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 PROFESSORS MARTIN S. LEDERMAN AND DAVID C. VLADECK AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI CURIAE*[1]

Amici are professors at the Georgetown University Law Center who have for many years taught and written on constitutional law, including the relative powers of the President and Congress. Professor Lederman has served as Deputy Assistant Attorney General in the Department of Justice Office of Legal Counsel and Professor Vladeck has served as the Director of the Bureau of Consumer Protection at the Federal Trade Commission.

[1] Under Supreme Court Rule 37.6, amici state that no counsel for any party authored this brief in whole or in part, and no person other than amici made a monetary contribution to the preparation or submission of this brief. The parties have lodged letters with the Clerk granting blanket consent to the filing of amicus curiae briefs.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has never announced a "general rule" that Article II guarantees the President "unrestricted removal power over principal executive officers." Resp. Br. 12. Indeed, the principal case on which the Solicitor General relies, *Myers v. United States*, 272 U.S. 52 (1926), did not even address, let alone decide, whether and under what circumstances Congress may narrow the permissible grounds for such removals. By contrast, in a string of at least six cases, stretching from 1886 through 2010 (including four cases involving removal restrictions for "principal" officers), the Court has repeatedly confirmed that Congress generally may impose "inefficiency, neglect of duty, or malfeasance in office" (INM), or "for cause," limits on the President's removal authority.

As the Court has explained, Congress's power to impose such limits is not unlimited: There are three important constraints—but the removal provision in this case does not implicate any of them.

First, Congress may not reserve for itself or any of its components a part in the removal process.

Second, the President must retain at-will removal authority for those officials whose principal duties are to act as President's agents in the service of his own constitutional functions and other matters where the law assigns duties to the President himself. By contrast, where an officer's duties are to perform statutory functions Congress has assigned to that office, and where Congress has made clear—as it has with respect to the Director of the Consumer Finance

Protection Bureau—that the President may not control such officer's discretionary decision-making within the proper bounds of the statutory delegation, then that officer does *not* act as the President's "alter ego" and it is "not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who [are] removable at will." *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

Third, the statutory removal conditions must preserve the President's ability to "take care" the officers in question faithfully execute the law, *see* U.S. Const. Art. II, § 3. The Court has explained, however, that a removal provision such as the one at issue here satisfies that constitutional requirement because it ensures the President can remove an officer who violates the law, refuses to implement it, or abuses her authority.

There is, moreover, no reason based in text, original understandings, or constitutional history for the Court to reconsider, or to materially narrow, its decisions establishing Congress' power to insulate from presidential control the exercise of most statutory functions Congress assigns to "independent" agencies and officers. In particular, this Court has repeatedly rejected the "unitary executive" argument that would read the Executive Vesting Clause, Art. II, § 1, to guarantee the President the authority to personally execute all federal laws and the ancillary, indefeasible authority to direct other officials in their execution of such laws. That "extrapolation from general constitutional language . . . is more than the text will bear," *Morrison*, 487 U.S. at 690 n.29; it was flatly rejected in a series of Attorney General opinions in the Nineteenth Century; and it is inconsistent with common

practices reaching from the framing to the present day.

ARGUMENT

I. A long and unbroken line of this Court's decisions rejects a "general rule" that the President has an "unrestricted" and illimitable power to remove principal executive officers.

According to the Government, a pair of this Court's decisions establish the parameters of Congress' authority to regulate the President's removal power: In *Myers v. United States*, 272 U.S. 52 (1926), the Court purportedly established a "general rule" that Article II guarantees the President "unrestricted removal power over principal executive officers." Resp. Br. 12. And in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court announced "the only exception" to that rule, Resp. Br. at 18—namely, that Congress can limit the President's authority to remove members of a multi-member commission who are not "purely executive officers," 295 U.S. at 632, to cases involving "inefficiency, neglect of duty, or malfeasance in office," *id.* at 620 (quoting Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 718).

In the Government's telling, then, the question is whether this Court should "expand[]" the "*Humphrey's Executor* exception," Resp. Br. 26, to agencies such as the Consumer Finance Protection Bureau (CFPB), which is administered by a single Director whom the President may remove only for "inefficiency, neglect of duty, or malfeasance in office" (INM). 12 U.S.C. § 5491(c)(3).

The constitutionality of the CFPB removal provision does not depend, however, upon expanding any doctrinal "exception," both because *Myers* did not establish the Government's "general rule" and because the Government's account of this Court's jurisprudence is radically incomplete. In a series of at least a half-dozen cases, several of which post-date *Humphrey's Executor*, this Court has repeatedly reaffirmed Congress' broad power to restrict the grounds of removal for Executive officers, including Department heads, subject to important limits that the statute here, § 5491(c)(3), does not transgress.

A. The Limited Holding of *Myers*

Unlike § 5491(c)(3), the statute at issue in *Myers* did not regulate the grounds on which the President could remove a First-Class Postmaster. Rather, the issue was merely whether Congress could give the Senate an effective veto over such a removal decision—"whether . . . the President has the *exclusive* power of removing executive officers" who were presidentially appointed with Senate confirmation. 272 U.S. at 106 (emphasis added). The Court answered "no." "[T]he essence of the decision in *Myers*," this Court has repeatedly confirmed, "was the judgment that the Constitution prevents Congress from 'draw[ing] to itself . . . the power to remove or the right to participate in the exercise of that power.'" *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (quoting *Myers*, 272 U.S. at 261); *see also id.* at 687 n.24; *Humphrey's Executor*, 295 U.S. at 626.

The Court in *Myers* did not decide whether the President has an "unrestricted" power to remove principal executive officers at will (indeed, *Myers* did not even involve a principal officer) or whether Congress

can narrow the permissible grounds for such removals.

The source of the Solicitor General's alleged "general rule" is therefore not the holding or judgment in *Myers*, but a single five-sentence passage in Chief Justice Taft's 70-page opinion, *see* 272 U.S. at 135. "[B]y virtue of the general grant to him of the executive power" in Article II, Section 1, Taft wrote, the President may "properly supervise and guide" the conduct even of officers charged with "ordinary duties … prescribed by statute"—to decide whether such officers are "intelligently or wisely" exercising their statutory duties." *Id.* at 135. This alleged authority to exercise "administrative control" over such officers "in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone," Taft surmised, is a "strong reason[]," *id.*, why the President should have an "unrestricted" power to remove such officers, akin to his uncontested authority to remove the officers (e.g., the Secretaries of Defense and State) who assist him in performing his own constitutional functions, *id.* at 134.

These remarks were pure dicta, ranging far from the question the Court resolved in *Myers*. As the Court explained just nine years later, they were "beyond the point involved, and, therefore do not come within the rule of *stare decisis*." *Humphrey's Executor*, 295 U.S. at 626.

B. The Court's long line of cases upholding Congress' authority to enact removal conditions of this sort

More importantly, this Court has repeatedly repudiated the "unitary executive" rationale in that *Myers* paragraph by upholding removal restrictions that prevent the President from exercising absolute "administrative control" over officers' execution of their statutorily assigned functions.

Long before *Myers*, for instance, in *United States v. Perkins*, 116 U.S. 483 (1886), the Court unanimously rejected the Executive's argument that a law allowing peacetime removal of military and naval officers only pursuant to a sentence of a court-martial was an impermissible "infringement upon the constitutional prerogative of the Executive." *Id.* at 484. Under the holding in *Perkins*, if Congress had given the Postmaster General rather than the President the power to remove a First-Class Postmaster such as Frank Myers, it could have "restrict[ed] the power of removal as it deem[ed] best for the public interest," *id.* (adopting the reasoning of the Court of Claims)—even though such a statute would afford the President *less* control over such officers' conduct than one that imposed the very same removal restriction but left the removal power in the President's own hands. *Perkins* cannot be squared with Chief Justice Taft's dicta in *Myers*.

In *Humphrey's Executor* itself, in a unanimous decision joined by four of the six Justices in the *Myers* majority, the Court expressly "disapproved" Taft's "expressions," 295 U.S. at 626, and upheld a statute permitting the President to remove members of the Federal Trade Commission only for "inefficiency, neglect

of duty, or malfeasance in office"—the very standard at issue here.

It is true, as the Solicitor General notes (Resp. Br. 30-31), that one aspect of the *Humphrey's* Court's rationale—that the FTC Commissioners "occupie[d] no place in the executive department" and "exercise[d] no part of the executive power vested by the Constitution in the President," *id.* at 628—was inconsistent with earlier Court decisions describing similar functions as executive in nature. When this Court later re-affirmed the *holding* of *Humphrey's*, it acknowledged that the removal limit there was constitutional notwithstanding that the FTC Commissioners *were* in the "executive department" and exercised part of the "executive power" of the federal government. *Morrison*, 487 U.S. at 688-91 & n.28. "[O]ur present considered view," wrote Chief Justice Rehnquist, "is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Id.* at 689.

Although the *Morrison* Court thereby disclaimed one discrete piece of Justice Sutherland's reasoning, it unequivocally reaffirmed the most important aspect of *Humphrey's Executor*—namely, its ratification of Congress' effort to make the FTC "a body which shall be independent of executive authority *except in its selection,* and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." 295 U.S. at 625-26; *accord id.* at 628.

Wiener v. United States, 357 U.S. 349 (1958), another unanimous opinion, did likewise. To ensure that

the War Crimes Commission would be "'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress," *id.* at 355-56 (quoting *Humphrey's*, 295 U.S. at 629)—an objective directly at odds with Chief Justice Taft's "unitary executive" dicta—the Court proceeded to *imply* a form of tenure-protection that Congress had not expressly prescribed. Justice Frankfurter explained that such a guarantee was necessary precisely in order to "preclude[] the President from influencing the Commission" in the performance of its statutory functions, *id.* at 356, notwithstanding that the Commissioners' functions are, from a constitutional perspective, an exercise of the government's "executive power."

In *Bowsher v. Synar*, 478 U.S. 714 (1986), the Executive Branch once again urged this Court to adopt a variant of Chief Justice Taft's unitary executive theory, but the Court "clearly" refused to accept it. *Morrison*, 487 U.S. at 689 n.26 (citing *Bowsher*, 478 at 738-39 & nn. 1-3 (White, J., dissenting); *see also* Kevin M. Stack, *The Story of Morrison v. Olson: The Independent Counsel and Independent Agencies in Watergate's Wake*, in Presidential Power Stories 101, 141-145 (C. Schroeder & C. Bradley, eds., 2009).

Two years later, in *Morrison*, a 7-1 majority of the Court upheld "the good cause" removal provision for an "independent" criminal prosecutor. 487 U.S. at 663. It was "undeniable" that such tenure protection, along with other features of the law, "reduce[d] the amount of control or supervision that the Attorney General and, through him, the President exercise[d] over the investigation and prosecution of a certain class of alleged criminal activity." *Id.* at 695. The Court explained, however, that such a reduction in po-

litical control was a valid and "essential" means of "establish[ing] the necessary independence" Congress intended. *Id.* at 693.

In his lone dissent, Justice Scalia, like Chief Justice Taft before him, insisted that because the Executive Vesting Clause, U.S. Const. Art. II, § 1, cl. 1, affords the President "full control" of "all" executive powers, 487 U.S. at 709; *accord id.* at 705, 724 n.4, the President must have virtually unlimited authority to remove officers exercising executive functions such as investigation and prosecution.

The Court, however, specifically rejected that reading of the Vesting Clause, *id.* at 690 n.29:

> The dissent says that the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of that power must serve at the pleasure of the President and be removable by him at will. . . . This rigid demarcation—a demarcation incapable of being altered by law in the slightest degree, and applicable to tens of thousands of holders of offices neither known nor foreseen by the Framers—depends upon an extrapolation from general constitutional language which we think is more than the text will bear. It is also contrary to our holding in *United States v. Perkins,* … decided more than a century ago.

Despite rejecting this more categorical reading of Article II, the Court in *Morrison* did not hold that Congress has unlimited power to regulate removals. Chief Justice Rehnquist, writing for the Court, identified three important limitations.

First, the Court reaffirmed the *holding* of *Myers*, which established that, outside the context of impeachment, Congress may not reserve for itself or any of its components a part in the removal process. *Id.* at 685-86 (citing *Bowsher*, 478 U.S. at 726). This "anti-aggrandizement" principal is now well-established. *See Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 494 n.3 (2010).

Second, *Myers* "was undoubtedly correct" in its "suggestion" that *some* officials "must be removable by the President at will *if he is to be able to accomplish his constitutional role*." 487 U.S. at 690 (citing 272 U.S. at 132-134) (emphasis added). In the passage of *Myers* the *Morrison* Court approvingly cited, Chief Justice Taft described officials who act "for" the President as his "subordinates," in the performance of his own *constitutional* functions (such as foreign diplomacy) and in other matters where the President himself "is required by law to exercise authority." 272 U.S. at 132-133. In *those* cases, the officers exercise "not their own, but [the President's] discretion." *Id.* at 132. And because such officers "must do his will," it follows that the President must be able to remove them "without delay" when "he loses confidence in the intelligence, ability, judgment or loyalty of anyone of them." *Id.* at 134.[2] *Accord Free Enterprise Fund*, 561 U.S. at

[2] The Solicitor General overreads this passage of *Myers* to stand for the proposition that *"[i]n executing the laws*" generally, an officer's "'discretion to be exercised is that of the President." CFPB Br. 17 (quoting 272 U.S. at 134). But that is not what Chief Justice Taft wrote in the passage in question, where he was describing only the execution of authorities the Constitution and statutes assign *to the President*. His discussion of officers "charged with other duties than those above described"—"[t]he ordinary

513-514 ("as a general matter" the President has "the authority to remove those who assist him in carrying out *his* duties," without which he "could not be held fully accountable for discharging *his own* responsibilities; the buck would stop somewhere else") (emphasis added); *see also Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803).

So, for example, Congress surely must afford the President authority to remove the Secretaries of State and Defense "at will," for they primarily assist the President in "accomplish[ing] his constitutional role[s]" (487 U.S. 690) in foreign diplomacy and as Commander-in-Chief of the armed forces, U.S. Const. Art. II, § 2; and in such capacities they must be his trusted agents.[3]

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duties of officers prescribed by statute"—is in the next paragraph, *id.* at 135, containing the "unitary executive" rationale the Court has specifically rejected in *Morrison* and in many other cases.

[3] So, for example, the First Congress specifically required the Secretaries of Foreign Affairs and of War to perform such duties that would be "intrusted" and "assigned" to them *by the President*—in contrast to the Secretary of the Treasury, to whom Congress assigned specific *statutory* duties. *Compare* Act of July 27, 1789, ch. 4, § 1, 1 Stat. 29 (Foreign Affairs), and Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 50 (War), *with* Act of Sept. 2, 1789, ch. 12, §§ 2,4, 1 Stat. 65-66 (Treasury).

Although the heads of some other Cabinet-level agencies might not be statutorily required to assist the President in performing his constitutionally assigned functions, it is arguable that the President must have broad discretion to remove them, too, by virtue of the expectation that Cabinet members ought to be "close presidential advisers and allies." *PHH Corp. v. CFPB*, 881 F.3d 75, 107 (D.C. Cir. 2018) (en banc). Thankfully this is only a theoretical question, because Congress has never tried to afford Cabinet officers tenure protection and is unlikely ever to do so.

By contrast, where an officer's duties are to perform statutory functions Congress has assigned to that office, and where Congress has made clear—as it has with respect to the Director of the CFPB—that the President may not control such officer's discretionary decision-making within the proper bounds of the statutory delegation, then that officer does *not* act as the President's "alter ego." *Myers*, 272 U.S. at 133. Therefore it is "not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who [are] removable at will." *Morrison*, 487 U.S. at 691.

Third, the Court emphasized that because "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty," *id.* at 691. Statutory tenure protections must leave the President with the "means . . . to ensure the 'faithful execution' of the laws" by officers in the Executive branch, *id.* at 692.

Crucially, however, the Court in *Morrison* explained that a requirement of "good cause" for removal—which is virtually equivalent to the traditional "inefficiency, neglect of duty, or malfeasance in office" criteria at issue in this case[4]—*satisfies* this constitutional requirement, even when Congress assigns the removal power to the Attorney General, rather than to the President. Such a standard preserves "ample authority" for the President "to assure that the [officer]

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[4] *See Free Enterprise Fund*, 561 U.S. at 483 (characterizing the INM standard in *Humphrey's* as a "for good cause" condition); *Mistretta v. United States*, 488 U.S. 361, 410 (1988); 12 U.S.C. 5491(c)(3) (removal provision for CFPB Director titled "Removal for cause").

is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act." 487 U.S. at 692; *see also id.* at 693.

The statute at issue here thus ensures that the President can remove a CFPB Director who is not faithfully executing the law. If the Director violates or refuses to implement the law, if she "discharg[es] [it] improperly," *Free Enterprise Fund*, 561 U.S. at 484, or if she engages in unethical behavior, abuses her authority, or engages in self-dealing, that would surely satisfy the "inefficiency, neglect of duty, or malfeasance in office" standard and thus justify her removal.[5]

What the "inefficiency, neglect of duty, or malfeasance in office" standard does *not* allow is removal simply because the President would prefer someone else "of his own choosing," *Wiener*, 357 U.S. at 356; because the President believes the officer and himself do not generally enjoy a sufficient meeting of the minds, *see Humphrey's Executor*, 295 U.S. at 618-619; or based upon the President's "simple disagreement with the [officer's] policies or priorities," *Free Enterprise Fund*, 561 U.S. at 502. There is no tension between these limitations and the President's "take care" duty.[6]

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[5] *See, e.g.*, Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 747 (2018) (recounting that President Taft removed a member of the Board of General Appraisers, subject to an INM provision, based upon a committee's finding that he likely misused his authority to compel personal favors and to set precedents for favorable decisions in cases involving his son).

[6] The Court-appointed amicus argues that, if it is necessary in order to avoid a serious constitutional question, the Court could construe the INM standard to allow removal "'for any number [of] actual or perceived transgressions of the [President's] will,'" even

These three important limits in *Morrison* accurately reflect this Court's well-established understandings of the scope of Congress' authority to limit the President's removal power.

In an effort to dampen *Morrison*'s precedential authority, Petitioner (Pet. Br. 21) and the Government (Resp. Br. 39-40) stress that the independent counsel, unlike the CFPB Director, was an "inferior officer." *See* 487 U.S. at 691.

The independent counsel, however, was afforded "the vast power and the immense discretion that are placed in the hands of a prosecutor," *id.* at 727

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if that might in effect render the Director "subservient" to the President. Clement Br. 51 (quoting *Bowsher*, 478 U.S. at 729, 730). We agree with the amicus (*id.* 53) that this Court need not and should not settle upon a comprehensive reading of the INM standard outside the fact-bound context of some future, actual presidential removal of a Director. We do, however, caution that such a reading could radically transform the nature and practice of not only the CFPB but also many other agencies, such as the Federal Reserve Board, whose officers are subject to similar removal restrictions. Particularly with respect to those "independent" agencies Congress has established in the wake of this Court's decisions in cases such as *Humphrey's Executor*, *Wiener*, *Morrison*, and *Free Enterprise Fund*—in all of which the Court read such removal standards to provide robust protection from the removing authority's coercive influence—it is simply implausible to assume Congress meant to make such officers "subservient" to the President's will. *See, e.g.,* 12 U.S.C. § 5491(a) (establishing the CFPB as "an independent bureau"). There is no doubt the modern Congress "specifically crafted" such tenure-protection provisions "to prevent the President from exercising 'coercive influence'" over such officials' exercise of the discretion Congress conferred upon them. *Mistretta v. United States*, 488 U.S. 361, 411 (1989) (quoting *Humphrey's Executor*, 295 U.S. at 630).

(Scalia, J., dissenting)—a portion of the "executive" authority with far greater potential to impinge upon individual liberty than the CFPB investigation Petitioner here seeks to avoid. *See id.* at 732 (describing "[h]ow frightening it must be to have your own independent counsel and staff appointed, with nothing else to do but to investigate you until investigation is no longer worthwhile"). Indeed, Alexa Morrison's authority was far greater than that of the (likewise "inferior") officer—First-Class Postmaster Frank Myers—in *Myers* itself.

The fact that the counsel in *Morrison* was an "inferior" officer for purposes *of the Appointments Clause,* Art. II, § 2, cl. 2—i.e., that another officer between her and the President, the Attorney General, was authorized to remove her for "good cause" and to impose modest constraints on her activity—was legally significant only to the extent it meant that Congress could provide for her appointment by a panel of Article III judges rather than by the President himself with the advice and consent of the Senate. *See* 487 U.S. at 670-677. For purposes of assessing the removal restriction's impact on *the President's executive power*, on the other hand, the fact that Morrison was "inferior" to the Attorney General only made matters worse: it served to insulate her further from the President's ability to control her conduct than if she had been a principal officer, appointed and removable by the President himself.

In any event, *Morrison* is most significant not for its particular holding respecting the independent counsel but for the Court's re-affirmation of *Perkins*, *Humphrey's Executor* and *Wiener*; for the Court's unequivocal rejection of the "unitary executive" argument

in *Myers*; and for Chief Justice Rehnquist's summary and reformulation of the principles governing the constitutionality of, and limits upon, congressional regulation of the removal power.[7]

Nor does *Morrison* stand alone in this Court's post-*Wiener* removal jurisprudence. Two later cases, both affirming "good cause" restrictions on the removal of *principal* officers, confirm its teachings.[8]

In *Mistretta v. United States*, 488 U.S. 361 (1989), petitioner argued that Congress violated Article III by giving the President the power to remove federal judges sitting on the Sentencing Commission. This Court rejected that challenge in large measure because the statute allowed the President to remove Commissioners "'only for neglect of duty or malfeasance in office or for other good cause shown,'" *id.* at 368—a degree of tenure protection that, "like the removal provisions upheld in [*Morrison* and *Humphrey's Executor*], is specifically crafted to prevent the President from exercising 'coercive influence' over independent agencies," thereby ensuring that the judges "would not be subject to coercion even in the exercise

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[7] Although there was widespread, bipartisan support for Congress' decision not to renew the independent counsel law on policy grounds in 1999, it is not the case, as some have suggested, that a broad consensus has developed within the legal community that rejects *Morrison*'s constitutional analysis—particularly not on the "for cause" removal question. *See* Marty Lederman, "The Constitutional Challenge to Robert Mueller's Appointment (Part IV): *Morrison*, *Edmond*, and the DOJ Special Counsel Regulations," *Just Security* (Oct. 31, 2018), https://bit.ly/37ecr2C.

[8] *See also Buckley v. Valeo*, 424 U.S 1, 141 (1976) (per curiam) (the President "may not insist" that the Federal Election Commissioners be removable at will despite their "significant government dut[ies]").

of their nonjudicial duties." *Id.* at 411.

Finally, in *Free Enterprise Fund*, the Court held that Congress could not insulate members of the Public Company Accounting Oversight Board from the President by two levels of "good cause" tenure protection because such a scheme left the President with insufficient means of ensuring that Board members would faithfully execute the law. *See* 561 U.S. at 484, 496, 498.

Significantly, the Court cured the constitutional infirmity by "striking" the second level of "good cause" protecting, leaving the agency in the middle of the chain—the Securities and Exchange Commission—with at-will authority to remove Board members, even though the President continued to have only "for cause" authority to remove SEC Commissioners. *Id.* at 508-509. *A fortiori* this meant that the Court approved the constitutionality of such "for cause" tenure protection for the principal executive officers on the SEC itself, a holding consistent with the *Humphrey's/Morrison* line of precedents. *See* Patricia L. Bellia, PCAOB *and the Persistence of the Removal Puzzle*, 80 G.W.L. Rev. 1371, 1406-1407 (2012). The Court insisted that "[t]he point is not to take issue with for-cause limitations in general; we do not do that." *Id.* at 501.[9]

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[9] The parties draw attention to a single sentence in the closing section of *Free Enterprise Fund* stating that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *See* Resp. Br. 9 and Pet Br. 5 (each quoting 561 U.S. at 513-514). That sentence, however, notably refers to officers who assist in carrying out *the President's* duties. It does not, by its terms, describe officers such as the PCAOB members and the CFPB Director, who

* * * *

The constitutionality of the removal provision governing the CFPB Director thus does not depend upon an alleged expansion of a narrow "exception" to a "general rule" that Article II guarantees the President "unrestricted removal power over principal executive officers." The Court has never adopted such a rule; and no fewer than six of this Court's decisions—most of them unanimous or near-so on the removal question—demonstrate that the "inefficiency, neglect of duty, or malfeasance in office" criteria here are consonant with the President's "take care" duty and do not otherwise transgress any constitutional limitations.

II. There is no basis in the constitutional text, original understandings, or constitutional history to justify reconsideration of this Court's many decisions affirming Congress' power to enact removal conditions of this kind

Neither the text of the Constitution nor anything "implicit in its structure and supported by historical practice," *Franchise Tax Board v. Hyatt*, 139 S. Ct. 1485, 1499 (2019), offers any basis for calling into question this Court's longstanding precedents affirming Congress' authority to impose substantive removal conditions such as those at issue here.

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perform their own statutory duties rather than assisting the President in the performance of his obligations. Indeed, if those sentences *had* referred to such officers, then the Court's judgment would not have cured the constitutional defect, for, even as "severed" by the Court, the Act does not afford the President authority to remove Board members, let alone to do so without good cause.

A. Text and Framing

Apart from the Opinions and Appointments Clauses, *see* Art. II, § 2, cls. 1-2, the Constitution says virtually nothing about the proper structure and operation of the executive "Departments." It is thus well-established that Congress has broad authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to prescribe the functions, procedures and tenure of the officers in those Departments. Accordingly, if "no specific clause speaks directly to the question at issue"—if congressional regulation of the other branches "neither contradicts an identifiable background understanding of one of the Vesting Clauses nor effectively reallocates power from its specified branch"—the Court should be reluctant to set aside Congress' judgments "by reading abstract notions of the separation of powers into those otherwise open-ended clauses." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1948 (2011).

The text of the Constitution is silent on the removal of executive officers, outside the discrete context of impeachment. Indeed, the framers did not even discuss the subject at the Constitutional Convention, *Myers*, 272 U.S. at 109-110, and there was little mention of it during the ratification debates, either, save for brief statements in *Federalist Papers* penned by both Hamilton and Madison suggesting that the President's removal power would not be illimitable.[10]

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[10] *See The Federalist* No. 39, p.242 (C. Rossiter ed. 1961) (Madison) ("The tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the case and the example of the State constitutions."); *id.* p.214 (stating

B. The "Decision of 1789" and Early Practice

The Government spends several pages describing the congressional "Decision of 1789" (Resp. Br. 12-14), and the petitioner even claims (Pet. Br. 18) that the 1789 Congress "recognized" the "rule" that the President "must have the power to remove the Director of the CFPB at will."

The most the Decision of 1789 might have reflected, however, was that a slight majority of the House believed the Constitution implicitly affords the President a presumptive unilateral power to remove officers he has—and even that much is uncertain. *See* Manning, *supra*, at 1965 n.135 ("The First Congress was deeply divided on the question, and the implications of the debate, properly understood, were highly ambiguous and prone to overreading."); *see also id.* at 2030-2031.[11] The House did *not* debate, however, let alone resolve, whether such unilateral presidential removal authority is defeasible by statute, *see* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Corn. L. Rev. 1021, 1072-1073 (2006).

And, most importantly here, the 1789 Congress did not discuss whether and how Congress could by

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that the government would be administered by, *inter alia*, people holding office "during good behavior"); *The Federalist* No. 77, *id.* at 459 (Hamilton) ("The consent of [the Senate] would be necessary to displace, as well as to appoint.").

[11] *See generally* J. David Alvis, Jeremey D. Bailey & F. Flagg Taylor IV, *The Contested Removal Power, 1789-2010*, at 16-47, 103-104, 116-126 (2013).

law *limit the permissible grounds* for removal. *See* Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 379 (1927). Thus, for the next several decades that remained primarily an abstract, "merely speculative question," because the bulk of legislation "giving a limited duration to office, recogni[zed] the executive power of removal, as in full force." 3 Joseph Story, *Commentaries on the Constitution* § 1531, at pp. 389-390 (1st ed. 1833). Even so, both Justice Story and Attorney General Wirt tentatively ventured that Congress might have the power to guarantee tenure protection. *See id.* ("it follows by irresistible inference [from the Constitution's protection of tenure in Article III] that all others must hold their offices during pleasure, *unless congress shall have given some other duration to their office*") (emphasis added); 1 Op. Att'y Gen. 212, 213 (1818) ("Whenever Congress intend a more permanent tenure, (during good behaviour, for example), they take care to express that intention clearly and explicitly . . . ."). And this Court, in *Marbury v. Madison*, explained that Congress had, in fact, denied the President the power to remove Justices of the Peace in the District of Columbia (Article II officers) during their five-year terms. 5 U.S. (1 Cranch) at 162—a proposition necessary to the Court's conclusion that Marbury had a legal right to receive his commission. *See id.* at 155, 164, 167.[12]

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[12] It is also noteworthy that President Lincoln later approved bills conditioning the President's power to remove the Comptroller of the Currency and consular clerks. *See* Act of Feb. 25, 1863, ch. 58, 12 Stat. 665-666 (Senate approval required for removal of the Comptroller); Act of June 20, 1864, ch. 136, 13 Stat. 140 (allowing removal of clerks only "for cause" reported to Congress).

Accordingly, neither the Constitution's framing and ratification, nor the government's early practice and understanding, offers any basis for imposing limits on this Court's many affirmations of Congress' power to impose removal conditions.

C. The Take Care Clause and the Executive Vesting Clause

In support of its purported "general rule" that the President is guaranteed an "unrestricted" removal power, the Government cites two clauses in Article II—the Take Care Clause and the Vesting Clause. Resp. Br. 10; *see also* Pet. Br. 15-16.

As we have explained, *supra* at 6-19, this Court has already determined, in a series of cases culminating in *Free Enterprise Fund*, that removal limits of the kind at issue here do not impermissibly impinge upon the President's "take care" duty because he remains fully able to remove officers who are not faithfully executing the law. (The INM removal standard also adequately accounts for Petitioner's principal functional concern (e.g., Pet. Br. 26) that the CFPB Director might engage in "arbitrary decisionmaking": If the President believes the Director is acting arbitrarily, the Act itself allows him to remove her for that reason, as well.[13])

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[13] Petitioner also argues (Pet. Br. 27) that the single-Director CFPB "poses [a] greater risk of tyranny" than multi-member commissions. That purely functionalist argument, however, "depends on a series of unsupported leaps," including that it "treats a broad purpose of the separation of powers—safeguarding liberty—as if it were a judicially manageable constitutional standard," which has never been this Court's practice in reviewing removal restrictions. *PHH*, 881 F.3d at 105-106. In any event, in

That leaves only the Vesting Clause in Article II, section 1: "The executive power shall be vested in a President." According to the Government, this clause implies an unrestricted removal power because "the President must have the 'power to remove' principal officers 'who assist him in carrying out his duties.'" Resp. Br. at 8 (quoting *Free Exercise Fund*, 561 U.S. at 513-514).

That assertion is undoubtedly correct as applied to officers whose functions are predominantly to "assist" the President "in carrying out *his* duties," as this Court affirmed in *Morrison*. *See supra* at 10-13. The same logic does not apply, however, where Congress has both assigned statutory functions to particular departmental offices *and* clearly intended to insulate the exercise of those functions from presidential control (apart from his obligation to see that the officers faithfully execute the law)—which for more than a century has been a deeply entrenched and important way in which Congress has provided for the administration of many important laws. *See Free Enterprise Fund*, 561 U.S. at 549-586 (Breyer, J, dissenting) (Apps. A & B).

The "unitary executive" argument depends upon denying that Congress has the power to prescribe and ensure such independence. It reads the Vesting Clause to guarantee the President the authority to personally execute all federal laws and the ancillary, indefeasible authority to direct other officials in their execution of such laws. *See, e.g.,* Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003

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the unlikely event a Director ever turns "tyrannical," the Act would allow a President to replace that officer, in accord with his "take care" obligation.

U. Ill. L. Rev. 701, 704 (2003) ("the president may execute any federal law by himself, whatever a federal statute might provide"). On this view, because the President has the indefeasible constitutional authority to execute every statute himself, it follows that officers in the Executive branch are merely his agents—that the Constitution establishes the President atop an unbreakable "chain of command," *PHH Corp. v. CFPB*, 881 F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting), not only with respect to his functions as Commander-in-Chief of the Army and Navy (a form of "unitary" control the text of the Constitution prescribes, *see* Art. II, § 2, cl. 1), but for *all* exercise of executive authority within the federal government, and that in order "[t]o supervise and direct executive officers, the President must be able to remove those officers at will." *Id.*; *see also* Brief of Amici Separation of Powers Scholars Calabresi, et al., at 6.

This Court has already rejected this theory of indefeasible presidential powers of execution and control as "an extrapolation from general constitutional language" in the Vesting Clause that "is more than the text will bear." 487 U.S. at 690 n.29. Indeed, it did so 150 years before *Morrison*. *See Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838) (characterizing the unitary-presidential-control argument as an "alarming doctrine," and explaining that although the President has the power to direct the discharge of "certain political duties imposed upon many officers in the Executive Department"—in particular, duties respecting his own "powers . . . derived from the

Constitution"—"it by no means follows that every officer in every branch of that department is under the exclusive direction of the President").[14]

Many early Attorney Generals likewise rejected the "unitary control" premises of the Vesting Clause theory. Attorney General William Wirt explained, in the first of a series of opinions on that question, that where Congress has clearly indicated that an officer's decision is to be final and conclusive within the Executive branch, the President may not review the "correctness" of the officer's judgment, let alone execute the authority himself. *The President and Accounting Offices*, 1 Op. Att'y Gen. 624, 625-629 (1823).[15] Wirt reaffirmed this conclusion in several succeeding opinions,[16] as did a string of his successors (including in

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[14] *See also* Letter from Thomas Jefferson to Benjamin Latrobe (June 2, 1808), *in* Thomas Jefferson and the National Capital 429, 431 (Saul K. Padover ed., 1946) ("With the settlement of the accounts at the Treasury I have no right to interfere in the least," because the Comptroller of the Treasury—whose decisions Congress had designated as "final and conclusive"—"is the sole & supreme judge for all claims of money against the US. and would no more receive a direction from me as to his rules of evidence than one of the judges of the supreme court.").

[15] Professors Calabresi, et al., claim that when Congress declared that the Comptroller's decision would be "final and conclusive" it was referring only to "the availability of judicial review, not presidential direction." Amici Separation of Powers Scholars Br. 24. That is incorrect, as Attorney General Wirt explained in another opinion. 1 Op. Att'y Gen. 624, 627 (1823). *Accord* 2 Op. Att'y Gen. 507, 509-510 (1832) (Taney).

[16] *See, e.g.*, 1 Op. Att'y Gen. 636, 637 (1824) ("the President has no right to interpose in the settlement of accounts," "[w]hether [the Comptroller's] position be right or wrong"); 1 Op. Att'y Gen. 678, 680 (1824) (because the statute "separated" the accounting

some cases involving decisions by Heads of Departments).[17]

This does not mean, of course, that early Presidents never directed other executive officers in the performance of their statutory functions: They certainly did, in situations where Congress had not afforded final decision-making authority to those officers—and, especially, where the President's directive was designed to ensure (to "take care") that the officers acted within the terms of their authority and otherwise complied with the law.

Attorney General Wirt himself, for instance, opined that the President could order the discontinuance of a "vexatio[us]" suit in the name of the United States if it was "wholly unfounded in law." *Power of President to Discontinue a Suit*, 2 Op. Att'y Gen. 53, 54 (1827). Wirt's successor, Roger Taney, likewise advised that the President could exercise his "take care" authority to direct a district attorney to discontinue a condemnation action involving jewels stolen from a foreign dignitary where the suit was manifestly baseless. *The Jewels of the Princess of Orange*, 2 Op. Att'y

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department from the President's authority, presidential interference in that department's settlement of accounts "in any form would, in my opinion, be illegal"); 1 Op. Att'y Gen. 705 (1825); 1 Op. Att'y Gen. 706 (1825).

[17] *E.g.,* 2 Op. Att'y Gen. 507 (1832) (Taney); 2 Op. Att'y Gen. 544 (1832) (Taney); 4 Op. Att'y Gen. 515, 516-518 (1846) (Mason); 5 Op. Att'y Gen. 630, 635-636 (1852) (Crittenden) (citing seven previous opinions); 11 Op. Att'y Gen. 14 (1864) (Bates); 11 Op. Att'y Gen. 129, 132-133 (1864) (Speed) (decisions of the Secretary of the Interior); 16 Op. Att'y Gen. 317, 318-319 (1879) (Devens) (decisions of the Secretary of the Treasury; citing several earlier opinions); 18 Op. Att'y Gen. 31 (1884) (Brewster) (decisions of the Secretary of the Interior).

Gen. 482, 483-484, 487-489 (1831).[18] And, famously, when he entered office President Jefferson ordered district attorneys to enter *nolle prosequies* in pending Sedition Act prosecutions because Jefferson viewed the Act as unconstitutional. *See, e.g.*, Letter from Jefferson to William Duane (May 23, 1801), in 8 The Writings of Thomas Jefferson 54, 55 (P. Ford ed., 1897); *see also* Letter from Jefferson to Edward Livingston (Nov. 1, 1801), in *id.* at 57, 58 n.1 ("if [the President] sees a prosecution put into a train which is not lawful, he may order it to be discontinued").

We are unaware, however, of any early case in which an Attorney General asserted a presidential authority to countermand an officer's lawful decisions within the terms of his statutory delegation in cases where Congress intended to give the officer the final say.[19] Moreover, no one during this period claimed

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[18] *See id.* at 491 (explaining that such a directive would be consistent with a statute expressly rendering the District Attorney "subject to the direction of the executive department").

[19] Andrew Jackson's dramatic actions in 1833 concerning the Bank of the United States are not inconsistent with this early practice. The governing statute required the Government to hold public funds in the federal bank "unless the Secretary of the Treasury shall at any time otherwise order and direct." Act of Apr. 10, 1816, ch. 44, § 16, 3 Stat. 274. Jackson ordered Treasury Secretary William Duane to transfer the funds from the national bank to state banks, but Duane refused to do so. Jackson therefore removed Duane from office, and his replacement as Acting Secretary, Roger Taney, did as Jackson insisted—a series of events that led the Senate to formally censure Jackson. Three things about Jackson's April 15, 1834 "Protest" to the Senate in defense of his actions are noteworthy here. *See* 3 James D. Richardson, A Compilation of the Messages and Papers of the Presidents, 1789-1897, at 1288 (1911). First, Jackson did not argue

that the President has the constitutional authority to *personally* execute statutory authorities Congress has specifically conferred upon another officer. To the contrary, Attorney General Wirt explained that if the President were to perform such functions "he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself." 1 Op. Att'y Gen. at 625; *see also* 2 Op. Att'y Gen. at 489 (Taney) (explaining that if the district attorney refused the President's order to discontinue the suit, "the prosecution, while he remained in office, would still go on" because the President "could only act through his subordinate officer").

That baseline understanding has persisted to the current day.[20] There is therefore no historical support for the underlying predicate of the Vesting Clause

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that he had the constitutional authority to transfer the funds himself, as the Vesting Clause thesis would have it. Second, Jackson insisted that the law in question was not properly understood "as in any way changing the relations between the President and Secretary of the Treasury, or as placing the latter out of Executive control even in relation to the deposits of the public money." *Id.* at 1303. In other words, Jackson did not argue that he could *disregard* the law affording the Secretary authority to make deposit decisions—instead, he construed it to allow for presidential directives. Third, Jackson actually argued, albeit implausibly, that Duane had a "legal duty" to pull the funds out of the Bank; that the Secretary had therefore refused to execute the law; and that thus Jackson was simply exercising his Take Care duty to ensure statutory compliance by replacing Duane with Taney. *Ibid.*

[20] Although President Trump, for example, has sharply criticized the Federal Reserve Board's refusal to lower interest rates to levels he believes would best serve the nation, he has not purported to direct the Board to lower the rates, and virtually no one suggests the President has the power to do so himself. *See* Jeanna Smialek, "After Recent Barbs, Trump Meets Fed Chair Powell

theory of an illimitable removal power—namely, that the Constitution affords the President the authority to personally exercise—and thus to direct the exercise of—all of "the executive Power."

For 'Cordial' Discussion," *N.Y. Times*, Nov. 19, 2019, at B4. *See also* Robert H. Jackson, *That Man: An Insider's Portrait of Franklin D. Roosevelt* 116-117 (J.Q. Barrett ed. 2003) (recounting how President Roosevelt could not sell helium to Germany in 1938 because a statute required the approval of Secretary of the Interior Ickes, who withstood Roosevelt's pressure to certify); Harold L. Ickes, "My Twelve Years With F.D.R.," *Saturday Evening Post*, June 5, 1948, at 15, 81-84.

CONCLUSION

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

Respectfully submitted,

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