

EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017**No. 15-1177**

United States Court of Appeals for the D.C. Circuit

PHH CORPORATION, PHH MORTGAGE CORPORATION, PHH HOME LOANS,
LLC, ATRIUM INSURANCE CORPORATION, AND ATRIUM REINSURANCE
CORPORATION,

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

**BRIEF ON REHEARING EN BANC OF THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF AMERICA AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

On Petition For Review Of An Order Of The Consumer Financial
Protection Bureau

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**CERTIFICATE OF PARTIES, RULINGS,
AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(A)(1)**

A. Parties and Amici. All parties and intervenors appearing before the Consumer Financial Protection Bureau (“the Bureau”) and in this Court appear in the en banc Brief for Petitioners. We believe that at least one additional *amicus* intends to file a brief in support of Petitioners at the en banc stage.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the en banc Brief for Petitioners.

C. Related Cases. An accurate statement regarding related cases appears in the en banc Brief for Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and D.C. Circuit Rule 26.1, *amicus curiae* the Chamber of Commerce of the United States of America hereby submits the following corporate disclosure statement:

The Chamber of Commerce of the United States of America (“Chamber”) states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

**STATEMENT REGARDING CONSENT TO FILE AND
SEPARATE BRIEFING**

Petitioners consent, and respondent does not object, to the filing of this brief.[†] The Chamber filed its notice of its intent to participate at the en banc stage as *amicus curiae* on March 6, 2017.

Pursuant to Circuit Rule 29(d), the Chamber certifies that a separate brief is necessary to provide the perspective of the businesses that the Chamber represents, including companies subject to regulation under one of the numerous statutes enforced by the Bureau, regarding the unconstitutionality of the Bureau's structure and the impact it has on the businesses regulated by the Bureau.

[†] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

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GLOSSARY

Bureau	Consumer Financial Protection Bureau
CFPA	Consumer Financial Protection Act (Dodd-Frank Wall Street Reform and Consumer Protection Act, tit. X, Pub. L. No. 111-203, 124 Stat. 1376 (2010))
FHFA	Federal Housing Finance Agency
Panel Opinion	<i>PHH Corp. v. Consumer Fin. Protection Bureau</i> , 839 F.3d 1 (D.C. Cir. 2016) (cites are to 839 F.3d page numbers)
OSC	U.S. Office of Special Counsel
RESPA	Real Estate Settlement Procedures Act
SSA	Social Security Administration

STATUTES AND REGULATIONS

Pertinent materials are contained in Petitioners' addendum.

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.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau is unique:

- its 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 his Deputy and all other Bureau staff (*id.* §§ 5491(a)(5)(A), 5493(a)(1)(A));¹

- the Director may be removed by the President only for “inefficiency, neglect of duty, or malfeasance in office” (12 U.S.C. § 5491(c)(3)); and
- the Director may spend nearly \$650 million dollars each year without seeking or obtaining the approval of Congress and the President. (The Bureau is funded by periodic transfers of money from the Federal Reserve in amounts “determined by the Director to be reasonably necessary” to fund the Bureau’s operations, limited by a statutory cap that in fiscal year 2017 is \$646.2 million. 12 U.S.C. § 5497(a)(1), (a)(2); *see also* Consumer Fin. Protection Bureau, *The CFPB strategic plan, budget and performance plan and report 9* (Feb. 2016), <https://goo.gl/Rk5zue>.)

¹ The Bureau is located within the Federal Reserve as an organizational matter, but the Federal Reserve Board is expressly precluded from reviewing any action of the Director. *See* 12 U.S.C. § 5492(c).

Most other independent regulatory agencies are headed by bipartisan, multi-member bodies²; when a 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.

There are a few exceptions to each of these generalizations—for example, other government entities funded outside the appropriations process. But no other federal agency with the power to regulate private parties—let alone the broad regulatory, prosecutorial, and adjudicatory

² See, e.g., 7 U.S.C. § 2(a)(2)(A) (Commodity Futures Trading Commission composed of five Commissioners, with no more than three from any political party); 12 U.S.C. § 241 (Federal Reserve System headed by seven-member Board of Governors); *id.* § 1752a(b)(1) (National Credit Union Administration headed by three-member bipartisan board); *id.* § 1812(a)(1) (Federal Deposit Insurance Corporation headed by five-member board); 15 U.S.C. § 41 (Federal Trade Commission composed of five bipartisan Commissioners); *id.* § 78d(a) (Securities and Exchange Commission composed of five bipartisan Commissioners); *id.* § 2053(a) (Consumer Product Safety Commission composed of five Commissioners); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission composed of five bipartisan Commissioners); 47 U.S.C. § 154(a) (Federal Communications Commission composed of five bipartisan Commissioners). See generally *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 17–18 (D.C. Cir. 2016) (“Panel Opinion”).

authority exercised by the Bureau's Director—is headed by a single individual who may be removed only for cause and who can spend funds 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 and regulatory power provides strong additional evidence of its unconstitutionality.

This Court can and should decide this constitutional issue now. The more time before the issue is resolved conclusively, the greater the disruption that could result if the Bureau's structure is unconstitutional.

Moreover, the concentration of the Bureau's regulatory power in a single, unaccountable officer is doing real harm to businesses *now*, by allowing the Bureau to stretch the limits on its authority and to engage in practices that differ significantly from those of other federal regulatory agencies. This very case provides a stark example of that phenomenon: the Director imposed penalties based on the retroactive application of a new interpretation of the Real Estate Settlement

Procedures Act that reversed prior federal agency interpretations, violating the basic due process principle that a regulated person or entity is entitled to fair notice of the conduct prohibited by a statute or regulation.

This Court should accordingly reach the constitutional question, hold that the Bureau's structure is unconstitutional, and—because it is clear that Congress would *not* have chosen to enact the same structure if the Director served at the pleasure of the President—leave to Congress the task of revising the Bureau's structure to comport with the Constitution.³

ARGUMENT

I. The CFPB'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

³ The Director's order must be vacated for the additional reason that it violated fundamental "fair notice" principles: the Director reversed the government's longstanding position on the legality of captive reinsurance agreements under the Real Estate Settlement Procedures Act ("RESPA") and then imposed retroactive sanctions against petitioners based on that new interpretation of the law. With respect to this point, we rest on our *amicus* brief before the panel, and the analysis in the panel opinion.

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. The Supreme 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. Lack of Accountability.

“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. *Id.* at 498; *see also id.* (“[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. 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.⁴ And the Director may initiate enforcement actions; adjudicate enforcement actions brought administratively; and issue regulations—not just under the Dodd-Frank Act but also under eighteen other federal laws.

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:

- The President may not remove the Director at will, to ensure the implementation of his policy priorities.
- Congress may not use its “power of the purse” to circumscribe the Director's exercise of his authority. (The Framers recognized the importance of the appropriations

⁴ See, e.g., 12 U.S.C. §§ 5481(15) & (26), 5514, 5531, 5536. The statute's exemptions (*see id.* § 5517) are quite narrow.

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.

The goal of insulating the Director, and the Bureau, from accountability to the President and Congress, and therefore to the people, is apparent in a number of less sweeping provisions of the statute. 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).⁵ The Director is

⁵ This provision not only provides the Bureau with another source of funding exempt from the accountability provided by the appropriations process; it also gives the Bureau a disturbing self-

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 his 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

interest in pursuing remedies in enforcement actions—harkening back to a discredited era in law enforcement. “[N]ot too long ago, public enforcers often were compensated in ways that were tied directly to their enforcement efforts. Tax collectors retained some of the taxes they collected, customs agents profited directly from the duties they collected, and prosecutors were paid per conviction.” But “[m]ost U.S. jurisdictions abandoned such payment schemes by the turn of the twentieth century, due in large part to concerns that bounty-based public enforcement would result in the same kind of overzealousness—a failure to exercise appropriate prosecutorial discretion—that we have come to expect from private enforcement. This historical episode, while largely forgotten, served to cement the tradition of fixed salaries for public employees, ‘mak[ing] the absence of the profit motive a defining feature of government.’” Margaret H. Lemos & Max Minzer, *For-Profit Public Enforcement*, 127 Harv. L. Rev. 853, 862 (2014).

mechanisms for ensuring accountability, and therefore self-government, is unconstitutional.

B. Violation Of Separation-Of-Powers.

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 President 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 Enter. 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 v. Synar*, 478 U.S. 714, 726 (1986) (“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); *see also, e.g., 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 Supreme 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.⁶ 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 the panel explained in detail (Panel Opinion 25-28), a multi-member commission structure means that members have

⁶ Apart from the Bureau, the Federal Housing Finance Agency, 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, *FHFA as Conservator of Fannie Mae and Freddie Mac*, goo.gl/XzeAYr; see also Panel Opinion at 19-20.

the ability to check each other and thus guard against the arbitrary exercise of power:

[N]o single commissioner or board member possesses authority to do much of anything. Before the agency can infringe your liberty in some way – for example, initiating an enforcement action against you or issuing a rule that affects your liberty or property – a majority of commissioners must agree. That in turn makes it harder for the agency to infringe your liberty.

Panel Opinion at 26.

C. Historical Practice.

The Supreme Court has repeatedly emphasized the importance of “longstanding practice” in explicating the Constitution’s structural protections. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) (internal quotation marks omitted); see Panel Opinion at 22-23 (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.

The lack of *any* historical precedent for an agency with a structure like the Bureau’s—set forth in detail in the panel’s opinion (at 17-21)—is therefore telling proof that it violates the Constitution. Congress may not vest such sweeping executive power in the hands of a single person

who is not accountable to the President, Congress, or the American people.

* * * *

Proponents of the Bureau's unprecedented structure recognize that it was designed intentionally to insulate the Bureau from "political influence" and that "the practical impact of the panel's decision will be to greatly increase political influence on the CFPB's day-to-day decisionmaking." Brief of Americans for Financial Reform, *et al.*, as *Amici Curiae* in Support of Rehearing En Banc at 6, 7. Although their rhetoric refers to campaign contributions and "industry influence" (*id.* at 4-5), that cannot disguise the basic argument: the greatest possible protection against political accountability was the goal in constructing the Bureau.

But that purpose is antithetical to the Constitution's design. And it is the precise argument rejected by the Supreme Court in *Free Enterprise Fund*, where 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. 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.” *Id.*

Here, where the insulation from political accountability 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.

II. The Bureau’s Unconstitutional Structure Has Harmful Consequences For The Businesses It Regulates.

“[S]tructural protections against abuse of power,” the Supreme Court has explained, are “critical to preserving liberty.” *Bowsher*, 478 U.S. at 730. The Bureau’s short history already has confirmed the truth of this principle—its unconstitutional structure has led to unfair, unjustified actions that have inflicted significant harm on the many businesses in the large sectors of the economy within the Bureau’s jurisdiction.

A. The Bureau Ignores Or Avoids Statutory Limits On Its Jurisdiction.

Although the Bureau's statutory authority is extremely broad, it has made a practice of circumventing the few limits that Congress imposed.

For example, the Consumer Financial Protection Act ("CFPA") expressly forbids the Bureau from exercising *any* authority over auto dealers (12 U.S.C. § 5519(a)), but the Bureau has sought to end run this restriction by bringing enforcement actions under the Equal Credit Opportunity Act against indirect auto lenders (*i.e.*, banks or other lenders who purchase installment sales agreements from dealers who have extended financing to car buyers) on the theory that the dealers with whom they do business have engaged in discrimination.

As of January 2017, the Bureau had extracted some \$200 million in penalties in these actions without ever having to defend in court its disparate-impact legal theory—which has been heavily criticized elsewhere. *See* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part III: The CFPB's Vitiating Legal Case Against Auto-Lenders* at 3 (Jan. 18, 2017). *See also* U.S. House of Reps., Comm. on Fin. Servs., *Unsafe at any Bureaucracy, Part I: CFPB Junk Science*

and Indirect Auto Lending at 46 (Nov. 14, 2015) (explaining that “internal [CFPB] documents reveal that the Bureau’s objective from the beginning has been to eliminate dealer discretion and dealer reserve”). This roundabout means of imposing the Bureau’s dictates on the auto dealer market flouts the clear limitation in the CFPB.

Similarly, the Bureau has used its Civil Investigative Demand power (12 U.S.C. § 5562(c)) to probe college accreditation bodies. These organizations are outside the Bureau’s jurisdiction because they do not offer or provide consumer financial products or services. *See* Br. of Chamber of Commerce of the U.S. as *Amicus Curiae* 4–16, *Consumer Fin. Protection Bureau v. Accrediting Council for Indep. Colleges & Schs.*, No. 16–5174 (D.C. Cir. Dec. 7, 2016).

And the Bureau has asserted jurisdiction over businesses that purchase structured settlement or annuity payments. Although such businesses offer no consumer financial product or service, the Bureau has relied on the theory that such businesses may provide “financial advisory services” subject to Bureau regulation by possibly representing to consumers that a sale of their structured payments is “in their best interest.” Decision and Order 3, *In re J.G. Wentworth, LLC*, 2015-MISC-

J.G. Wentworth, LLC-001 (Feb. 11, 2016). (This order is being contested in court. *See Consumer Fin. Protection Bureau v. J.G. Wentworth, LLC*, No. 16-cv-02773 (E.D. Pa. June 7, 2016) (petition to enforce civil investigative demand)).

Next, although the CFPA expressly denies the Bureau the authority to enforce the data security requirements of the Graham-Leach-Bliley Act (*see* 12 U.S.C. § 5481(12)(J)), the Bureau nonetheless has claimed the authority to fine companies for allegedly failing to protect customer data. *See* Consent Order at 1, *In re Dwolla, Inc.*, 2016-CFPB-0007 (Mar. 2, 2016). To justify this end run around the specific limitations on its authority under the governing Graham-Leach-Bliley Act, the Bureau has relied on its catch-all authority under the CFPA to prosecute unfair, deceptive or abusive acts or practices. *Id.*

Finally, the Bureau has pursued vicarious liability theories that ignore corporate forms, and the standards for disregarding them, that are long recognized under state law. For example, at least one court has rejected the Bureau's "common enterprise" theory, which would hold a company liable for the acts of its affiliates—*see Pennsylvania v. Think Fin., Inc.*, 2016 WL 183289, at *26 (E.D. Pa. Jan. 14, 2016) (holding that

the “common enterprise theory” is unavailable under the CFPA)—yet the Bureau continues to advance that theory in enforcement actions. Not only is there no statutory language supporting the theory, but the statute reflects Congress’ decision to take another approach to the liability of affiliated companies. *See* 12 U.S.C. § 5481(6)(B) (subjecting affiliated companies to direct liability when they serve as service providers).

These aggressive assertions of authority harm regulated businesses and the entire economy. The courts, which have the power to invalidate Bureau actions when the agency exceeds its jurisdiction, stand as a check on the Bureau’s overreach. But even where the courts rebuff overreach by the Bureau, companies are put to unnecessary effort and expense in defending themselves—and the Bureau may continue to employ the legal theories that courts invalidate.

B. The Bureau Deviates Significantly From The Norms Followed By Other Federal Regulatory Agencies.

The Director’s unchecked power also has resulted in deviations from the consistent approaches of other federal regulatory agencies—in the form of unfair, arbitrary actions.

The Bureau, unlike other regulators, publishes unverified consumer complaint data on its public website. *See* Disclosure of Consumer Complaint Narrative Data, 80 Fed. Reg. 15572 (Mar. 24, 2015). And it does so while recognizing that—in the Director’s words—the Bureau is giving a “government megaphone” to information that the Bureau knows is misleading, subject to manipulation, and often plainly wrong. *See* Disclosure of Consumer Complaint Narrative Data, 79 Fed. Reg. 42765, 42767 (July 23, 2014) (acknowledging that Bureau does not prevent inaccuracy of complaint data); Prepared Remarks of CFPB Director Richard Cordray at the Consumer Response Field Hearing (July 16, 2014) (describing “government megaphone” provided by the complaint database), <https://goo.gl/ry8GCc>.

The Federal Trade Commission, by contrast, limits complaint database access to law enforcement agencies. *See* Federal Trade Comm’n, *The FTC’s Consumer Sentinel Network*, goo.gl/5ctOlk (“Consumer Sentinel is a secure online database of millions of consumer complaints available only to law enforcement.”). Other agencies that permit public access verify the data or provide a procedure for companies to seek removal of inaccurate data. *See* 16 C.F.R. § 1102

(Consumer Product Safety Commission); Consumer Complaint Disclosure, California Department of Consumer Affairs, http://www.dca.ca.gov/about_dca/disclosure_standards.shtml (noting that a consumer complaint report “shall not disclose information about a complaint if it is determined that: the complaint is without merit”).

Despite repeated requests by industry to fix the acknowledged flaws in the database, the Bureau has insisted on publishing this information that misleads consumers and unduly injures responsible companies.

Next, unlike its fellow regulators, the Bureau has failed to take reasonable steps to reduce regulatory uncertainty. Other agencies employ robust advisory opinion and no-action letter processes to enable regulated businesses to clarify the rules of the road. *See, e.g.*, 17 C.F.R. § 140.98 (providing for “no-action, interpretative and exemption letters” from Commodity Futures Trading Commission); *id.* § 202.1(d) (providing for informal statements from Securities and Exchange Commission); 16 C.F.R. § 1000.7 (providing for “written advisory opinions” from General Counsel of Consumer Product Safety Commission); *id.* § 1.1(b) (Federal Trade Commission authorization for

staff to “consider all requests for advice and to render advice, where practicable”); 28 C.F.R. § 50.6 (providing for “Business Review Procedure” by Department of Justice Antitrust Division); *id.* pt. 80 (providing for no-action letters by Department of Justice under Foreign Corrupt Practices Act). The Securities and Exchange Commission issues hundreds of no action letters each year. *See, e.g.*, Sec. & Exch. Comm’n, Div. of Corp. Fin., *No-Action, Interpretive, and Exemptive Letters*, goo.gl/uTVfX3; Sec. & Exch. Comm’n, Div. of Inv. Mgmt., *Staff No-Action and Interpretive Letters*, goo.gl/4lWROs.

The CFPB, by contrast, created an extremely restrictive no-action letter process that the Bureau expects will be used only in “exceptional circumstances”—and result in a mere *one to three actionable requests each year*. *See* Policy on No-Action Letters; Information Collection, 81 Fed. Reg. 8686, 8691 (Feb. 22, 2016); *see also id.* at 8693 (requiring a company to explain, among other things, why the company cannot avoid regulatory uncertainty by modifying its product).

Similarly, the Bureau has refused to institute a public proceeding to clarify the scope of its power under 12 U.S.C. § 5531(a) to prosecute “unfair, deceptive, or abusive act[s] or practice[s]”—even though the

Director himself has testified to Congress that the “unreasonable advantage” element of the cause of action for “abusiveness” was “something of a vague term that needs definition.” *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs, 112th Cong. 112-107, at 70 (2012)*. Instead, the Bureau has issued only vague guidance that recites the general statutory standard. See CFPB Bulletin 2013-07, Prohibition of Unfair, Deceptive, or Abusive Acts or Practices in the Collection of Consumer Debts (July 10, 2013), perma.cc/JXE2-LLMC.

Other agencies recognize the importance of such guidance. For example, the FTC long ago issued detailed policy statements clarifying the meaning of “unfair” and “deceptive” practices under the FTC Act. See FTC Policy Statement on Deception (Oct. 14, 1983), *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), perma.cc/KK7Q-3BQE; FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984), perma.cc/3AUE-4943.

The result of the Bureau's refusal to provide guidance is that businesses seeking to understand the scope of this authority must either err on the side of complying with the broadest possible interpretation of the statutory terms or read the tea leaves provided in the Bureau's enforcement actions and Director Cordray's public statements.

The Bureau's Director has indicated that its pattern of regulation by enforcement (rather than rulemaking) will continue. Rejecting criticisms of the Bureau's focus on enforcement actions as "badly misplaced," Director Cordray has stated that he intends to continue to use enforcement proceedings to set rules for the regulated community. Remarks of Richard Cordray, Director, Consumer Fin. Protection Bureau, to Consumer Bankers Ass'n, Mar. 9, 2016, perma.cc/TV66-T5HE. Absent the introduction of checks on the Bureau's authority, therefore, it is clear that the Director will continue to define terms and concepts through individual enforcement actions that leave businesses largely in the dark about what the Director expects of them.

Even when it does not proceed by enforcement action, the Bureau has shown a preference for informal "guidance" over formal rules

created through the Administrative Procedure Act's notice and comment process and subject to judicial review. Indeed, the Director often addresses issues through mere public pronouncements about "recommendations" or "best practices" for a particular sector.

For example, the Director sent a letter to CEOs at large banks making a "suggestion" that they offer lower-risk accounts, in addition to their current products, in order to serve currently "unbanked" individuals. *See* Form Letter from Dir. Richard Cordray to CEOs of Financial Institutions at 1 (Feb. 3, 2016), perma.cc/9Q38-LJZP. Similarly, the Bureau issued an "advisory" to financial institutions containing "voluntary best practices" for protecting customers from elder financial exploitation. Press Release, CFPB, CFPB Issues Advisory and Report for Financial Institutions on Preventing Elder Financial Abuse (Mar. 23, 2016), goo.gl/x7YxoI.

The companies who make up the audience for these informal guidance documents have no way of knowing whether the "voluntary" recommendations pronounced by the Director are in fact mandatory—or whether failure to comply with those recommendations will lead to an enforcement action. *See, e.g.*, Prepared Remarks of CFPB Director

Richard Cordray at the Americans for Financial Reform Event on CFPB Anniversary (July 16, 2015) (“urg[ing] all financial institutions” to adopt a “meaningful best practice” for handling customer complaints), perma.cc/4PSU-HJ85. But this indirect method of regulation circumvents the procedural protections that would accompany a rulemaking or enforcement action, particularly judicial review.

This Court has repeatedly recognized that uncertain regulatory standards produce inefficiency and harm competition. *See, e.g., Apotex, Inc. v. FDA*, 449 F.3d 1249, 1252 (D.C. Cir. 2006) (per curiam) (agreeing with FDA’s conclusion that a regulatory test that would “undermine marketplace certainty and interfere with business planning and investment” was “ill-advised”) (alterations and internal quotation marks omitted); *AT&T Inc. v. FCC*, 452 F.3d 830, 836 (D.C. Cir. 2006) (noting that “even the Commission recognizes that regulatory uncertainty in itself may discourage investment and innovation”) (internal quotation marks and ellipsis omitted).

When businesses are unsure what standards apply to their conduct, what those standards require, and even whether they are subject to a regulator’s jurisdiction in the first place, law-abiding

businesses may avoid risk by tightening underwriting requirements, eliminating product features, or exiting a product category. Competition in turn is reduced, resulting in higher prices and reduced product choice for consumers.

This state of affairs is exactly the opposite of what Congress sought to accomplish when it created the Bureau. The Bureau was intended to “set and enforce clear rules of the road across the financial marketplace.” Statement by the President on Financial Regulatory Reform (Mar. 22, 2010), perma.cc/Q2EC-MC2P; *see also* Pub. L. No. 111-203 § 1061(b)(7), 124 Stat. 1376, 2038 (2010) (transferring financial regulatory functions from other agencies to the Bureau). By relying on a closed, opaque decision-making process and eschewing notice and comment rulemaking, the Bureau is failing to perform the mission Congress gave it and denying the regulated community the clarity and certainty it needs.

Indeed, the Bureau’s unwillingness to provide “clear rules of the road” can, and has, risen to the level of a constitutional violation. The panel explained in detail why the Director’s retroactive application in this case of a new interpretation of the Real Estate Settlement

Procedures Act violated the due process principle that an agency must “provide regulated parties ‘fair warning of the conduct [a regulation] prohibits or requires.’” *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012). *See* Panel Opinion at 44-49. Many of the Bureau’s practices discussed above similarly infringe on this fundamental protection against arbitrary and unfair government action.

III. This Court Should Address The Constitutionality Of The Bureau’s Structure Now.

In its en banc order, this Court asked whether it should address the question whether the Bureau’s structure is unconstitutional “given the panel’s ruling on the statutory issues in this case.” Order at 2, Feb. 16, 2017. It is essential that the Court resolve this important issue now.

The questions regarding the constitutionality of the Bureau’s structure loom over every action the Bureau takes. Any business subject to an enforcement action or regulation will raise the issue—creating a huge number of administrative decisions that would be invalidated if the structure is later held unconstitutional.

Indeed, a number of companies that fear that they will face Bureau action have filed preemptive complaints against the agency—raising the unconstitutionality of the Bureau’s structure as a basis for

holding that the Bureau cannot pursue an action against them. *See, e.g.,* Complaint at 1, *John Doe Co. v. Consumer Fin. Protection Bureau*, No. 1:17-cv-00049-RC (D.D.C. Jan. 10, 2017) (citing panel opinion in this case). Whether in one of these preemptive actions, or in this case, the issue will have to be resolved.⁷

The Supreme Court's holding in *Noel Canning* that several members of the National Labor Relations Board had been unlawfully appointed, implicated the validity of more than 1,000 Board decisions. *See* Elizabeth Wydra, *Four reasons why Noel Canning still matters in a post-nuclear world*, Constitution Daily (Nat'l Constitution Ctr.), Jan. 13, 2014, perma.cc/M8MV-N7ED. A similar amount of disruption can be expected if this Court delays addressing the constitutional question here.

That is particularly true because, as we discuss below, the remedy for the constitutional violations here may be the invalidation of all

⁷ This Court is particularly likely to be required to address the issue eventually, even if it declines to do so here, given that it is the only court of appeals that has jurisdiction over a petition for review in every cease-and-desist proceeding involving the Bureau. *See* 12 U.S.C. § 5563(b)(4) (establishing jurisdiction in the circuit where petitioner's principal office is located, and in this Court).

actions taken by the Bureau—with the Bureau unable to act in those or any future matters until Congress revises its structure.

Given the potential future disruption, there is no justification for delay. The better course is to address the issue now—with the benefit of the parties’ already-extensive briefing and the opportunity for a definitive decision by the en banc court—and put an end to the uncertainty that now exists throughout the huge sector of the economy that is regulated by the Bureau.

IV. Congress Must Remedy The Bureau’s Unconstitutional Structure.

Courts confronted with “a constitutional flaw in a statute” generally “try to limit the solution to the problem,’ severing any ‘problematic portions while leaving the remainder intact.’” *Free Enterprise Fund*, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2006)). But that approach is not permissible when “it is evident that the Legislature would not have enacted those provisions . . . independently of that which is [invalid].” *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted).

The panel concluded that the appropriate remedy was to strike the restriction on the President’s removal authority. Panel Opinion at

37-39. But the relevant evidence indicates that Congress would not have enacted a statute giving an official serving at the pleasure of the President sole authority to spend more than \$650 million annually without congressional approval: the proposal submitted by President Obama and the bill enacted by the House of Representatives adopted the traditional multi-member commission structure. See Panel Opinion at 6. The more appropriate course, therefore, may be to leave to Congress the task of repairing the Bureau's unconstitutional structure. Compare *N. Pipeline Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982).⁸

V. The Administrative Law Judge Was Appointed In Violation Of The Appointments Clause.

For the reasons stated in the Chamber's *amicus* brief in *Raymond J. Lucia Companies, Inc. v. SEC*, No. 15-1345, the appointment of the

⁸ The Supreme Court's retroactivity jurisprudence regarding decisions in civil cases has changed since the *Northern Pipeline* ruling, and now holds that when a court "applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the court's] announcement of the rule." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). That fact provides an additional reason why the Court should address the issue in this case—delay will only increase the number of CFPB actions that are overturned.

administrative law judge who presided over this case violated the Appointments Clause.

CONCLUSION

The petition for review should be granted, the Bureau's Decision and Order vacated, and the case remanded with directions that it be dismissed.

Dated: March 10, 2017

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,066 words, including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

Dated: March 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(c) and Cir. R. 25(a), that on March 10, 2017, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

Dated: March 10, 2017

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