No. _____

IN THE

Supreme Court of the United States

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

v.

STEVEN MNUCHIN, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act violates the Constitution's separation of powers by creating the Bureau of Consumer Financial Protection ("CFPB") as an independent agency that exercises expansive executive authority over private citizens but is led by a single Director that the President cannot remove from office for policy reasons, is exempted from Congress's power of the purse and accompanying congressional oversight, and has no internal checks or balances (such as those afforded by a deliberative multi-member commission structure) to mitigate this lack of accountability and restraint.

2. Whether *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), should be overturned.

3. Whether the Appropriations Clause, in conjunction with the Constitution's separation of powers, permits Congress to create perpetual, on-demand funding streams for executive agencies that are unreviewably drawn from the coffers of other independent agencies.

PARTIES TO THE PROCEEDING

The Petitioners, plaintiffs below, are State National Bank of Big Spring, the Competitive Enterprise Institute, and the 60 Plus Association, Inc.

Petitioner State National Bank of Big Spring (the "Bank") is a federally-chartered bank. It has one parent company, SNB Delaware Financial, Inc., a Bank Holding Company in Dover, Delaware. SNB Delaware Financial, in turn, has one parent company, SNB Financial, Inc., a Texas Corporation and Bank Holding Company in Big Spring, Texas. No publicly held company has 10 percent or greater ownership of the Bank.

Petitioner the 60 Plus Association, Inc. (the "Association") is a non-profit, non-partisan seniors advocacy group that is tax exempt pursuant to Section 501(c)(4) of the Internal Revenue Code. The Association has no parent corporation, and no publicly held company has 10 percent or greater ownership of the Association.

Petitioner Competitive Enterprise Institute ("CEI") is a non-profit public interest organization that is tax-exempt pursuant to Section 501(c)(3) of the Internal Revenue Code. CEI has no parent corporation, and no publicly held company has 10 percent or greater ownership of CEI.

Respondent Bureau of Consumer Financial Protection was the lone defendant that participated in the proceedings in the D.C. Circuit below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals' decision summarily affirming the district court's entry of judgment against Petitioners is unpublished, but is wholly based on the en banc court's opinion in *PHH Corp. v. Consumer Fin. Prot. Bureau*, which is reported at 881 F.3d 75 (D.C. Cir. 2018) and is reprinted in the Appendix to the Petition ("App.") at 244a-546a. The unpublished summary affirmance is reprinted at App. 1a. The district court's unpublished entry of judgment against Petitioners, also based on the en banc court's opinion in *PHH Corp. v. Consumer Fin. Prot. Bureau*, is reprinted at App. 3a-4a.

JURISDICTION

The court of appeals issued its decision on June 8, 2018. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), reprinted at App. 26a-160a, the Appointments Clause of the Constitution, reprinted at App. 25a, and the Appropriations Clause of the Constitution, reprinted at App. 24a.

STATEMENT OF THE CASE

Petitioners seek review of the D.C. Circuit's decision rejecting their challenge to the constitutionality of the novel structure of the CFPB, an "independent" agency that Congress created in response to the financial crisis of 2008–2009 for the express purpose of exercising exclusive federal authority over all aspects of consumer finance. Congress designed the CFPB to consolidate in a single individual, the Director of the CFPB, all of the federal government's previously disparate statutory authorities governing consumer finance, vesting the Director with sweeping power to singlehandedly create, implement, and enforce the nation's consumer finance policy. Congress simultaneously stripped away all traditional checks on the Director's exercise of this power: the Director does not report to the President, self-appropriates his budget without the involvement or oversight of Congress, and is unconstrained in the exercise of power by any mitigating feature of agency design, such as a deliberative multi-member commission structure. In the history of the United States, no individual has ever wielded such expansive executive enforcement authority over an entire sector of private economic activity, devoid of the checks and balances the Constitution's separation of powers requires.

1. Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank" or "the Act") consolidates in the CFPB exclusive jurisdiction to administer eighteen "Federal consumer financial law[s]" that were previously administered by myriad

other agencies. 12 U.S.C. §§ 5481(12), (14), 5511. It further vests the CFPB with newly created authority to regulate or prosecute "unfair, deceptive, or abusive" consumer lending practices. *Id.* § 5531(a). The Act accords the CFPB power to "establish the general policies of the [CFPB] with respect to *all executive and administrative functions*," including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions." 12 U.S.C. § 5492(a)(10) (emphasis added). The core purpose of the CFPB is "to implement and, where applicable, enforce Federal consumer financial law," *id.* § 5511(a)—in essence, to "take Care that the [Federal consumer financial laws] be faithfully executed," *see* U.S. Const. Art. II, § 4, cl. 4—a clear executive responsibility.

Dodd-Frank labels the CFPB an "independent bureau" within the Federal Reserve System. *Id.* § 5491(a); *see also* 44 U.S.C. § 3502(5) (designating the CFPB as an "independent regulatory agency," and thus excluding it from Executive Order 12866's process for regulatory review by the Office of Management and Budget). Eschewing the checks and balances afforded by the traditional independent agency model, however, the Act vests the entirety of the agency's power in a single agency head, the Director. 12 U.S.C. § 5491(b)(1). The Director does not answer to the Federal Reserve, which is prohibited from intervening in any CFPB matter or proceeding and cannot appoint or remove any CFPB employee. *See* 12 U.S.C. § 5492(c). Nor does the Director answer to the President, who cannot remove him ex-

cept "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

Additional features make it even harder for the President to exert control over the CFPB, or otherwise to influence consumer finance policy:

- The Director serves longer than a full presidential term, being accorded a minimum term of five years, as well as authority to hold over in office indefinitely until a successor is confirmed. 12 U.S.C. § 5491(c)(1)-(2).
- The Director is completely independent from the President's financial oversight. He has no "obligation … to consult with or obtain the consent or approval of the Director of the [OMB] with respect to any report, plan, forecast, or other information," and the OMB lacks "any jurisdiction or oversight over the affairs or operations of the [CFPB]." *Id.* § 5497(a)(4)(E).
- The Director is not required to coordinate with any other executive branch official regarding "legislative recommendations, or testimony or comments on legislation." 12 U.S.C. § 5492(c)(4).
- Dodd-Frank mandates that the courts credit the Director's interpretations of consumer finance statutes over those of the Executive Branch for purposes of assigning *Chevron* deference. *See* 12 U.S.C. § 5512(b)(4)(B). Courts thus must defer to the CFPB even when it overrules the President himself.

At the time of Justice Breyer's *Free Enterprise Fund* dissent, it could be said that independent agencies "are *all* subject to presidential direction in significant aspects of their functioning." *Free Enter. Fund*, 561 U.S. at 524 (Breyer, J., dissenting) (emphasis is Breyer, J.'s), *quoting* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 583 (1984). After the creation of the CFPB, that is no longer true. It is as though Congress used Justice Breyer's dissent as a checklist of independent agency structural features that permit a President to exert some modicum of policy influence over them, and undertook when drafting Dodd-Frank to systematically eliminate each.

The CFPB is also made entirely independent from Congress's power of the purse. Instead of receiving its funding through annual congressional appropriations, the CFPB determines and draws its entire budget out of the Federal Reserve's, without review by Congress, the President, or the Federal Reserve itself. *See* 12 U.S.C. § 5497(a)(2)(C). Specifically, the CFPB is entitled to designate up to 12 percent of the Federal Reserve's operating expenses for its own use. 12 U.S.C. § 5497(a). According to the CFPB, this amounted to $631.7 million in 2016, $646.2 million in 2017, and $663 million in 2018. CFPB, *The CFPB Strategic Plan, Budget, and Performance Plan and Report* (May 2017), http://files.consumerfinance.gov/f/documents/201705_cfpb_report_strategic-plan-budget-and-performance-plan_FY2017.pdf.

2. Petitioner State National Bank is a communi-

ty bank that has served Big Spring, Texas and other communities for over a century, and is directly subject to numerous CFPB regulations. The Bank offers many consumer financial services, including remittance transfers, checking accounts, and agricultural and vehicle loans.

Petitioner Competitive Enterprise Institute ("CEI") is a nonprofit organization dedicated to advancing the principles of individual liberty, limited government, and free enterprise. Towards those ends, CEI engages in research, education, and advocacy efforts involving a broad range of regulatory, trade, and legal issues. CEI also has participated in federal court cases involving important separation of powers issues. *See, e.g.*, Pet. Br., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010) (No. 08-861). CEI relies on the services of banks and brokerage firms that are regulated by the CFPB, the nature and cost of which have been negatively impacted by the CFPB's exercise of regulatory authority.

Petitioner 60 Plus Association is a non-profit, non-partisan seniors advocacy group devoted to advancing free markets. The members of the 60 Plus Association have been harmed by the CFPB because its regulatory and enforcement actions have reduced the range and affordability of the banking, credit, investment, and savings options available to them.

On June 21, 2012, Petitioners filed a complaint seeking, *inter alia*, an order and judgment declaring that the provisions of Dodd-Frank creating and empowering the CFPB are unconstitutional, and enjoining the CFPB and its Director from exercising

any powers delegated to them by Title X of the Act. The district court dismissed the complaint, holding that Petitioners lacked standing and that their claims were not ripe. In *State National Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015), the D.C. Circuit held that "[t]here is no doubt that the Bank is regulated by the Bureau," and therefore "has standing to challenge the constitutionality of the Consumer Financial Protection Bureau." *Id.* at 53-54.

On remand from the D.C. Circuit, Petitioners and the CFPB filed cross-motions for summary judgment in the district court. Before those cross-motions could be decided, however, another case that included a challenge to the CFPB's constitutionality, *PHH Corp. v. Consumer Fin. Prot. Bureau*, Case No. 15-1177, reached the D.C. Circuit. The district court accordingly held Petitioners' case in abeyance pending the D.C. Circuit's resolution of the CFPB's constitutionality in *PHH Corp.* App. 6a.

On October 11, 2016, a panel of the D.C. Circuit held that the CFPB's novel structure is unconstitutional. *PHH Corp.*, 839 F.3d 1 (D.C. Cir. 2016). The *en banc* D.C. Circuit granted rehearing, and in a subsequent 6-1-3 decision upheld the CFPB's constitutionality. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018). Judges Kavanaugh, Henderson, and Randolph dissented. App. 391. Judge Griffith concurred in the judgment, while noting that "[i]n practical effect, my approach yields a result somewhat similar to Judge Kavanaugh's proposed remedy." App. 387a. Having substantially prevailed on separate statutory

grounds, App. 328a, PHH did not petition for certiorari.

With *PHH Corp*. decided, the district court in Petitioners' case lifted its abeyance order. Applying the D.C. Circuit's *en banc* decision in *PHH Corp*., the district court entered judgment against Petitioners. App. 3a. The D.C. Circuit summarily affirmed. App. 1a. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The CFPB is unlike any "independent" agency previously approved by this Court. Dodd-Frank consolidated in a single individual, the Director of the CFPB, sweeping executive authority to create and enforce law against private citizens. The Director is unchecked by the President. He is unchecked by Congress. And he is unchecked by any of the substitute structural features this Court has cited approvingly in its few decisions upholding the constitutionality of other independent agencies.

Dodd-Frank's consolidation of expansive executive authority in the CFPB, unchecked by the separation of powers, represents an unprecedented threat to individual liberty. In addition, the circuits are split on its constitutionality. Certiorari should be granted.

I. THE CASE IS EXCEPTIONALLY IMPORTANT AND WARRANTS REVIEW

A. The D.C. Circuit's recasting of this Court's separation of powers jurisprudence threatens individual liberty and paves the way for Congress to fundamentally restructure the Executive Branch.

Unlike any independent agency this Court has previously reviewed, the CFPB was designed to be—and operates as—a government unto itself. It is vested with sweeping executive authority to make and enforce rules that affect virtually every sector of the U.S. economy. And this authority is entrusted to a single individual, the Director, who serves a five-year term that is longer than the President's, and who can indefinitely carry over in office.

This long-tenured Director does not answer to the President, who is prohibited from removing him from office except for cause. Further, unlike the President, who is checked in the exercise of his executive authority by his dependence on congressional appropriations to fund the government he runs, the Director is exempted from Congress's power of the purse and accompanying congressional oversight. Indeed, the CFPB is entirely self-perpetuating, empowered to take hundreds of millions of dollars annually from the Federal Reserve System for its own use without approval or review from the legislative or executive branches.

Nor did Congress stop at freeing the CFPB from external restraints; in the interest of fostering effi-

ciency and independence, Congress also eschewed the creation of any substitute checks or balances in the CFPB's design, such as those afforded by a deliberative multi-member commission structure.

Consequently, "the Director enjoys significantly more *unilateral* power than any single member of any other independent agency." App. 473a (Kavanaugh, J., dissenting) (emphasis in original). "Indeed, other than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power." App. 459. "He is no less than the czar of consumer finance. In that realm he is legislator, enforcer, and judge," and in this combination of powers over a vital sector of the economy, the Director "meets Madison's definition of a tyrant." App. 432 (Henderson, J., dissenting).

The Constitution does not permit the creation of such an entity. Rather, to protect individual liberty, the Constitution mandates a separation of powers that imposes checks, balances, and accountability on the exercise of governmental authority. Congress was clear in creating the CFPB that it deliberately removed these restraints in the interest of expediency, efficiency, and what it perceived to be the virtues of unaccountability in the enforcement of consumer financial protection law. But whatever the merits of Congress's policy objectives, the Constitution does not permit the amalgamation of such sweeping and unchecked authority. Moreover, Congress has further exacerbated what was already a separation of powers violation by placing a single Director at the head of the CFPB—beholden to no one, charged with

running a self-perpetuating executive agency with vast enforcement authority, and able to act unilaterally and without need to deliberate or persuade. Certain features of the CFPB viewed in isolation may or may not be constitutionally permissible, but the combination most definitely is not. As several judges of the D.C. Circuit would have held, fidelity to the Constitution requires that the CFPB be invalidated.

A majority of the *en banc* D.C. Circuit, however, held otherwise. The majority acknowledged that "[t]here is no question that 'structural protections against abuse of power [a]re critical to preserving liberty.'" App. 315a, *quoting Bowsher v. Synar*, 478 U.S. 714, 730 (1995), and *Free Enterprise Fund*, 561 U.S. at 501. But according to the majority, judicial review of an agency's constitutionality must focus *solely* on the legality of any removal restriction Congress has imposed, *viewed in isolation*: "Once the Supreme Court is satisfied that a removal restriction leaves the President adequate control of the executive branch's functions, the Court does not separately attempt to re-measure the provision's potential effect on liberty or any other separation-of-powers objective." *Id*. at 316a "[L]iberty analysis is no part of the inquiry the Supreme Court's cases require… ." *Id*. at 317a.

PHH Corp. and the agency structure it upholds represent a gross departure from this Court's separation of powers precedents. *See also* Section III, *infra.* Only two of this Court's cases have upheld the constitutionality of allowing independent agencies to wield executive authority insulated from presiden-

tial control. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (upholding the Federal Trade Commission, or FTC); *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding the Office of the Independent Counsel). And *Humphrey's Executor*—the primary authority on which the *en banc* majority relied—expressly disclaimed that the FTC's powers were executive in nature. *Humphrey's Executor*, 295 U.S. at 628 (stating an FTC Commissioner "exercises no part of the executive power … in the constitutional sense."). Moreover, in both *Humphrey's Executor* and *Morrison* the Court was at pains to emphasize the limited scope of power the agencies wielded, as well as mitigating structural design features that checked the agencies in their exercise of power and safeguarded individual liberty by providing restraint and accountability. *Humphrey's Executor*, 295 U.S. at 619-21, 624-25; *Morrison v. Olson*, 487 U.S. at 671-72, 691.

Humphrey's Executor noted that beyond the bounds of the 1935 FTC lay a "field of doubt" concerning the constitutionality of other independent agencies that lacked similar structural limitations, reserving such questions "for future consideration and determination as they may arise." 295 U.S. at 632. Yet in a single stroke, *PHH Corp*. purports to resolve that entire field of doubt decisively in favor of Congress's ability to place virtually the entire Executive Branch outside the control of the President. To be sure, the *en banc* majority purports to preserve the President's exclusive authority over what it labels the President's "core constitutional responsibilities" of foreign affairs, the military, and pardons.

App. 319a-320a. The entire rest of the federal government, however, is fair game: Treasury; Commerce; Labor; Interior; Education; Health & Human Services; Housing & Urban Development; Environmental Protection. Under *PHH Corp.*'s open-ended reasoning, not one of these Cabinet-level Departments would be immune from conversion into standalone czarships run by single Directors who do not answer to the President or to Congress.[1] And if Congress did decide to balkanize the Executive Branch by breaking it into an amalgam of self-perpetuating and unaccountable mini-governments, *PHH Corp.* would impose no requirement that Congress imbue them with any mitigating structural

[1] *PHH Corp.* acknowledges that such converted czarships would need to be removed from the Cabinet, because of the role that Cabinet officials play in removing the President under the 25th Amendment. App. 320a. But the main text's illustrative list of convertible Departments is no overstatement. *PHH Corp.* repeatedly emphasized its view that "financial and commercial regulator[s]" do not perform "core executive functions" and are "exemplars of appropriate and necessary independence." App. 267a, 307a, 320a. That would encompass, at minimum, the Treasury, Commerce, and Labor Departments. But nothing in *PHH Corp.* provides grounds to treat other Departments that regulate and enforce solely in the domestic sphere any differently; only the "core executive functions" of "the President's role as Commander in Chief, and the foreign-affairs and pardon powers" are identified as immune. App. 320a.

constraints designed to protect the liberty of the governed.

In short, *PHH Corp.* paves the way for a wholesale transformation of the Executive Branch into something unlike anything our nation has ever known. The CFPB represents an unprecedented combination of expansive, unchecked, and unaccountable executive authority that uniquely threatens the liberty of the governed. But *PHH Corp*. itself is an even greater threat to liberty than the agency it upholds, as it provides a blueprint for replicating and expanding on the CFPB's novel structure as a model for an entirely new form of government that is wildly inconsistent with the separation of powers principles on which our constitutional system of governance is founded. Certiorari should be granted both so that this Court can restore to constitutional means of executive enforcement the nation's laws governing consumer finance, and so that it can rectify *PHH Corp.*'s misconstruction of this Court's separation of powers cases.

B. Certiorari should also be granted so that this Court can clarify constitutional limitations on Congress's ability to abdicate its power of the purse.

The CFPB is not funded by appropriations. Instead, the Dodd-Frank Act gives the CFPB a perpetual, annual entitlement to hundreds of millions of dollars from the Federal Reserve. 12 U.S.C. § 5497(a). Indeed, the Dodd-Frank Act goes so far as to expressly prohibit Congress even from attempting to "*review*" the CFPB's automatically funded budget. *See id.* § 5497(a)(2)(C) (emphasis added).

The President and Congress included this provision in the Dodd-Frank Act in order to free the CFPB from congressional oversight. S. Rep. No. 111-176, at 163 (2010)). They characterized this as a salutary feature, viewing such funding as "absolutely essential" to ensuring the agency's "independent operations"—independent, that is, from future Congresses. S. Rep. No. 111-176, at 163. But the Framers never imagined Congress might perpetually relinquish its most powerful check on executive enforcement power. To the contrary, Congress's power of the purse was as a matter of constitutional design intended to provide an essential check against executive excess.

The Constitution entrusts taxpayers' money to Congress, requiring that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7. The Constitution commits that power and responsibility to Congress for a very specific reason: "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist 'the overgrown prerogatives of the other branches of government.'" *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2250 (2014).

On this point, the Framers were emphatic. James Madison stressed that "[t]his power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, . . . for

carrying into effect every just and salutary measure," and for "reducing . . . all the overgrown prerogatives of the other branches of the government." Federalist No. 58 (Madison). Alexander Hamilton was all the more blunt: "[T]hat power which holds the purse-strings absolutely, must rule." 1 *Works of Alexander Hamilton* 218–19 (Henry Cabot Lodge, ed., 1904) (Letter to James Duane); *see also* 2 *Works of Alexander Hamilton* 61 (Address to New York Ratification Convention) ("Neither [the Legislative Branch] nor the [Executive Branch] shall have both [the power of the purse and the sword]; because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny. But when the purse is lodged in one branch, and the sword in another, there can be no danger.")

Even before the American experiment, Montesquieu had warned that "[w]ere the executive power to determine the raising of public money otherwise than by giving its consent, liberty would be at an end; because it would become legislative in the most important point of legislation." Baron de Montesquieu, *The Spirit of the Laws*, bk. XI, ch. VII (1748). The earliest major constitutional commentators reiterated the importance of Congress's power of the purse as both a check against the other parts of government and a means of accountability between Congress and the Executive to the People. "The power to control, and direct the appropriations," wrote Joseph Story, "constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public pecula-

tion." 3 Joseph Story, *Commentaries on the Constitution* § 1342 (1833); *see also* 1 St. George Tucker, *Views of the Constitution of the United States* 298 (1803) (describing the Appropriations Clause as "a salutary check . . . upon the extravagance, and profusion, in which the executive department might otherwise indulge itself, and its adherents and dependents").

Modern Congresses have recognized the significance of their "power of the purse" not merely as an end in itself, but as a means for ensuring that the other parts of government conduct their work in a manner consistent with the law, the public interest, and the public will. "The appropriations process is the *most potent form* of congressional oversight, particularly with regard to the federal regulatory agencies." S. Comm. on Gov't Operations, 95th Cong. 1st Sess., 2 *Study on Federal Regulatory Agencies* 42 (1977) (emphasis added); *see also* 1 GAO, *Principles of Federal Appropriations Law*, pp. 1-4 to 1-5 (3d ed. 2004) ("The Appropriations Clause has been described as 'the most important single curb in the Constitution on Presidential power.' . . . [T]he congressional power of the purse reflects the fundamental proposition that a federal agency is dependent on Congress for its funding.").

This Court has never directly considered constitutional limits on Congress's ability to relinquish its power of the purse for the expressly stated purpose of freeing executive authority from legislative restraint. It has, however, recognized on several occasions the essential role the power of the purse plays as the primary Article I check within the Constitu-

tion's separation of powers. *See, e.g., Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury."); *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) ("The ultimate weapon of enforcement available to the Congress [to rein in a rogue agency] would, of course, be the 'power of the purse.'"); *Laird v. Tatum*, 408 U.S. 1, 15 (1972) (dismissing a suit challenging Vietnam-era military surveillance of American civilians, and stressing that the task of monitoring "the wisdom and soundness of Executive action" is "a role [that] is appropriate for the Congress acting through its committees and the 'power of the purse'; it is not the role of the judiciary . . . .").

This Court has further expressly recognized that Congress's power of the purse plays an essential role in constraining independent agencies. In *Humphrey's Executor*, the Court justified the FTC's independence from the President largely on the basis that Congress remained the agency's "master." 295 U.S. at 630; *see also id.* (describing the FTC as "wholly disconnected from the executive department" but "an agency of the legislative . . . department[]"). And in *Free Enterprise Fund*, the majority and dissent *both* stressed the paramount importance of the power of the purse within the separation of powers—each side invoking it in support of its own broader constitutional argument.

Justice Breyer, writing for the four dissenting justices, downplayed the practical importance of "for

cause" removal by contending that the President's ability to influence agencies by threatening to remove appointed officers is dwarfed by Congress's *fiscal* influence: "the decision as to who controls the agency's budget requests and funding, the relationships between one agency or department and another, as well as more purely political factors (including Congress' ability to assert influence) are more likely to affect the President's power to get something done." *Free Enter. Fund*, 561 U.S. at 524 (Breyer, J., dissenting). In reply, the Court's majority did not downplay the structural importance of the power of the purse; rather, it stressed that the sheer potency of this core legislative power—Congress's "plenary control over the salary, duties, and even existence of executive offices"—is the very reason why the President must retain full power to act as a counterweight against Congress's influence. *Id.* at 500.

This case presents an ideal and important vehicle for this Court to consider and explain the limitations the Constitution's separation of powers imposes on Congress's ability to relinquish the power of the purse to the executive, and particularly to independent agencies that are already thoroughly insulated from presidential control. The D.C. Circuit could discern no applicable limitations, holding in *PHH Corp.* that "Congress can, consistent with the Appropriations Clause, create government institutions reliant on fees, assessments, or investments rather than the ordinary appropriation process." App. 292a. But even assuming that *PHH Corp.* is correct that the Appropriations Clause permits Congress to fund service agencies such as the U.S. Post

Office through unappropriated user fees, *PHH Corp.*'s blanket statement that all executive agencies can be funded outside the congressional appropriation process cannot be universally correct. Permitting Congress to fund the Department of Defense through unappropriated sources, for example, would allow it to entirely circumvent the Constitution's express limitation that "no Appropriation of Money [to raise and support Armies] shall be for a longer Term than two Years." U.S. Const. Art. I, § 8, cl. 12.

The duration and source of government funding are thus indisputably matters of constitutional significance. And because of its checking power, Congress's control of the federal purse strings is nowhere more important to the constitutionally mandated separation of powers than in those areas in which executive authority is most heavily concentrated, such as the military—or enforcement. Yet *PHH Corp.* would interpose no constitutional obstacle to Congress writing the President a blank check to fund the entire federal government.

The CFPB's limited history demonstrates the problems inherent in freeing an entire executive agency—one wielding massive federal enforcement authority—from budgetary oversight:

- The CFPB proudly proclaims in publications that its legal entitlement to hundreds of millions of dollars in "funding outside the congressional appropriations process" ensures its "full independence" from Congress. *Consumer Financial Protection Bureau Strategic Plan: FY 2013-FY 2017* 36 (Apr. 2013), http://files.consumerfinance.gov/f/strategic-

plan.pdf.

- Earlier this year, the CFPB's Acting Director told the House Financial Services Committee that the CFPB "[i]s not accountable to you. It's not accountable to the public. It's not accountable to anybody but itself." He further informed the Committee "I believe it would be my statutory right to just sit here and twiddle my thumbs while you all ask questions." Jim Puzzanghera, *CFPB chief Mick Mulvaney says he could just 'twiddle my thumbs' before Congress to highlight agency's flaws*, Los Angeles Times (April 11, 2018).

- At a hearing in 2015, a Congresswoman asked the CFPB's first Director for information concerning who at the agency was responsible for directing renovation projects that cost hundreds of millions of dollars. The Director declined to answer her question, instead asking her bluntly, "*why does that matter to you?*" *See* U.S. House of Representatives, Committee on Financial Services, "Committee Pushes for Accountability and Transparency at the CFPB" (Mar. 6, 2015) (emphasis added), https://www.youtube.com/watch?v=jQx_IMHfjDo at 3:33:19.

- Congressmen and Senators recurrently complain that the CFPB is unresponsive to requests for budget information, and that it refuses to explain its basis for controversial policies. *See, e.g.,* Letter from Rep. Randy Neugebauer, Chairman, H.R. Comm. on Fin. Servs., Subcomm. on Oversight and Investiga-

> tions, *et al.* to Richard Cordray, Director of the CFPB, at 1 (May 2, 2012), http://www.aba.com/aba/documents/winnews/CFPB_OversightMemo_050212.pdf; Letter from Sen. Rob Portman, *et al.* to Richard Cordray, Director of the CFPB, at 1 (Oct. 30, 2013), http://www.portman.senate.gov/public/index.cfm/files/ serve?File_id=ad73c8d1-39c6-4c4f-80da-c13c57013b12.

The taxpayers expect Congress to be accountable for the expenditure of public funds, as well as for consumer finance policy. But having yielded its power of the purse to the CFPB, Congress's ability even to secure answers to the most basic questions is limited.

The loss of Congress's constitutional power over the CFPB is not ameliorated by the fact that a previous Congress passed the statute eliminating Congress's power of the purse. After all, an individual Congress, like an individual President, "might find advantages in tying [its] own hands." *Free Enter. Fund*, 561 U.S. at 497; *see also* James Q. Wilson, *Bureaucracy* 239 (1989) ("[P]oliticians have good reasons to tie their own hands. But once tied, they cannot easily be untied."). But just as "the separation of powers does not depend on the views of individual Presidents," *Free Enter. Fund*, 561 U.S. at 497, nor does it depend on the views of an individual Congress. Therefore, just as a single President "cannot . . . choose to bind his successors by diminishing their powers," *id.*, a single Congress cannot choose to bind its successors by diminishing theirs.

Whatever flexibility Congress may have in effecting appropriations, the perpetual nature of § 5497(a)'s massive funding stream—amounting to more than $660 million in 2018, enough to fund the entire operations of an agency that cannot meaningfully be distinguished from an executive Department—is uniquely constitutionally problematic. And make no mistake: having granted the CFPB perpetual authority to self-appropriate its funding from a source outside the Treasury, a future Congress cannot simply restore to itself its constitutionally prescribed oversight role. Even if both houses of Congress were to pass a bill that eliminated § 5497(a) and required the CFPB to seek all of its future funding from Congress, that bill could be vetoed by the President. *See* U.S. Const. Art. I, § 7. The Dodd-Frank Congress having abdicated its power-of-the-purse check on executive authority by rendering the CFPB entirely self-sustaining, a successor Congress cannot simply take its constitutional authority back.

A perpetual funding stream such as the CFPB's—which the Director unaccountably siphons from the *also* unappropriated budget of a *different* independent agency—thus gives rise to significant separation of powers concerns. *See generally Free Enterprise Fund*, 561 U.S. at 495 ("The added layer . . . makes a difference."). And those concerns would not be alleviated even if the CFPB reported to the President, as the President would then have an even greater incentive to wield his veto authority to preserve his powerful combination of sword and purse against any attempt by a future Congress to resume its constitutionally prescribed oversight role. Certio-

riari should be granted for this Court to consider whether the Appropriations Clause permits Congress to abdicate its control over the federal purse strings to a powerful executive enforcement agency such as the CFPB.

II. THE CIRCUITS ARE SPLIT ON THE CONSTITUTIONALITY OF AGENCIES LIKE THE CFPB

At about the same time that Congress created the CFPB, it also enacted the Housing and Economic Recovery Act of 2008 ("HERA"), Pub. L. No. 110-289, 122 Stat. 2654, which created the Federal Housing Finance Agency ("FHFA"). Like the CFPB, the FHFA exercises significant executive authority, all of which is vested in a single Director who does not answer to the President and does not derive his budget from Congress. Also like the CFPB, the FHFA is unconstrained in the exercise of its executive authority by any of the substitute structural checks Congress has traditionally applied to other independent agencies.

The *PHH Corp.* majority invoked the FHFA as an agency with both executive authority and a structure that are similar to those of the CFPB. App. 259a, 292a. And in dissent, Judge Kavanaugh described the FHFA as "a contemporary of the CFPB [that] merely raises the same question we confront here." App. 482a (Kavanaugh, J., dissenting).

A few months after *PHH Corp.* was decided, a divided panel of the Fifth Circuit held that the FHFA is unconstitutionally structured. *Collins v. Mnuchin*, 896 F.3d 640 (5th Cir. 2018). In so holding, the panel majority squarely rejected *PHH*

Corp.'s reasoning on several separation of powers questions common to both the FHFA and the CFPB:

- The Fifth Circuit held that the constitutionality of removal restrictions imposed by Congress cannot be assessed in isolation, but rather must be considered in combination with "other independence-promoting mechanisms working together." *Collins*, 896 F.3d at 667.
- The Fifth Circuit held that the concentration of all of an independent agency's executive authority in a single Director, instead of its traditional dispersion across multiple members of a bipartisan commission, represents a "dramatic and meaningful difference" from a separation of powers perspective that materially increases the agency's insulation from Presidential influence. *Id* at 667–68.
- The Fifth Circuit acknowledged that "the power of the purse is one of the key ways in which democratic accountability is served," *id.* at 668 n.214, *quoting* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 43 (2010), and held that Congress's placement of the FHFA "outside the normal appropriations process . . . in stark contrast to '*nearly all* other administrative agencies'" resulted in its further constitutionally significant insulation. *Id.* at 668–69, *quoting PHH Corp.*, 881 F.3d at 146 (Henderson, J., dissenting).
- The Fifth Circuit rejected the proposition that the FHFA "follow[s] in a long line of inde-

pendent agencies that courts have found to be constitutional," finding instead that it "is sui generis, and that its unique constellation of insulating features offends the Constitution's separation of powers." *Collins*, 896 F.3d at 670.

- The court held that *Humphrey's Executor* and *Morrison* were inapposite, as the FTC and the independent counsel had narrower scopes of power, as well as materially different structural features that "mitigated the impact of limiting the President's removal power." *Id.* at 671–72.

In sum, *PHH Corp.* and *Collins* are utterly irreconcilable. The D.C. Circuit and the Fifth Circuit have adopted completely divergent analytical approaches to determining the constitutionality of novel independent agency structures.

To be sure, *Collins* purported to distinguish *PHH Corp.*, rather than acknowledge the irreconcilable conflict. *Id.* at 672–73. But neither of the allegedly "salient distinctions" that *Collins* identified hold up on closer examination.

First, *Collins* distinguished *PHH Corp.* as addressing a challenge that was solely to the CFPB's "single-head structure" and "removal-power limitation," whereas it described the case before it as a broader challenge to "the *cumulative* effect of Congress's agency-design decisions" in creating the FHFA. *Id.* at 673 (emphasis in original). That is probably not an accurate description of PHH Corporation's challenge to the CFPB, or of the D.C. Cir-

cuit's treatment of it. *See, e.g.,* App. 293a ("PHH suggests that, even if budgetary independence and for-cause removal protection are not separately unconstitutional, their combination might be.") But it unquestionably is not an accurate description of Petitioners' challenge to the CFPB in *this* case, which in every pleading from the complaint forward has emphasized that its separation of powers challenge is directed to *the combination* in the CFPB of unprecedently expansive executive authority and multiple insulating structural features that free it from constitutionally required restraint and accountability. *See, e.g.*, Second Amended Complaint at 170a-71a ¶6, 200a-03a ¶¶111-23.

Second, *Collins* identified one structural constraint that applies to the CFPB but that the FHFA lacks: the narrow regulatory oversight of the Financial Stability Oversight Council ("FSOC"). *Id.* at 669–70. In describing this constraint, the *Collins* majority stated that the FSOC "holds veto-power over the CFPB's policies." *Id.* at 670. If that were true, it might at least represent a relevant point of distinction (although, for a variety of reasons related to the FSOC's own structure, not a significant one). But it is not true.

As Judges Kavanaugh and Henderson explained in their *PHH Corp.* dissents, "the [FSOC's] veto power may be used only to prevent regulations (not to overturn enforcement actions or adjudications); only when two-thirds of the Council members agree; and only when a particular regulation puts 'the safety and soundness of the United States banking system or the stability of the financial system of the

United States at risk,' a standard unlikely to be met in practice in most cases." App. 475a (Kavanaugh, J., dissenting), *quoting* 12 U.S.C. § 5513(c)(3)(B)(ii). The FSOC's veto was entirely inapplicable, for example, to the CFPB's abusive enforcement action against PHH Corporation. App. 444a (Kavanaugh, J., dissenting). "As far as the [FSOC] is concerned, then, the CFPB can break the law or abuse its power as long as it does so (1) in an enforcement action or (2) in a regulation that does not threaten financial ruin." App. 444a (Henderson, J., dissenting).

The FSOC's narrow veto power is particularly meaningless from a separation of powers perspective because the CFPB most purely and powerfully exercises executive power through its enforcement actions, to which the veto does not apply. And the "CFPB … formulates policy through an enforcement action rather than rulemaking … a lot, perhaps because of the rulemaking requirements." App. 443a (Henderson, J., dissenting).

In sum, *Collins* seems to have misunderstood the scope of the FSOC's oversight role with respect to the CFPB; there is no intellectually honest way to invoke the FSOC's limited veto authority on certain regulations to place the CFPB and the FHFA on opposite sides of a constitutional dividing line. The approaches of the D.C. Circuit and the Fifth Circuit to determining the constitutionality of independent agencies cannot be reconciled. Certiorari should be granted to resolve the conflict.

III. THE DECISION BELOW IS CONTRARY TO THE COURT'S SEPARATION-OF-POWERS AND APPOINTMENTS CLAUSE PRECEDENTS

Four decisions of this Court establish the applicable framework for determining the constitutionality of independent agencies: *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor*; Morrison; and *Free Enterprise Fund*. *Myers* invalidated removal restrictions on a postmaster of the first class, 272 U.S. at 161, and *Free Enterprise Fund* invalidated "dual for-cause limitations" that restricted removal of the members of the Public Company Accounting Oversight Board ("PCAOB"), 561 U.S. at 492. *Humphrey's Executor* upheld removal restrictions on members of the Federal Trade Commission ("FTC") as it existed in 1935, 295 U.S. at 628, and *Morrison* upheld removal restrictions on the independent counsel, 487 U.S. at 691–92. (*PHH Corp.* invokes *Wiener v. United States*, 357 U.S. 349 (1958) as an additional relevant precedent, but that case is inapposite because it turned on the War Claims Commission's quintessentially judicial character.)

PHH Corp. conflicts with these cases in at least two significant ways. First, it treats *Myers* as an inconvenient constitutional burp that has been effectively nullified by subsequent case law and that may consequently be disregarded. Second, it treats as irrelevant dicta this Court's repeated reliance, in those few cases in which the Court has upheld removal restrictions, on mitigating structural limitations that helped safeguard individual liberty by preserving some form of restraint and accountability. Only by willfully rewriting these precedents was the *PHH*

Corp. majority able to sustain the unprecedented combination of executive authority and unaccountability with which Dodd-Frank infused the CFPB.

A. *Myers* remains good—and indeed foundational—law.

Contrary to *PHH Corp.*'s view, *Myers* not only remains good law, but continues to be a cornerstone of this Court's Appointments Clause jurisprudence. *Free Enterprise Fund* described *Myers* as a "landmark case" that was grounded in "the traditional default rule" that "removal is incident to the power of appointment." 561 U.S. at 492, 509. Of course, so long as *Humphrey's Executor* and *Morrison* remain good law, *Myers*' default rule that the President retains authority to remove Executive Branch officials is not absolute. But *Myers* continues to furnish the presumptive rule for evaluating novel independent agency structures, and *PHH Corp.* misdescribes *Myers* when it calls it "short-lived" "dictum" that should be "narrowly read." App. 270a.

B. This Court's few precedents upholding removal restrictions repeatedly emphasize mitigating structural features that protect individual liberty.

PHH Corp. also fundamentally veered from this Court's precedents by devising an entirely new test for assessing the constitutional permissibility of removal restrictions, a test that assigns no weight to substitute structural checks that guard against abuse of power and protect individual liberty. According to *PHH Corp.*, a reviewing court should first assess whether Congress's chosen "means of inde-

pendence" for an agency is constitutionally permissible, focusing solely on any restrictions Congress has imposed on the President's authority to remove the agency's controlling officers. App. 249a. Second, a reviewing court should determine whether "the nature of the function" that is vested in the agency "calls for" the chosen means of independence. App. 251a. The Court described any consideration of substitute structural features that "safeguard liberty" by "check[ing] or slow[ing] or stop[ping]" the agency as a "non-sequitur from the perspective of precedent." App. 306a.

PHH Corp. invokes *Humphrey's Executor* and *Morrison* as alleged support for this approach, but that reliance is misplaced. Both of those cases holistically analyzed the agencies at issue, weighing the nature and scope of their powers, the extent of their insulation, and the existence of other structural features that served as a substitute check against arbitrary or abusive exertion of executive authority.

In *Humphrey's Executor*, the Court upheld restrictions on the President's removal authority only after taking pains to emphasize the nonexecutive nature as well as limited scope of the FTC's powers. Specifically, the Court found that:

- the FTC's "duties are neither political nor executive, but predominantly quasi judicial and quasi legislative," noting that it performs its "specified duties as a legislative or as a judicial aid," 295 U.S. at 624, 628;
- the commissioners served as an impartial "body of experts" "informed by experience" and

exercising "trained judgment," *id.* at 624;

- "in making investigations and reports thereon for the information of Congress under section 6 . . . it acts as a legislative agency," *id.* at 628;
- "under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary," *id.*;
- "To the extent it exercises *any* executive function, as distinguished from executive power in the constitutional sense, it does so in the discharge and effectuation of its quasi legislative or quasi judicial powers, or *as an agency of the legislative or judicial departments of the government*," *id.* (emphasis added); and
- "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive," and is in fact "wholly disconnected from the executive department," *id.* at 628, 630.

The Court further noted several structural features it believed would constrain and moderate the FTC's exercise of these limited, nonexecutive powers:

- Out of the five-member commission, "[n]ot more than three of the commissioners [could] be members of the same political party," *id.* at 620;
- The commissioners served staggered terms, which gave the President the opportunity to appoint a new commissioner almost every year, *id.*; and

- The commission was "nonpartisan; and it must, from the very nature of its duties, act with entire impartiality," *id.* at 624.

As in *Humphrey's Executor*, the *Morrison* Court balanced the Office of the Independent Counsel's powers and structural features against each other in reaching its determination that it did not violate the separation of powers. At the very outset of its separation of powers analysis, the Court cited *Humphrey's Executor*'s clear holding that the constitutionality of an agency's independence from the executive will in all circumstances "depend upon the character of the office," 487 U.S. at 687, *citing Humphrey's Executor*, 295 U.S. at 631. While acknowledging that the independent counsel's prosecutorial powers were without question purely executive in nature, the Court repeatedly emphasized the significant structural limitations on their scope. Specifically, the Court found that the independent counsel:

- "is an inferior officer under the Appointments Clause," 487 U.S. at 691;
- "lack[s] policymaking or significant administrative authority," *id.*; and
- had "limited jurisdiction" "restricted primarily to investigation and, if appropriate, prosecution" only of "certain federal officials suspected of certain serious federal crimes," *id.* at 671–72, 691.

Notably, *Morrison* did not end its analysis with its determination that the independent counsel enjoyed only strictly limited powers. Rather, the Court went on to highlight a number of structural

features of the Independent Counsel Act that it deemed to impose important restraints on the independent counsel's exercise of those powers. Specifically, the Court observed that:

- "the jurisdiction of the independent counsel is defined with reference to the facts submitted by the Attorney General," and "an independent counsel can only act within the scope of the jurisdiction that has been granted by the Special Division pursuant to a request by the Attorney General," *id.* at 672, 696;
- "No independent counsel may be appointed without a specific request by the Attorney General, and the Attorney General's decision not to request appointment if he finds 'no reasonable grounds to believe that further investigation is warranted' is committed to his unreviewable discretion," *id.* at 696;
- the independent counsel is "limited in tenure," because an independent counsel is "appointed essentially to accomplish a single task, and when that task is over the office is terminated," *id.* at 672, 691; and
- "the Act requires that the counsel abide by Justice Department policy unless it is not 'possible' to do so," *id.* at 696.

These mitigating structural features were essential to the Court's holding, since they are what gave "the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties." *Id.*

This Court's most recent independent agency decision, *Free Enterprise Fund*, follows this pattern. There, the Court reinforced *Myers*' default rule that the President has general power to "keep [agency heads] accountable" by "removing them from office, if necessary." *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. at 483 (citing *Myers v. United States*, 272 U.S 52 (1926)). But it noted that Congress "can, *under certain circumstances*, create independent agencies" run by officers removable only for good cause. *Id.* (emphasis added) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935)). Those "certain circumstances" this Court has relied on in upholding some removal restrictions have never been, as *PHH Corp.* implies, the mere fact that an agency operates in a purely domestic or financial sphere. Indeed, *Free Enterprise Fund* invalidated restrictions on the President's ability to remove members of the Public Company Accounting Oversight Board—a purely financial regulator. Rather, this Court has repeatedly identified mitigating structural features that provide substitute checks on the executive authority conferred.

PHH Corp.'s lack of concern for liberty, and complete disregard for substitute structural checks, leads it inexorably into yet another clash with this Court's precedents. *PHH Corp.* cited as justification for Congress's unprecedented grant of independence to the CFPB its desire to ensure "initiative and decisiveness" in "monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance." App. 258a. *PHH Corp.* also invoked the desirability of agency "efficiency" as a

reason "[w]e should not require Congress always to privilege the putative liberty-enhancing virtues of the multi-member form over other capabilities Congress may choose." App. 326a. But however desirable a decisive and efficient administrative state may be, this Court has repeatedly emphasized that the liberty-protecting value of checks, balances, oversight, and accountability cannot be sacrificed at the altar of expediency. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) ("Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government." (quoting *INS v. Chadha*, 462 U.S. 919, 944 (1983))); *Free Enter. Fund*, 561 U.S. at 498 (separation of powers violations are not saved by perceived need for "technical competence" and "apolitical expertise" (quotations omitted)).

Without exception, this Court's precedents have determined the constitutionality of independent agencies facing separation of powers challenges by balancing the nature and scope of the agency's powers, viewed as a whole, against the structural restraints imposed on their exercise. So viewed, the CFPB's unprecedented concentration of the powers of the sword and the purse in the hands of a single unaccountable Director, who is vested with broad authority to regulate and enforce against the general public but is unchecked by any meaningful structural restraints, cannot be reconciled with the constitutionally prescribed separation of powers. The CFPB is unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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