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 OF *AMICI CURIAE* FINANCIAL REGULATION SCHOLARS IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici Peter Conti-Brown, Adam Levitin, and Patricia McCoy—three leading scholars of financial regulation—submit this brief to lend their expertise on the history and purpose of the Consumer Financial Protection Bureau's structure. They take no position on the question of severability. Their affiliations are listed in the appendix.

SUMMARY OF ARGUMENT

The Framers of the Constitution did not include a detailed list of administrative design features that would pass constitutional muster. Instead, the Constitution left those details for Congress to consider—an invitation that the legislature accepted with relish. In the subsequent 230 years, Congress has experimented with a wide variety of institutional design features that matched the politics of the enacting coalition with the policy goals it sought to accomplish.

Congress's authority to experiment is not unlimited. The Court has previously identified certain principles that shape the boundaries of constitutionally acceptable agency structure. The touchstone principle for agency design is "accountability," because the authority that agencies exercise—be it executive, legislative, or adjudicative—is derivative of the three branches of government.

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[1] This brief was not authored in whole or in part by counsel for a party and no one other than amici curiae and their counsel made a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief; letters of consent have been lodged with the Clerk.

With those principles in mind, Congress has continuously experimented with the design of administrative agencies, sometimes learning from past disappointments, sometimes adapting features to the particular policy concerns at hand. It is an ongoing and iterative process; as a result, there is no single paradigmatic agency. Instead, different agencies achieve sufficient accountability through various combinations of features.

Petitioner seeks to petrify the administrative state by requiring agencies to conform to one of two paradigms: Either the head of the agency must be removable at will by the President or the agency must be structured as a multimember commission. But there is no basis to believe that commissions foster accountability. This wooden one-or-the-other requirement has no connection to either the constitutional text or the principle of accountability.

Accountability must be analyzed holistically, on the sum of an agency's features, and not merely on removal status or the number of Senate-confirmed appointees. Viewed holistically, the Consumer Financial Protection Bureau (CFPB) is a highly accountable agency, designed to be insulated both from (1) specific kinds of political manipulations that Congress has deemed harmful to its policy goals and (2) "regulatory capture," or the concern that regulators become mere instruments of industry rather than the government. The CFPB boasts a new combination of agency features that reflect both Congress's concern about regulatory capture undermining agency accountability *and* a longstanding concern about the particular dangers that flow from direct presidential control over financial regulatory policy.

The CFPB's structure is a permissible example of how Congress—learning from what works in regulatory agencies—can design a system that enhances rather than diminishes accountability. To the extent that this case raises separation-of-powers concerns, it is through Petitioner's invitation to this Court to usurp Congress's role as the Constitution's chief designer of the institutions of government. Petitioner's request would calcify the acceptable set of agency designs and assign to the Court the never-ending role of evaluating every facet of congressional experimentation any time a regulator reached a conclusion that a regulated entity opposed. The Court must reject Petitioner's invitation.

The present lack of controversy exposes some of the risks of doing otherwise. The President has not attempted to remove the CFPB Director. There is no record before the Court about what such a removal attempt would look like and whether Congress's requirement of "cause" before the President could do so breaches constitutional limits. As Judge Griffith's concurring opinion in a related case indicates, there is no consensus about what "cause[]" even means. *PHH Corp. v. CFPB*, 881 F.3d 75, 126 (D.C. Cir. 2018) (en banc) (Griffith, J., concurring). Because of this uncertainty, this Court should dismiss certiorari as improvidently granted and await a genuine controversy regarding the limits of for-cause removability.

Should the Court not dismiss the case, there are two alternatives that will respect Congress's constitutional role as the legislative designer of federal administration. First, it can acknowledge that the many accountability-enhancing mechanisms that Congress attached to the CFPB bring it well within the constitutional mainstream and affirm the circuit court's opinion. Second, it can remand the case for further review of these accountability-enhancing mechanisms. A holistic review of the

CFPB's structure will reveal the constitutional logic of Congress's design. That record is not currently before the Court, and a remand would permit further review of these design features. What the Court should not do is accept Petitioner's invitation to depart from the judicial lane and usurp Congress's constitutional authority.

ARGUMENT

I. Institutional design is a highly political and legislative function.

The Constitution grants substantial authority to Congress to design the institutions that exercise federal governmental power. Petitioner asks this Court to circumscribe that authority by eliminating single-director agencies with for-cause protection. The Court should decline: Doing so would place judges in the inappropriately activist position of substituting their judgment for that of legislators in areas where policy—and politics—must prevail. Petitioner's request would freeze the administrative state in a set of historically contingent institutional arrangements that are unmoored to any constitutional text, unsupported by any scholarly theory of organizational design, and incapable of guaranteeing agency accountability.

A. The Constitution vests Congress with broad authority to design agencies.

The power of institutional design derives primarily from Article I's Vesting Clause: "All legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. Art. I § 1. The scope of this provision is mostly limited by Congress's enumerated powers, but the Constitution provides more specific authorization of power—and limits on that power—in Article II's Appointments Clause, *id.* Art. II § 2 cl. 2. The Appointments Clause outlines who shall exercise governmental authority and through what process of appointment. Despite the Appointments Clause's inclusion in Article II, the Constitution gives Congress a primary role in exercising that power: it is Congress's authority to "establish[] by law" all "Officers of the United States, whose Appointments are not . . . otherwise provided for" in the Constitution itself and to "vest the Appointment of such inferior Officers, as [Congress] think[s] proper." *Id.* The President's role is to "appoint" officers of the United States "by and with the Advice and Consent of the Senate." *Id.*

Beyond the text of the Constitution itself, this Court has also concluded that Congress's expansive authority to engage in institutional design is limited by general principles of separation of powers. That is, Congress may not restrict the President's executive authority unduly by creating institutions that are insufficiently connected to the President. The public must have "a clear and effective chain of command" between the institutions of Congress's design and the President. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 498 (2010). Besides the Appointments Clause and general principles of separation of powers, Congress's authority to design the institutions that will carry out governmental policy is limited essentially only by its own enumerated powers.

While the Constitution requires a sufficient modicum of accountability from regulatory agencies, it never specifies how this accountability may be achieved. Contrary to Petitioner's contention that it requires either at-will removal or a multimember commission structure, the accountability analysis must be holistic and consider the totality of an agency's features. The presence of one feature may offset another. Indeed, substantial variation in agency structure already exists among agencies with for-cause removal protection—without raising general questions of constitutional validity.

B. Congress has constantly experimented with agency design.

From the Founding to the present, Congress has engaged in near constant experimentation with its substantial authority to design institutions of government. Take the Bank of the United States, one of the first instances of institutional design, which passed the First Congress at the behest of Alexander Hamilton. Congress endowed the Bank with important institutional details: that the President would appoint "not less than three" superintendents to oversee the bank's initial capitalization, Act of Feb. 25, 1791, ch. 10, § 1, 1 Stat. 191, 191-92 (amended 1791); that the Bank would have a president appointed by twenty-five directors, *id.* § 7; and that the directors would have a highly specific voting system, *id.* From an institutional design perspective, the Bank of the United States was highly specified.

That novelty continued throughout the 19th century and beyond. The original Congress also created a customs service, a mint, a naval department, and the great departments of State, Treasury, the Attorney General, and many others. The watchword for the original Congress and for its successors was the same: how to manage the vast apparatus that would govern this new nation? Congress has responded to the call with true democratic experimentalism, striking out in multiple directions over history. *See* Jerry Mashaw, *Creating The Administrative Constitution* 34-35 (2012).

In other words, novelty is not a constitutional enemy of the administrative state, but a constitutional invitation that Congress has accepted for over two centuries. Institutions are designed in response to specific policy problems, and nearly every effort to design relevant institutions is novel because of those unique circumstances. There is no off-the-shelf approach to the institutional design of the administrative state. Each institution—from the Federal Reserve System to the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC) to the Federal Housing Finance Agency (FHFA)—has its own bespoke design. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769 (2012).

The freedom to experiment when designing the government is more than a policy choice by the Framers. It also reflects the reality that institutional design is a highly political process. The politics of the day determine which design features will attract support from enacting coalitions. The President has a role to play here, too: When design features are not to his liking, he may veto the sponsoring legislation and send it back to the Congress to change the institution's design, override his veto, or abandon the effort.

This is not to say that the President's ability to supervise the executive and "take Care that the Laws be faithfully executed," U.S. Const. Art. II § 3, does not matter in assessing Congress's institutional design. It only means that the judiciary must not fetishize only one feature of institutional design among so many. The Constitution grants the legislative power to Congress, and invites experimentation when designing the administrative state. While that experimentation has some limits in the Appointments Clause and in ensuring that Congress does not encroach on executive authority, this Court has held for eighty years that requiring a good reason to fire the head of an agency that exercises substantial legislative and adjudicative functions is not such an encroachment. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). This case presents that same, long-answered question over again. There is no reason for the Court to undertake the radical step of undermining the administrative state that Congress built in reliance on past precedent.

C. Congress regularly revisits and amends institutional design.

Congress has not only used its expansive authority to design the structure of administrative government—it has also exercised oversight of those structures. While the separation of powers prevents Congress from usurping executive authority, evaluating the performance of administrative agencies and adjusting their institutional design in the face of changing politics and policy is also an important aspect of constitutional accountability over the administrative state.

Examples of legislation that adjust agency design are legion. Congress creates agencies, Congress alters them, and Congress eliminates them. It is an oft-repeated myth that "[o]nce an agency is established, its resources favor its own survival," and it persists in immortality. Theodore J. Lowi, *The End of Liberalism* 309 (1979). Yet Congress terminated more than half of administrative agencies between 1946 and 1997. David E. Lewis, *The Politics of Agency Termination: Confronting the Myth of Agency Immortality*, 64 J. Politics 89, 90 (2002).

Congress also amends existing institutions by altering their design. Two examples from financial regulation are worth highlighting because their unique institutional structures are comparable to the CFPB: the Federal Reserve System and the regulation of federal thrifts.

1. *Congress and the Federal Reserve.* The Federal Reserve System was created in 1913 as an answer to longstanding concerns about the fragility of the U.S. financial system. Peter Conti-Brown, *The Power and Independence of the Federal Reserve* 15-24 (2016). Originally, Congress created the "Federal Reserve System" to include a variety of administrative bodies, including: twelve Federal Reserve Banks, quasi-private institutions led by a "Governor" appointed by a board of directors with only tangential participation by politicians, Federal Reserve Act, Pub. L. 63-43, § 2, 38 Stat. 251 (1913); a "Federal Reserve Board," chaired by the Secretary of the Treasury and with members appointed under the Appointments Clause, including the Comptroller of the Currency, *id.* § 10; and the Federal Advisory Council, or group of twelve private individuals selected by each Federal Reserve Bank to advise the Federal Reserve Board, *id.* § 12.

Initially, Congress felt satisfied with this design, although it added a member to the Federal Reserve Board in 1922. But in 1933 and especially in 1935, Congress substantially reorganized the system, largely to address concerns that the Fed had mishandled the Great Depression. It added a new agency, the Federal Open Market Committee, to coordinate monetary policy. It abolished the Federal Reserve Board and organized in its place the "Board of Governors of the Federal Reserve System." It created the modern structure of a Fed Chair and Vice Chair, while removing the President's representative from the Board.

Congress has sustained near-constant attention to the Fed in the interim, making substantial changes to its authorities (such as adding holding-company supervision to its duties in 1956) and structure (such as adding a second Vice Chair with responsibilities for bank supervision in 2010).

2. *The supervision of federal thrifts.* Another example is Congress's approach to overseeing a special set of financial institutions that started as a creature of state law in the late 19th century: the building and loan association. Beginning in 1933, the Homeowners Refinancing Act created a federal charter for federal savings-and-loan associations. These would be overseen by two new federal entities: a regional Federal Home Loan Bank, overseen by a Chief Executive and board of directors, and a multimember agency, the Federal Home Loan Bank Board (created in 1932 by the Federal Home Loan Bank Act). The Board was a five-member commission with a bipartisan balancing requirement. Pub. L. 72-304, 47 Stat. 725, 736-37 (1932).

After the 1980s "savings and loan" crisis, Congress further changed the institutional design of thrift charter and supervision by abolishing the Federal Home Loan Bank Board and replacing it with the Office of Thrift Supervision (OTS). Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, §§ 301, 401, 103 Stat. 183 (1989). OTS was "an office of the Treasury" and "subject to the general oversight of the Secretary of the Treasury," but the Secretary could not interfere with OTS affairs at will. *See* 12 U.S.C. § 1462a (1989) ("The Secretary of the Treasury may not intervene in any matter or proceeding before the Director unless otherwise provided by law.").

Although OTS was designed to prevent future crises, Congress determined that OTS's performance before the 2008 crisis was a failure. Kathleen C. Engel & Patricia A.

McCoy, *The Subprime Virus* 174-84 (2011). In 2010, Congress abolished OTS and placed most its functions within the Office of the Comptroller of the Currency (OCC), with some going to the CFPB. 12 U.S.C. § 5412.

These examples illustrate how attentive Congress is to its ongoing authority to redesign institutions of government to remain politically accountable. It is simply not the case that Congress creates institutions that continue to exist without accountability. Given how dynamic this process is, the Petitioner's appropriate avenue to change the CFPB is Congress, not the courts.

II. Congress has many routes for designing constitutionally accountable agencies.

A. Federal agencies reflect tremendous diversity in design.

There is substantial variation in federal agency structure, and there is no single paradigmatic agency. For example, some agencies are headed by a single director; others are led by multimember bodies. One study found that thirty-nine have single directors, while forty-three are multimember commissions. Datla & Revesz, *Deconstructing,* at 784. Examples of the former include the CFPB, the FHFA, the Social Security Administration (SSA), and the OCC. Each head has a fixed term and may be removed by the President for cause. 12 U.S.C. §§ 2 (OCC), 5491(c) (CFPB), 4512(b)(2) (FHFA); 42 U.S.C. § 902 (SSA) .

Among commissions, wide variation exists as to the number of members. Some have three members (e.g., National Credit Union Administration (NCUA), 12 U.S.C. § 1752a), some five (e.g., Commodity Futures Trading Commission (CFTC), 7 U.S.C. § 2(a)(2)), some seven (e.g., Board of Governors of the Federal Reserve

(FRB), 12 U.S.C. § 242), and some eleven (e.g., the Postal Service, 39 U.S.C. § 202(a)).

Among those agencies with boards, Congress has also varied membership requirements, by including party-affiliation requirements (e.g., SEC, 15 U.S.C. § 78d(a)) and varying lengths of terms (e.g., fourteen years for the FRB, 12 U.S.C. § 242; six years for NCUA, 7 U.S.C. § 2(a)(2)(A)(ii)).

Agencies also have different removal protections for their leaders. The statute governing the CFTC, for instance, does not expressly prohibit at-will removal. 7 U.S.C. § 2(a)(2). By contrast, Congress included some forms of explicit removal protection for other agencies, including the FRB, 12 U.S.C. § 242, and the FHFA, 12 U.S.C. § 4512(b)(2), among others.

Agencies also differ in other key respects, including how they are funded. Some agencies, like the SEC, receive funding primarily through congressional appropriations. Henry B. Hogue et al., Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 25 (2017). Others, like the OCC, are funded primarily by fees from regulated entities. *Id.* at 27-28. The Federal Deposit Insurance Corporation (FDIC) generates income through deposit insurance premiums, while the FRB derives its income primarily from securities purchased in the conduct of monetary policy. None is subject to congressional appropriations. *Id.*

The design variations are myriad. Some agencies are "nested" within other agencies, like the Federal Bureau of Investigation, 28 U.S.C. § 531, and the OCC, 12 U.S.C. § 1. Others exist as public-private hybrids, like Amtrak, 49 U.S.C. § 24301-02, and the Federal Open Market Committee, 12 U.S.C. § 263.

As these examples demonstrate, there is no standard paradigm of agency structure. The variation in agency structure reflects a long history of congressional experimentation, as the Constitution permits. The structure of independent agencies is not set in stone—nor should it be.

B. No single feature of an agency's design determines agency accountability.

The features examined above all affect the degree of agency insulation from presidential or partisan control. But few would urge the Court to cast in constitutional amber any one of these idiosyncratic policy choices. The Constitution assigns those choices to Congress to make, which it does in the context of particular agencies. The impact of Congress's choices must be viewed holistically in the context of all of an agency's features (not limited to those discussed above). No feature in isolation says anything about the agency's overall constitutional accountability. Some features may lessen accountability, but may be offset by other features that foster it. A holistic analysis is required to determine whether Congress's implementation of the Constitution's expansive invitation to experiment has usurped presidential authority. As explained below, the CFPB is not close to such a usurpation.

C. Multimember commissions represent only one policy option for Congress; the Court should not fetishize them.

The lack of any constitutional text addressing the minimum features necessary for agency accountability makes claims that agencies must all conform to litmus features all the more peculiar. *See, e.g.,* Brief for Separation of Powers Scholars in Support of Petitioner 21-22.

Nor does the Court's past precedent create grounds for such an artificial constraint upon Congress's Article I power to design agencies. Scholars supporting Petitioner argue that:

> if the exception to the presidential removal power is to apply, it can only apply when all the factors supplied by the Court in *Humphrey's Executor* are present. That includes a multimember body of "experts" from different political parties who are to be "nonpartisan" and act "impartially."

Id. at 22. Yet *Humphrey's Executor* is in no way tied to these factors. The Federal Trade Commission Act did not mandate commissioner expertise or nonpartisanship or impartiality. Instead, *Humphrey's Executor* stands on a separation of powers principle: that Congress in protection of its own legislative authority may reasonably limit the presidential removal power for agencies like the Federal Trade Commission (FTC) (and the CFPB) that exercise substantial legislative and adjudicative powers. 295 U.S. at 627-630.

The fetishizing of commissions ignores the adjudicative origins of commission structures, which may not be well-suited for rulemaking bodies. Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 Admin. L. Rev. 719, 755-58 (2019). More critically, the valorization of commissions misses that the fact that structuring an agency as a commission says nothing about the agency's overall constitutional accountability. The decision to put a multimember structure at the top of an agency is only part of the political and policy calculus in agency design and says little about an agency's insulation, politicization, or efficiency. Standing alone, the mere fact that an agency is a multimember commission is simply uninformative about accountability. There are numerous reasons to question whether multimember commissions foster accountability. *Id.* at 735-55.

Some scholars and judges have argued that multimember commissions foster collegial decision-making, deliberation, and compromise. They do not. Commissions do not reliably produce compromise or check extreme policy positions. This is true for several reasons: partisan composition, quorum rules, horse-trading, and restrictions on private group deliberations by commissioners.

In reality, the partisan majority of a bipartisan commission can usually out-vote the majority. While a new president cannot immediately overhaul a commission upon taking office, "presidents have been able to obtain majorities for their party on independent commissions within 13-14 months after taking office from a prior President of a different party." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 38 (2010). Further, a partisan requirement does not guarantee policy stability. Empirical evidence suggests that multimember agencies can be partisan and unbalanced in their decision-making, and that "during periods of divided government, partisan-line voting increases and members in the minority dissent more." Datla & Revesz, *Deconstructing,* at 796.

Some commentators assert that accountability derives from gaining the support of a bare majority of commission members. But because of majority rule, commission structures are unlikely to be a meaningful check on abuse of power. A real check on independent agency overreach is judicial review of agency actions for arbitrary and capricious behavior—not a commission structure. Indeed, were it otherwise, courts would never have cause to strike down the actions of commissions as arbitrary and capricious.

Commissions all have quorum requirements, but they are frequently created through agency regulation rather than by statute. Absent a statute or rule requiring multiple members for a quorum, even a nominally multimember commission could function with just one appointed member. Thus, "[i]n the absence of a statutory requirement to the contrary, a five-person agency with a three-person quorum can make decisions on a 2–1 basis or even a 3–0 basis—potentially undermining the existence of ideological diversity among the members." Sitaraman & Dobkin, *The Choice,* at 748.

This is hardly speculative. Term expirations, resignations, disability, and death can all leave commissions short-handed because the Federal Vacancies Reform Act does not apply to independent commissions. 5 U.S.C. § 3349c(1). Indeed, the average tenure of a political appointee is only two-and-a-half years. James P. Pfiffner et al., *Strong Executive Branch Leadership Crucial for Policy Implementation*, Pub. Manager, Winter 2012, at 37, 38 (2012). This has prevented some commissions, such as the National Labor Relations Board, from making collective decisions for lack of a quorum. *See, e.g., Hosp. of Barstow, Inc. v. NLRB*, 820 F.3d 440, 441 (D.C. Cir. 2016). A multimember commission is no guarantee of compromise when the commission cannot muster a quorum.

Commissions also provide no guarantee against extreme policy positions given the possibility of horse-trading among members. In the jargon of game theory, commissions don't operate as single-stage, one-shot games, but as multi-stage, repeat games. This opens the door to complex deal-making—a commission member might trade her vote on one issue in exchange for a vote on another. Thus, instead of two moderate outcomes, a commission could also produce two (disparate) extreme policy results. Barkow, *Insulating Agencies*, at 20.

The idea that commissions foster compromise also ignores the Government in Sunshine Act, which requires that discussions among more than two commissioners be held in public. 5 U.S.C. § 552b(b). This open-meeting requirement effectively precludes frank and deliberative discussion among members and impedes negotiated compromises. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 595 (1984); Sitaraman & Dobkin, *The Choice*, at 745-47.

In short, a multimember commission—one of the two agency structures that Petitioner believes is constitutionally permissible—has no necessary connection with accountability. The proper inquiry is not whether an agency has a particular feature—an at-will removal or commission structure—but whether the sum total of all of its features, taken together, make it sufficiently accountable. The CFPB readily does. While the CFPB has a unique constellation of regulatory design features, they reflect thinking about how to minimize regulatory capture and how to protect against presidential manipulation of the economy for short-term political gain.

III. The CFPB is subject to numerous accountability mechanisms.

A. Accountability concerns animated the CFPB's design.

1. ***The CFPB was created in response to the lack of accountability of other agencies for consumer financial protection.*** The legislative history shows that Congress's central concern in creating the CFPB was to ensure

public accountability in overseeing consumer-financial protection. Before the CFPB's creation, consumer financial protection had been fragmented among a dozen federal agencies: five bank regulators, the FTC, the FHFA, the Internal Revenue Service, and the Departments of Defense, Education, Housing and Urban Development, and Veterans Affairs. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Ann. Rev. Banking & Fin. Services L. 321, 327-28 (2013). This diffusion of consumer financial protection meant that no single agency bore responsibility for regulating core consumer financial markets like deposits, mortgages, credit cards, auto loans, payday loans, and debt collection.

In the wake of the 2008 financial crisis, some of these agencies were perceived as having been "asleep at the wheel" in part because of structural problems that made consumer financial protection subordinate to the agencies' other missions as well as some agencies beholden to the financial services industry for their funding. *See* Engel & McCoy, *Subprime Virus*, at 151-223; Levitin, *The CFPB*, at 328-34. These concerns animated the creation of the CFPB, which consolidated the consumer financial protection mission in a single agency, equipped with adequate statutory authority and independent funding.

2. *Congress was particularly concerned about regulatory capture.* In designing the CFPB, Congress was concerned about a particular accountability problem—"regulatory capture"—in which agencies favor the interests of regulated industries over those of the public. Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 Harv. L. Rev. 1991, 2042 (2014). Capture concerns were expressly mentioned in a Treasury white paper setting out the Obama Administration's reasons for creating the CFPB, which argued that the wrong funding structure could "lead to regulatory capture." U.S. Dep't of the Treasury, *Financial Regulatory Reform: A New Foundation* 29 (2009). The paper accordingly proposed that the CFPB be "an independent agency with stable, robust funding" that is not subject to appropriations. *Id.* at 14. The need to devise a structure immune from regulatory capture informed Congress's design of the CFPB.

3. ***The CFPB's design reflects a concern about regulatory capture.*** The regulatory-capture concern is reflected most notably in three key features of the CFPB's design: non-appropriated funding; a for-cause removal standard; and a single director. Regulatory capture operates in many ways, but a key mechanism is through agency funding. Agencies that are dependent on regulated industries for funding may seek to curry favor with their regulatory charges. This dynamic was a major criticism of various federal bank regulators before Dodd-Frank. For example, the OCC and the OTS were both funded by the institutions they regulated. They attempted to win charters by engaging in a race to the bottom on consumer protection and other regulatory oversight. Levitin, *The CFPB*.

Relatedly, regulated industries are likely to bring concentrated political pressure to bear on the White House to influence an agency whose head is subject to at-will removal, in order to adjust policy in favor of the industry. The CFPB's for-cause removal standard is designed to shield against such favoritism.

The CFPB's single-director structure also reflects a concern about capture. Earlier proposals for the CFPB contemplated a bipartisan commission or a non-partisan board. During the legislative process, Congress ultimately decided on a single-director structure precisely to enhance agency accountability. With one director, it is clear who is responsible for the agency's actions: The colloquial buck stops with that one person. In contrast, multimember commissions diffuse accountability, allowing members to point fingers at each other and plead the necessity of cutting deals as ways of shirking accountability.

A single-director structure also protects against capture by preventing regulated industries from using quorum requirements to hold up agency action. Regulated industries can paralyze commissions from acting by exerting political pressure to delay or hold up confirmation of enough members to permit a quorum. A single-director structure is less vulnerable to this sort of delay because when there is a vacancy, its organic statute or the Vacancies Reform Act provides for it to be filled without congressional action, thereby enabling the agency to continue exercising its full powers.

Finally, the single-director structure made it easier to launch the CFPB. It took a substantial amount of time for the Senate to confirm the CFPB's first Director. It is far easier to confirm a single director than to confirm multiple commission members. In the contemporary political environment, a single-director structure was essential for making sure that the CFPB could commence operations in a timely fashion, thereby ensuring that the agency would be accountable to Congress in fulfilling its policy mission.

B. The CFPB is subject to a battery of accountability measures.

Congress's deliberate choice in designing the CFPB to avoid capture does not mean that the agency was left unaccountable. Quite the opposite. The CFPB is "a unique package of agency checks and balances that does not track with pre-existing agency forms." Levitin, *Financial Regulation*, at 2057. It "represents an attempt to balance oversight with sufficient political insulation to avoid the problem of agency capture via internalization of legislative capture." *Id.*

The CFPB is subject to robust accountability mechanisms. They are carefully calibrated with broader policy objectives: Congress prioritized "programmatic accountability" to meet the "the substantive goals of consumer financial protection" over "accountability to current national political leaders." Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 Law and Contemp. Probs. 129, 148 (2015).

1. The CFPB is accountable to Congress and the President first and foremost through the oversight process. The CFPB Director is required to appear twice a year before the Senate Banking Committee and the House Committees on Financial Services and Energy and Commerce, 12 U.S.C. § 5496(a). In advance, the CFPB must submit to the Committees and the President a comprehensive report on topics ranging from regulatory obstacles and objectives to budgetary justifications, as well as analysis of past and anticipated agency actions. *Id.* § 5496(b)-(c). The CFPB is also subject to an annual audit by the Government Accountability Office, and full review by the Federal Reserve's Inspector General. *Id.* § 5496a; 5 U.S.C. App. § 8G(a)(2). Congress can, of course,

undertake additional oversight of the CFPB, and Congress has been anything but lax in this regard. In its first five years, CFPB officials testified before Congress over sixty times and responded to numerous document requests. *See* CFPB, *Factsheet: Consumer Financial Protection Bureau By the Numbers* (2016), http://bit.ly/2olQFUz.

2. Ultimately, if enough members of Congress do not approve of the CFPB's actions, they can reform the agency through legislation. Congressional oversight combined with the regular legislative process imposes a critical measure of accountability on the CFPB.

3. Some have argued that the CFPB is not subject to Congress's power of the purse because it is not subject to annual appropriations. That mistakes annual appropriations as Congress's sole means of exercising the power of the purse.

Congress does not control the budgets of any other federal bank regulator. It does not appropriate funds for the FRB, the OCC, the FDIC, the NCUA, or FHFA. Instead, these agencies by law all have their own independent revenue streams from chartering, insurance assessments, or earnings on their holdings, and set their own budgets independently from the President or Congress.

In contrast to all the other bank regulators, the CFPB's budget is capped by statute at 12% of the Federal Reserve System's fiscal year 2009 annual operating budget, subject to inflation adjustment. 12 U.S.C. § 5497. This generally puts a hard ceiling on the CFPB's activities. No such cap exists for any other non-appropriated federal financial regulator. In other words, Congress still exercises budgetary control over the CFPB—something it does not do for any other bank regulator.

More broadly, most federal spending today is not set through annual appropriations, but rather through a wide variety of permanent funding mechanisms. *See* Congressional Budget Office, The Budget and Economic Outlook: 2017 to 2027, at 12-14 (2017). It would be odd indeed if annual appropriations were now held to be a constitutional requirement for accountability.

4. Beyond being answerable to Congress through the legislative process and a capped budget, the CPFB is subject to a wide array of other accountability mechanisms. CFPB rulemakings—unlike those of any other regulator—are subject to veto by the Financial Stability Oversight Council. 12 U.S.C. § 5513. CFPB enforcement actions are subject to judicial review. *Id.* § 5563. Its rulemakings and adjudications are subject to the Administrative Procedure Act. 5 U.S.C. §§ 551-59. And lastly, the CFPB is subject to explicit statutory requirements to engage in cost-benefit analysis. *Id.* § 5512. Viewed holistically, then, the CFPB represents a constitutionally permissible and effective experiment in agency design.

IV. Congress insulates financial agencies including the CFPB from politics to ensure economic safety and stability.

Petitioner asks the Court to overrule *Humphrey's Executor* and cause all independent agency heads—single directors and multimember commissions alike—to serve at-will. Pet. Br. 3. Nothing in the text of the Constitution mandates such a result. Whatever the wisdom of such a structure generally, there are unique and overriding considerations for insulating financial regulators from at-will termination. If this Court invalidates for-cause removal, it will destroy one of Congress's most important policy tools in the regulation of the economy: forcing politicians and regulators to take a long-term view of the nation's economic, financial, and monetary stability. Without for-cause removal protection, the partisan and electoral disputes of the day will drive financial and monetary policy—a concern to which Congress has been attuned since the Founding—and Presidents would be free to threaten removal to stoke the economy for short-term political gain, at the expense of economic stability.

For-cause removal, especially in the realm of financial and economic regulation, is thus a key and enduring feature of congressional experimentation. It permits a balance between granting presidents the power of appointment and limiting a President bent on producing a short-term, unsustainable boom contra congressional policy. A constitutional ruling stripping financial regulators of for-cause protection would put the nation's economy at risk every election cycle and is inconsistent with the Constitutional purpose of "promot[ing] the general welfare."

A. Credit-fueled asset bubbles are the leading cause of financial crises.

When Presidents lean on financial regulators to bolster their political prospects, the result is primarily to loosen credit to fuel spending and a booming economy. As alluring as this temptation is, Congress has for decades opted to temper it because loosening credit can result in reckless lending that threatens financial stability. A short-term, but unsustainable credit-fueled asset bubble can result in a subsequent debilitating economic crash. History has shown that the worst financial crises for centuries have been caused by real estate bubbles financed by loose credit. Carmen M. Reinhart & Kenneth S. Rogoff, *This Time Is Different* xliv–xlv, 158–62

(2009). The 2008 financial crisis is the latest troubling reminder.

B. Financial regulators control key congressional priorities in lending and credit expansion

In part to ensure accountability and the decentralization of power throughout the administrative state, Congress has delegated the control of credit expansion to a variety of institutions, including the FRB, the SEC, and the CFPB. For this reason, federal financial regulators do not serve at the pleasure of the President, no matter the other details of agency structure. Hogue et al., *Independence of Federal Financial Regulators* 16-19 & tbl. 4.

1. ***Congress delegated monetary policy to the Federal Reserve.*** Monetary policy is the domain of the Federal Reserve System. By law, the Federal Reserve must conduct monetary policy "to promote . . . maximum employment, stable prices, and moderate long-term interest rates." 12 U.S.C. § 225a. Monetary policy addresses these objectives by managing the money supply and interest rates.

The Federal Reserve has several monetary tools at its disposal. Its main tool consists of moving the target for the federal funds rate (which is the interest rate that banks pay to borrow reserve balances overnight). The Federal Reserve moves this rate by purchasing and selling U.S. government securities through open market operations. FRB, *The Federal Reserve System—Purposes & Functions* 21-22 (10th ed. 2016).

To stimulate demand for goods and services, the Federal Reserve can cut the federal funds rate, causing short-term interest rates to fall and credit to expand. Conversely, if demand overheats, the Federal Reserve can ease inflationary pressures by raising that rate.

Since 2008, the Federal Reserve has added other monetary tools with the same objective: to stabilize demand and, with it, prices and employment. *Id.*

Cognizant of these stimulus powers, Presidents have incentives to pressure the Federal Reserve to cut interest rates to improve their political prospects. The Constitution grants the President important power to influence that policy through his appointment power, an ability that every President in the Fed's history has exercised. Conti-Brown, *Power and Independence,* at 185-87. But Congress restricts the President's influence over day-to-day monetary policy by protecting those presidential appointees from immediate dismissal. Without that protection, the Fed's autonomy to pursue Congress's objectives would be all but eliminated.

2. ***The White House can also push for lax credit by pressuring federal financial regulators.*** Monetary policy is just one area of economic policy that Congress has sought to insulate from the President's day-to-day influence over credit expansion. The President may also lean on a host of federal financial regulators to expand credit through deregulation of lending standards.

Over the years, Congress created multiple federal financial regulators and entrusted each with duties for the regulation of credit. Foremost are the three prudential bank regulators (the FRB, the FDIC and the OCC), who oversee the solvency of insured depository institutions. Keith R. Fisher, *Banking Law Manual: Federal Regulation of Financial Holding Companies, Banks and Thrifts* § 2.02[2][b][ii] (Matthew Bender, 2d ed. 2019). To safeguard solvency, all three regulators administer statutes and rules that affect the supply and terms of loans by banks and thrifts. These include lending limits and other credit regulations, capital adequacy requirements and liquidity standards. *Id.* §§ 6.03-6.05. The FRB has added responsibilities for credit regulation in supervising financial stability and depository institution holding companies. *Id.* §§ 2.03[3][c][iii], [v], 4.03, 4.07[6].

Other federal financial regulators exercise specialized oversight of consumer lending. The CFPB regulates market conduct for consumer finance and is the only federal agency that regulates the residential mortgage lending system in its entirety. Patricia A. McCoy & Susan M. Wachter, *The Macroprudential Implications of the Qualified Mortgage Debate*, 83 J. L. & Contemp. Probs. pt. VII (forthcoming 2020). The FTC and the CFPB share enforcement for consumer protection violations by nonbank lenders. Levitin, *The CFPB*, at 357, 361. Meanwhile, FHFA supervises the federal mortgage guarantors Fannie Mae and Freddie Mac. Fisher § 2.06[4]. In overseeing the mortgage market, these agencies affect the ease of obtaining mortgages and thus their supply. *See, e.g.*, McCoy & Wachter, *Macroprudential Implications,* pt. III; FHFA, 2018 Annual Report to Congress 6, 37-49 (2019).

Finally, capital markets regulators exert a critical effect on the supply of capital for lending. The SEC does so as the lead regulator for asset-backed securitizations and corporate debt issuances. The SEC and the CFTC also share oversight of credit default swaps, which protect bond investors from defaults. CFTC, *FY 2019 Agency Financial Report* 10, 12-13, 111 (2019); SEC, *The Regulatory Regime for Security-Based Swaps* 3 (2013).

In each case, Congress has balanced the constitutional requirement that the President take care that the laws are faithfully executed with the need to shield credit and monetary expansion from political interference. Protection from at-will termination has been Congress's preferred mechanism to achieve this balance for over a century. For-cause removal's impact on agency accountability does not depend on a multimember commission structure—multimember commissions do not inherently add anything to accountability and may in fact lessen it. Thus the firstborn of federal financial regulators, the OCC, has a single director with for-cause removal protection as well as additional statutory protection against political interference by the President. 12 U.S.C. §§ 1(b), 2.

In short, a ruling stripping the CFPB Director of for-cause protection could destabilize lending. A ruling overturning *Humphrey's Executor* would expose all federal financial regulators to the same disastrous pressure.

Concerns about presidential pressure on financial regulators to deregulate lending are by no means hypothetical. Over the last eighteen months, President Donald Trump has publicly blasted the Federal Reserve in interviews and on Twitter, including twenty-five times in the month of August. His criticism was exactly as Congress predicted: to slash interest rates to "ZERO, or less," criticizing Federal Reserve Chair Jerome Powell for his "naïveté . . ." Kate Davidson & Catherine Lucey, *Trump Says Fed Should Cut Rates to 'Zero, or Less,' Attacks Jerome Powell Again*, Wall St. J., Sept. 11, 2019; Howard Schneider*, 'Boneheads' no more? Fed's rate cuts appear to defuse Trump's Twitter rage*, Reuters, Dec. 12, 2019. President Trump has even reportedly considered removing Chairman Powell from his position because of dissatisfaction with Federal Reserve monetary policy, but concluded that Congress's for-cause removability protection for the Fed likely prevents him from doing so. Saleha Mohsin et al., *Trump Asked White*

House Lawyers for Options on Removing Powell, Bloomberg, June 18, 2019. This nation's history is replete with similar instances of presidential efforts to muscle financial regulators, reaching the same legal conclusion. Kevin Granville, *A President at War With His Fed Chief, 5 Decades Before Trump*, N.Y. Times, June 13, 2017 (discussing Lyndon Johnson's desire to fire Fed Chair William McChesney Martin). History is clear: Congress is closely attuned to the constitutional demands of presidential prerogatives of influencing policy through the appointment power while also insulating financial regulatory agencies from day-to-day political interference. For-cause removability protection is the center of that balancing act.

V. This case is not an appropriate vehicle for addressing whether "for cause" removal places a material limitation on the President's powers.

Congress maintains substantial political freedom to experiment with optimal agency design and the Constitution's text fails to provide any objective metric for evaluating the permissibility of Congress's choices in this instance. The Constitution no more petrifies the regulatory state in the form of multimember commissions than it precludes the regulatory state altogether. Moreover, financial regulatory agencies present unique concerns about manipulation by the President for his own political benefit that counsel for-cause removal insulation as a way of ensuring economic stability and the public welfare. Accordingly, Congress should have extra latitude regarding the design of financial regulatory agencies because presidential abuse could undermine the entire constitutional system by enabling a President to effectively "buy" elections through easy credit.

If the Court is still concerned whether the President has sufficient ability to supervise the CPFB, we would urge the Court to begin its inquiry as Judge Griffith did. *PHH Corp.*, 881 F.3d at 124. The initial inquiry must be: "How difficult is it for the President to remove the Director?" *Id.* To the extent that the Court determines that the statutory "for cause" removal standard in 12 U.S.C. § 5491(c)(3) does not present an impermissible obstacle to the President's duty to "take care that the laws be faithfully executed," there is no need to address the broader and perilous constitutional questions about whether for-cause removal is ever permitted or whether it is only permitted for multimember agencies. That modest approach is compelled by the doctrine of constitutional avoidance and by what the Chief Justice has called "the cardinal principal of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs, Inc. v. U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring).

While we believe that an inquiry beginning with the scope of the statutory provision is the proper route for the Court to pursue, and also believe that "for cause" removal is consistent with ensuring "faithful execution"—that is, good-faith performance—of the laws, this case does not provide a proper vehicle for determining the scope of "for cause" removal power because there is no case or controversy regarding the application of that clause. No attempt has been made by the President to remove the CFPB Director. Instead, this case is about the CFPB's ability to enforce a civil investigatory demand (not even signed by the Director) against a private entity that has no interest in whether the Director is in fact removable only for cause. While the scope of "for cause" dismissal is an important question, it is one that is depends on the specific statutory text and which should only be addressed when it is actually litigated. We therefore urge the Court to dismiss certiorari as improvidently granted and await a case where there is a genuine conflict between a President and an appointee about a statutory "for cause" removal provision.

If the Court does not dismiss this case, there are two alternative paths the Court may take to ensure that Congress retains its role as the Constitution's chief institutional designer of the administrative state. First, it may affirm the lower court's opinion, given the substantial accountability that the CFPB has to democratic and constitutional processes. Second, it may remand the case to the lower courts to render a holistic analysis of the design features of the CFPB. The Court should decline Petitioner's invitation to curtail Congress's constitutional authority to design the institutions of the federal government.

CONCLUSION

For these reasons, this Court should dismiss certiorari as improvidently granted. In the alternative, the Court should either hold that the CFPB's structure is constitutional or remand for further consideration.

Respectfully submitted,

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APPENDIX A
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