No. 15-1177

IN THE

Morris Tyler Moot Court of Appeals at Yale

CONSUMER FINANCIAL PROTECTION BUREAU
Petitioner,

V.

PHH CORPORATION, ET AL.
Respondents.

On Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED

(1) Whether the Court must address the constitutional challenge to the structure of the Consumer Financial Protection Bureau ("CFPB"), given the Court of Appeals' ruling on the statutory issues in this case;

(2) Whether the structure of the CFPB as a single-Director independent agency violates Article II of the Constitution, and if so, whether the violation requires invalidating the CFPB.

PARTIES TO THE PROCEEDING

Petitioner is the Consumer Financial Protection Bureau.

Respondents are PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation (collectively, "PHH").

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The District of Columbia Circuit's opinion is reported at 839 F.3d 1. The decision of the CFPB is No. 2014-CFPB-0002 and is available at <http://files.consumerfinance.gov/f/201506_cfpb_decision-by-director-cordray-redacted-226.pdf>.

JURISDICTION

The court of appeals entered its judgment on October 11, 2016. The petition for a writ of certiorari was timely filed. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article II of the U.S. 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. In addition, Article II requires that "he shall take care that the laws be faithfully executed." U.S. Const. art. II, § 3.

The Tenth Amendment provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const. amend. X.

Section 8 of the Real Estate Settlement Procedures Act ("RESPA") provides:

> (a) No person shall . . . accept any fee, kickback, or thing of value pursuant to any agreement . . . that business incident to . . . a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
>
> (b) No person shall . . . accept any portion . . . of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.
>
> (c) Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation . . . for services actually performed.
>
> 12 U.S.C. § 2607(a)-(c).

RESPA further provides that "actions brought by the [Consumer Financial Protection] Bureau . . . may be brought within 3 years from the date of the occurrence of the violation." 12 U.S.C. § 2614.

The Dodd-Frank Act provides, in relevant part:

> (a) "There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection. . ."
>
> (b)(1) "There is established the position of the Director, who shall serve as the head of the Bureau."
>
> (b)(3) "The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."

12 U.S.C. § 5491(a)-(b).

Other relevant statutory provisions may be located in the United States Code.

STATEMENT OF FACTS

1. The Director of the CFPB ("Director") wields more unilateral power than any other independent agency head in American history. He enforces nineteen consumer protection statutes—authority that was previously spread across seven different federal agencies. *See* 12 U.S.C. § 5581(b); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 7 (D.C. Cir. 2016). His authority reaches "everything from home finance to student loans to credit cards to banking practices," and directly impacts "American business, American consumers, and the overall U.S. economy." 839 F.3d at 7. In short, "the Director of the CFPB is the single most powerful official in the entire U.S. Government, other than the President." *Id.* at 17.

Remarkably, Congress has left the Director's power unchecked. The Director cannot be removed by the President at will, even if they disagree on policy. *See* 12 U.S.C. § 5491(c)(3); 839 F.3d at 15. The Director also shares power with no one within the CFPB, unlike the heads of

multi-member independent agencies. The combination of power, independence, and unilateral control makes the Director of the CFPB truly unprecedented.

2. Independent agencies that wield substantial executive authority have traditionally been designed as multi-member bodies. *See* 839 F.3d at 6. Because they are "wholly disconnected from the executive department," they constitute a "headless fourth branch" mentioned nowhere in the Constitution. *Id.* at 6. Nevertheless, the Court has approved a limited role for such agencies in matters requiring independent expertise. *See Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935). But crucially, the agency in *Humphrey's Executor* comprised a "body" of "members." *Id.* at 624. Thus, no individual could wield unilateral, unchecked power.

3. Elizabeth Warren, then a professor, designed the CFPB to be a traditional, multi-member independent agency. *See* Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages. Why We Need a Financial Product Safety Commission*, Democracy, Summer 2007, 8, 16-18. Her design was adopted in the Department of Treasury's proposal and the original House bill. *See* Department of the Treasury, Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation 4 (2009); H.R. 4173, 111th Cong. § 4103 (as passed by House, Dec. 11, 2009). But without significant discussion or justification, the multi-member structure was ultimately dropped from the final bill. *See* 12 U.S.C. § 5491(b)(1). It is not even clear that the change was deliberate.

4. Thus, today, a single individual wields the immense power of the CFPB. At the behest of the Director, the CFPB can "prescribe rules," bring enforcement actions against violations of those rules, and adjudicate those actions. *See* 12 U.S.C. § 5581(a)(1)(A); § 2607(d); § 2617; 12 C.F.R. § 1081.405. The Director has used this power more aggressively each year. *See* Kyle Correa-Brady et al., *CFPB 2015: A Year of Growth and Expansion*, Bloomberg Law: Banking

(Feb. 24, 2016) ("The number of enforcement actions initiated by the [CFPB] has increased each year since it began enforcement activity in summer 2012.").

5. In 2014, the CFPB brought this immense power to bear on PHH. *See In re PHH Corporation*, CFPB No. 2014-CFPB-0002, at 7 (June 4, 2015). The CFPB charged PHH under the Real Estate Settlement Procedures Act ("RESPA"). RESPA prohibits "any fee, kickback, or thing of value" accepted in an agreement to refer a "real estate settlement service" that results in a referral and is connected to a federally related mortgage loan. *See* 12 U.S.C. § 2607(a); *see also id.* § 2607(b). The CFPB charged that PHH violated RESPA by receiving payments for "captive reinsurance." *In re PHH Corp.* at 7.

a. Captive reinsurance was a regular practice in the mortgage industry. *See* 839 F.3d at 40 ("Many other mortgage lenders did the same thing as PHH."). When PHH issues a loan, it typically requires that the borrower obtain mortgage insurance.[1] As is common in the industry, PHH identifies particular mortgage insurance companies for its borrowers to use. *Id.* at 3. These companies included United Guaranty Residential Mortgage Company ("UGI") and Genworth Mortgage Insurance Corporation ("Genworth"). PHH chooses these mortgage insurance companies because they themselves are insured—their policies are called mortgage reinsurance.[2] PHH created a subsidiary called Atrium Reinsurance Corporation[3] ("Atrium") to provide this reinsurance. Because PHH has control over the issuance of the loan and the designation of the mortgage insurer, PHH's reinsurance is called "captive reinsurance."

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[1] By purchasing a mortgage insurance policy, a borrower receives a guarantee that the insurer will cover a certain percentage of the loan if the borrower goes into default.

[2] By purchasing a mortgage reinsurance policy, a mortgage insurer receives a guarantee that its losses on loans issued by PHH in a certain year—called a "book year"—will not exceed a certain amount per quarter. Each policy provides ten years of coverage, unless it is cancelled through a process called "commutation."

[3] PHH initially established Atrium Insurance Corporation, and then transferred its functions to Atrium Reinsurance Corporation in 2010.

b. Captive reinsurance was common because, prior to this litigation, the federal government consistently affirmed that captive reinsurance was legal under RESPA.[4] RESPA specifically does not prohibit "bona fide salary or compensation . . . for services actually performed." *See* 12 U.S.C. § 2607(c) ("Section 8(c)(2)"). In 1997, the Department of Housing and Urban Development ("HUD") clarified that this exemption applies to captive reinsurance, as long as the price reasonably relates to the value of the reinsurance service.[5]

c. However, in 2014, the CFPB changed its mind. Despite the government's prior interpretation, the CFPB reinterpreted RESPA to prohibit captive reinsurance agreements *per se*. *See In re PHH Corp.* at 9. The CFPB's Enforcement arm brought an administrative enforcement action against PHH, applying this new interpretation retroactively. *See* 839 F.3d at 12. In fact, the CFPB initially charged PHH with violations stretching all the way back to 1995—well before the CFPB was even established. *See In re PHH Corp.* at 7.

6. The CFPB's action was first tried by an Administrative Law Judge ("ALJ") appointed through an agreement between the CFPB and the Securities and Exchange Commission. 839 F.3d at 55 (Randolph, J., concurring). The ALJ agreed with PHH that RESPA permits captive reinsurance, so long as there is a real transfer of risk for a price that is commensurate with the value of the risk transfer. *See In re PHH Corp.* at 8. In reaching this conclusion, the ALJ specifically relied on HUD's 1997 guidance letter. *Id.* The ALJ also barred the CFPB from pursuing violations occurring before July 21, 2008.[6] *Id.* At trial, PHH presented analyses

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[4] *See* Letter from Nicolas P. Retsinas, Assistant Secretary for Housing, Department of Housing and Urban Development, to Countrywide Funding Corporation 3 (Aug. 6, 1997); Letter from John P. Kennedy, Associate General Counsel for Finance and Regulatory Compliance, Department of Housing and Urban Development, to American Land Title Association 1 (Aug. 12, 2004); 24 C.F.R. § 3500.14(e) (1977); 24 C.F.R. § 3500.14(g)(1) (1993); 12 C.F.R. § 1024.14(g) (2012).

[5] *See* Letter from Nicolas P. Retsinas, Assistant Secretary for Housing, Department of Housing and Urban Development, to Countrywide Funding Corporation 3 (Aug. 6, 1997).

[6] This was the earliest that HUD could have charged a violation when it turned over enforcement authority to the CFPB. *See In re PHH Corp.* at 8.

conducted by a professional actuarial firm showing risk transfer and price commensurability. *Id.* at 8. Ultimately, the ALJ assessed liability, but only in the amount of $6,442,399. *Id.* at 9.

7. The Director then heard the appeal. The Director rejected the ALJ's determination that Section 8(c)(2) provided a defense to PHH's liability. *Id.* Instead, the Director adopted the argument of the CFPB's Enforcement arm, concluding that "PHH committed a separate violation of RESPA every time it accepted a reinsurance payment." *Id.* at 15, 22. The Director also concluded that RESPA's three-year statute of limitations on "actions brought by the Bureau" did not apply to the proceedings against PHH. *Id.* at 11. The Director thus raised the judgment against PHH from $6,442,399 to $109,188,618. *Id.* at 37. Concluding that the $109 million judgment was "a just and sufficient remedy," the Director reserved civil penalties. *Id.* at 37-38.

8. On appeal to the D.C. Circuit, PHH made two types of arguments: first, that the CFPB had exercised its authority unlawfully, and second, that it was unlawful for the CFPB to exercise any authority because the agency's structure "violate[d] the constitutional separation of powers." *See* Opening Brief for Petitioners at iii-iv, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016). In the first set of arguments, PHH argued that (1) the Director misinterpreted RESPA to prohibit even bona fide payments for reinsurance that were reasonably related to the market value of such services, (2) the Director violated Due Process by applying his new interpretation of RESPA retroactively, and (3) RESPA's three-year statute of limitations applied to the action against PHH. *Id.* PHH argued that "[t]he appropriate remedy for the Director's multiple legal errors is vacatur." *See id.* at 61.

Second, PHH argued that the CFPB's structure as a single-Director independent agency violates the Constitution. *Id.* at iv; *see also id.* at 4 (making clear that "constitutional provisions" were "at issue" in the case). This argument had a far broader scope than PHH's first set of

arguments, which would only affect a subset of the liability imposed by the Director.[7] *See In re PHH Corp.* at 22 ("[E]ven if PHH were right about section 8(c)(2), it would still be liable under RESPA on the facts established in the record of this proceeding."). Thus, even if PHH fully prevailed on its first set of arguments, the D.C. Circuit would have to remand the case to the CFPB for a reassessment of liability. *See* 839 F.3d at 9 n.1. In contrast, PHH's separation-of-powers argument, if fully sustained, would foreclose any remand to the CFPB as currently structured. *See id*.

9. Thus, the D.C. Circuit concluded that it was necessary to address the constitutional argument, analyzing the issue in a "length[y]" opinion. *See id.* at 5-39, 9 n.1. The D.C. Circuit concluded that the CFPB's structure as a single-Director independent agency violates Article II. *Id.* at 36. The D.C. Circuit remedied the violation by severing the for-cause removal provision, rather than invalidating the CFPB. *Id.* at 39. As a result, the D.C. Circuit remanded the case to the CFPB. *Id.* at 55. But Judge Kavanaugh also specifically determined that remand would be inappropriate if PHH fully prevailed on its constitutional argument. *Id.* at 9 n.1. ("If PHH fully prevailed on its constitutional argument, including with respect to severability, . . . we could not and would not remand to the CFPB for any further proceedings in this case.").

10. The parties now appeal the D.C. Circuit's constitutional holding. PHH challenges the D.C. Circuit's choice of remedy, seeking invalidation of the CFPB. The CFPB argues that the Court should avoid the constitutional question, given the D.C. Circuit's statutory rulings. In the alternative, the CFPB challenges the determination of an Article II violation.

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[7] Specifically, the Director found that payments were made on the two largest reinsurance accounts – those of UGI and Genworth – within the statute of limitations. *Id.* at 14, 35 (showing payments in 2011, 2012, and 2013, and noting that the CFPB filed charges in 2014). In total, the UGI and Genworth accounts comprised 98% of the Director's original judgment. *See In re PHH Corp.* at 35-36. The Director found that, at a minimum, the amount these companies paid exceeded the value of the services Atrium provided. *Id.* at 21-22. In fact, the Director concluded that the evidence "strongly suggest[ed] that mortgage insurers had *no need* for reinsurance unless it was connected to referrals of business." *Id.* at 13 (emphasis added).

SUMMARY OF ARGUMENT

I. The Court must address the constitutional challenge to the CFPB's structure, given the Court of Appeals' statutory rulings. The statutory rulings only address a portion of the liability imposed by the Director's vacated order. As a result, even though PHH fully prevailed on its statutory claims, the D.C. Circuit authorized the CFPB to continue its enforcement action and reassess liability. In contrast, if PHH fully prevails on its constitutional arguments, the CFPB will be unable to exercise any enforcement authority against PHH. 839 F.3d at 9 n.1.

Therefore, addressing the constitutional question is necessary because it provides the only basis for relief against the CFPB's narrowed enforcement action. A question is necessary if deciding it could provide broader relief than available non-constitutional grounds. Thus, a question is clearly necessary if it provides the *only* grounds for relief. That is the case here. Deciding the constitutional question would not be premature, as the CFPB proceedings are imminent. Plus, any suggestion that no liability will result is speculative. In fact, the CFPB's order expressly found that PHH would be liable even under the D.C. Circuit's statutory rulings.

Vacating the Director's order on statutory grounds is not sufficient to dispose of the case, regardless of what the parties argued below. The CFPB argues that the way in which PHH presented its arguments below renders the constitutional question unnecessary. However, in *Morrison v. Olson*, the Court addressed constitutional arguments presented in the same way, and still reached the constitutional question. Any remaining concerns based on waiver or forfeiture are minimized by the need to resolve structural constitutional challenges like PHH's.

This Court's paramount duty to preserve the separation of powers makes avoidance especially inappropriate. The CFPB's violation affects both the Constitution's structure of government and legitimacy of the proceedings in this case. Moreover, because the CFPB's

power is so broad, federal courts will not be able to avoid confronting this question. Given this inevitability, this Court should decide the question with the benefit of the well-developed record and opinion below. The Court has no duty to defer to other branches when violations are clear.

II. The CFPB's unprecedented structure as a single-Director independent agency violates Article II of the Constitution. This Court's separation of powers jurisprudence requires it to put "significant weight upon historical practice" when analyzing the constitutionality of the agency's structure. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014). No independent agency wielding such vast power as the CFPB has operated with a single Director. Instead, independent agencies have traditionally been headed by multi-member commissions or boards. Only three independent agencies past or present have had a single Director: the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency. But, these agencies are few in number and distinguishable in kind, and this Court has not confirmed their constitutionality. Against this long history of settled and established practice, the CFPB's structure is unprecedented and thus violates Article II of the Constitution.

III. The Director's unilateral, unchecked power undermines the constitutional structures and principles that protect individual liberty. Our Constitution creates a carefully balanced system of government, separating power among the three branches and empowering each to check the others. The Framers recognized the danger inherent in concentrating power in any one governmental actor, fearing that such unchecked power could lead to tyranny or arbitrary decision-making and thus infringe on individual liberty. The sole exception to this division of powers is the President. Where he alone is responsible for the executive power, he is also solely accountable for that power, which helps protect against liberty infringements. The CFPB's single-Director structure diverges from the narrow exception this Court has created to the

President's overarching executive authority. It thus creates an unprecedented and dangerous concentration of power in the Director alone, contradicting this Court's precedent and undermining the constitutional structures and values that protect individual liberty.

IV. To remedy the CFPB's constitutional flaw without undermining Congress' basic intent, this Court must strike down section 5491(b)(1) of the Dodd-Frank Act, which "establishe[s] the position of the Director." 12 U.S.C. § 5491(b)(1). Because Congress clearly contemplated the CFPB as an independent agency, this Court would undermine Congress' intent by severing the for-cause provision to make the Director removable at will. So as not to leave the Dodd-Frank Act without an agency to enforce it, this Court should follow its past practice of staying its order for a set period of time to allow Congress to implement a constitutional scheme to re-establish the CPFB as an independent agency whose structure comports with the Constitution. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

ARGUMENT

I. THE COURT MUST ADDRESS THE CONSTITUTIONAL QUESTION BECAUSE THE STATUTORY RULINGS BELOW DO NOT PROVIDE FULL RELIEF FOR THE STRUCTURAL CONSTITUTIONAL VIOLATION.

The Court must address the constitutional question because the statutory rulings below do not provide full relief for the structural constitutional violation. This Court has a "virtually unflagging" obligation to "decide cases within its jurisdiction." *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014). Although a grave and delicate function, this duty extends to "litigation challenging the constitutional authority of one of the three branches." *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Thus, "while it is true that [i]f it is not necessary to decide more, it is necessary not to decide more, sometimes it *is* necessary to

decide more." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (internal quotation marks and citation omitted)).

Here, it is necessary to decide the constitutional question because only it can provide full relief to PHH. The CFPB will subject PHH to further proceedings and liability unless PHH is able to prevail on its constitutional arguments. Therefore, this Court cannot dispose of the case by vacating the Director's order on statutory grounds, regardless of what the parties argued below. Moreover, avoidance would be especially inappropriate because this Court has a paramount duty to preserve the separation of powers. Therefore, avoiding the constitutional question today would not be "judicial restraint": It would be "judicial abdication." *See Citizens United v. Federal Election Commission*, 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring).

A. Addressing PHH's Constitutional Challenge Is Necessary Because It Determines Whether the CFPB Can Exercise Enforcement Authority Against PHH.

Addressing PHH's constitutional challenge is necessary because it determines whether the CFPB can exercise enforcement authority against PHH. The D.C. Circuit's statutory rulings authorize the CFPB to conduct further proceedings and re-impose liability on PHH. *See* 839 F.3d at 9 n.1. Whether this is lawful turns on the constitutional question; there is no "other ground upon which the case may be disposed of." *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Thus, the Court "must meet and decide" the question. *See Ex parte Randolph*, 20 F. Cas. 242, 254 (C.C.D. Va. 1833) (No. 11,558) (Marshall, C.J.).

i. A Constitutional Question Is Necessary If Deciding It Could Provide Broader Relief Than a Decision Solely on Non-Constitutional Grounds.

A constitutional question is necessary if deciding it could provide broader relief than a decision solely on non-constitutional grounds. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 446 (1988) ("This principle [of constitutional avoidance] required the

courts below to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary."); *Veasey v. Abbott*, 830 F.3d 216, 230 n.11 (5th Cir. 2016) (en banc), *cert. denied*, 137 S. Ct. 612 (2017) ("[W]e cannot avoid ruling on the discriminatory intent claim here, where the remedy to which Plaintiffs would be entitled . . . is potentially broader than the remedy the district court may fashion for the discriminatory impact violation."). For example, in *Lyng*, this Court refused to vacate a First Amendment ruling because the relief supported by the statutory grounds would have been "conditional, or narrower in scope." 485 U.S. at 447. Thus, the constitutional question was "necessary to the decisions below." *Id.*

As a result, a constitutional question is clearly necessary when it is the only basis for relief. *See Myers v. United States*, 272 U.S. 52, 107-08 (1926); *Bandimere v. Secs. & Exch. Comm'n*, 844 F.3d 1168, 1172 (10th Cir. 2016) ("Because the sole argument attacking his registration liability is constitutional, we cannot avoid the Appointments Clause question."); *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward Cty.*, 450 F.3d 1295, 1306 (11th Cir. 2006) ("[I]f a plaintiff is not entitled to statutory relief (as is the case here), then the constitutional claims are unavoidable and the federal court must address their merits."). For example, in *Myers*, the Court addressed the constitutionality of a removal statute because Myers's right to relief turned solely on the statute's validity. 272 U.S. at 107-08 ("If this statute . . . is valid, the appellant . . . is entitled to recover his unpaid salary . . . . The government maintains that the requirement is invalid . . . . If this view is sound, the removal of Myers by the President without the Senate's consent was legal."). Thus, the Court was "confronted by the constitutional question and [could not] avoid it." *Id.*

ii. PHH's Constitutional Challenge Is Necessary Because It Is the Only Basis for Relief from the Enforcement Action Authorized by the D.C. Circuit's Statutory Rulings.

PHH's constitutional challenge is necessary because it is the only basis for relief from the enforcement action authorized by the D.C. Circuit's statutory rulings. The statutory rulings authorize the CFPB to impose liability for payments made within the statute of limitations and in excess of reasonable market value. 839 F.3d at 55. The constitutional question is the only basis for challenging this enforcement authority. *See id.* at 9 n.1 ("If PHH fully prevailed on its constitutional argument, including with respect to severability, . . . we could not and would not remand to the CFPB for any further proceedings."). Thus, as in *Myers*, this Court is squarely "confronted" with the constitutional question and "cannot avoid it." *See* 272 U.S. at 108.

Addressing the constitutional question now would not be premature. This Court does not require that individuals wait to challenge the legality of impending administrative action. *See Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626 n.1 (1986) ("If a reasonable threat of prosecution creates a ripe controversy, we fail to see how the actual filing of the administrative action threatening sanctions in this case does not."). Thus, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court reached an Article II challenge to an agency, even though the agency had not yet sanctioned the challenger. *See* 561 U.S. 477, 490 (2010). The government argued that Court should wait for the case to return on appeal from a Board sanction. *Id.* The Court rejected this argument, explaining that "[w]e normally do not require plaintiffs to bet the farm" to challenge a law. *Id.* at 490. Similarly, here, the Court should not force PHH to incur liability on remand before hearing its challenge.

In addition, the mere possibility that the Director might not impose liability on remand does not make the constitutional question unnecessary. First, PHH is entitled to challenge further proceedings before an unconstitutional body. *See Marathon Pipeline Constr. Co. v. Marathon*

Pipe Line Co., 458 U.S. 50, 89 (1982) (Rehnquist, C.J., concurring) (concluding that "Marathon may object to proceeding further with this lawsuit" on the grounds that the agency lacked constitutional authority to resolve the dispute). Second, this Court has refused to avoid constitutional questions based on speculative claims that constitutional relief is unnecessary. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 936 (1983) (refusing to avoid a constitutional question "on the basis of speculation over the availability of other forms of relief"). Rather, this Court has required proof of a *legal guarantee* that a future violation will not occur. *See Jean v. Nelson*, 472 U.S. 846, 857 (1985) (avoiding a constitutional question because revised regulations "protected [the claimants] . . . from the very conduct which they fear"). Without such a guarantee, the Court has refused to leave constitutional relief to chance. For example, in *Chadha*, the Court rejected the INS's suggestion that "Chadha may have other statutory relief available to him" because they were "by no means certain." 462 U.S. at 936. Instead the Court reached Chadha's constitutional claim, which guaranteed that he would not be deported and would "automatically become eligible to apply for citizenship." *Id.* at 937.

Similarly, here, the constitutional question can provide certain relief, while avoiding it will result in an unconstitutional exercise of power. There is no doubt that the CFPB will impose liability on remand because the Director has already declared that such liability has been proven. *See In re PHH Corp.*, CFPB No. 2014-CFPB-0002, at 22 (June 4, 2015) ("[E]ven if PHH were right about section 8(c)(2), it would still be liable under RESPA on the facts established in the record of this proceeding."). Two sets of reinsurance payments fall within the three-year statute of limitations: those of UGI and Genworth. *See In re PHH Corporation* at 14, 35 (identifying payments from 2011 to 2013, and noting that the CFPB filed charges in 2014). The Director found that, at a minimum, these payments overestimated the value of Atrium's reinsurance. *See*

id. at 21-22. In fact, the Director concluded that the evidence "strongly suggest[ed] that mortgage insurers had *no need* for reinsurance unless it was connected to referrals of business." *Id.* at 13 (emphasis added). In that case, the Director could assess liability for the full amount, as "disguised payment[s] for the referral." 839 F.3d at 49 & n.27.

Such liability would be substantial. In total, the UGI and Genworth accounts comprised 98% of the CFPB's $109 million disgorgement amount. *See In re PHH Corp.* at 36-37. Moreover, the Director specifically reserved discretion to assess civil monetary penalties. *Id.* at 37. The Director declined to do so only because he believed the original award was "just and sufficient." *Id.* at 37-38. Now that portions of the disgorgement award have been excluded, the Director will be able to inflate the new judgment through civil penalties. Thus, like in *Chadha*, the Court cannot avoid the constitutional question presented.

B. Vacating the Director's Order on Statutory Grounds Is Not Sufficient to Dispose of the Case, Regardless of What the Parties Argued Below.

Vacating the Director's order on statutory grounds is not sufficient to dispose of the case, regardless of what the parties argued below. To decide what relief is necessary, the Court must examine "the entire case," not just the issues litigated below as they were litigated below. *See United States v. Locke*, 471 U.S. 84, 92 (1985); *Williams v. Zbaraz*, 448 U.S. 358, 367-68 (1980) (addressing the constitutionality of the Hyde Amendment even though "[n]one of the parties to these cases ever challenged the validity of the Hyde Amendment"). As shown above, vacatur does not constitute full relief. Therefore, the Court must decide the constitutional question.

i. This Court Has Addressed Constitutional Arguments That Were Presented Just as PHH's Were Below, and Even Arguments Not Presented Below at All.

This Court has addressed constitutional arguments that were presented just as PHH's were below, and even arguments not presented below at all. The CFPB argues that the

constitutional question is unnecessary because (1) PHH described its constitutional arguments as an "alternative" basis for vacating the Director's Order, and (2) PHH requested "vacatur," which the statutory claims could support. *See also* 839 F.3d at 58 (Henderson, J., concurring in part and dissenting in part). But PHH did not assert that vacating the Director's order was sufficient to cure the constitutional violation. Rather, in its remedies section, PHH argued that "[t]he appropriate remedy *for the Director's multiple legal errors* is vacatur." *See* Opening Brief for Petitioners at 61, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016) (emphasis added). There, PHH was referring to the errors underlying its statutory claims. *See id.* Those errors did warrant vacatur. But even with vacatur, the violation inherent in the CFPB's exercise of authority against PHH remains unaddressed.

In *Morrison v. Olson*, this Court addressed constitutional arguments that were presented just as PHH's were in the court below. *See* 487 U.S. 654 (1988). First, Olson raised an alternative, non-constitutional ground for relief, claiming that under the Ethics in Government Act, the independent counsel lacked jurisdiction to continue her investigation. *See* Brief for Appellee at 54, *Morrison v. Olson*, 487 U.S. 654, 1987 WL 880907 (1988). Second, Olson framed this argument as an "alternative" to the constitutional ground and "an *independent basis* to affirm the decision below." *Id.* at 54 & n.152 (emphasis added). Finally, Olson requested affirmance, which the non-constitutional argument supported. *Id.* at 57. Nevertheless, the Supreme Court reached the merits of Olson's constitutional challenge. *See* 487 U.S. at 685-97.

Moreover, this Court has decided constitutional questions even when the litigants failed to present them as necessary in the court below—or present them at all. *See, e.g.*, *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 378 (1995) (reaching a constitutional argument even though the proponent "did not raise this point below; indeed, he expressly

disavowed it in both the District Court and the Court of Appeals"); *Bowsher v. Synar*, 478 U.S. 714, 778 (1986) (Blackmun, J., dissenting) (noting that the majority evaluated the constitutionality of a law even though "[a]ppellees have not sought invalidation"). In extreme cases, the Court has declined to consider "issues . . . neither raised before nor considered by the Court of Appeals." *See Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970). But that is not the case here. PHH did raise its constitutional arguments below, and the Court of Appeals squarely addressed them, including the relief they would afford. 839 F.3d at 5-39, 9 n.1.

The cases that the CFPB cites do not show that the constitutional question is unnecessary. For example, *Northwest Austin Municipal Utility District Number One v. Holder* ("*NAMUDNO*") is distinguishable because of unique deference this Court gives to Congress in implementing the Reconstruction Amendments. *See* 557 U.S. 193, 205 (2009) ("The Fifteenth Amendment empowers 'Congress,' not the Court, to determine in the first instance what legislation is needed to enforce it."); *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2636 (2013) (Ginsburg, J., dissenting) ("It is well established that Congress' judgment regarding exercise of its power to enforce the Fourteenth and Fifteenth Amendments warrants substantial deference."). Thus, in *NAMUDNO*, the Court took special care to avoid the constitutional question in order to give Congress an opportunity to revise the law at issue. *See* 133 S. Ct. at 2631 ("[I]n 2009, we took care to avoid ruling on the constitutionality of the Voting Rights Act . . . . Congress could have updated the coverage formula at that time."). In this case, PHH's challenge does not implicate the Fifteenth Amendment or the unique deference it requires.

In addition, even if *NAMUDNO* applied, it shows only that this Court has held parties to the framing of their arguments *before the Supreme Court*, not the court below. *See* 557 U.S. at 205-06 (quoting the district's merits brief and oral argument before the Supreme Court, without

referencing the arguments in the court below). The Court took particular notice of the fact that, in arguing before the Supreme Court, the district "acknowledge[d]" that the Court could avoid the constitutional question through statutory grounds. *Id.* at 206. The special focus on the parties' arguments to the Supreme Court reflects this Court's rule that "[a] litigant seeking review in this Court . . . generally possesses the ability to frame the question to be decided in any way he chooses." *See Yee v. City of Escondido*, *Cal.*, 503 U.S. 519, 535 (1992); *see also B & B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1304 (2015) (declining to address a constitutional challenge when the proponent did not clearly make the argument to the Supreme Court, and in fact "seemingly conceded" it in opposing certiorari). Unlike the district in *NAMUDNO*, PHH has clearly presented the constitutional question to the Supreme Court as separate and independent from the statutory issues decided below. PHH has further clarified that the constitutional question is necessary for full relief, and thus cannot be avoided. Thus, *NAMUDNO* does not support avoidance in this case.

Cases like *Zobrest v. Catalina Foothills School District* also do not support avoidance in this case. *See* 509 U.S. 1 (1993). In fact, *Zobrest* shows that this Court will not reach for *non-constitutional* arguments that were not raised below in order to avoid constitutional questions. *Id.* at 8. In *Zobrest*, the Court refused to apply the avoidance doctrine where the "parties chose to litigate the case on the federal constitutional issues alone." *Id.* at 7-8. The Court noted that there may have been "buried in the record a nonconstitutional ground for decision," but found that this was "not by itself enough" to invoke the avoidance doctrine. *Id.* at 8. Thus, the Court held that "the prudential rule of avoiding constitutional questions has no application." *Id.* Far from supporting avoidance, *Zobrest* shows that this Court will not "transform principles of avoidance

. . . into devices for sidestepping resolution of difficult cases." *See DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting).

ii. PHH Neither Waived Nor Forfeited Its Constitutional Arguments, and Such Concerns Are Minimized by the Need to Resolve Structural Constitutional Challenges.

PHH neither waived nor forfeited its constitutional arguments, and such concerns are minimized by the need to resolve structural constitutional challenges. First, PHH has not waived its constitutional arguments. A waiver is the "intentional relinquishment or abandonment of a known right or privilege." *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 n.2 (1991) (Scalia, J., concurring) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). This Court has held that consenting to adjudication before an Article I court or administrative agency can waive the right to challenge that body's authority. *See Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1942 (2015) ("Our precedents make clear that litigants may validly consent to adjudication by bankruptcy courts."). But here, PHH never consented to adjudication before the CFPB: Rather, the CFPB haled PHH before it using its enforcement authority. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 855 (1986) (considering consent because "the decision to invoke this forum is left entirely to the parties"). Thus, there has been no waiver.

Second, PHH has not forfeited its constitutional arguments. A party does not forfeit an argument unless it fails to raise it below. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 894 (1991) (Scalia, J., concurring). Thus, no forfeiture occurs if a party raises an argument in the party's opening brief sufficiently for the court below to rule on it. *See, e.g.*, *Outdoor Media Grp., Inc. v. City of Beaumont*, 506 F.3d 895, 900 (9th Cir. 2007); *State of Ariz. v. Components Inc.*, 66 F.3d 213, 217 (9th Cir. 1995). Here, PHH raised its constitutional challenge to the CFPB's structure in its opening brief, arguing from pages forty-five to fifty that "the CFPB

violates the constitutional separation of powers."[8] *See* Opening Brief for Petitioners at 45-50, *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1 (D.C. Cir. 2016). Moreover, on page four, PHH notified the court that "constitutional provisions" were "at issue" in the case. *See id.* at 4. The D.C. Circuit found PHH's briefing sufficient to rule on the constitutional question in a "length[y]" opinion. *See* 839 F.3d at 5-39, 9 n.1. Judge Kavanaugh also specifically determined that remand would be inappropriate if PHH fully prevailed on its constitutional arguments. *Id.* at 9 n.1. Thus, there has been no forfeiture.

Third, even if there were waiver or forfeiture, PHH's constitutional arguments would still merit determination. *See Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879 (1991). The judicial policy of waiver and forfeiture is not absolute. *See id.*; *see also Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("A rigid and undeviating judicially declared practice under which courts of review would invariably . . . decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice."). Thus, this Court has repeatedly considered issues that the parties failed to even identify below, when necessary to dispose of the case. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, *Inc.*, 508 U.S. 439, 445 (1993) ("[A] court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify and brief."); *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting) (collecting cases in which the Court "considered issues

[8] Whether PHH raised its constitutional arguments before the ALJ or the Director of the CFPB does not affect the issue of forfeiture. Questions about the separation of powers, especially those which affect the authority of an agency to act, are "for the courts." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 473 (2001); *see also Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 928 (1983) (noting that the Board of Immigration Appeals determined that it had 'no power to declare unconstitutional an act of Congress'"). Thus, in *Freytag*, the Court reached the merits of a constitutional separation-of-powers claim that was first raised on appeal to the Fifth Circuit. *See* 501 U.S. 868, 879-80 (1991). Here, it is sufficient that PHH raised its challenge in the D.C. Circuit.

waived by the parties below and in the petition for certiorari"). Here, the constitutional question is necessary to and ultimately dispositive of this case, and therefore should be addressed.

Moreover, the structural nature of PHH's constitutional challenge weighs strongly in favor of disregarding any concerns about waiver or forfeiture. In *Freytag*, the Court reached the merits of a constitutional challenge under the Appointments Clause, despite both waiver and forfeiture concerns. 501 U.S. 868, 878 (1991). The Court recognized that "as a general matter, a litigant must raise all issues and objections at trial." *Id.* at 879 (quoting *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). However, the Court concluded that this policy "does not always overcome what Justice Harlan called 'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'" *Id.*; *see also Myers*, 272 U.S. at 141 (explaining that in *Marbury v. Madison*, Marshall addressed "whether the appointee was removable by the President" even though no party had "contend[ed] for that view"). Thus, the Court refused to avoid the constitutional question. 501 U.S. at 879. Here, the unprecedented concentration of power in the hands of a single independent Director threatens the "constitutional plan of separation of powers" even more gravely than the special trial judges did in *Freytag*. *See id.*

Finally, PHH's constitutional arguments fall within the core class of structural challenges that undermine the legitimacy of the proceedings at issue. *See id.* (emphasizing that "[t]he alleged defect in the appointment of the Special Trial Judge goes to the validity of the Tax Court proceeding that is the basis for this litigation"). This Court has analogized such challenges to truly "jurisdictional" issues, which can never be waived or forfeited. *See Glidden Co. v. Zdanok*, 370 U.S. 530, 537-38 (1962) (analogizing a challenge to the constitutional authority of the Court of Customs and Patent Appeals and Court of Claims to "[w]hether diversity of citizenship exists"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986) ("To the

extent that this structural principle is implicated . . . the parties cannot by consent cure the constitutional difficult for the same reason that the parties by consent cannot confer on federal courts subject-matter jurisdiction."). Similarly, here, if PHH fully prevails, "the CFPB could not continue operating unless and until Congress enacted new legislation." 839 F.3d at 9 n.1. Thus, "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" is at its peak in this case. *See Freytag*, 501 U.S. at 879.

C. This Court's Paramount Duty to Preserve the Separation of Powers Makes Constitutional Avoidance Especially Inappropriate.

This Court's paramount duty to preserve the separation of powers makes constitutional avoidance especially inappropriate. As a "prudential rule," the avoidance doctrine does not apply in all cases. *See Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993). In particular, the policy of avoidance does not supersede the Court's duty to preserve the guarantees of the Constitution. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 333 (2010) (reaching the First Amendment challenge because "[a]ny other course of decision would prolong the substantial, nationwide chilling effect"); *see also Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (rejecting pendent jurisdiction under the Eleventh Amendment, despite federal courts' previous use of pendent jurisdiction "to avoid federal constitutional questions"). As Justice Harlan said, "[T]he judiciary has a particular responsibility to assure the vindication of constitutional interests." *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 407 (1971) (Harlan, J., concurring); *see also* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1047 (1994) ("Even if all agree that deciding constitutional issues is the most important function of federal courts, . . . it does not follow that the courts should avoid such a responsibility. On the contrary, the importance of such issues . . . might dictate a heightened duty to decide constitutional questions.").

i. This Court Has Refused to Avoid Fundamental Constitutional Questions Concerning the Separation of Powers.

As a result, this Court has refused to avoid fundamental constitutional questions concerning the separation of powers. *See PHH Corp.*, 839 F.3d at 9 n.1 (detailing the Supreme Court's practice of addressing such challenges "promptly"); *see, e.g.*, *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 490-91 (2010) (refusing to avoid the constitutional question based on an alleged failure to exhaust administrative review). The separation of powers is one of the most essential guarantees that federal courts uphold. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (stating that "[i]t is emphatically the province and duty of the judicial department to say what the law is" in "litigation challenging the constitutional authority of one of the three branches" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Myers v. United States*, 272 U.S. 52, 182 (1926) (opinion of McReynolds, J.) ("These questions press for answer; and thus the cause becomes of uncommon magnitude."). Delaying "a fundamental and ultimately unavoidable structural challenge" can be "irresponsible," "given the systemic ramifications of such an issue." *See* 839 F.3d at 9 n.1. The risks are especially severe here, given that "[t]he Director enjoys more unilateral authority than any other officer in any of the three branches of the U.S. Government, other than the President." *See id.* at 7.

ii. Avoidance in This Case Will Not Serve the Purposes for Which the Doctrine Was Designed.

Moreover, avoidance in this case will not serve the purposes for which the doctrine was designed. First, avoidance will not allow the federal judiciary to escape a confrontation with a coordinate branch because these "constitutional issues . . . concern vast numbers of people . . . and they will not disappear. They must inevitably return to the federal courts and ultimately

again to this Court." *See DeFunis v. Odegaard*, 416 U.S. 312, 350 (1974) (Brennan, J., dissenting); *see also* Kyle Correa-Brady et al., *CFPB 2015: A Year of Growth and Expansion*, Bloomberg Law: Banking (Feb. 24, 2016) ("The number of enforcement actions initiated by the [CFPB] has increased each year since it began enforcement activity in summer 2012."). In fact, at least one federal court is poised to address the very question presented in this case. *See State Nat'l Bank of Big Spring v. Lew*, 197 F. Supp. 3d 177, 179 (D.D.C. 2016) (holding resolution in abeyance until this Court's decision). Thus, avoiding resolution today will not insulate the judiciary, or even buy it more time. *See* 839 F.3d at 59 n.4 (Henderson, J., concurring in part and dissenting in part) ("[T]hat challenge will be before this Court relatively quickly.").

Second, if the Court avoids the question today, the Court will forgo perhaps the best opportunity to address the question with the benefit of a well-developed factual and legal record. The avoidance doctrine is designed to prevent "abstract" determinations that are not grounded in concrete disputes. *See Rescue Army v. Mun. Court of City of L.A.*, 331 U.S. 549, 575 (1947) (avoiding constitutional issues framed "in highly abstract form" on a "record present[ing] only bare allegations"); *Poe v. Ullman*, 367 U.S. 497, 503-04 (1961) (plurality). In fact, Justice Brandeis's primary concern in *Ashwander* was that "plaintiffs have no standing to challenge the validity of the legislation." 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). Here, the constitutional question has been framed by a thoroughly litigated dispute between clearly interested and adverse parties. Far from a "record present[ing] only bare allegations," *see Rescue Army*, 331 U.S. at 575, the extensive record and opinion below have shaped the question "as leanly and as sharply as judicial judgment upon an exercise of congressional power requires," *see United States v. Cong. of Industrial Orgs.*, 335 U.S. 106, 126 (1948). Moreover, a constitutional ruling would not be an advisory opinion, as it could directly change the outcome of

the case. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945). Thus, the Court has met its duty of "assur[ing] that the constitutional challenge will be made in a form traditionally thought to be capable of judicial resolution." *See Flast v. Cohen*, 392 U.S. 83, 97 (1968).

Finally, this case does not raise concerns about "[d]ue respect for the decisions of a coordinate branch" because PHH has made a clear showing of unconstitutionality. *See United States v. Morrison*, 529 U.S. 598, 607 (2000). As discussed below, the CFPB as structured is an unprecedented concentration of power outside the Constitution's three-branch structure of government. PHH's arguments are supported by this Court's precedent, historical practice, and the separation of powers. Thus, no matter how difficult or consequential it may be, the constitutional question presented cannot and should not be avoided. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 205 (2012) (Sotomayor, J., concurring).

II. THE CFPB'S UNPRECEDENTED STRUCTURE AS A SINGLE-DIRECTOR INDEPENDENT AGENCY VIOLATES ARTICLE II OF THE CONSTITUTION.

The Director's unilateral, unchecked power makes him "the single most powerful official in the entire U.S. Government, other than the President." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 17 (D.C. Cir. 2016). "No head of either an executive agency or an independent agency operates unilaterally without any check on his or her authority." *Id.* at 6. In an executive agency, the President retains authority over a single director through his removal power. In an independent agency, the agency's power is divided among its multiple directors. But in the CFPB, this division of power simply does not exist. This concentration of power in the Director renders the CFPB's structure unconstitutional.

To analyze the constitutionality of the CFPB's unprecedented structure, this Court must place "significant weight upon historical practice." *NLRB v. Noel Canning*, 134 S. Ct. 2550,

2559 (2014) (emphasis omitted). This method of analysis is "neither new nor controversial" where, as here, the text of the Constitution alone does not resolve the question. *Id.* at 2560. Historical practice has informed this Court's separation of powers cases for nearly a century. *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2091 (2015) (internal quotation marks omitted) ("In separation-of-powers cases this Court has often put significant weight upon historical practice."); *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014) ("This Court has treated practice as an important interpretive factor . . . even when that practice began after the founding era."); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring) ("Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them."); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 327-28 (1936) ("A legislative practice . . . evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the presence of unassailable ground for the constitutionality of the practice. . ."); *The Pocket Veto Case,* 279 U.S. 655, 689 (1929) ("Long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions."). These cases make clear that a longstanding "practice of the government," *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819), must inform how this Court determines "what the law is," *Marbury v. Madison,* 5 U.S. 137, 177 (1803).

This Court's recent separation of powers jurisprudence is illustrative for this case. In *NLRB v. Noel Canning*, this Court held that recess appointments made during a Senate recess of fewer than ten days were presumptively unconstitutional. 134 S. Ct. 2550, 2567 (2014). This Court relied heavily on historical use of the Recess Appointments Clause to guide its analysis, drawing its conclusion "in light of historical practice" surrounding the Clause. *Id.* at 2567. This

Court did "not [find] a single example of a recess appointment made during an intra-session recess that was shorter than 10 days." *Id.* at 2566. This "lack of examples" heavily informed this Court's holding. *Id.*

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, this Court held that two layers of for-cause protection insulating Board members from the President violated Article II of the Constitution. 561 U.S. 477 (2010). This Court emphasized that "[p]erhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity." *Id.* at 505 (internal quotation marks omitted). The parties identified "only a handful of isolated positions" in the Executive Branch that had double for-cause protection. *Id.* These examples were both distinguishable in kind and few in number. Accordingly, they did not contradict the overwhelming evidence that the settled independent agency practice was to have only one layer of for-cause protection. *See id.* at 505-08. On this basis, this Court held that the Board's novel structure violated the Constitution.

The CFPB's structure is similarly unprecedented. Until now, "no independent agency exercising substantial executive authority has ever been headed by a *single person*." 839 F.3d at 6 (emphasis in original). Instead, from as far back as 1887 to as recently as 2010, these agencies "have all been multi-member commissions or boards." *Id.* at 17-18 (referencing the Interstate Commerce Commission (1887) and the Independent Payment Advisory Board (2010)). The Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board, the Federal Energy Regulatory Commission, and the Merit Systems Protection Board, all independent agencies, have multi-member boards. *See id.*[9] So, too, does the Consumer Product Safety Commission, on which the

[9] Generally, an agency whose Director is removable at will is an executive agency, not an independent agency, because the President can direct, supervise, and remove its heads. In the years between *Myers* (1926) and

CFPB was modeled. *See* Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages. Why We Need a Financial Product Safety Commission*, Democracy, Summer 2007, 8, 16-18 (comparing the proposed CFPB to "its counterpart for ordinary consumer products"); *see also* 15 U.S.C. § 2053(a).

The CFPB has identified only three independent agencies, past or present, with a single director: the Social Security Administration, the Office of Special Counsel, and the Federal Housing Finance Agency. 839 F.3d at 18; *see also* Tr. of Oral Arg. at 19. "[W]hen considered against . . . settled practice," this Court must "regard these few scattered examples as anomalies."[10] 134 S. Ct. at 2567.

In addition, the Social Security Administration and the Office of Special Counsel are distinguishable from the CFPB; their directors cannot unilaterally bring enforcement actions or impose penalties on private citizens. The Office of Special Counsel has only narrow jurisdiction, primarily to enforce personnel rules against government employers and employees. *See* 839 F.3d at 19. The Social Security Administration's ("SSA") primary authority is supervisory in adjudicating private benefits claims. While the SSA Commissioner can bring enforcement actions or to impose penalties or fines on private citizens for violating agency rules, that power is not unilateral. The Commissioner may seek civil sanctions against individuals who file improper claims "only as authorized by the Attorney General"—an executive officer accountable to the President. *See* 42. U.S.C. § 1320a-8(b).

Humphrey's Executor (1935), however, Congress created some multi-member agencies whose heads were removable at will, likely because it believed *Myers* prohibited independent agencies. The Federal Trade Commission and the Securities and Exchange Commission were among these agencies. But, this Court has treated them as independent agencies. *Cf. Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 487 (2010) (deciding the case on assumption that the SEC is an independent agency).

[10] Even if Petitioners or this Court were to uncover additional examples, it is clear that the single-Director independent agency "has been rare at its best." *Free Enterprise Fund*, 537 F.3d 667, 699 n.8 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *reversed by Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477. The Supreme Court adopted Judge Kavanaugh's view over the that of the D.C. Circuit.

The CFPB, by contrast, wields enormous regulatory, enforcement, and adjudicatory power. The Director unilaterally enforces nineteen federal consumer protection statutes—authority that was previously spread across seven different agencies. *See* 12 U.S.C. § 5581(b); 839 F.3d at 7. This authority reaches "everything from home finance to student loans to credit cards to banking practices" and directly impacts "American business, American consumers, and the overall U.S. economy." *Id.* In these areas, the Director alone can enforce the agency's rules against private citizens, and he alone supervises adjudications for those violations. The Director's power vastly outweighs that of the SSA Commissioner and the Office of Special Counsel, rendering those agencies inapposite as historical precedent.

Although the Federal Housing Finance Agency is somewhat more similar to the CFPB, it was established around the same time as the CFPB and thus cannot be said to provide historical precedent. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, § 1101, 122 Stat. 2654, 2662 (codified at 12 U.S.C. §§ 4511-4512).

In addition, this Court has never confirmed that any of these agencies' single-Director structure is constitutional. This structure thus cannot constitute a *settled* practice. *See The Pocket Veto Case*, 279 U.S. 655, 689 (1929).[11] Where this Court has not yet addressed whether a governmental practice violates separation of powers, it has factored Executive and Legislative doubts as to the constitutionality of that practice into its own analysis. *See, e.g.*, 134 S. Ct. at 2562, 2564 (looking to "opinions of Presidential legal advisers" and Senate silence on decades of Presidential recess appointments to analyze the scope of the Recess Appointments Clause);

[11] A holding that the CFPB's single-Director structure is unconstitutional need not invalidate this same structure in these other agencies. First, these agencies do not exercise the core executive power of bringing law enforcement actions against private citizens. In addition, "the very size and variety of the Federal Government . . . discourage[s] general pronouncements on matters neither briefed nor argued" in the case in question. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 506 (2010).

Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 942, 942 n.13 (1983) (noting the significance of a history of Executive Branch challenges to the constitutionality of the legislative veto).

When Congress converted the Social Security Administration into a single-Director independent agency in 1994, *see* 839 F.3d at 18, President Clinton issued a signing statement to state his constitutional objection to the change, *see* President William J. Clinton, Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994) ("[I]n the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question.").

The Executive Branch has also expressed doubts over the constitutionality of the Office of Special Counsel. The Department of Justice under President Carter advised that the Special Counsel "must be removable at will by the President." Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. O.L.C. 120, 120 (1978). President Reagan subsequently vetoed additional legislation relating to the Office because of "serious constitutional concerns" about its structure. *See* President Ronald Reagan, Memorandum of Disapproval on a Bill Concerning Whistleblower Protection, 2 Pub. Papers 1391, 1392 (Oct. 26, 1988). One past Special Counsel himself acknowledged that the position is "a controversial anomaly in the federal system." K. William O'Connor, *Foreward to* Shigeki J. Sugiyama, Protecting the Integrity of The Merit System: A Legislative History of the Merit System Principles, Prohibited Personnel Practices and the Office of the Special Counsel, at v (1985). In light of this historical and legal uncertainty about the constitutionality of a single-Director

independent agency, this Court must "regard these few scattered examples as anomalies." 134 S. Ct. at 2567.

One additional historical example is worth addressing, though it does not concern an independent agency. This case is also distinguishable from *Morrison v. Olson*. 487 U.S. 654 (1988). There, this Court upheld the now-defunct Office of Independent Counsel, the single head of an independent entity whom the Attorney General could remove only "for good cause." *Id.* at 663 (quoting 28 U.S.C. § 596(a)(1)). First, the independent counsel was not a regulatory agency at all. The office had no "policymaking or significant administrative authority." *Id.* at 691. Instead, the independent counsel exercised purely prosecutorial power, and only with narrow jurisdiction. *See id.* at 663. Importantly, *Morrison* does not hold that the single director of an independent *agency* may enjoy for-cause removal protection.

In addition, this Court emphasized that the President retained direct authority over the independent counsel through the Attorney General, who had "several means of supervising or controlling" the independent counsel. *Id.* at 696. Where the Attorney General is removable by the President at will and is thus directly responsible to him, this Court reasoned that the President retained some authority over the independent counsel through the Attorney General. This Court upheld the independent counsel under these specific circumstances, which are clearly distinguishable from those in the present case. The CFPB is a regulatory agency with enormous rulemaking, prosecutorial, and adjudicatory power, and the Director's for-cause protection makes him responsible to no one, either directly or indirectly, for his policy decisions. *Morrison* is thus inapposite.[12]

[12] In addition, the Office of Independent Counsel was widely recognized to be a mistake. Justice Scalia's dissenting opinion, concluding that the independent counsel was an unconstitutional departure from historical practice that seriously threatened individual libert, has been lauded as "one of the greatest dissents ever written." *Stanford*

III. THE DIRECTOR'S UNILATERAL, UNCHECKED POWER UNDERMINES THE CONSTITUTIONAL STRUCTURES AND PRINCIPLES THAT PROTECT INDIVIDUAL LIBERTY.

A. The Constitution Values Separation of Powers to Preserve Individual Liberty.

Our Constitution creates a carefully balanced system of government, separating power among the three branches and empowering each to check the others. *See Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of the articles delegating and separating powers under Arts. I, II, and III exemplify the concept of separation of powers."). The deliberate, "declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). The Framers recognized the danger inherent in concentrating power in any one governmental actor, fearing that such unchecked power could lead to tyranny or arbitrary decision-making and thus infringe on individual liberty. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 121 (1976). With such grave consequences at stake, "the carefully defined limits on the power of each Branch must not be eroded." 462 U.S. at 957-58.

"Virtually every part of our constitutional system bears the mark of this judgment." *Id.* at 998 (White, J., dissenting). The Constitution divides power between the federal and state governments. *See* U.S. Const. amend. X. Within the federal government itself, the Constitution divides power not only between the three branches, but also among different actors within each "to prevent unnecessary and dangerous concentration of power." 462 U.S. at 998. The Speaker of the House and Senate Majority Leader need the votes of half their members—and half the

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Lawyer, Spring 2015, at 4 (quoting Justice Kagan). This Court has frequently cited Justice Scalia's dissent in separation of powers cases since the office was terminated in 1999, including in several cases cited in this brief.

members of the other house and the President's signature—to enact legislation. The Constitution establishes a Supreme Court composed not of one judge but of multiple "judges." U.S. Const. art. III § 1.

The sole exception to this division of powers is the President, who serves alone as head of the Executive Branch. The Framers concentrated the executive power in a unitary President so it would not be overrun by the stronger Legislative Branch—another piece in the Constitution's careful plan to separate powers. *See* The Federalist No. 48. Yet, recognizing the threat this concentration of power posed to individual liberty, the Framers imposed checks on the President's power, just as they imposed checks on the other two branches.

To that end, Article II makes it "emphatically clear from start to finish" that "the president would be personally responsible for his branch." Akhil Reed Amar, America's Constitution: A Biography 197 (2005). Article II vests the full executive power in the President and requires him to take care that the laws be faithfully executed. U.S. Const. art. II §§ 1, 3. This Court has interpreted these Clauses to give meaning to each other; the executive power must be sufficient in scope for the President to fulfill his constitutional obligation. *Cf. Myers v. United States*, 272 U.S. 52 (1926). In order to supervise and direct the subordinate officers who assist in discharging executive power, the President must have some "power of removing those for whom he can not continue to be responsible." *Id.* at 117. Without this removal power, "the buck would stop somewhere else." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 514 (2010). A subordinate could ignore the President's direction without consequence. 478 U.S. at 726 (internal quotation marks omitted) ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey."). Accordingly, the President's removal power is not simply an authority, but also a

measure to protect individual liberty by ensuring that the people and the other branches can hold him accountable for the exercise of that power.

This Court has approved a limited exception to the President's removal power. In *Humphrey's Executor v. United States*, this Court upheld the constitutionality of multi-member independent agencies whose Directors the President can remove only for "inefficiency, neglect of duty, or malfeasance in office"—that is, for cause. 295 U.S. 602, 623, 629 (1935). Because they are "wholly disconnected from the executive department," independent agencies constitute a "headless fourth branch" mentioned nowhere in the Constitution, and with no direct accountability to the President. 839 F.3d at 6. Nevertheless, the Court has approved a limited role for these agencies in matters requiring independent expertise. But crucially, the agency upheld in *Humphrey's Executor* comprised a "body" of "members." 295 U.S. at 624. Thus, no individual held the agency's full power in his hands.

The CFPB's single-Director structure presents an unprecedented restriction on the President's removal power and, thus, an unprecedented concentration of power in any single Government official beyond the President himself. The Director's power is unchecked not only within the agency but within the entire headless fourth branch, making the him "the single most powerful official in the entire U.S. Government, other than the President." 839 F.3d at 17. The Constitution cannot tolerate a single, independent agency Director wielding such vast power.

This Court's doctrine, the historical practice of independent agencies, and our constitutional values make clear that a single-Director independent agency is constitutionally distinct from its multi-member counterpart. "Whether headed by one, three, or five members, an independent agency is not supervised or directed by the President, and its heads are not removable at will by the President." *Id.* at 32. The critical factor is whether the independent

agency separates power within it; the CFPB clearly does not. Its structure means the buck stops with the Director, contradicting this Court's precedent and undermining the constitutional structures and values that protect individual liberty.

B. Limited Checks on the Director's Power Do Not Mitigate the Threat to Individual Liberty.

The Act's limited checks on the Director's unilateral power do not sufficiently mitigate the threat that power poses to individual liberty. None of these checks sufficiently transfer power from the Director. First, the Dodd-Frank Act establishes a Consumer Advisory Board, with which the Director must consult. *See* 12 U.S.C. § 5494(a). The Act defines two functions for the Board: to "advise" the CFPB on federal consumer financial laws and to "provide information on emerging practices" in the regulated industry. *Id.* Nothing in the statute requires the Director to heed the Board's advice, and nothing indicates that the Board's informational function will check the Director's power in any way. Full decision-making power remains in the Director's hands alone.

The Act also gives a Financial Stability Oversight Council veto power over certain regulations. *See id.* § 5513. This check, too, is insufficient to cure the CFPB's constitutional defect. The Council may only veto the Director by a two-thirds majority of its members. *See id.* Even with that supermajority, the veto power only reaches regulations, leaving with the Director the sole authority to bring enforcement actions and direct adjudications. *See* 12 U.S.C. § 5513. Further still, the veto power reaches only those regulations that put "the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk," *id.* § 5513(c)(3)(B)(ii). This "extreme test will rarely be satisfied in practice." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 875 (2013); *see also* S. Rep. No. 111-176, at 166 ("The Committee notes that there

was no evidence provided during its hearings that consumer protection regulation would put safety and soundness at risk."). Between its limited scope and high bar for application, the Council's veto power does not sufficiently transfer power from the Director.

In addition, the Act technically establishes the CFPB as part of the Federal Reserve. But, this connection is limited to certain administrative purposes. *See, e.g.*, 12 U.S.C. §§ 5491(a), 5493. The Federal Reserve cannot supervise, direct or remove the Director and thus cannot check his power.

Lastly, the availability or even the likelihood of judicial review of agency action does not compensate for Article II defects in the agency's structure. *See, e.g.*, *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976). Further, judicial review is not available for many agency actions. *See, e.g.*, *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411 (1971). Even when judicial review is available, courts review agency actions with varying levels of deference. *See, e.g.*, *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844-45 (1984); *Motor Vehicle Manufacturers Association of U.S. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 41-43 (1983). But, discretionary agency actions can still substantially constrain individual liberty. Lastly, pre-enforcement challenges are not always ripe for review, often leaving a regulated entity the difficult choice either to violate the rule and risk penalties that would accompany a lost challenge, or not to challenge the rule at all. *See Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Toilet Goods Ass'n. v. Gardner*, 387 U.S. 158 (1967). For these reasons, judicial review does not sufficiently transfer power from the Director and thus does not address the CFPB's unconstitutional structure.

IV. THIS COURT MUST STRIKE DOWN THE CFPB'S SINGLE-DIRECTOR STRUCTURE TO REMEDY ITS CONSTITUTIONAL DEFECT WITHOUT UNDERMINING CONGRESS' INTENT.

To remedy the CFPB's constitutional flaw without undermining Congress' basic intent, this Court must strike down section 5491(b)(1) of the Dodd-Frank Act, which "establishe[s] the position of the Director." 12 U.S.C. § 5491(b)(1). Because Congress clearly contemplated the CFPB as an independent agency, this Court would undermine Congress' intent by severing the for-cause provision to make the Director removable at will. So as not to leave the Dodd-Frank Act without an agency to enforce it, this Court should follow its past practice of staying its order for a set period of time to allow Congress to implement a constitutional scheme to re-establish the CPFB an independent agency whose structure comports with the Constitution. *See, e.g.*, 478 U.S. at 736.

"Three interrelated principles" inform this Court's approach to considering whether to sever a constitutionally invalid provision from its statute. *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329 (2006). First, this Court must retain those portions of the act that are "capable of 'functioning independently.'" *United States v. Booker*, 543 U.S. 220, 258 (2005) (quoting *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987)). There is no suggestion here that the Dodd-Frank Act or the CFPB is not capable of functioning with a multi-member commission rather than a single Director.

In addition, this Court "must retain those portions of the Act that are (1) constitutionally valid." 543 U.S. at 258 (quoting *Regan v. Time*, 468 U.S. 641, 652-53 (1984) (plurality opinion)); *see also* 546 U.S. at 329 ("[W]e try not to nullify more of a legislature's work than is necessary. . ."). Critically, "the unconstitutional provision must be severed *unless the statute*

created in its absence is legislation that Congress would not have enacted." *Alaska Airlines v. Brock*, 480 U.S. 678, 685 (1987) (emphasis added).

To that end, this Court must retain those portions of the act that are "consistent with Congress' basic objectives in enacting the statute." 543 U.S. at 258 (citing 468 U.S. at 652); *see also* 424 U.S. at 108 (quoting *Champlin Refining Co. v. Corporation Commission of Oklahoma*, 286 U.S. 210, 234 (1932) (internal quotation marks omitted) ("Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.")). This last inquiry is "the more relevant inquiry in evaluating severability." 480 U.S. at 685 (recognizing that severing the provision in question "necessarily alters the balance of powers between the Legislative and Executive Branches of the Federal Government").

The inquiry into Congress' "basic objectives in acting the statute" is also most relevant here. This Court cannot sever the for-cause provision, 12 U.S.C. § 5491(c)(3), without undermining Congress' clear vision for the CFPB as an independent agency. Congress clearly intended to establish the CFPB as an independent agency. Severing the for-cause provision, however, would effectively render it an executive agency. Although constitutional, this solution would "alter the balance that Congress had in mind in drafting" the Dodd-Frank Act and undermine Congress' intent. 478 U.S. at 734. Severing the for-cause provision "would require this Court to undertake a weighing of the importance Congress attached" to that provision, an act this Court has suggested is beyond its judicial role. *Id.* at 735 (rejecting appellant's argument that this Court should undertake such weighing).

Congress initially contemplated the CFPB as a traditional, multi-member independent agency. The original bill that passed in the House of Representatives bill structured the CFPB as

a multi-member independent agency. *See* H.R. 4173, 111th Cong. § 4103 (as passed by House, Dec. 11, 2009). Although Congress ultimately changed the CFPB's structure to have a single Director, 12 U.S.C. § 5491(b)(1), Congress always treated the proposed CFPB as an independent agency, 12 U.S.C. § 5491(a) ("There is established in the Federal Reserve System, an independent bureau to be known as the 'Bureau of Consumer Financial Protection' . . .").[13] The Act's final text reflects this commitment to establishing an independent CFPB.

The Act also reflects that original proponents of the CFPB envisioned it as an independent agency. Elizabeth Warren, then a Harvard Law School professor, designed the CFPB as a multi-member independent agency. *See* Elizabeth Warren, *Unsafe at Any Rate: If It's Good Enough for Microwaves, It's Good Enough for Mortgages. Why We Need a Financial Product Safety Commission*, Democracy, Summer 2007, 8, 16-18 (comparing proposal for the Financial Product Safety Commission, the first proposed name for the CFPB, to "its counterpart for ordinary consumer products," the independent Consumer Product Safety Commission); *see also* 15 U.S.C. § 2053(a).

The Department of the Treasury adopted this structure in its administrative proposal. *See* Department of the Treasury, Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation 4, 14 (2009) ("We propose the creation of the Consumer Financial Protection Agency, which will be an independent entity. . .") ("The CFPA should be an independent agency. . .").

[13] The statute also provides that "[t]he Bureau shall be considered an Executive agency, as defined in section 105 of Title 5." This section defines "Executive agency" as "an Executive department, a Government corporation, and an independent establishment." 5 U.S.C § 105. "Independent establishment" is, in turn, defined as "(1) an establishment in the executive branch . . . which is not an Executive department, military department, Government corporation, or part thereof, or part of an independent establishment. . ." 5 U.S.C. § 104. The Dodd-Frank Act's broader use of "Executive agency" thus includes all agencies housed in the Executive Branch, encompassing both executive agencies whose Director is removable at will and independent agencies whose Directors are removable only for cause.

Against this background, this Court must not contradict Congress' intent to establish an independent CFPB. This Court has acknowledged that it "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached." *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560 (2014). Transforming the CFPB into an executive agency would upset Congress' deliberate intent to establish an independent CFPB and to fit it into our Government's delicate system of checks and balances accordingly. This Court must also hesitate to upset the compromises and working arrangements of settled historical practice.

Congress may ultimately decide to re-establish the CFPB as a single-Director executive agency; that decision is certainly within Congress's purview. But that decision is one for Congress, not for this Court. If, in the alternative, this Court concludes that it remains an "open question" whether Congress would have preferred a multi-member independent CFPB or a single-Director executive CFPB, it should not sever the for-cause provision but should instead "remand for the lower courts to determine legislative intent in the first instance. 546 U.S. at 331.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals on the constitutionality of the CFPB's structure should be affirmed, and the judgment on the remedy should be reversed. Furthermore, the order to remand the case to the CFPB should be vacated.

Respectfully submitted,

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