ARGUED APRIL 12, 2016; DECIDED OCTOBER 11, 2016

No. 15-1177

In the United States Court of Appeals for the District of Columbia Circuit

PHH CORPORATION, et al., *Petitioners*,

v.

CONSUMER FINANCIAL PROTECTION BUREAU, *Respondent.*

On Petition for Review of an Order of the
Consumer Financial Protection Bureau (CFPB File 2014-CFPB-0002)

BRIEF OF AMERICANS FOR FINANCIAL REFORM, CALIFORNIA REINVESTMENT COALITION, THE CENTER FOR RESPONSIBLE LENDING, CONSUMER FEDERATION OF AMERICA, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL COMMUNITY REINVESTMENT COALITION, THE NATIONAL CONSUMER LAW CENTER, THE NATIONAL COUNCIL OF LA RAZA, UNITED STATES PUBLIC INTEREST RESEARCH GROUP EDUCATION FUND, INC., AND WOODSTOCK INSTITUTE AS AMICI CURIAE IN SUPPORT OF REHEARING EN BANC

KATHRYN E. MATTHEWS
J. ROSS WALLIN
MASHA HEIFETZ
GRAIS & ELLSWORTH LLP
1211 Avenue of the Americas
New York, New York 10036
(212) 755-0010

BRIAN SIMMONDS MARSHALL
AMERICANS FOR FINANCIAL REFORM
1620 L Street NW, 11th Floor
Washington DC 20006
(202) 684-2974

DEEPAK GUPTA
MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

Counsel for Amici Curiae

COMBINED CERTIFICATES

Certificate as to Parties, Rulings, and Related Cases

A. Parties and Amici. Except for the organizations that are signatories to this brief and any other *amici* who had not yet entered an appearance as of the filing of the petition for rehearing en banc, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the petition for rehearing en banc.

B. Rulings under Review. References to the rulings under review appear in the brief for Respondent.

C. Related Cases. References to the rulings under review appear in the brief for Respondent.

Rule 29(c)(5) Statement

No party's counsel authored this brief, in whole or in part. No party or a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person (other than *amici curiae*, their members, or their counsel) contributed money that was intended to fund the preparation of the brief.

Certificate of *Amici Curiae* Under Circuit Rule 29(d)

Amici curiae are ten non-profit organizations that advocate for consumer protection and civil rights. Each organization advocated for the CFPB's creation and frequently appears before the Bureau to advocate for consumer interests. *Amici* and their members therefore have a strong interest in ensuring that the CFPB remains free from undue political and industry influence, and are uniquely well positioned to explain to the Court why the panel opinion, if left standing, will threaten the Bureau's ability to protect consumers and imperil Congress's goal of creating a regulatory environment free of undue industry influence.

Corporate Disclosure Statement

No party to this filing has a parent corporation, and no publicly held corporation owns 10% or more of the stock of any party to this filing.

/s/ Deepak Gupta
DEEPAK GUPTA
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
FCIC	Financial Crisis Inquiry Commission
OCC	Office of the Comptroller of the Currency
SEC	Securities and Exchange Commission

INTRODUCTION

Spurred by toxic mortgages, the 2008 financial crisis caused millions of American families to lose their homes and brought the economy to the brink. A key cause, Congress found, was regulatory failure. Consumer protection was orphaned across many federal agencies and took a backseat to concern for banks' safety and soundness. And, all too often, regulators were captured by industry influence. The result was a vacuum in which reckless predatory lending flourished.

Congress responded by creating a new Consumer Financial Protection Bureau (CFPB)—an independent single-director agency charged with protecting consumers from the unchecked financial practices that fueled the crisis. To prevent history from repeating itself, Congress deliberately designed this new agency to withstand partisan politics and the powerful influence of the financial industry.

The panel's sweeping and unprecedented opinion in this case reaches out to declare Congress's design unconstitutional. If left standing, the panel's opinion will threaten the CFPB's ability to protect consumers and imperil Congress's goal of creating a regulator free of undue industry influence. And the opinion's reach does not stop at the CFPB; it threatens other federal agencies with single directors insulated by for-cause removal protection—including the Federal Housing Finance Agency—as well as other bodies those officials oversee, such as the Federal Stability Oversight Council (12 U.S.C. § 5321) and the Federal Deposit Insurance

Corporation (12 U.S.C. § 1812(a)(1)). Because the decision comes on the eve of a presidential transition, it will also sow uncertainty about whether the new administration may replace the leadership of the CFPB and other single-director agencies, and possibly even uncertainty over who will control this litigation. *Cf.* 12 U.S.C. § 5564(e) (partially limiting CPFB's independent litigation authority in the Supreme Court). Such a momentous decision should not be made in this way—by a split panel, without precedent, where a constitutional ruling may not have been "absolutely necessary to a decision of the case." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

Beyond its practical implications, the panel's opinion is also manifestly wrong. It cannot be reconciled with *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), or *Morrison v. Olson*, 487 U.S. 654 (1988), both of which endorsed for-cause removal protection for independent-agency heads. And nothing in the Constitution's text, or any previous decision by *any* court, supports the policy preference that drove the panel's opinion: its view that, "notwithstanding some failings and downsides, multi-member independent agencies are superior to single-Director independent agencies." Op. at 52. That is a debatable judgment for the political branches—not a rule for judges to divine based on their special insight into "the deep values of the Constitution." Op. at 49. This Court should rehear this case en banc and uphold the agency's structure.

INTEREST OF *AMICI CURIAE*

Amici curiae are ten non-profit organizations that advocate for consumer protection and civil rights. Each organization advocated for the CFPB's creation and frequently appears before the Bureau to advocate for consumer interests. *Amici* and their members therefore have a strong interest in ensuring that the CFPB remains free from undue political and industry influence. The identity and interest of each *amicus curiae* is stated individually in an appendix to this brief.

ARGUMENT

I. The panel's decision undermines Congress's goal of structuring the CFPB to effectively protect consumers, free of undue political influence and industry capture.

By invalidating the CFPB director's for-cause removal protection, the panel decision topples Congress's design for this critical new agency and imperils its ability to function as intended. Worse still, the panel's one-hundred-page opinion reaches this result without even once addressing *why* Congress took such care to structure the CFPB as it did or *how* the CFPB's design is so critical to its proper functioning.

A. Had the panel properly examined those questions, it would have had to acknowledge that the CFPB's structure was a direct response to what Congress identified as "the spectacular failure of the prudential regulators to protect average American homeowners from risky, unaffordable" mortgages before the crisis. S.

Rep. No. 111-176, at 15 (2010). Before the CFPB's creation, authority for consumer financial protection was scattered across many federal agencies—most of them focused on the safety and soundness of the banking system, with consumer protection as a secondary or tertiary concern. 12 U.S.C. § 5581(b) (transferring authority to CFPB from seven agencies).

But the problem wasn't just that these federal regulators had divided missions. They were also too susceptible to capture by the powerful influence of the financial industry, which led them to overlook predatory consumer lending practices that should have been seen as alarming. As the Senate report put it, 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 testimony of Patricia McCoy). Congress's verdict was harsh: "[I]t was the failure by the [federal] prudential regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166; *see* KATHLEEN ENGEL AND PATRICIA MCCOY, THE SUBPRIME VIRUS 157-205 (2011).

Perhaps the "prime example" was "the Federal Reserve's pivotal failure to stem the flow of toxic mortgages, which it could have done by setting prudent mortgage-lending standards." FINANCIAL CRISIS INQUIRY COMMISSION REPORT xvii (2011). Not far behind were the Office of the Comptroller of the Currency

(OCC) and the now-abolished Office of Thrift Supervision, both of which were "under pressure to cater to their regulated institutions' interests because of the ability of banks to shop their charter"—*i.e.*, to choose their regulator. Adam J. Levitin, *The Politics of Financial Regulation and The Regulation of Financial Politics*, 127 HARV. L. REV. 1991, 2043 (2014). "This structure set up a competition for laxity in regulation." *Id.* Before the crisis, the Comptroller pointed to "national banks' immunity from many state laws" on predatory lending as "a significant benefit of the national charter—a benefit that the OCC [had] fought hard over the years to preserve." FCIC REPORT at 112. In addition, "there is a problem of legislative capture that is particularly pronounced in financial services and which can, in turn, shape agency capture." Levitin, *Politics of Financial Regulation*, 127 HARV. L. REV. at 2044. The financial-services industry has been "far and away the largest source of campaign contributions to federal candidates and parties and has ranked among the top of all industries in terms of lobbying expenditures since 1998." *Id.* As the Financial Crisis Inquiry Commission found, financial industry lobbying "played a key role in weakening regulatory constraints on institutions, markets, and products. It did not surprise the Commission that an industry of such wealth and power would exert pressure on policy makers and regulators." FCIC REPORT at xviii.

Congress thus recognized the need to redouble its efforts to insulate banking regulation from political and industry influence. As a result, "[t]he institutional

framework for the CFPB was a hotly contested issue from the beginning. And because capture was an obvious concern, many [agency design issues] were expressly debated as industry groups fought to avoid powerful equalizing measures." Rachel Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 71 (2010); *see* Levitin, *Politics of Financial Regulation*, 127 HARV. L. REV. at 2056 (CFPB "was specifically intended to free consumer protection from the particular capture problems that plagued prudential bank regulators"). Congress structured the CFPB to be headed by a single director, appointed by the president for a term of five years. It also employed other safeguards common among banking agencies, including insulation from the ordinary appropriations process and a limitation on the director's removal to cases of "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491. This structure allows the Bureau to make decisions that protect consumers, including decisions strongly opposed by industry.

B. Because the panel's opinion paid insufficient attention to Congress's *reasons* for adopting this structure, it also failed to recognize that Congress's concerns are neither unprecedented nor lacking a grounding in empirical reality.

As this Court has previously recognized, "[i]ndependence from presidential control is arguably important if agencies charged with regulating financial institutions . . . are to successfully fulfill their responsibilities; people will likely have greater confidence in financial institutions if they believe that the regulation of

these institutions is immune from political influence." *Swan v. Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1986). And the importance of removal protection goes well beyond instances in which a director might actually be fired. Instead, the practical impact of the panel's decision will be to greatly increase political influence on the CFPB's day-to-day decisionmaking. *See generally* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2303-09 (2001). To avoid just such influence, Congress has ensured that "[t]he vast majority of financial regulators enjoy protection from removal from office, often coupled with budgetary autonomy from Congress and other indicia of independence, such as exemption from White House regulatory oversight." Gillian E. Metzger, *Through the Looking Glass to A Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 130 (2015).

The panel opinion concludes that the CFPB must be treated differently merely because it has a single director. But there is no solid foundation—and certainly no constitutional basis—for the panel's categorical decree that "multi-member independent agencies are superior to single-Director independent agencies." Op. at 52. To the contrary, "[t]he scholarly literature on agency design has not achieved any consensus as to whether single agency heads are superior or inferior to multimember commissions." Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31

REV. BANKING & FIN. L. 881, 919 (2012). Scholars see the two structures as "offering relatively equal 'trade-offs' between (1) greater 'efficiency and accountability' within agencies administered by single officials and (2) increased 'deliberation and debate' and 'compromise' within multimember commissions." *Id.* at 919-920. Notably, a 1987 evaluation of the Consumer Product Safety Commission by the General Accounting Office concluded that the superior effectiveness of a single-director structure would outweigh any benefits of collegial decision-making by the multimember agency. *See* U.S. GAO, *Administrative Structure of the Consumer Product Safety Commission* 2-6 (1987).

The panel also overlooked the ways in which "a single Director structure makes the CFPB *more* electorally responsive than a commission structure." Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 369 (2013) (emphasis added). Given the financial industry's powerful influence on Congress, "a five-member commission structure would likely change the political direction of the CFPB, as the choice of commissioners would be the result of Congressional bargaining." *Id.* at 368. In this way, "[a] commission structure would effectively shift the power of appointment for the CFPB from the Presidency to the Senate, which, given staggered elections and incumbent entrenchment because of lack of term limits, is arguably the less democratically responsive branch of government." *Id.*

C. Finally, the panel's decision ignores the fact that the CFPB's design is working: the agency has stayed true to its mission and "has taken pains" to avoid capture. Rob Blackwell, *How Specter of Regulatory Capture Shaped CFPB's First Year*, Am. Banker, Jul. 9, 2012. Among other things, it has "sought to limit its hiring of existing federal bank regulators"—part of a "a conscious effort . . . to avoid the criticism that has long dogged traditional bank regulators—that they sometimes go soft on the banks they oversee because they become too close to them." *Id.*

Since the CFPB began operating in July 2011, it has proven to be highly effective in identifying violations of consumer-protection law and remedying problems with precision and agility. "The bureau has overhauled mortgage lending rules, reined in abusive debt collectors, prosecuted hundreds of companies, and extracted nearly $12 billion from businesses in the form of canceled debts and consumer refunds." Stacy Cowley, *Consumer Protection Bureau Chief Braces for a Reckoning*, N.Y. Times, Nov. 24, 2016; *see also* Christopher Peterson, *Consumer Financial Protection Bureau Law Enforcement: An Empirical Review*, 90 TULANE L. REV. 1057 (2016) (in an examination of all publicly announced CFPB enforcement actions between 2012 and 2015, finding that the agency did not lose a single case; that no bank had contested any CFPB enforcement action; and that 90% of all CFPB cases in which consumer relief was awarded involved evidence that defendants had illegally deceived consumers). The CFPB's effectiveness, and its

ability to respond to unlawful practices quickly, is attributable in part to its leadership by a single director and its insulation from political influence and industry capture.

II. The panel's decision is wrong.

Even setting aside the profound practical implications, rehearing should be granted because the panel decision is manifestly incorrect. *First*, although amici agree with the CFPB that the panel incorrectly interpreted the Real Estate Settlement Procedures Act, the panel was doubly wrong to decide the constitutional question because PHH (on the panel's mistaken view of the statute) could have obtained all the relief it sought on statutory grounds. As Judge Henderson pointed out, the panel thus "unnecessarily reach[ed] PHH's constitutional challenge, thereby rejecting one of the most fundamental tenets of judicial decisionmaking." Dissent at 1. That failure to show "judicial restraint" warrants rehearing en banc. *Id.* at 2.

Second, as the Bureau's petition ably demonstrates, the panel decision cannot be reconciled with the Supreme Court's consistent endorsement of for-cause removal protections for independent agency heads in both *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). In this regard, it is telling how much weight the panel opinion places on the *dissent* in *Morrison*. Nothing in the Constitution's text—or in any previous decision by any

court—supports transforming the panel's policy preference for multi-member bodies into a constitutional rule.

Third, the panel's dubious historical analysis not only gives short shrift to the parallel structures of the Social Security Administration, Office of Special Counsel, and Federal Housing Finance Agency, but also rests on the unsubstantiated claim that "[t]he Comptroller [of the Currency] is removable at will by the President." Op. at 33-34 n.6. Since 1863, the OCC has been headed by one Comptroller appointed by the President, with the Senate's advice and consent, for a five-year term. 12 U.S.C. § 2. The panel's interpretation of the requirement that "reasons" for removing the Comptroller be "communicated [by the President] to the Senate," *id.*, as authorizing removal-at-will (Op. at 33-34 n.6) is incompatible with *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). *Free Enterprise* assumed that SEC commissioners are removable only for cause, *id.*, despite the statute's silence, 15 U.S.C. § 78d(a). That conclusion was essential to the Court's holding that accounting board members' "two levels of protection from removal" are unconstitutional. 561 U.S. at 514. Given that *Free Enterprise* inferred "for cause" removal for SEC commissioners without any textual basis, the Comptroller cannot fairly be assumed to be removable without cause. *See also Wiener v. United States*, 357 U.S. 349, 356 (1958); *Federal Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 826 (D.C. Cir. 1993); *Swan*, 100 F.3d at 981-88.

There are thus strong reasons to doubt the panel's conclusion that the CFPB is "a gross departure from settled historical practice." Op. at 8.

CONCLUSION

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

Respectfully submitted,

/s/ Deepak Gupta
DEEPAK GUPTA
MATTHEW W.H. WESSLER
GUPTA WESSLER PLLC
1735 20th Street, NW
Washington, DC 20009
(202) 888-1741
deepak@guptawessler.com

KATHRYN E. MATTHEWS
J. ROSS WALLIN
MASHA HEIFETZ
GRAIS & ELLSWORTH LLP
1211 Avenue of the Americas
New York, New York 10036
(212) 755-0010

BRIAN SIMMONDS MARSHALL
AMERICANS FOR FINANCIAL REFORM
1620 L Street NW, 11th Floor
Washington DC 20006
(202) 684-2974

Counsel for Amici Curiae

November 29, 2016

APPENDIX

Americans for Financial Reform (AFR) is a nonpartisan, nonprofit coalition of more than 200 consumer, investor, labor, civil rights, business, faith-based, and community groups. *See* AFR Membership List, available at http://ourfinancialsecurity.org/about/our-coalition/. AFR works to lay the foundation for a strong, stable, and ethical financial system—one that serves the economy and the nation as a whole. Through policy analysis, education, and outreach to our members and others, AFR seeks to build public will for substantial reform of the American financial system. AFR engages actively in policy issues relating to securities regulation and investor protections.

California Reinvestment Coalition (CRC) is a nonprofit organization that has been advocating for consumer protection and fair and equal access to credit for all California communities since 1986. CRC builds an inclusive and fair economy that meets the needs of communities of color and low-income communities by ensuring that banks and other corporations invest and conduct business in our communities in a just and equitable manner. Over its 30 years, the CRC has grown into the largest state community reinvestment coalition in the country with a membership of 300 nonprofit organizations working for the economic vitality of low-income communities and communities of color.

The Center for Responsible Lending (CRL) is a nonprofit, non-partisan research and policy organization dedicated to protecting homeownership and family wealth by working to eliminate abusive financial practices. CRL is an affiliate of Self-Help, one of the nation's largest nonprofit community development financial institutions. Over 30 years, Self-Help has provided $6 billion in financing to 70,000 homebuyers, small businesses, and nonprofits. It serves more than 140,000 mostly low-income families through 43 retail credit union branches in North Carolina, California, Florida, and Chicago.

Consumer Federation of America (CFA) is a nonprofit association of more than 250 state, local, and national pro-consumer organizations, founded in 1968 to represent the consumer interest through research, advocacy, and education. More information about CFA's membership is available at http://consumerfed.org/membership/. For decades, CFA has been a leading voice advocating for consumers, especially low-wealth consumers, who need safe, affordable transaction accounts to get paid, pay bills, and save. CFA supports consumer protections designed to make sure that banking fees are predictable, proportional, and fair, to encourage and preserve access to financial services that

help consumers achieve financial security. CFA works to ensure that the CFPB remains at the center of the national effort to prevent abusive financial practices and has the information, independent funding and leadership structure it needs to ensure that consumers have every chance to safely borrow, save, and build assets.

The Leadership Conference on Civil and Human Rights (**The Leadership Conference**) is a coalition of more than 200 organizations committed to the protection of civil and human rights in the United States. It is the nation's oldest, largest, and most diverse civil and human rights coalition advocating for federal legislation and policy. It has worked to secure passage of every major civil rights statute since the Civil Rights Act of 1957, including the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. The Leadership Conference works to address the continuing problem of housing and financial discrimination in the United States, with a particular focus on the nature and extent of housing discrimination, including the impact of subprime lending and the resulting foreclosure crisis.

The National Community Reinvestment Coalition (**NCRC**) is a nonpartisan, nonprofit coalition of 600 community-based organizations that promote access to basic banking services including credit and savings, to create and sustain affordable housing, job development, and vibrant communities for America's working families. Its members include community reinvestment organizations, community development corporations, local and state government agencies, faith-based institutions, community organizing and civil rights groups, minority- and women-owned business associations, and social service providers from across the nation.

The National Consumer Law Center (**NCLC**) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low income and elderly consumers. Since its founding as a nonprofit corporation in 1969, NCLC has been a resource center addressing numerous consumer finance issues affecting equal access to fair credit in the marketplace. NCLC publishes a 20-volume Consumer Credit and Sales Legal Practice Series and has served on the Federal Reserve System Consumer-Industry Advisory Committee and committees of the National Conference of Commissioners on Uniform State Laws. NCLC has also acted as the Federal Trade Commission's designated consumer representative in promulgating important consumer protection regulations. NCLC staff actively engage with the CFPB on a broad range of consumer-oriented topics and the organization currently is represented by a staff member serving on the CFPB's Consumer Advisory Board.

The National Council of La Raza (NCLR)—the largest national Hispanic civil rights and advocacy organization in the United States—works to improve opportunities for Hispanic Americans. Through its network of nearly 300 affiliated community-based organizations, NCLR reaches millions of Hispanics each year in 41 states, Puerto Rico, and the District of Columbia. To achieve its mission, NCLR conducts applied research, policy analysis, and advocacy, providing a Latino perspective. Its Wealth-Building Initiative develops and promotes a policy agenda that creates economic opportunities for Latino families, including consumer finance regulation. Founded in 1968, NCLR is a private, nonprofit, nonpartisan, tax-exempt organization serving all Hispanic subgroups in all regions of the country.

United States Public Interest Research Group Education Fund, Inc. (U.S. PIRG Education Fund) is a 501(c)(3) independent, non-partisan organization that works on behalf of consumers and the public interest. Through research, public education, and outreach, it serves as a counterweight to the influence of powerful special interests that threaten the public's health, safety, or well-being. U.S. PIRG Education Fund participates as amicus curiae in cases that will have a substantial impact on consumers and the public interest, such as this one. U.S. PIRG Education Fund was one of the leading advocates for the creation of the CFPB and continues to work to ensure that the CFPB remains a strong and independent regulator that protects consumers.

Woodstock Institute is a nonprofit research and policy organization in the areas of equitable lending and investments; wealth creation and preservation; and safe and affordable financial products, services, and systems. Through applied research, policy development, coalition building, and technical assistance, Woodstock Institute works locally and nationally to create a financial system in which lower-wealth persons and communities of color can safely borrow, save, and build wealth so that they can achieve economic security and community prosperity. Woodstock Institute was founded in 1973 near Woodstock, Illinois.

CERTIFICATE OF COMPLIANCE

In the absence of a specific rule that sets a maximum length for *amicus* briefs in support of petitions for rehearing, *amici curiae* have limited their brief to no more than 2,600 words—the limit under the soon-to-be-implemented Federal Rule of Appellate Procedure 29(b) (excluding those parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and D.C. Circuit Rule 32(e)(1)). The body of the brief contains 2,577 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced 14-point typeface, including serifs. The typeface is Baskerville.

I certify that this information is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

DATED: November 29, 2016

/s/ *Deepak Gupta*
Deepak Gupta

CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2016, I electronically filed the foregoing Brief of *Amici Curiae* Americans for Financial Reform, et al. in Support of Respondent with the Clerk of the Court of the U.S. Court of Appeals for the D.C. Circuit by using the Appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the Appellate CM/ECF system.

/s/ *Deepak Gupta*
Deepak Gupta