

CASE No. 15-1177

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 Petition for Review of an Order
of the Consumer Financial Protection Bureau

***EN BANC BRIEF OF AMICI CURIAE RD LEGAL FUNDING, LLC;
RD LEGAL FINANCE, LLC; RD LEGAL PARTNERS, LP; AND
RONI DERSOVITZ IN SUPPORT OF PETITIONERS***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), RD Legal Funding, LLC; RD Legal Finance, LLC; and RD Legal Partners, LP, certify that none of them have a parent corporation and that no publicly held corporation owns more than ten percent of any of their stock.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici.

Petitioners in this Court are PHH Corporation; PHH Mortgage Corporation, PHH Home Loans, LLC; Atrium Insurance Corporation; and Atrium Reinsurance Corporation (collectively “Petitioners”). Respondent in this Court is the Consumer Financial Protection Bureau (“CFPB”).

Amicus Curiae RD Legal Partners, LP, is a hedge fund that invests in legal financing. *Amicus Curiae* RD Legal Finance, LLC, is a limited liability company that also engages in legal financing. *Amicus Curiae* RD Legal Funding, LLC, is the entity that originates the financing transactions entered into by RD Legal Partners, LP and RD Legal Finance, LLC. *Amicus Curiae* Roni Dersovitz is the chief executive officer and managing member of the entity that is the manager of RD Legal Partners, LP. He is also the managing member of RD Legal Finance, LLC, and RD Legal Funding, LLC.

B. Rulings under Review.

Amici curiae adopt the reference to the rulings under review in Petitioners’ Opening Brief.

C. Related Cases.

Amici curiae adopt the reference to related cases in Petitioners’ Opening Brief.

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GLOSSARY OF ABBREVIATIONS

ALJ	Administrative Law Judge
CFPB or Bureau	Consumer Financial Protection Bureau
CID	Civil Investigative Demand
RDLF	<i>Amicus Curiae</i> RD Legal Funding, LLC
RD Legal Amici	<i>Amici Curiae</i> RD Legal Funding, LLC, RD Legal Finance, LLC, RD Legal Partners, LP, and Roni Dersovitz
SEC	Securities and Exchange Commission

I. STATEMENT OF INTEREST OF THE *AMICI CURIAE*

Amicus Curiae RD Legal Partners, LP, is a hedge fund that invests in legal financing. *Amicus Curiae* RD Legal Finance, LLC, is a limited liability company that also engages in legal financing. The legal financing transactions they engage in involve purchasing from law firms their receivables representing legal fees owed and purchasing from plaintiffs portions of their proceeds from legal judgments or settlements.

Amicus Curiae RD Legal Funding, LLC, is the entity that originates the financing transactions entered into by RD Legal Partners, LP, and RD Legal Finance, LLC. *Amicus Curiae* Roni Dersovitz is the chief executive officer and managing member of the entity that is the manager of RD Legal Partners, LP. He is also the managing member of RD Legal Finance, LLC, and RD Legal Funding, LLC. The *amici curiae* are referred to collectively herein as the “RD Legal *Amici*.”

RD Legal *Amici* are defendants in an enforcement action filed by the Consumer Financial Protection Bureau (“CFPB” or the “Bureau”) in the Southern District of New York, *see Consumer Financial Protection Bureau, et al. v. RD Legal Funding, LLC*, Case No. 1:17-cv-0089 (S.D.N.Y.). As discussed below, the RD Legal *Amici* maintain that this lawsuit was filed as a result of the unchecked power vested in the CFPB and in retaliation for *Amicus Curiae* RD Legal Funding,

LLC, exercising its right to challenge the CFPB's jurisdiction over the RD Legal *Amici's* business. The RD Legal *Amici* thus have a direct and substantial interest in the outcome of this case and, in particular, the Court's determination regarding whether the CFPB's structure is constitutional.¹

II. PRELIMINARY STATEMENT

The CFPB has been granted broad authority to regulate consumer financial markets that are worth trillions of dollars.² The constitutionality of its structure is an issue of critical importance that goes to the heart of the agency's legitimacy and impacts all businesses that the CFPB regulates or attempts to regulate, including the RD Legal *Amici*. The RD Legal *Amici* submit this brief to urge the Court to reach the constitutionality of the CFPB's structure even if the *en banc* Court concludes, as it should, in *Lucia v. SEC*, No. 15-1345, that the SEC's appointment

¹ Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, and Rule 29 of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, all parties have consented to the filing of this *amici curiae* brief. No counsel for a party authored this brief in whole or in part, no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no persons or entities—other than *amici curiae*, their members, or their counsel—made a monetary contribution to the preparation or submission of the brief.

² Richard Cordray, Prepared Remarks of CFPB Director Richard Cordray at the Consumer Advisory Board Meeting (Sept. 11, 2014) <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-consumer-advisory-board-meeting-sept-2014/>.

of administrative law judges (“ALJs”) violates the Constitution’s Appointments Clause.³

The ruling in Petitioners’ favor on the statutory issues and a determination that the SEC ALJs are inferior officers within the meaning of the Appointments Clause would provide incomplete relief to Petitioners in this action, as they would still be subject to regulation by the unconstitutionally structured CFPB. A ruling solely on either ground would also fail to remedy the ongoing constitutional violations suffered by individuals and businesses, like the RD Legal *Amici*, that are subject to the significant unchecked power of the CFPB. In order to provide a full remedy to Petitioners and address the ongoing constitutional violations by the CFPB against other businesses like the RD Legal *Amici*, the RD Legal *Amici* respectfully request that the Court reach the constitutionality of the CFPB’s structure and find that it is unconstitutional.

III. ARGUMENT

As discussed by Petitioners and other *amici*, the CFPB’s structure violates constitutional separation-of-power principles by insulating the agency from oversight by both the president—who may only remove the Bureau’s single

³ RD Legal Capital, LLC, which is not included as an *amicus curiae* on this brief, and Mr. Dersovitz are current parties to an administrative proceeding presided over by an SEC ALJ and have filed an *amicus curiae* brief in the *Lucia* appeal in support of petitioners.

director “for inefficiency, neglect of duty, or malfeasance in office,” 12 U.S.C. § 5491(c)(3)—and Congress—which has no power to approve or oversee the CFPB’s budget, 12 U.S.C. § 5497(a). The panel decision thus correctly concluded that the Bureau was unconstitutionally structured.

As set forth below, a consequence of the CFPB’s unconstitutional structure is that the CFPB goes unchecked, allowing it to overreach and abuse its power, including by acting beyond its statutory jurisdiction, as it has done in the cases against the RD Legal *Amici* and others. The Court should thus exercise its discretion to reach this important and far-reaching structural constitutional issue.

A. The Panel Decision Correctly Determined That the CFPB’s Structure Is Unconstitutional

The CFPB was established in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Unlike most federal agencies, which are headed by a panel of commissioners appointed for fixed, and often staggered, terms, the CFPB is headed by a single director who can only be removed for cause—making him “the single most powerful official in the entire United States Government, other than the President,” in terms of unilateral power. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 16 (D.C. Cir. 2016). And it should come as no surprise that such enormous unchecked power is prone to abuse. *See id.* at 8 (“The CFPB’s concentration of enormous executive power in a single, unaccountable,

unchecked Director not only departs from settled historical practice, but also poses a far greater risk of arbitrary decisionmaking and abuse of power.”). The panel decision thus correctly determined that the CFPB’s structure is unconstitutional.

The panel also properly concluded that it was appropriate to reach the question of the constitutionality of the Bureau’s structure given that the constitutional question could “afford [Petitioners] broader relief than would [their] statutory arguments” and in light of the structural nature of the claimed constitutional violation. *See id.* at 9 n.1.

***B. The Unbridled Authority of the CFPB Allows It to Overreach
Beyond Its Clear Statutory Jurisdiction***

Although the CFPB’s statutory authority over economic matters is broad, it is not unlimited. The Consumer Finance Protection Act regulates only “covered person[s] or service provider[s]” who are engaged in “unfair, deceptive, or abusive act[s] or practice[s] under Federal law.” 12 U.S.C. §§ 5531(a), 5536(a). A “covered person” is defined as “any person that engages in offering or providing a consumer financial product or service.” 12 U.S.C. § 5481(6)(A). In turn, a “financial product or service” is defined by statute to include only an enumerated list of products and services. 12 U.S.C. § 5481(15)(A)(i)-(x).

These limitations, however, are often disregarded or, at best, interpreted unreasonably broadly by the CFPB through its single director, who is not subject to

any structural check as to what he determines to be the CFPB's jurisdictional reach. Indeed, throughout the CFPB's brief existence, numerous parties have protested that the CFPB has exceeded the limitations of its statutory authority—in other words, the director has abused his power by attempting to extend the already broad authority of the agency. *See, e.g., Consumer Fin. Prot. Bureau v. Accrediting Council for Indep. Colls. & Sch. (ACICS)*, 183 F. Supp. 3d 79, 84 (D.D.C. 2016), *appeal pending* (rebuking the CFPB for attempting to investigate the accreditation of for-profit schools, which “the CFPB was never empowered to do”).

Challenges to the CFPB's jurisdiction, however, are first reviewed by the director, and the director has never sustained a challenge to the agency's own jurisdictional limits. *See generally* <https://www.consumerfinance.gov/policy-compliance/enforcement/petitions/> (publishing all rulings on petitions to set aside civil investigative demands); *John Doe Co. v. CFPB*, Case No. 17-cv-00049-RC (D.D.C. 2016) (Dkt. #18 at 14, Declaration of Sarah J. Auchterlonie) (explaining that CFPB has never sustained a petition to set aside a civil investigative demand).

In recent months, the CFPB (presumably at the direction of its sole director) has sought to regulate the legal finance industry, including the RD Legal *Amici*, through its enforcement process, not rulemaking. In each of these proceedings known to the RD Legal *Amici*, the jurisdictional overreach of the CFPB has been

challenged, and the CFPB itself has either avoided the jurisdictional challenge or announced an overly broad, self-serving view of its own jurisdiction:

- *CFPB v. J.G. Wentworth, LLC*, Case No. 2:16-cv-2773 CDJ (E.D. Pa. 2016) (where company argues CFBP lacks jurisdiction to investigate structured settlement and annuity payment purchasing business).
- *CFPB v. Access Funding, LLC, et al.*, Case No. 1:16-cv-03759 (D. Md. 2016) (where company argues CFPB lacks jurisdiction because factoring structured settlements does not involve extensions of credit).
- *John Doe Co. v. CFPB*, No. 17-cv-0049-RC (D.D.C. 2016); *cf. John Doe Co. v. CFPB*, Case. No. 17-5026 (D.C. Cir. March 3, 2017) (Kavanaugh, J., dissenting) (agreeing that company is “being regulated by an unconstitutionally structured agency”).

As set forth below, the CFPB’s action against the RD Legal *Amici*, in which the agency declined even to rule on its jurisdiction, is perhaps the most egregious example of how the CFPB’s unchecked authority leads to abuse.

C. The CFPB’s Treatment of the RD Legal Amici Illustrates Why Constitutional Checks and Balances Are Necessary

The need for constitutional checks and balances is illustrated by the CFPB’s treatment of the RDLF *Amici*:

On August 26, 2016, *Amicus Curiae* RD Legal Funding, LLC (“RDLF”) responded to a civil investigative demand (“CID”) by producing 218 contracts to the Bureau.⁴ While there are minor variations in the contracts, they all are clearly identified as Assignment and Sale Agreements, and their terms unambiguously confirm that the transactions they memorialize involve the sale of a legal receivable by the customer—a transaction not encompassed by the statutory definition of a “financial product or service” that defines the CFPB’s jurisdiction.

On October 27, 2016, the Bureau issued another CID to the RDLF, which sought to depose a representative of RDLF in connection with its investigation of the company. In response, RDLF followed the Bureau’s enabling regulations and submitted a petition to set aside the CID, in part, on the grounds the company does not engage in conduct that subjects it to the CFPB’s statutory jurisdiction. *See* 12 C.F.R. § 1080.6(e).

Although the issuance of the Bureau’s CID was predicated on the CFPB’s need to conduct an investigation to determine whether it had jurisdiction in the first place, the Bureau made no pretenses about following its own procedures and ruling on RDLF’s petition: The day after RDLF submitted its petition, Bureau staff notified RDLF that it would immediately take steps towards an enforcement action against RDLF, apparently having found, despite its statements justifying the

⁴ A CID is the equivalent of an administrative investigative subpoena.

issuance of the CID, that it did in fact have jurisdiction over RDLF's business.⁵ In essence, the CFPB *deliberately avoided* the agency's own regulations, which would have required the agency to go to federal court to enforce the CID and, in the case of RDLF, would have necessarily induced a ruling on the CFPB's jurisdictional limits. *See* 12 C.F.R. § 1080.10.

To this day, the CFPB has never ruled on RDLF's petition. Accordingly, in order to obtain a jurisdictional ruling, RDLF sought a declaratory judgment on the CFPB's jurisdiction in federal court in the Southern District of New York. *See RD Legal Funding, LLC v. CFPB*, Case No. 1:17-cv-00010 (S.D.N.Y. 2017).

Instead of litigating the threshold jurisdictional issue, on February 7, 2017, the CFPB followed through on its prior threat and filed a lawsuit against all of the RDLF *Amici*. *See Consumer Fin. Prot. Bureau, et al. v. RD Legal Funding, LLC*, Case No. 1:17-cv-0089 (S.D.N.Y. 2017). The same day, the Bureau issued a sensationalized press release,⁶ and the Director published harmful prepared

⁵ The fact that the CFPB decided to initiate the recommendation process the day after it received RDLF's petition strongly supports an inference that the decision was motivated by a desire to circumvent the issues presented in RDLF's petition, was retaliatory, and constituted a violation of RDLF's First Amendment right to petition the government. *See Hamilton v. Geithner*, 666 F.3d 1344, 1357 (D.C. Cir. 2012) ("close temporal proximity" between protected speech and adverse action is "sufficient to establish a prima facie case of retaliation").

⁶ Available at <https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-new-york-attorney-general-sue-rd-legal-scramming-911-heroes-out-millions-dollars-compensation-funds/> (last visited Mar. 8, 2017).

remarks,⁷ opting to try the case in the court of public opinion before it was even determined that the CFPB had *jurisdiction* over their business—let alone that any wrongdoing had occurred. The testimony of a former lawyer in the Bureau’s enforcement division confirms that the CFPB’s use of a press release against the RDLF *Amici* is not an anomaly, and that the CFPB uses the threat of negative publicity to coerce compliance. *See John Doe Co. v. CFPB*, Case No. 17-cv-00049-RC (D.D.C.) (ECF. No. 18, Declaration of Sarah J. Auchterlonie).

D. The Court Should Reach the Constitutionality of the CFPB’s Structure and Rein In the Agency’s Authority

In light of the serious abuses that the unconstitutionally structured CFPB—unchecked by the president or Congress—has imposed on members of the consumer financial industry, such as Petitioners and the RDLF *Amici*, this Court should reach the important constitutional question.

As an initial matter, the doctrine of constitutional avoidance does not prevent the Court from reaching constitutional questions where, as here, resolving this case on alternative grounds would not provide the Petitioners complete relief. Even in light of the panel’s ruling on statutory grounds and even if this *en banc* Court were to determine that the SEC ALJ was not constitutionally appointed,

⁷ Available at <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-rd-legal-funding-enforcement-action-press-call/> (last visited March 9, 2017).

Petitioners would still be subject on remand to an unconstitutionally structured agency with a single director who is accountable to neither the president nor Congress. *See Veasey v. Abbott*, 830 F.3d 216, 227–28 (5th Cir. 2016) (reaching constitutional issue because the remedy for constitutional violation was “broader than the remedy” for statutory violation); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 990–91 (D.D.C. 1991) (reaching constitutional issue where resolving case on statutory issue would provide only “conditional relief”). Indeed, it would create a perverse result to invoke principles of constitutional avoidance to solely rely on the panel’s ruling on statutory grounds: By erroneously applying a statute in its enforcement proceeding, the CFPB would be rewarded by preventing the Court from considering the more critical issue of the agency’s constitutionality.

Moreover, Petitioners are not alone in facing the abuses of an unconstitutionally structured agency, as the CFPB regulates huge segments of the national economy. Indeed, several district courts in this Circuit currently are considering challenges to the constitutionality of the CFPB’s structure, and would benefit from guidance from this Circuit. *See John Doe Co. v. Consumer Fin. Protection Bureau*, No. 17-cv-0049-RC (D.D.C.); *State Nat’l Bank of Big Spring v. Lew*, No. 12-cv-1-32 (D.D.C.); *Morgan Drexen, Inc. v. Consumer Fin. Protection Bureau*, No. 13-cv-1112 (D.D.C.). Because it is an issue of significant practical and public importance, and one that currently is the subject of much litigation,

resolution of the structural constitutional question now would serve the interests of judicial economy. By contrast, declining to reach the issue would subject countless businesses to ongoing regulation by an unconstitutional and unaccountable agency that, as discussed above, uses coercive tactics and pays little heed to the limitations on its already broad authority.

* * *

The CFPB's treatment of the RDLF *Amici* illustrates the agency's willingness to abuse the massive power it has been granted by Congress. The Court should address the constitutionality of the Bureau's structure to ensure that the agency, which regulates huge segments of the national economy, is subject to constitutionally required checks and balances.

IV. CONCLUSION

For all of the foregoing reasons, the Court should reach the issue of whether the CFPB's structure violates the Constitution and find that it is unconstitutional.

DATED: March 10, 2017

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By /s/ Michael D. Roth

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief uses a proportionally spaced Times New Roman typeface, 14-point, and that the text of the brief contains 2,667 words according to the word count provided by Microsoft Word, as required by Federal Rule of Appellate Procedure 32.

DATED: March 10, 2017

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