

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

KIMBERLY A. PISINSKI, an individual, and  
MORGAN DREXEN, INC., a Nevada  
Corporation

Plaintiffs

v.

CONSUMER FINANCIAL PROTECTION  
BUREAU

Defendant

Case No.:

**DECLARATION OF  
PROFESSOR TODD ZYWICKI**

I, Todd Zywicki, declare under penalty of perjury as follows:

1. I have been retained by counsel for Plaintiffs to provide expert testimony.
2. I make this declaration in support of Plaintiffs' motion for preliminary injunction and make this declaration based on personal knowledge.
3. A copy of my current CV and prior testimony is attached as Exhibit A.
4. I am a George Mason University Foundation Professor of Law at George Mason University Law School.
5. I have been a law professor at George Mason University School of Law since 1998. I received tenure and promotion to Associate Professor in 2000. I received promotion to Professor of Law in 2002, and to George Mason University Foundation Professor of Law in 2009.
6. I am a Senior Fellow at the F.A. Hayek Program for Advanced Study in Philosophy, Politics and Economics and Senior Scholar of the Mercatus Center at George Mason University. I am the Editor of the *Supreme Court Economic Review*, which publishes peer reviewed articles in the field of law and economics. I serve as a peer reviewer for the following scholarly journals: *Review of Austrian Economics*, *Journal of Institutional and Theoretical Economics*, *Journal of Bioeconomics*, *Supreme Court Economic Review*, *Journal of Institutional Economics*, and *Philosophy, Politics, and Economics*. I am the author of over 70 published scholarly articles in leading law journals and economics journals.

7. From May 2003 to August 2004, I served as the Director of the Office of Policy Planning, United States Federal Trade Commission (“FTC”). As Director of the Office of Policy Planning, I reported directly to Chairman Tim Muris and was responsible for helping to conceive and execute policies and priorities of the Commission on issues of Consumer Protection, Competition, and Competition Advocacy. I was heavily involved in interactions between the Chairman’s Office and the Bureau of Consumer Protection. Indeed, much of my time at the Federal Trade Commission was spent on issues of consumer credit policies and regulation.
8. I have testified in Congress on several occasions with respect to the structure and effects of the Consumer Financial Protection Bureau, both as initially proposed and as finally enacted into law. *See e.g.*, “*Who’s Watching the Watchmen?*” Hearing Before the Subcomm. on TARP, Financial Services and Bailouts of Public and Private Programs of the H. Comm. on Oversight and Gov’t Relations, 112th Cong. 112-76,41 (2011); “*The Condition of Small Business and Commercial Real Estate Lending in Local Markets,*” Testimony before United States House of Representatives, Committee on Financial Services and Committee on Small Business (Feb. 26, 2010); “*Banking Industry Perspectives on the Obama Administration’s Financial Regulatory Reform Proposals,*” Testimony before United States House of Representatives, Committee on Financial Services (July 15, 2009)..In addition, I have frequently testified before Congress on issues of the economics of consumer credit and consumer protection regulation. *See e.g.*, *Modernizing Consumer Protection in the Financial Regulatory System: Strengthening Credit Card Protections:* Hearing Before the S.Comm. on Banking, Housing, and Urban Affairs, 112th Cong. (2009); *Credit Card Practices: Current Consumer and Regulatory Issues:* Hearing Before the Subcomm. on Financial Institutions and Consumer Credit of the H. Comm. on Financial Services, 110th Cong. 15-30,120-150 (2007); *Oversight of the Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act:* Hearing Before the Subcomm. on Administrative Oversight and the Courts of the S. Comm. on the Judiciary, 109th Cong. 21-22, 220-32 (2006). I have also provided testimony to the Congressional Subcommittee on Troubled Assets Relief Fund (TARP),Financial Services and Bailouts of Public and Private Programs.
9. My scholarly writing focuses on federal agency structure, consumer credit policy, consumer protection, the economics of consumer credit, and consumer bankruptcy. I have published numerous articles on the topic and have authored/co-authored books on the subject, including CONSUMER CREDIT AND THE AMERICAN ECONOMY (with Thomas Durkin, Gregory Elliehausen, and Michael Staten) (Oxford University Press, Forthcoming 2013)and PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (with Maxwell Stearns) (West Publishing, 2009).
10. In addition, I annually teach a class on “Public Choice and the Law,” which studies the application of economics and political science to the questions of agency design, legislation, and agency deference. On numerous occasions I have lectured on the topic to seminars of judges, law professors, and state attorney general staffs and have on two occasions submitted expert witness reports in lawsuits in District Courts of the United States Courts on the topic of public choice economics and one occasion submitted an *amicus* brief to the United States Court of Appeals on the topic.

11. Attached as Exhibit B is a copy of my article "*The Consumer Financial Protection Bureau: Savior Or Menace?*" which was published in Volume 81 of the George Washington Law Review in April 2013, which discusses issues that I understand will be relevant in this case. I incorporate the research and views expressed in that article in this declaration.
12. The work I have performed in writing about the Consumer Financial Protection Bureau ("CFPB") and the testimony that I would provide in this case includes an extensive examination of the structure of the CFPB as provided by the Dodd-Frank Act, Title X, 12 U.S.C. § 5481 *et. seq.* and how the structure compares to that of other agencies of federal government, both today and historically. I have also studied the legislative history of the Dodd-Frank Act and subsequent legislative hearings. As noted, I have been invited to testify several times before Congress to evaluate the Bureau's design and the impact of its regulations. I have been invited to speak at several academic conferences addressing the Bureau's design and the relationship of its structure to its regulatory decisions. In addition, I have published academic several articles and working papers analyzing the agency's structure and regulations as well as numerous newspaper op-eds, blog posts and essays, and other media contributions.
13. In my opinion, there are four structural features of CFPB that distinguishes the CFPB from other government agencies.
14. First, CFPB is headed by a single director who serves a fixed term of five years and is removable only for "cause" (and not "at will" by the President). Second, CFPB is not subject to Congressional oversight through the budget and appropriations process; instead, CFPB automatically receives a fixed sum that it can use to carry out its activities – up to a twelve percent (12%) cap of the Federal Reserve's total operating expenses. Third, CFPB is insulated from accountability from the Federal Reserve Board itself, which does not review or approve CFPB actions. Fourth, the Dodd Frank statute limits judicial review over CFPB actions.
15. Agencies of the federal government are accountable in essentially two ways: for executive agencies that exercise executive authority, the head of the agency typically serves at the pleasure of the President and is removable at will by the President. This is not the case for the CFPB, which limits removal of the CFPB director for cause, which Dodd-Frank defines as "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).
16. For so-called "independent agencies," accountability is provided with other features such as a multi-member bipartisan structure, such as the Federal Trade Commission. Indeed, a multi-member bipartisan commission structure is usually identified as a defining feature of an independent agency. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 26 (2010) (identifying multi-member bipartisan governance, for cause removal, and exemption from OIRA oversight the "[t]raditional [I]odestars of [agency] [i]ndependence"); *see also* Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935) ("The commission is to be *nonpartisan*, and it must from the very nature of its duties, act with entire impartiality.... Like the Interstate

Commerce Commission, its members are called upon to exercise the trained judgment of a *body of experts* ‘appointed by law and informed by experience.’” (quoting *Illinois Central R. Co. v. Interstate Commerce Comm’n*, 206 U. S. 441, 206 U. S. 454; *Standard Oil Co. v. United States*, 283 U. S. 235, 283 U. S. 238-239)). The bipartisan multimember structure provides public accountability, most notably through internal deliberation, which requires proponents of particular actions to publicly articulate a coherent rationale to support their views, thereby mitigating the threat of biased, ill-considered, or politically-motivated decisions, and provides an opportunity for those who disagree to publicly dissent. Multi-member commissions also can temper any biased, idiosyncratic, or extreme views held by a single member that otherwise might control the agency. Independent agencies also typically are subject to congressional accountability through the appropriations and budgeting process. In addition, even when commissioners serve a fixed term, the current President often retains the authority to name the commission chair. These features are lacking with the CFPB.

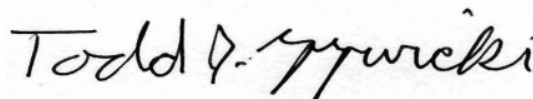
17. The effect of these four interlocking provisions has been to make the CFPB one of the most powerful and publicly unaccountable agencies in American history. It is effectively an independent agency housed inside another independent agency—not only largely immune from congressional appropriations, but immune from oversight by the Fed or the President (either directly or via the Office of Information and Regulatory Affairs of the Office of Management and Budget) as well. No other branch or agency can control the CFPB’s budgetary appropriations, regulations, or enforcement decisions. Moreover, there is no multimember commission to counterbalance the Director’s policy initiatives or to provide the structural checks arising from deliberative processes. Finally, substantive checks on the CFPB can be triggered only by the cumbersome supermajority rule required for the FSOC to act, and even then, only under the extreme circumstance of a severe threat to the safety and soundness of the American financial system. It is likely that this extreme test will rarely be satisfied in practice.
18. Scholars who have studied agency design have found that regulatory agencies are subject to several well-established problems in practice. To counterweight these problems, scholars have identified the above-mentioned characteristics of executive and independent agencies in order to make them responsive to the political system and to improve agency outcomes. These concerns explain why the CFPB’s unaccountable structure is novel.
19. In addition, the CFPB lacks many of the informal mechanisms of accountability on its actions that are sometimes identified as providing some degree of accountability of agencies to elected officials. *See Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 130 S. Ct. 3138, 3183 (2010), (Breyer, J., dissenting) (listing informal methods of accountability for Public Company Accounting Oversight Board to a traditional independent agency, the Securities and Exchange Commission, which is a “multimember bipartisan board” that could modify or reject proposed rules and recommended sanctions).
20. Since its establishment, the CFPB has acted as these scholars of regulation and regulatory design would predict in light of the vast power granted to the Bureau and extreme lack of

accountability. *See, e.g.*, Todd Zywicki, *Policy-Based Evidence-Making at the Consumer Financial Protection Bureau*, LIBERTY LAW BLOG, <http://www.libertylawsite.org/2013/01/21/policy-based-evidence-making-at-the-consumer-financial-protection-bureau-new-mortgage-rules-show-why-heightened-oversight-is-necessary/> (Jan. 21, 2013); Todd Zywicki, *The Revenge of Richard Nixon: The Consumer Financial Protection Bureau Spreads Its Tentacles*, LIBERTY LAW BLOG, <http://www.libertylawsite.org/2012/08/10/the-revenge-of-richard-nixon-the-consumer-financial-protection-bureau-spreads-its-tentacles/>. For example, concerns have been expressed that CFPB is attempting to regulate the practice of law and also is collecting/mining private financial data of citizens. As such, the Bureau's actions and performance have demonstrated why its unique and unprecedented combination of power and unaccountability is so troubling and why the Bureau's structure and lack of accountability is so novel. These actions are consistent with the tendencies that scholars of regulation and regulatory design have identified as typical of unaccountable bureaucracies, including a tendency to be "imperialistic" by expanding their jurisdiction beyond their authorized scope and to pursue their agency's mission with "tunnel vision" that ignores competing social goals.

21. This declaration is intended as a preliminary disclosure to accompany the initial filing of this lawsuit; I would request the opportunity to supplement this declaration and provide live testimony to elaborate on my opinions.
22. In connection with my work in this matter, I am being compensated at my customary rate of \$500 per hour.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated this 21st day of July 2013.



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Todd Zywicki