur W. Macmahon, *Con-*

gressional Oversight of Administration: The Power of the Purse I, 58 Pol. Sci. Q. 161, 173 (1943). This is no less true with respect to the independent regulatory agencies not subject to direct presidential oversight: "The most constant and effective control which Congress can exercise over an independent regulatory commission is financial control.... Viewed broadly, the financial control exercised by Congress over the [independent] commissions is a necessary and desirable form of supervision." Robert E. Cushman, *The Independent Regulatory Commissions* 674-75 (1972).

The Court's recognition of these principles is more than merely theoretical. In *Humphrey's Executor* itself, for example, the Supreme Court justified the FTC's independence from the President on the basis that Congress remained the agency's "master." 295 U.S. at 630; *see also id.* (describing the FTC as "wholly disconnected from the executive department" but "an agency of the legislative ... department[]"). Freed from Congress's power of the purse, the FTC would have been no such agent, and Congress no such master.

The entire point of the Appropriations Clause would be defeated if Congress could simply vest agencies with a perpetual right to fund their own operations. For, as the Baron de Montesquieu recognized, "[i]f the legislative power was to settle the subsidies, not from year to year, but forever, it would run the risk of losing its liberty, because the executive power would be no longer dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference whether it held it of itself or of another." Baron de Montesquieu, The Spirit of the Laws, bk. XI, ch. VII (1748).

III. The CFPB's Conduct Demonstrates The Propensity For Unchecked And Unaccountable Power To Be Abused

The danger that Congress's deliberate stripping away of all traditional checks when it created the CFPB would result in tyrannical abuse of power is not merely theoretical, but rather is now an historical fact. And nothing is more emblematic of that abuse than the manner in which the CFPB pursued enforcement action against mortgage lender PHH Corporation in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018).

PHH attracted the CFPB's ire by referring its customers to insurance companies that had entered into reinsurance contracts with PHH's affiliates, a widespread practice known as captive reinsurance. Acting as investigator, prosecutor, and judge, the CFPB found PHH to be in violation of the Real Estate Settlement Procedures Act (RESPA), which prohibits mortgage companies from accepting "kickbacks" in exchange for referrals. *PHH Corp.*, 839 F.3d at 10–11. The chief problem with the CFPB's novel theory was that RESPA expressly states that mortgage services that are provided for "reasonable market value" are not prohibited, and the Department of Housing and Urban Development had long interpreted that statutory safe harbor to allow captive reinsurance arrangements so long as they are contracted for reasonable market value. *Id.* at 11. Yet CFPB Director Cordray elected not only to break from this venerable agency interpretation—on which an entire industry had long relied—but to do so both without warning and retroactively, imposing more than $109 million in penalties on PHH in the process.

The *en banc* D.C. Circuit unanimously held that the CFPB's retroactive penalties violated due process, and all but three judges voted to reinstate in full the prior panel decision on the subject of the enforcement action against PHH, which had "rejected: the Director's new interpretation of the anti-kickback provision of [RESPA]; his attempt to apply that interpretation retroactively to PHH; his construction of RESPA's limitations provision; and his theory that the CFPB is bound by no limitations period in any administrative enforcement action under any of the laws the agency administers." *PHH Corp.*, 881 F.3d at 150 (Henderson, J., dissenting) (citation omitted). As Judge Henderson put it, "[t]he issues were 'not a close call': the CFPB flunked 'Rule of Law 101' and was called out for 'gamesmanship' and 'absurd' reasoning." *Id.* (alteration omitted).

The historical record further shows that the CFPB's abusive treatment of PHH was not an aberration, but rather is a symptom of the CFPB's unaccountable structure. From its inception, the CFPB has openly declared that it would pursue precisely the kind of "gotcha" enforcement policy that was visited upon PHH, which—rather than announcing the rules of acceptable conduct in advance—informs regulated parties of the agency's views of legality for the first time when it serves them with a complaint. For example, in a January 24, 2012 hearing before a subcommittee of the U.S. House Committee on Oversight and Government Reform, CFPB Director Cordray stated that the Act's use of the term "abusive" is "a little bit of a puzzle because it is a new term." *How Will The CFPB Function Under Richard Cordray*, Hrg. before the House Oversight Committee, Subcomm. on TARP, Financial Servs., and Bailouts of Public and Private Programs, 112th Cong. 69 (Jan. 24, 2012). The Director elaborated that the CFPB has "been looking at it, trying to understand it, and we have determined that that is going to have to be a fact and circumstances issue; it is not something we are likely to be able to define in the abstract. Probably not useful to try to define a term like that in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs." *Id.*

The Treasury Department has similarly noted the CFPB's penchant for adopting new policies retroactively, which it does through an "unusual degree" of "enforcement actions and guidance documents, which the CFPB has consistently issued without opportunity for public comment." Dep't of the Treasury, A Financial System that Creates Economic Opportunities: Banks and Credit Unions 82 (2017).

And the rules that the CFPB *has* seen fit to promulgate have inflicted substantial harm even on those institutions that have not been targeted for enforcement. For example, under the CFPB's rules, *Amicus* State National Bank of Big Spring has been forced (1) to limit its remittance transfers to no more than 99 annually, losing substantial business; (2) to change its mortgage servicing practices in ways that increase lending risks to the Bank and make foreclosure more likely; and (3) to exit the consumer-mortgage lending business entirely. Opening Brief of Private Plaintiffs-Appellants 9–11, Nos. 13-5247, 5248 (D.C. Cir., Feb. 11, 2014). More broadly, the Bank "must incur costs to ensure" compliance with the CFPB's evolving interpretations of the law. *State Nat'l Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015).

Moreover, the CFPB's cavalier flaunting of its unaccountable independence is not limited to enforcement policy:

- The CFPB proudly proclaims in publications that its legal entitlement to hundreds of millions of dollars in "funding outside the congressional appropriations process" ensures its "full independence" from Congress. *Consumer Financial Protection Bureau Strategic Plan: FY 2013-FY 2017* 36 (Apr. 2013), https://files.consumerfinance.gov/f/strategic-plan.pdf.

- At a hearing in 2015, a Congresswoman asked the CFPB's first Director for information concerning who at the agency was responsible for directing renovation projects that cost hundreds of millions of dollars. The Director declined to answer her question; instead, he asked her bluntly, "*why does that matter to you?*" *See* U.S. House of Representatives, Committee on Financial Services, "Committee Pushes for Accountability and Transparency at the CFPB" (Mar. 6, 2015) (emphasis added), https://www.youtube.com/watch?v=jQx_IMHfjDo at 3:33:19.

- Last year, the CFPB's Acting Director told the House Financial Services Committee that the CFPB "[i]s not accountable to you. It's not accountable to the public. It's not accountable to anybody but itself." He further informed the Committee "I believe it would be my statutory right to just sit here and twiddle my thumbs while you all ask questions." Jim Puzzanghera, *CFPB Chief Mick Mulvaney Says He Could Just 'Twiddle My Thumbs' Before Congress To Highlight Agencys Flaws*, Los Angeles Times (April 11, 2018).
- Congressmen and Senators recurrently complain that the CFPB is unresponsive to requests to explain the basis for its more controversial policies. *See, e.g.,* Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investigations *et al*. to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2012/05/DOC.pdf; Letter from Sen. Rob Portman *et al*. to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013), https://ourfinancialsecurity.org/wp-content/uploads/2014/01/Oct-30-Senate-Letter.pdf.

The taxpayers expect Congress to be accountable for the expenditure of public funds. But having yielded its power of the purse to the CFPB, Congress's ability even to secure answers to basic questions has been all but lost.

IV. Severing The CFPB's Tenure Protection Would Raise Constitutional Questions The Court Should Avoid

This Court may not sever Title X's for-cause removal provision, 12 U.S.C. § 5491(c)(3), while preserving the other provisions of Title X, because "it is evident that the [Congress] would not have enacted those provisions ... independently of" § 5491(c)(3)'s tenure protection. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987), *quoted in Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018). A CFPB retrofitted with a presidentially removable Director would violate Congress's express intention to create an "independent bureau" free from presidential control. 12 U.S.C. § 5491(a).[3] And as Judge Henderson noted in dissent, such a "mutant CFPB" would "transfer to the executive branch far-reaching new powers that, before Title X, resided with several non-executive agencies." *PHH Corp.*, 881 F.3d at 163, 162.

Bringing the CFPB's vast and discretionary enforcement apparatus under presidential control would effect a "delegation[] of power to the Executive

[3] Excising § 5491(c)(3) would not erase Congress's "independent bureau" label or its designation of the CFPB as an "independent regulatory agency" under the Paperwork Reduction Act (PRA). 44 U.S.C. § 3502(5). The Court should be especially reluctant to tinker with Congress's deliberate and consistent treatment of the CFPB as an independent agency when the tinkering would make such an incongruous mess of the statutory scheme.

... so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. And Congress would have no recourse to its most important oversight mechanism—the power of the purse—because the CFPB is funded outside the appropriations process through direct payments from the Federal Reserve.

Such an Executive Branch agency could not "function in a *manner* consistent with the intent of Congress." *Id.* at 685. And there is no reason to think Congress would have brought it into existence if given the option. For this reason, *Amici* agree with Petitioner that this Court must invalidate Title X in its entirety—if it reaches the severability question at all. *See* Brief of Petitioner at 41–45.

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But *Amici* write separately to offer an additional reason why this Court must not rewrite the statute to place the CFPB under presidential control while preserving the agency's other structural features. Such an agency would turn a new page in the annals of the administrative state: it would be the first entirely self-funded law-enforcement agency that is subject to the President's direction and control. That novel entity would aggrandize the President at Congress' expense, and it would raise difficult questions about the compatibility of the CFPB's funding mechanism with the Appropriations Clause. *See generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) ("Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting))). The Court should decline to create such a novel and arguably unconstitutional entity by judicial fiat.

A. A Self-Funded Executive Agency Subject to Presidential Control Would Be Novel

"Until the CFPB ... Congress ha[d] utilized self-funding in only a limited number of 'narrowly focused' independent agencies." Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1735 (2013) (citing examples); *see also PHH Corp.*, 881 F.3d at 95 (discussing examples). The Administrative Conference of the United States identifies eleven agencies that are entirely self-funded,[4] but none offers a legislative precedent for turning the CFPB into an Executive Branch agency.

At least eight of the eleven fully self-funded agencies are financial regulatory agencies designed by Congress to possess some or all of the traditional hallmarks of independence that insulate them from presidential control—multi-member boards, partisan balance requirements, and tenure protection. *See* 12 U.S.C. § 241 (Board of Governors of the Federal Reserve System); *id.* § 1812 (Board of Directors of the

[4] Jennifer L. Selin & David E. Lewis, Sourcebook of United States Executive Agencies 110, Tbl. 14 (Oct. 2018), https://www.acus.gov/sites/default/files/documents/ACUS%20Source-book%20of%20Executive%20Agenices%202d%20ed.%20508%20Compliant.pdf.

Federal Deposit Insurance Corporation); *id.* §§ 4511(a), 4512(b)(2) (Federal Housing Finance Authority)[5]; *id.* § 1752 (National Credit Union Administration Board); *id.* § 2242 (Farm Credit Administration Board); 15 U.S.C. § 7211(e)(6) (Public Company Accounting Oversight Board)[6]; 12 U.S.C. § 2277a-2(a) (Farm Credit System Insurance Corporation); *id.* § 1452(a)(2)(A) (Federal Home Loan Mortgage Corporation). The Paperwork Reduction Act lists the first six of these as "independent regulatory agencies," 44 U.S.C. § 3502(5), and they "are considered independent whether or not for-cause removal protection is specified by statute," *PHH Corp.*, 881 F.3d at 92.

A ninth self-funding financial regulatory agency, the Office of the Comptroller of the Currency, is ostensibly a bureau within the Treasury Department, but has several features of independence.[7]

[5] The Federal Housing Finance Authority is a recently-created agency with structural features similar to the CFPB's that was held unconstitutional in *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019).

[6] The Public Company Accounting Oversight Board was established as an independent agency, and remains under the control of an independent agency after this Court severed one layer of its for-cause removal protection. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 495 (2010).

[7] If the President removes the Comptroller of the Currency, he must send the Senate his "reasons" for removing him. 12 U.S.C. § 2; *see PHH Corp.*, 881 F.3d at 91–92 ("Whatever type of reason it requires, the statute without question constrains the presidential removal power."). The Treasury Secretary is forbidden from interfering with the Comptroller's regulatory functions. 12 U.S.C. § 1(b)(1). Moreover, the OCC's self-funding

Only two fully self-funding agencies are clearly under presidential control, but neither possesses any enforcement authority. The board of Federal Prison Industries serves at the pleasure of the President, 18 U.S.C. § 4121, but it performs an exclusively commercial function, *see* 18 U.S.C. § 4122. And the Director of the Bureau of Engraving and Printing serves at the pleasure of the Secretary of the Treasury, 31 U.S.C. § 303, but the Bureau merely designs and prints currency and other government documents on behalf of the Secretary, *id.* § 321(a)(4).

Amici are aware of no presidentially accountable law-enforcement agency that is entirely funded outside of the congressional appropriations process.[8] If

mechanism (assessments on the financial institutions it regulates) is of relatively recent vintage. Until 1947, the Comptroller was funded by congressional appropriations. *See L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211, 1212 (Ct. Cl. 1982), *abrogated by Slattery v. United States*, 635 F.3d 1298 (Fed. Cir. 2011). The Comptroller did not acquire broad self-funding authority until 1991. *Compare* 12 U.S.C. § 482 (1988) (authorizing Comptroller to assess banks to pay only "[t]he expense of [bank] examinations"), *with* Federal Deposit Insurance Corporation Improvement Act of 1991. Pub. L. 102–242, § 114(a), 105 Stat. 2236, 2248 (1991) ("The Comptroller of the Currency may impose and collect assessments, fees, or other charges as necessary or appropriate to carry out the responsibilities of the duties of the Comptroller."). The Paperwork Reduction Act identifies the OCC as an "independent regulatory agency." 44 U.S.C. § 3502(5).

[8] Congress has often authorized agencies that are subject to the regular appropriations process to maintain "revolving funds" that reduce or supplement their appropriated funds. *See* Stith, 97 Yale L.J. at 1366–67; Selin & Lewis, *supra* note 8, at 109, Tbl. 13. Whether funded by receipts from the agencies' own commercial activities, *see, e.g.*, 39 U.S.C. § 2003; user fees

this Court were to sever the CFPB's for-cause removal protection it would create a hybrid never before witnessed in our republic: a self-funded executive agency with enforcement powers.

B. A Self-Funded Executive Agency Would Relinquish To The President Congress's Core Legislative Power Of The Purse

It is for good reason that Congress has never seen fit to create such an agency: It would raise grave constitutional questions.

The Appropriations Clause exists not simply to reserve fiscal power to Congress in the abstract, but to keep it out of the hands of the President. Indeed, "[t]he Appropriations Clause has been described as 'the most important single curb in the Constitution on Presidential power.' " GAO, 1 Principles of Federal Appropriations Law, at 1-4 to 1-5 (3d ed. 2004).

The British experience taught the Founders that legislative control over the Executive's spending was essential to liberty. As James Madison observed, legislative control of the purse was the "powerful instrument by which ... an infant and humble representation of the people"—namely Parliament—

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for the services they provide, *see, e.g.*, 16 U.S.C. § 6806; or fines for violations of the laws they enforce, *see, e.g.*, 12 U.S.C. § 5497(d), such arrangements are a far cry from the CFPB's authority to draw over $600 million every year directly from the Federal Reserve to carry out *all* its law-enforcement activities.

triumphed over the "overgrown prerogatives" of the English King. The Federalist No. 58 (James Madison). As Alexander Hamilton put it, a government that vested the power of the purse and of the sword in a single branch "would destroy that division of powers on which political liberty is founded, and would furnish one body all the means of tyranny." Alexander Hamilton, *Convention of New York*, *in* 2 The Works of Alexander Hamilton 61 (Henry Cabot Lodge ed., 1904).

Early commentators continued to justify Congress's exclusive power of the purse as a limit on the Executive. In his influential commentaries, Justice Joseph Story observed that the Appropriations Clause preserves "in full vigor the constitutional barrier between each department," giving Congress "controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable." Joseph Story, Commentaries on the Constitution of the United States § 531 (1833). Congress's "power to control, and direct appropriations," Story observed, "constitutes a most useful and salutary check ... upon corrupt influence and public peculation." *Id.* § 1342. It is what distinguishes our system of coordinate branches from "arbitrary governments" in which "the prince levies what money he pleases from his subjects, disposes of it, as he thinks proper, and is beyond responsibility or reproof." *Id.* § 1348.

St. George Tucker agreed. He characterized the Appropriations Clause as "a salutary check against any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make." St. George Tucker, Views of the Constitution of the United States 298 (1803) (Clyde N. Wilson ed. 1999).

In light of the dangers posed by presidential control of the purse strings, it is no surprise that Congress has traditionally funded executive departments controlled by the President through a periodic, typically annual, appropriations process. *See, e.g.*, An Act Making Appropriations for the Service of the Present Year, 1 Stat. 95 (1789). This "200 year" tradition should " 'give meaning' to the Constitution." *Mistretta v. United States*, 488 U.S. 361, 401 (1989).

The effects of breaking with this tradition would be especially grave in a context like this one "where the Executive has significant authority to define government policy and has significant discretion in deciding the means of policy implementation." Stith, 97 Yale L.J. at 1383. An opportunistic President could force the CFPB to radically increase spending to advance the President's electoral or personal interests, instead of the agency's law-enforcement mission. *See* John Hudak, Presidential Pork 3 (2014) (discussing "the executive branch's desire to use spending in politically and electorally expedient ways."). Another President, hostile to the CFPB's mission, could unilaterally starve the agency of funds. *See* Fiscal Year 2020 Budget of the U.S. Government 185 (proposing to dramatically lower Federal Reserve transfers to the CFPB). And all of this could happen without any meaningful check from Congress.

It would be an even greater affront to the Constitution for a self-funded executive agency to come about from the remedial action of this Court rather than Congress. In the first place, the constitutionality of a court's statutory revision is doubtful indeed. *See Nat'l Treasury Employees Union*, 513 U.S. at 478–79 ("[O]ur obligation to avoid judicial legislation also persuades us to reject" a suggested remedy that would require the Court to "tamper with the text of the statute, a practice we strive to avoid."). Moreover, if this Court rewrote the statute in a manner that aggrandized the President by handing him Congress's power of the purse, the President could veto any attempt by Congress to restore its power of the purse to its rightful place.

Finally, whatever claim Congress may have to be able to delegate its *own* power of the purse to the Executive, surely it lies beyond the *Judiciary's* authority to grant to the Executive what the Constitution vests in Congress—especially where Congress has expressed a clear intention to keep the agency's power out of the President's hands.

C. The Court Must Avoid a Judicial Rewrite That Would Raise These Constitutional Questions

In selecting among various potential remedies for a constitutional violation, the Court should avoid any remedy that would raise constitutional questions. *See Nat'l Treasury Employees Union*, 513 U.S. at 478–79 (rejecting a broad remedy that would have reached parties not before the court because of "[o]ur policy of avoiding unnecessary adjudication of constitutional issues"). It is an accepted canon of statutory construction that a court should "shun an interpretation that raises serious constitutional doubts," if it can do so without "rewrit[ing]" the statute. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). By the same token, the Court should shun a remedy that would resolve one constitutional defect only to raise a novel constitutional question, especially where the remedy involves putting the Court in the unsuitable role of a remedial legislature.

Severing 12 U.S.C. § 5491(c)(3) from Title X of the Dodd-Frank Act would have just that effect: It would raise difficult constitutional questions about an executive agency's exercise of the power of the purse, placing this Court's imprimatur on a novel government structure never adopted by Congress and in stark tension with the text, structure, and history of the Constitution. Such an action could have the unintended effect of encouraging Congress to create new self-funded Executive Branch agencies, empowering an ever more powerful presidency and shirking the legislative accountability that comes with the appropriations process. Such a decision would also raise serious questions about the judiciary's exercise of the legislative power to repeal or "sever" unconstitutional line items.

This case is not the occasion to answer such questions. *See Goldwater v. Carter*, 444 U.S. 996, 997 (1979) (Powell, J., concurring in judgment) ("The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse."). Instead of attempting to restructure the CFPB by judicial fiat, the Court should let the political branches fix the agency through the ordinary legislative process that the Constitution prescribes. Members of Congress have introduced several bills that would restructure the CFPB in a constitutional manner. *See* C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted" A Constitutional Recipe for the CFPB*, 24 Geo. Mason L. Rev. 1213, 1231 (2017) (discussing bills to reform or abolish the CFPB). Severing the offending statutory provision here would only discourage the political branches from resolving the agency's constitutional defects as they see fit.

CONCLUSION

This Court should hold that the CFPB violates the separation of powers, and it should leave for Congress the task of rewriting Title X of the Dodd-Frank Act.

Respectfully submitted,

SAM KAZMAN
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St. NW, 7th Floor
Washington, DC 20005
(202) 331-1010

GREGORY JACOB
(Counsel of Record)
gjacob@omm.com
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

C. BOYDEN GRAY
ADAM R.F. GUSTAFSON
JAMES R. CONDE
T. ELLIOT GAISER
BOYDEN GRAY & ASSOCIATES
801 17th St., NW
Suite 350
Washington, DC 20006
(202) 955-0620
gustafson@boydengrayassociates.com