No. 18-60302

In the United States Court of Appeals for the Fifth Circuit

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellee,
v.
ALL AMERICAN CHECK CASHING, INCORPORATED,
MID-STATE FINANCE, INCORPORATED, and
MICHAEL E. GRAY, Individually
Defendants-Appellants.

On Appeal from the United States District Court for the
District of Mississippi
Case No. 3:16-cv-00356-WHB-JCG

Brief for Appleseed Foundation, Inc. as *Amicus Curiae* Supporting Appellee and Affirmance

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Fifth Circuit Rule 28.2.1 Statement

1. Number and Style of the Case: Case No. 18:60302, *Consumer Financial Protection Bureau v. All American Check Cashing, Inc. et al.*

2. The undersigned counsel of record certifies that the following listed persons and entities (in addition to those described in the certificates of Appellants and their *amici* and the certificates of Appellee) described in the fourth section of Rule 28.2.1 have an interest in the outcome of the case. These representations are made in order that the judges of the court may evaluate possible disqualification or recusal.

   a. Appleseed Foundation, Inc., *amicus curiae*, has no parent corporations and no publicly held company has an interest in Appleseed Foundation, Inc.

   b. Nebraska Appleseed Center for Law in the Public Interest, Kansas Appleseed Center for Law and Justice, New Jersey Appleseed Public Interest Law Center, Hawaii Appleseed Center for Law and Economic Justice, Chicago Appleseed Fund for Justice, Texas Appleseed, and South Carolina Appleseed Legal Justice Center, which are members of the Appleseed Network that have reviewed this brief and concur with its contents, each has no parent company and no publicly held company has an interest in any of these Appleseed network members.

   c. Suman Godfrey LLP (Colin Watterson), counsel for *amicus curiae* Appleseed.

/s/ Colin M. Watterson
Attorney of Record for Appleseed Foundation, Inc.

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Interest of *Amicus Curiae*[1]

Appleseed Foundation, Inc. ("Appleseed") is a network of 17 public interest justice centers in the United States and Mexico.[2] Among other things, Appleseed advocates for policies that combat poverty and help low-income individuals build assets by encouraging greater access to fair financial products and by seeking consumer protections from predatory lending practices. Appleseed supports pro-consumer policies at the local, state, and federal levels. It also files *amicus curiae* briefs in cases with important implications for consumers.

Rule 29(a)(4) Statement

Pursuant to Federal Rule of Appellate Procedure 29(a)(4), Appleseed represents that its counsel drafted this brief. No party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae or their

[1] All Parties have consented to the filing of this brief.

[2] The following Appleseed centers have reviewed the brief and concur with its contents: Nebraska Appleseed Center for Law in the Public Interest, Kansas Appleseed Center for Law and Justice, New Jersey Appleseed Public Interest Law Center, Hawaii Appleseed Center for Law and Economic Justice, Chicago Appleseed Fund for Justice, Texas Appleseed, and South Carolina Appleseed Legal Justice Center.

counsel contributed money that was intended to fund preparing or submitting this brief.

Summary of the Argument

Congress concluded that one of the causes of the Great Recession was the failure of regulators to protect consumers from unsustainable, toxic mortgages. While regulators had the ability to protect consumers, they failed to act. At least part of this failure was structural: responsibility for enforcing consumer financial protection laws was dispersed throughout the federal bureaucracy. To correct this structural flaw, Congress consolidated responsibility for enforcing consumer financial protection law in a single agency: the Consumer Financial Protection Bureau ("CFPB" or the "Bureau"). To minimize the risk of regulatory capture, Congress charged a sole Director—removable by the President only for cause—with leading the Bureau. Congress also gave the Bureau an independent funding source.

Nothing about the Bureau's structure offends Article II of the Constitution. Congress imposed a number of limitations on the Bureau's authority. These include removal of the Director for cause, oversight of the Bureau by the Financial Stability Oversight Council, substantive limitations on the Bureau's rulemaking authority, and requirements that the Bureau consult and coordinate with federal and state regulators and policy experts before taking action.

Binding Supreme Court precedent holds that Congress may appropriately limit the President's removal powers by making the leadership of a financial regulator removable only for cause. That is precisely what Congress did here. Almost every other court to consider the issue has agreed and concluded that the CFPB's structure passes Constitutional muster. This Court even recently concluded that the CFPB is subject to direct oversight by the Executive Branch. None of the Bureau's other features offend the Constitution. Neither the Bureau's funding source nor its relative power matter for Constitutional purposes. The Court should affirm the district court's decision and hold that the CFPB's structure is Constitutional.

Argument

Congress created the CFPB in the aftermath of the financial crisis of 2007–08. According to the *Financial Crisis Inquiry Report*,[3] "the

[3] The Financial Crisis Inquiry Commission was appointed by Congress in order to investigate the causes of the financial crisis. Fraud Enforcement & Recovery Act of 2009, at § 5, Pub. L. No. 111-21.

spark that ignited a string of events" that "led to a full-blown crisis" was a "housing bubble—fueled by low interest rates, easy and available credit, scant regulation, and toxic mortgages." Fin. Crisis Inquiry Comm'n, *The Fin. Crisis Inquiry Report* at xvi. According to the *Report*, the crisis was avoidable and caused in part by "egregious and predatory lending practices" and "dramatic increases in household mortgage debt." *Id.* at xvii. These threats were met with "pervasive permissiveness" and "little meaningful action was taken to quell the threats in a timely manner." *Id.* The *Report* cites "the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards" as the "prime example" of this regulatory inaction. *Id.*

In response, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"). Dodd-Frank created the Bureau and "gave the new agency a focused mandate to improve transparency and competitiveness in the market for consumer financial products, consolidating authorities to protect household finance that had been previously scattered among separate agencies in order to end the 'fragmentation of the current system' and 'thereby ensur[e] accountability.'" *PHH Corp. v. CFPB*, 881 F.3d 75, 80 (D.C. Cir. 2018) (*en banc*) (quoting S. Rep. No. 111-176, at 11).

> To lead this new agency, Congress provided for a single Director to be appointed by the President and confirmed by the Senate. [12 U.S.C.] §§ 5491(b)(1)-(2). Congress designed an agency with a single Director, rather than a multi-member body, to imbue the agency with the requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance. *See, e.g.,* S. Rep. No. 111-176, at 11. A single Director would also help the new agency become operational promptly, as it might have taken many years to confirm a full quorum of a multi-member body. *See* 155 Cong. Rec. 30,826-27 (Dec. 9, 2009) (statement of Rep. Waxman) (noting that a single director "can take early leadership in establishing the agency and getting it off the ground").

Id. at 81.

Since its creation, the Bureau has taken steps to ensure transparency in the market for consumer financial products. For example, as directed by Congress in § 1073 of Dodd-Frank, the Bureau passed new regulations governing remittances (*i.e.*, relatively small transfers of money from a consumer in the United States to a person living abroad). *See* 12 C.F.R. § 1005.30 *et seq.* Consistent with the Bureau's mandate to ensure that "consumers are provided with timely and understandable information to make responsible decisions about financial transactions," 12 U.S.C. § 5511(b)(1), the new remittance rules require companies to give consumers disclosures about the exchange rate, fees and taxes collected by the companies, fees charged abroad, and to disclose the amount of money the recipient is expected to receive. *See* 12 C.F.R. § 1005.31–32.

The Bureau has also made significant improvements to consumer protections in mortgage lending by targeting issues that contributed to the mortgage crisis. For instance, in 2013 the Bureau finalized a rule implementing §§ 1411 and 1412 of Dodd-Frank, which generally require creditors to make a good-faith determination of a consumer's ability to repay home loans before extending credit. *See* 12 C.F.R. § 1026.31 *et seq*. Further, as directed by Congress in §§ 1098 and 1100A of Dodd-Frank, the Bureau issued a rule integrating mortgage loan disclosures by combining disclosures that consumers receive in connection with applying for and closing on a mortgage loan under the Truth in Lending Act and the Real Estate Settlement Procedures Act. *See* 12 C.F.R. § 1026.19 *et seq.* In doing so, the Bureau designed two new forms that make it easier for consumers to locate key loan information and determine whether they can afford the cost of the loan over time.

The Bureau also took action to protect consumers from unfair and abusive practices related to the issuance of payday, vehicle title, and certain high-cost installment loans. After several years of research and outreach, the Bureau concluded these loan products were typically used by consumers who are living paycheck-to-paycheck and have little to no access to other credit products. Additionally, the lenders that made covered loans routinely failed to assess consumers' ability to repay and often engaged in harmful practices when seeking to withdraw payments from consumers' accounts. In response, the Bureau issued a rule with two primary parts. First, the rule requires certain lenders to reasonably determine whether a borrower has the ability to repay a loan before the loan is issued. Second, the rule identifies as an unfair and abusive practice an attempt to withdraw payment from a consumer's account after two consecutive payment attempts have failed. *See* 12 C.F.R. § 1041.1 *et seq.*

Ensuring greater transparency in the financial markets for consumers using remittances, taking out a mortgage, or utilizing high-cost, short-term credit products are just a few examples of ways the

Bureau has protected consumers through rulemaking. Apart from rulemaking, the Bureau's supervisory and enforcement work has provided much-needed relief for consumers harmed by unfair and abusive financial practices. To date, the Bureau has ordered nearly $12 billion in relief to over 29 million consumers. CFPB, *Enforcing Federal Consumer Protection Laws Factsheet*, available at https://files.consumerfinance.gov/f/documents/201701_cfpb_CFPB-By-the-Numbers-Factsheet.pdf. The Bureau has thus far succeeded in carrying out its congressional mandate. Unsurprisingly, industry groups have pushed back against these actions. *See, e.g.*, *Comm. Fin. Servs. Assoc. of Am., Ltd. v. CFPB*, No. 1:18-cv-295, Docket Entry 1, (W.D. Tex. April 9, 2018) (lawsuit by trade groups asking court to set aside the CFPB's "draconian final rule on payday, vehicle title, and certain high-cost installment loans.").

I. Congress imposed numerous limitations on the CFPB.

Appellants and certain *amici* broadly characterize the CFPB as an unaccountable, rogue agency. The truth is that Congress imposed a number of substantive limitations on the Bureau's authority and ensured that it is accountable to the Executive Branch.

A. The Director is removable for cause.

First and most fundamentally, the President can remove the Bureau's Director for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). As discussed below, binding Supreme Court precedent holds that limiting the President's authority to remove the leadership of a financial regulator in this way does not violate Article II of the Constitution.

B. The Financial Stability Oversight Council.

Congress imposed additional control by the Executive Branch. The CFPB is subject to oversight by the Financial Stability Oversight Council (the "FSOC"). The FSOC was created by Dodd-Frank and consists of the Treasury Secretary, the heads of other federal financial regulators, and an "independent member" with "insurance expertise" appointed for a six-year term by the President and confirmed by the Senate. 12 U.S.C. § 5321(b)(1). "'Significantly, a supermajority of persons on the Council are designated by the President.'" *Collins v. Mnuchin*, 896 F.3d 640, 669–70 (5th Cir. 2018) (quoting *PHH Corp.*, 881 F.3d at 120 (Wilkins, J., concurring)). The FSOC can vote to set aside a final regulation passed by the CFPB if the FSOC concludes that the rule would "put the safety and soundness of the United States banking" or "financial system" "at risk." 12 U.S.C. § 5513(a). Any member of the FSOC—including the Secretary of the Treasury—can initiate the veto process.

This Court has already concluded that "the President, through the Financial Stability Oversight Council . . . , can influence the CFPB's activities." *Collins*, 896 F.3d at 670 (citing 12 U.S.C. § 5321). The FSOC's ability to veto a CFPB rule "is a 'powerful' oversight mechanism" that gives "the Executive Branch . . . an emergency brake to hold the CFPB accountable." *Id.* (quoting *PHH Corp.*, 881 F.3d at 120 (Wilkins, J., concurring)).

C. Limits on the CFPB's authority.

Congress also limited the CFPB's authority by imposing standards the CFPB must follow when promulgating regulations and taking other actions. The Bureau must consider "potential benefits and costs to consumers" and on "covered persons," *i.e.*, companies selling consumer financial products. 12 U.S.C. § 5512(b)(2)(A)(i). Congress imposed clear, commonsense limitations on the CFPB's authority to regulate "unfair, deceptive, or abusive" acts or practices. The CFPB may only declare an act to be unfair if the agency has a reasonable basis to conclude:

> (A) the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and
>
> (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.

12 U.S.C. § 5531(c)(1). Congress imposed additional limits on the CFPB's ability to declare an act as "abusive." *Id.* § 5531(d). Congress imposed a number of additional limitations on the CFPB's rulemaking authority. *See, e.g.*, 12 U.S.C. § 5532(c) (requiring the Bureau to consider certain evidence in prescribing rules regarding disclosures). If the Bureau ignores the standards imposed by Congress, the Courts can step in. *See, e.g.*, *CFPB v. The Mortgage Law Group, LLP*, 157 F. Supp. 3d 813 (D. Wis. 2016) (concluding that CFPB rule was invalid in part as applied to practicing attorneys). And, if the Bureau ignores any of these limitations imposed by Congress, that can be a basis for the President to consider whether to remove the Director for cause. *PHH Corp.*, 881 F.3d at 106.

D. Consultation and coordination obligations

Congress imposed numerous consultation and coordination obligations on the CFPB. *See PHH Corp.*, 881 F.3d at 119 (Wilkins, J., concurring) ("we cannot downplay the fact that Congress also required extensive coordination, expert consultation, and oversight of the Director. If much was given to the Director, then much was also required."). Before making a rule, the CFPB must "consult with the appropriate prudential regulators or other Federal Regulators." 12 U.S.C. § 5512(b)(B). If a prudential regulator objects to a CFPB rule, the agency must include "a description of the objection and the basis for the Bureau decision, if any, regarding that objection." *Id.* § 5512(b)(C). The CFPB has additional consultation obligations with respect to rules that affect certain businesses. *See id.* § 5514(a)(2) (CFPB must consult with FTC regarding rules that affect non-depository institutions); 12 U.S.C. § 5531(e) (CFPB must consult with prudential regulators before issuing rules regarding unfair, deceptive, or abusive acts and practices); 12 U.S.C. § 5533(e) (CFPB must consult with banking regulators and FTC regarding rules regarding consumer rights to access information).

Congress imposed similar cooperation and consultation obligations on the CFPB with respect to its enforcement authority. The CFPB must coordinate with the FTC with respect to enforcement actions directed at nondepository institutions. 12 U.S.C. § 5514(c)(3). Congress required the CFPB to coordinate with "its supervisory activities with the supervisory activities conducted by prudential regulators and the State bank regulatory authorities." 12 U.S.C. § 5515(b)(2). Congress imposed similar obligations with respect to the Bureau's litigation authority. When the Bureau files suit, it must provide notice to the Attorney General and any appropriate prudential regulator. *Id.* § 5564(d).

Congress also imposed a general cooperation obligation on the CFPB. The Bureau must:

> coordinate with the Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, and other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.

12 U.S.C. § 5495.

Congress also required the CFPB to coordinate with a Consumer Advisory Board made up of:

> experts in consumer protection, financial services, community development, fair lending and civil rights, and

> consumer financial products or services and representatives of depository institutions that primarily serve underserved communities, and representatives of communities that have been significantly impacted by higher-priced mortgage loans, and seek representation of the interests of covered persons and consumers, without regard to party affiliation.

12 U.S.C. § 5494(b). At least six members of the Advisory Board must be appointed by the Federal Reserve. The Advisory Board must meet with the director at least twice per year. *Id.* § 5494(c).

Put together, the CFPB is subject to numerous consultation and coordination obligations. In sum:

> With the amount of 'coordination' and 'consultation' required of the CFPB by statute, there can be no doubt that the Director operates with as much expert advice as any other independent agency. Congress went even further, repeatedly requiring the Director to seek 'consistency' with other agencies, and in some circumstances, requiring the Director to explain why he or she failed to heed an objection of another agency.

PHH Corp., 881 F.3d at 120 (Wilkins, J., concurring).

E. Oversight by Congress

The Director of the CFPB is subject to oversight by Congress. Dodd-Frank requires the Director to appear before the Committee on Banking, Housing, and Urban Affairs of the Senate and the Committee on Financial Services and the Committee on Energy and Commerce of the House of Representatives for semi-annual hearings. 12 U.S.C. §

5496(a). In conjunction with those hearings, the CFPB must prepare a report to the President and the Committees regarding its activities. *Id.* § 5496(b).

II. The CFPB's structure does not offend Article II under applicable caselaw.

This Court should affirm the district court's decision holding that the CFPB's structure is Constitutional because there is binding Supreme Court precedent directly on point holding that Congress can limit the President's power to remove the head of an independent financial regulator to instances of "inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Almost every other Court to consider the issue agrees. This Court should do the same.

A. The CFPB's structure is constitutional under binding Supreme Court precedent.

Humphrey's Executor was about a claim brought by the estate of a deceased Federal Trade Commissioner. *Id.* at 618. Humphrey was removed by President Roosevelt because the President wanted "personnel of [his] own selection" to be appointed even though § 1 of the Federal Trade Commission Act provides that the president can remove a commissioner only for "inefficiency, neglect, of duty, or malfeasance in office." *Id.* at 618–19. The Court held that § 1 placed an appropriate limit on the President's removal power. *Id.* at 631–32. Congress has the power to create "quasi legislative or quasi judicial agencies" and can require such agencies "to act in discharge of their duties independently of executive control." *Id.* at 629. That power to create independent agencies necessarily includes the "power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Id.* This power exists because "one who holds office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.*

The *Humphrey's Executor* Court distinguished the facts of the case from its earlier decision in *Myers v. United States*, 272 U.S. 52 (1923). *Myers* was about the President's power to remove a postman. *Id.* at 158. The *Humphrey's Executor* Court clarified that the holding of *Myers* applied to "purely executive officers" and that "[w]hether 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 officer." 295 U.S. at 631. In later decisions, the Court explained that the propriety of a for-cause removal provision does not turn on a categorization of an official as "quasi-legislative" and "quasi-judicial" versus "purely executive," but rather on ensuring "Congress does not interfere with the President's exercise of the executive power and his constitutionally appointed duty to take care that the laws be faithfully executed under Article II." *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (internal quotation marks omitted).

Humphrey's Executor is identical to this case. The President can remove the CFPB's Director "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). That is the exact same standard Congress used in the Federal Trade Commission Act. 15 U.S.C. § 41. Like the FTC, the CFPB is an independent agency created by Congress. *See* 12 U.S.C. § 5491. The FTC and the CFPB have similar missions. The FTC is "a consumer protection agency with a broad mandate to prevent unfair methods of competition in commerce." *PHH Corp.*, 881 F.3d at 78–79. Congress tasked the Bureau with implementing and enforcing federal consumer protection laws "for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a).

Appellants and their *amici* can't (and don't) dispute the fundamental similarities between this case and *Humphrey's Executor*. Their only response is that the FTC involved a multi-member commission while the CFPB has a single director. But, Appellants cannot point to a single case where the Supreme Court has held that the multi-member nature of an agency's leadership body had Constitutional significance. While the *Humphrey's Executor* Court certainly mentioned the fact that the FTC is run by a multi-member commission, see 295 U.S. at 619–20, that fact played no part in the Court's reasoning. And, the Court expressly approved the for-cause removal restriction in *Morrison* with respect to a single independent counsel. 487 U.S. at 667.

The CFPB's lack of a multi-member commission or board in no way impairs the President's ability "to execute the laws—by holding his subordinates accountable for their conduct." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496 (2010). If the SEC fails in its duty to enforce the nation's securities laws, the President can remove its five commissioners. If the CFPB fails in its duty to enforce laws regulating consumer financial products, the President can remove the Director. If anything, the CFPB is more accountable because it has a single director. If the SEC fails, blame might be shifted throughout the Commission. If the Bureau fails, it is clear who is to blame. *See PHH Corp.*, 881 F.3d at 93 ("The fact that the Director stands alone atop the agency means he cannot avoid scrutiny through finger-pointing, buck-passing, or sheer anonymity.")

Appellants can't and don't dispute the fact that the President may hold the Director accountable. Rather, Appellants' arguments focus on the President's supposed inability to influence the CFPB's policy decisions by choosing the chairperson of a multi-member body or by appointing members of the President's political party. *See, e.g.*, Appellants' Br. at 23 ("Each of these features ensures that the President will have a healthy measure of influence over the agency's policy choices."). But the Supreme Court has never said that the Constitution requires the President to retain influence over an independent agency's policy decisions (at least so long as the agency acts within the bounds set by Congress). For good reason. Congress—not the President—decided "to cleanse consumer financial markets of deception and fraud." *PHH Corp.*, 881 F.3d at 106. The President is responsible for ensuring that those laws are enforced as provided by Congress. The President has the power to do so. "If the CFPB Director runs afoul of statutory or constitutional limits, it is the President's prerogative to consider whether any excesses amount to cause for removal." *Id.*

Of course it is true that any independent agency—the CFPB included—has substantial discretion to make policy within the limits set by Congress. And the President may well disagree with some of the Director's policy decisions. But that is exactly why Congress made the Bureau independent. The independence of financial regulators "shields the nation's economy from manipulation or self-dealing by political incumbents and enables such agencies to pursue the general public interest in the nation's longer-term economic stability and success, even where doing so might require action that is politically unpopular in the short term." *PHH Corp.*, 881 F.3d at 79. Congress insulated the Director from removal precisely so the Bureau can make politically unpopular decisions. But Congress made sure the Director would be accountable as well: if the Bureau oversteps the limits set by Congress, the President can determine whether cause exists for removing the Director. Such a structure was blessed by the Supreme Court more than eighty years ago in *Humphrey's Executor* and is neither novel nor interesting. It is impossible to square Appellants' contention that the Constitution requires the President to retain a "healthy measure of influence over the agency's policy choices" with the longstanding rule that Congress may create independent agencies that "act in discharge of their duties independently of executive control." *Humphrey's Executor*, 295 U.S. at 629.

B. <u>Almost every court to consider Appellants' arguments has rejected them.</u>

Appellants' arguments are not new. Many litigants have made the arguments Appellants make here, and many courts have rejected them. Almost every other Court to consider the issue agrees that the CFPB's structure does not violate Article II. Recently, the *en banc* D.C. Circuit considered the exact same arguments Appellants and their *amici* make in this case. In *PHH Corporation v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), the D.C. Circuit rejected Appellants' arguments and held that: "Nothing about the CFPB stands out to give us pause that it—distinct from other financial regulators or independent agencies more generally—is constitutionally defective." *Id.* at 93.

Appellants' arguments also have bad track record at the district court level. The district court rejected Appellants' arguments in the proceedings below. District courts around the country have considered the same arguments Appellants make here and rejected them. Appellants' arguments have been rejected in the following cases:

- *CFPB v. Think Finance, LLC*, 2018 WL 3707911 (D. Mon. Aug. 3, 2018);
- *CFPB v. Future Income Payments, LLC*, 252 F. Supp. 3d 961 (C.D. Cal. 2017);
- *CFPB v. Nationwide Biweekly Admin, Inc.*, 2017 WL 3948396 (N.D. Cal. Sept. 8, 2017);
- *CFPB v. TCF Nat'l Bank*, 2017 WL 6211033 (D. Minn. Sept. 8, 2017);
- *CFPB v. Selia Law, LLC*, 2017 WL 6536586 (C.D. Cal. Aug. 25, 2017);
- *CFPB v. Navient Corp.*, 2017 WL 3380530 (M.D. Penn. Aug. 4, 2017);
- *CFPB v. CashCall,* Inc., 2016 WL 4820635 (C.D. Cal. Aug. 31, 2016);
- *CFPB v. ITT Educ. Servs.*, 219 F. Supp. 3d 878 (S.D. Ind. 2015);
- *CFPB v. Morgan Drexen, Inc.*, 60 F. Supp. 3d 1082 (C.D. Cal. 2014).

Only two courts have reached a contrary conclusion.[4] In *Consumer Financial Protection Bureau v. D and D Marketing*, 2016 WL 8849698, at *4 (C.D. Cal. Nov. 17, 2016), the court held that the Bureau's structure was unconstitutional based on the now vacated panel opinion in *PHH Corp. v. Consumer Financial Protection Bureau*, 839 F.3d 1 (D.C. Cir. 2016). In *Consumer Financial Protection Bureau v. RD Legal Funding, LLC*, 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018), the Court held that the CFPB's structure was unconstitutional based on the reasoning in Judge Kavanaugh's dissent in the *en banc PHH Corp.* decision. Nevertheless, the vast majority of courts to consider the issue have concluded the CFPB's structure is constitutional.

C. <u>This Court already concluded that the CFPB is distinguishable from the FHFA.</u>

Recently, this Court concluded that the structure of the Federal Housing Finance Agency ("FHFA") violated Article II. *Collins*, 896 F.3d at 674. After the financial crisis, Congress created the FHFA to oversee Fannie Mae and Freddie Mac. *Id.* at 645. The FHFA shares certain

[4] A panel of the D.C. Circuit also concluded that the Bureau was unconstitutional, but that opinion was vacated.

structural similarities with the CFPB. Both agencies are led by a single director. *Id.* at 649 (citing 12 U.S.C. § 4512(a), (b)(1)). Like the CFPB, the FHFA director is appointed for a five-year term. *Id.* (citing 12 U.S.C. § 4512(b)(2)). The FHFA's director "may only be removed 'for cause by the President.'" *Id.* Finally, the FHFA is funded through "annual assessments collected from the [Fannie Mae and Freddie Mac] for reasonable costs and expenses of running the FHFA. *Id.* (citing 12 U.S.C. § 4516(a)). The CFPB also has an independent funding source. In *Collins*, this Court concluded that the "FHFA's structure violates Article II" because "Congress encased the FHFA in so many layers of insulation—by limiting the President's power to remove and replace the FHFA's leadership, exempting the Agency's funding from the normal appropriations process, and establishing no formal mechanism for the Executive Branch to control the Agency's activities." *Id.* at 674.

In reaching this conclusion, the *Collins* Court carefully considered the structure of the CFPB. Despite certain structural similarities between the two agencies, the *Collins* Court concluded that there were "salient distinctions between the agencies." *Id.* at 673. Specifically, the Court concluded that the key distinction was that the Executive Branch retained "formal control" over the CFPB through the FSOC, but that no similar controls applied to the FHFA. *Id.* at 669–70. This Court has already concluded that the Executive Branch retains formal control over the CFPB and that this retention of formal control has significant Constitutional implications. It should do so again in this case.

Under Chief Judge Stewart's dissenting opinion in *Collins*, Congress imposed additional checks on the CFPB that have Constitutional significance. In *Collins*, the government argued that the President retained control over the FHFA through the Federal Housing Finance Oversight Board (the "Board"), because "[t]wo of the Board's four members are Cabinet officials who are beholden to the President." 896 F.3d 640. However, "[t]he Board exercises purely advisory functions; it cannot *require* the FHFA or Director to do anything." *Id.* The majority concluded that the Board's inability to compel the FHFA to take action meant the Executive lacked adequate formal control over the FHFA.

Chief Judge Stewart disagreed and explained that "[t]he mandatory-versus-advisory oversight distinction, although important, does not meaningfully alter the constitutional analysis in this case." *Id.*

at 677 (Stewart, C.J., dissenting in part). Although the Board could not compel the FHFA to act, its director was still required to meet with the Board periodically and "at the very least subject himself to their advice." *Id.* at 678. In turn, the Board is required to testify in front of Congress once a year and "may either testify in support of the Director's leadership or testify that the Director has derogated from his duties under HERA, thereby providing grounds for the President to exercise his 'prerogative to consider whether any excesses amount to cause for removal.'" *Id.* (quoting *PHH Corp.*, 881 F.3d at 106). As discussed above, the CFPB is required to coordinate its actions with other financial regulators as well as the Consumer Advisory Board. While these coordination and consultation obligations do not give other agencies or the Advisory Board the same kind of direct control the FSOC holds, they still provide indirect control. If the Director fails to meet these obligations, that may create a basis for the President to consider whether cause for removal exists.

The consultation and coordination obligations are significant for another reason. In *Collins*, the Court concluded that the FHFA's single-director structure created constitutional problems because it "affects the

President's ability to monitor independent agencies." *Id.* at 667. By contrast, the consultation and coordination obligations ensure that the President will stay apprised of the Bureau's activities. For example, the Bureau is required to inform the Attorney General every time it files a lawsuit. 12 U.S.C. § 5564(d). This reporting obligation and other similar requirements ensure that the President has all the information necessary to monitor the Bureau's activities.

III. Appellants' claims that the Bureau's other features exacerbate its supposed Constitutional defects fail.

Appellants argue that several of the Bureau's features exacerbate its alleged Constitutional infirmities. First, they say Congress abdicated its responsibility for overseeing the Bureau by giving it an independent source of funding. Second, they say the Bureau is powerful.[5] Appellants are wrong.

First, Appellants complain that the CFPB is not subject to the Congressional appropriations process. But again, the Supreme Court has never suggested that the source of an independent agency's funding

[5] *See, e.g.*, Appellant's Br. at 7 ("Never in the history of the Republic has an independent agency with such vast power been lorded over by a single unelected official rather than a multi-member commission."); *id.* at 46 ("Within his vast realm, the Director wields sweeping Legislative, Executive, and Judicial powers.")

has Constitutional import. The D.C. Circuit concluded that it doesn't: "The CFPB's independent funding source has no constitutionally salient effect on the President's power." *PHH Corp.*, 881 F.3d at 96.

Second, Appellants say that the Bureau is powerful. But they point to no authority that suggests a more powerful agency must be subject to greater Presidential control. In rejecting a similar argument, the *PHH* Court explained that the Supreme Court "has analyzed the function of the office in question and where it stood in relation to particular types of governmental power," not the "social and economic impact" an agency might possess. 881 F.3d at 102. The Federal Reserve has comparable—if not far greater—influence on the economy than the CFPB. Yet its Board is insulated from removal by the President.

Appellants are also wrong as a matter of fact. Congress created the CFPB by consolidating responsibility for consumer financial protection law in a single agency. It did so by taking authority over preexisting consumer protection statutes that had been dispersed throughout the government and consolidating it under a single roof. *See PHH Corp.*, 881 F.3d at 77–78 ("Congress's solution was not so much to write new consumer protection laws, but to collect under one roof existing statutes and regulations and to give them a chance to work.”). Taking preexisting statutes and consolidating authority for enforcing them in one place hardly creates the regulatory behemoth described by Appellants.

Conclusion

The Court should affirm the district court’s decision holding that the CFPB’s structure is Constitutional.

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Respectfully submitted,

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