

No. 19-7

In The
Supreme Court of the United States

—◆—
SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF *AMICUS CURIAE*
LANDMARK LEGAL FOUNDATION
IN SUPPORT OF PETITIONER**

—◆—
RICHARD P. HUTCHISON
LANDMARK LEGAL
FOUNDATION
3100 Broadway
Suite 1210
Kansas City, MO 64111
816-931-5559
816-931-1115 (Facsimile)

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL
FOUNDATION
19415 Deerfield Ave.
Suite 312
Leesburg, VA 20176
703-554-6100
703-554-6119 (Facsimile)
matt@landmarklegal.org

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. Independent agencies that engage in legislative, executive, and judicial functions like the CFPB violate the separation of powers.....	4
II. The CFPB’s structure and funding exceed the <i>Humphrey’s Executor</i> standard and violate the separation of powers	9
A. The CFPB’s structure improperly concentrates power in a single director with broad regulatory power but limited accountability to the Executive Branch and the people.....	10
B. Congress further enhanced the CFPB’s independence by allowing it to draw funding from one of the least transparent and accountable elements of the federal government: the Federal Reserve System	16
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
CASES	
SUPREME COURT	
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986).....	4
<i>Buckley v. Valeo</i> , 424 U.S. 1 (1976)	4
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010).....	3, 6, 12, 18
<i>Freytag v. Comm’r of Internal Revenue</i> , 501 U.S. 868 (1991)	5
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	<i>passim</i>
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988)	10, 11, 12
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	2, 10, 11
<i>PHH Corp. v. Consumer Fin. Prot. Bureau</i> , 881 F.3d 75 (D.C. Cir. 2018)	13
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	10
<i>Youngstown Sheet & Tube Co. v. Sawyer</i> , 343 U.S. 579 (1952)	4
OTHER CASES	
<i>English v. Trump</i> , 279 F. Supp. 3d 307 (D.D.C. 2018), <i>appeal dismissed</i> , No. 18-5007, 2018 U.S. App. LEXIS 19856, 2018 WL 3526296 (D.C. Cir. July 13, 2018)	15

TABLE OF AUTHORITIES – Continued

	Page
CONSTITUTION	
U.S. CONST.:	
Art. I, § 9, cl. 7	3
Art. II, § 1, cl. 1	10
Art. II, § 2	10, 18
Art. II, § 3	10
FEDERAL STATUTES & REGULATIONS	
5 U.S.C. §§ 3345-3349d	15
12 U.S.C. § 241	18
12 U.S.C. § 242	18
12 U.S.C. § 5491	2
12 U.S.C. § 5491(a)	16
12 U.S.C. § 5491(b)(5)	13, 15
12 U.S.C. § 5491(c)	13
12 U.S.C. § 5491(c)(3)	3, 9
12 U.S.C. § 5492(a)(10)	7
12 U.S.C. § 5492(c)(2)	17
12 U.S.C. § 5497	3
12 U.S.C. § 5497(a)	9, 16
12 U.S.C. § 5497(a)(2)(C)	9, 17
12 U.S.C. § 5497(a)(4)(E)	19
12 U.S.C. § 5512	7

TABLE OF AUTHORITIES – Continued

	Page
12 U.S.C. § 5563	7
12 U.S.C. § 5564	12
12 U.S.C. § 5581	7
12 U.S.C. § 5581(a)(2)(A)	8
15 U.S.C. § 7211(e)(6).....	12
15 U.S.C. § 7217(d)(3)	12
Act of Congress of July 12, 1876, 19 Stat. 80, ch. 179, sec. 6.....	11
Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).....	2
 OTHER AUTHORITIES	
1 Annals of Cong. 463 (1789).....	10
The Federalist No. 51	4
The Federalist No. 70	14
The Federalist No. 78	20
Board of Governors of the Federal Reserve Sys- tem, <i>Purposes and Functions</i> , September 28, 2018, https://www.federalreserve.gov/aboutthe- fed/pf.htm	17
Note: <i>Independence, Congressional Weakness, and the Importance of Appointment: The Im- pact of Combining Budgetary Autonomy with Removal Protection</i> , 125 Harv. L. Rev. 1822 (May 2012).....	17

TABLE OF AUTHORITIES – Continued

	Page
<i>The Constitution of the United States of America: Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 28, 2012</i> (Kenneth R. Thomas & Larry M. Eig eds., Centennial ed. 2013)	13
1 The Records of the Federal Convention of 1787 (Max Farrand ed., 1911)	14
Tara Siegel Bernard, <i>Dueling Appointments Lead to Clash at Consumer Protection Bureau</i> , N.Y. Times, Nov. 24, 2017	14
Marshall J. Breger & Gary J. Edles, <i>Established by Practice: The Theory and Operation of Independent Federal Agencies</i> , 52 Admin. L. Rev. 1111 (2000)	5
Peter Conti-Brown, <i>Is the Federal Reserve Constitutional?</i> , Liberty Law Blog, September 1, 2013, https://www.lawliberty.org/liberty-forum/is-the-federal-reserve-constitutional/	19
Peter Conti-Brown, <i>The Case for the Federal Reserve Banks' Constitutionality is Uneasy Indeed, part II: Appointing and Removing the Reserve Bank Presidents</i> , 36 Yale J. on Reg.: Notice & Comment (May 18, 2016), http://yalejreg.com/nc/the-case-for-the-federal-reserve-banks-constitutionality-is-uneasy-indeed-part-ii-appointing-and-rem/	18
Daniel A. Crane, <i>Debunking Humphrey's Executor</i> , 83 Geo. Wash. L. Rev. 1835 (2015)	8

TABLE OF AUTHORITIES – Continued

	Page
Gary Lawson, <i>The Rise and Rise of the Administrative State</i> , 107 Harv. L. Rev. 1231 (April 1994)	7
James Madison, <i>Notes of Debates in the Federal Convention of 1787</i> , Ohio University Press (1985)	10
Richard H. Pildes, <i>Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act</i> , 5 N.Y.U. J.L. & Bus. 485 (2009)	5
Steven A. Ramirez, <i>Depoliticizing Financial Regulation</i> , 41 Wm. & Mary L. Rev. 503 (2000)	16
Katie Rogers, <i>Consumer Financial Protection Bureau Has 2 Bosses Claiming Control</i> , N.Y. Times, Nov. 27, 2017	15
Michael Uhlmann, <i>A Note on Administrative Agencies</i> , in <i>The Heritage Guide to the Constitution</i> (David F. Forte & Matthew Spalding, eds., 2d ed. 2014)	5
Danny Vinik, <i>Trump’s unusual chance to stack the Fed</i> , Politico.com, Oct. 31, 2017, https://www.politico.com/agenda/story/2017/10/31/trump-unusual-chance-stack-federal-reserve-000567	18
Woodrow Wilson, <i>The Study of Administration</i> , 2 Pol. Sci. Q. 197 (1887)	6
David Wright, <i>Watchdog agency architect Barney Frank disagrees with Mulvaney appointment</i> , CNN Wire, Nov. 27, 2017	15

**STATEMENT OF INTEREST
OF *AMICUS CURIAE*¹**

Landmark Legal Foundation (“Landmark”) is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner. For reasons stated herein, Landmark respectfully urges the Court to rule that the Consumer Financial Protection Bureau’s structure and funding violate the Constitution’s separation of powers and grant the relief sought by the Petitioner.



SUMMARY OF ARGUMENT

The separation of powers in our constitutional system ensures political accountability of the government to the people and protects their liberties. The Consumer Financial Protection Bureau (“CFPB”) violates the separation of powers because Congress took extraordinary steps, beyond those sanctioned by *Humphrey’s*

¹ The parties have provided consent for the filing of Landmark’s *Amicus Curiae* brief in this case. 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. No person other than *Amicus Curiae*, its members or its counsel made a monetary contribution to its preparation or submission.

Executor v. United States, 295 U.S. 602 (1935), to shield it from presidential control and congressional oversight.

The CFPB was created under Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) as an independent bureau within the Federal Reserve System. 12 U.S.C. § 5491. Independent bureaus or agencies exist as a subcategory of administrative agencies. Administrative agencies are already constitutionally suspect for blurring the boundaries of the separation of powers. They often engage in legislative, executive and judicial functions simultaneously. Independent agencies like the CFPB are even more egregious. They are designed by Congress to be independent of the political influence of the Executive Branch by restricting the President's removal power of their principal officers. This power was long considered a settled question after the Decision of 1789.

Yet, only nine years after the Supreme Court upheld the President's Article II power to remove Executive Branch officers in *Myers v. United States*, 272 U.S. 52 (1926), the Court created an exception. It upheld the protection from removal for the Federal Trade Commission's ("FTC") multi-member board in *Humphrey's Executor*, citing the board's nature as a body of apolitical experts engaging in quasi-legislative and quasi-judicial, as opposed to executive, functions. Thus, the Court compounded the error of allowing the FTC to operate in the domain of more than one branch of

government by restricting the President's removal authority as well.

The CFPB is an attempt to make an independent agency even further removed from the President's control. Unlike other independent agencies, such as the FTC, the executive control of the CFPB is not diffused in a multi-member board. Instead, power is vested in a single person, the Director, who may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). A single person has sweeping regulatory power over the consumer finance industry. Congress protected the CFPB from the normal budgetary process by setting it to run almost autonomously. Congress shielded it from the most potent congressional check on the Executive: the "power of the purse," contained in the Appropriations Clause. Art. I, § 9, cl. 7. The CFPB sets its own budget and draws funds from the Federal Reserve, one of the few entities granted financial independence from Congress. 12 U.S.C. § 5497. The Director does not answer to the President or the Federal Reserve, however. To make matters worse for the President, the Federal Reserve System itself has a structure of multi-level protection of leadership from removal that is constitutionally dubious after this Court's decision in *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). Thus, by its structure and funding, the CFPB is one of the "dangerous innovations in the government" that Alexander Hamilton believed an independent judiciary must prevent. The Court should not extend the holding of *Humphrey's Executor* any

further. Instead, the Court should hold the CFPB unconstitutional.

◆

ARGUMENT

I. Independent agencies that engage in legislative, executive, and judicial functions like the CFPB violate the separation of powers.

The separation of powers among three branches of government was among the chief virtues of the Constitution, according to James Madison and Alexander Hamilton. They addressed it repeatedly in *The Federalist Papers*, drawing from John Locke and Baron de Montesquieu. The framers were “practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.” *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). This separation was a “self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.” *Id.* at 122. Madison considered it “essential to the preservation of liberty.” *The Federalist No. 51*, in Vol. 2, *The Debate on the Constitution*, 163, 165 (The Library of America, 1993). He explained that “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other.” *Id.* The purpose of divided government was to “[diffuse] power the better to secure liberty.” *Bowsher v. Synar*, 478 U.S. 714, 721 (1986), quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

Congress betrayed this vision with the creation of the “fourth branch” of government. Administrative agencies, once limited in number and scope, proliferated and now assume broad powers and expansive budgets. Independent agencies, a subset of administrative agencies, are “wholly accountable neither to the President nor to Congress.” Michael Uhlmann, *A Note on Administrative Agencies, in The Heritage Guide to the Constitution*, 278 (David F. Forte & Matthew Spalding, eds., 2d ed. 2014). Although independent agencies like the CFPB differ in form and function, “Independence is a legal term of art in public law, referring to agencies headed by officials that the President may not remove without cause.” Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1138 (2000). They are “specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President’s accountability to the people.” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (internal quotation marks and alteration omitted).

The expansion of the administrative state and independent agencies in particular stems from *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). See, e.g., Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 *N.Y.U. J.L. & Bus.* 485, 520 (2009). The FTC was conceived with the Progressive Era vision of apolitical, technical bureaucrats holding

the reins of power: government administration as science. See, e.g., Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 197, 210 (1887). President Franklin Roosevelt wanted to remove a holdover Republican FTC commissioner due to policy disagreements. While ruling on the President's Article II removal power of the commissioner, the *Humphrey's* Court analyzed the character and structure of the FTC. The Commission, in its view, was a body of experts, both nonpartisan and impartial. 295 U.S. 602, at 624. Furthermore, "Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* Thus, despite explicit acknowledgment of the FTC's multiple-branch powers, the Court upheld a restriction on the President's removal power of FTC Commissioners to "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620. Similar cases in the future, the Court wrote, would depend upon "the character of the office," suggesting a balancing test would be appropriate. *Id.* at 631.

Humphrey's Executor helped create the modern administrative state. "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). This administrative state inherently violates the separation of powers. As Professor Gary Lawson wrote:

The United States Congress today effectively exercises general legislative powers,

in contravention of the constitutional principle of limited powers. Moreover, Congress frequently delegates that general legislative authority to administrative agencies, in contravention of Article I. Furthermore, those agencies are not always subject to the direct control of the President, in contravention of Article II. In addition, those agencies sometimes exercise the judicial power, in contravention of Article III. Finally, those agencies typically concentrate legislative, executive, and judicial functions in the same institution, in simultaneous contravention of Articles I, II, and III.

Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1233 (April 1994).

The CFPB, an independent bureau formed in the wake of the financial crisis of 2008, shares these constitutional defects common to administrative agencies. It has rulemaking power, examination authority and is authorized to conduct hearings and adjudication proceedings. 12 U.S.C. § 5512; 12 U.S.C. § 5581; 12 U.S.C. § 5563. It has power to “establish the general policies of the [CFPB] with respect to all executive and administrative functions.” 12 U.S.C. § 5492(a)(10). It was granted authority to administer eighteen consumer finance statutes and assumed consumer financial protection functions from the “Board of Governors (and any Federal reserve bank, as the context requires), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the

Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development.” 12 U.S.C. § 5581(a)(2)(A). In short, the CFPB exercises legislative, executive and judicial powers. It violates the separation of powers as envisioned by the framers.

Furthermore, the practical experience of the FTC does not come close to Justice Sutherland’s four-prong justification for an independent agency in *Humphrey’s Executor*: a body of nonpartisan experts engaging in neither political nor executive duties, but quasi-judicial and quasi-legislative ones. Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 Geo. Wash. L. Rev. 1835 (2015). Professor Crane argues that rather than being apolitical, the FTC “has become the creature of Congress,” subject to political pressure. *Id.* at 1856. In terms of expertise, it does not surpass the Justice Department’s Antitrust Division. *Id.* at 1858-59. Rather than quasi-legislative and quasi-judicial, the FTC’s character “has increasingly become that of a conventional law enforcement department.” *Id.* at 1863. The CFPB does not meet Justice Sutherland’s template as well. It was given explicitly executive functions, not just quasi-judicial and quasi-legislative ones. It is far from apolitical. Its control by the President’s budget director became a political dispute only a few years after its inception.

Administrative agencies with multi-branch functions do not hold up to scrutiny under separation-of-powers principles. Furthermore, the justification for independent agencies in *Humphrey’s Executor* does not

hold up in light of the agencies' practical experience. There is little to support the holding in *Humphrey's Executor* other than *stare decisis*. The Court should overrule *Humphrey's Executor* and strike down the CFPB.

II. The CFPB's structure and funding exceed the *Humphrey's Executor* standard and violate the separation of powers.

If the Court declines to overturn *Humphrey's Executor*, the Court should not extend its holding to cover the separation-of-powers violations inherent to the CFPB's structure and funding. Congress made extraordinary effort to shield the CFPB from accountability to the Legislature and the Executive, well beyond the FTC's removal restriction. To prevent influence from the Executive Branch, executive control of the CFPB is vested in a single person, the Director. The Director may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). In addition, Congress granted the CFPB independence from the recurring budgetary process, its "power of the purse" under Article I. 12 U.S.C. § 5497(a)(2)(C). The CFPB sets its own budget and draws its funds from another self-financed entity – the Federal Reserve – providing another layer of protection. 12 U.S.C. § 5497(a). These factors ultimately shield the CFPB from accountability from the American people, in contravention of Madison's ideal of well-constructed government: "An independence of the three great departments of each other, as far as possible, and the responsibility of all to the will of the

community.” James Madison, *Notes of Debates in the Federal Convention of 1787*, 313, Ohio University Press (1985). The CFPB’s structure and funding does not survive the holistic analytical approach found in *Humphrey’s Executor* and its progeny.

A. The CFPB’s structure improperly concentrates power in a single director with broad regulatory power but limited accountability to the Executive Branch and the people.

The Constitution provides: “The executive Power shall be vested in a President of the United States.” Art. II, § 1, cl. 1. “[T]his does not mean some of the executive power, but *all* of the executive power.” *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). The President “‘shall take Care that the Laws be faithfully executed,’ Art. II, § 3, personally and through officers whom he appoints (save for such inferior officers as Congress may authorize to be appointed by the ‘Courts of Law’ or by ‘the Heads of Departments’ who are themselves Presidential appointees), Art. II, § 2.” *Printz v. United States*, 521 U.S. 898, 922 (1997). Yet, other than impeachment, the power to remove officers was not explicitly addressed in the Constitution.

In the first Congress, James Madison stated “if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.” 1 Annals of Cong. 463 (1789). This longstanding view of the executive power was affirmed in *Myers v. United States*, 272 U.S. 52

(1926). Congress’s attempt to restrict the President’s removal power of postmasters with a requirement of senatorial advice and consent was struck down.²

In *Humphrey’s Executor*, less than ten years later, a restriction on the removal of a commissioner of the five-member Federal Trade Commission was upheld due to the quasi-legislative and quasi-judicial nature of the commission. Commissioners were removable for inefficiency, neglect of duty, or malfeasance in office. The Court distinguished the FTC commissioner from the purely executive employee at issue in *Myers*. *Id.* at 632. It further stated: “whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause *will depend upon the character of the office.*” *Id.* at 631. (Emphasis added.) This analysis of the position and statutes at issue continued in later removal power cases.

In *Morrison v. Olson*, a broad “for cause” restriction was upheld where an official, an independent counsel, had “limited jurisdiction and tenure” and lacked “policymaking or significant administrative authority.” *Id.* at 691. The Court also noted that where officials are subject to the President’s removal power, courts must examine whether the statutory framework

² “Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed or suspended according to law.” Act of Congress of July 12, 1876, 19 Stat. 80, 81, ch. 179, sec. 6.

“taken as a whole . . . violates the separation of powers by reducing the President’s ability to control” the use of executive power. *Morrison v. Olson*, 487 U.S. 654, 685 (1988).

In *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010), the Court analyzed the Public Company Accounting Oversight Board (“PCAOB” or “Board”), an entity created under the Sarbanes-Oxley Act of 2002. Board members could be removed only “for good cause shown” by the Securities and Exchange Commission (“SEC”). 15 U.S.C. §§ 7211(e)(6), 7217(d)(3). Officers of the SEC in turn could only be removed by the President under the *Humphrey’s Executor* standard for “inefficiency, neglect of duty, or malfeasance in office.” The Court held that “dual for-cause limitations on the removal of Board members contravene the Constitution’s separation of powers.” 561 U.S. 477, 492. Writing for the majority, Justice Roberts considered the Board’s “novel structure” and the possibility that if allowed to stand, the “dispersion of responsibility” could be multiplied across government. *Id.* at 496, 497.

Taking the statute as a whole, there are novel aspects to the CFPB’s structure and funding, such as its single directorship, its ability to draw funds from the Federal Reserve, and its broad regulatory scope. There are other features of independence. The CFPB has independent litigation authority. 12 U.S.C. § 5564. There are multiple protections to the tenure of the CFPB Director: The Director has a five-year term; the Director may stay in office after the term is

over until a successor has been appointed and qualified; and the Director may not be removed except “for inefficiency, neglect of duty, or malfeasance in office.” 12 U.S.C. § 5491(c). The Director thus can outlast a sitting President and, depending on partisan control of the Senate, could theoretically stay in the post indefinitely. The Director can name his own Deputy Director who serves as Acting Director in the “absence or unavailability of the Director.” 12 U.S.C. § 5491(b)(5). In addition, the Director has significant power to achieve the Bureau’s broad mandate. In then-Judge Kavanaugh’s words in his dissenting opinion, “The Director enjoys significantly more unilateral power than any single member of any other independent agency. . . . Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 171 (D.C. Cir. 2018). If allowed to stand, Congress could create more independent agencies led by single directors with czar-like powers, protected from Presidential authority and control.

The urge to create financial regulators free from political influence – a series of independent Executive Branch components – is at odds with the Constitution’s design of a unitary executive. Not only was executive power vested in one branch in Art. II, it was granted to a single person. This was a point of contention at the Constitutional Convention, where James Wilson was the chief proponent for a “single magistrate” as opposed to multiple administrators. *The Constitution of*

the United States of America: Analysis and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 28, 2012, 455-56 (Kenneth R. Thomas & Larry M. Eig eds., Centennial ed. 2013). Wilson argued that a single executive would give the “most energy dispatch and responsibility to the office.”¹ The Records of the Federal Convention of 1787, 65 (Max Farrand ed., 1911). Wilson further argued that “tranquility” was one of its virtues. Three equal executives would bring “uncontroled, continued, & violent animosities” which would interrupt the public administration. *Id.* at 96. Alexander Hamilton echoed these sentiments in Federalist No. 70, and noted how multiple magistrates would likely lead to animosity and dissension.

The early experience of the CFPB confirms Wilson’s prediction that a lack of “tranquility” would result from multiple administrators in the Executive Branch. The CFPB’s structure and leadership have been debated in Congress since the Bureau’s inception. Richard Cordray, appointed by President Obama, served as the CFPB’s first director. On the Friday after Thanksgiving in 2017, Director Cordray announced that he would resign his position, effective at midnight. As one of his last official acts, he reassigned then-chief of staff Leandra English to the position of Deputy Director. According to *The New York Times*, Director Cordray’s move was considered an attempt to delay President Trump from appointing his own director. Tara Siegel Bernard, *Dueling Appointments Lead to Clash at Consumer Protection Bureau*, *N.Y. Times*,

Nov. 24, 2017. By virtue of her new position, Deputy Director English would become Acting Director in the “absence or unavailability of the Director.” 12 U.S.C. § 5491(b)(5). President Trump named his budget director, Mick Mulvaney, as Acting Director of the CFPB to maintain control of the Bureau under the Federal Vacancies Reform Act of 1998. 5 U.S.C. §§ 3345-3349d. Both Ms. English and Mr. Mulvaney wrote to the CFPB staff, claiming to be the Bureau’s Acting Director. Katie Rogers, *Consumer Financial Protection Bureau Has 2 Bosses Claiming Control*, N.Y. Times, Nov. 27, 2017.

Ms. English filed suit, seeking a temporary restraining order and declaratory judgment to prevent Mulvaney from becoming Acting Director but was unsuccessful. *English v. Trump*, 279 F. Supp. 3d 307 (D.D.C. 2018), *appeal dismissed*, No. 18-5007, 2018 U.S. App. LEXIS 19856, 2018 WL 3526296 (D.C. Cir. July 13, 2018). Nonetheless, in support of Ms. English, former Rep. Barney Frank, who co-authored Dodd-Frank, told CNN that legislators deliberately crafted the law to be exempt from the Federal Vacancies Act. “We deliberately tried to give it some protection from the normal process.” David Wright, *Watchdog agency architect Barney Frank disagrees with Mulvaney appointment*, CNN Wire, Nov. 27, 2017. Furthermore, former Rep. Frank said that the legislators added the deputy director provision because if something happened to the Director, like being “hit by a car” during the five-year term, “You don’t want the autonomy to end.” *Id.*

The CFPB's short history is further proof that the efforts to make it independent of the political branches were extraordinary. The Director apparently attempted to name his own replacement, in spite of the President's wishes. The disruption caused by the CFPB's leadership dispute was the type the framers predicted would result by a multi-headed Executive Branch. The CFPB's structure is well beyond the standards of *Humphrey's Executor*.

B. Congress further enhanced the CFPB's independence by allowing it to draw funding from one of the least transparent and accountable elements of the federal government: the Federal Reserve System.

The CFPB is an "independent bureau" within the Federal Reserve System. 12 U.S.C. § 5491(a). As one observer has noted, "It is difficult to conceive of an administrative agency with more power and more political independence than the Fed." Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 Wm. & Mary L. Rev. 503, 523 (2000). Congress granted the CFPB the ability to designate up to 12 percent of the Federal Reserve's operating expenses for itself. 12 U.S.C. § 5497(a). This was an apparent attempt to remove the CFPB from the political accountability and scrutiny that comes with the normal appropriations process. This self-funding provision puts the CFPB in "a short list composed of narrowly focused agencies, including many agencies that only regulate financial institutions or make technical financial decisions" such as the Farm

Credit Administration, the Federal Deposit Insurance Corporation, the Federal Home Loan Mortgage Corporation, and the Federal Housing Finance Agency. Note: *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1823 (May 2012). Although many of these agencies are financial regulators, the CFPB has a much broader mandate, making the CFPB example more concerning.

Congress further provided that the funds derived from the Federal Reserve System are not subject to review by the House or Senate Committees on Appropriations. 12 U.S.C. § 5497(a)(2)(C). The CFPB has structural protections from the Federal Reserve as well. The Federal Reserve cannot intervene in any matter or proceeding before the Director; appoint, direct, or remove any officer or employee of the Bureau; or merge or consolidate the Bureau, or any of its functions or responsibilities with any division or office of the Board of Governors or the Federal Reserve banks. 12 U.S.C. § 5492(c)(2).

The Federal Reserve System is itself extremely insulated from executive and legislative accountability, adding to the Matryoshka doll nature of the CFPB. The Federal Reserve System has three major components: the Board of Governors, the Federal Reserve Banks and the Federal Open Market Committee (“FOMC”). See Board of Governors of the Federal Reserve System, *Purposes and Functions*, September 28, 2018, <https://www.federalreserve.gov/aboutthefed/pf.htm>. The seven members of the Board of Governors, appointed by the

President and confirmed by the Senate, each serve a remarkable 14-year term.³ 12 U.S.C. § 241. The Chairman and Vice Chairman, chosen from among the sitting governors, are appointed by the President and confirmed by the Senate and serve four-year terms. 12 U.S.C. § 242. Twelve Federal Reserve Banks regulate privately owned banks around the country. The Governors and Presidents of the Federal Reserve Banks make up the FOMC, the policy arm of the system, although only five presidents have voting rights. Thus, the Federal Reserve System has public and private elements.

With these private elements, it is important to note that the Federal Reserve has *Free Enterprise Fund* issues of its own. The process for appointing Reserve Bank presidents may not meet the Article II, § 2, clause 2 requirements of the appointment of “Officers of the United States.” The process for removing Reserve Bank presidents may not meet the constitutional requirements for the removal of Officers. Peter Conti-Brown, *The Case for the Federal Reserve Banks’ Constitutionality is Uneasy Indeed, part II: Appointing and Removing the Reserve Bank Presidents*, 36 Yale J. on Reg.: Notice & Comment (May 18, 2016), <http://yalejreg.com/nc/the-case-for-the-federal-reserve-banks-constitutionality-is-uneasy-indeed-part-ii-appointing-and-rem/>. “Stating the holding in *Free Enterprise*

³ Although most governors do not serve their full terms, their lengthy terms were designed to prevent political interference over monetary policy. Danny Vinik, *Trump’s unusual chance to stack the Fed*, Politico.com, Oct. 31, 2017, <https://www.politico.com/agenda/story/2017/10/31/trump-unusual-chance-stack-federal-reserve-000567>.

Fund reveals the constitutional defect of the FOMC. The President cannot remove members of the FOMC without reaching through two explicit for-cause removal restrictions, on top of a third layer of at-will removability.” Peter Conti-Brown, *Is the Federal Reserve Constitutional?*, Liberty Law Blog, September 1, 2013, <https://www.lawliberty.org/liberty-forum/is-the-federal-reserve-constitutional/>.

Finally, the President has limited ability to conduct financial oversight of the Director. The Director has no obligation to get approval from the Office of Management and Budget (“OMB”) and the OMB has no jurisdiction or oversight over the CFPB. 12 U.S.C. § 5497(a)(4)(E). Congress increased the CFPB’s independence from external control and accountability in its funding as well as its single director structure and removal protection. Thus, the CFPB enjoys many more layers of protection than the FTC of 1935. The “nature of the office” of the CFPB Director is beyond the scope of *Humphrey’s Executor*.

◆

CONCLUSION

In its quest to regulate consumer finance in the wake of a financial crisis, Congress has created a uniquely egregious organization, largely free from Executive Branch control or congressional financial oversight. Alexander Hamilton wrote that an independent judiciary is necessary to protect the Constitution and individual liberty from ill-conceived ideas.

This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information and more deliberate reflection, have a tendency in the meantime to occasion *dangerous innovations in the government*, and serious oppressions of the minor party in the community.

Federalist No. 78. (Emphasis added.) Given its structure and funding, the CFPB is a dangerous innovation in the government that violates the Constitution's separation of powers. For the foregoing reasons, the Court should grant Petitioner's request for relief.

RICHARD P. HUTCHISON
 LANDMARK LEGAL
 FOUNDATION
 3100 Broadway
 Suite 1210
 Kansas City, MO 64111
 816-931-5559
 816-931-1115 (Facsimile)

Respectfully submitted,

MATTHEW C. FORYS
Counsel of Record
 MICHAEL J. O'NEILL
 LANDMARK LEGAL
 FOUNDATION
 19415 Deerfield Ave.
 Suite 312
 Leesburg, VA 20176
 703-554-6100
 703-554-6119 (Facsimile)
 matt@landmarklegal.org

Attorneys for Amicus Curiae