No. 18-307

In the Supreme Court of the United States

STATE NATIONAL BANK OF BIG SPRING, ET AL.,
PETITIONERS

v.

STEVEN T. MNUCHIN, SECRETARY OF
THE TREASURY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Bureau of Consumer Financial Protection except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether 12 U.S.C. 5497 violates the separation of powers by authorizing the Bureau of Consumer Financial Protection to receive up to a fixed amount of the Federal Reserve System's combined earnings, and authorizing Congress to appropriate any additional funds beyond that amount.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The district court's order (Pet. App. 5a-22a) is reported at 197 F. Supp. 3d 177. An earlier decision of the court of appeals is reported at 795 F.3d 48. An earlier decision of the district court is reported at 958 F. Supp. 2d 127.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 2018. The petition for a writ of certiorari was filed on September 6, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In July 2010, the President signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub. L. No. 111-203, 124 Stat.

1376. The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.* As most relevant here, the Act established the Bureau of Consumer Financial Protection (Bureau) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a).

a. The Dodd-Frank Act prohibits any "covered person"—generally an entity or person involved in "offering or providing a consumer financial product or service," 12 U.S.C. 5481(6)(A)—or any "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5536(a)(1)(B). The Act then authorizes the Bureau to issue regulations identifying such acts or practices and to take enforcement actions against "covered person[s]" and "service provider[s]" to prevent them from engaging in such acts or practices. 12 U.S.C. 5531(a) and (b). The Act also transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to prescribe regulations implementing the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*; the Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq.*; the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. 2601 *et seq.*; and the Electronic Fund Transfer Act, 15 U.S.C. 1693

et seq. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

The Bureau has supervisory and enforcement authority to ensure that banks and credit unions with more than $10 billion in total assets comply with federal consumer financial law. 12 U.S.C. 5515. It has limited authority over smaller banks and credit unions that have $10 billion or less in total assets, over which other federal agencies retain primary authority to ensure compliance. 12 U.S.C. 5516. The Bureau, for example, has no authority to enforce the substantive requirements of federal consumer financial law with respect to such smaller institutions. See 12 U.S.C. 5516(d)(1), 5581(c)(2)(B). The Bureau may only require that those institutions submit reports, and the Bureau's examiners may participate in examinations of those institutions that are performed by other federal agencies to ensure compliance with federal consumer financial law. 12 U.S.C. 5516(b) and (c).

b. The Dodd-Frank Act established the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, who is appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1) and (2). The only qualification required for the Director is that he or she be a United States citizen. 12 U.S.C. 5491(b)(3). The Director serves for a term of five years, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1) and (2). The President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau is funded in significant part by monetary transfers from the Federal Reserve System's combined earnings. Each year, the Director may request and the Federal Reserve must provide an amount the Director determines is "reasonably necessary to carry out" the Bureau's duties. 12 U.S.C. 5497(a)(1). That amount, however, may not exceed 12% of the Federal Reserve System's total operating expenses as reported in the Board of Governors' 2009 annual report, adjusted for inflation. 12 U.S.C. 5497(a)(2)(A)(iii) and (B).[1] If the Bureau requires more funds to carry out its duties, the Director must submit a report to the President and the Appropriations Committees of the Senate and House of Representatives, explaining the Bureau's funding, assets, and liabilities, and requesting appropriations. 12 U.S.C. 5497(e)(1). Congress authorized such appropriations, if needed, for fiscal years 2010-2014. 12 U.S.C. 5497(e)(2).

2. Petitioners are State National Bank of Big Spring (Bank); the 60 Plus Association, Inc., a non-profit, non-partisan seniors advocacy group; and the Competitive Enterprise Institute, a non-profit public interest organization. Pet. ii. Along with several States, petitioners sued the Department of the Treasury and its Secretary, the Bureau and its Director, the Federal Reserve System Board of Governors and its members, and numerous other federal defendants. Pet. App. 161a-243a. Petitioners alleged that the Director's protection from removal violates the Constitution's separation of powers, that Congress's vesting of authority in the Bureau violates the non-delegation doctrine, that the Director was

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[1] For fiscal years 2011 and 2012, the amount was capped 10% and 11%, respectively, of the same sum from the 2009 report. 12 U.S.C. 5497(a)(2)(A)(i) and (ii).

improperly appointed under the Recess Appointments Clause, and that other aspects of the Dodd-Frank Act, including provisions vesting authority in the Secretary of the Treasury and the Federal Deposit Insurance Corporation (FDIC), are unconstitutional. *Id.* at 221a-235a.[2]

a. The district court initially dismissed the complaint for lack of standing, concluding that petitioners had not suffered injury in fact from any actions of the Bureau or its Director. 958 F. Supp. 2d 127, 147-165. The court determined that the Bank's asserted compliance costs were "the costs of learning about the Bureau's regulatory and enforcement activities," rather than costs incurred to come into compliance with the Bureau's regulations or to respond to any reporting request. *Id.* at 151; see *id.* at 151-154. And although the Bureau had promulgated a rule imposing greater disclosure and compliance requirements on banks that offer remittance transfers (*i.e.*, electronic money transfers) to people and businesses outside the United States, *id.* at 148, the court observed that the Bank did not need to comply with the rule because of its limited number of remittances, *id.* at 154. The court noted that the Bank also relied on two of the Bureau's rules related to mortgages to establish its standing, but the court reasoned that "these two rules did not exist at the time the suit was filed, [and] they cannot form the basis of the Bank's standing." *Id.* at 156. Even if they could, more-

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[2] The plaintiff States joined only the challenges to the authority of the Secretary of the Treasury and the FDIC. See Pet. App. 228a-235a. They are not petitioners here.

over, the court determined that the Bank's alleged injuries from the rules were "far too speculative" to confer Article III standing. *Ibid.*[3]

The district court further determined that neither the Bank nor the States possessed standing to challenge the constitutionality of other aspects of the Dodd-Frank Act. See 958 F. Supp. 2d at 136-147. The court therefore dismissed petitioner's complaint in its entirety. *Id.* at 166.

b. The court of appeals affirmed in part and reversed in part. 795 F.3d 48 (Kavanaugh, J.).

Contrary to the district court, the court of appeals determined that the Bank had standing to challenge the constitutionality of the Bureau's structure. 795 F.3d at 53-54. The court of appeals observed that the Bank was generally subject to the Bureau's regulatory authority, and it specifically pointed to the Bureau's regulation of international remittances. *Id.* at 53. The court acknowledged that the Bank operated within a safe harbor from that regulation, but it noted that the Bank had "alleged that it must now monitor its remittances to stay within the safe harbor, and the monitoring program causes it to incur costs." *Ibid.* The court of appeals remanded the case to the district court to consider the merits of the Bank's challenge to the constitutionality of the Bureau's structure. *Id.* at 54.

The court of appeals also determined that the Bank had standing to challenge the recess appointment of the Bureau's Director for the same reasons, and remanded that claim for further consideration in light of this Court's decision in *NLRB* v. *Noel Canning*, 134 S. Ct.

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[3] The other petitioners, the 60 Plus Association and the Competitive Enterprise Institute, did not advance any arguments for standing that were different from the Bank's. See 795 F.3d 48, 53 n.1.

2550 (2014). 795 F.3d at 54. But the court affirmed the district court's judgment that the plaintiffs lacked standing to raise their challenges to the Dodd-Frank Act unrelated to the Bureau. *Id.* at 54-57.[4]

c. On remand, the district court determined that petitioners' challenges to the Director's recess appointment failed on the merits because the Director, after he had been appointed by the President with the advice and consent of the Senate, had properly ratified his prior actions. Pet. App. 12a-22a. The court deferred ruling on petitioners' other constitutional challenges pending the decision by the en banc D.C. Circuit in *PHH Corp.* v. *Consumer Financial Protection Bureau*, 881 F.3d 75 (2018). Pet. App. 22a.

d. In *PHH*, a majority of the en banc court held that the statutory restriction on the President's authority to remove the Bureau's Director is constitutionally permissible. Pet. App. 244a-546a.

The court of appeals' majority observed that the removal restriction in 12 U.S.C. 5491(c)(3)—limiting the grounds for removal to inefficiency, neglect of duty, or malfeasance in office—is identical to the restriction upheld in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and less "onerous" than the restriction that this Court invalidated in *Free Enterprise Fund* v. *Public Co. Accounting Oversight Board*, 561 U.S. 477, 486 (2010). Pet. App. 287a. The majority determined that this removal restriction, which *Humphrey's Executor* approved as constitutional as applied to commis-

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[4] Petitioners do not seek review of the court of appeals' rulings on their lack of standing to challenge these other aspects of the Dodd-Frank Act. The Bureau is thus the only remaining respondent.

sioners of the multi-member Federal Trade Commission, is also constitutional as extended to the Bureau's single Director here. Pet. App. 294a-304a.

The court of appeals separately held that the Bureau's funding from the Federal Reserve System "has no constitutionally salient effect on the President's power." *Id.* at 293a; see *id.* at 291a-293a. The court noted that the challenger in *PHH* "suggest[ed]" that the Bureau's funding scheme may present constitutional concerns when considered in tandem with the Director's removal restriction. *Id.* at 293a. But the court concluded that the Bureau's "budgetary independence primarily affects Congress, which has the power of the purse; it does not intensify any effect on the President of the removal constraint," and therefore presents no constitutional problem whether considered alone or in tandem with that constraint. *Id.* at 294a.

Judge Tatel, joined by Judges Millett and Pillard, concurred and wrote separately to address non-constitutional issues presented by the case. Pet. App. 328a-335a. Judge Wilkins, joined by Judge Rogers, also concurred, stating that in his view the fact that the Director's underlying actions in *PHH* were taken in his adjudicatory role—rather than a rulemaking role—"seriously undermine[d] the separation-of-powers challenge before [the court]." *Id.* at 335a; *id.* at 335a-360a. Judge Griffith concurred in the judgment, reasoning that the restriction on removal of the Director should be read narrowly to permit the President to remove the Director "for ineffective policy choices," which in his view would afford the President sufficient control over the Executive Branch to address separation-of-powers concerns. *Id.* at 361a; see *id.* at 360a-391a.

Judge Kavanaugh, joined by Judge Randolph, dissented, reasoning that *Humphrey's Executor* could not be extended from removal restrictions on members of multi-member commissions to a removal restriction on the single director of the Bureau. Pet. App. 455a-541a. Judge Kavanaugh concluded that the removal restriction should be invalidated and severed from the rest of the Dodd-Frank Act. *Id.* at 535a-540a. Judge Henderson also dissented, concluding that the removal restriction is unconstitutional but cannot be severed from the rest of the Dodd-Frank Act's Title X (which created the Bureau). *Id.* at 391a-455a. Judge Randolph also dissented separately, stating that the proceedings in *PHH* presented a separate constitutional question concerning the appointment of the administrative law judge involved in that case, and suggesting that the en banc court should have waited until this Court decided *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), before rendering a decision. Pet. App. 541a-546a.

e. After the en banc court of appeals' decision in *PHH*, the parties here stipulated to a judgment by the district court against petitioners. Pet. App. 3a-4a. The court of appeals summarily affirmed, on the parties' joint request, finding that the "merits of the parties' positions are so clear as to warrant summary action." Pet. App. 2a (citing *PHH*, *supra*); see *id.* at 1a-2a.

ARGUMENT

Petitioner contends (Pet. 29-36) that the structure of the Bureau, including the for-cause removal restriction on its single director, violates the constitutional separation of powers. That question is important, and it warrants this Court's review in an appropriate case. This case, however, would be a poor vehicle for considering the constitutionality of the Bureau's structure because

it is unlikely that the question would be considered by the full Court in this case and, even if it were, there is a substantial jurisdictional question that could prevent the Court from reaching the merits of this dispute. Further review of this case is therefore unwarranted.

1. a. The principal question presented—whether the restriction on removal of the Director in 12 U.S.C. 5491(c)(3) violates the separation of powers—is an important one that warrants this Court's review in an appropriate case. As explained below, the United States has articulated its view that Section 5491(c)(3) impermissibly infringes on the President's control of the Executive Branch, and unconstitutionally frustrates the President's "responsibility to take care that the laws be faithfully executed." *Free Enter. Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010). Additionally, although the Bureau itself has continued to defend the constitutionality of its structure in the lower courts—where it possesses independent litigating authority, 12 U.S.C. 5564—it likewise agrees that, absent legislative action eliminating the restrictions on removal, the principal question presented in this case will ultimately need to be settled by this Court.

b. This case, however, would be a poor vehicle to consider the question for multiple reasons. First, if the Court were to grant a writ of certiorari in this case, it is unlikely that the case would be considered by the full Court. Justice Kavanaugh previously participated in this case while a judge on the D.C. Circuit, authoring the court of appeals' decision addressing petitioners' standing to challenge the constitutionality of the Bureau's structure. 795 F.3d 48. Particularly for a question of this magnitude, the Court may wish to wait for a vehicle in which all nine Justices are likely to participate.

Second, this case presents a substantial jurisdictional question that the Court would have to resolve (and resolve in petitioners' favor) before the Court could reach the merits. Two of the petitioners are not banks and are not regulated in any way by the Bureau. As for the Bank, because it holds less than $10 billion in assets, the Office of the Comptroller of the Currency—not the Bureau—has authority to supervise the Bank for compliance with federal consumer financial law and to enforce those laws against the Bank. See 12 U.S.C. 1813(q)(l), 5481, 5516; Pet. App. 173a (Bank has less than $275 million in deposits). And while the Bureau has authority to request a report from the Bank, 12 U.S.C. 5516(b), it has never done so, see 958 F. Supp. 2d at 148.

The Bureau has promulgated a rule governing international remittance transfers, which the Bank performs. But the Bureau's rule does not apply to banks that complete 100 or fewer remittances per year, 12 C.F.R. 1005.30(f)(2)(i), and the Bank's remittances have historically fallen well short of 100. C.A. App. 104. The Bank offered no evidence to support its bare assertion that it could or would complete more than 100 remittance transfers in a year but for the regulation. See *id.* at 104-105.

The court of appeals relied upon the Bank's assertion that it has incurred monitoring costs to ensure that it stays under the minimum remittances that trigger coverage under the Bureau's rule. 795 F.3d at 53. But self-inflicted costs incurred to address a highly speculative possibility of regulatory harm are insufficient to satisfy Article III. See *Clapper* v. *Amnesty Int'l USA,* 568 U.S. 398, 416 (2013) (holding that parties "cannot manufacture standing merely by inflicting harm on themselves

based on their fears of hypothetical future harm that is not certainly impending").

Finally, the Bank also invoked two of the Bureau's rules related to mortgages as demonstrating their standing to challenge the Bureau's structure. See 958 F. Supp. 2d at 148-149, 156. But as the district court recognized, neither of those rules had been issued when the plaintiffs filed their complaint, and neither rule was even mentioned in the operative second amended complaint. *Id.* at 156. Moreover, there is "substantial doubt" that those rules would ever apply to the Bank. *Id.* at 157. One rule regulates the origination of mortgage loans, and the Bank "chose to exit the mortgage lending business in 2010." *Ibid.* The other rule includes regulations on foreclosures of existing mortgages, but it, too, would not likely apply to the Bank because "the Bank ha[d] not initiated a single foreclosure from the beginning of 2008 through the end of 2012—a time during which foreclosures were rampant nationwide." *Ibid.* At a minimum, petitioners' standing is sufficiently questionable to present a significant vehicle problem.

c. There are other cases currently pending in the courts of appeals that raise similar challenges to the restriction on removal of the Director. See, *e.g.*, *CFPB* v. *RD Legal Funding, LLC*, No. 18-2743 (2d Cir. filed Sept. 17, 2018); *CFPB* v. *All American Cash Checking, Inc.*, No. 18-60302 (5th Cir. filed Apr. 24, 2018); *CFPB* v. *Seila Law, LLC*, No. 17-56324 (9th Cir. filed Sept 1, 2017). One or more of those cases may not present the same obstacles that could impede the full Court from considering the merits of this important issue.

2. On the merits, the United States agrees with petitioners that the statutory restriction on the President's authority to remove the Director violates the constitutional separation of powers.

a. Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President, U.S. Const., Art. II, § 1, Cl. 1, and that he shall "take Care that the Laws be faithfully executed," *id.* § 3. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund,* 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789) (Joseph Gales ed., 1834) (remarks of Madison)). Just as the President's ability to "select[] * * * administrative officers is essential" to the exercise of "his executive power," *Myers* v. *United States,* 272 U.S. 52, 117 (1926); see U.S. Const. Art. II, § 2, Cl. 2, so too is his ability to "remov[e] those for whom he can not continue to be responsible," *Myers*, 272 U.S. at 117; see *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.") (citation omitted).

"Since 1789, the Constitution has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enter. Fund,* 561 U.S. at 483. Indeed, the First Congress extensively debated the President's removal authority when creating the Department of Foreign Affairs (which later became the Department of State). "The view that 'prevailed' * * * was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained

with the President.'" *Id.* at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *reprinted in* 16 *Documentary History of the First Federal Congress of the United States of America* 893 (Charlene Bangs Bickford *et al.* eds., 2004)). This view "soon became the 'settled and well understood construction of the Constitution.'" *Ibid.* (quoting *Ex parte Hennen,* 38 U.S. (13 Pet.) 230, 259 (1839)).

This Court affirmed that established understanding in *Myers* and held that the President's executive power necessarily includes "the exclusive power of removal." 272 U.S. at 122. "[T]o hold otherwise," the Court explained, "would make it impossible for the President * * * to take care that the laws be faithfully executed." *Id.* at 164. And the Court has recently reaffirmed that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Free Enter. Fund,* 561 U.S. at 513-514. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting *The Federalist No. 70,* at 478 (Alexander Hamilton) (Jacob E. Cooke ed., 1961)).

b. The Court has recognized only one "limited" exception to the President's authority under Article II to remove principal officers of the United States. *Free Enter. Fund*, 561 U.S. at 495.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court recognized a narrow exception to the general rule in upholding a provision establishing that Federal Trade Commission (FTC) commissioners

could be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 620 (quoting 15 U.S.C. 41 (1934)). The Court's conclusion "depend[ed] upon the character of the office"—namely, that, in the Court's view at the time, the FTC commissioners were not "purely executive officers," *id.* at 631-632, because they "act[ed] in part quasi-legislatively and in part quasi-judicially," *id.* at 628.[5] In particular, the Court understood the FTC to act as a continuing deliberative body, composed of several members with staggered terms to maintain institutional expertise and promote a measure of stability that would not be immediately undermined by political vicissitudes. See *id.* at 624-625, 628. The FTC was "called upon to exercise the trained judgment of a body of experts" and was "so arranged that the membership would not be subject to complete change at any one time." *Id.* at 624. Indeed, the direct relationship perceived between those structural features and the restriction on the President's removal power was underscored by the fact that they all were enacted in the same statutory section. See 15 U.S.C. 41 (1934) (quoted in *Humphrey's Executor,* 295 U.S. at 620).

Humphrey's Executor has been understood to authorize similar removal restrictions as applied to other multi-member commissions with features and functions similar to those of the FTC. See, *e.g.*, *Wiener* v. *United States,* 357 U.S. 349, 355-356 (1958) (holding that "[t]he philosophy of *Humphrey's Executor*" precludes at-will removal of members of the War Claims Commission, a

[5] Although this Court has since treated that distinction as not dispositive for at least some *inferior* officers, see *Morrison* v. *Olson*, 487 U.S. 654, 689 (1988), it has also reaffirmed the distinction as the sole basis for the *Humphrey's Executor* exception for *principal* officers, see *Free Enter. Fund*, 561 U.S. at 493.

three-member body that was charged with adjudicating war-related compensation claims); see also *Morrison* v. *Olson,* 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting) ("[R]emoval restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission, and the Consumer Product Safety Commission, which engage substantially in what has been called the 'quasi-legislative activity' of rulemaking.") (citations omitted).

As then-Judge Kavanaugh noted in his *PHH* dissent, "the multi-member structure of [such] independent agencies is not an accident." Pet. App. 506a. Rather, it has been generally recognized that a removal restriction is concomitant of—indeed, "*inextricably bound together*" with—a continuing deliberative body. *Ibid.* (quoting Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941)). As an extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded, "[t]he size of the commission, the length of [its members'] terms, and the fact that they do not all lapse at one time are key elements of the independent structure." Senate Comm. on Governmental Affairs, *Study on Federal Regulation, Volume V, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977); see *id.* at 79 (concluding that the "[c]hief" consideration in determining whether to create an independent commission, rather than an executive agency, "is the relative importance to be attached to group decisionmaking").

c. A single-headed agency lacks the critical structural attributes that were thought to justify "independent" status for multi-member regulatory commissions in *Humphrey's Executor*.

First, a multi-member commission with staggered-term memberships is established as a "quasi-legislative[]" or "quasi-judicial[]" "body of experts" that is supposed to operate in an interactive and deliberative manner, and is "so arranged that the membership would not be subject to complete change at any one time." *Humphrey's Executor,* 295 U.S. at 624, 628. Restricting the President's power to remove the members of such commissions has been thought to facilitate deliberative group decisionmaking and promote an inherent institutional continuity. An agency headed by a single officer, however, has none of those attributes.

To the contrary, a single-headed agency embodies a quintessentially executive structure. See *Clinton* v. *Jones,* 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multi-member bodies). It has long been recognized that "[d]ecision, activity, secre[c]y, and d[i]spatch will generally characterise the proceedings of one man in a much more eminent degree[] than the proceedings of a greater number." 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1414, at 283 (1833). The Constitution specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. See *Printz* v. *United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known.").

The attributes animating the exception in *Humphrey's Executor* thus are absent when Congress carves

off a portion of quintessentially executive power and vests it in a single principal officer not removable at the President's will. And because the *rationale* for the *Humphrey's Executor* exception does not apply, even the same level of intrusion into the President's exercise of executive authority approved in *Humphrey's Executive* cannot be justified when imposed by a single-headed agency like the Bureau. See *Humphrey's Executor*, 295 U.S. at 632 (disclaiming any conclusion on the permissibility of applying removal restriction to any office other than ones "such as that here involved").

Second, a single-headed independent agency presents a greater risk than a multi-member independent commission of taking actions or adopting policies inconsistent with the President's executive policy. Unlike a multi-headed commission, which generally must engage in at least some degree of deliberation and collaboration, a single Director can decisively implement his own views and exercise discretion without those structural constraints. As noted, it is for such reasons that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. Vesting such power in a single person not answerable to the President represents a stark departure from the Constitution's framework.

That difference in decisionmaking is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multi-headed commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the bipartisan-membership requirement that is common for such commissions further increases the likelihood that at least some of the

holdover members share the President's views. By contrast, where a single Director has a term greater than four years, a President may never have the opportunity to appoint the Director. Cf. 12 U.S.C. 5491(c)(1) (Bureau's Director to serve a five-year term). An agency over which the President lacks control of both back-end removal and front-end appointment represents a further departure from the constitutional design.

To be sure, the frequency with which the threat of departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a difference." *Free Enter. Fund,* 561 U.S. at 495. In *Morrison*, the interference with executive power was found to be mitigated because it applied only to an inferior officer with "limited jurisdiction and tenure" and the lack of any "policymaking or significant administrative authority." 487 U.S. at 691. In *Humphrey's Executor*, the interference with executive power was found to be mitigated by the FTC's multi-member nature. But the interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policymaking and enforcement authority over private conduct.

Third, unlike multi-member independent commissions, a single-headed independent agency like the Bureau is a relatively novel innovation. See Pet. App. 478a-484a (Kavanaugh, J., dissenting). In the separation-of-powers context, "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem." *Free Enter. Fund*, 561 U.S. at 505 (citation omitted); see *NLRB* v. *Noel Canning,* 134 S. Ct. 2550, 2559 (2014) ("'[L]ong

settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President.") (quoting *The Pocket Veto Case,* 279 U.S. 655, 689 (1929)). In *Free Enterprise Fund,* for instance, the Court declined to extend *Humphrey's Executor* to the "novel structure" of requiring "an unusually high standard" of cause for a principal officer to remove an inferior officer, when the principal officer, in turn, could only be removed for cause. *Free Enter. Fund,* 561 U.S. at 496, 502-503. The Court has rightly been reluctant to expand *Humphrey's Executor* to "new situation[s] not yet encountered by the Court." *Id.* at 483.

Finally, there would be no meaningful limiting principle if *Humphrey's Executor* were extended beyond certain multi-member commissions to single-headed agencies like the Bureau. The functions, rather than the structure, of the FTC cannot alone justify the characterization as "quasi-legislative" or "quasi-judicial," because, as the Court later acknowledged in *Morrison*, "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted); *accord Bowsher* 478 U.S. at 733 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). The terms "quasi-legislative" and "quasi-judicial" thus must be understood to reflect the interactive and deliberative mode of decisionmaking that is expected of multi-member legislative and judicial bodies.

Given "[t]he difficulty of defining such categories of 'executive' or 'quasi-legislative' officials" based on function, *Morrison*, 487 U.S. at 689 n.28, the *PHH* court provided little basis for distinguishing even Cabinet officers like the Secretary of the Treasury. Indeed, the *PHH* majority opinion strongly suggests Congress could restrict the President's ability to remove any "financial regulator[ ]" and offers no limitation that would prevent Congress from similarly restricting the President's ability to remove the Secretary of the Treasury. Pet. App. 283a; see *id.* at 251a-252a, 281a-285a.[6]

d. The proper remedy for the constitutional violation is to sever the provision limiting the President's authority to remove the Bureau's Director. As explained in *Free Enterprise Fund,* when "'confronting a constitutional flaw in a statute,'" courts generally "'try to limit the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" 561 U.S. at 508 (quoting *Ayotte* v. *Planned Parenthood of N. New England,* 546 U.S. 320, 328-329 (2006)). Even

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[6] If this Court were to grant review and conclude that *Humphrey's Executor* applies to single-headed agencies like the Bureau, it should consider whether that case should be overruled in part or in whole. That issue is fairly encompassed in the first question presented, and so there would be no need for this Court to separately grant review of that question. Similarly, any effect of the Bureau's funding scheme on the infringement on the President's exercise of executive authority could be considered as part of the first question. See Pet. App. 293a-294a (majority opinion); *id.* at 533a-534a & n.19 (Kavanaugh, J., dissenting). To the extent petitioners assert that the funding scheme presents a distinct constitutional problem, the question received only passing consideration in *PHH*, and petitioners provide no compelling reason for this Court to further consider it here. See *Byrd* v. *United States*, 138 S. Ct. 1518, 1527 (2018) ("[T]his is 'a court of review, not of first view.'") (citation omitted).

though Congress had not enacted a severability clause, the Court there held unconstitutional only the removal restriction pertaining to members of the Public Company Accounting Oversight Board, and went on to hold that the proper remedy was to invalidate the removal restriction, leaving the board members removable at will. *Id.* at 509. The Court reasoned that the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, would "'remain[] fully operative as a law' with these tenure restrictions excised," and no evidence suggested that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Free Enter. Fund*, 561 U.S. at 509 (citations and internal quotation marks omitted).

The same result follows *a fortiori* here. Absent the for-cause removal provision, the Dodd-Frank Act and its Bureau-related provisions will remain "fully operative." *Free Enter. Fund,* 561 U.S. at 509 (citation omitted). And, as in *Free Enterprise Fund,* there is no evidence that Congress would have preferred no Bureau at all to a Bureau with a Director who is removable at will. See *ibid.* Moreover, unlike the statute at issue in *Free Enterprise Fund*, the Dodd-Frank Act includes a severability clause, providing that if one of the Act's provisions is "held to be unconstitutional," the remainder of the Act "shall not be affected thereby." 12 U.S.C. 5302. While it may be possible to conceive of other ways to remedy the constitutional violation, "[s]uch editorial freedom * * * belongs to the Legislature, not the Judiciary." *Free Enter. Fund,* 561 U.S. at 510.

For these reasons, in an appropriate case, the Court should hold that the removal restriction in 12 U.S.C. 5491(c)(3) impermissibly infringes the separation of

powers fundamental to our constitutional structure, and sever the provision from the rest of the Dodd-Frank Act.

3. The position expressed here is that of the United States, not the position of the Bureau to date. As noted, the Bureau possesses independent litigating authority in the lower courts. See 12 U.S.C. 5564. Under the leadership of Acting Director John Michael Mulvaney, the Bureau continued to defend the constitutionality of the Bureau's structure in those courts. On Thursday, December 6, 2018, the Senate confirmed Kathleen Kraninger to serve as the new Director of the Bureau. See 164 Cong. Rec. S7341 (daily ed. Dec. 6, 2018). This Office has been informed that Ms. Kraninger will soon be appointed and assume leadership of the Bureau.

In light of the United States' position in this case, if the Court were to grant the petition for a writ of certiorari, it would be the Court's usual practice to appoint an amicus curiae to defend the judgment of the court of appeals. Before following that approach here, however, the United States respectfully requests a reasonable opportunity for the new Senate-confirmed Director of the Bureau to determine whether the Bureau will seek to defend the court of appeals' judgment in this Court and for the Acting Solicitor General to determine whether he will authorize the Bureau to do so. See 12 U.S.C. 5564(e); cf., *e.g.*, Nat'l Labor Relations Bd. Br., *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612 (2018) (No. 16-307).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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* The Solicitor General is recused in this case.