No. 18-307

# In The Supreme Court of the United States

STATE NATIONAL BANK OF BIG SPRING, et al.,

*Petitioners,*

v.

STEVEN T. MNUCHIN, Secretary of the Treasury, et al.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit**

## BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

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

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## INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national nonprofit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of individual rights and the framework set forth to protect such rights in the Constitution. This aspect of its advocacy is reflected in the regular representation of those challenging overreaching governmental and other actions in violation of the constitutional framework. *See*, *e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427 (2014), and *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018). SLF also regularly files *amicus curiae* briefs with this Court about issues of agency overreach and deference. *See*, *e.g.*, *Flytenow v. FAA*, 137 S. Ct. 618 (2017); *Sturgeon v. Frost*, 136 S. Ct. 1061 (2016); *United States Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small

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[1] *Amici curiae* notified the parties at least 10 days prior to the filing of this brief of their intent and request to file it. All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.2(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, and their counsel has made a monetary contribution to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

businesses in the nation's courts through representation on issues of public interest affecting small businesses. The NFIB is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that affect small businesses.

The Cato Institute is a nonpartisan public-policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

*Amici*'s direct interest here stems from their profound commitment to protecting America's legal heritage. That heritage includes the separation of powers enshrined in the Constitution, a vital component of the Nation's laws and a critical safeguard of political liberty. This case is about a separation of powers violation because of the unrestrained power vested in the single-Director led Bureau of Consumer Financial Protection.

## SUMMARY OF ARGUMENT

Congress violated the separation of powers principle when it created the Bureau of Consumer Financial Protection (CFPB) and gave CFPB's Director unilateral and unchecked power to legislate, execute, and adjudicate nineteen federal consumer protection statutes. *Amici* agree with Petitioners that *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), was wrongly decided.[2] But we write separately to emphasize how separation of powers concerns are ultimately about safeguarding individual liberties. More specifically, *Amici* believe that this case warrants review because the *en banc* D.C. Circuit summarily dismissed any consideration of individual liberty in its analysis. In so doing, the *en banc* decision divorces separation of powers doctrine from the fundamental principles

[2] *Humphrey's Executor* held that there is no separation of powers problem with independent agencies wherein a governing multi-member board is insulated from control from either Congress or the President. 295 U.S. at 626-32. But federalists and anti-federalists alike expressed deep concern over vesting any semblance of federal power in the hands of anyone who would not be accountable to the electorate, or to the direct authority of the President, who is personally accountable to the American people. *See* Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 Tex. L. Rev. 807, 823-25 (2002) (extensively detailing contemporary views on republican ideals at the time of ratification and citing extensively from both federalists like Alexander Hamilton and anti-federalists like Patrick Henry). They were united in a zeal for republican ideals that abhorred the idea that any single man might wield power over life and liberty without consent of the people. And they would no more have a king (even one with authority over a single subject) than a board of unelected and unaccountable despots.

embedded in our Constitution and often considered by this Court.

The design of our governmental structure was compelled by Lord Acton's observation that "power corrupts." *See generally* Martin H. Redish & Elizabeth J. Cisar, "*If Angels Were to Govern*": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 Duke L.J. 449, 451 (1991). Intrinsic in this constitutional structure was an adherence to the separation of powers principle. Following the established thought of Montesquieu, the Framers wove a delineation within the constitutional framework between the three branches (with clear and defined spheres of authority), and provided further checks to discourage any branch from encroaching upon the prerogatives of another. The Framers adhered to the separation of powers principle because of its underlying logic – *i.e.*, the protection of individual liberty. In following the historical consensus, the Framers acknowledged that the separation of powers principle was necessary for protecting the liberty interest. In following the constitutional framework, this Court has often acknowledged the need for heightened safeguards that protect the liberty interest whenever congressional or executive action threaten to dilute the principle.

The single-Director CFPB exercises legislative, executive, and judicial functions, while completely removed from any restraints that would provide for the checking, diversity, and accountability necessary to protect individual liberty. Thus, in creating the CFPB, Congress disposed of the separation of powers

principle and failed to impose any additional checks or safeguards to compensate for the resulting constitutional violation. The *en banc* D.C. Circuit's wholesale dismissal of the liberty analysis as unmoored is inconsistent with the Constitution, and in turn, this Court's treatment of the issue.

## ARGUMENT

### The D.C. Circuit's refusal to consider the CFPB's impact on individual liberty not only contradicts Supreme Court precedent, but also threatens our constitutional structural and fundamental procedural safeguards.

The CFPB "wields vast power and touches almost every aspect of daily life." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010)). Through the Dodd-Frank Act of 2010, Congress gave the CFPB's Director the power to unilaterally enforce nineteen federal consumer protection statutes, "covering everything from home finance to student loans to credit cards to banking practices." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). He "alone [] decide[s] what rules to issue. . . . how to enforce, when to enforce, and against whom to enforce the law . . . [and] what sanctions and penalties to impose on violators of the law." *Id*. The CFPB's unfettered authority over the U.S. economy, encompassing executive, legislative, and

judicial powers, removes all constitutional checks, eliminates a diversity of opinions, and results in a complete lack of accountability anathematic to the republican principles upon which our Constitution was founded.

The Framers and the Court have sought to secure the individual liberty interest within each branch of government. In structuring the legislative body, the Framers saw fit to include two separate bodies, which secured both a diversity of opinions and accountability. The Federalist Nos. 61-62, at 370-80 (Alexander Hamilton; James Madison) (Clinton Rossiter ed. 1961) (discussing the House of Representatives and Senate). To ensure executive accountability, the Framers mandated a nationally elected President that remained accountable to the people. *See* The Federalist No. 10 (James Madison) (Clinton Rossiter ed. 1961); *see also Myers v. United States*, 272 U.S. 52, 123 (1926) (stating that "The President elected by all the people is rather more representative of them all than are the members of either body of the Legislature. . . ."). And while Article III does not mention an impartial decisionmaker, the Court has mandated impartiality as a part of its Article III analysis largely because it "promot[es] [] participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (citation omitted). In stark contrast, structure of the CFPB promises no accountability to the electorate.

The single-Director agency stands in juxtaposition to the divided government of enumerated powers the Framers envisioned. Our Founding Fathers created a government with limited power, both as compared to

the states[3] and with respect to its own branches.[4] "Separation of powers and federalism form the fundamental matrix or Euclidian plane of our constitutional law." Redish & Cisar, 41 Duke L.J. at 451 n.8 (citing Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. Phil. & Pol'y 196 (1991)). "In structuring their unique governmental form, the Framers sought to avoid undue concentrations of power by resort to institutional devices designed to foster three political values: checking, diversity, and accountability." *Id*. at 451. As Justice Frankfurter reminded us in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the purpose of the separation of powers principles is "not to avoid friction, but, by means of the inevitable friction incident to the distribution of governmental powers among three departments to save the people from autocracy." *Id*. at 629 (Frankfurter, J., concurring). This is because the "accretion of dangerous power" is spawned by "unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority." *Id*. at 594.

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[3] "The powers delegated by the proposed Constitution to the federal government are few and defined . . . [and] will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce." The Federalist No. 45, at 292 (James Madison) (Clinton Rossiter ed. 1961).

[4] "In order to form correct ideas . . . it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct." The Federalist No. 47, at 298 (James Madison) (Clinton Rossiter ed. 1961).

Under these principles, any action taken by one branch of the federal government that presumes to encroach upon the constitutionally assigned functions of another branch presents a fundamental threat to the preservation of liberty. "Political liberty . . . is there only when there is no abuse of power." 1 Charles de Secondat Montesquieu, The Complete Works of M. de Montesquieu 197 (London: T. Evans, 1777). " 'There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates' or, 'if the power of judging be not separated from the legislative and executive powers.' " The Federalist No. 47, at 299. As Montesquieu explained:[5]

> When the legislative and executive powers are united . . . in the same body . . . , *there can be no liberty*; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner. . . . Were it joined with the legislative, the life and liberty of the subject would be *exposed to arbitrary control*; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

Montesquieu, at 199 (emphasis added). "In a government, where the liberties of the people are to be preserved . . . the executive, legislative and judicial, should ever be separate and distinct, and consist of

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[5] Quoting Montesquieu in The Federalist No. 47, James Madison explained that these passages "sufficiently establish the meaning which we have put on this celebrated maxim of this celebrated author." *Id*. at 300.

parts, mutually forming a check upon each other." Charles Pinckney, Observations on the Plan of Government, Submitted to the Federal Convention of May 28, 1787, *reprinted in* 3 M. Farrand, Records of the Federal Convention of 1787 108 (rev. ed. 1966); *see* The Federalist Nos. 47-51, at 297-322 (James Madison) (Clinton Rossiter ed. 1961) (explaining and defending the Constitution's structural design of separated powers). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). *See id*. at 447 (opinion for the Court) (striking down the line-item veto as unconstitutional because it "gives the President the unilateral power to change the text of duly enacted statutes").

This Court once explained that "[it has] not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *INS v. Chadha*, 462 U.S. 919, 959 (1983). In his concurrence, Justice Powell took this idea a step further and acknowledged outright the fundamental importance of analyzing individual liberty:

> The House and the Senate argue that the legislative veto does not prevent the executive from exercising its constitutionally assigned function. Even assuming this argument is correct, it does not address the concern that the Congress is exercising unchecked judicial power *at the expense of individual liberties*. It was precisely to prevent such arbitrary action

> that the Framers adopted the doctrine of separation of powers.

*Id.* at 963 n.4 (Powell, J., concurring) (emphasis added).

On a number of other occasions, this Court has acknowledged the inextricable link between the separation of powers principle and preservation of liberty. For example, in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), the Court explained that the judicial independence contemplated by Article III and mandated by the separation of powers doctrine served to protect "primarily personal, rather than structural, interests." *Id*. at 848. To this end, the Court engaged in a thorough analysis of the personal interests at stake to find no due process concern because the interested party voluntarily subjected himself to the agency's jurisdiction. *Id*. at 848-50.

Similarly, the Court engaged in a thorough liberty analysis in *Morrison v. Olson*, 487 U.S. 654 (1988), when it addressed whether the Special Division, a "specially created federal court," *id*. at 676, encroached on the "executive power or upon the prosecutorial discretion of the independent counsel." *Id*. at 682.[6] After finding that none of the Special Division's powers and duties at issue intruded upon executive branch powers, *id*. at 677-83, the Court considered if those powers posed a threat to the "impartial and independent federal adjudication of claims within the judicial power."

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[6] While the *en banc* D.C. Circuit relied heavily on *Morrison v. Olson* to justify the CFPB's structure, it ignored the liberty analysis in the decision. 881 F.3d at 79.

*Id*. at 683 (quoting *Schor*, 478 U.S. at 850). The Court examined whether the Special Division had the power to review executive actions taken by the very executive officers it appointed (independent counsel), whether there was a "risk of partisan or biased adjudication of claims[,]" and whether the Special Division could review judicial proceedings about the independent counsel's exercise of its duties. *Id*. at 683-84. Notably, the text of Article III does not mention or require an "impartial" or "independent" judiciary. Instead, those requirements derive from the need to preserve liberty. As this Court has explained, "entitl[ing] a person to an impartial and disinterested tribunal . . . *safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process*." *Jerrico*, 446 U.S. at 242 (citation omitted) (emphasis added). *See* The Federalist No. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed. 1961) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").[7] Following these principles, the Court ultimately found the Special Division constitutional, reasoning, in part, that it was "sufficiently

[7] *See also* The Federalist No. 78, at 468 ("This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.").

isolated by these statutory provisions from the review of the activities of the independent counsel so as to avoid any taint of the independence of the Judiciary." *Morrison*, 487 U.S. at 684.

This Court applied a similar liberty analysis in *Mistretta v. United States*, 488 U.S. 361 (1989), where it addressed the constitutionality of the Sentencing Guidelines promulgated by the United States Sentencing Commission – an independent commission of the judicial branch created by an act of Congress. *Id*. at 362-68. The plaintiff there alleged, among other things, that the Act violated the separation of powers principle because it gave the President the power to appoint and remove members of the Commission. *Id*. at 408-09. While the Court ultimately found those arguments "fanciful," *id*. at 409, it stressed the importance of preserving liberty. The Court reasoned that the President's appointment and removal powers did not risk "compromis[ing] the impartiality of Article III judges serving on the Commission and, consequently, [there is] no risk that the Act's removal provision will prevent the Judicial Branch from performing its constitutionally assigned function of fairly adjudicating cases and controversies." *Id*. at 411. Thus, while the methods for preserving liberty depend on the functions at issue (legislative, executive, or judicial), the purpose of the liberty analysis is the same – to ensure the presence of other checks to counteract the threat to the liberty interest when the separation of powers doctrine is infringed.

Even Justice Marshall, who held an arguably moribund view of both the separation of powers and nondelegation doctrine, acknowledged that congressional delegations to public authorities are unconstitutional when "neither delegation was to a regularly constituted administrative agency which followed an established procedure designed to afford the customary safeguards to affected parties." *Fed. Power Comm'n v. New England Power Co.*, 415 U.S. 345, 352-53, 353 n.1 (1974) (Marshall, J., concurring in result). In his obituary of the separation of powers principle, Justice Marshall justified abandoning the doctrine by pointing to the importance of a "regular constitution" and "customary safeguards." *Id*. at 351. Those very safeguards and structures are the ones Judge Kavanaugh highlighted in detail in his *PHH Corp.* dissent: the historical practice of having multi-member bodies, OMB review, appropriations requirements, or other various checks to prevent "palpable abuse." 881 F.3d at 166-68 (Kavanaugh, J., dissenting).

The Framers maintained a similar mindset about the separation of powers principle. While separation of powers was fundamental to the structure of government established by the Framers, the insistence of checks and balances – a principle that inherently contemplates a breach of separation of powers – highlights that even the Framers were aware of situations in which a strict adherence to the doctrine was impractical.[8] Still, both the Framers and this Court have sought

[8] James Madison highlighted his concerns about a potential infringement of the separation of powers principles in The

to limit the negative impact that separation of powers violations have on individual liberty. In the context of independent agencies, the traditional "checks" that the Court has found sufficient to counteract some denigration of the principle does not exist within the CFPB. The CFPB structure lacks the "concepts of control and accountability" which "define the constitutional requirement . . . " of separation of powers and delegation of powers. *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971).[9]

Ignoring these constitutional safeguards, the *en banc* D.C. Circuit declared that "[l]iberty analysis is no part of the [separation of powers] inquiry." 881 F.3d at 106. Looking only to the President's removal power, the

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Federalist Papers: "Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? . . . [E]xperience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary. . . ." The Federalist No. 48, at 305 (James Madison) (Clinton Rossiter ed. 1961).

[9] While the district court in *Connally* found appropriate a broad delegation of legislative functions to the executive branch, even here, the district court stressed the importance of imposing "limitation on the President's power to take action in particular industries or sectors." 337 F. Supp. at 747. This highlights the concern for individual liberty and the necessity of due process that arises when the separation of powers principle is abrogated. The district court, following Supreme Court precedent, was willing to sustain the delegation because of limitations that protected individual liberty, such as "preclud[ing] . . . from singling out a particular industry or sector. . . ." *Id.* (quotations omitted).

*en banc* D.C. Circuit left unacknowledged the grave impact of the CFPB on individual liberty. As Judge Kavanaugh explained in his dissent, "the Director enjoys significantly more *unilateral* power than any single member of any other independent agency." *Id*. at 171 (Kavanaugh, J., dissenting). For example, the CFPB Director unilaterally created a new interpretation of the reinsurance policy, unilaterally enforced that interpretation, and unilaterally levied heavy fines based on that interpretation and enforcement. *Id*. at 170.

The lack of any restraints – such as multi-member bodies, OMB review, or appropriation requirements – on the Director's powers with respect to just this one example and the resulting violation of separation of powers, allow one person to encroach on the liberty interests of countless Americans. Given the CFPB's broad jurisdiction over enforcement of nineteen consumer protection statutes, the impact on individual liberty is endless. And when combined with the unilateral authority afforded the CFPB Director, Title X of the Act becomes "the very definition of tyranny" our Founding Fathers feared. The Federalist No. 47, at 298 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."). *Id.* To ignore such consequences, ignores the fundamental safeguards embedded in the Constitution.

## CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus curiae* brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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