No. 19-7

# In the Supreme Court of the United States

SEILA LAW LLC,

*Petitioner*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

*Respondent.*

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

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER


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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### INTEREST OF THE *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.[1]

The Chamber's members include numerous consumer financial services providers—and other businesses—subject to the regulatory and enforcement authority of the Consumer Financial Protection Bureau. For that reason, the Chamber has a strong interest in ensuring that the Bureau is structured in a manner that complies with the Constitution.

Moreover, the Chamber's members have a strong interest in obtaining an authoritative resolution of that question now. The current uncertainty regarding the legality of the Bureau's structure means that

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus* to file this brief. All parties consented to the filing of this brief.

every act that the Bureau takes—whether promulgating rules, issuing subpoenas, or imposing sanctions—is potentially invalid.

But certainty regarding the validity of regulatory actions is important to regulated companies, which often must invest large sums to comply with regulatory standards. If a regulation is held invalid years later based on the illegality of the Bureau's structure, a business could be required to expend large additional amounts to comply with the pre-Bureau standards. The Chamber accordingly has a strong interest in this case.

## SUMMARY OF ARGUMENT

Whether the Consumer Financial Protection Bureau's structure complies with the Constitution is an extraordinarily important unsettled question that this Court should resolve now.

To begin with, the issue is being raised frequently in the lower courts, because it provides grounds for invalidating every Bureau action, from demands for information to imposition of enforcement sanctions to promulgation of regulations. And there is a particular incentive for raising the issue in light of the United States' position that the Bureau's structure is unlawful.

The *en banc* D.C. Circuit addressed the issue comprehensively in a majority opinion and six separate concurring and dissenting options. See *PHH Corp.* v. *Consumer Fin. Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). Lower courts faced with the issue are not engaging in new analysis, but rather are simply agreeing with one or another of the *PHH* opinions; and this Court therefore is unlikely to gain any insight by leaving the issue to the lower courts. That

will produce only a waste of judicial resources as numerous lower court judges are obliged to analyze and decide the question.

Review also is warranted now to eliminate uncertainty regarding the status of Bureau actions, particularly the agency's regulations.

The lawfulness of agency regulations may be challenged by multiple parties for a long period of time, either directly in an action for judicial review or in the context of an enforcement proceeding. For that reason, the legal status of every Bureau regulation is uncertain until the constitutionality of the agency's structure is resolved definitively by this Court.

The Bureau has exercised vast authority over the past six years, dramatically reshaping markets for entire categories of consumer financial products and services. Its regulations reach all corners of the consumer financial services market, covering companies large and small. And more Bureau regulations have been proposed.

If those regulations are set aside sometime in the future because the Bureau's structure is unlawful, the regulatory landscape could change dramatically—forcing companies to incur significant additional expenditures and to revamp their operations to comply with the pre-existing regime or new rules put in place by a lawfully-constituted Bureau. The Court should resolve the question now, before those burdens are multiplied further by the addition of still more potentially-invalid regulations.

On the merits, the Bureau's structure plainly violates the Constitution. It has no parallel among federal agencies: the Bureau's broad regulatory authority is concentrated in a single Director—the "head of the

Bureau" (12 U.S.C. § 5491(b)(1))—who single-handedly decides whether to bring enforcement actions, adjudicates administrative enforcement actions, and issues regulations (*id.* §§ 5512(b)(1), 5563(a)), and has exclusive authority to appoint her Deputy and all other Bureau staff (*id.* §§ 5491(a)(5)(A), 5493(a)(1)(A)). The Director also has authority to spend nearly $700 million dollars each year without seeking or obtaining the approval of Congress and the President. 12 U.S.C. § 5497(a)(1), (a)(2); see also CFPB, *Fiscal Year 2019: Annual performance plan and report, and budget overview* 7 (Feb. 2019), https://bit.ly/2YlY0Iv).

In exercising her vast power over the consumer finance industry, the Director is not accountable to the President or to any other elected official. She may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

Most other regulatory agencies with similar authority are headed by bipartisan, multi-member bodies. Where a comparable department or agency is headed by a single individual, that person almost always serves at the pleasure of the President. And most components of the federal government (including Congress and the Office of the President) must obtain spending authority through annual appropriations laws.

To be sure, there are exceptions to each of these generalizations. But no other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause

and who also can spend hundreds of millions of dollars without obtaining an annual appropriation.

That unprecedented structure violates the Constitution. It conflicts fundamentally with the self-governance principle on which the Constitution rests, and the absence of any historical precedent in our history for a federal agency with the Bureau's structure exercising broad regulatory power provides strong additional evidence of its unconstitutionality.

## ARGUMENT

### I. The Court Should Grant Review Now To Eliminate Uncertainty Regarding The Constitutionality Of The Bureau's Actions.

Whether the Bureau's current structure comports with the Constitution is a critically important question with extremely broad consequences—and the uncertainty regarding the answer is producing a number of adverse effects, which will multiply the longer the uncertainty persists. The Court should therefore grant review now.

*First*, if the Bureau's structure is unlawful, then acts taken by the Bureau must be vacated and remanded for a new decision by a constitutionally-constituted Bureau. See *Bowsher* v. *Synar*, 478 U.S. 714, 736 n.10 (1986) (noting that an officer whose appointment violates separation of powers "may not exercise the powers conferred upon him"). For that reason, any party affected by a Bureau action—for example, a subpoena or other demand for information, enforcement action, or regulation—has a strong incentive to raise this argument in court. That is especially true because a failure to challenge the Bureau's structure might make it impossible for the party to obtain relief if this Court or another court holds the structure unlawful.

And the incentive to raise the issue is particularly strong because the United States has taken the position that the Bureau's structure is unconstitutional. Br. for United States as *Amicus Curiae* 5-19, *PHH* (D.C. Cir. Mar. 17, 2017).

It therefore is not surprising that the constitutional issue is being raised in many cases, forcing numerous lower courts to devote resources to deciding it. See, e.g., *Consumer Fin. Protection Bureau* v. *RD Legal Funding, LLC*, No. 18-2743 (2d Cir.); *Consumer Fin. Protection Bureau* v. *All-Am. Check Cashing, Inc.*, No. 18-60302 (5th Cir.); *Consumer Fin. Protection Bureau* v. *CashCall, Inc.*, No. 18-55407 (9th Cir.); *Consumer Fin. Protection Bureau* v. *Ocwen Fin. Corp.*, No. 9 :17-cv-80495-KAM (S.D. Fla.); *Consumer Fin. Protection Bureau* v. *Think Fin., LLC*, No. 4 :17-cv-00127-BMM (D. Mont.); *Consumer Fin. Protection Bureau* v. *Navient Corp.*, No. 3 :17-cv-00101-RDM (M.D. Pa.); *Cmty. Fin. Servs. Ass'n of Am., Ltd.* v. *Consumer Fin. Protection Bureau*, No. 1:18-cv-00295-LY (W.D. Tex.).

There is no reason to believe that additional decisions by lower courts will aid this Court in its ultimate resolution of the question. As the court below recognized, the arguments on both sides of the question were "thoroughly canvassed" in the various opinions of the en banc D.C. Circuit in *PHH* (Pet. App. 2a)—so much so that the court below thought it sufficient to give only a summary explanation of its decision to agree with the *PHH* majority.

Other lower courts are not likely to address the issue in more detail than the various *PHH* opinions, regardless of how they decide the case. But as long as this Court declines to take up the issue, scarce re-

sources (of the courts, the taxpayers, and private parties) will be consumed by the need to litigate and decide this important question across myriad federal district and circuit courts.

*Second*, definitive resolution of this constitutional question is necessary and appropriate now to eliminate uncertainty regarding the status of a growing number of Bureau actions, particularly the agency's regulations. Businesses face significant—and growing—operational and economic burdens in the event the issue is not resolved now and the Bureau's structure is held unlawful years from now.

The legality of a particular Bureau subpoena or enforcement action can be resolved conclusively when a final judgment is entered in a lawsuit challenging the agency action. But the lawfulness of agency regulations may be challenged by multiple parties for a long period of time (up to six years, see 28 U.S.C. § 2401(a)), either in an action for pre-enforcement judicial review or in the context of an enforcement proceeding. For that reason, the legal status of every Bureau regulation is uncertain until the constitutionality of the agency's structure is addressed by this Court.

Businesses, of course, are obligated to comply with regulations that are in force. That compliance often involves large expenditures as well as changes in business systems. And the more regulations that the Bureau issues, the greater those expenditures and other burdens.

But if those regulations are set aside sometime in the future because the Bureau's structure is unlawful, the regulatory landscape could change dramatically—

forcing companies to incur significant additional expenditures and to revamp their operations to comply with the pre-existing regime or new rules put in place by a lawfully-constituted Bureau.[2]

Certainty about Bureau regulations is particularly important given the expansive scope of its jurisdiction. As one judge has put it, the Bureau's vast authority makes it "an agency like no other." *PHH*, 881 F.3d at 137 (Henderson, J., dissenting).

In addition to administering the Consumer Financial Protection Act, the Bureau has "all but exclusive power" to issue regulations under *eighteen* different preexisting federal statutes, "cover[ing] most consumer credit products, including mortgages, student loans and credit cards"—including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act,

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[2] The Bureau might try to defend the validity of its regulations by invoking the *de facto* officer doctrine—which "confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient" (*Ryder v. United States*, 515 U.S. 177, 180 (1995))—in the event its structure were held invalid. But, as this Court explained in *Ryder*, it is doubtful that the *de facto* officer doctrine would preclude relief for violations of "basic constitutional protections designed in part for the benefit of litigants" such as the Appointments Clause or separation-of-powers principles. *Id.* at 182 (internal quotation marks omitted). Absent a change in this Court's jurisprudence regarding that issue (questions regarding the *de facto* officer doctrine are presented in the cases now pending before the Court involving the Financial Oversight and Management Board for Puerto Rico (see Nos. 18-1334, 18-1475, 18-1496, 18-1514, 18-1521)), the *de facto* officer doctrine is unlikely to provide grounds for upholding these regulations in a case in which the issue is properly preserved and presented.

the Real Estate Settlement Procedures Act, and the Truth in Lending Act. *PHH*, 881 F.3d at 145 (Henderson, J., dissenting). The Bureau's authority reaches into virtually every corner of the consumer finance industry and to nearly every firm in that industry.

The Bureau has used this authority to remake the consumer financial services regulatory landscape over the past six years. It has not merely adjusted long-established regulations in exercising its authority, but also has created entire new regulatory frameworks that reach into areas previously not subject to federal rules.

For example, no regulator had substantive rulemaking authority under the Fair Debt Collection Practices Act prior to the Bureau's creation. See Debt Collection Practices (Regulation F), 84 Fed. Reg. 23,274, 23,276 (May 21, 2019). The Bureau now has proposed the first rules governing that statute—addressing both numerous interpretive disputes that have arisen in cases under the FDCPA and questions about how the statute applies in light of the massive technological and social changes in the 42 years since its enactment. See generally *ibid.*

Likewise, the Bureau has established a new regulatory framework for international remittances—a market that saw consumers transfer over 325 million remittances, worth more than $175 billion, in 2017. *See* Bureau of Consumer Financial Protection, *Remittance Rule Assessment Report* 4 (April 2019). See also Request for Information Regarding Potential Regulatory Changes to the Remittance Rule, 84 Fed. Reg. 17,971, 17,971-17,972 (April 29, 2019) (describing prior Bureau rulemaking).

And the Bureau issued first-of-their-kind regulations governing prepaid cards that addressed products ranging from general-purpose cards to digital wallets. See Rules Concerning Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 83 Fed. Reg. 6364 (Feb. 13, 2018).

The Bureau itself has recognized that compliance with such regulations imposes significant costs and time—including substantial investment in new or updated systems, employee retraining, and testing. For example, the Bureau delayed the compliance date for its rules governing mortgage disclosures, see 2013 Integrated Mortgage Disclosures Rule Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z) and Amendments; Delay of Effective Date, 80 Fed. Reg. 43,911 (July 24, 2014), reflecting the enormous practical challenges faced by businesses as they work to comply with the Bureau's new regulatory systems.

The Bureau has acknowledged, moreover, that its rules may even force businesses out of their chosen fields. *See, e.g.*, Small Business Advisory Review Panel for Potential Rulemakings for Payday, Vehicle Title, and Similar Loans, *Outline of Proposals Under Consideration and Alternatives Considered* 45 (Mar. 26, 2015) (explaining that in response to then-forthcoming rules, "[s]ome [payday lending] stores might diversify their product offerings, including offering other forms of covered loans, while others might close. The proposals under consideration could, therefore, lead to substantial consolidation in the short-term payday and vehicle title lending market.").

Nor is the Bureau's rulemaking complete. The Bureau is currently considering significant amendments

that it has proposed to its payday lending rule. *See* Payday, Vehicle Title, and Certain High-Cost Installment Loans, 84 Fed. Reg. 4252 (Feb. 14, 2019). And the Bureau has indicated its intention to pursue a highly consequential rulemaking governing the collection of small business lending data. *See* Diane Thompson, *Spring 2019 rulemaking agenda* (May 22, 2019), https://www.consumerfinance.gov/about-us/blog/spring-2019-rulemaking-agenda/.

The question whether the Bureau is unconstitutionally structured is thus one of exceptional importance to the business community, and to the American economy more generally. As long as that question remains unresolved, there will be a cloud over every action that the Bureau takes, including significant rulemakings with substantial compliance costs for regulated businesses.

That legal uncertainty is exactly the opposite of what Congress sought to achieve when it created the Bureau. The Bureau was created to "set and enforce clear rules of the road across the financial marketplace." See Statement by the President on Financial Regulatory Reform (Mar. 22, 2010), perma.cc/Q2EC-MC2P. But the Bureau's ability to provide clear, reliable rules is currently impaired, because businesses cannot be assured that the rules currently in place will remain in place. This Court's review of the Bureau's constitutionality is needed to eliminate the existing uncertainty.

## II. The Bureau's Structure Violates The Constitution.

The Bureau's unprecedented structure violates the Constitution in two separate, but related, ways.

*First*, the complete insulation of the Bureau from accountability to citizens' elected representatives (the President and Congress) for the Director's entire five-year term is inconsistent with the Constitution's fundamental principle of self-governance.

*Second*, the grant of broad power to a single Director unaccountable to the President violates basic separation-of-powers principles.

This Court has repeatedly looked to history in construing the Constitution's structural protections, and these conclusions are therefore bolstered by the complete absence of any historical precedent for a federal agency resembling the Bureau.

### A. The Bureau Is Not Accountable To The People's Elected Representatives.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). It embodies "that honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government." The Federalist No. 39 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed39.asp; see also, *e.g.*, *Providence Bank* v. *Billings*, 29 U.S. (4 Pet.) 514, 548 (1830) ("The power of self government is a power absolute and inherent in the people.").

For that reason, all "legislative Powers" of the federal government are "vested in a Congress of the United States," consisting of the people's elected Representatives and Senators. U.S. Const. art. I, § 1. And "[t]he executive Power" is "vested in a President of the

United States" (art. II, § 1), who is "chosen by the entire Nation" (*Free Enterprise Fund*, 561 U.S. at 499). Conferring legislative and executive authority directly, and solely, on the representatives chosen by the people is essential for accountability to the people—and therefore to the self-government on which the constitutional structure rests.

That is because "[t]he diffusion of power carries with it a diffusion of accountability," which "subverts * * * the public's ability to pass judgment on" the efforts of those whom they elect. *Free Enterprise Fund*, 561 U.S. at 497-98; *see also id.* at 498 ("[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall'" (quoting The Federalist No. 70, p. 476 (Alexander Hamilton) (J. Cooke ed. 1961)).

The Bureau's structure was expressly intended to achieve the opposite result: unprecedented insulation of the Director's actions from control by Congress or the President. That insulation violates the Constitution.

To begin with, the Director's authority is extremely broad, as described above. It extends to any person or business who engages in any of ten specified activities that are common throughout the economy, as well as service providers to such businesses.[3]

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[3] See, *e.g.*, 12 U.S.C. §§ 5481(15) & (26), 5514, 5531, 5536. The statute's exemptions (*id.* § 5517) are quite narrow.

The Director's exercise of this broad authority is not subject to any of the mechanisms for accountability to the people's elected representatives that apply to other agencies.

Most pertinently, the President may not remove the Director at will to ensure the implementation of his policy priorities. As discussed below (at pages 16-18), that is a critical element of the constitutional design.

In addition, Congress may not use its "power of the purse" to oversee the Director's exercise of her authority. The Framers recognized the importance of the appropriations power to ensuring accountability to the people: "[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," because those representatives "cannot only refuse, but they alone can propose, the supplies requisite for the support of government." The Federalist No. 58 (James Madison) (Lillian Goldman Law Library, 2008), http://avalon.law.yale.edu/18th_century/fed58.asp.

Moreover, the statutory features that contribute to the Bureau's lack of accountability go beyond the Director's removal protection and the agency's budgetary independence. Any penalties and fines collected by the Bureau are deposited into a separate account and, if not used to compensate affected consumers, may be expended by the Director—without any approval by the President or Congress—"for the purpose of consumer education and financial literacy programs." 12 U.S.C. § 5497(d)(2). The Director is specifically empowered to provide "legislative recommendations, or testimony, or comments on legislation" to Congress without prior review by "any officer or

agency of the United States." *Id.* § 5492(c)(4). And the Director is authorized to appoint her own Deputy, who serves as Acting Director in the absence of a Director. *Id.* § 5491(a)(5).

The combination of *all* of these provisions creates an extraordinarily attenuated "chain of command" that uniquely limits the people's ability to exercise their right to self-government with respect to matters within the Bureau's jurisdiction. That unprecedented disconnection of federal executive and legislative power from all of the Constitution's mechanisms for ensuring accountability, and therefore self-government, should not be permitted to stand.[4]

### B. The Bureau's Structure Violates Fundamental Separation of Powers Principles.

The Constitution charges the President with "tak[ing] Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. In order to exercise the entire executive power of the federal government, the Presi-

[4] Defenders of the Bureau's structure point to appearances of the Director at congressional hearings, the Bureau's responses to congressional requests for information, the statutory requirement of reports to the Office of Management and Budget, the Bureau's inability to exceed its budget cap without congressional and presidential approval, and the Financial Stability Oversight Council's limited ability to set aside certain Bureau regulations as ways in which Congress and the President are able to exercise oversight with respect to the Bureau's operations. See Appellee Br. 35-37, *All-Am. Check Cashing* (5th Cir. Sept. 10, 2018). But none of those mechanisms enables Congress or the President to exercise control over the Bureau's decisions, and therefore none comes close to qualifying as effective substitutes for the protections set forth in the Constitution.

dent necessarily must act with "the assistance of subordinates." *Myers* v. *United States*, 272 U.S. 52, 117 (1926).

But, because "[t]he buck stops with the President" under Article II (*Free Enterprise Fund*, 561 U.S. at 493), the President remains responsible for supervising and controlling the actions of his subordinates. *See Dep't of Transp.* v. *Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (explaining that Article II "ensures that those who exercise the power of the United States are accountable to the President, who himself is accountable to the people").

And in order effectively to control his subordinates, the President must be able to remove them. See, *e.g.*, *Bowsher*, 478 U.S. at 726 ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (internal quotation marks omitted); *Myers*, 272 U.S. at 119 ("[T]hose in charge of and responsible for administering functions of government, who select their executive subordinates, need in meeting their responsibility to have the power to remove those whom they appoint.").

To be sure, in *Humphrey's Executor* v. *United States*, 295 U.S. 602, 632 (1935), the Court held that Congress could create administrative agencies whose officers were protected from presidential removal except for cause. But the Court based this exception to the general rule of unfettered presidential control on the understanding that such officers would "be nonpartisan," "act with entire impartiality," exercise "neither political nor executive" duties, and apply "the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* at 624. The

Court reasoned that such an expert body was not truly executive and thus could be insulated from presidential control. *Id.* at 628.

The extent to which the rationale of *Humphrey's Executor* extends to the labyrinth of administrative agencies established since 1935 is far from clear. But it surely does not reach the Bureau, whose Director bears no resemblance to the multi-member Federal Trade Commission before the Court in *Humphrey's Executor*—or to any other federal regulatory agency.

That is because every agency that regulates the private sector and is headed by officials whom the President may remove only for cause has a multi-member commission structure.[5] Because the terms of such commission members are staggered, a President inevitably will have the ability to influence the commission's deliberations by appointing one or more members. And, of course, many of these statutes establishing these agencies expressly require bipartisan membership. Those features provide at least some accountability to the President.

In addition, as then-Judge Kavanaugh explained in detail in his *PHH* dissent, a multi-member commission structure means that members have the ability

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[5] Apart from the Bureau, the Federal Housing Finance Agency ("FHFA"), the Office of Special Counsel ("OSC"), and the Social Security Administration ("SSA") also have single heads who are removable only for cause. But these agencies do not enforce laws against private persons—FHFA, for example, oversees government-sponsored entities, two of which are in conservatorship with the FHFA as the conservator. 12 U.S.C. § 4511(b); FHFA, *History of Fannie Mae & Freddie Mac Conservatorships*, goo.gl/XzeAYr; see also *PHH*, 881 F.3d at 174-76 (Kavanaugh, J., dissenting).

to check each other and thus guard against the arbitrary exercise of power. *PHH*, 881 F.3d at 183-84 (Kavanaugh, J. dissenting). The Bureau's single-Director structure thus finds no support in *Humphrey's Executor*. Insulating an officer as powerful as the Director from presidential control violates the separation of powers.

### C. Longstanding Historical Practice Confirms That The Bureau Is Unconstitutional.

This Court has emphasized the importance of "longstanding practice" in explicating the Constitution's structural protections. *NLRB* v. *Noel Canning*, 573 U.S. 513, 574 (2014); *see PHH*, 881 F.3d at 179-81 (Kavanaugh, J., dissenting) (collecting quotations). Thus, "[p]erhaps the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent." *Free Enterprise Fund*, 561 U.S. at 505 (internal quotation marks omitted).

The lack of *any* historical precedent for an agency with a structure like the Bureau's—set forth in detail in the *PHH* dissent (881 F.3d at 173-79)—is therefore weighty evidence that it violates the Constitution.

* * *

Proponents of the Bureau's unprecedented structure have asserted that the Bureau was designed intentionally to "insulat[e]" the Bureau from any "political influence." Brief of Americans for Financial Reform, *et al*., as *Amici Curiae* in Support of Respondent at 12, *PHH* (No. 15-1177). That is what the statute achieves: "when measured in terms of unilateral power, the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President. Indeed, within his jurisdiction,

the Director of the CFPB is even more powerful than the President. The Director's view of consumer protection law and policy prevails over all others. In essence, the Director of the CFPB is the President of Consumer Finance." *PPH*, 881 F.3d at 172 (Kavanaugh, J., dissenting).

But that purpose and effect is wholly antithetical to the Constitution's design. And it is the precise argument rejected by this Court in *Free Enterprise Fund*. There, the Public Company Accounting Oversight Board was defended on the ground that its mission was "said to demand both 'technical competence' and 'apolitical expertise,' and its powers . . . exercised by 'technical experts.'" 561 U.S. at 498. But the Court asked, "where, in all this, is the role for oversight by an elected President?" *Id.* at 499. "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Ibid.*

Here, where the insulation from accountability to either of the elected Branches is much greater, and the reach of the Director's power far broader, this Court should reach the same conclusion: the Bureau's structure violates the Constitution.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.


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