No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF FOR AMICUS CURIAE THE UNITED STATES HOUSE OF REPRESENTATIVES IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

This case arises from an action brought by the Consumer Financial Protection Bureau (CFPB) to enforce an administrative subpoena called a civil investigative demand. Like the heads of many other independent agencies, the CFPB's Director may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). The questions presented are:

1. Whether a constitutional flaw in the CFPB Director's removal protection would entitle petitioner to relief from the civil investigative demand.

2. Whether the CFPB Director's removal protection violates the separation of powers.

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INTEREST OF AMICUS CURIAE

Petitioner and the Solicitor General urge this Court to hold unconstitutional the provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), specifying that the President may remove the Director of the Consumer Financial Protection Bureau (CFPB) only for cause. Like the Court, the House of Representatives has an institutional interest in avoiding the unnecessary adjudication of that delicate separation-of-powers question. If the Court nonetheless reaches the issue, the House has a strong interest in defending the validity of the CFPB Director's removal protection—and the many similar provisions found throughout the U.S. Code. The House also has a critical interest in the continued existence and effective functioning of the CFPB. Congress created the CFPB based on its considered judgment that a single agency focused on consumer protection is essential to curb abuses and prevent a recurrence of the regulatory failures that led to the devastating Great Recession of 2008.[1]

[1] Pursuant to Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made a monetary contribution to this brief. The parties have filed blanket letters of consent to amicus briefs.

SUMMARY OF ARGUMENT

1. Since the Founding, the scope of Congress's authority to regulate the removal of executive officers has often been the subject of discussion and debate within and between the political branches. This Court, in contrast, has ventured into that sensitive constitutional territory only a handful of times—and, consistent with bedrock principles of judicial restraint, only when it was "absolutely necessary to a decision of the case." *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (citation omitted).

This is not one of those cases. Quite the opposite: A decision on the validity of the CFPB Director's removal protection would have no effect on the result of this case, which is an action to enforce a routine civil investigative demand (CID). That CID was ratified by an Acting CFPB Director who was not protected from removal, and it is now being pursued by a Director who has acceded to the President's view that she is removable at will. The removal protection would thus have no bearing on this CID even if it had improperly insulated *other* CFPB actions from "presidential supervision" (Petr. Br. 36).

In the lower courts, petitioner asserted that a flaw in the removal protection would preclude enforcement of the CID because it would require the invalidation of the entire title of the Dodd-Frank Act creating the CFPB. But petitioner now downplays that argument, and for good reason. Congress specifically directed that if "any provision" of the Dodd-Frank Act "is held to be unconstitutional, the remainder of th[e] Act . . . shall not be affected thereby." 12 U.S.C. § 5302.

Petitioner thus cannot establish any connection between the CID it seeks to avoid and the weighty constitutional issue it urges this Court to decide. As the Court-appointed amicus explains, that fact raises serious questions about petitioner's standing. Br. 21-24; *see* Morrison Amicus Br. 7-29. But even if petitioner could clear that hurdle, the Court should avoid the constitutional question by holding that the CID would be enforceable even if the removal protection were invalid. That non-constitutional holding would fully resolve this case. And it would be especially prudent to adhere to traditional avoidance principles here, because it is unclear when the constitutional question will arise again. Now that the Director has adopted the President's view that she is removable at will, the removal protection has no effect on *any* of the CFPB's ongoing activities.

2. If the Court nonetheless opts to reach the constitutional question, it should uphold the CFPB Director's removal protection. For much of the Nation's history, Congress has exercised its broad authority to structure the Executive Branch by creating independent agencies headed by officers removable only for cause. This Court has repeatedly approved those removal protections, which provide the covered officers with a measure of independence while preserving the President's authority to remove them if they fail to faithfully execute the laws.

The CFPB fits comfortably within that constitutional tradition. The Bureau performs the same regulatory functions independent agencies have long performed, and its Director is subject to the same removal protection this Court has long blessed.

Petitioner and the Solicitor General assert that the CFPB's single-director structure transforms that traditional protection into an infringement on Presidential authority. That gets things backwards. A single-director structure fosters *more* Presidential control, not less, because it is easier to oversee (and, if necessary, remove) one officer than a group of five or more. Indeed, Congress has established other independent agencies as multi-member commissions precisely because that structure increases their independence from the President.

3. Beyond attempting to distinguish the CFPB from multi-member commissions, petitioner and (to a lesser extent) the Solicitor General urge this Court to overrule its precedents approving for-cause removal protections. According to petitioner, *all* principal officers must be removable by the President at will, and the longstanding removal protections for dozens of independent agencies are invalid. That radical assertion is not supported by the text, structure, or Framing-era understanding of the Constitution. It is also contrary to the way all three Branches have long understood the separation of powers to operate. Petitioner provides no good reason to upset that settled understanding—much less a sufficient justification for overruling precedents that have become deeply embedded in the structure of our government.

ARGUMENT

I. The Court should resolve this case without deciding the constitutionality of the CFPB Director's removal protection.

"[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009) (citation omitted). The Court thus ordinarily "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond v. United States*, 572 U.S. 844, 855 (2014) (citation omitted).

Consistent with that fundamental principle, this Court has sometimes addressed remedial issues, including "questions of severability," before taking up a constitutional challenge to an Act of Congress. *INS v. Chadha*, 462 U.S. 919, 931 n.7 (1983); *see Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984). That approach wisely ensures that the Court does not decide an important constitutional question in a case where the challenger "could receive no relief even if his constitutional challenge prove[d] successful." *Chadha*, 462 U.S. at 931.[2]

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[2] As the Court-appointed amicus does here, the Court in *Chadha* described such an inability to obtain relief as a lack of "standing." 462 U.S. at 931. It could also be characterized as an alternative reason why the challenger loses on the merits. Either way, the principle is the same: The Court should not decide a constitutional question in a case where its answer would have no effect on the outcome.

Familiar principles of constitutional avoidance call for the same remedies-first approach here. This is a special action brought by the CFPB to enforce a CID seeking evidence from petitioner. Pet. App. 2a; *see* 12 U.S.C. § 5562(e)(1). Thus, as petitioner acknowledges, it has not sought (and could not have been granted) the sort of declaratory or injunctive relief that was at issue in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 487 (2010). Petr. Br. 37-38. Instead, the sole remedial question is whether petitioner can establish that a flaw in the CFPB Director's removal protection would preclude enforcement of the CID.

Petitioner cannot make that showing. To the contrary, both of its remedial arguments are insubstantial. Those arguments were briefed below, and petitioner itself has placed them before this Court (Br. 35-47). Rejecting those arguments would thus provide a straightforward non-constitutional path for resolving this case.

A. The removal protection has no bearing on the CID at issue here.

Petitioner's principal remedial argument is that an invalid removal protection renders every action taken by the affected officer "void." Br. 36. Petitioner relies on decisions involving officers who were not properly appointed, and who thus never had authority to act at all. *Id.* Petitioner cites no decision addressing a validly appointed officer who was merely subject to an allegedly improper protection against removal. But even if the same logic extended to this very different context, petitioner still would not be entitled to relief because the CID was ratified,

and is now being pursued, by officers effectively serving at the President's pleasure.

1. The CFPB originally issued, declined to modify, and sought enforcement of the CID under then-Director Richard Cordray. Pet. App. 10a-11a; CFPB C.A. Br. 6-9. But Acting Director Mick Mulvaney later "ratified these decisions after being briefed by Bureau staff." CFPB C.A. Br. 10; *see id.* at 13-14. Acting Director Mulvaney was not covered by the removal protection, which applies only to a Senate-confirmed "Director." 12 U.S.C. § 5491(c)(3); *see Designating an Acting Director of the CFPB*, 2017 WL 6419154, at *7 (O.L.C. Nov. 25, 2017).

The ratification of the CID by an officer removable by the President at will "purge[d] any residual taint or prejudice" that might be attributable to the allegedly invalid removal protection. *Guedes v. ATF*, 920 F.3d 1, 13 (D.C. Cir. 2019). Even in the appointments context, courts have "repeatedly held that a properly appointed official's ratification of an allegedly improper official's prior action . . . 'remed[ies] the defect' (if any) from the initial appointment." *Id.* (brackets and citation omitted); *see, e.g.*, *Advanced Disposal Servs. E., Inc. v. NLRB*, 820 F.3d 592, 602-06 (3d Cir. 2016); *CFPB v. Gordon*, 819 F.3d 1179, 1191-92 (9th Cir. 2016); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 707-09 (D.C. Cir. 1996).

So too here. Given Acting Director Mulvaney's ratification, petitioner can no longer argue that the

CID is an "exercise of power by an officer who has been impermissibly insulated from removal" (Petr. Br. 36).[3]

2. Later events have cemented that conclusion. On the day the Solicitor General filed his certiorari-stage brief in this case, current CFPB Director Kathy Kraninger informed Congress that "[t]he President, through the Department of Justice, determined in March 2017 that the for-cause removal provision . . . unduly interferes with the President's Executive authority under Article II." Letter from Hon. Kathy Kraninger to Hon. Nancy Pelosi 2 (Sept. 17, 2019), https://perma.cc/RQ92-LZT7. Director Kraninger then stated that, being "[m]indful of the Bureau's role as an Executive agency within the Executive Branch," she had "decided that the Bureau should adopt the Department of Justice's view." *Id.*

The Executive Branch has long taken the position that the President has authority—indeed, a "responsibility"—to refuse to comply with a statutory provision if he concludes that it "encroach[es] upon

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[3] Although the CFPB raised the ratification issue in the court of appeals, petitioner now ignores it. Below, petitioner faulted the CFPB for failing to submit "evidence" of ratification, but it gave no reason to question the CFPB's express representation of the then-Acting Director's position. Petr. C.A. Reply Br. 3-4. Petitioner also appeared to argue that "ratification" principles should not apply when the asserted constitutional defect is a removal protection rather than an invalid appointment. *Id.* at 6-7. But regardless of terminology, the approval of the CID by an Acting Director serving at the President's pleasure defeats petitioner's argument on its own terms because it means that the CID cannot be attributed to any lack of "presidential supervision" (Petr. Br. 36).

the constitutional powers of the Presidency." *Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.LC. 199, 201 (1994); *see, e.g.*, *Unconstitutional Restrictions on the Activities of OSTP*, 2011 WL 4503236, at *3 (O.L.C. Sept. 19, 2011). Under that longstanding Executive-Branch view, the President's (erroneous) determination that the removal protection is invalid means that it does not restrain him from seeking to remove the CFPB Director. And now that Director Kraninger has acceded to the President's position, her conduct in office is not influenced by any belief that she is protected from removal.

3. Two officers under the President's full control have thus separately determined that the CFPB should obtain the evidence sought in the CID. The President could have removed Acting Director Mulvaney if he disapproved of the ratification of the CID, and the President and Director Kraninger agree that he can remove her if he disapproves of her decision to continue to pursue it. The CID thus does not even arguably reflect any lack of "presidential supervision" (Petr. Br. 36). And that would make this case a profoundly artificial vehicle for deciding whether the removal protection has improperly insulated *other* CFPB actions from Presidential oversight.

B. A flaw in the removal protection would not affect the rest of the Dodd-Frank Act.

In the lower courts, petitioner also advanced a broader remedial argument, asserting that a defect in the removal protection would require invalidation of Title X of the Dodd-Frank Act—which would abolish the CFPB altogether. Petr. C.A. Br. 30-32. Petitioner

now minimizes that argument, urging the Court not to address the severability issue that petitioner itself pressed below. Br. 37-41. That shift is understandable, because the removal protection is plainly severable from the rest of the Dodd-Frank Act.

1. In addressing the severability of a removal protection in *Free Enterprise Fund*, this Court reiterated that a court confronting a constitutional flaw in one provision of a statute "must sustain its remaining provisions 'unless it is evident that the Legislature would not have enacted those provisions . . . independently of that which is invalid.'" 561 U.S. at 509 (brackets and citation omitted). Here, there is no need to speculate about what Congress would have done, because "Congress itself has provided the answer to the question of severability." *Chadha*, 462 U.S. at 932. Congress directed that, if "any provision" of the Dodd-Frank Act "is held to be unconstitutional, the remainder of th[e] Act . . . shall not be affected thereby." 12 U.S.C. § 5302. That textual directive makes this "an even easier case than *Free Enterprise Fund* for severability." *PHH Corp. v. CFPB*, 881 F.3d 75, 199 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting); *see* SG Br. 46-48.

2. Petitioner provides no basis for disregarding the Dodd-Frank Act's express severability clause. It asserts that the clause means only that "Congress viewed the various *titles* as severable from each other." Br. 45. But that is not what the statute says. Congress directed that any invalid "provision"—not title—is severable. 12 U.S.C. § 5302.

Petitioner also dismisses the severability clause because it appears many pages before the removal protection in the printed version of the Act. Br. 45.

But no principle of interpretation allows a court to ignore an unambiguous statutory directive based on page count. And the severability clause was hardly obscure—it is the third section of the Act, just after the title and definitions. 124 Stat. 1390.[4]

3. Finally, petitioner posits that Congress would not have wanted to give the CFPB's authority to an agency with a Director removable at will. Instead, petitioner maintains that Congress would have preferred the pre-Dodd-Frank Act regime, which scattered responsibility for consumer financial protection among various independent agencies. Br. 43-44, 46-47. But such extra-textual speculation about Congressional intent provides no basis for disregarding "[t]he plain text of [a] severability provision." *Exec. Benefits Ins. Agency v. Arkison*, 573 U.S. 25, 36 (2014).

Petitioner's speculation is also unpersuasive on its own terms. To begin with, petitioner presumes that the agencies previously responsible for consumer financial protection could simply pick up where they left off in 2010. In fact, any attempt to unwind Title X would raise a host of thorny questions about whether and how the CFPB's various authorities revert to their prior homes. It would also severely disrupt the

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[4] Petitioner notes that a different subtitle of the Act contains a redundant severability clause. Br. 45. But that does not suggest that Congress viewed the general severability clause as ineffective. Instead, it simply reflects the relevant subtitle's origin as a freestanding bill with a severability clause of its own. *See* H.R. 2571, 111th Cong. § 302 (2009).

enforcement of the consumer financial protection laws by suddenly forcing other agencies to locate the funding, personnel, and expertise required to fulfill statutory duties they last held a decade ago.

Even setting aside those grave obstacles to returning to the pre-Dodd-Frank Act world, Congress created the CFPB precisely because it deemed that regime "too fragmented to be effective." S. Rep. No. 111-176, at 9-10 (2010). Indeed, it found that existing regulators' "spectacular failure" to address consumer financial protection issues had led directly to the Great Recession. *Id.* at 15.

The text of the Dodd-Frank Act confirms that Congress deemed it more important to unite the CFPB's regulatory authorities in a single agency than to have them be exercised by officers protected from removal. Congress provided that until a CFPB Director was confirmed, the Bureau's transferred authorities would be exercised by the Treasury Secretary. 12 U.S.C. § 5586(a). Congress also allowed the CFPB to be led by an Acting Director removable at will. *See Designating an Acting Director,* 2017 WL 6419154, at *3-7. Those features of the statute further refute petitioner's conjecture that Congress "would have preferred no [CFPB] at all to a [CFPB] whose [Director is] removable at will." *Free Enterprise Fund*, 561 U.S. at 509.

* * *

Because petitioner would not be entitled to relief even if this Court were to hold the removal protection invalid, principles of constitutional avoidance counsel powerfully against addressing that question here. Nor is this the rare case where an urgent need to provide guidance to other parties might justify a

departure from those traditional principles. *Cf. United States v. Windsor*, 570 U.S. 744, 761 (2013). To the contrary, the position taken by the President and the Director means that the removal protection has no effect on—and would thus provide no basis for challenging—any of the CFPB's ongoing activities.

Of course, future Presidents and CFPB Directors could (and should) reach a different conclusion. If that happens, the prudential calculus may be different. Then, unlike now, the removal protection could affect the CFPB's actions. And then, unlike now, the Court may be presented with genuinely adverse parties who have a concrete stake in the resolution of the constitutional issue. Here, however, the Court should affirm the court of appeals on the alternative ground that any defect in the removal protection would neither invalidate the rest of the Dodd-Frank Act nor otherwise preclude enforcement of the CID.

II. The CFPB Director's removal protection is constitutional.

If this Court reaches the issue, it should hold that the CFPB Director's removal protection is constitutional. For more than 130 years, Congress has conferred the same protection on the heads of financial regulators and many other agencies whose duties warrant a degree of independence. This Court has repeatedly upheld those protections as consistent with the President's authority to "hold[] his subordinates accountable for their conduct." *Free Enterprise Fund*, 561 U.S. at 496. The CFPB sits squarely within that established tradition. If anything, its single-director structure makes the traditional

removal protection a *lesser* constraint on Presidential authority.

A. This Court has long held that Congress has authority to create independent agencies.

1. The Necessary and Proper Clause gives Congress "broad" authority to create and structure administrative agencies. *Buckley v. Valeo*, 424 U.S. 1, 134 (1976). Congress has long exercised that authority by establishing independent agencies headed by officers with some protection from removal.

In 1887, Congress created the Interstate Commerce Commission (ICC) to curb abuses by the interstate railroads, then the backbone of the national economy. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1126-27 (2000). In doing so, Congress provided the ICC with a measure of independence by specifying that the President could remove the commissioners for "inefficiency, neglect of duty, or malfeasance in office." Act of February 4, 1887, ch. 104, § 11, 24 Stat. 383.

In the decades that followed, Congress created additional independent agencies to regulate other aspects of the Nation's growing economy. In 1913, Congress gave for-cause removal protection to the governors of the Federal Reserve Board, which was established to stabilize the Nation's banking system in the wake of financial "panics and crises." H.R. Rep. No. 63-69, at 28 (1913); *see* Federal Reserve Act, ch. 6, § 10, 38 Stat. 260-61 (1913). In 1914, Congress did the same for the commissioners of the Federal Trade Commission (FTC), which was charged with

preventing "unfair methods of competition in commerce" through administrative adjudications and actions in federal court. Federal Trade Commission Act, ch. 311, § 5, 38 Stat. 719; *see id.* § 1, 38 Stat. 718.

During the Great Depression, Congress again turned to independent agencies to stabilize the financial system and prevent future crises. It reaffirmed the Federal Reserve Board's for-cause removal protection, Banking Act of 1935, Pub. L. No. 74-305, § 203(b), 49 Stat. 704-05, and granted the Board new authority to set the Nation's interest rates, Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 168. It established the Federal Deposit Insurance Corporation (FDIC) to restore confidence in the banking system. *Id.* And it created the Securities and Exchange Commission (SEC) to curtail fraud and other abuses in the Nation's stock markets. Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881.

Over the years, Congress has continued to create independent agencies "across a wide range of policy fields." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 27 (2010). In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U.S. markets." Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 Calif. L. Rev. 327, 331 (2013). The Federal Reserve Board, FDIC, and SEC are now joined by the Commodity Futures Trading Commission (CFTC) and the National Credit Union Administration (NCUA), among other independent financial regulators. *See* Cong. Research Serv., *Independence of Federal Financial Regulators* 15-17 (Feb. 28, 2017) (*CRS Report*). And other vital sectors

of the Nation's economy are regulated by independent agencies like the Federal Communications Commission and the Federal Energy Regulatory Commission.

2. This Court has long 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." *Free Enterprise Fund*, 561 U.S. at 483.

The Court first considered the issue 85 years ago, in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). That case arose after President Roosevelt removed an FTC commissioner without invoking the statutory grounds of "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 618-19. The Commissioner's estate sued for backpay, and the Solicitor General argued that the statutory removal protection was invalid because all agency heads must be "subject to removal by the President without limitation by Congress." *Id.* at 618.

This Court unanimously rejected that argument. It explained that, while the President's constitutional role requires him to have the power to remove some Executive Branch officers at will, it is "plain under the Constitution" that this "illimitable power of removal" does not extend to officers like the FTC commissioners. *Humphrey's Executor*, 295 U.S. at 629. Instead, the Court held that Congress's broad power to create regulatory agencies like the FTC includes, "as an appropriate incident, power to fix the period during which [commissioners] shall continue in office, and to forbid their removal except for cause in the meantime." *Id.*

Since *Humphrey's Executor*, this Court has repeatedly reaffirmed the constitutionality of removal protections for the heads of independent agencies. *See Morrison v. Olson*, 487 U.S. 654, 687-91 (1988); *Bowsher v. Synar*, 478 U.S. 714, 724-25 & n.4 (1986); *Buckley*, 424 U.S. at 141; *Wiener v. United States*, 357 U.S. 349, 352-56 (1958). Indeed, the validity of such protections is so well-established that the Court has presumed that statutes creating independent agencies confer removal protection by implication even when they do not do so expressly. *See Free Enterprise Fund*, 561 U.S. at 487 (SEC); *Wiener*, 357 U.S. at 354-56 (War Claims Commission).

3. The traditional removal protection for the heads of independent agencies is fully consistent with the three limits this Court's decisions have placed on Congress's authority to regulate removals.

First, this Court has recognized that the ability to remove certain officers at will is "essential to the President's proper execution of his Article II powers." *Morrison*, 487 U.S. at 690-91. "Nobody would suggest that Congress could make the Secretary of Defense or Secretary of State, for example, removable only for cause." *PHH*, 881 F.3d at 79. But the Court has made clear that the same principle does not extend to the heads of independent regulatory agencies like the FTC. *See, e.g.*, *Morrison*, 487 U.S. at 690-91; *Buckley*, 424 U.S. at 141.

Second, this Court has held that Congress cannot arrogate to itself any role in the decision to remove. The ability to remove an officer, even for cause, is a powerful tool for controlling her conduct. *Bowsher*, 478 U.S. at 726. Allowing Congress to share in that power "would, in practical terms, reserve in Congress

control over the execution of the laws." *Id.* Congress thus cannot give itself the power to remove, *id.*, or require the Senate's consent for a removal by the President, *Myers v. United States*, 272 U.S. 52, 164 (1926). In providing for-cause removal protection, Congress does neither. It prescribes broad criteria for removal, but leaves it to the President to decide whether those criteria are met.

Third, this Court held in *Free Enterprise Fund* that Congress could not give the Public Company Accounting Oversight Board *two* layers of removal protection. The SEC could remove members of the Board only under an "unusually high" for-cause standard. 561 U.S. at 503. The President, in turn, could remove SEC commissioners only for cause. *Id.* at 487. The Court held that this double protection interfered with the President's ability to "take Care that the laws be faithfully executed." U.S. Const. Art. II, § 3; *see Free Enterprise Fund*, 561 U.S. at 498.

In so doing, however, the Court was careful to distinguish the Board's two layers of for-cause protection from the single layer applicable to the SEC. Indeed, the existence of the SEC's removal protection was an essential premise of the Court's holding, and the Court reaffirmed that the traditional for-cause standard preserves the President's ability to "hold the Commission to account" if it fails to carry out its duties. *Free Enterprise Fund*, 561 U.S. at 495-96. The "second level of removal protection" was impermissible only because it meant that the President was not "the judge of the Board's conduct" in the same way that he is the judge of the SEC's. *Id.* at 496.

B. The CFPB fits comfortably within the Nation's long tradition of independent regulatory agencies.

In establishing the CFPB, Congress built upon its long history of creating, and this Court's long history of upholding, independent agencies. The CFPB performs the same functions independent regulators have long performed, and it does so under the same for-cause standard this Court first blessed 85 years ago. The CFPB's single-director structure does not transform that traditional standard into an infringement on the President's authority. And the various other challenges to that structure advanced by petitioner and the Solicitor General sound in policy or political science, not constitutional law.

1. The CFPB has the same functions, powers, and removal protection as other independent agencies.

The CFPB's mission is to ensure that "markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. § 5511(a). The Bureau's functions mirror those of other independent agencies. "The CFPB administers eighteen preexisting, familiar consumer-protection laws previously overseen by the Federal Reserve and six other federal agencies, virtually all of which were also independent." *PHH*, 881 F.3d at 80-81. The CFPB also has authority to prevent "unfair, deceptive, or abusive" acts or practices by providers of consumer financial services. 12 U.S.C. § 5531(a). That parallels the FTC's longstanding authority to prevent "unfair or deceptive acts or practices" across a far larger portion of the economy. 15 U.S.C. § 45(a)(2).

And also like the FTC and other independent regulators, the CFPB is empowered to carry out its mandate by issuing regulations, conducting adjudications, and bringing actions in court. *Compare* 12 U.S.C. §§ 5512, 5562-65 (CFPB), *with* 15 U.S.C. §§ 45, 53, 57a, 57b-3 (FTC).

Other aspects of the CFPB's structure likewise track existing independent agencies. The Director's for-cause removal protection is exactly the same as the FTC's. *Compare* 12 U.S.C. § 5491(c)(3) (CFPB), *with* 15 U.S.C. § 41 (FTC). Her five-year term is the same as (or shorter than) the terms of the members of the FTC, SEC, CFTC, NCUA, FDIC, and Federal Reserve Board. 15 U.S.C. § 41; *see CRS Report* 17. And the CFPB's limited autonomy from the annual appropriations process is likewise nothing new. The NCUA, FDIC, and Federal Reserve Board enjoy even greater budgetary freedom. *CRS Report* 27.

2. The CFPB's single-director structure enhances Presidential oversight.

In asserting that Congress cannot confer the traditional removal protection on the CFPB Director, petitioner and the Solicitor General focus on the Bureau's single-director structure. But the validity of a removal protection turns on whether it impairs the President's ability to ensure the faithful execution of the laws by "holding his subordinates accountable for their conduct." *Free Enterprise Fund*, 561 U.S. at 496; *see Morrison*, 487 U.S. at 689-91. And the CFPB's single-director structure actually *increases* the Bureau's accountability to the President.

a. Petitioner and the Solicitor General are quite right that Congress has often structured independent

agencies as multi-member commissions. Petr. Br. 22-23; SG Br. 32-33. But that is decidedly not because Congress believed that a multi-member structure is necessary to preserve constitutionally sufficient Presidential oversight. To the contrary, a multi-member structure *reduces* accountability to the President, because it is harder for the President to oversee (or remove) a group of five or more commissioners than a single director who is solely responsible for the agency's actions. Congress has thus paired removal protections with multi-member structures to further limit—not enhance—the President's control over other independent agencies.

The Federal Reserve Board's multi-member structure, for example, was chosen precisely because "[i]t seemed easier to protect a board from political control than to protect a single appointed official." Robert E. Cushman, *The Independent Regulatory Commissions* 153 (1941). Decades later, an influential Senate study confirmed that "multiple membership" is "a buffer against Presidential control." *Study on Federal Regulation,* S. Doc. No. 95-91, at 75 (1977). In 1987, the General Accounting Office (GAO) recognized that this "greater independence" is what "most likely explains why the Congress in the past has opted to head independent regulatory bodies with multimember commissions." GAO, *Administrative Structure of the Consumer Product Safety Commission* 12 (1987), https://perma.cc/4TGE-U3UW. And more recently, a study prepared for the Administrative Conference of the United States reiterated the uncontroversial proposition that "[g]overnance by multiple members limits the President's influence." Jennifer L. Selin & David E. Lewis, *Sourcebook of*

United States Executive Agencies 89 (2d ed. 2018) (*ACUS Sourcebook*).[5]

By uniting responsibility for consumer financial protection in the single-director CFPB, therefore, Congress "enhanced public accountability and simplified the President's ability to communicate policy preferences and detect failings." *PHH*, 881 F.3d at 98. "Now, if the President finds consumer protection enforcement to be lacking or unlawful, he knows exactly where to turn." *Id.* And if the Director fails to faithfully execute her duties, "[t]he President need only remove and replace a single officer"—not multiple commissioners or board members. *Id.*

b. Petitioner and the Solicitor General insist that two other features of multi-member commissions give the President greater control over those bodies than he has over a single-director agency like the CFPB. This Court has never relied on those arguments, and they are unpersuasive.

First, petitioner and the Solicitor General argue that a multi-member commission provides "an opportunity to appoint at least some of its members" during a four-year Presidential term. SG Br. 36; *see*

[5] *See also, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 611 (2010); David E. Lewis, *Presidents and the Politics of Agency Design: Political Insulation in the United States Government Bureaucracy, 1946-1997*, at 46 (2003); Emmette S. Redford, *Administration of National Economic Control* 286 (1952); Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 Admin. L. Rev. 719, 732-33 (2019) (Sitaraman & Dobkin).

Petr. Br. 28. But it is the power to remove, not the power to appoint, that gives the President control over his subordinates. "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726 (citation omitted).

If petitioner and the Solicitor General were correct that constitutionally adequate control depended on appointment, moreover, a new President would lack sufficient control over *every* independent agency. A President may have to wait months or years before making a single appointment to a commission—and may never appoint a majority. *See CRS Report* 17. The constitutional question thus is not whether the President gets to appoint some officers at some point during his tenure. It is whether the President can "hold[] his subordinates accountable" *throughout* his term. *Free Enterprise Fund*, 561 U.S. at 496. This Court's decisions establish that the traditional for-cause standard preserves that accountability for the officers who head independent regulatory agencies—whether or not the sitting President appointed them. The same is true of the CFPB Director.

Second, petitioner and the Solicitor General observe that "[m]any multimember commissions . . . afford the President the unfettered ability to appoint and remove their chairs." SG Br. 36; *see* Petr. Br. 29. But it was not until 1950, long after *Humphrey's Executor*, that the President was given the authority to designate the chair of the FTC. Reorg. Plan No. 8 of 1950, § 3, 64 Stat. 1265. Even today, the statutes governing many commissions do not allow the

President to replace the chair at will—or even to select the chair at all. *ACUS Sourcebook* 100.

Furthermore, even when the President can select an agency's chair, "the chairman may or may not have greater powers than the other board members." *CRS Report* 8. The SEC's powers, for example, are "generally vested in the Commissioners jointly, not the Chairman alone." *Free Enterprise Fund*, 561 U.S. at 512. The President thus has sufficient control over the SEC not because he gets to choose its chair, but because his ability to remove the commissioners for cause allows him to "hold the Commission to account." *Id.* at 495-96. So too at the CFPB—where the President's task is easier, because he need oversee only one director, not five commissioners.

3. The other arguments based on the CFPB's single-director structure lack merit.

Rather than focusing on Presidential oversight—the dispositive consideration under this Court's precedents—petitioner and the Solicitor General devote the bulk of their briefs to various other arguments based on the CFPB's single-director structure. None has merit.

First, petitioner asserts that a multi-member structure prevents "arbitrary decisionmaking" and "regulatory capture." Br. 26-27. Scholars have long debated the relative merits of single-director and multi-member structures, and petitioner's portrait of the virtues of multi-member commissions is (at a minimum) hotly contested. *See, e.g.*, Sitaraman & Dobkin at 726-60 (reviewing the extensive literature). But whatever the merits of petitioner's arguments as a matter of sound agency design, they have no

bearing on the constitutional question before the Court, which—again—is whether the CFPB's for-cause removal protection unduly interferes with the President's authority to "hold[] his subordinates accountable." *Free Enterprise Fund*, 561 U.S. at 496.

Second, the Solicitor General asserts that what he calls the "justification for independence"—"promoting continuity and expertise"—"does not apply to a single-headed agency." Br. 28. But that argument improperly seeks to transform a *policy* "justification for independence" into a constitutional requirement. And in any event, promoting continuity on multi-member bodies is far from the only reason why Congress may determine that "a degree of independence . . . is necessary to the proper functioning of [an] agency." *Morrison*, 487 U.S. at 691 n.30. Congress has, for example, concluded that some insulation from politics is appropriate for officers charged with setting the Nation's interest rates, ensuring the fairness of its markets, and adjudicating all manner of individual cases. That justification applies equally whether the officer acts alone or as part of a group.

Third, the Solicitor General asserts that the holding of *Humphrey's Executor* applies only to multi-member agencies. Br. 30-32. But this Court articulated no such limit. *See Humphrey's Executor*, 295 U.S. at 626-32. And as the Court-appointed amicus demonstrates, the Court's subsequent decision in *Morrison* forecloses any argument that *Humphrey's Executor* is limited to multi-member bodies. Br. 42-44; *see Morrison*, 487 U.S. at 688-93.

Finally, petitioner and the Solicitor General assert that the combination of a for-cause removal

protection with a single-director structure is suspect because it is "novel." Petr. Br. 22-24; SG Br. 32-35. But that combination has existed for decades. Congress gave the head of the Office of Special Counsel for-cause removal protection more than forty years ago. Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122. The Social Security Administration and the Federal Housing Finance Agency also combine these characteristics. *ACUS Sourcebook* 48-49.

More fundamentally, this Court has instructed that "[o]ur constitutional principles of separated powers are not violated . . . by mere anomaly or innovation." *Mistretta v. United States*, 488 U.S. 361, 385 (1989). Instead, novelty is a potential red flag only if it aggravates the relevant constitutional concern—here, interference with the President's ability to oversee the Executive Branch. And on that score, the supposed novelty works the opposite effect, giving the President *more* control over the CFPB than over its multi-member counterparts.

III. There is no basis for overruling this Court's precedents upholding independent agencies.

Beyond seeking to distinguish the CFPB's removal protection from the equivalent provisions this Court has long approved, petitioner also urges the Court to overrule those precedents and hold that *all* principal officers must be removable by the President at will. Br. 31-34. That radical proposal is not supported by the constitutional text or structure, and it is contrary to the practical construction of the Constitution reflected in dozens of statutes enacted over more than a century. Petitioner provides no

basis for upsetting that settled understanding—much less the sort of compelling reasons that would be required to justify overruling foundational precedents on which Congress has relied so pervasively in structuring the Nation's government.[6]

1. Aside from impeachment, "[t]he Constitution is silent with respect to the power of removal from office." *Ex parte Hennen*, 38 U.S. 230, 258 (1839). The issue "was not discussed in the Constitutional Convention," *Myers*, 272 U.S. at 109-10, and it was the subject of widely varying views in the years following ratification, *see, e.g.*, 3 Joseph Story, *Commentaries on the Constitution of the United States* §§ 1532-37, at 390-95 (1833) (Story). Absent governing text or a settled Framing-era understanding, the contours of the removal power have instead been defined through "the practical construction of the Constitution" by the political branches. *Hennen*, 38 U.S. at 259. That practical construction confirms the validity of the traditional removal protection for independent agencies.

a. Congress first examined removal in the "Decision of 1789," which considered "whether the removal [of the Secretary of Foreign Affairs] was to be by the President alone, or with the concurrence of the Senate." *Hennen*, 38 U.S. at 259. The issue

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[6] The Solicitor General's position is more modest. He asserts that the Court should overrule *Humphrey's Executor* "to the extent it would apply to the CFPB" (Br. 45). Perhaps recognizing the decades of reliance on that decision, however, he does *not* argue that it should be overruled entirely, or that all independent agencies are invalid.

sparked a vigorous debate in the House, with some representatives (led by James Madison) arguing that the Constitution vests removal power in the President; others maintaining that the Constitution requires the advice and consent of the Senate; and still others arguing that Congress may allocate the removal power as it sees fit. *See* David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801*, at 36-41 (1997) (Currie).

The House ultimately adopted language presuming that the President could remove the Secretary without Senate consent—though it is unclear how many of those who voted for that language believed that the power was conferred upon the President by the Constitution and how many thought it was properly granted to him by Congress. Currie 40-41. That language then passed the Senate by the barest of margins, with Vice President Adams casting the tie-breaking vote. *Id.* at 41 & n.243.

Despite the close vote and ambiguous nature of the debates, the Decision of 1789 has long been regarded as a "legislative construction of the constitution" that is authoritative because it has been "acquiesced in and acted upon" by the political branches. 1 James Kent, *Commentaries on American Law* 310 (2d ed. 1832); *see* Story § 1537, at 394-95. This Court has thus held that the Decision of 1789 conclusively determined that Congress may not arrogate to itself any role in removals. *See Bowsher*, 478 U.S. at 723.

b. Petitioner and the Solicitor General ask this Court to read the Decision of 1789 far more broadly, to establish that Congress can never impose *any* limit on removal. But as the Court has emphasized, a

statute authorizing "direct congressional involvement over the decision to remove" is "nothing like" a statute providing that an officer is "removable by the President for specified causes." *Bowsher*, 478 U.S. at 725 n.4. The Decision of 1789 did not address such modest removal protections. And it cannot plausibly be understood to have prohibited them by silent implication—particularly because they are not subject to either of Madison's main objections to a direct Senate role in removals.

First, Madison and his allies emphasized that the power to remove officers charged with executing the laws cannot be vested in the Senate because it "is of an Executive nature." 1 Annals of Cong. 464 (1789) (Madison). But unlike direct Senate involvement, a for-cause removal protection neither "mingl[es] the powers of the President and Senate," *id.* at 557 (Baldwin), nor gives Congress any "agency in the Executive business," *id.* at 572 (Vining).

Second, Madison argued that if an officer "is not to depend upon the President for his official existence, but upon a distinct body"—the Senate—the President would be unable to "take care that the laws be faithfully executed." 1 Annals of Cong. at 496-97. A for-cause removal protection, in contrast, leaves the covered officer dependent on the President for her continuation in office and thus preserves the President's "control over the execution of the laws." *Bowsher*, 478 U.S. at 726.

c. Nor have the political branches understood the Decision of 1789 to have the sweeping implication petitioner and the Solicitor General now attribute to it. Since 1863, for example, the Comptroller of the Currency has been removable only if the President

sends the Senate "reasons" for the removal—a requirement that "without question constrains the President's removal power." *PHH*, 881 F.3d at 91-92. And since 1866, Congress has limited the President's ability to remove military officers during peacetime. Act of July 13, 1866, ch. 176, § 5 14 Stat. 92; *see Blake v. United States*, 103 U.S. 227, 235-37 (1880).

As explained above, moreover, Congress has been conferring for-cause removal protection on the heads of independent agencies since it created the first modern regulatory agency in 1887. *See supra* p. 14. This Court confirmed the validity of those protections in *Humphrey's Executor*, and it has repeatedly reaffirmed that decision over the eighty-five years that followed. During that time, Congress has created more than two dozen agencies with explicit for-cause removal protections. *ACUS Sourcebook* 45-49. The statutes creating those agencies were enacted by twenty different Congresses and signed by twelve Presidents, Republicans and Democrats alike. For-cause removal protections thus reflect an established practice accepted by all three branches and deeply integrated into our governmental structure.

2. Such "traditional ways of conducting government give meaning to the Constitution." *Mistretta*, 488 U.S. at 401 (brackets and ellipsis omitted). Of course, tradition "cannot supplant the Constitution." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). But where, as here, neither the constitutional text nor any Framing-era understanding provides a clear answer, "the longstanding 'practice of the government' can inform [the Court's] determination of 'what the law is.'" *NLRB v. Noel*

Canning, 573 U.S. 513, 525 (2014) (citations omitted). And it is particularly appropriate to look to history in this area, which has long been governed by the "the practical construction of the Constitution" reflected in Congressional action. *Hennen*, 38 U.S. at 259.

Experience has, moreover, confirmed the soundness of the tradition of independent agencies. As the Nation's economy has grown ever larger and more complex, the Executive Branch has come to include officers whose duties call for a measure of independence. For example, the Governors of the Federal Reserve oversee monetary policy and are insulated from politics both through fourteen-year terms and for-cause removal protection. 12 U.S.C. § 242. Those protections reflect a wise judgment that the Nation's monetary policy should not be driven—or be perceived to be driven—by a President's short-term political interests. Similar logic applies to other financial regulators like the SEC, FTC, and CFPB. And Congress has also deemed for-cause removal protections to be essential for a wide variety of Executive Branch bodies charged with adjudicating individual cases, including the Court of Appeals for the Armed Forces, *see Edmond v. United States*, 520 U.S. 651, 664 n.2 (1997), and the Merit Systems Protection Board, *see* 5 U.S.C. § 1202(d).

3. Even if this Court might consider deciding the issue differently were it writing on a clean slate, that would not justify overruling decades of precedent. "Overruling precedent is never a small matter." *Kimble v. Marvel Entmt., LLC*, 135 S. Ct. 2401, 2409 (2015). Before taking that step, this Court "demands special justification," not just an argument that the precedent was wrongly decided. *Gamble v. United*

States, 139 S. Ct. 1960, 1969 (2019) (citation omitted). And petitioner's criticisms of *Humphrey's Executor* do not remotely justify overruling multiple unanimous precedents that have not only proved workable, but have become deeply embedded in the structure of the government.

As this Court has emphasized, *stare decisis* has "special force when legislators or citizens 'have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations.'" *Hubbard v. United States*, 514 U.S. 695, 714 (1995) (citation omitted). Congress has repeatedly relied on *Humphrey's Executor* in creating independent agencies vested with a wide range of important regulatory, adjudicatory, and enforcement responsibilities. Those agencies were built on the understanding that their powers would be exercised by officials with a measure of independence. The Executive Branch, Congress, and the Judiciary have developed settled norms and understandings governing their work. Overruling *Humphrey's Executor* at this late date would upend those understandings and disrupt more than a century's worth of legislation reflecting Congress's considered judgment about how best to structure the Nation's government. If there were ever a case where reliance required adherence to precedent, it is this one.

CONCLUSION

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

Respectfully submitted,

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