UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MORGAN DREXEN, INC. and
KIMBERLY A. PISINSKI,

***Plaintiffs*,**

v.

CONSUMER FINANCIAL
PROTECTION BUREAU,

***Defendant*.**

Civil Action No. 13-01112 (CKK)

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

The opposition of the Consumer Financial Protection Bureau ("CFPB") analyzes CFPB's lack of checks (no presidential at-will removal, no congressional appropriations oversight, no internal checks though commission voting) one at a time. However, CFPB never confronts Plaintiffs' core argument—that CFPB is unconstitutionally structured and historically unique because it lacks ***any*** of these safeguards. This analytical flaw pervades every aspect of CFPB's Opposition. As explained below, evaluating all of these features together, and in conjunction with CFPB's broad power, discretion, and limited judicial review, the inescapable conclusion is that CFPB is unmoored from the Nation's history and traditions, which the Supreme Court says is the guide to evaluating the constitutionality of government power. No agency has all of these elements of autonomy, and no case supports or even considers the constitutionality of these features combined. The Court should grant Plaintiffs' Motion for Summary Judgment.

I. CFPB DOES NOT CONFRONT THE CUMULATIVE IMPACT OF ITS STRUCTURAL FEATURES IN COMBINATION

CFPB fails to join the main issue: whether CFPB's aggregate elements of autonomy render it unconstitutional. Plaintiffs' opening brief demonstrated that CFPB's structure was entirely novel in that no other comparable agency aggregated its constitutionally troubling features together: it is undisputed that the CFPB Director does not serve at the pleasure of the President; he has half a billion dollars to spend annually without being subject to Congress's appropriations power; and he does not have to build consensus for decisions through a multimember structure. Pls.' Mem. at 16. CFPB's opposition evaluates and discusses each of these features in ***isolation***; however, CFPB never confronts their ***cumulative*** impact.

As the U.S. Chamber of Commerce has stated, Congress broke new ground when it created CFPB by combining features of power and autonomy:

> [T]here is no other agency head who exercises sole decisionmaking authority with regard to rulemaking, enforcement and supervision actions, and every other matter—***and*** need not obtain the concurrence of colleagues on a multi-member commission; ***and*** who also has policy independence from the President such that he or she may be removed from office only 'for inefficiency, neglect of duty, or malfeasance in office'; ***and*** who also has plenary power to appoint every one of the agency's employees; ***and*** who also has the ability to spend more than half a billion dollars without congressional approval.

Statement of the U.S. Chamber of Commerce on "Enhanced Consumer Financial Protection After the Financial Crises," *U.S. Senate Committee on Banking, Housing, and Urban Affairs*, at 4 (July 19, 2011) (emphasis in original).[1]

This year, the D.C. Circuit held that combining legitimate structural features can result in an unconstitutional entity: "[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute." *Ass'n of American Railroads v. U.S. Dept. of Transp.*, 721 F.3d 666, 673 (D.C. Cir. 2013). Here, the combination of CFPB's features of autonomy makes the agency novel and unprecedented. CFPB does not—and cannot—cite any case or any historical practice that would justify CFPB's combined lack of structural safeguards. Under *Ass'n of American Railroads*, CFPB's "novelty may . . . signal unconstitutionality." *Id.* at 673.

Instead, CFPB relies on cases like *Humphrey's Executor* (Opp'n at 25), which approved a restriction on the President's ability to remove FTC Commissioners (which supports CFPB's argument that Congress may restrict the President's ability to remove its Director); but then, CFPB denies that FTC's multimember structure was relevant to the Court's analysis. Opp'n at 27-28. Likewise, CFPB cites to agencies such as the Social Security Administration ("SSA"),

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[1] Available at http://www.banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=19e3efe3-0c50-47df-bb3c-b75ff93e7a5f (lasted visited Aug. 5, 2013).

which has a single head (which supports CFPB's argument that a multimember commission is not necessary), but ignores that the SSA is—unlike CFPB—subject to congressional appropriation oversight.

The uncontroverted facts of this case demonstrate that Congress entered into new territory in establishing this new "Bureau." CFPB's argument—that Plaintiffs' theory is "unmoored" from precedent (Opp'n at 3)—has it backward. It is Congress that created an agency "unmoored" from legal precedent and the Nation's history and traditions.

II. CFPB PROVIDES NEITHER JUDICIAL CRITERIA NOR A LIMITING PRINCIPLE

CFPB's brief seems to suggest that Congress has unfettered discretion to set up agencies however it wants, and CFPB does not appear to acknowledge the limits of this authority or the criteria the Court should consider. And, as explained above, CFPB's "one at a time" analysis of the structural features suggests that the Court should not consider, from a functional separation of powers perspective, the broader context of how CFPB's powers and safeguards work together. However, as Plaintiffs demonstrated in their opening brief, a constitutional challenge to agency structure should be informed by the overall context and comparing the scope of agency power to the accompanying structural protections (checks, balances, and oversight). Pls.' Mem. at 20-21. The case law provides the following foundational principles that should guide the Court's analysis:

1. The Court has the authority to review, and if necessary declare unconstitutional, an agency's structure.[2]

2. "[S]tructural protections against abuse of power [are] critical to preserving liberty."[3]

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[2] *Free Enter. Fund v. Pub. Co. Acct'ing Oversight Bd.*, 130 S. Ct. 3138, 3160 (2010).

3. Federal agencies must have constitutional “checks and balances.”[4]

4. The extent of the required checks and balances depends on the scope of the agency’s powers and duties.[5]

5. History and “traditional ways of conducting government give meaning to the Constitution.”[6]

6. “[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.”[7]

7. An agency’s “novelty may . . . signal unconstitutionality.”[8]

8. “The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”[9]

When applying these criteria to evaluate CFPB, it is clear that CFPB fails the constitutional test. Here, CFPB has one of the broadest delegations of power in history yet ***each*** of the most important restraints on agency power (presidential at-will removal,

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[3] *Bowsher v. Synar*, 478 U.S. 714, 730 (1986).
[4] *Ralpho v. Bell*, 569 F.2d 607, 620 (D.C. Cir. 1977) (holding that it is “daring to suggest that Congress, though subject to the checks and balances of the Constitution, may create a subordinate body free from those constraints”); *compare Fed. Mar. Comm’n v. S. C. State Ports Auth*., 535 U.S. 743, 773 (2002) (Breyer, J., dissenting) (observing that the Court permitted Congress to delegate rulemaking and adjudicative powers to agencies in part “because the Court established certain safeguards surrounding the exercise of these powers.”).
[5] *Morrison v. Olson*, 487 U.S. 654, 671-73 (1988) (finding that the independent counsel had “limited jurisdiction and tenure” and “lack[ed] policymaking or significant administrative authority” and therefore was not “so central to the functioning of the Executive Branch” to require at-will presidential removal); Pls.’ Mem. at 20-21.
[6] *Bauer v. Marmara*, 2013 WL 1684051, at *3 (D.D.C. 2013) (quotations and citations omitted).
[7] *Ass’n of American Railroads v. U.S. Dept. of Transp*., 721 F.3d 666, 673 (D.C. Cir. 2013).
[8] *Id.* at 673.
[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)).

congressional appropriations oversight, multimember commission) is absent. Accordingly, CFPB's novel structure violates the Constitution.

III. CFPB'S POSITION CONTRADICTS THE HISTORICAL USE OF MULTIMEMBER COMMISSIONS FOR COMPARABLE AGENCIES

CFPB argues that the Supreme Court has upheld restrictions on the President's removal of members of multimember Commissions. *See* Opp'n at 25 (*citing Humphrey's Executor*). However, CFPB also argues that multimember commissions have no role to play in our system of constitutional checks and balances or in preserving the democratic structure of our government. Nothing could be further from the truth.

In creating independent agencies with broad jurisdiction, Congress has traditionally balanced the need for an agency that was independent of the President's removal power through the use of a multimember, often bipartisan, commission. Such a commission structure insures that power is not held in the hands of a single individual. In addition, Congress has staggered the terms of members of such Commissions such that each newly-elected President has the ability to appoint at least some Commission members. In many instances the President also has the right to designate the Commission Chairman. Such provisions insure that these agencies, while independent of the President, are not totally divorced from the democratic process and the will of the electorate. If Congress intended to give CFPB independence from the removal power of the President akin to that of other independent multimember agencies that enjoy similarly broad authority—much of which was transferred to CFPB—then Congress should have created CFPB as a multimember commission.

In arguing against the multimember structure (Opp'n at 37-38), CFPB does not confront the Nation's 125-year history, beginning with the ICC, of using the multimember structure for independent regulatory agencies with broad delegations such as the SEC, FTC, and the CPSC.

However, this history is ***critical to the constitutional analysis*** because "traditional ways of conducting government give meaning to the Constitution." *Bauer v. Marmara*, 2013 WL 1684051, at *3 (D.D.C. 2013) (quoting *Mistretta v. United States*, 488 U.S. 361, 401 (1988)).

In fact, courts are obligated to evaluate traditions when determining issues of constitutional structure and power. "Long settled and established practice is a consideration of ***great weight*** in a proper interpretation of constitutional provisions" relating to the separation of powers. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (emphasis added). *See also Eldred v. Ashcroft*, 537 U.S. 186, 204 (2003) (relying on "historical practice" in determining constitutional requirements, and noting "a page of history is worth a volume of logic"); *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414 (2003) (determining constitutional powers based on tradition and "historical gloss"); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (constitutional ruling recognizing executive claims settlement authority based on the "history" of assertion of such power and the "acquiescence" of Congress to those practices over the years). *See generally* Michael J. Glennon, The Use of Custom in Resolving Separation of Powers Disputes, 64 B.U. L. REV. 109, 115-16 (1984) (discussing that tradition and custom has "been a source of decisional authority that has been relied upon frequently by the Court").

Here, in analyzing the question of whether CFPB is unconstitutional, the Court can, and should, consider the tradition of using bipartisan multimember commissions for agencies possessing broad enforcement, adjudicatory, and rulemaking authority. Comparable (albeit more limited) agencies such as FTC, SEC, CFTC, FCC, FERC, and CPSC use the multimember structure. *See* Pls.' Mem. at 17-18.

For example, FTC—an agency cited by CFPB and the subject of *Humphrey's Executor*—has a multimember structure. Its statute states: "A commission is created and established, to be

known as the Federal Trade Commission (hereinafter referred to as the Commission), which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party." 15 U.S.C. § 41.

Likewise, the PCAOB—an agency cited by CFPB and the subject of *Free Enterprise Fund*—has a multimember structure. Its statute states: "The Board shall have 5 members, appointed from among prominent individuals of integrity and reputation who have a demonstrated commitment to the interests of investors and the public, and an understanding of the responsibilities for and nature of the financial disclosures required of issuers, brokers, and dealers under the securities laws and the obligations of accountants with respect to the preparation and issuance of audit reports with respect to such disclosures." 15 U.S.C. § 7211(e)(1).

It is not surprising in light of the prevalence of the multimember structure for this type of agency that when CFPB was conceived (by Professor, now Senator, Elizabeth Warren) it was based on an agency (the CPSC) that used a multimember structure.[10] And when the administration proposed the new "Consumer Protection Financial *Agency*," it was a multimember agency whose decisions would have the benefit of the "diverse" views of a "Board." The Administration's White Paper stated: "The CFPA will have a Director and a Board. The Board should represent a ***diverse set of viewpoints and experiences***." U.S. Department of the Treasury, Financial Regulatory Reform: A New Foundation (2009) at 58

[10] "Clearly, it is time for a new model of financial regulation, one focused primarily on consumer safety rather than corporate profitability . . . The model for such safety regulation is the U.S. Consumer Product Safety Commission (CPSC), an independent health and safety regulatory agency. . . ." Elizabeth Warren, *Unsafe at Any Rate*, Democracy Journal at 16 (2007), *available at* http://www.democracyjournal.org/pdf/5/Warren.pdf.

(emphasis added).[11] When the House enacted the bill, it adopted the Administration's proposed multimember structure. See H.R. 4173, 111th Cong. § 4103 (2009) (enacted) ("The Commission shall be composed of 5 members who shall be appointed by the President, by and with the advice and consent of the Senate, from among individuals who— (A) are citizens of the United States; and (B) have strong competencies and experiences related to consumer financial protection.").[12] SF ¶¶ 2-4. The enacted version of the bill changed CFPB to a "Bureau" to be located in the Federal Reserve rather than an "Agency," and dropped the multimember structure in favor of a single director. SF ¶ 5.

The originally proposed and House-enacted multimember structure could have potentially avoided the constitutional infirmities that now characterize the agency. Congress could have achieved its goal of having an agency head independent of the President's at-will removal authority without violating a core constitutional principle that too much unchecked power may not be concentrated in the hands of a single person: the CFPB Director. As the Supreme Court has held: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006) (quoting The Federalist No. 47, p. 324 (J. Cooke ed. 1961) (J. Madison)). A multimember structure would impose internal checks and balances on the Director. Multimember decisionmaking guards against the prospect that a single individual is or will become biased, blinded, or captured.[13] A multimember structure accommodates "diverse or

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[11] Available at http://online.wsj.com/public/resources/documents/finregfinal06172009.pdf.

[12] Available at http://www.gpo.gov/fdsys/pkg/BILLS-111hr4173eh/pdf/BILLS-111hr4173eh.pdf.

[13] "One justification for placing decisionmaking authority in corporate boards, rather than a single CEO, is that collective governance is more effective than vesting power in an individual. To be sure, individual control of a corporation promotes swifter and more decisive action. But collective corporate governance permits the board to collect, process, store, discuss, and retrieve

extreme views through the compromise inherent in the process of collegial decisionmaking," and "dilute[s] the effect of transitory political events on agency policy."[14] Here, this internal restraint afforded by a traditional structure is constitutionally necessary because the CFPB Director is not subject to the most important external checks—presidential removal and congressional appropriations—a concept that CFPB's Opposition does not confront.

A multimember structure also strengthens judicial review, which CFPB touts as an available safeguard (Opp'n 34-35). When commissioners debate and disagree, there is an opportunity to capture the expressions of minority viewpoints, which facilitate such review. *See Radio-Television News Directors Ass'n v. F.C.C.*, 184 F.3d 872, 878 (D.C. Cir. 1999) (noting that those FCC "commissioners voting against [the agency's action] were obliged to submit a statement of reasons to the court in order to facilitate judicial review"). With a lone and unchecked CFPB director, there will be insufficient recordation of competing considerations (or worse, no consideration of competing considerations), impairing the impartiality of the initial decision and undermining judicial review. This problem is compounded in light of the provision of Dodd-Frank obligating courts to defer to CFPB's judgment over inconsistent views of other federal agencies, even where those agencies have overlapping functions.[15]

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information more thoroughly and accurately than one person acting alone. Also, collective governance can constrain overconfidence or cognitive errors by providing critical assessments and viewpoints of proposals. Collective governance can also constrain shirking, self-dealing, and capture by providing multilateral monitoring and raising the number of people who need to be corrupted for improper action to occur." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856, 897-98 (2013).

[14] Marshall J. Breger & Gary J. Edles, Established by Practice: The Theory and Operation of Independent Federal Agencies, 52 Admin. L. Rev. 1111, 1113 (2000).

[15] "[T]he deference that a court affords to the Bureau with respect to a determination by the Bureau regarding the meaning or interpretation of any provision of a Federal consumer financial law shall be applied as if the Bureau were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law." 12 U.S.C. § 5512(b)(4)(B).

By contrast, the deliberations of multimember agencies are open to the public under the Sunshine Act. As the D.C. Circuit observed, the requirement of public meetings facilitates democratic control of government: Congress "believed that increased openness would enhance citizen confidence in government, encourage higher quality work by government officials, stimulate well-informed public debate about government programs and policies, and promote cooperation between citizens and government. In short, it sought to make government more fully accountable to the people." *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 921, 928 (D.C. Cir. 1982). None of this applies to CFPB.

The Supreme Court has recognized that the multimember structure facilitates "expert" decisions as distinguished from raw political (and potential tyrannical) decisions. In *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), a crucial decision at the very moment when the modern administrative state was exploding, and when many in government were expressing serious concerns about this "headless fourth branch of government" of unchecked bureaucrats wielding power,[16] the Supreme Court accepted Congress's decision to insulate an agency (the FTC) from the President's at-will removal power only after taking comfort in the structural protections afforded by the multimember structure—the "body of experts." *See id*. at 624 (emphasizing that FTC members were "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'"); *see also Mistretta v. United States*, 488 U.S. 361, 379, (1989) (approving of Congress "delegating to an expert body located within the Judicial Branch the intricate task of formulating sentencing guidelines").

[16] President's Comm. on Admin. Mgmt., Report of the Committee With Studies of Administrative Management in the Federal Government 39-40 (1937) ("They are in reality miniature independent governments . . . . They constitute a headless 'fourth branch' of the Government . . . ."); *see also FTC v. Ruberoid Co*., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (describing administrative agencies as "a veritable fourth branch of the Government, which has deranged our three-branch legal theories").

In its section on presidential removal, CFPB asserts that the decision in *Humphrey's Executor* had nothing to do with FTC's "body of experts." Opp'n at 28. However, CFPB does not deny that the Court carefully evaluated the existence of FTC's multimember structure before approving its constitutionality. The Court in *Humphrey's* did not state expressly that if the multimember commission were not present, the result would be different. But that is the most logical reading of the case, and history has confirmed this gloss. Moreover, CFPB cannot cite to any case where a court has tolerated the vesting by Congress of broad authority (such as that conferred on the FTC)—in conjunction with restrictions on presidential removal and congressional appropriations oversight—in the absence of a multimember structure.

CFPB relies on *Mistretta* for the principle that "separation of powers [is] not violated . . . by mere anomaly or innovation." Opp'n at 39. But *Mistretta* involved the United States Sentencing Commission—a 7 member multimember commission.[17] This is typical of CFPB's Opposition. For example, CFPB states:

> . . . Plaintiffs complain that the Bureau has "rulemaking, adjudicatory, and enforcement powers." . . . But those powers are common among regulatory agencies. As the Supreme Court has observed, "[u]nder most regulatory schemes, rulemaking, enforcement, and adjudicative powers are combined in a single administrative authority." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 151 (1991) (citing the ***FTC, Securities and Exchange Commission, and Federal Communications Commission*** as examples).

Opp'n at 36 (emphasis added). The examples cited in this portion of the Opposition (FTC, SEC, and FCC) are multimember commissions.

[17] The Court in Mistretta described the Sentencing Commission at 488 U.S. at 368-69: "The [Sentencing] Commission is established 'as an independent commission in the judicial branch of the United States.' . . . . It has seven voting members (one of whom is the Chairman) appointed by the President . . . . No more than four members of the Commission shall be members of the same political party."

Single director agencies mentioned by CFPB—such as SSA, FHFA, and the Office of Special Counsel (Opp'n at 39)—all have other safeguards and are not comparable in the scope of function or degree of discretion entrusted to CFPB. SSA and the Office of Special Counsel are subject to the appropriations power and have limited functions (SSA administrates benefits and the Office of Special Counsel protects federal employees and applicants from prohibited personnel practices). FHFA, like the independent counsel in *Morrison*, has a more narrow scope of power: whereas CFPB has open-ended jurisdiction over all consumer lending practices by private companies, FHFA's jurisdiction pertains to government-sponsored entities: Fannie, Freddie, and the Federal Home Loan Banks. *See* 12 U.S.C. §§ 4511 (jurisdiction over Fannie, Freddie, and the Office of Finance); 4513 (jurisdiction over "Federal Home Loan Banks"); 1423 (same). Each of these entities pays fees to FHFA. 12 U.S.C. 4516(a)-(b).[18]

When one looks at similar agencies that approach the power (even if they fall short) delegated to CFPB, courts have only tolerated the incursion on the President's removal power and Congress's appropriations power where there is a multimember commission. This history is the most important guide to the Court's constitutional decisions based on the authorities above.

Ultimately, Senator Warren, the Obama Administration, and the House of Representatives may have gotten it right the first time by selecting the traditional model of a multimember commission. Having decided to curtail two of the most powerful "checks" (presidential removal and congressional appropriations), and given CFPB's broad scope of enforcement, rulemaking and adjudicatory power, the multimember structure is the historical

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[18] For this reason, a decision by this Court granting Plaintiffs' Motion does not impugn the constitutionality of any other federal agency. As the Supreme Court noted in *Free Enterprise* when confronted with a similar concern, the decision invalidating PCAOB's structure did not impact other agencies because each agencies' scope of power versus structural protection requires a unique analysis. *Free Enter. Fund*, 130 S. Ct. at 3160.

practice, which is given "***great weight***," *The Pocket Veto Case*, 279 U.S. 655, 689 (1929) (emphasis added), in determining whether CFPB is constitutional. Here, in this case of first impression, the Constitution mandates a multimember commission.

The chorus of concerns about the lack of a commission structure continue from Congress, industry, scholars, and organizations such as the Chamber of Commerce. On September 12, 2013, the Chairman of the House Financial Services Committee stated: "CFPB is uniquely unaccountable even to itself since there is fundamentally no 'it,' no 'they' only a 'he.' There is no commission, only one omnipotent director fundamentally accountable to no one." (Statement attached as **Exhibit 1**).

A multimember structure would fulfill Madison's promise that government power would not be concentrated in the hands of a single individual such as a king or despot. If CFPB's lone Director were the CFPB Chairman overseeing a commission, he would have to go through the important processes of debate and deliberation, forging a consensus, and persuading fellow other commissioners. As a recent FTC Chairman said shortly after assuming that position, "[e]very Chairman has to get a majority and that means in practice that the Commission largely moves forward in a bipartisan way."[19] As CFPB suggests, deliberating sometimes can slow down action. *See* Opp'n at 39 (arguing that the benefits of a multimember commission are "debatable"). Indeed, democracy itself has sometimes been criticized for this reason. But such built in structural inefficiency is the genius—and mandate—of the Constitution. This is consistent with decisions by Congresses for more than 125 years beginning with the ICC to the present, where the federal agencies that not only execute—but which also possess broad enforcement and adjudicatory power—have a multimember structure.

[19] http://ftc.gov/speeches/leibowitz/090924fordhamspeech.pdf.

IV. CFPB'S STRUCTURE VIOLATES THE CONSTITUTIONAL REQUIREMENT OF DEMOCRATIC CONTROL OF GOVERNMENT

Before CFPB, Congress had never legislated, nor had any Court condoned the consolidation of sweeping regulatory, supervisory, and enforcement power in the hands of a single individual shielded from removal by the President except for good cause. Doing so violates the democratic principles that underlie our system of government, and places that single individual too far outside the control of the people's elected representatives.

As CFPB concedes in its opposition (Opp'n at 27), the "character," "function," and scope of agency authority is key to the constitutional analysis. For example, in *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court addressed whether the independent counsel provisions of the Ethics in Government Act were constitutional because, among other things, the independent counsel could be removed only for "good cause." The Supreme Court found that the independent counsel had "limited jurisdiction and tenure" and "lack[ed] policymaking or significant administrative authority." *Id.* at 691. As a result, the Court held that the authority of the independent counsel was not "so central to the functioning of the Executive Branch" so as to require Presidential control. *Id.* at 691-92.

Here, unlike the independent counsel in *Morrison*, Congress consolidated supervisory, regulatory, and enforcement authority from seven different agencies into CFPB, and CFPB has authority over virtually every consumer financial transaction and every business that engages in such transactions. CFPB confirms the breadth of its authority in its opposition. *See* Opp'n at 3-6 (confirming that CFPB has broad and "exclusive" "rulemaking," "supervision," and "enforcement" authority, power to implement "18 pre-existing statutes," transferred authority from "seven different federal regulators," power to declare what constitutes an "abusive act or practice," and current year funding (from outside the appropriations process) of "$597.6

million.”). Thus, the parties agree that CFPB has Herculean authority over the United States economy. Notwithstanding this broad delegation, CFPB receives funding independently of the appropriations process and is not answerable to Congress (even if the composition of Congress changes after an election) through its power of the purse. And no President, not even a newly-elected President, can replace CFPB’s Director due to policy disagreements.

A. Power of the Purse

CFPB sets up yet another straw man when it characterizes Plaintiffs as arguing that CFPB is unconstitutionally structured because it does not receive funds through the appropriations process. Opp’n at 30-32. This is incorrect because the constitutionality of an agency’s structure does not turn on the presence or absence of any particular check or balance but rather on the scope of that agency’s authority and appropriate checks and balances in the aggregate.

The D.C. Circuit recently noted that “[t]he Appropriations Clause is thus a bulwark of the Constitution’s separation of powers among the three branches of the National Government. It is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, ‘the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.’” *U.S. Dept. of Navy v. FLRA*, 665 F.3d 1339, 1346-47 (D.C. Cir. 2012) (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1342, at 213-14 (1833)). Here, Congress has done exactly what the D.C. Circuit and Justice Story warned against. While Congress retains its power of the purse over the Executive Branch as a whole, it has taken the unprecedented step of creating an agency with a half billion dollar budget that is outside the scope of Congress’ power of the purse restraint ***and*** unaccountable to the President given the absence of traditional checks and balances such as at-will removal or the ability to appoint one or more members to a multimember Commission. In

creating CFPB, Congress endowed a single individual with vast spending power who "might apply all [CFPB's] monied resources at his pleasure."[20]

While Congress, as CFPB argues, has the constitutional authority to create agencies outside of the appropriations process, what it cannot do—and has never done—is create one that also lacks any of the other traditional checks and balances that restrain the exercise of power by independent executive agencies.[21] None of the cases cited by CFPB in its opposition suggest otherwise. Two of them, *Cincinnati Soap* and *Aiken County*, have nothing to do with how Congress allocates funds to agencies. In *Cincinnati Soap*, petitioners unsuccessfully challenged Congress' decision to permit the Philippines treasury to keep a 3 cent per pound tax imposed on the production of coconut oil in the Philippines. *Cincinnati Soap Co. v. United States*, 301 U.S. 308 (1937). In *Aiken County*, the D.C. Circuit upheld a challenge to the Nuclear Regulatory Commission's refusal to abide by Congress' mandate that it approve or disapprove within a set period of time a request by the Department of Energy to store nuclear waste at Yucca Mountain. *In re Aiken Cnty.*, -- F.3d --, 2013 WL 4054877 (D.C. Cir. 2013)

In two other cases the Court simply considered whether the funds at issue were appropriated or non-appropriated funds. In *American Federation of Government Employees*, a

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[20] CFPB's unbridled control over its own funding has already led to allegations of excess. For example, according to publicly available information, more than 60 percent of CFPB's 1,204 employees make six figures. Fifty six CFPB employees make more than $199,700, the salary of the Federal Reserve Chairman Ben Bernanke, and 37 make more than Supreme Court justices, who earn $213,500. Richard Pollock, *Fat Paychecks for CFPB Officials, Hundreds Paid More Than Fed Chairman, Congressmen, Supreme Court Justices*, Washington Examiner, *available at* http://washingtonexaminer.com/fat-paychecks-for-cfpb-officials-hundreds-paid-more-than-fed-chairman-congressmen-supreme-court-justices/article/2533189.

[21] CFPB argues that it is still subject to the power of the purse because it must submit reports to Congress. (Opp. at 30) However, this is no way restrains the CFPB's use of its non-appropriated funds. Indeed, Congress specifically mandated that the funding of CFPB "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C).

union representing Defense Department employees argued that although the employees could not lawfully be reimbursed for personal expenses incurred as a result of cancelled leave through appropriated funds, another revenue source allegedly consisting of non-appropriated funds could be used for that purpose. *Am. Fed'n of Gov't Emps., AFL-CIO v. Fed. Labor Relations Auth.* 388 F.3d 405, 408 (3d Cir. 2004). The Third Circuit disagreed, finding that all the funds in question were appropriated. *Id.* at 413. In *AINS*, the Court held that a contractor could not sue the U.S. Mint for breach of contract because the Mint did not receive its funding through appropriations and allowing the case to proceed would violate longstanding precedent that the Court of Claims cannot award judgments out of non-appropriated funds. Finally, in *U.S. Dept of Navy* the Court considered whether appropriated funds could be used to purchase bottled water as a "necessary expense" at a particular Naval facility. *U.S. Dep't of Navy v. Fed. Labor Relations Auth.*, 665 F.3d 1339, 1342 (D.C. Cir. 2012).

None of the cited cases raises any of the constitutional issues present here. CFPB suggests that exempting CFPB from the appropriations process is simply business as usual. Yet, CFPB has identified no other person like its Director, who is responsible for regulating private sector activity and who has sole power to determine whether and how to spend hundreds of millions of dollars outside of the appropriations process.

Not only may CFPB spend a half a billion dollars without Congress's authorization, the Dodd-Frank Act goes further and prohibits Congress from reviewing CFPB's use of these funds. The Act states "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C). Dodd-Frank thus disables the most

important check that the people's representatives have on CFPB.[22] "This 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, and for carrying into effect every just and salutary measure." The Federalist No. 51, at 320 (James Madison) (Clinton Rossiter ed., 1961) (quoted in *U.S. Dep't of* Navy, 665 F.3d at 1346-47). *See also Laird v. Tatum*, 408 U.S. 1, 15 (1972) (describing Congress's power of the purse as particularly well suited to monitor the "wisdom and soundness of Executive action"); Kate Stith, Congress' Power of the Purse, 97 YALE L.J. 1343, 1356 (1988) ("[A]ppropriations do not merely set aside particular amounts of money; they define the character, extent, and scope of authorized activities."); 3 The Founders' Constitution 377 (Philip B. Kurland & Ralph Lerner eds., 1987) (debate of Mar. 1, 1793) (reporting comment made by James Madison shortly after ratification of the Constitution that "appropriations of money [are] of a high and sacred character; [they are] the great bulwark which our Constitution [has] carefully and jealously established against Executive usurpations").[23]

B. Presidential Removal

CFPB's argument about restricting presidential removal—like its other arguments—evaluates this feature in isolation from the broad powers and absence of other checks and balances. Because of this flaw, CFPB fails to acknowledge dispositive distinguishing factors in

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[22] Congressional discipline of agencies through appropriations can ultimately strengthen the agency. In the 1980s, Congress shut down the FTC until FTC could better articulate its unfairness policy; FTC responded by developing a now-revered policy statement on unfairness, which gave FTC its persuasive authority and legitimacy. *See* J. Howard Beales III, The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection (June 2003), available at http://www.ftc.gov/speeches/beales/unfair0603.shtm.

[23] CFPB argues that it must submit reports to Congress (Opp'n at 34), but this is a toothless check. CFPB is not dependent on annual appropriations, and can obtain its guaranteed funding from the Federal Reserve regardless of how much supporting material it provides to Congress.

its legal authority. Plaintiffs explained in their opening brief that there is a compelling constitutional interest in the President being able to remove the CFPB Director for policy differences, and that this ability facilitates the President's Article II powers and obligation to take care that the laws be faithfully executed. Pls.' Mem. at 16. CFPB cites no contrary authority.

CFPB cites *Morrison v. Olson* which upheld tenure protection for independent counsel, but there the Supreme Court sustained tenure protection only because the independent counsel—in stark contrast to the CFPB Director—are "inferior" officers with "limited" duties and jurisdiction. CFPB cites *Humphrey's Executor*, which approved tenure protection for FTC commissioners, but as noted above, FTC commissioners are internally checked by FTC's multimember structure. CFPB cites *Free Enterprise Fund*, but that goes the wrong way for CFPB. There, the Supreme Court rejected the double layer of insulation from presidential removal. There is simply no case that justifies the constitutionality of CFPB's structure.

In *Myers v. United States*, 272 U.S. 52 (1926), which was limited but not overruled by *Humphrey's Executor*, the Court invalidated the limitation on the President's power to remove a postmaster from office on the grounds that the statute invaded the Constitution's vesting of executive power to the President. Plaintiffs cited *Myers* in their opening brief (Pls.' Mem. at 12), but CFPB does not address it. In the absence of a multimember commission or some other justifying feature in this case, CFPB's structure runs afoul of *Myers*. Indeed, the Supreme Court in *Free Enterprise Fund* cited *Myers* as controlling authority for the general rule that presidents may dismiss agency officials "at will", and then noting that the power could be restricted "under certain circumstances." *Free Enterprise Fund,* 130 S.Ct. at 3146-46 (*citing, inter alia, Humphreys Executor*). CFPB does nothing to respond to this controlling authority or to explain "circumstances" that would justify departing from the general rule in *Myers*.

V. CONTRARY TO CFPB'S OPPOSITION BRIEF, CFPB IS NOT SUBJECT TO ORDINARY JUDICIAL REVIEW BECAUSE DODD-FRANK DECLARES CFPB THE WINNER IN ADVANCE OF AGENCY DISPUTES

Plaintiffs' opening brief demonstrated that Dodd-Frank limits judicial review of CFPB. Pls.' Mem. at 13 (citing 12 U.S.C. § 5512(b)(4)(B) as requiring courts to grant the same deference to CFPB's interpretation of federal consumer financial laws that they would "if [CFPB] were the only agency authorized to apply, enforce, interpret, or administer the provisions of such Federal consumer financial law.") Plaintiffs explained that this requires courts to grant CFPB *Chevron* deference when it interprets statutes transferred to CFPB—which essentially unwinds decades of precedent created by other agencies and courts reviewing those agencies. It also insulates CFPB from future conflicting determinations by other agencies that continue to share jurisdiction over certain aspects or entities under federal consumer financial law.

CFPB's only answer to this is to argue that this provision "merely clarifies that courts should review [CFPB] interpretations under well-established principles of agency deference" and that this is not a "separation-of-powers problem." Opp'n at 34-35. CFPB is mistaken. First, the statute does not say "should" but instead "shall" ("the deference that a court affords to the [CFPB] with respect to a determination . . . shall be applied . . ."). 12 U.S.C. 5512(b)(4)(B). Second, this is a separation-of-powers "problem" because Dodd-Frank mandates that Courts treat any CFPB interpretation as displacing all previous agency interpretations (including judicially-reviewed ones). This prevents the Court from following its usual process of analyzing prior regulatory interpretations, and, as CFPB admits in a footnote, changes the analysis that would otherwise occur. Opp'n at 35 n.17. Thus, Congress converted discretionary rules of deference to statutory, mandatory rules of obeisance. Such mandatory deference is particularly significant given that CFPB is empowered to enforce open-ended and new statutory concepts such as determining what constitutes an "abusive act or practice." Opp'n at 4.

Aggregating the power of seven agencies into a single agency (CFPB) and then insulating that agency from any prior statutory interpretation further demonstrates that CFPB possesses unprecedented power.

VI. THE RISK OF CFPB OVERREACH IS REAL AND NOT THEORETICAL

Plaintiffs' opening brief demonstrated that the absence of sufficient checks, balances, and oversight creates a real rather than theoretical risk of CFPB overreach. Pls.' Mem. at 26-27.

In recent days, a new concern has emerged: there have been reports that CFPB improperly enlisted the U.S. Trustee Program ("USTP") to collect personal financial data from approximately five million American citizens without their consent, raising both privacy concerns and threats to the independence and impartiality of the USTP (which is not supposed to be an investigation arm of CFPB). *See* Richard Pollock, *Consumer Agency Threatens Independence of Bankruptcy Office*, Washington Examiner, *available at* http://washingtonexaminer.com/article/2535482. *See also* Exhibits 1 (Rachel Witkowski, Lawmakers Fume Over Unanswered Questions to CFPB, American Banker, Consumer Finance Vol. 178 No. 177 (Sept. 13, 2013)) and 2 (Opening Statement of Rep. Jeb Hensarling, Chairman of the House Financial Services Committee, House Financial Services Committee Hearing (Sept. 12, 2013)).

Of particular relevance here, at a hearing before the House Committee on Financial Services on September 12, 2013, the CFPB Director refused to respond substantively to these reports.[24] The CFPB Director also testified that he would not respond to questions that related to enforcement proceedings (despite the fact that CFPB issued a press release after it sued Morgan

[24] The relevant portion of the hearing which took place before the House Committee on Financial Services on September 12, 2013 is available at https://www.youtube.com/watch?v=r8WiIOFmT3c.

Drexen in California and accused it and its supported lawyers (like Plaintiff Pisinski) of using their law practice as a front for improper debt settlement services). Given that CFPB's funding is not subject to the appropriations process, there is no monetary incentive for its Director to answer questions at such hearings.

CFPB attempts to justify the absence of appropriations oversight by arguing that Congress has "other" tools and can hold "oversight hearings" to "check" CFPB and ensure that CFPB "remains accountable to Congress." Opp'n at 34. The CFPB Director's testimony on September 12, 2013—in which he refuses to answer Congress's questions and faces no real consequences—demonstrates that such hearings cannot save CFPB's flawed constitutional status.

CFPB also gamely cites other supposed limitations on CFPB's authority. For example, Congress can change CFPB through the "ordinary legislative process" and other "tools" (Opp'n at 31, 33-34). Of course, the President and Congress can always pass new legislation. The Act in *Free Enterprise Fund* could have been amended or repealed—but no Court has ever held that the possibility of amendment or repeal is a sufficient check on an unconstitutional agency.

Ultimately, CFPB cannot escape the conclusion that it stands outside the democratic transfer of power that has historically occurred every four years when the people elect a President and Congress. Historically, after such elections, with respect to all the far-reaching functions of government, the President, whether newly elected or re-elected, could nominate or remove certain single agency heads and Cabinet officials or alternatively fill vacancies as they occurred on multimember commissions. And while the structure and make-up of these commissions may have varied over time, the principle that to act they must form at least a limited consensus did not change. At the same time Congress largely retained the power of the

purse. This democratic process still occurs in every significant corner of our government except one: the regulation, supervision and enforcement of the numerous laws and entities that relate to consumer financial transactions.

A CFPB Director confirmed by Congress to a 5-year term shortly before an election cannot be removed without cause by the President, cannot be controlled through the appropriations process by Congress, and cannot be checked by judicial deference to the decisions of more accountable agencies that enjoy overlapping authority. Whatever winds of change may have been stirred by the electorate will pass by CFPB. However well-intentioned Congress or CFPB may be, such a structure is incompatible with our constitutional form of government.

VII. CFPB'S REFERENCES TO VOLUMINOUS MATERIALS SHOULD BE DISREGARDED

Finally, CFPB responds to many of Plaintiffs' facts by "refer[ing]" the Court to voluminous materials for a "full and accurate statement of its contents" (Docket No. 17-2 at 2). This is not helpful to the Court, which should not have to "sift through" voluminous materials to determine whether a dispute exists. *See Jackson v. Finnegan, Henderson, Farabow, Garrett & Dunner*, 101 F.3d 145, 151 (D.C. Cir. 1996). The court may consider treating facts with this type of response as admitted under LCvR 7(h)(1). *See Whiting v. Labat-Anderson, Inc.*, 926 F. Supp. 2d 106, 2013 WL 75391, *1 n.1 (D.D.C. 2013).

CONCLUSION

Plaintiffs request that the Court grant the pending Motion for Summary Judgment.

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Respectfully submitted,

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