[[ORAL ARGUMENT HELD APRIL 12, 2016]]

No. 15-1177

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PHH CORPORATION; PHH MORTGAGE CORPORATION; PHH HOME LOANS, LLC; ATRIUM INSURANCE CORPORATION; and ATRIUM REINSURANCE CORPORATION,

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 *AMICI CURIAE* OF CURRENT AND FORMER MEMBERS OF CONGRESS IN SUPPORT OF RESPONDENT'S PETITION FOR REHEARING EN BANC

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amici curiae* members of Congress represents that both parties were sent notice of the filing of the accompanying motion for invitation to file a brief as *amici curiae* on November 21, 2016. The Consumer Financial Protection Bureau (CFPB) has consented to the filing of the motion; PHH Corp. takes no position on the motion.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amici curiae* certifies that a separate brief is necessary. *Amici* are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the financial crisis that precipitated the passage of Dodd-Frank, as well as the legislative plan that Congress put in place to avoid similar financial crises in the future. *Amici* are thus particularly well situated to provide the Court with insight into why Congress put in place the structure it did when it established the Consumer Financial Protection Bureau, and they also there-

[1] Pursuant to Fed. R. App. P. 29(c), *amici curiae* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

fore have a strong interest in preserving the regulatory scheme that Congress established when it enacted Dodd-Frank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND AMICI

Except for *amici* members of Congress who are signatories to this brief and any other *amici* who had not yet entered an appearance in this case as of the filing of Respondent's petition for rehearing *en banc*, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Addendum to Respondent's petition for rehearing *en banc*.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Addendum to Respondent's petition for rehearing *en banc*.

III. RELATED CASES

Reference to any related cases pending before this Court appears in Respondent's petition for rehearing *en banc*.

Dated: November 29, 2016

By: /s/ Elizabeth Wydra
Counsel for Amici Curiae

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* Authorities on which *amici* chiefly rely are marked with asterisks.

GLOSSARY

CFPB	Consumer Financial Protection Bureau

STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the addendum to Respondent's Brief filed with this Court on November 5, 2015.

INTEREST OF *AMICI CURIAE*

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), Pub. L. No. 111-203, 124 Stat. 1376. Indeed, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when Dodd-Frank was passed. They are thus familiar with the critical role that the Consumer Financial Protection Bureau (CFPB) plays in the legislative plan that Congress put in place when it enacted Dodd-Frank to prevent future financial crises like the Great Recession of 2008, and they understand how critical the CFPB Director's for-cause removal provision is to the CFPB's ability to play its intended role effectively. *Amici* thus have a strong interest in the D.C. Circuit rehearing this case *en banc* and making clear that the CFPB's structure is consistent with the Constitution's text and history.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted Dodd-Frank in response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* ("the financial crisis has torn at the very fiber of our middle class"). Critical to Dodd-

Frank's legislative plan was the creation of the CFPB, a new bureau designed to end the long-standing fragmentation of responsibility for consumer financial protection that Congress concluded was largely responsible for the 2008 financial crisis. Significantly, the CFPB is the only agency with the sole responsibility of protecting American consumers from bad actors in the financial services industry.

By concluding that the CFPB's leadership structure is unconstitutional and severing the provision that made its Director removable only for cause, the panel decision fundamentally altered the CFPB and hampered its ability to function as Congress intended. It also called into question the constitutionality of other regulatory agencies with similar structural features. For those reasons alone, this case involves a question of "exceptional importance" that merits reconsideration by the *en banc* court. Moreover, the panel's decision is at odds not only with the text and history of the Constitution, but also with long-standing Supreme Court precedent—yet another reason why this case presents a question of "exceptional importance."

ARGUMENT

I. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE BECAUSE THE PANEL'S DECISION RESTRUCTURES THE CFPB IN A WAY THAT CONFLICTS WITH CONGRESS'S LEGISLATIVE PLAN

As *amici* well know, Congress extensively studied the causes of the Great Recession of 2008, holding more than fifty hearings devoted to "prob[ing] and evaluat[ing]" its causes and "assess[ing] the types of reforms needed." S. Rep. No.

111-176, at 42, 44 (2010). As a result of that study, lawmakers concluded that the financial crisis was caused in large part by "the spectacular failure of the prudential regulators to protect average American homeowners" from "risky" and "unaffordable" financial products, in favor of protecting the "short-term profitability of banks." *Id.* at 15. A key explanation for this regulatory failure, Congress found, was the fact that "[c]onsumer protection in the financial arena [was] governed by various agencies with different jurisdictions and regulatory approaches," resulting in a "disparate regulatory system" that did not "aggressive[ly] enforce[] against abusive and predatory loan products." H.R. Rep. No. 111-367, pt. 1, at 91 (2009).

To remedy these failures, Congress enacted Dodd-Frank, a key component of which was the creation of the CFPB. Pub. L. No. 111-203, 124 Stat. 1376, tit. X (2010). By creating the CFPB, Congress sought to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection ... , thereby ensuring accountability" and "leaving regulatory arbitrage and inter-agency finger pointing in the past," S. Rep. No. 111-176, at 10-11, 168 (2010); *see* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 29 (2012) (Dodd-Frank "shifted pre-existing regulatory authority that had been scattered among several federal regulators to one federal agency, the CFPB").

In setting up the CFPB, Congress decided to structure the Bureau with a sin-

gle director removable for cause—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—to ensure that it could effectively fulfill its role. Congress understood that the nation needed a regulator that could "respond quickly and effectively" to "new threats to consumers," S. Rep. No. 111-176, at 18, and it knew that a commission structure could meaningfully hamper the CFPB's effectiveness. *See* U.S. Gov't Accounting Off., GAO/HRD-84-47, Consumer Product Safety Commission: Administrative Structure Could Benefit from Change 9 (1987) ("CPSC could benefit by changing to a single administrator"); Arthur E. Wilmarth, *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 919 (2012) (scholars generally associate the single-director model with greater "efficiency and accountability"). It also appreciated that a for-cause removal provision would ensure that Bureau experts had the political independence necessary to effectively regulate. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 687-88 (1988) ("Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 630 (1935)); S. Rep. No. 111-176, at 24 (testimony recommending, *inter alia*, "improving regulatory independence"); *id.* at 174 ("strong and independent Bureau ... will reduce the incentive for State action and increase uniformity"); Block-Lieb, *supra*, at 38 (re-

moval limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action" (quotation marks omitted)).

By severing the for-cause removal provision, the panel decision fundamentally altered the CFPB's structure in a way that is at odds with Congress's design and will undermine the CFPB's ability to fulfill its important role under Dodd-Frank. It also called into question the constitutionality of other agencies with the same or similar structures, such as the Federal Housing Finance Agency, Office of the Comptroller of the Currency, and Social Security Administration. *See* 12 U.S.C. § 4512(a), (b); *id.* § 2; 42 U.S.C. § 902(a)(3). And it appears to prohibit Congress from establishing independent agencies headed by single directors—at least if those agencies "have authority to enforce laws against private citizens," slip op. at 32. The significance of the panel's action is thus itself sufficient to make this case one that involves a question of "exceptional importance" that warrants *en banc* review. But *en banc* review is particularly appropriate here because, as the next Section explains, the panel's decision is at odds with not only the Constitution's text and history, but also long-standing Supreme Court precedent.

II. THE PANEL'S OPINION IS AT ODDS WITH BOTH THE TEXT AND HISTORY OF THE CONSTITUTION AND GOVERNING SUPREME COURT PRECEDENT

Despite fundamentally altering the structure of a federal agency created by Congress, the panel decision points to nothing in the text of the Constitution that

supports its conclusion that the Director of the CFPB must be removable at will. In fact, "[t]he text and structure of the Constitution impose few limits on Congress's ability to structure administrative government," Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984), instead largely leaving "the job of creating and altering the shape of the federal government ... to the future," *id.* at 598-99. As Chief Justice Marshall explained, "[t]o have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument," resulting in "an unwise attempt to provide, by immutable rules, for exigencies which … can be best provided for as they occur." *M'Culloch v. Maryland*, 17 U.S. 316, 415 (1819).

Indeed, the Supreme Court has long recognized that Congress may choose to shield the heads of independent regulatory agencies from presidential removal at will. In *Humphrey's Executor*, 295 U.S. at 631-32, the Court upheld a removal provision identical to the one governing the CFPB Director in a case involving an FTC Commissioner, an officer whose functions were not materially different from those of the CFPB Director. *Id.* at 629.[2] In the years since, the Supreme Court has

[2] While *Humphrey's Executor* involved a multimember commission rather than a single director, that is a distinction without a difference from a constitutional perspective. Indeed, a multimember body in which members serve staggered terms is, if anything, less accountable to the President than is a single directorship, which offers a direct line of accountability when an agency strays from its mandate.

repeatedly reaffirmed *Humphrey's Executor*, *see, e.g., Wiener v. United States*, 357 U.S. 349, 352 (1958); *Morrison*, 487 U.S. at 691, including just six years ago, *Free Enter. Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 483, 509 (2010). In the process, the Court has explained that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. Here, they plainly do not because if the President determines, for instance, that the Director is "abusing [his] offic[e]," committing a "breach of faith," or "neglecting his duties or discharging them improperly," the President may hold the Director accountable by removing him. *Free Enter. Fund*, 561 U.S. at 496, 484. The CFPB's for-cause removal provision thus preserves "the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts." *Id.* at 498.[3] The panel's conclusion that the CFPB's structure is unconstitutional flatly contradicts all of these decisions, and it does so principally because it views multi-member commissions as superior to agencies led by a single director. The panel improperly elevated that policy judgment—one properly made by Congress—into a holding of constitutional law. That was plainly wrong, and consider-

[3] Even the panel opinion admits that "there is no meaningful difference in responsiveness and accountability to the President" between the CFPB and the many multimember independent agencies, slip op. at 56, concluding instead—contrary to all precedent—that removal limits can violate the separation of powers without causing a "diminishment of Presidential power," *id*. at 58.

ation by the *en banc* court is thus warranted.

CONCLUSION

For the foregoing reasons, the petition for rehearing *en banc* should be granted.

Respectfully submitted,

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Dated: November 29, 2016

APPENDIX:

LIST OF *AMICI*

Brown, Sherrod
Senator of Ohio

Capuano, Michael E.
Representative of Massachusetts

Conyers, John, Jr.
Representative of Michigan

Cummings, Elijah
Representative of Maryland

Durbin, Dick
Senator of Illinois

Ellison, Keith
Representative of Minnesota

Frank, Barney
Former Representative of Massachusetts

Grayson, Alan
Representative of Florida

Green, Al
Representative of Texas

Lynch, Stephen F.
Representative of Massachusetts

Maloney, Carolyn B.
Representative of New York

Menendez, Bob
Senator of New Jersey

Merkley, Jeff
Senator of Oregon

Miller, Brad
Former Representative of North Carolina

Moore, Gwen
Representative of Wisconsin

Pelosi, Nancy
Representative of California

Reed, Jack
Senator of Rhode Island

Reid, Harry
Senator of Nevada

Sherman, Brad
Representative of California

Warren, Elizabeth
Senator of Massachusetts

Waters, Maxine
Representative of California

CERTIFICATE OF COMPLIANCE

In the absence of a specific Rule that sets a maximum length for *amicus* briefs in support of petitions for rehearing *en banc*, *amici curiae* have limited their brief to no more than 2,600 words—the limit under the soon-to-be-implemented Federal Rule of Appellate Procedure 29(b). I certify that the brief contains 1,753 words, excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that the attached *amicus* brief 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 typeface using Microsoft Word 2010 14-point Times New Roman font.

Executed this 29th day of November, 2016.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on November 29, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 29th day of November, 2016.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

Counsel for Amici Curiae