ORAL ARGUMENT EN BANC SCHEDULED FOR MAY 24, 2017

No. 15-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

Petitioners,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On En Banc Rehearing of a Petition for Review of an Order of the Consumer Financial Protection Bureau

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BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the Cato Institute certifies the following:

Parties and Amici. All parties, intervenors, and amici appearing before the District Court and in this Court are listed in Petitioners' brief.

Rulings Under Review. The rulings under review are listed in Petitioners' brief.

Related Cases. Counsel is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

s/ Marc J. Gottridge
Marc J. Gottridge

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 Cato Institute hereby states that: it is a not-for-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3); it has no parent corporation; and no publicly held company has a 10% or greater ownership interest in Cato.

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief. The Cato Institute filed its notice of its intent to participate in this case as *amicus curiae* on March 10, 2017.

Pursuant to D.C. Circuit Rule 29(d), Cato states that a separate brief is necessary for its presentation to this Court in order to provide Cato's unique perspective on issues of individual liberty and as a public policy research organization that has studied the operation of the Consumer Protection Financial Bureau and the legal issues related to the Bureau's structure and operations. A joint brief is not feasible because other *amici* have interests and opinions that differ from those of Cato.

s/ Marc J. Gottridge
Marc J. Gottridge

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GLOSSARY

ALJ	Administrative Law Judge
CFPB or the Bureau	Consumer Financial Protection Bureau
CFTC	Commodity Futures Trading Commission
Director	Director of the CFPB
Dodd-Frank Act	The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub L. No. 111-203, 124 Stat. 1276-2223
FTC	Federal Trade Commission
HUD	The Department of Housing and Urban Development
PCAOB	Public Company Accounting Oversight Board
PHH	Petitioners PHH Corporation, PHH Mortgage Corporation and PHH Home Loans, LLC
RESPA	Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.*
SEC	Securities and Exchange Commission

STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Cato Institute, established in 1977, is a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government.[1] Cato's Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books, studies, and the annual *Cato Supreme Court Review*, and conducts conferences and forums.

Cato's Center for Monetary and Financial Alternatives was established in 2014 to reveal the shortcomings of today's monetary and financial-regulatory systems and to identify and promote alternatives more conducive to a stable, flourishing, and free society. Cato has devoted considerable attention to the CFPB's structure and operations. *See, e.g.*, Mark Calabria, "The CFPB: Problem or Solution?", Mortgage Orb (Aug. 17, 2012);[2] *Hearing on Examining the Consumer Financial Protection Bureau's Mass Data Collection Program Before the Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs.*, 114th Cong. (2015) (testimony of Mark A. Calabria, Ph.D., Director, Cato Institute

[1] No counsel for a party authored any part of this brief, 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(c)(5).

[2] *Available at* https://www.cato.org/publications/commentary/cfpb-problem-or-solution (last visited Mar. 10, 2017).

discussing Fourth Amendment implications for CFPB's data-collection activities).[3] Cato also filed a brief *amicus curiae* in the U.S. Supreme Court in support of the pending petition for a writ of certiorari in *Chance E. Gordon v. Consumer Financial Protection Bureau*, No. 16-673 (filed Nov. 17, 2016). That case arises out of the purported retroactive ratification of the Director's actions during an 18-month recess-appointment period, notwithstanding the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), that the Senate was not in recess when the Director was appointed and therefore recess appointments made on that day were not valid.

This case is of interest to Cato because it involves significant issues relating to the constitutional separation of powers and the vitality of Article II of the U.S. Constitution, and the threat posed to individual liberty by the creation of an "independent agency," exercising substantial executive powers, headed by a single person without any meaningful checks or balances. Cato agrees with Petitioners, and with the majority opinion of the panel of this Court that originally decided this case, that the CFPB's structure violates the separation of powers and that the CFPB, in unconstitutionally exercising its power, has violated the due process rights of Petitioners and others which it regulates. Cato also agrees with

[3] *Available at* http://democrats.financialservices.house.gov/uploadedfiles/12.16.2015_mark_a._calabria_testimony.pdf (last visited Mar. 10, 2017).

Petitioners, and the panel majority opinion, that it is necessary for this Court to reach the separation of powers and Article II issues raised by this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The constitutional separation of powers serves not merely to demarcate the boundaries between the three branches of the federal government, but also to protect individual liberty. Article II of the U.S. Constitution, which vests all Executive power in a President accountable to the electorate, likewise safeguards liberty by ensuring that those who execute the laws are, directly or indirectly, responsible to the people. The panel correctly discerned that these principles lie at the heart of this case, involving a single officer who exercises immense executive power without being accountable to the elected branches of government.

The panel was also correct in holding that the Dodd-Frank Act's grant to the CFPB's Director of such power over the entire consumer finance industry, without subjecting him to Presidential control, was unconstitutional. The Director is in fact answerable to no one. He is not subject to any meaningful Executive branch oversight; he is immune from Congress's power of the purse or any real legislative oversight; and—unlike commissioners of other "independent agencies"—he is not even held in check by any fellow officers of his own agency. That unique structure violates the Constitution, as the panel held.

The record of this very case in fact demonstrates how the Director uses his unchecked power to violate the due process rights of entities regulated by the Bureau. In deciding an administrative appeal from an ALJ's decision, the Director retroactively applied to PHH a novel interpretation of a RESPA provision, reversing eighteen years of precedent and relied-upon guidance to the industry. He also increased 18-fold the ALJ's recommended penalty for the supposed violation. The result was the staggering $109 million disgorgement order subject to review in this case, which in itself underscores the need for the Court to ensure that an agency exercising broad regulatory authority over a large portion of the Nation's economy acts within established constitutional requirements.

Finally, in response to a question raised in the Court's Order directing en banc rehearing, the issue of the constitutionality of the CFPB's structure cannot be avoided in this case. Even if the en banc Court were to adhere to the panel's rulings on the statutory questions, those rulings included a remand and PHH is entitled to have the proceedings on remand be conducted by a constitutionally constituted agency. In any event, the fundamental constitutional flaws in the CFPB's formation go to the very structure and composition of the agency, and unless corrected, will infect other enforcement proceedings, as well as supervisory actions and rulemakings. This Court should therefore address the constitutional issues, as it and the Supreme Court have done in similar circumstances in the past.

ARGUMENT

I. THE CONSTITUTIONAL SEPARATION OF POWERS GENERALLY, AND ARTICLE II IN PARTICULAR, SERVE AS IMPORTANT SAFEGUARDS OF INDIVIDUAL LIBERTY.

"The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, legislative, executive and judicial, to assure, as nearly as possible, that each Branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). "The declared purpose of separating and dividing the powers of government, of course, was to 'diffuse[e] power the better to secure liberty.' " *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (brackets in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring in the judgment)). In other words, "the dynamic between and among the branches is not the only object of the Constitution's concern. The structural principles secured by the separation of powers protect the individual as well." *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (quoting *Bond v. United States*, 564 U.S. 211, 222 (2011)); *see also Bowsher*, 478 U.S. at 722 ("Even a cursory examination of the Constitution reveals the influence of Montesquieu's thesis that checks and balances were the foundation of a structure of government that would protect liberty.").

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl.

1. "Article II confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)). "It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman's phrase." *Id.* at 493. By granting the President these powers and making him accountable to the electorate, the Constitution protects individual liberty: as the Supreme Court explained, "unlike [in] parliamentary systems, the President, under Article II, is responsible not to the Congress but to the people." *Bowsher*, 478 U.S. at 722 (citing U.S. Const. art. II, § 4). The Framers thus "created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'" *Free Enter. Fund*, 561 U.S. at 501 (brackets in original) (quoting The Federalist No. 51, at 349 (James Madison)).

The decision of the panel that originally heard this case[4] recognized this, emphasizing that the structure of the CFPB, with its single unaccountable head, poses a serious threat to "individual liberty." Panel Decision, 839 F.3d at 33; *see also id.* at 28 ("The Constitution as a whole embodies the bedrock principle that dividing power among multiple entities and persons helps protect individual liberty."). Relying on Supreme Court precedents spanning nearly six decades,

[4] *PHH Corp. v. CFPB*, 839 F.3d 1 (D.C. Cir. 2016), *vacated and reh'g en banc ordered*, No. 15-1177 (D.C. Cir. Feb. 16, 2017) (the "Panel Decision").

Judge Kavanaugh wrote for the panel majority: "[T]he Constitution's separation of powers is not solely or even primarily concerned with preserving the powers of the branches. The separation of powers is primarily designed to protect individual liberty." *Id*. at 33 (citing cases). "Although it is true that Article II violations often involve diminishment of Presidential power, neither *Humphrey's Executor*[5] nor any later case gave Congress a free pass, without any boundaries, to create independent agencies that depart from history and threaten individual liberty." *Id.*[6]

The Supreme Court has repeatedly recognized the standing of individuals injured by unconstitutionally constructed federal agencies, confirming that the system of checks and balances established by the Framers is designed to protect individual liberty. Thus, for example, "[a] cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was a person whose liberty was at risk." *Bond*, 564 U.S. at 223 (discussing *Chadha*). "If the constitutional structure of our

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[5] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[6] It is immaterial that a President acquiesced in the CFPB's unconstitutional structure by signing the Dodd-Frank Act, Title X of which created the CFPB. As Chief Justice Roberts explained in *Free Enterprise Fund*, 561 U.S. at 497: "Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, *see Freytag v. Commissioner*, 501 U.S. 868, 879-880 (1991), nor on whether 'the encroached-upon branch approves the encroachment,'" *New York v. United States*, 505 U.S. 144, 182 (1992). The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending they are not his own."

Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Id.*[7]

II. THE CFPB DIRECTOR EXERCISES ENORMOUS UNILATERAL POWER, INCLUDING SIGNIFICANT EXECUTIVE POWER, WITHOUT ANY EFFECTIVE CHECK.

A. The Director Wields Unprecedented Power, Checked by No One.

As the panel majority explained, "the Director of CFPB possesses enormous power over American business, American consumers, and the overall U.S. economy." Panel Decision, 839 F.3d at 7. The Director "unilaterally enforces 19 federal consumer protection statutes, covering everything from home finance to student loans to credit cards to banking practices." *Id.* He *alone* makes all decisions about "what rules to issue; how to enforce, when to enforce, and against whom to enforce the law; and what sanctions and penalties to impose on violators of the law." *Id.*; *see* 12 U.S.C. § 5481(12), (14); *id.* § 5531(a). And the person brandishing this unprecedented power—far exceeding the authority entrusted to any director or commissioner of any other "independent agency"—is "unaccountable to the President," Panel Decision, 839 F.3d at 7, who can only remove him "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). The Director's term is five years, *id.* § 5491(c)(1)—longer than that of the President himself. The Director can also remain in office

[7] The CFPB has not challenged Petitioners' standing.

indefinitely after his term has expired, pending confirmation of a successor. *Id.* § 5491(c)(2).

The CFPB and its Director, moreover, are immunized from Congress's power of the purse. The Bureau does not rely on legislative appropriations to fund itself; instead, the Director is permitted to unilaterally tap from the Federal Reserve System an amount equal to 12% of the central bank's annual expenses—over $600 million per year, and growing—without Congressional review. *See* pp. 16-19 *infra*.

Although the CFPB was established as an "independent bureau" within the Federal Reserve System, 12 U.S.C. § 5491(a), it is not in any way accountable to the Federal Reserve. The Dodd-Frank Act denied the Federal Reserve—itself an independent agency—any power to oversee the CFPB. Indeed, the statute specifies that "[n]o rule or order of the Bureau shall be subject to approval or review by the Board of Governors." *Id.* § 5492(c)(3). The Federal Reserve may not deny the CFPB's request for transfers of funds up to the 12% cap. *See id.* § 5497(a)(1) ("Each year . . . the Board of Governors *shall* transfer to the Bureau . . . the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau." (emphasis added)). Nor does the Federal Reserve have the power to intervene in CFPB enforcement actions, appoint or remove any

officer or employee of the CFPB, or to approve, review, delay, or prohibit any CFPB rule or order. *See id.* §§ 5492(c)(2)(A)-(C), (c)(3).

The Director, unlike commissioners in multi-member "independent agencies," cannot even be held in check by peers or equals in the Bureau. He has none. As the panel majority explained, "[n]ever before has an independent agency exercising substantial executive authority been headed by just one person." Panel Decision, 839 F.3d at 8. The Director is, uniquely in our government, accountable to literally no one.

B. The Dodd-Frank Act Unconstitutionally Grants the CFPB and Its Sole Director Substantial Executive Powers Without Any Presidential Oversight.

A statute that grants an agency "executive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Free Enter. Fund*, 561 U.S. at 498. The Dodd-Frank Act is just such a statute, and its "restrictions" on the President's ability to effectively oversee the Bureau "are incompatible with the Constitution's separation of powers." *Id.*

The Dodd-Frank Act bestows on the Director an immense amount of executive authority. As the sole head of the CFPB, he is empowered to "establish the general policies of the Bureau with respect to all executive and administrative functions." 12 U.S.C. § 5492(a). He is also authorized (among much else) to

"implement[] the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions," *id.* § 5492(a)(10), and to "coordinate and oversee the operation of all administrative, enforcement and research activities of the Bureau." *Id.* § 5492(a)(10). And Congress vested in the CFPB, and therefore in its single Director, exclusive jurisdiction to administer *eighteen* "Federal consumer financial law[s]" previously administered by other agencies, *id.* §§ 5481(12), (14), 5511,[8] as well as to regulate and bring enforcement actions against "unfair, deceptive or abusive" consumer lending practices, *id.* § 5531(a)—a powerful tool in itself. The CFPB and its sole Director thus have been assigned substantial executive responsibilities. *See Free Enter. Fund*, 561 U.S. at 484 ("determin[ing] the policy and enforc[ing] the laws of the United States" are executive functions), 505 ("start[ing], stop[ping], or alter[ing] individual . . . investigations" are "executive activities typically carried out by officials within the Executive Branch"). Yet, under the Dodd-Frank Act, the President "may not supervise, direct, or remove at will the Director." Panel Decision, 839 F.3d at 15.

[8] Among these statutes was RESPA, enacted in 1974, which had previously been administered and enforced by HUD. *See* Panel Decision, 839 F.3d at 40. The Dodd-Frank Act transferred to the CFPB "'[a]ll consumer financial protection functions' previously exercised by the Board of Governors of the Federal Reserve, the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the National Credit Union Administration," as well as "select functions" of HUD and the FTC. *Id.* at 15-16 (quoting 12 U.S.C. § 5581(b))

In *Free Enterprise Fund*, its most recent decision considering the President's removal power, the Supreme Court reaffirmed that "[t]he Constitution requires that a President chosen by the entire Nation oversee the execution of the laws." 561 U.S. at 499. The Court there held unconstitutional the Sarbanes-Oxley Act's innovation of creating a board (the PCAOB) to which it granted "expansive powers to govern [the] entire industry" of public company accounting, while authorizing the SEC, rather than the President, to remove the PCAOB's five members. *Id*. at 485-486. This structure, providing for no "oversight by an elected President," was unconstitutional; the delegation of such authority to unaccountable "functionaries" could not be justified on the basis of "[c]onvenience and efficiency" or the supposed expertise of the bureaucrats. *Id*. at 498-499 (brackets in original) (internal quotation marks omitted).

In *Free Enterprise Fund*, the Court applied the teaching of "[t]he landmark case of *Myers v. United States*," *id*. at 492, which held that "under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Myers*, 272 U.S. at 60. The core principle underlying both *Free Enterprise Fund* and *Myers* is that the President—who is constitutionally accountable to the people—cannot "'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561

U.S. at 484 (quoting U.S. Const. art. II, § 3). That principle now requires that the provision of the Dodd-Frank Act placing the Director outside the oversight of the President be declared unconstitutional.

To be sure, there are two post-*Myers* cases in which the Supreme Court upheld, in "certain circumstances," "limited restrictions on the President's removal powers." *Id.* at 483, 495. But neither of those exceptions to the rule of *Myers* can fairly be stretched to salvage the anomalous position of the CFPB Director. In *Humphrey's Executor*, the Court concluded that "*Myers* did not prevent Congress from conferring good-cause tenure" on the five commissioners of the FTC. *Id.* at 493. But Congress has granted the sole CFPB Director far more executive power than any FTC commissioner possesses. As only one member of five, no FTC commissioner can exercise any part of that agency's power by himself, yet that is precisely what the CFPB Director does, with no colleagues to provide any check on his power.[9] As the panel majority correctly observed, "[i]n the absence of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head—a check that helps to prevent arbitrary decisionmaking and abuse of power,

[9] The five-member structure is common to a number of "independent agencies." *See, e.g.*, 15 U.S.C. § 78d(a) (establishing five-member SEC); *id.* § 41 (establishing five-member FTC); *id.* § 7211(e)(1) (establishing five-member PCAOB); 7 U.S.C. § 2(a)(1)(D)(2)(A) (establishing five-member CFTC).

and thereby to protect individual liberty." Panel Decision, 839 F.3d at 26.[10] That "substitute check" is lacking in the case of the sole CFPB Director. He acts alone, including when he promulgates new policies and rules and exercises the discretion to commence enforcement proceedings (and adjudicate them on appeal from the ALJs' decisions).

What is more, nothing in the Dodd-Frank Act requires the Director to be "non-partisan" or to "act with entire impartiality," *Humphrey's Executor*, 295 U.S. at 624.[11] And while *Humphrey's Executor* emphasized that the FTC's "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative," *id*., that is not true of the CFPB; its core powers are executive. *See* pp. 10-11 *supra*. Further, unlike the FTC or other traditionally structured "independent agencies," the CFPB operates free of meaningful Congressional

[10] Although this "substitute check" significantly distinguishes the case of the CFPB Director from that of the FTC commissioner at issue in *Humphrey's Executor*, *amicus curiae* does not concede that it is a *constitutionally sufficient* check, because the members of a multi-member commission—unlike the President and Congress—are not accountable to the people. The viability of *Humphrey's Executor* also is subject to question in light of the Supreme Court's more recent decision in *Free Enterprise Fund*. *See In re Aiken Cty*., 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (observing that "there can be little doubt that the *Free Enterprise* Court's wording and reasoning are in tension with *Humphrey's Executor* and are more in line with Chief Justice Taft's majority opinion in *Myers*"); *see also* Panel Decision, 839 F.3d at 34 n.15. The Supreme Court in *Free Enterprise Fund* specifically noted that the parties had not asked the Court to "reexamine" *Myers*, *Humphrey's Executor*, or *Morrison v. Olson*, 487 U.S. 654 (1988). *Free Enter. Fund*, 561 U.S. at 483.

[11] Statutes require the FTC and several other multi-member "independent agencies" to include members of both major political parties. *See* Panel Decision, 839 F.3d at 15 n.3 (listing examples).

oversight.[12] Congress has renounced the power of the purse over the CFPB, instead permitting the CFPB to draw funds directly and in perpetuity from the Federal Reserve (which itself cannot curb the CFPB's funding or, for that matter, any aspect of its decision-making). *See* pp. 16-19 *infra*. The unaccountability of the CFPB Director to *any* political branch of government thus far exceeds that of the FTC commissioner whose tenure was at issue in *Humphrey's Executor*.

Nor does *Morrison v. Olson*, 487 U.S. 654 (1988), salvage the CFPB's structure from constitutional challenge. Although the Court in *Morrison* sustained the constitutionality of a now-defunct statute creating an office of independent counsel, the panel majority was plainly correct in distinguishing that decision from this case, both because *Morrison* "did not expressly consider whether an independent agency could be headed by a single director" and because the independent counsel "had only a limited jurisdiction for particular defined investigations." Panel Decision, 839 F.3d at 20; *see Morrison*, 487 U.S. at 671-672. The independent counsel in *Morrison* was also quite unlike the CFPB Director; she "lac[ked] policymaking or significant administrative authority," *Morrison*, 487 U.S. at 691, and instead was vested with only a singular and narrow charge. The Director, by contrast, as the head of a supposedly "independent

[12] Congress's high degree of oversight over the FTC is discussed at length in Daniel A. Crane, Debunking *Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1835, 1853-56 (2015).

agency," exercises sweeping executive powers, including the ability to make (and change) federal policy and laws covering the entire field of consumer finance. *See* pp. 10-11 *supra*.

C. The Dodd-Frank Act Exempts CFPB and Its Sole Director From the Congressional Power of the Purse or Any Meaningful Congressional Oversight.

In addition to being unaccountable to the President, the CFPB and its Director are also unaccountable to the other elected branch of our government. "The power over the purse was one of the most important authorities allocated to Congress in the Constitution's 'necessary partition of power among the several departments.'" *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1346 (D.C. Cir. 2012) (quoting The Federalist No. 52, at 320 (James Madison)). But unlike other "independent agencies" reliant on Congressional appropriations for their funding, the CFPB Director skirts that process altogether; he has the sole authority to establish his agency's budget and to demand up to 12% of the Federal Reserve System's annual operating expenses in order to satisfy it. *See* 12 U.S.C. § 5497(a)(2)(A). And to drive home the point further, the Dodd-Frank Act expressly insulates the CFPB and its Director from Congressional oversight by exempting this demand for funding from "review by the Committees on Appropriations of the House of Representatives and the Senate," *id.* § 5497(a)(2)(C), notwithstanding the Constitution's Appropriations Clause. *See*

U.S. Const. art. I, § 9, cl. 7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

Through this uncontrolled and unreviewable process, the CFPB Director has consistently arrogated to his agency amounts just shy of the annual 12% "cap." The CFPB's budgets have exceeded $500 million in each year since 2014, increasing in each year of the Bureau's existence. *See* CFPB, "*The CFPB strategic plan, budget, and performance plan and report*" (Feb. 2015); CFPB, "*The CFPB strategic plan, budget, and performance plan and report*" (Mar. 2014).[13] The CFPB has estimated that its 2017 budget will rise to $636.1 million—98% of the $646.2 million cap. *See* CFPB, "The CFPB strategic plan, budget, and performance plan and report" (Feb. 2016).[14]

This lack of financial oversight has further emboldened the CFPB to be, in a word, opaque in its dealings with Congress. Several members of Congress have expressed their frustration with the CFPB's failure to provide information and answer questions. *See, e.g.*, Letter from Rep. Randy Neugebauer, Chairman, Subcomm. on Oversight & Investigations of the H. Comm. on Fin. Servs. et al. to

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[13] *Available at* http://files.consumerfinance.gov/f/201502_cfpb_report_strategic-plan-budget-and-performance-plan_FY2014-2016.pdf (last visited Mar. 10, 2017).; http://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report-FY2013-15.pdf (last visited Mar. 10, 2017).

[14] *Available at* http://files.consumerfinance.gov/f/201602_cfpb_report_strategic-plan-budget-and-performance-plan_FY2016.pdf (last visited Mar. 10, 2017).

Richard Cordray, Director, CFPB 1 (May 2, 2012)[15] ("CFPB has been wholly unresponsive to our requests for additional budget information."); Letter from Sen. Rob Portman et al. to Richard Cordray, Director, CFPB 1-2 (Oct. 30, 2013)[16] (writing "to request greater transparency" and noting that "the Bureau has not provided complete responses to several of the questions presented by our House colleagues"). On one occasion, the Director declined to answer one Representative's question concerning hundreds of millions of dollars of renovation projects, and instead asked her, "why does that matter to you?" *See* U.S. House of Representatives, Committee on Fin. Servs., "Committee Pushes for Accountability and Transparency at the CFPB" (Mar. 6, 2015).[17]

In short, the CFPB Director is accountable to no one. Neither the President, nor the Congress, nor the Federal Reserve has any meaningful control over him, and he even lacks any fellow directors or commissioners to check the exercise of his vast power. The Panel Decision was correct in concluding that this unique and

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[15] *Available at* http://www.aba.com/aba/documents/winnews/CFPB_OversightMemo_050212.pdf. (last visited Mar. 10, 2017).

[16] *Available at* http://www.portman.senate.gov/public/index.cfm/files/serve?File_id=ad73c8d1-39c6-4c4f-80da-c13c57013b12 (last visited Mar. 10, 2017).

[17] *Available at* http://financialservices.house.gov/blog/?postid=398780 (last visited Mar. 10, 2017).

unprecedented structure is incompatible with our Constitution and a danger to individual liberty.

III. THE CFPB AND ITS DIRECTOR EXERCISE THEIR UNCHECKED POWER IN A MANNER THAT ENCROACHES ON INDIVIDUAL LIBERTY AND VIOLATES DUE PROCESS.

The threat to individual liberty posed by the unrestrained power of the CFPB and its Director is not theoretical or abstract. The record in this case shows, as the panel correctly held, that the order of the CFPB now under review "violated bedrock principles of due process." Panel Decision, 839 F.3d at 9.

In the enforcement proceedings giving rise to that order, the Director adopted and applied retroactively to PHH a novel (and, as the judges on the panel all agreed, incorrect)[18] interpretation of Section 8 of RESPA. Since 1997, HUD had interpreted that provision to allow mortgage lenders to enter into affiliated mortgage reinsurance arrangements, so long as the amount paid did not exceed the reasonable market value of the insurance. *See id.* at 40, 44-46. HUD originally expressed this interpretation in a 1997 letter to a mortgage lender, stating, "I trust that this guidance will assist you to conduct your business in accordance with RESPA," *id.* at 48 (quoting Letter from Nicolas P. Retsinas, Ass't Sec'y, HUD, to Sandor Samuels, Gen. Counsel, Countrywide Funding Corp. 8 (Aug. 6, 1997) (the

[18] Panel Decision, 839 F.3d at 41-44; *see also id.* at 56 (Henderson, J., concurring in part and dissenting in part) ("I agree that . . . the Bureau's interpretation of section 8(c)(2) contravenes the language of the statute").

"1997 HUD Letter")), and then repeatedly reiterated that guidance. *Id.* After the Dodd-Frank Act shifted authority to enforce RESPA from HUD to the CFPB, the Bureau announced that HUD's "official commentary, guidance and policy statements" concerning RESPA would be "applied by the CFPB pending further CFPB action." *Identification of Enforceable Rules and Orders*, 76 Fed. Reg. 43,569, 43,570 (July 21, 2011). As a result, "everyone knew the deal." Panel Decision, 839 F.3d at 46. And yet: In 2015, in the Bureau's enforcement proceeding against PHH, the CFPB not only decided that Section 8 rendered all affiliated mortgage reinsurance arrangements unlawful, but "applied its new interpretation of Section 8 *retroactively* against PHH, ruling against PHH based on conduct that had occurred as far back as 2008." *Id*.

The CFPB, moreover, did not promulgate its new interpretation through any rule-making procedure, with notice to those who might be affected in the future. The Director instead overturned the long-standing HUD guidance, on which the industry had relied for many years, in the midst of a pending case. He did so with this *ipse dixit* contained in the decision now under review: "[t]o the extent that the [1997 HUD Letter] is inconsistent with my textual and structural interpretation of section 8(c)(2), I reject it." JA17. Such unilateral and retroactive application of new substantive rules, at variance with eighteen years of prior guidance and practice, deprives regulated entities of the "opportunity to know what the law is

and to conform their conduct accordingly," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994).

The panel majority (joined on this point by the partially dissenting judge)[19] was therefore right to condemn the CFPB's high-handed actions as a violation of the Due Process Clause. *See* Panel Decision, 839 F.3d at 49 ("In sum, even if the CFPB's new interpretation of Section 8 were a permissible interpretation of the statute, which it is not, the CFPB's interpretation could not constitutionally be applied retroactively to PHH's conduct that occurred before that new interpretation."); *see also FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

The Director then compounded the due process violation by imposing on PHH an astounding sanction—"disgorgement" of $109 million. In his order, the Director—serving in effect as a one-man court of appeals from the ALJ's ruling[20]—multiplied *by a factor of eighteen* the recommendation of the Bureau's own ALJ.

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[19] Panel Decision, 839 F.3d at 56 (Henderson, J., concurring in part and dissenting in part) ("I agree that . . . the Bureau's interpretation of section 8(c)(2) is a new interpretation retroactively applied against PHH without fair notice.").

[20] *See* 12 U.S.C. § 5492(a)(4), (10); 12 C.F.R. § 1081.405(a).

As the facts of this case show, the CFPB and its Director have taken advantage of the lack of accountability in the Bureau's current structure to cavalierly violate the due process rights of regulated entities and individuals.[21]

IV. THE UNCONSTITUTIONALITY OF THE CFPB'S STRUCTURE CANNOT BE SIDESTEPPED IN THIS CASE.

In its February 16 Order setting this case for en banc rehearing, the Court asked whether it could appropriately avoid deciding the constitutionality of the CFPB's structure in light of the panel's ruling on statutory issues. The answer to that question is no.

The panel held that a remand was necessary, explaining "even if PHH fully prevails on the statutory issues, [the court] still will have to remand to the CFPB for the agency to conduct the proceeding in accordance with the appropriate statutory requirements, under which PHH may still be liable for certain alleged wrongdoing." Panel Decision, 839 F.3d at 9 n.1. If this Court remands this case, PHH has a right to have the claims against it adjudicated by a constitutionally constituted body. *See Noel Canning v. NLRB*, 705 F.3d 490, 499, 514 (D.C. Cir. 2013), *aff'd on other grounds*, 134 S. Ct. 2550 (2014); *cf. Fed. Election Comm'n v.*

[21] The availability of judicial review of certain agency decisions provides no reason for courts to refrain from holding the CFPB's structure unconstitutional. As the panel majority explained, "much of what an agency does—determining what rules to issue within a broad statutory authorization and when, how, and against whom to bring enforcement actions to enforce the law—occurs in the twilight of judicially unreviewable discretion. Those discretionary actions have a critical impact on individual liberty. And courts do not review or only deferentially review such exercises of agency discretion." Panel Decision, 839 F.3d at 35.

NRA Political Victory Fund, 6 F.3d 821, 823 (D.C. Cir. 1993) (where parties have "challenged the constitutional composition or character of a tribunal," the Supreme Court has "determined the constitutional status issue without reaching the merits"; holding that Congress's appointment of certain members of the Federal Election Commission violated the separation of powers).

In addition, as the record of this case shows, an agency that operates without the constitutional checks required by the separation of powers is apt to violate the due process rights of those it regulates. *See* pp. 19-22 *supra*. The constitutional issues in this case are systemic, baked into the very structure of the CFPB, and are likely to recur in other cases. As the panel majority put it, "when a litigant raises a fundamental constitutional challenge to the very structure or existence of an agency enforcing the law against it, the courts ordinarily address that issue promptly, at least so long as jurisdictional requirements such as standing are met." Panel Decision, 839 F.3d at 9 n.1 (citing, *inter alia*, *Free Enter. Fund*, 561 U.S. at 490-491; *Morrison*, 487 U.S. at 669-670; *Buckley v. Valeo*, 424 U.S. 1, 12 (1976)). The unconstitutionality of the CFPB's structure is squarely presented by this case, and should be decided on its merits.

CONCLUSION

The Court should decide this appeal in light of the foregoing principles, granting the petition for review and vacating the Bureau's Decision and Order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Circuit Rule 32(a), I hereby certify that the foregoing brief was produced using the Times New Roman 14-point typeface and contains 5,618 words.

s/ Marc J. Gottridge
Marc J. Gottridge

CERTIFICATE OF SERVICE

I certify that on March 10, 2017, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users.

s/ Marc J. Gottridge
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