EN BANC ORAL ARGUMENT SCHEDULED FOR MAY 24, 2017

No. 15-1177

In the United States Court of Appeals for the District of Columbia Circuit

PHH CORPORATION, et al., *Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *Respondent.*

On Petition for Review of an Order of the
Consumer Financial Protection Bureau (CFPB File 2014-CFPB-0002)

BRIEF ON REHEARING EN BANC OF *AMICI CURIAE* FINANCIAL REGULATION SCHOLARS IN SUPPORT OF RESPONDENT

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COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

A. *Parties and Amici.* Except for the signatories to this brief and any other *amici* who had not yet entered an appearance as of the filing of the respondent's brief, all parties and *amici* appearing in this Court are listed in the brief for respondent.

B. *Rulings under Review.* References to the rulings under review appear in the brief for respondent.

C. *Related Cases.* References to any related cases appear in the brief for respondent.

Rule 29(c)(5) Statement

No party's counsel authored this brief, in whole or in part. No party or a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person (other than *amici curiae*) contributed money that was intended to fund the preparation of the brief.

Certificate of *Amici Curiae* Under Circuit Rule 29(d)

Amici are scholars of financial regulation and consumer finance. *Amici* submit this brief to lend their expertise regarding the history and purpose of the CFPB's structure and how it reflects an attempt to enhance accountability and address the problem of regulatory capture. To our knowledge, no other brief addresses these questions from the perspective of financial regulation scholars.

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
CFTC	Commodity Futures Trading Commission
FERC	Federal Energy Regulatory Commission
FHFA	Federal Housing Finance Agency
FRB	Federal Reserve Board
FTC	Federal Trade Commission
NCUA	National Credit Union Administration
OCC	Office of the Comptroller of the Currency
OTS	Office of Thrift Supervision
SEC	Securities and Exchange Commission
SSA	Social Security Administration

INTEREST OF *AMICI CURIAE*

Amici are leading scholars of financial regulation and consumer finance who submit this brief to lend their expertise on the history and purpose of the Consumer Financial Protection Bureau's (CFPB's) structure. This structure reflects an attempt to enhance accountability and combat the danger of regulatory capture in a constitutionally permissible manner. *Amici* take no position on the Real Estate Settlement Procedures Act. *Amici* and their affiliations are listed in Appendix A.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Constitution requires public accountability for government agencies but does not prescribe how it must be achieved. It can be achieved in a variety of ways through agency design, and indeed, there is tremendous variation in agency structure. Public accountability can also be fostered through presidential action, congressional oversight, and judicial review.

The panel's decision, however, would require either at-will presidential removal of the agency's head or a multi-member commission structure. This wooden one-or-the-other requirement has no logical connection to the constitutional mandate of public accountability, which is better analyzed holistically, based on the entirety of an agency's features.

Viewed holistically, the CFPB is a highly accountable agency. It was designed specifically in response to a *lack* of accountability by other financial agencies, even those that would formally satisfy the panel's new either-or requirement. The CFPB is designed to address a specific type of accountability problem—regulatory capture—and comes with a battery of accountability mechanisms that have proven successful. The CFPB's structure is a permissible example of how Congress—learning from its experiences of what works in regulatory agencies—can design a system that enhances rather than diminishes public accountability.

ARGUMENT

I. The Constitution mandates public accountability for agencies but does not mandate any particular mode of achieving it.

In a democracy, the government is accountable to the people. Although the Constitution never specifically addresses public accountability, the concern animates its entire structure, which implies that any unit of government must have sufficient public accountability to pass constitutional muster. At the same time, the Constitution is silent about how this accountability may be achieved. The analysis does not depend on the presence or absence of any particular feature, such as at-will-removal authority or a multi-member commission structure. Instead, it is a holistic analysis that considers the totality of features. Indeed, substantial variation in agency structure already exists among agencies with for-cause removal protection—without raising general questions of constitutional validity.

Agencies are not made the same. They have a wide range of leadership structures and other features. Some of the key ways in which they differ include:

The number of leaders. Some agencies are headed by a single director, while others are led by multi-member boards or commissions. Examples of the former include not only the CFPB, but also the Federal Housing Finance Agency (FHFA), the Social Security Administration (SSA), and the Office of the Comptroller of the Currency (OCC). The director of each of these agencies has a fixed term and may be removed by the President for cause before the end of that term. *See* 12 U.S.C. § 5491(c) (2016) (CFPB); *id.* § 4512(b)(2) (FHFA); *id.* § 2 (OCC)[1]; 42 U.S.C. § 902 (SSA).

Examples of the latter include the Commodity Futures Trading Commission (CFTC), 7 U.S.C. § 2(a)(2); the Federal Deposit Insurance Corporation (FDIC), 12 U.S.C. § 1812; the Board of Governors of the Federal Reserve System (FRB), *id.* § 241; the National Credit Union Administration (NCUA), *id.* § 1752a; the Postal Service, 39 U.S.C. § 202(a); and the Securities and Exchange Commission (SEC),

[1] Although the OCC was established before the rise of independent agencies, it has substantial independence, strengthened by Congress over time. *See* Act of Feb. 25, 1863, ch. 58, § 1, 12 Stat. 665 (establishing OCC); 12 U.S.C. § 1 (amended by the Riegle Community Development and Regulatory Improvement Act of 1994, Pub. L. No. 103-325, § 331(2), 108 Stat. 2160, 2231, to prohibit the Treasury Secretary from interfering with the Comptroller); 44 U.S.C. § 3502(5) (amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524 (2010), to include the OCC in the definition of "independent regulatory agency").

15 U.S.C. § 78d. And wide variation exists as to the number of members, even among these multi-member structures: The NCUA has three members, the CFTC has five commissioners, and the Federal Reserve Board and Postal Service have seven and eleven governors, respectively.

How agency heads are selected. Some agency heads are nominated by the President and confirmed by the Senate. Others hold their position by virtue of another office (known as *ex officio* membership). And some are selected by other board members. To give a few illustrations: The FDIC board has three members appointed by the President and two *ex officio* members. 12 U.S.C. § 1812(a)(1) (providing that the Comptroller of the Currency and CFPB Director shall be FDIC board members).[2] Before 1935, the Federal Reserve Board was similarly structured as a five-member board, with the Treasury Secretary and Comptroller of the Currency serving *ex officio*. Federal Reserve Act, Pub. L. No. 63-43, ch. 6, § 10, 38 Stat. 251, 260 (1913). And the U.S. Postal Service Board of Governors represents still another model: It has eleven members—nine selected by the President and confirmed the Senate, and the other two selected by those nine. *See* 39 U.S.C. § 202(a), (c), (d).

[2] Before 2010, the *ex officio* members were the Comptroller and the Director of the Office of Thrift Supervision (OTS). Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 203, 103 Stat. 183, 188.

Board membership and term length. Agencies with boards often have different membership requirements, including:

- party-affiliation requirements, *see* 15 U.S.C. § 78d(a) (SEC); 7 U.S.C. § 2(a)(2)(A)(ii) (CFTC); 12 U.S.C. § 1752a(b)(1) (NCUA);
- non-partisan boards, *see* 12 U.S.C. §§ 241-42 (FRB);
- geographical-affiliation requirements, *see id.* § 241 (FRB); and
- expertise requirements, *see* 39 U.S.C. § 202(a)(1) (Postal Service); *id.* § 502(a) (Postal Regulatory Commission).

There are also varying term lengths for board members or directors. *See* 12 U.S.C. § 241 (14-year term for FRB Governor); *id.* § 1752a(c) (six-year term for NCUA board members); 7 U.S.C. § 2(a)(2)(A)(ii) (five-year term for CFTC Commissioner); 12 U.S.C. § 4512(b)(2) (five-year term for FHFA Director), 25 U.S.C. § 2704(b)(4)(A) (three-year term for member of National Indian Gaming Commission).

Removal protections. Agencies also have different express removal protections for the director or board members. The statute governing the CFTC, for instance, does not expressly prohibit at-will removal. 7 U.S.C. § 2(a)(2). By contrast, Congress included some forms of explicit removal protection for other agencies, including the FRB, 12 U.S.C. § 242; the National Labor Relations Board (NLRB), 29 U.S.C. § 153(a); the Federal Energy Regulatory Commission (FERC), 42 U.S.C. § 7171(b)(1); the SSA, *id.* § 902(a)(3); the FHFA, 12 U.S.C. § 4512(b)(2); and the OCC, *id.* § 2. Nine of the eleven members of the Postal Service's Board of Governors are removable by the President for cause, but the two remaining members are appointed by the other nine and are removable by those nine at will. 39 U.S.C. § 202(a)(1), (c)-(d).

Other variables. Agencies differ in other key respects. They have different funding mechanisms, for example: Some agencies, like the CFTC and SEC, have their funding levels set primarily through congressional appropriations. Henry B. Hogue et al., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 25 (2017). Others, like the OCC and the FHFA, are funded primarily by fees from regulated entities and are not subject to the congressional appropriations process. *Id.* at 27-28. The FDIC and NCUA generate income in yet another way, through deposit insurance premiums, while the Federal Reserve derives its income primarily from securities purchased in the conduct of monetary policy. None are subject to congressional appropriations. *Id.* Finally, some agencies are "nested" within other agencies, like the Federal Bureau of Investigation, 28 U.S.C. § 531, and the OCC, 12 U.S.C. § 1. Others exist as public-private hybrids, like Amtrak, 49 U.S.C. §§ 24301-02, and the Federal Open Markets Committee, 12 U.S.C. § 263.

As these examples demonstrate, there is no standard paradigm of agency structure. The variation in agency structure reflects a long history of congressional experimentation with agency design; the structure of independent agencies is not set in stone.

II. An agency's public accountability should be evaluated holistically.

The panel would allow for only two forms by which an agency may meet the minimum level of constitutional accountability: a single director removable at the President's will, or else a multi-member commission, which may be subject only to for-cause removal. Under the logic of *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 496 (2010), at-will removal is one method that may make an agency accountable to the public through the control of an elected official. To the panel, the only other method that may do so is the commission structure, on the (unsupported) theory that the commissioners will check each other.

There was no basis for the panel's conclusion that sufficient public accountability is solely a function of these two alternatives. Instead, sufficient accountability depends on the entirety of the agency's features. No one feature is dispositive—and certainly not the presence of more than one member.

The necessity of a holistic approach to accountability is demonstrated by the panel's logically unconnected analysis. What the panel held as sufficient—the presence of a commission structure—is logically unconnected to public accountability. The panel's view that commissions foster accountability is based on three flawed assumptions.[3] The panel assumes that accountability among commissioners is constitutionally relevant, that policy compromise is the same thing as public accountability, and that commissions reliably generate policy compromise. None of these assumptions bear any relation to the realities of agency practice, and the panel gives no support for its assumptions.

A. Public accountability, not accountability among commissioners, is constitutionally relevant.

The panel concluded (at 44-46) that a commission structure is sufficiently accountable because "each commissioner is . . . accountable to his or her fellow commissioners and needs the assent of a majority of commissioners to take significant action," thereby forcing compromise and preventing the abuse of power.

But accountability *among commissioners* isn't the same as accountability *to the public*. From a constitutional perspective, only the latter matters. Accountability among commissioners may be a worthy goal, but it has no necessary connection to public accountability, and the panel never says that it does. Partisan commission requirements reflect partisan politics; they do not ensure public accountability.

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[3] Although *Free Enterprise Fund* establishes at-will removal authority as an adequate accountability mechanism, scholars have questioned whether this authority actually translates into presidential control over an agency, and in turn translates into democratic accountability. *See* Aziz Z. Huq, *Removal as a Political Question*, 65 Stan. L. Rev. 1, 5-6 (2013).

B. Compromise is not accountability.

The panel also equated compromise on policy with accountability to the public. Whatever the virtues of policy compromise, it is distinct from (and perhaps even inconsistent with) *public* accountability. *See* Ronald J. Krotoszynski, Jr. et al., *Partisan Balance Requirements in the Age of New Formalism*, 90 Notre Dame L. Rev. 941, 1003 (2015) ("[A] mandatory partisan balance requirement . . . empowers a group of would-be bomb-throwers who also happen to serve as principal officers . . . ."). Most multi-member commissions have a bipartisan structure. The composition loosely reflects the outcome of presidential elections, with a majority of members being from the President's party. Thus, mandating compromise among commissioners undermines accountability based on electoral results, unless minority commissioners' views are simply disregarded. Moreover, since many commissions with partisan affiliation requirements restrict the number of commissioners who may be associated with one party, a lopsided election result would not be reflected in the commission's composition.

C. Multi-member commissions do not reliably produce compromise or check extreme positions.

Even if compromise had some relationship to accountability, multi-member commissions do not reliability produce compromise and check extreme policy positions. This is true for several reasons: partisan composition, quorum rules, horse-trading, and restrictions on private group deliberations by commissioners.

1. Partisan majorities need not compromise with minorities, and consensus among a partisan majority is not meaningful accountability.

Many commissions are structured to require partisan affiliation. *See, e.g.*, 15 U.S.C. § 41 (Federal Trade Commission (FTC)); *id.* § 78d(a) (SEC); *id.* § 2053(c) (Consumer Product Safety Commission); 42 U.S.C. § 7171(b)(1) (2016) (FERC). Other commissions typically have membership from both parties as a matter of practice, with the majority being from the President's party. Both types of commissions will usually have a partisan majority, which can dominate the minority by out-voting it.

Indeed, while a new president cannot immediately overhaul a commission upon taking office, "presidents have been able to obtain majorities for their party on independent commissions within thirteen to fourteen months after taking office from a prior president of a different party." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 38 (2010). Further, a partisan requirement does not guarantee policy stability. Empirical evidence suggests that multi-member agencies can be partisan and unbalanced in their decision-making, and that "during periods of divided government, partisan-line voting increases and members in the minority dissent more." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 796 (2013).

The panel implied that accountability derives from gaining the support of a bare majority of commission members, but convincing a majority of partisan affiliates to support a policy does not impose a meaningful accountability check. Indeed, for a three-member board like the NCUA, the panel's accountability principle means convincing *only one other non-elected member*. Because of majority rule, commission structures are unlikely to be a meaningful check on arbitrariness or abuses of power. A real check on independent agency overreach is judicial review of agency actions, not a commission structure.

2. Multi-member commissions do not generally have statutory quorum requirements.

Multi-member commissions all have quorum requirements, but they are frequently created through agency regulation, rather than by statute. *Cf.* Op. at 35 n.7 ("[Q]uorum provisions reinforce the settled understanding that independent agencies are to have multiple members."). If the constitutionality of these agencies depended upon their adoption of quorum rules, the agency structure would be unconstitutional until such rules were adopted. But absent a rule requiring multiple members for a quorum, even a nominally multi-member commission could function with just one appointed member.

This is hardly speculative. Term expirations, resignations, disability, and death can all leave commissions short-handed, because the Federal Vacancies Act does not apply to multi-member independent commissions. 5 U.S.C. § 3349c(1). In some instances, this has prevented commissions, such as the NLRB, from making collective decisions for lack of a quorum. *See e.g.*, *Hosp. of Barstow, Inc. v. NLRB*, 820 F.3d 440, 441 (D.C. Cir. 2016). A "multimember" commission structure is hardly a guaranty of compromise when the commission has only one member.

3. Multi-member commissions do not protect against extreme policy outcomes because of horse-trading.

Multi-member commissions also do not provide any guarantee against extreme policy positions given the possibility of horse-trading among members. Barklow, *supra*, at 20 (describing "political horse-trading" as "anathema to impartial decision making"). In the jargon of game theory, commissions do not operate as single-stage, one-shot games, but as multi-stage, repeat games. This opens the door to complex deal-making—a commission member might trade her vote on one issue in exchange for a vote on another. Thus, instead of two moderate outcomes, a commission could also produce two (disparate) extreme policy results.

4. The Sunshine Act inhibits deliberative discussion among commissioners.

The idea that commissions foster deliberative decision-making and consensus-building also ignores the limitations imposed by the Government in Sunshine Act, which requires that discussions between more than two commissioners on multi-member commissions be held in public. 5 U.S.C. § 552b(b) (2016). This open-meeting requirement effectively precludes frank and deliberative discussion among members and impedes negotiated compromises. *See* Peter L.

Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 595 (1984) ("It remains true that candor and the flexibility necessary for collaboration or compromise are more likely to flourish in the shade.").

* * *

In short, a multi-member commission—one of the two agency structures that the panel believes is constitutionally permissible—has no necessary connection with public accountability. So the proper inquiry is not whether an agency has a *particular* feature—an at-will removal or commission structure—but whether *all* of its features, taken together, make its sufficiently accountable. The Court need not articulate precisely where this accountability line lies because, for the reasons we now explain, the CFPB readily meets any reasonable standard here.

III. The CFPB is publicly accountable in implementing its mission.

A. Accountability concerns animated the CFPB's design.

1. The CFPB was created in response to the lack of accountability of other agencies for consumer financial protection.

The legislative history shows that Congress's central concern in creating the CFPB was to ensure public accountability in performing its consumer-financial-protection mission. Before the CFPB's creation, consumer financial protection had been fragmented among a dozen federal agencies: five bank regulators, the FTC, the FHFA, the Internal Revenue Service, and the Departments of Defense, Education, Housing and Urban Development, and Veterans Affairs. As the Administration testified: "The present system of consumer protection regulation is not designed to be independent or accountable, effective or balanced. It is designed to fail." *Creating a Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the S. Comm. on Banking, Housing and Urban Affairs,* 111th Cong. (2009) (hereinafter Senate Banking Hearing) (statement of Michael S. Barr, Assistant Sec'y for Financial Institutions, Dep't of the Treasury); Michael S. Barr, et al., *Financial Regulation: Law and Policy* 552, 558-564 (2016); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Ann. Rev. Banking & Fin. Services L. 321, 327-28 (2013) (hereinafter Levitin, *CFPB Introduction*). These agencies' authorities varied substantially, as did their funding and motivation: The diffusion of consumer financial protection among a dozen agencies meant that no single agency bore responsibility for regulating core consumer financial markets like deposits, mortgages, credit cards, auto loans, payday loans, and debt collection.

In the wake of the 2008 financial crisis, some of these agencies were perceived as having been "asleep at the wheel" in part because of structural problems that made consumer financial protection subordinate to the agencies' other missions and the agencies beholden to the financial-services industry for their funding. *See* Adam J. Levitin, *The Consumer Financial Protection Agency* (Pew Financial

Reform Project, Briefing Paper No. 2, 2009), http://bit.ly/2nOSs6M; Levitin, *CFPB Introduction, supra,* at 328-34. These concerns animated the creation of the CFPB, which consolidated the consumer financial protection mission in a single agency, equipped with adequate statutory authority and independent funding.

2. Congress was particularly concerned about regulatory capture.

In designing the CFPB, Congress was concerned about a particular type of accountability problem—"regulatory capture"—in which agencies come to serve the interests of regulated industries rather than those of the public *See, e.g.*, Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 Harv. L. Rev. 1991, 2042 (2014); Adam J. Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream,* 26 Yale J. Reg. 143, 159-60 (2009); Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. Corp. L. 621, 629 (2012) ("Regulatory capture is one of the most widely accepted concepts in the studies of politics, regulation, and administrative law."). As Professor (now Senator) Elizabeth Warren explained, "concentrating authority in a single regulator . . . could exacerbate the problem of political capture" by, for example, making it difficult for consumer groups "to oppose well-funded banking interests at multiple state legislatures" instead of "at a single federal regulator." Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 99 n.325 (2008). As a result, "minimizing the risk of capture," Professor

Warren emphasized, "is a main regulatory-design challenge in implementing our proposal." *Id.*

Similarly, in congressional testimony, Professor Warren observed the need for independent funding for the CFPB. *Regulatory Restructuring: Enhancing Consumer Financial Products Regulation: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 36 (2009). At a later hearing, the Legislative Director of the Consumer Federation of America testified about the need for independent (non-appropriated) funding for the CFPB to protect against the risk of "political manipulation by regulated entities." Senate Banking Hearing, *supra*, at 99.

Likewise, capture concerns were expressly mentioned in a Treasury white paper setting out the Obama Administration's reasons for creating the CFPB, which noted the need for legislation to consider "how supervisory agencies should be funded and structured, keeping in mind that the funding structure can seriously impact regulatory competition and potentially lead to regulatory capture." U.S. Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation: Rebuilding Financial Supervision and Regulation* 29 (2009). The paper accordingly proposed that the CFPB be "an independent agency with stable, robust funding," that is not subject to appropriations. *Id.* at 14. The need to devise a structure immune from regulatory capture informed Congress's design of the CFPB.

3. The CFPB's design reflects a concern about regulatory capture.

The regulatory-capture concern is reflected most notably in three key features of the CFPB's design: non-appropriated funding; a for-cause removal standard; and a single director. Regulatory capture operates in many ways, but a key mechanism is through agency funding. Agencies that are dependent upon regulated industries for funding may seek to curry favor with their regulatory charges. This dynamic was a major criticism of the various federal bank regulators before the Dodd-Frank Act; for example, the OCC and the OTS were both funded by the institutions they regulated and attempted to win charters by engaging in a race to the bottom on consumer protection and other regulatory oversight. *See* Levitin, *The Consumer Financial Protection Agency*, *supra*.

Appropriated funding raises its own public-choice-theory problem: concentrated industry interests opposed to a diffuse public interest. Concentrated industry interests will spend much greater effort using the appropriations process as an annual deregulatory mechanism than the public will use it to push for the common good. The CFPB's dedicated (but capped) funding source is designed to address this capture mechanism while ensuring congressional control over the scope of the CFPB's activity.

This public-choice-theory problem also manifests itself in executive control over agencies. Regulated industries are likely to bring concentrated political pressure to bear on the White House to influence an agency whose head is subject to at-will removal to adjust policy in favor of the industry. The CFPB's for-cause removal standard is designed to shield against this.

The CFPB's single-director structure also reflects a concern about capture. Earlier proposals for the CFPB did not involve a single director, but instead had a partisan commission or a non-partisan board. During the legislative process, however, Congress gave further consideration to the issue, and ultimately decided on a single-director structure precisely to enhance agency accountability. With one director, it is clear who is responsible for the agency's actions, and the colloquial buck stops with that one person. In contrast, multi-member commissions diffuse accountability, and its members can point fingers at each other and plead the necessity of cutting deals as ways of shirking accountability.

A single-director structure also protects against capture by preventing regulated industries from using quorum requirements to hold up agency action. Regulated industries can prevent multi-member commissions from acting by exerting political pressure to delay or hold up confirmation of enough members for the possibility of a quorum. A single-director structure is less vulnerable to this sort of delay because when there is a vacancy, its organic statute or the Federal Vacancies Act provides for it to be filled without congressional action, thereby enabling the agency to continue exercising its full powers.

Finally, the single-director structure made it easier to launch the CFPB. It took a substantial amount of time for the Senate to confirm the CFPB's first (and thus far only) Director. It is far easier to confirm a single director than to confirm multiple commission members. In the contemporary political environment, a single-director structure was essential for making sure that the CFPB could commence operations in a timely fashion, thereby ensuring that the agency would be accountable to Congress in fulfilling its policy mission.

Thus, three key features of the CFPB's design are all responsive to the capture concern and the desire to increase the CFPB's public accountability.

B. The CFPB is subject to a battery of accountability measures.

Congress' deliberate choice in designing the CFPB to avoid capture does not mean that the agency was left unaccountable. Quite the opposite. The CFPB is "a unique package of agency checks and balances that does not track with pre-existing agency forms." Levitin, *Politics of Financial Regulation*, *supra*, at 2057. Instead, it "represents an attempt to balance oversight with sufficient political insulation to avoid the problem of agency capture via internalization of legislative capture." *Id.*

The CFPB is subject to robust accountability mechanisms. They are carefully calibrated with broader policy objectives: Congress prioritized "programmatic accountability" to meet the "the substantive goals of consumer financial protection" over "accountability to current national political leaders."

Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 Law and Contemp. Probs. 129, 148 (2015).

1. The CFPB is subject to a host of oversight mechanisms.

The CFPB is accountable to both the President and Congress in a variety of ways. The CFPB is accountable to Congress first and foremost through the oversight process. The CFPB Director is required to appear twice a year before the Senate Committee on Banking, Housing, and Urban Affairs, and the House Committees on Financial Services and Energy and Commerce, 12 U.S.C. § 5496(a) (2016). For these meetings, the CFPB must submit to the Committees and to the President a comprehensive report on topics ranging from regulatory obstacles and objectives to budgetary justifications, as well as analysis of past and anticipated agency actions. *Id.* § 5496(b)-(c). These reporting requirements foster accountability because they require the CFPB to "demonstrate to Congress on a continuous basis that it is working to accomplish its mission." Michael S. Barr, Comment, *Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 Law and Contemp. Probs. 119, 126 (2015). The CFPB is also subject to an annual audit by the Government Accountability Office, and full review by the Federal Reserve's Inspector General. 12 U.S.C. § 5496; 5 U.S.C. § 8G (2016). Congress can, of course, undertake additional oversight of the

CFPB, and Congress has been anything but lax in this regard. In its first five years, CFPB officials have testified before Congress over sixty times and responded to numerous document requests. *See* CFPB, *Factsheet: Consumer Financial Protection Bureau By the Numbers* (2016), http://bit.ly/2olQFUz (hereinafter *CFPB By the Numbers*).

2. The CFPB is subject to legislative control.

Ultimately, if enough members of Congress do not approve of the CFPB's actions, they can reform the agency through legislation. Indeed, this is precisely what the House Financial Services Committee's chairman has promised to do. Jeb Hensarling, *How We'll Stop a Rogue Federal Agency*, Wall St. J. (Feb. 8, 2017, 6:43 PM), http://on.wsj.com/2k5Djsk. Congressional oversight combined with the regular legislative process imposes a critical measure of accountability on the CFPB.

3. The CFPB is the only bank regulator over which Congress exercises the power of the purse.

The panel concluded (at 63-64 n.16) that the CFPB is not subject to Congress's power of the purse because it is not subject to annual appropriations. That mistakes annual appropriations as Congress's sole means of exercising the power of the purse, and as necessary for congressional oversight in any event.

Congress does not control the budgets of *any* other federal bank regulator. It does not appropriate funds for the Federal Reserve Board, the OCC, the FDIC, the NCUA, or the FHFA. Instead, these agencies by law all have their own independent revenue streams from chartering, insurance assessments, or earnings on their holdings, and set their own budget independently from the President or Congress.

In contrast to all the other bank regulators, the CFPB's budget is capped by statute at 12% of the Federal Reserve System's fiscal year 2009 annual operating budget, subject to inflation adjustment. 12 U.S.C. § 5497 (2016). This generally puts a hard ceiling on the CFPB's activities—which all other federal banking regulators and the FHFA lack. In other words, contrary to the panel's understanding, Congress still exercises budgetary control over the CFPB, something it does not do for any other bank regulator.[4]

More broadly, most federal spending today is not set through annual appropriations, but rather through a wide variety of permanent funding mechanisms. *See* Congressional Budget Office, *The Budget and Economic Outlook: 2017 to 2027* 12-14 (Jan. 2017). It would be odd indeed if annual appropriations were now held to be a constitutional requirement for accountability.

4. The CFPB is subject to many other accountability mechanisms.

Beyond being answerable to Congress through the legislative process and a capped budget, the CPFB is subject to a wide array of other accountability mechanisms. *See* Michael Barr et al., *supra*, at 565–77; Barr, Comment, *supra*, at 126

[4] By statute, Congress has also authorized the CFPB to use certain fines and penalties, 12 U.S.C. § 5497(b), and authorizes additional appropriations, *id.* § 5497(e).

("Balanced against its independence are carefully crafted provisions to ensure that the Bureau remains publicly accountable for its accomplishments and failures."); Levitin, *Politics of Financial Regulation*, *supra*, at 2057. Its adjudications are subject to the Administrative Procedures Act (APA). 5 U.S.C. §§ 551-59 (2016). Further, the CFPB's rulemakings are subject to both the APA and the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. 847, 857 (codified at 5 U.S.C. § 601), which requires the CFPB to consult with, and gain direct input from, small businesses regarding proposed rulemakings. CFPB rulemakings are also subject to a veto by the Financial Stability Oversight Council. 12 U.S.C. § 5513 (2016). CFPB enforcement actions are subject to judicial review. *Id.* § 5563. The CFPB lacks fully independent litigation authority before the Supreme Court. *Id.* § 5564. Lastly, the CFPB is subject to explicit statutory requirements to engage in cost-benefit analysis. *See* 12 U.S.C. § 5512.

5. The CFPB is accountable to the public through various feedback mechanisms.

The CFPB is also directly accountable to the public. Because it is subject to the APA, the CFPB is required to inform the public of any proposed rules and offer the opportunity to comment on the proposed rules. 5 U.S.C. § 500. The CPFB has a statutory Consumer Advisory Board, 12 U.S.C. § 5494, an Office of Service Member Affairs, an Office of Financial Protection for Older Americans, and a Private Education Loan Ombudsman, and has also created an academic research council, a credit union advisory council, and a community bank advisory council. CFPB, *Advisory Groups*, http://bit.ly/2mTcA8N. All of these groups channel public feedback to the CFPB, in addition to the 38 public field hearings the CFPB has held in its first five and a half years of operation. *CFPB By the Numbers*, *supra*.

The CFPB has also created a Consumer Complaint Database, mandated under the Dodd-Frank Act, which fields and publishes complaints from consumers, and provide consumers the opportunity to provide direct input into the agency's work. CFPB, *Consumer Complaint Database*, http://bit.ly/2nAolhr.[5] 12 U.S.C. § 5534(a). The CFPB is required to provide a summary, published for the public, of its responses and any agency action taken to resolve the issues. *Id.* § 5534(b). In addition, the CFPB uses information obtained from consumers to analyze the financial markets and prioritize its enforcement, supervision, and regulatory goals. *See, e.g.*, CFPB, *2014 Consumer Response Annual Report* 2 (2014). It publishes a report, at least once a year, on its consumer-risk-monitoring activities—giving consumers knowledge of the agency's priorities. 12 U.S.C. § 5512. The CFPB thus has numerous channels for public feedback and accountability.

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[5] Similar consumer complaint databases exist at the Consumer Products Safety Commission, *see Publicly Available Consumer Product Safety Database*, http://bit.ly/2om5nuQ, http://bit.ly/2oDemHb, and the National Highway Transportation Safety Administration, *see* Gregory E. Magno, NHTSA's Consumer Complaint Database (2011), http://bit.ly/2mTpT98.

In short, the CFPB represents a constitutionally permissible and effective experiment in agency design. The CFPB has achieved unprecedented relief for consumers—in just six years of operation it has secured nearly $12 billion in relief for approximately 27 million consumers. *CFPB By the Numbers*, *supra*. It has also helped thousands of consumers through the mediation function of its consumer complaint database. The result has been an astounding 97% resolution rate. *CFPB By the Numbers*, *supra*. These results show the value of allowing Congress to adjust independent agency design.

IV. Novelty does not make a congressional act unconstitutional.

A. Legislative novelty should not be used as evidence that a statute is unconstitutional on separation of powers grounds.

The CFPB's structure is unique in some regards, but that novelty is not in and of itself problematic.[6] While historical precedent may *enhance* the constitutionality of a particular action, the lack of historical precedent does not make an act suspect or illegitimate. "Legislative novelty is not necessarily fatal; there is a first time for everything." *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2586 (2012) (plurality op.) (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995)). Courts need only "'pause to consider the implications of the Government's arguments' when confronted with such new conceptions of federal

[6] We note that the panel decision puts the constitutionality of many other independent agencies in doubt, including the FHFA and the SSA.

power." *Id.* Thus, while the Supreme Court in *New York v. United States* noted that a federal statute "appear[ed] to be unique" in the course of holding that statute unconstitutional, 505 U.S. 144, 168, 177 (1992), nothing in that case stands for the proposition that novelty is wholly *determinative* in a separation of powers analysis.

The Court has held unprecedented statutes constitutional without examining legislative novelty, even where the dissent or lower court does so at length. *See, e.g.*, *Va. Office for Prot. and Advocacy v. Stewart*, 131 S. Ct. 1632 (2011) (holding novel statutory power is constitutional without discussing legislative novelty); *United States v. Kebodeaux*, 647 F.3d 137 (5th Cir. 2011), *rev'd en banc*, 687 F.3d 232, 245 (5th Cir. 2012), *rev'd*, 133 S. Ct. 2496 (discussing novelty as factor indicating statute is unconstitutional in the *en banc* reversal, but with no discussion of legislative novelty in the original Fifth Circuit opinion or in the Supreme Court opinion). The panel's ruling strays far from these precedents. Its emphasis on legislative novelty borders on a bright-line rule that where there is novelty, there is a constitutional violation. Such a rule is unsound in both precedent and practice.

Legislative novelty is a poor proxy for Congress' assumption that it lacks the power to enact a particular statute. *See* Leah M. Litman, *Debunking Anti-Novelty*, 66 Duke L.J. (forthcoming 2017), http://bit.ly/2og4JSS. First, numerous institutional forces make enacting legislation practically difficult, including the Constitution's bicameralism and presentment requirements, internal congressional "veto gates", and the nature of interest group politics. *Id.* (manuscript at 17-22). Second, Congress enacts law in response to, and in the context of, existing conditions. The reason a certain statutory feature may not have previously existed may be due to an absence of necessity under previous conditions, a change in constitutional jurisprudence, or simply a lack of legislative imagination. *See id.* (manuscript at 22-32). Legislative novelty, standing alone, is not a constitutional violation.

B. Prohibiting novelty in agency design prevents improvement of agency structure to enhance accountability and met other congressional goals.

The panel's decision chills congressional experimentation with agency design and petrifies administration. Administrative organization requires continuous improvement. It makes little sense for the Court, in the 21st century, to mandate an agency structure adopted in the late 19th century for policy concerns particular to the agencies being created at that time.

The panel's decision chills learning and experimentation in agency design by making new structures constitutionally suspect. Legislation creating new agencies is difficult to pass, often requiring political coalitions and conditions that exist only for a brief period. If an agency structure is found unconstitutional, it may be nearly impossible to correct it legislatively while maintaining other features of the legislation. Because a risk created by the panel's presumption disfavors experimentation, Congress is unlikely to experiment with agency design when the threat of a constitutional challenge is at all present.

CONCLUSION

For these reasons, this Court should hold that the CFPB's structure is constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(b) because it contains 6,145 words, excluding the parts exempted by Fed. R. App. P. 32(f) and D.C. Cir. Rule 32(1). This brief further complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced 14-point typeface, including serifs. The typeface is Baskerville.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: March 31, 2017

/s/ *Deepak Gupta*
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CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2017, I electronically filed the foregoing Brief of *Amici Curiae* Scholars of Financial Regulation in Support of Respondent with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

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