

2. The Director has the unilateral power to enact regulations with the force of law, to police compliance with those regulations, and to impose sanctions on those he decides have violated those regulations, all free from congressional or presidential supervision. This concentration of power in the Director violates the separation of powers and “is contrary to Article II’s vesting of the executive power in the President.” *Id.* at 484.

3. The Supreme Court has held that “Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.” *Id.* at 483. The Supreme Court has recognized only one such circumstance: an independent agency headed by “a body of experts ‘appointed by law and informed by experience.’” *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (quoting *Illinois Cent. R. Co. v. Interstate Commerce Comm’n*, 206 U.S. 441, 454 (1907)). In addition, the Court has permitted for-cause removal restrictions for an inferior officer with a narrow jurisdiction and limited tenure. *See Morrison v. Olson*, 487 U.S. 654, 672 (1988). The Bureau is not headed by a body of experts, nor is the Director an inferior officer with a narrow jurisdiction.

4. The Bureau’s structure as a single-Director independent agency that can bring law enforcement actions against the public is unprecedented and unconstitutional.

5. This Court should enter an order and judgment (1) declaring unconstitutional the provisions of the Dodd–Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5491 *et seq.*, creating the Bureau and (2) enjoining the Bureau from exercising any of the powers that Congress delegated to it.

PARTIES

6. Plaintiff is a limited liability company organized under the laws of the State of Delaware and registered to conduct business in the State of California.¹

7. Defendant Consumer Financial Protection Bureau is an agency of the United States charged with enforcing federal consumer financial laws. The Bureau's principal office is located in the District of Columbia.

8. Defendant Richard Cordray is the Director of the Consumer Financial Protection Bureau. The Director is sued in his official capacity.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this case under 28 U.S.C. §§ 1331 and 2201.

10. Venue lies in the District of Columbia under 28 U.S.C. § 1391(b) and (e).

STATEMENT OF FACTS

I. FIP's Business

11. FIP is in the business of purchasing and selling the right to certain income streams.

12. FIP purchases income streams from individuals who are entitled to receive periodic payments from a pension or similar source and who wish to sell a portion of the income stream derived from those payments. FIP purchases those income streams at a discount, which reflects both the time value of money and the risk of non-payment. The existence and size of that discount are clearly and conspicuously disclosed to the seller.

13. FIP sells income streams to individuals who wish to buy the right to receive a monthly income stream for a fixed period, usually five or ten years.

¹ FIP corrects the record regarding its citizenship. This correction has no effect on this Court's jurisdiction because this civil action arises under the U.S. Constitution.

14. FIP's purchasing and selling activities include neither the offering or providing of credit or financial advisory services, nor the assignment of pensions or pension payments. Rather, FIP purchases and sells assets: the right to receive income streams derived from periodic payments received by sellers.

II. The Bureau's Powers and Unconstitutional Structure

15. The Director holds more unilateral federal power than any person other than the President. This concentration of power in the hands of one unelected, unaccountable person threatens the individual liberty protected by the Constitution's separation of powers. *See Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

16. The Bureau has broad powers "to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service." 12 U.S.C. § 5531(a).

17. Congress defined the term "covered person" to include "any person that engages in offering or providing a consumer financial product or service." *Id.* § 5481(6). A "financial product or service," in turn, encompasses ten defined categories such as "extending credit and servicing loans," *id.* § 5481(15)(A)(i), and "such other financial product or service as may be defined by the Bureau," *id.* § 5481(15)(A)(xi).

18. The Bureau's powers include "all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law," *id.* § 5581(a)(1)(A), previously held by "the Board of Governors (and any Federal reserve bank, as the context requires), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union

Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development, and the heads of those agencies,” *id.* § 5581(a)(2)(A).

19. Congress has placed no meaningful limit on the Bureau’s power to deem an act or practice “unfair, deceptive, or abusive.” *Id.* § 5531(a).

20. The Bureau has the unilateral power to deem any act or practice unfair as long as the Director “has a reasonable basis to conclude that,” *id.* § 5531(c)(1), it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers,” *id.* § 5531(c)(1)(A), and “such substantial injury is not outweighed by countervailing benefits to consumers or to competition,” *id.* § 5531(c)(1)(B).

21. Similarly, the Bureau can declare an act or practice abusive in connection with the provision of a consumer financial product or service if it “materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service.” *Id.* § 5531(d)(1).

22. The Bureau can also find an act or practice abusive if, in its view, the act or practice “takes unreasonable advantage of,” *id.* § 5531(d)(2), “a lack of understanding on the part of the consumer of the material risks, costs, or conditions of the product or service,” *id.* § 5531(d)(2)(A), “the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service,” *id.* § 5531(d)(2)(B), or “the reasonable reliance by the consumer on a covered person to act in the interests of the consumer,” *id.* § 5531(d)(2)(C).

23. These four alternative definitions of “abusive” give the Bureau virtually unconstrained authority to declare any act or practice abusive, and they provide the marketplace

with little, if any, notice of what acts or practices will be the subject of Bureau investigations or enforcement actions.

24. Indeed, Director Cordray testified before Congress in 2012 that it is “[p]robably not useful to try to define a term like [abusive] in the abstract; we are going to have to see what kind of situations may arise where that would seem to fit the bill under the prongs.” *CFPB v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB, 2015 WL 1013508, at *19 (S.D. Ind. Mar. 6, 2015) (quoting *How Will the CFPB Function Under Richard Cordray: Hearing Before the Subcomm. on TARP, Fin. Servs. & Bailouts of Pub. & Private Programs*, 112th Cong. 112–107, at 69 (2012)).

25. The Bureau has vast investigatory and enforcement powers. It can “conduct hearings and adjudication proceedings,” 12 U.S.C. § 5563(a), and “issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, documents, or other material in connection with hearings,” *id.* § 5562(b)(1). In fact, the Bureau can issue a civil investigative demand to “any person” requiring that person to produce documents for inspection, file written reports or answers to questions, and give oral testimony as long as the Director “has reason to believe” that the person “may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation.” *Id.* § 5562(c)(1).

26. While the Bureau’s investigatory demands are not self-enforcing—the Director must petition a federal district court to compel compliance—the Bureau is “accorded ‘extreme breadth in conducting [its] investigations.’” *United States v. Capitol Supply, Inc.*, 27 F. Supp. 3d 91, 99 (D.D.C. 2014) (quoting *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1517 (D.C. Cir. 1993)). The courts’ only role is to

determine “whether ‘the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.’” *U.S. Int’l Trade Comm’n v. ASAT, Inc.*, 411 F.3d 245, 253 (D.C. Cir. 2005) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950)).

27. Even in the absence of judicial enforcement, the Bureau’s decision to pursue an investigation against “any person” injures that person’s liberty by requiring them to expend resources and time responding to the investigation, and by imposing reputational and other harms on that person associated with being the focus of a federal investigation by a Director who is more powerful than the President within his broad and loosely defined jurisdiction.

28. Specifically, the recipient of a civil investigative demand must choose whether to (1) comply with that demand by producing documents, filings written reports, answering questions, and providing oral testimony; (2) file a presumptively public petition to set aside or modify that demand; or (3) forfeit any objection to that demand by taking no action in response thereto.

29. The Bureau also has the power to pursue a broad range of legal and equitable relief, including rescission or reformation of contracts, refund of moneys or return of real property, restitution, disgorgement or compensation for unjust enrichment, payment of damages or other monetary relief, public notification regarding the violation limits on the activities or functions of the person, and civil money penalties. *See* 12 U.S.C. § 5565(a)(2). The Bureau pursues this relief by filing suit in “a United States district court or in any court of competent jurisdiction of a state in a district in which the defendant is located or resides or is doing business,” *id.* § 5564(f), or by conducting its own “adjudication proceedings” subject to deferential Administrative Procedure Act review, *id.* § 5563(a); *see also id.* § 5563(b)(4).

30. Many of the Bureau's decisions are committed entirely to its discretion. For example, there is no check on the Bureau's discretion to initiate an investigation or file an enforcement action. These decisions are unreviewable. It is therefore critically important that the Director be supervised, directed, or checked by the President or by other directors.

31. The Bureau is headed by a single Director whom the President cannot remove for any reason other than "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This removal restriction prevents the President from supervising, directing, or removing the Director at will, *see Humphrey's Ex'r*, 295 U.S. at 620, particularly given that the Director serves a five-year term that extends "until a successor has been appointed and qualified," 12 U.S.C. § 5491(c)(2); *see also id.* § 5491(c)(1).

32. Congress does not supervise the Bureau because the Director—not Congress—funds the Bureau with an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law," up to 12 percent of the combined earnings of the Federal Reserve System. 12 U.S.C. § 5497(a)(1); *see also id.* § 5497(a)(2)(A)(iii). Congress is prohibited from reviewing the Director's funding of the agency he controls. *Id.* § 5497(a)(2)(C).

33. Moreover, the Bureau has no obligation "to consult with or obtain the consent or approval of the Director of the Office of Management and Budget" (OMB) when determining its budget. 12 U.S.C. § 5497(a)(4)(E). This lack of reliance on OMB further insulates the Bureau from executive supervision because, when "agencies must rely on OMB for budget requests, the President has a huge lever of power over the agency, whether or not the head of the agency is removable at will." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 42–43 (2010).

34. While courts have a limited role in reviewing some of the Bureau's decisions, that review does not and cannot remedy the constitutional violation here.

35. As an initial matter, the Bureau exercises unreviewable discretion on matters of constitutional import. For example, the Bureau's decision whether to initiate an enforcement action against FIP will not be reviewable. That decision directly affects FIP's liberty.

36. Moreover, judicial review of agency decisions does not excuse a structural separation of powers violation. An unconstitutional structure is an insurmountable obstacle for any federal agency to do anything, or restrict liberty to any degree, under the guise of legitimate exercise of governmental power.

III. The D.C. Circuit's Opinion in *PHH*

37. On October 11, 2016, the Court of Appeals for the D.C. Circuit correctly held in *PHH Corp. v. CFPB* "that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director." 839 F.3d 1, 36 (D.C. Cir. 2016), *reh'g en banc granted*, (Feb. 16, 2017). Judges Kavanaugh and Randolph found that Congress has made the Director "the single most powerful official in the entire U.S. Government, other than the President," by giving him broad authority to interpret and enforce consumer protection law without imposing any meaningful check on his exercise of that authority. *Id.* at 17. The panel explained that this grant of powers to a single Director "departs from settled historical practice regarding the structure of independent agencies" and "that departure makes a significant difference for the individual liberty protected by the Constitution's separation of powers." *Id.* at 36.

38. PHH is a mortgage lender that was the subject of a CFPB enforcement action that resulted in a \$109 million order against it. *Id.* at 7. After PHH asked the D.C. Circuit to vacate

that order on statutory and constitutional grounds, the panel granted PHH's petition for review, vacated the CFPB's order, and remanded for further proceedings. *Id.* at 55.

39. The Court of Appeals remanded for further proceedings because it held that the Bureau could continue to bring enforcement actions and otherwise function *if* the President of the United States had "the power to remove the Director at will, and to supervise and direct the Director." *Id.* at 8. The D.C. Circuit determined that it could impose this constitutional fix and ordered that it be put into effect "by severing the for-cause removal provision from [12 U.S.C. § 5491(c)(3)]." *Id.*

40. On February 16, 2017, the D.C. Circuit granted the Bureau's petition for rehearing en banc. In so doing, the en banc Court prevented the panel's constitutional remedy from going into effect. As a result, at the time of this filing, the Bureau's unconstitutional structure has not been remedied.

41. On March 17, 2017, the United States filed a brief in *PHH* as *amicus curiae*. The government states that "a removal restriction for the Director of the CFPB is an unwarranted limitation on the President's executive power" and argues that the D.C. Circuit "should not extend the exception established by the Supreme Court in *Humphrey's Executor* to undermine the general constitutional rule that the President may remove principal officers at will." Br. of United States 17, Doc. No. 1666553, *PHH Corp. v. CFPB*, No. 15-1177 (D.C. Cir. filed Mar 17, 2017).

42. The en banc D.C. Circuit is scheduled to hear oral argument in *PHH* on May 24, 2017.

IV. The Bureau's Ongoing Investigation of FIP

43. On November 23, 2016—more than a month after the D.C. Circuit found that the Bureau's unconstrained powers exceed constitutional limits—the Bureau served FIP with a Civil Investigative Demand (the "CID") (ECF No. 4-5). The CID seeks information and documents from FIP and "any successor in interest, and any parent companies, wholly or partially owned subsidiaries, unincorporated divisions, joint ventures, operations under assumed names, and affiliates, and all principals, directors, officers, owners, employees, agents, representatives, consultants, attorneys, accountants, independent contractors, and other persons working for or on behalf of the foregoing." (CID ¶ II.E, ECF No. 4-5, at 8.)

44. On December 8, 2016, FIP met and conferred with the Bureau and asked the Bureau to withdraw the CID. The Bureau refused that request and elected to continue with the CID process.

45. On December 13, 2016, FIP petitioned the Director to set aside the CID. FIP explained that the Director should withdraw the petition because "the CID is a product of the Bureau's unconstitutional structure" and "the CID does not relate to a consumer financial product or service and fails to seek information relevant to a legitimate purpose." (Pl.'s Pet. Set Aside or Modify CID at 1, ECF No. 4-6.)

46. On Friday, January 6, 2017, the Bureau notified FIP by email that the Director had denied FIP's Petition. (*See* Email from Bureau to FIP (Jan. 6, 2017), ECF No. 4-7.) The Director dismissed FIP's constitutional objection to the Bureau's authority on the ground that FIP's "constitutional challenge is not properly raised in this administrative proceeding . . . because 'government agencies may not entertain a constitutional challenge to authorizing

statutes.” (Director’s Decision & Order 2 (quoting *United Space All., LLC v. Solis*, 824 F. Supp. 2d 68, 97 n.10 (D.D.C. 2011)), ECF No. 4-8.)

47. Finding that FIP had not presented a sufficient basis to revoke or set aside the CID, the Director ordered FIP “to produce all responsive documents, items, and information within its possession, custody, or control that are covered by the CID, within 10 calendar days of [the] Decision and Order [i.e., by January 15, 2017].” (*Id.* at 6.)

48. On January 10, 2017, FIP, proceeding under the pseudonym John Doe Co., filed this action against the Bureau. That same day, FIP moved for a temporary restraining order and preliminary injunction prohibiting the Bureau “from using the executive, legislative, and judicial powers delegated to the Bureau to impose any restriction on Plaintiff’s liberty or otherwise take any action adverse to Plaintiff unless and until the Bureau is constitutionally structured.” (Mem. Supp. Pl.’s Mot. TRO & Prelim. Inj. 1, ECF No. 7-1.)

49. On February 17, 2017—the day after the D.C. Circuit agreed to rehear *PHH* en banc—this Court denied FIP’s motion for a temporary restraining order and preliminary injunction. The Court held that, because the Court was “not bound by the vacated D.C. Circuit panel opinion in *PHH*,” FIP had not shown a likelihood of success on the merits for its claim that the CFPB is unconstitutionally structured. (Mem. Op. 10, ECF No. 31.) The Court also noted that, even if the Court “were to adopt Judge Kavanaugh’s reasoning” in *PHH*, FIP would still be unlikely to succeed on the merits because “the Court would also be likely to adopt Judge Kavanaugh’s narrow remedy” striking the for-cause removal restriction. (*Id.* at 11.)

50. FIP appealed to the D.C. Circuit the same day that the Court denied that motion for a temporary restraining order and preliminary injunction. (*See* Notice of Appeal, ECF No. 28.) Shortly thereafter, FIP moved in the Court of Appeals for an injunction pending appeal.

51. On March 3, 2017, the D.C. Circuit denied by a 2-1 vote FIP's motion. Judges Millett and Wilkins wrote that FIP's "sole argument regarding likelihood of success on the merits before [the Circuit Court] and the district court ha[d] been to point to the now-vacated majority opinion in *PHH*" and held that "[p]ointing to *PHH* is not enough" to carry FIP's burden of showing "not just that there is potentially persuasive authority for its legal position, but that the district court abused its discretion in not sufficiently crediting that showing in the balancing of equities that preliminary injunctive relief requires." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1131–32 (D.C. Cir. 2017).

52. Judge Kavanaugh dissented, stating his view "that the CFPB's structure is likely to be ruled unconstitutional, whether by [the D.C. Circuit] sitting en banc or by the Supreme Court." *Id.* at 1136. Judge Kavanaugh also rejected as "badly mistaken" the Bureau's argument that FIP "is not entitled to a preliminary injunction or injunction pending appeal to prevent the CFPB in its current form from regulating [FIP] now." *Id.* at 1136–37.

53. On February 21, 2017, while FIP's appeal to the D.C. Circuit was pending, the Bureau filed in the Central District of California a Petition to Enforce the CID. *See CFPB v. Future Income Payments, LLC*, No. 8:17-cv-00303-JLS-SS (C.D. Cal.).

54. FIP is opposing that petition on constitutional and other grounds. On March 20, 2017, it filed its Opposition to Petition to Enforce CID, in which FIP urges the district court to "deny the Bureau's request to enforce the CID and dismiss [that] action." Opp'n to CID 25, ECF No. 26, *CFPB v. Future Income Payments, LLC*, No. 8:17-cv-00303-JLS-SS (C.D. Cal. filed Mar. 20, 2017). While FIP objects to the CID on constitutional grounds, its argument is limited to the CID. FIP is not seeking, and, within the statutory structure, has no vehicle on which to seek, either (1) an order declaring unconstitutional the provisions of the Dodd–Frank Act

creating the Bureau or (2) an injunction preventing the Bureau from wielding any of the powers that Congress delegated to it.

COUNT I
(Violation of the Separation of Powers)

55. FIP realleges and incorporates by reference the allegations contained in all previous paragraphs.

56. Congress has placed massive legislative, executive, and judicial power “in the same hands,” which is “the very definition of tyranny.” *In re Aiken Cty.*, 725 F.3d 255, 264 (D.C. Cir. 2013) (quoting *The Federalist* No. 47, at 269 (James Madison) (Clinton Rossiter ed., rev. ed. 1999)).

57. The Constitution provides: “The executive Power shall be vested in a President of the United States of America,” U.S. Const. art. II, § 1, and the President “shall take Care that the Laws be faithfully executed, *id.* § 3.

58. The President cannot take care that the Bureau faithfully executes the laws because the President cannot supervise, direct, or remove at will the Director.

59. The Bureau’s structure violates the separation of powers and departs from historical practice because, among other reasons, the Bureau is headed by a single Director who is unaccountable to the President.

COUNT II
(Deprivation of Due Process)

60. FIP realleges and incorporates by reference the allegations contained in all previous paragraphs.

61. The Fifth Amendment guarantees that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. Const. amend. V.

62. FIP has a protected liberty interest in being free from structurally unconstitutional exercises of federal power. *See, e.g., Free Enter. Fund*, 561 U.S. at 480 (2010) (“[T]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” (quoting *Bowsher*, 478 U.S. at 730)).

63. The formation and operation of the Bureau injures FIP’s liberty by concentrating executive, legislative, and judicial powers—including the quintessentially executive power to bring law enforcement actions against the public—in the hands of one unelected, unaccountable Director.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Future Income Payments, LLC prays that the Court:

- A. enter an order and judgment declaring the Bureau's current structure unconstitutional;
- B. enter an order and judgment enjoining the Bureau from carrying out any of the powers delegated to it by the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5491 *et seq.*;
- C. award FIP its costs and attorneys' fees pursuant to any applicable statute or authority; and
- D. award any other relief this Court deems just and appropriate.

This the 14th day of April, 2017.

**WOMBLE CARLYLE SANDRIDGE &
RICE LLP**

/s/ Christopher W. Jones

Christopher W. Jones
Admitted Pro Hac Vice
Samuel B. Hartzell
Admitted Pro Hac Vice
555 Fayetteville Street, Suite 1100
Raleigh, NC 27601
Telephone: (919) 755-8173
Facsimile: (919) 755-6180
E-mail: cjones@wcsr.com
shartzell@wcsr.com

/s/ Cathy A. Hinger

Cathy A. Hinger
DC Bar No. 473697
1200 Nineteenth Street NW, Suite 500
Washington, DC 20036
Telephone: (202) 857-4489
Facsimile: (202) 261-0029
E-mail: chinger@wcsr.com

DORSEY & WHITNEY LLP

/s/ Ji-Hyun Jennifer Lee

Ji-Hyun Jennifer Lee
DC Bar No. 1029193
1801 K Street NW, Suite 750
Washington, DC 20006
Telephone: (202) 442-3572
Facsimile: (202) 315-3682
E-mail: lee.jenny@dorsey.com

Eric Epstein

Admitted Pro Hac Vice
51 West 52nd Street
New York, NY 10019-6119
Telephone: (212) 415-9309
Facsimile: (718) 877-3719
E-mail: epstein.eric@dorsey.com

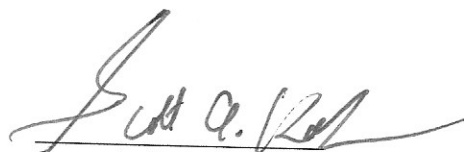
*Attorneys for Plaintiff Future Income
Payments, LLC*

VERIFICATION

I, SCOTT A. KOHN, declare as follows:

1. I am the manager of Plaintiff, Future Income Payments, LLC.
2. I have personal knowledge of the facts alleged in this Amended Verified Complaint.
3. If called upon to testify I would competently testify as to the matters stated herein.
4. I verify under penalty of perjury under the laws of the United States of America that the factual statements in this Amended Verified Complaint concerning Plaintiff are true and correct.

This the 14th day of April, 2017.



Scott A. Kohn
Manager of Plaintiff Future Income
Payments, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 14th day of April, 2017, a copy of the foregoing document was served via ECF on the following:

Christopher John Deal
Consumer Financial Protection Bureau
Office of General Counsel
1700 G Street, N.W.
Washington, DC 20552
(202) 435-9582
Email: christopher.deal@cfpb.gov
Counsel for Defendants

Steven Y. Bressler
Consumer Financial Protection Bureau
Office of General Counsel
1700 G Street, N.W.
Washington, DC 20552
(202) 435-7248
Email: steven.bressler@cfpb.gov

Counsel for Defendants

/s/ Cathy A. Hinger
Cathy A. Hinger