No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF SELF-HELP CREDIT UNION, HOPE CREDIT UNION, HOPE ENTERPRISE CORPORATION, NATIONAL ASSOCIATION OF LATINO COMMUNITY ASSET BUILDERS, AND INCLUSIV AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are community development credit unions, community development financial institutions (CDFIs), and related industry associations whose membership includes credit unions and CDFIs, that are regulated by the Consumer Financial Protection Bureau (CFPB). Amici and their members have a strong interest in ensuring that the CFPB continues to benefit consumers by enforcing U.S. consumer protection laws and regulations while maintaining a level regulatory playing field in the financial marketplace. The CFPB's structure is constitutional and critical to ensuring that it can carry out its consumer protection mission free from undue political and industry influence. For this reason and the reasons set forth below, amici request that this Court uphold the agency's structure and affirm the judgment of the court of appeals.

Amicus curiae Self-Help is one of the nation's largest community development financial institutions. For thirty years, Self-Help has focused on creating asset-building opportunities for low-income, rural, women-headed families and businesses, and families of color, primarily through financing safe, affordable home loans and small business loans. In total, Self-Help has

[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

provided $8.5 billion in financing to 159,000 homebuyers, small businesses and nonprofit organizations and serves more than 150,000 mostly low-income families through more than 60 retail credit union branches in California, Florida, Illinois, North Carolina, South Carolina, Virginia, and Wisconsin.

Amicus curiae Hope Enterprise Corporation / Hope Credit Union (HOPE) is a community development credit union, community development financial institution, and policy institute. Hope Enterprise Cor-poration is the primary sponsor of Hope Credit Union. HOPE provides affordable financial services; leverages private, public, and philanthropic resources; and engages in policy analysis in order to fulfill its mission of strengthening communities, building assets, and improving lives in economically distressed parts of the Deep South. Since 1994, HOPE has generated over $2.5 billion in financing and related services for the unbanked and underbanked, entrepreneurs, homeowners, nonprofit organizations, and health care providers, and for other community development purposes. Collectively, these projects have benefitted more than 1 million individuals in the most economically distressed communities in Alabama, Arkansas, Louisiana, Mississippi, and Tennessee. HOPE has 28 branches with 50,000 credit union members across these five states. HOPE is intimately familiar with credit and other lending practices that ensure full and equal access to responsible credit for the populations it serves.

Amicus curiae National Association for Latino Community Asset Builders (NALCAB) is a community development financial institution, grantmaker, and hub of a national network of more than 120 mission-driven organizations including real estate developers, business lenders, and community development credit unions that are anchor institutions in geographically and ethnically diverse Latino communities in 40 states, Washington, DC and Puerto Rico. NALCAB strengthens and coordinates the capacity of the NALCAB Network to deploy capital and influences investors and policy makers with research, advocacy and technical advice. NALCAB operationalizes this work in three areas: organizational capacity building for nonprofits and government agencies; policy advocacy and field building; and impact investing through lending and asset management.

Since 2007, NALCAB has provided its Network members with over $20 million in grants and a wide range of technical assistance. NALCAB has also trained more than 1,000 practitioners and graduated 137 next generation Latino leaders from the Pete Garcia Community Development Fellowship. With NALCAB's support, member organizations have secured more than $400 million for affordable housing, small business and financial capability programs. NALCAB has also influenced how local and federal government agencies are deploying hundreds of millions of dollars for community development and disaster recovery.

Amicus curiae Inclusiv is a national organization of community development credit unions working to help low- and moderate-income people and communities achieve financial independence. Inclusiv has 278 member Credit Unions. 225 of Inclusiv's members are designated as Low-Income Credit Unions by the National Credit Union Administration, and 163 are Certified as CDFIs by the U.S. Treasury Department.

Established more than 40 years ago, Inclusiv's founding was a direct response to the ongoing legacy of redlining and other predatory practices used by mainstream financial institutions. Its member credit unions serve predominantly low-income and underserved communities with few alternatives for affordable credit. The more than 10 million Americans served by community development credit unions are vulnerable to predatory lenders. In many cases the direct competitors of Inclusiv's member credit unions are high-cost lenders. The regulatory clarity provided by a central government bureau has been crucial in protecting these consumers from bad actors. The CFPB also provides valuable frontline counselling and coaching tools for financial institutions with limited resources, and the consumer complaint line managed by the CFPB is another valuable tool for consumers to directly report issues related to predatory practices. Any suspension of these tools would do real harm to the consumers and communities served by Inclusiv's members.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Great Recession of 2008 left millions of Americans jobless, caused millions to lose their homes to foreclosure, and had lasting and "profound effects" on the "health, wellbeing and, later earnings" of millions more. Annie Lowrey, *The Great Recession Is Still With Us*, The Atlantic (Dec. 1, 2017), https://www.theatlantic.com/business/archive/2017/12/great-recession-still-with-us/547268/. In its aftermath, Congress created an independent agency designed and purposely structured to protect consumers from the insidious and destructive financial practices that led to the crisis—the Consumer Financial Protection Bureau. The CFPB, as established by the Dodd-Frank Wall Street Reform and the Consumer Financial Protection Act (CFPA), is an independent agency led by a single Director who is appointed by the President for a term of five years and removable for cause. See 12 U.S.C. § 5491(c).[2] The CFPB thus remains accountable to the President, who can correct any inefficiency, neglect, or malfeasance with the removal and replacement of that individual. But the President cannot dictate his or her will to the CFPB such that it will not carry out its duty to enforce the law equally and fairly.

The tools of independence Congress used to protect the CFPB are not at all novel.[3] And what is new

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[2] Congress created the CFPB as an independent agency in the Federal Reserve but made it "clear that the Bureau is to operate without any interference by the Board of Governors." S. Rep. No. 111-176, at 161 (2010); 12 U.S.C. § 5492(c) (providing for the CFPB's autonomy). Congress also ensured that the CFPB would have an independent source of funding, outside of the Congressional appropriations process—which was "absolutely essential" to the CFPB's "independent operations." S. Rep. No. 111-176, at 163; 12 U.S.C. § 5497.

[3] Among other tools, the CFPB's Director is protected from removal except for cause, as is typically the case for leadership of independent agencies. The Director's five-year term is consistent with the Comptroller of the Currency's tenure, 12 U.S.C. § 2 (five-year term), though shorter than the terms of members of the National Credit Union Administration, *id.* § 1752a(c) (six-year term), Social Security Administration, 42 U.S.C. § 902(a)(3) (six-year term), Federal Deposit Insurance Corporation Board, 12 U.S.C. § 1812(c)(1) (six-year term), Federal Trade Commission, 15 U.S.C. § 41 (seven-year term), and the Federal Reserve Board 12 U.S.C. §§ 241-242 (fourteen-year term). The standard for the Director's removal, "inefficiency, neglect of duty, or malfeasance in office" is found in numerous other statutes. *See, e.g.*, 5 U.S.C. § 7104(b) (Federal Labor Relations Authority); *id.* § 1202(d) (Merits System Protection Board); 42 U.S.C. § 5841(e) (Nuclear Regulatory Commission); and *id.* § 7171(b)(1) (Federal Energy Regulatory Commission). The CFPB's budget comes from funding independent of the budget appropriation process, as is the case with other financial regulators. *See* 12 U.S.C. § 5497.

about the CFPB's design—its exercise of un-fragmented jurisdiction and prioritization of the interests of consumers—reflects a policy correction to address the failures that led to the financial crisis. The CFPB's focus on consumers, consistent approach to consumer protection, and both its independence and public accountability, ensure the health of the marketplace of financial products and services. By creating a predictable and fair regulatory environment in which to do business, the CFPB also promotes the long-term health of responsible smaller financial institutions, like the Community Development Credit Union Amici.

This approach to structuring an independent Bureau aligns with the historical and constitutional practice of establishing independent financial regulators. And the markets have demonstrated the serious need for staunchly independent regulation shielded from the undue political pressures to which other agencies succumbed before the 2008 financial crisis.

ARGUMENT

I. THE CFPB'S INDEPENDENCE ALLOWS SMALL FINANCIAL INSTITUTIONS TO THRIVE BY PROVIDING A LEVEL REGULATORY PLAYING FIELD

The CFPB's independence helps ensure a level playing-field and a more predictable regulatory environment for smaller financial institutions, like the Community Development Credit Union Amici, that serve low-income and minority communities with safe, affordable financial products. The CFPB's design both prevents regulatory capture and provides accountability in the CFPB's efforts to protect consumers by vigorously enforcing the law. Smaller financial institutions play a central role in the Nation's economic life, and the CFPB's current structure allows them to be heard.

A. Regulatory Independence Levels the Playing Field for All Financial Institutions, Which Benefits Community Development Credit Unions

The CFPB's consolidated regulatory authority provides consistency and removes regulatory gaps that permitted predatory practices that helped cause the financial crisis. An independent CFPB allows Amici and other financial institutions to more reliably assess their compliance risks. By contrast, a CFPB stripped of its independence is more apt to subject financial institutions to the cost and uncertainty associated with shifting political winds.

At the same time, the CFPB is subject to strong accountability measures that allow the public and regulated institutions like Amici to provide input and feedback on its work. The breadth of the CFPB's authority brings institutions of vastly different size and mission within its purview. The benefits of its consistency must not be achieved by marginalizing the needs and input of smaller institutions or institutions that offer consumers in underserved communities with alternatives to the large bank model. The various independent features of the CFPB—the removal protections, budget independence, and absence of direct political control—help ensure that CFPB approaches this balancing with a focus solely on empirical evidence and facts. Should the removal protections be struck, Community Development Credit Union Amici will be severely harmed by the return of the regulatory capture and politicized decision-making that led to the financial crisis.

1. *Regulatory Capture Harms Small Financial Institutions*

Community Development Credit Union Amici are relatively small institutions, focused on providing consumer financial services to underserved communities often overlooked by larger financial institutions. These consumers are often prey to unscrupulous financial predators of all stripes. For example, between 2004 and 2006 in Mississippi, a state that Amici HOPE serves, lenders made 72,866 subprime mortgages. *See* Center for Social Inclusion, *Tough Times in Mississippi: Housing and Poverty, A Census Snapshot* 3 (2009), https://www.centerforsocialinclusion.org/wp-content/uploads/2012/07/Tough_Times_in_Mississippi_-_Housing_and_poverty_a_census_snapshot-1.pdf. In 2007-2008 the homeownership rate for Black Mississippians dropped further (down 2.8%) than for White Mississippians (down 0.5%); this was due at least in part to the inaction of federal banking regulators to address predatory lending. *Id.* The CFPB's exercise of independent authority over these actors prioritizes risks to consumers, including Amici HOPE's customers. For Community Development Credit Union Amici, the CFPB's independence helps preserve their ability to fulfil their mission to provide stable financial services to underserved communities by protecting Amici's interests and allowing their voice to be heard. Without insulation, the CFPB may not avoid "short-term political pressures so that it could adopt public policies based on expertise that would yield better public policy over the long term." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 20 (2010).

"The financial services industry exercises considerable political clout, in large part through massive political campaign donations and lobbying" which can affect financial regulatory agencies. Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 Harv. L. Rev. 1991, 2044-45 (2014). Community Development Credit Union Amici are responsible actors in their communities and support strong consumer protection measures. However, by the very nature of their structure and membership, Community Development Credit Union Amici, like the customers they serve, are not designed nor are they in the position to leverage political clout. They are less inclined and less equipped to protect themselves in the same manner as larger financial institutions and less likely to benefit from the effects of regulatory capture or political influence.

A regulatory structure that prioritizes special interests over consumers in the communities that Community Development Credit Union Amici serve, is detrimental to the health of an honest and stable financial marketplace. As the Financial Crisis Inquiry Commission found, industry lobbying "played a key role in weakening regulatory constraints on institutions, markets, and products," and "the nation was deprived of the necessary strength and independence of the oversight necessary to safeguard financial stability." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* xviii (2011). Federal banking agencies "routinely sacrificed consumer protection" while adopting policies that promoted the "short-term profitability" of large banks, nonbank mortgage lenders, and Wall Street securities firms. S. Rep. No. 111-176, at 15 (quoting *Consumer Protections in Financial Services: Hearing Before the S. Comm. on Banking, Housing, and Urb. Aff.*, 111th Cong. 53 (2009) (statement of Patricia A. McCoy, Law Professor, UConn School of Law)). Preserving the CFPB's independence leaves in place the regulatory infrastructure that has allowed financial institutions to better serve their customers responsibly.

Before the CFPB was created, community development credit unions and CDFIs faced competitors that were subject to disparate and often competing regulatory and supervisory schemes: they competed with banks regulated by the OCC, OTS, and Federal Reserve; and also non-banks that were subject to the FTC's enforcement authority, but no federal supervisory authority. As then Assistant Secretary of the Treasury, Michael Barr testified to Congress in 2009: "[The regulatory framework] fragments jurisdiction for consumer protection over many regulators, most of which have higher priorities than protecting consumers. Nonbanks avoid Federal supervision. . . . Banks can choose the least restrictive supervisor among several different banking agencies with respect to consumer protection." *Creating A Consumer Financial Protection Agency: A Cornerstone of America's New Economic Foundation: Hearing Before the Comm. On Banking, Housing, and Urb. Aff.*, 111th Cong. 6-7 (2009) (statement of Michael S. Barr, Assistant Secretary for Fin. Institutions, Dep't. of the Treasury). This left smaller financial institutions, such as Amici, at a competitive disadvantage compared with less responsible lenders.

In response, Congress created a single independent agency led by a single individual designed to implement "Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets . . . that . . . are fair, transparent, and competitive." Dodd-Frank Wall Street Reform and

Consumer Protection Act of 2010, Pub. L. 111-203, § 1021(a), 124 Stat. 1376, 1979-80 (Dodd-Frank). The breadth of the CFPB's purview means that rather than multiple, competing approaches and interpretations of Federal consumer financial protection laws across various financial institutions, there is one level playing-field for all actors in the market. More importantly, "[t]he CFPB is the first administrative agency to be created with regulatory capture concerns in mind." Levitin, *supra*, at 2056. Accordingly, CFPB's structure involves a blend of both independence enhancing features and checks for accountability.

2. A Director subject to undue political influence will undermine the CFPB's Congressionally-provided mandate to enforce the law

Undoubtedly, the focus of Congress in making these changes was consumer protection. But the health of small financial institutions and their ability to compete in the market for financial services or products, particularly with healthy, sound banking products, was also at stake. The CFPB's authority over Federal consumer financial laws means that it controls numerous regulations that affect credit unions and CDFIs in dramatic ways. Community Development Credit Union Amici not only support strong consumer protections, but they also depend on having a voice in the formulation and enforcement of the CFPB's rules to ensure that responsible institutions are not squeezed out of the marketplace.

Should the CFPB Director's removal protections be found unconstitutional, the CFPB's independence will be critically diminished. A Director subject to at-will removal by the President may make decisions not based on the Agency's expertise but based purely on partisan political calculations. The CFPB may dramatically shift from impartially enforcing and interpreting the law to operating at the whim of politicians. Moreover, the CFPB will shift from being an equal with the prudential regulators to the sole financial regulator serving at the President's pleasure.

Eliminating the removal protections provided by Congress raises the danger that the CFPB Director will selectively avoid enforcing the law against certain politically powerful institutions that the CFPB regulates. An entity subject to enforcement or one that dislikes the direction of an adopted or contemplated rulemaking, will likely see the President's removal authority as a means of pressuring the CFPB to change course. Just as James Madison was concerned that the Comptroller would worry too much about the President's good favor to be able to impartially implement the law, the CFPB Director would begin any action with asking: what would the President want? *See* 1 Annals of Cong. 636 (1789) (Joseph Gales ed., 1834) (arguing that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government."). Such disproportionate political and industry input will drown out the voice of small financial institutions like Community Development Credit Unions in a way that Congress did not intend.

B. A CFPB Director Subject to At-Will Removal Will Undermine the Agency's Accountability to the Public, and Harm Small Financial Institutions

Eliminating the removal protections will not increase the CFPB's accountability to the public. The CFPB is already structured to provide robust democratic accountability in important ways that foster transparency and public input. Changing that structure will harm smaller financial institutions, like Community Development Credit Union Amici, and silence their voice with their regulators.

Most significant of these checks is simply the President's "very broad" authority to remove the Director, *Bowsher v. Synar*, 478 U.S. 714, 729 (1986), for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3). But other measures buttress the President's authority or otherwise require the CFPB to take into account the concerns of the public, especially the concerns of consumers and a wide range of financial institutions, including the Community Development Credit Union Amici.

Within government, the CFPB is subject to several checks and balances. The CFPB's budgetary cap presents a limitation on its reach that other financial regulators do not face. *See id.* § 5497(a)(1), *id.* § 5497(2)(A)(iii), *id.* § 5497(2)(B). The CFPB can only press its legal case so far, as the CFPB lacks independent litigation authority before this Court, relying instead upon the Attorney General's approval (who serves at the pleasure of the President). *Id.* § 5564(e). In addition, the CFPB is required to coordinate with federal and state regulators on rulemaking, supervision, and enforcement matters, meaning virtually every major decision the CFPB takes in implementing Federal consumer financial laws is subject to interagency and Federal-State consultation and coordination. *See, e.g.*, *id.* §§ 5517(i)(2) & (j)(2). The CFPB must directly seek the input of small businesses and consumers in its work, particularly with respect to its rulemaking function. *See, e.g.*, the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 847, 857 (codified at 5 U.S.C.

§ 601). And, the CFPB is overseen in its rulemaking by the Financial Stability Oversight Council, a board composed of the presidentially-appointed leaders of the other bank regulators, *See* 12 U.S.C. § 5321. That Board has the highly unique ability to veto rules issued by CFPB. *Id.* § 5513(c)(4). The CFPB is also subject to audits and requirements to report to Congress on its activities. *Id.* § 5496. For a financial regulator in particular, the CFPB is subject to a remarkable amount of transparency and coordination.

The CFPB is also directly accountable to the public. Like most federal agencies, the CFPB is subject to the Administrative Procedures Act's notice-and-comment rulemaking procedures. But unlike *any other* financial regulator, the CFPB is also subject to the Small Business Regulatory Enforcement Fairness Act, Pub. L. No. 104-121, 110 Stat. at 857 (codified at 5 U.S.C. § 601). For many rulemakings, this requires the CFPB to assemble a panel of affected small business entities to take public input. For example, Amici HOPE served on one such panel convened during the CFPB's Payday Rulemaking. *See Final Report of the Small Business Review Panel on CFPB's Rulemaking on Payday, Vehicle Title, and Similar Loans*, app. A, part 2 (April 29, 2015) (written Comments of Ed Sivak, Hope Federal Credit Union), available at https://www.consumerfinance.gov/policy-compliance/rulemaking/small-business-review-panels/payday-vehicle-title-and-similar-loans/. This regime allows small financial institutions, and the communities they serve, to hold the CFPB accountable in meaningful and important ways.

The CFPB's rulemaking is also subject to an explicit cost-benefit analysis, requiring it to consider the impact that its regulations may have on smaller institutions, such as community development credit unions and CDFIs. See 12 U.S.C. § 5512(b)(2). The CFPB also has established advisory boards composed of members of the public, including credit unions. The CFPB is statutorily required to convene a minimum of two meetings a year of the Consumer Advisory Board. *Id.* § 5494(c). This Board, composed of experts in "consumer protection, financial services, community development, fair lending and civil rights," *id.* § 5494(b), as well as representatives of financial institutions, advises and consults with the CFPB in its "exercise of its functions," and "to provide information on emerging practices," *id.* § 5494(a). Indeed, Amici HOPE's CEO, William J. Bynum, served as the Consumer Advisory Board's Chair. *See* CFPB, *Annual Report of the Consumer Advisory Board* 2 (Sept. 2014 – Sept. 2015), https://files.consumerfinance.gov/f/201603_cfpb_2015_annual-report_cab.pdf. The CFPB has also created a Credit Union Advisory Council, along with other advisory councils, to channel feedback from regulated institutions. *See Advisory Committees*, CFPB (last visited Jan. 16, 2020), https://www.consumerfinance.gov/about-us/advisory-committees/.

Congress further required that the CFPB create a consumer complaint database, which builds greater transparency by publishing consumer complaints. *See* 12 U.S.C. § 5534. Not only does this provide a valuable means for consumers to resolve their complaints with financial institutions, but it also provides an important mechanism for institutions to receive feedback directly from consumers and to assess their own compliance risks. For Community Development Credit Union Amici, it provides a valuable window into the needs of the communities they serve. Moreover, it publicly illustrates the areas that require regulatory attention and enforcement.

Subjecting the Director to the political whims of the President will delegitimize the important work these boards and panels are doing by predicating the Bureau's policy decisions on political impulses and special interests, not empirical evidence and public feedback. This is all to the detriment of small financial institutions, such as Amici, and the communities they serve.[4] This will render the CFPB only accountable to volatile political agendas, not to the institutions it regulates or the public it serves.

CFPB was intended by Congress to be insulated from direct political control, but not isolated from public accountability. A single agency accountable to the American consumer creates far more transparency and accountability than twelve different agencies administering the law over different types of institutions. Leadership of the Bureau by one person, while representing a choice by Congress among competing alternatives, strengthens that accountability by providing

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[4] Indeed, under the prior regime, regulators "routinely sacrificed consumer protection for short-term profitability of banks," undercapitalized mortgage firms and mortgage brokers, and Wall Street investment firms, despite the fact that so many people were raising the alarm about the problems these loans would cause." S. Rep. 111-176, at 15 (internal citation omitted). "[R]egulators had 'ample authority' to prohibit banks from extending credit without proof of a borrower's ability to pay." Yet, "'they refused to exercise their substantial powers of rule-making, formal enforcement, and sanctions to crack down on the proliferation of poorly underwritten loans until it was too late.'" *Id.* (internal citation omitted).

clear, agile, and accountable leadership to Federal consumer financial protection. This individual cannot place the blame of CFPB's failings on others. And because finger-pointing is less plausible for a single director, removal for cause would be easier for the President to justify, because the buck stops with only a single individual. Yet the Director, in implementing the law as it is written, need not overlay all decisions with political concerns.

C. The CFPB's Leadership Structure is Consistent with the Historical Design of Financial Regulation

Congress brought more than two centuries' worth of experience creating and overseeing independent financial regulators to bear when it designed the leadership structure of the CFPB. Its policy choices in this context should be given deference. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 522-23 (2010) (Breyer, J., dissenting) (internal citations and quotation marks omitted) (applying a presumption that the challenged statute is valid).[5] In providing independent regulation of the Nation's financial affairs, Congress was traveling well-trod ground. By providing various measures of independence, Congress was affording the CFPB equal footing with other financial regulators, all of whom enjoy a variety of independent features.

The Constitution's text is silent as to the removal of officers, save for impeachment. And the origin,

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[5] As explained more fully in the Br. for Court-Appointed *Amicus Curiae* in Supp. of J. Below 28-32, "[o]ur Constitution vests the primary responsibility for establishing and organizing executive-branch agencies in the Congress." *Id.* at 29.

scope, and permissible constraints upon the President's removal authority have been debated since the First Congress. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789-1791*, 2 U. Chi. L. Sch. Roundtable 161 (1995). However, from the earliest days of the Republic, Congress has recognized the need for independence in guarding the nation's financial health, and it shielded financial regulators from direct presidential control.

The First Congress established three departments: the Department of Foreign Affairs, War, and Treasury. The Secretaries of Foreign Affairs and War were explicitly directed to carry out the orders of the President, and to serve as his spokesperson. *See* Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 29 (charging the Secretary of Foreign Affairs to "perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States."); *see also* Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50 (Department of War). In stark contrast to these two political departments, the First Congress established the Treasury Department with detailed and well-specified offices, functions, and responsibilities. *See* Act of Sept. 2, 1789, ch. 12, 1 Stat. 65; *see also* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations*, *1787-1801*, 115 Yale L.J. 1256, 1288–89 (2006) ("The independent functions of officers within the Treasury, . . . interrupt the line of hierarchical control that might be thought to run from the President through department heads to lesser officials"). Indeed, in creating the three departments, "Congress seemed to distinguish between those departments that were exclusively under presidential direction and those that were also directed according to law." *Id.* at 1289. Congress eventually specified that the position of Comptroller, established within the Treasury, would exercise "final and conclusive" decision-making, suggesting that he was independent of presidential control. Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442.

Just as the 111th Congress would with the CFPB Director, the First Congress made the Comptroller removable by the President, but nonetheless protected him from *arbitrary* removal. *See* Act of Sept. 2, 1789, ch. 12, §8, 1 Stat. at 67 ("if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office."). James Madison, who was in favor of presidential removal of Cabinet Officers, argued that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government." 1 Annals of Cong. 636; *see also Humphrey's Ex'r v. United States*, 295 U.S. 602, 631 (1935).

Notably, the first Bank of the United States, established in 1791, was chartered initially with directors elected by shareholders and the Government's stake was limited to a minority share. Act of Feb. 25, 1791, ch. 10, §§ 4, 11, 1 Stat. 191, 192-93, 196. Upon re-chartering in 1816, the President could only appoint five Directors of the 25, less than a quorum. Act of Apr. 10, 1816, ch. 44, § 2, 3 Stat. 266. The Bank's charter had no provision for the President or the Treasury Secretary to direct the Bank in its operations. *Id.*

These historical indicators reflect a sensibility that whatever the extent of executive power, financial regulators should be able to act independent of "political concerns," especially "in cases where it is desirable for agencies to make decisions that are unpopular in the short run, but beneficial in the long run," such as "the Fed's monetary policy decisions." Henry B. Hogue et al., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 5 n.16 (2017). Where the role of a government agency is particularly sensitive to the concerns of capture or otherwise requires independent and impartial administration—something Congress has long viewed as elemental for financial regulators—Congress can impose limits on the President's inherent removal authority. *Free Enterprise*, 561 U.S. at 483 (majority opinion) (noting that the President's removal authority "is not without limit.").

This sensibility is also reflected in this Court's precedent in upholding "for cause" removal protections in other contexts. In no less than *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Justice Marshall recognized the important distinction between political officers and officers of the law. *Id.* at 166. *Humphrey's Executor* upheld the FTC's structure as constitutional, thus blessing the independence of one of the CFPB's predecessors with respect to nonbanks, and an agency "which shall be independent of executive authority, except in its selection," 295 U.S. at 625.

Myers v. United States, 272 U.S. 52 (1926) and *Bowsher v. Synar*, 478 U.S. 714, represent removal limitations of a different type than "for cause" removal—whether Congress can impose itself on the actual removal decision with respect to an officer with executive powers, as opposed to the *parameters* of the President's exercise of removal power. *Myers*' discussion of executive authority, however persuasive as to the former, has less force in the latter, as *Humphrey's Executor* illustrated. Even in striking down the dual layering of "for cause" removal protections in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, the Court left undisturbed a "for cause" removal restriction for Commissioners of the Securities and Exchange Commission. 561 U.S. at 525 (Breyer, J., dissenting) (emphasis omitted) (concluding that "the President is legitimately foreclosed from removing the [SEC] Commissioners except for cause (as the majority assumes)").

Other facets of the modern financial regulatory landscape affirm the necessity of independence. Often, Congress has acted out of the same concern as Madison had regarding the Comptroller—protecting agency leadership from serving fully "at the pleasure of the [E]xecutive." 1 Annals of Cong. 636. For instance, the Federal Reserve Board governors can be removed only for cause during their fourteen-year term. 12 U.S.C. § 242. Such independence was required to "increase the ability of the banking system to promote stability." H.R. Rep. No. 74-742, at 1 (1935). In structuring this financial regulator as independent from political and industry pressures, Congress tried to ensure that the Federal Reserve would "reflect, not the opinion of a majority of special interests, but rather the well considered judgment of a body that takes into consideration all phases of national economic life." *Id.* at 6. The FTC, whose authority over consumer financial products or services offered by non-banks is now shared with the CFPB, was created with the explicit purpose of being independent to ensure "a continuous policy . . . free from the effect of . . . changing incumbency" in the executive branch. 51 Cong. Rec. 10,376 (daily ed. June 13, 1914) (statement of Sen. Newlands). Congress has included other explicit removal protections for the Social Security Administration, 42 U.S.C. § 902(a)(3), the Office of the Comptroller of the Currency, 12 U.S.C. § 2, and the Federal Housing Finance Administration, *id.* § 4512(b)(2).

Moreover, there are other examples of single-headed independent agencies whose directors are only removable for cause. In 2008, Congress established the Federal Housing Finance Agency in response to the same concerns that created the CFPB; it has a single director who is removable only for cause. *See id.* § 4512. The Social Security Administration was also placed under a unitary director in 1994. *See* 42 U.S.C. § 902(a).

In sum, the CFPB fits well within the historical and modern-day landscape of independent financial regulation.

II. SHOULD THE COURT FIND REMOVAL RESTRICTIONS UNCONSTITUTIONAL, THE PROPER COURSE IS TO SEVER 5491(C)(3)

Although Amici strongly believe this Court should uphold the constitutionality of the removal restrictions, if the Court disagrees, severing the removal restrictions is consistent with legislative intent and would be prudent. The Dodd-Frank Act provides for severability of "any provision of this Act, an amendment by this Act, or any application of such provision or amendment to any person." Dodd-Frank, Pub. L. 111-203, § 3, 124 Stat. at 1390. With the CFPA, "Congress clearly intended 'the remainder of the Act' to stand if 'any particular provision' were held invalid." *I.N.S. v. Chadha*, 462 U.S. 919, 932 (1983) (internal citation omitted). Moreover, the remaining provisions of the CFPA are not "incapable of functioning independently" if the removal protections are invalidated. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Although weakened, the CFPB would retain several independence-enhancing measures, notwithstanding the increased risk of regulatory capture created by allowing at-will removal of the CFPB's Director. The consolidation of authority over Federal consumer financial laws would continue to provide consistency across different types of institutions, as Congress intended. The CFPB's consumer complaint database would continue to provide accountability and insight into compliance with the law. And the role of state Attorneys General would also remain. *See* 12 U.S.C. § 5517(a)(2)(E).

The CFPA represents far too many well-considered decisions by Congress intended to prevent another financial crisis for the Court to strike down the entire Act, and that is not "what Congress would have intended." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 586 (2012) (quoting *United States v. Booker*, 543 U.S. 220, 246 (2005)). In deciding whether to sever an unconstitutional provision, the Court must "determine what Congress would have intended in light of the Court's constitutional holding." *Id.* (quoting *Booker,* 543 U.S. at 246).

The critical policy choices of the CFPA do not rest solely on the Director's tenure protections. Indeed, the Director's tenure is secondary to the consolidation of oversight across categories and institution-type for consumer financial protection laws and the decision to remove the prudential banking regulators' primary authority over the same. In addition to these important elements, the CFPA preserves and enhances the authority of state attorneys general and state regulators, by permitting them to bring their own enforcement actions, including actions to enforce regulations adopted under the CFPA. *See* 12 U.S.C. § 5517(a)(2)(E).

Moreover, implementing a six-month stay, as the amicus brief of the Credit Union National Association suggests, plainly ignores the practicalities of the legislative process. *See* Br. of Credit Union Nat'l Ass'n, Inc. 20-26. A stay of any order striking down the entire Act would not preserve the status quo. As the amicus brief of CUNA acknowledges, the CFPB would exist "in name" only during such a stay. *Id.* at 24. Every enforcement action, every regulatory decision, every examiner's request for information related to supervision would be without clear legal authority. Community Development Credit Union Amici could not be sure what, if any, guidance or direction from the CFPB could be followed.

The result would be that enforcement of Federal consumer financial protection laws would grind to a halt. In the interim, every aspect of the CFPA would be subjected anew to legislative approval, and would inevitably be altered in ways that have nothing to do with removal restrictions. The CFPB has been subjected to repeated attempts by unsuccessful legislative minorities to dramatically scale back its authority and independence. A stay merely gives leverage to legislative minorities that have yet been unsuccessful in changing it.

In contrast, severing the removal protections affords Congress the opportunity to resolve how to preserve CFPB's independence without raising the uncertainty around any ongoing or future enforcement of consumer protection laws.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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