No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE RESPONDENT

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Constitutional text, history, and precedent establish the general rule that the President must possess the unrestricted authority to remove principal officers who assist him in executing the laws of the United States. That basic principle of our government ensures that the Executive Branch is responsible to the Chief Executive, who is ultimately responsible to the people. The only exception recognized by this Court is limited to certain multimember agencies that have been characterized as quasi-legislative or quasi-judicial, and it should not be extended to the single-headed Consumer Financial Protection Bureau, which cannot be so described. The Court should declare unconstitutional the removal restriction on the Director of the Bureau and sever it from the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act).

The court-appointed amicus argues that the Court should not address the constitutional question for jurisdictional or prudential reasons. But petitioner plainly has standing to challenge the judgment below, which compels it to produce documents to the Bureau in accordance with a civil investigative demand (CID). Amicus principally contends that the CID may be lawfully enforced against petitioner regardless of whether the removal restriction is unconstitutional because it has been ratified by a Director unencumbered by the restriction. But that contested remedial argument goes to the merits of petitioner's claim for relief, not to this Court's jurisdiction. And because the structural protections of the Constitution protect individual liberty as well as presidential prerogatives, it is both prudent and important for this Court to address petitioner's claim.

On the merits, amicus contends that nothing in the Constitution speaks to the President's authority to oversee and supervise the Executive Branch, and thus Congress possesses near-plenary power to restrict the President's removal authority over all manner of executive officers. From that general theory of legislative supremacy, amicus argues that a few "closely divided" precedents have carved out an exception for laws that assign authority to remove executive officials to another Branch or otherwise eliminate the President's removal authority. But that reconceptualization of the separation of powers cannot be squared with the constitutional text, the Framers' understanding, or this Court's precedent. And amicus fails to identify any limiting principle that would prevent Congress from converting virtually every executive agency into an independent agency insulated from the President's supervision.

Finally, although the removal restriction is unconstitutional, Congress has expressly provided that the rest of the Dodd-Frank Act shall be unaffected. Petitioner's arguments for declaring the entirety of Title X of the Act invalid are insufficient to overcome the severability clause's plain text. And petitioner's arguments for ignoring the severability question altogether are both procedurally and substantively wrong.

A. The Constitutionality Of The Removal Restriction Is Properly Presented

Amicus errs in contending (Br. 21-27) that the Court lacks jurisdiction to consider the constitutionality of the removal restriction or that prudential factors counsel against doing so.

1. Although amicus avoids using the term, his jurisdictional argument principally sounds in Article III standing. To "invoke the power of a federal court," a plaintiff must establish a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen* v. *Wright*, 468 U.S. 737, 751 (1984). And because Article III's requirements must be satisfied throughout the litigation, they "must be met by persons seeking appellate review." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997). They are plainly met here.

In the district court, petitioner's standing was irrelevant because it did not invoke the power of the court. Petitioner was the defendant in the Bureau's suit to enforce its CID, and the Bureau indisputably has standing to enforce that federal legal obligation.

Amicus instead suggests (Br. 21-24) that petitioner lacked standing to appeal the district court's order compelling it to comply with the CID and the court of ap-

peals' affirmance. But those judgments threaten petitioner with an "'actual,'" "concrete and particularized" injury—a requirement to produce documents that petitioner does not wish to produce. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). Petitioner's injury is directly traceable to those challenged judgments (and the Bureau's continued enforcement efforts), and it would be fully redressed by the relief petitioner seeks—an order reversing the court of appeals' judgment and denying the Bureau's petition to enforce the CID.

Amicus nevertheless suggests (Br. 21-24) that petitioner's injury is not traceable to the removal restriction unless petitioner can prove that Director Cordray would not have issued the CID if he were subject to at-will removal. That argument is doubly wrong. It conflates the standing requirement to challenge the CID's enforcement (does it injure petitioner?) with the merits showing necessary to invalidate the CID (is it tainted by the removal restriction?). And it improperly heightens the showing required to establish that the CID cannot constitutionally be enforced.

Namely, regulated parties are entitled to seek relief that is "sufficient to ensure that the [statutory requirements] to which they are subject [are] enforced only by a constitutional agency accountable to the Executive." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) (citing *Bowsher* v. *Synar*, 478 U.S. 714, 727 n.5 (1986)). After all, the purpose of separation-of-powers principles is not only to protect the President from Congress or vice versa, but to "preserv[e the] liberty" of the people. *Id.* at 501. This

Court has thus never required a party seeking to vindicate those principles to prove that the agency would have acted differently if it had been appropriately accountable.

In *Bowsher*, for example, the Comptroller General emphasized that there was "no claim that any decision of the Comptroller General was ever improperly influenced by Congress." Comptroller General Br. at 31, *Bowsher*, *supra* (No. 85-1377). But the Court found that private plaintiffs had standing because the challenged order prevented them from receiving a "scheduled increase in benefits"—without any inquiry into whether the same order would have issued absent the unconstitutional provision. *Bowsher*, 478 U.S. at 721. Similarly, in *Morrison* v. *Olson*, 487 U.S. 654 (1988), the independent counsel had argued that the Court could not properly address the untested restriction on her removal, Appellant Br. at 24-29, *Morrison*, *supra* (No. 87-1279), but the Court found that the "burden of complying with the grand jury subpoena" and the Court's "power to redress" that injury were sufficient to establish an Article III controversy. *Morrison*, 487 U.S. at 670. The same is true here.

Amicus alternatively contends (Br. 22-24) that, even if petitioner's injury was initially traceable because the removal restriction tainted issuance of the CID, subsequent developments have severed the connection. He observes that the previous Acting Director, who was not subject to the restriction, and the current Director, who agrees that the restriction is unconstitutional, have continued to seek the CID's enforcement. And he argues (Br. 23 n.4) that these ratifications of the CID "eliminate[] any constitutional injury." But again, whether the Acting or current Director effectively ratified the

CID has no bearing on jurisdiction. Ratification, "rather than mooting a claim," "resolves the claim on the merits." *Guedes* v. *ATF*, 920 F.3d 1, 13 (D.C. Cir. 2019) (per curiam) (collecting cases), petition for cert. pending, No. 19-296 (filed Aug. 29, 2019).

2. Amicus also argues (Br. 24-27) that prudential factors counsel against deciding the removal restriction's constitutionality unless and until a Director contests her removal. That argument cannot be squared with *Bowsher*, *Morrison*, or *Free Enterprise Fund*, where the Court considered the constitutionality of removal restrictions at the request of regulated private parties, without any contested removal. See *Bowsher*, 478 U.S. at 719-721; *Morrison*, 487 U.S. at 668-669; *Free Enterprise Fund*, 561 U.S. at 487-488. Indeed, the appellant and dissent in *Bowsher* emphasized that Congress had never invoked or even threatened to use the removal provision there in the 65 years it had existed. See U.S. Senate Br. 29-30, *Bowsher*, *supra* (No. 85-1377); *Bowsher*, 478 U.S. at 773 (White, J., dissenting). The Court nevertheless found that the potential effect on the Comptroller General's decisionmaking process created a "here-and-now" defect with his actions that rendered the constitutional question ripe for review. *Bowsher*, 478 U.S. at 727 n.5; accord *Free Enterprise Fund*, 561 U.S. at 513.

Indeed, prudence strongly militates in favor of definitively resolving the constitutional question. The issue is squarely presented, fully briefed, and "undoubtedly important," Amicus Br. 17. It has broad implications for the President's ability to supervise the Executive Branch, and its very existence creates regulatory uncertainty and litigation objections that undermine the

Bureau's ability to execute federal law and fulfill its consumer protection mission.[1]

Amicus emphasizes (Br. 25) that the current Director agrees that the removal restriction is unconstitutional. But the Ninth and D.C. Circuits disagreed. Current and future Directors will therefore know they have a potent defense against any presidential attempt to remove them until this Court resolves the issue. That is more than sufficient to justify review here, because the removal restriction is a structural defect that generally infects the Bureau's decisionmaking process, just as it did in *Free Enterprise Fund* and *Bowsher*. As noted, the Constitution's "structural protections" are "critical" to preserving individual liberty. *Free Enterprise Fund*, 561 U.S. at 501. That interest is not served where the Director remains statutorily insulated from removal, regardless whether she believes the law is invalid.

Amicus urges (Br. 25, 27) the Court to wait for "an actual dispute" rather than a "theoretical" one. But there is nothing academic about this case. The Bureau seeks to enforce its demand for documents in petitioner's possession, and petitioner contends the Bureau may not do so because it is unconstitutionally insulated from presidential supervision. Absent intervention from this Court, the judgment below requires compliance with the CID. And although the Bureau agrees with petitioner on the constitutionality of the removal provision, it disagrees on the consequences of that unconstitutionality and thus has no intention of rescinding

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[1] The Court should thus reject the House of Representatives' suggestion (Br. 6-9) to avoid the constitutional question by resolving this dispute on case-specific ratification grounds that are neither fairly encompassed within the questions presented nor addressed in the parties' briefs.

the CID. "[I]t would be a curious result if, in the administration of justice, a person could be denied access to the courts because the [government defendant] agreed with [one of] the legal arguments asserted by the [challenger]." *INS* v. *Chadha*, 462 U.S. 919, 939 (1983).

B. The Removal Restriction Is Unconstitutional

Amicus's merits defense of the removal restriction is contrary to text, history, and precedent. Indeed, amicus's cramped view of the removal power provides no coherent limiting principle for distinguishing the Bureau's Director from virtually any member of the President's Cabinet.

1. The text and history of Article II require the President to retain the unrestricted ability to remove principal executive officers

a. Amicus observes (Br. 28) that the Constitution includes no "removal clause," and from that concludes that the Constitution's text grants the President no authority to remove principal officers beyond what Congress affords him. But the very first clause of Article II grants the President removal authority when it vests in him (and him alone) "[t]he executive Power." U.S. Const. Art. II, § 1, Cl. 1; see 1 Annals of Cong. 382 (1789) (Joseph Gales ed., 1834) (Clymer) ("[T]he power of removal * * * belong[s] to the President alone, by th[os]e express words."). The removal authority, moreover, is the constitutional means through which the President fulfills his obligation to "take care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, by "overseeing[] and controlling those who execute the laws" on his behalf, 1 Annals of Cong. 463 (Madison).

To be sure, the Constitution grants Congress the authority to establish officers and some role in their appointments, see U.S. Const. Art. II, § 2, Cl. 2, as well as authority over "the determination of their functions and jurisdiction, the prescribing of reasonable and relevant qualifications and rules of eligibility of appointees, and the fixing of the term for which they are to be appointed, and their compensation," *Myers* v. *United States*, 272 U.S. 52, 129 (1926); see U.S. Const. Art. I, § 8, Cl. 18 (Necessary and Proper Clause). But once a principal executive office is established and the officer appointed, Congress has "no right to diminish or modify [the] Executive authority" over the officer. 1 Annals of Cong. 463 (Madison).

b. Amicus contends (Br. 28-29) that the Framers' views on the removal power were "remarkably heterodox," citing a statement by Madison about the first Comptroller, a passage from *The Federalist No. 77* (Hamilton) (Jacob Ernest Cooke ed., 1961), and a discussion in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). Each of these assertions of heterodoxy, however, has already been considered and rejected by this Court.

In *Free Enterprise Fund*, the Court refuted the dissent's reliance on the same statement by Madison that amicus repeatedly invokes. As the Court explained, Madison's "actual" proposal was that the Comptroller should serve a limited, but renewable term *in addition to* being removable at will by the President—so that he would be "'dependent upon the President'" *and* "'upon the Senate'" for his reappointment. *Free Enterprise Fund,* 561 U.S. at 500 n.6 (citation omitted).

In *The Federalist No. 77*, Hamilton said only that the Senate's consent "would be necessary to displace" principal officers, *id.* at 515, not to "remove" them. Replacing an officer would of course require Senate confirmation of the replacement—which is all Hamilton may have meant. See Seth Barrett Tillman, *The Puzzle of Hamilton's Federalist No. 77*, 33 Harv. J.L. & Pub. Pol'y 149 (2010). Regardless, any role of the Senate in the removal of officers apart from impeachment was indisputably disavowed by the First Congress; disclaimed by Hamilton himself, see *Myers*, 272 U.S. at 136-139 (citing 7 *Works of Alexander Hamilton* 80-81 (John C. Hamilton ed., 1851)); and rejected by this Court, *e.g.*, *Bowsher*, 478 U.S. at 726.

As for *Marbury*, it concerned only the right to serve as a justice of the peace in the District of Columbia. The removability of a principal executive officer was neither presented nor discussed. See *Myers*, 272 U.S. at 142. As this Court recognized in *Myers*, Chief Justice Marshall focused on that question four years after *Marbury*, and he fully accepted the First Congress's view. See *id.* at 143-144 (citing 5 John Marshall, *The Life of George Washington* 192-200 (1807)).

c. Finally, amicus argues (Br. 30) that the First Congress determined only that Congress could not grant itself removal authority over principal executive officers, not that the President must retain the authority to remove such officers at will. But the First Congress's views were broader. The Decision of 1789 was driven by "that great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good." 1 Annals of Cong. 499 (Madison). In the First Congress's view, the President must retain the power of removal, so that

"those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Ibid.* This Court has long understood that to mean that the President must retain the "unrestricted power to remove the most important of his subordinates" and that Congress has no "power to make provision for removal" of those officers. *Myers*, 272 U.S. at 125, 134; accord *Free Enterprise Fund*, 561 U.S. at 492. After all, "[o]nce an officer is appointed, it is only the authority that can remove him * * * that he must fear and * * * obey." *Bowsher*, 478 U.S. at 726 (citation omitted).

Amicus's purported historical counterexamples (Br. 31-32) do not demonstrate otherwise. Most have nothing to do with the President's removal authority. As for the others, the government already explained why the first Treasury bill's removal penalty for certain misconduct did not displace the President's at-will removal authority (and amicus does not claim otherwise), and why the reporting requirement concerning the Civil-War-era Comptroller is inapposite. Gov't Br. 35, 41-42. And more modern removal provisions for multimember commissions first created nearly 100 years after the Founding say nothing about the views of the First Congress, and provide no support for the removal restriction here.

2. The* Humphrey's Executor *exception should not be extended to single-headed agencies

This Court's precedents accordingly establish that, "as a general matter," the President must have the "authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513-514.

The Court has recognized only one exception for principal executive officers: "quasi-legislative" or "quasi-judicial" commissions. *Id.* at 493 (citing *Humphrey's Executor* v. *United States*, 295 U.S. 602, 627-629 (1935)). That exception does not apply and should not be extended to single-headed agencies. Gov't Br. 26-46.

a. Amicus reads this Court's precedents as establishing the opposite rule. Building on a mistaken view of the text and history, amicus argues (Br. 33) that Congress has near-plenary power to impose removal restrictions on all manner of executive officers—the only limits being when "Congress has purported to arrogate removal authority over executive-branch officials to itself, or has prevented the President himself (or his at-will agents) from exercising the removal authority over executive-branch officers." But while amicus accurately describes the facts of this Court's cases invalidating removal restrictions, their legal reasoning sweeps more broadly.

In *Myers*, the Court struck down a statute providing for the removal of a postmaster only with the Senate's consent. 272 U.S. at 107. But the Court's analysis focused more generally on the interference with the President's constitutional authority to remove executive officers whom he appoints; its conclusion was that the law was unconstitutional, not because Congress had arrogated the removal authority, but because it "denied to the President" the "*unrestricted power of removal*." *Id.* at 176 (emphasis added). Although this Court has sometimes suggested that *Myers* was limited to congressional usurpation of the removal power, *e.g.*, *Morrison*, 487 U.S. at 685-686, it rejected that reading in *Free En-*

terprise Fund, relying on the broader reasoning of *Myers* to invalidate a removal restriction that did not grant any power to Congress, 561 U.S. at 492-493, 513-514.

To be sure, in *Free Enterprise Fund*, the dual for-cause limitations on the removal of members of the Public Company Accounting Oversight Board (PCAOB) prevented the President or any at-will subordinate from determining whether a PCAOB member's conduct warranted removal. 561 U.S. at 495. But the *reason* the Court found the PCAOB's "novel structure" invalid was that it interfered with the President's broader "responsibility to take care that the laws be faithfully executed." *Id.* at 493, 496. Because "[t]he buck stops with the President," the Court explained that he must possess the "general * * * authority to remove those who assist him in carrying out his duties." *Id.* at 493, 513-514. And the removal restrictions there could not be justified by the previously recognized "limits on the President's removal power." *Id.* at 514.

Even in *Humphrey's Executor*, the Court did not conclude that the removal restriction on FTC Commissioners was constitutionally permissible merely because it neither granted removal authority to Congress nor categorically precluded the President from exercising it. Rather, as amicus acknowledges (Br. 35), the Court's analysis rested on its view that the FTC was a "quasi-legislative" and "quasi-judicial" body, rather than "purely executive." *Humphrey's Executor*, 295 U.S. at 628; see *id.* at 631-632 (relying "upon the character of the office" and limiting its ruling "to officers of th[at] kind"). The Court in fact reaffirmed "the unrestrictable power of the President to remove purely executive officers," including the postmaster at issue in *Myers*. *Id.*

at 631-632. *Humphrey's Executor*, therefore, provides no support for amicus's position.

Amicus's theory instead depends almost entirely on his reading of one passage of the Court's decision in *Morrison*. He argues (Br. 35-36) that the "critical inquiry" in determining whether a removal restriction violates Article II is "whether the restrictions on the President['s]" removal authority "unconstitutionally interfere[s] with the President's Article II powers." See *Morrison*, 487 U.S. at 691 ("[T]he real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."). But *Morrison* concerned an *inferior* officer, and its analysis cannot be extended to *principal* officers.

Free Enterprise Fund makes clear that for principal officers the only exception to the President's unrestricted removal authority is the *Humphrey's Executor* "quasi-legislative and quasi-judicial" exception. *Free Enterprise Fund*, 561 U.S. at 493 (citation omitted); see *ibid.* (explaining that *Humphrey's Executor* addressed the constitutionality of "conferring good-cause tenure on the principal officers of certain independent agencies," while *Morrison* "address[ed] the removal of inferior officers, whose appointment Congress may vest in heads of departments"); *id.* at 494 ("We * * * considered the status of inferior officers in *Morrison*.").

Amicus's only answer (Br. 43-44) is to insist that while the *Morrison* Court's "inferior-officer determination was critical to its Appointments Clause holding, it played no role in *Morrison*'s removal holding." In addition to ignoring *Free Enterprise Fund*, that incorrectly describes *Morrison* itself. The independent

counsel's status as "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority" was, in fact, the *Morrison* Court's *primary* basis for determining that "the imposition of a 'good cause' standard for removal" there did not "unduly trammel[] on executive authority." 487 U.S. at 691.

Moreover, amicus disregards the obvious reasons why imposing for-cause removal restrictions on principal officers, unlike inferior officers, is necessarily a significant impairment of the President's supervision of executive power. See Gov't Br. 39-41. Because the President "alone and unaided could not execute the laws," *Myers*, 272 U.S. at 117, principal executive officers must serve as the "arm[s]" and "eye[s] of the executive," *Humphrey's Executor*, 295 U.S. at 628. He must rely on those officers, in whom he places his "implicit faith," to supervise inferior officers. *Myers*, 272 U.S. at 134. Amicus's proposal to permit removal restrictions on virtually any principal officer would significantly undermine the President's ability to "take care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. The President would be required to personally monitor and litigate the actions of his principal officers in running their respective departments, rather than having complete confidence in them to supervise the inferior officers who answer to them. Such restrictions are neither "modest" nor constitutional, even under amicus's amorphous proposed "sav[ing]" construction. Amicus Br. 42, 50.

b. Amicus provides little other basis for extending *Humphrey's Executor* to single-headed agencies. He urges (Br. 39-40, 45-46) that the characteristics of some multimember commissions (such as partisan-balancing

requirements) and certain characteristics of the Bureau (like the ability of the Financial Stability Oversight Council to veto certain Bureau rules) prevent the Bureau from infringing on executive power more than those multimember commissions. But while partisan-balancing requirements may *sometimes* restrain the President's ability to appoint like-minded officials to multimember commissions, the removal restriction on the single-headed Bureau may prevent a President from appointing *any* like-minded official to lead the agency. Gov't Br. 36. And while the authority to veto Bureau rules in narrow circumstances may indirectly provide some modest control over the Bureau's functions, even "[b]road power over [agency] functions" is not an adequate substitute for "the power to remove [agency] members." *Free Enterprise Fund*, 561 U.S. at 504.

More fundamentally, even if it were unclear whether the threat to executive authority posed by single-headed independent agencies will always be greater than multimember commissions, it is enough that the rationale for the *Humphrey's Executor* exception does not apply. Amicus recognizes (Br. 35) that *Humphrey's Executor* rested exclusively on the quasi-legislative, quasi-judicial characterization of multimember commissions, and does not refute the government's argument that a single-headed agency cannot be so described. Gov't Br. 26-32.

Amicus similarly fails to rebut the government's showing that single-headed independent agencies are recent innovations the constitutionality of which have been challenged since their inception. Tellingly, amicus's primary purported counterexamples (Br. 30-31, 41) are not removal restrictions at all: the "qualification limitations" initially placed on the Attorney General's

appointment (which simply required he be "learned in the law") and the provision in the first Treasury bill mandating removal of high-ranking Treasury officials for certain violations (see p. 11, *supra*). Amicus's other historical precedents are a repeat of those on which the D.C. Circuit relied. None provides any basis for the restriction here. Gov't Br. 32-35.

Finally, and critically, amicus fails to offer any meaningful limiting principle on Congress's authority to impose removal restrictions on executive officers if *Humphrey's Executor* were extended to single-headed agencies. Gov't Br. 37-39. By his own admission (Br. 53), "it is difficult to pinpoint" the circumstances in which a good-cause standard would cross the constitutional line. Contra *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[H]igh walls and clear distinctions" are the only ones "judicially defensible in the heat of interbranch conflict."). And while amicus accepts (Br. 46) that "nothing in this Court's precedents suggests that Congress is free to impose for-cause restrictions on the President's closest advisors"—*i.e.*, the Cabinet—nothing in his conception of legislative power would do anything to prevent it.

Indeed, a key reason why the Heads of certain Departments (like the Bureau) are not among the President's "closest advisors," while the Heads of other Departments (like Treasury, Commerce, Education, Labor, and Transportation) are, is precisely because Congress has restricted the President's ability to supervise the former, and not the latter. See The White House, *The Cabinet*, https://go.usa.gov/xd5rB. Amicus thus provides no reason why Congress could not treat nearly every current Cabinet-level agency—or any other agency that administers a statutory scheme through

rulemaking, adjudication, and enforcement—precisely as it has treated the Bureau.

Amicus observes (Br. 32) that Congress "has long recognized that some functions—*e.g.*, foreign relations, war powers, national security—are best discharged by officers who serve at the pleasure of the President." He candidly admits (Br. 49), however, that, under the view articulated in his brief, "[s]o long as Congress leaves removal authority with the President, and does not attempt to assign it elsewhere, it may impose" what he deems "modest restrictions on [the President's] authority" to remove the head of virtually any other agency, presumably including the vast majority of the agency heads who currently comprise the Cabinet. "But where, in all this, is the role for oversight by an elected President?" *Free Enterprise Fund*, 561 U.S. at 499. The amicus effectively answers: "Trust [Congress]. [It] will make sure that [the President is] able to accomplish [his] constitutional role." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). In the view of the United States, "the Constitution gives the President—and the people—more protection than that." *Ibid.*[2]

C. The Removal Restriction Should Be Severed From The Rest Of The Dodd-Frank Act

1. "Generally speaking, when confronting a constitutional flaw in a statute," this Court "tr[ies] to limit the

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[2] Although *Humphrey's Executor* and *Morrison* are distinguishable, narrowing or overruling them insofar as necessary is fully consistent with *stare decisis* principles. Gov't Br. 44-46. Contrary to amicus's invocation of reliance concerns (Br. 48), principles of finality, administrative exhaustion, ratification, and similar doctrines should mitigate disruptive effects on the work of the four likely affected agencies, and principles of severability would preserve Congress's creation of those agencies.

solution" to "severing any 'problematic portions while leaving the remainder intact,'" unless it is "'evident'" that the Congress that enacted it would have preferred a different approach. *Free Enterprise Fund*, 561 U.S. at 508-509 (citations omitted). Congress's preferences here could not be clearer. Section 3 of the Dodd-Frank Act expressly instructs that "[i]f any provision * * * is held to be unconstitutional, the remainder of th[e] Act * * * shall not be affected thereby." 124 Stat. 1390. Section 3 is a complete and unambiguous statement of congressional intent, and there is no need to undertake a counterfactual "hypothetical" analysis of what Congress would prefer. *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring).

a. Nothing in the text of the Dodd-Frank Act suggests that the severability provision should not apply. Petitioner's contention (Br. 45-46) that the severability clause applies only to "the various *titles*" of the Act lacks merit for the simple reason that the clause addresses "provision[s]," not titles. And while petitioner points (Br. 45) to a separate severability clause for a particular subtitle within the Act, that is hardly persuasive evidence that Section 3 does not mean what it says. The Court's "preference for avoiding surplusage constructions is not absolute," particularly where the redundant words appear "inadvertently inserted." *Lamie* v. *United States Trustee*, 540 U.S. 526, 536 (2004) (citation omitted). Here, the separate provision is a relic of the fact that the subtitle was a standalone bill before being incorporated into the Dodd-Frank Act. See H.R. 2571, § 302, 111th Cong., 1st Sess. (Sept. 10, 2009).

Nor does Congress's description of the Bureau as an "independent" agency in the Federal Reserve System suggest that its "'very existence'" is inextricably tied to

its "'freedom from the President.'" Pet. Br. 43 (citation omitted). That language simply refers to the fact that the Act created a distinct agency dedicated to consumer protection, rather than merely delegating additional powers to an entity supervised by the Board of Governors. See 12 U.S.C. 5492(c)(1)-(3) (describing the Bureau's autonomy from the Board of Governors). In any event, it does not remotely suggest, let alone make "evident," that "Congress * * * would have preferred no [Bureau] at all to a [Bureau] whose [Director is] removable at will." *Free Enterprise Fund*, 561 U.S. at 509.

Petitioner claims (Br. 43) it is "highly unlikely" that Congress would have allowed the Bureau to be funded outside of the annual appropriations process if it knew that the President would be able to remove the Director at will. But other non-independent executive agencies have similar funding mechanisms. See, *e.g.*, 12 U.S.C. 482 (Office of the Comptroller of the Currency).

b. Petitioner's appeal to legislative history is no more persuasive. To the extent such history is relevant, it indicates that Congress's primary goal was to consolidate the administration and enforcement of federal consumer financial law in an agency with a dedicated consumer protection mission. See S. Rep. No. 176, 111th Cong., 2d Sess. 10-11 (2010). The administration of those laws previously was spread among seven different federal regulators, each with differing levels of oversight authority over overlapping types of market participants. Many in Congress believed that this system of "conflicting regulatory missions, fragmentation, and regulatory arbitrage" "helped bring the financial system down." *Id.* at 10, 166.

To be sure, Congress also wanted the Director to have removal protection during her five-year term. Cf.

Pet. Br. 44. But it is clear that Congress did not view the removal restriction as essential to the agency's success. By its terms, the provision does not apply when the Bureau is led by an Acting Director—either by default during the appointed Director's "absence or unavailability," 12 U.S.C. 5491(b)(5)(B), or by designation under the Federal Vacancies Reform Act of 1998, 5 U.S.C. 3345 *et seq.* See *Designating an Acting Director of the Bureau of Consumer Financial Protection* (O.L.C. Nov. 25, 2017), slip op. 10. And until the first Director was appointed, the Treasury Secretary was "authorized to perform the functions of the Bureau." 12 U.S.C. 5586(a).

c. Finally, contrary to petitioner's contention (Br. 46-47), refusing to apply the severability provision according to its terms would be severely disruptive. The Bureau is the federal government's only agency solely dedicated to consumer financial protection. It has issued numerous significant rules, obtained billions of dollars in relief through enforcement, and reached millions of consumers through its education functions. Invalidating Title X would lead to grave doubt as to the validity of those rules and eliminate the safe harbors Congress established for regulated entities who relied in good faith on them. See, *e.g.*, Mortgage Bankers Ass'n Amicus Br. 12-16. It would eliminate important new consumer protection authorities. See, *e.g.*, Dodd-Frank Act § 1024, 124 Stat. 1987; § 1031, 124 Stat. 2005; § 1089, 124 Stat. 2092. It would undo substantive amendments to several consumer protection statutes. See, *e.g.*, § 1073, 124 Stat. 2060; § 1075, 124 Stat. 2068; § 1098, 124 Stat. 2103. And it would require unwinding the transfer of functions and staff to the Bureau from seven transferor agencies, one of which, the Office of

Thrift Supervision, no longer even exists. 12 U.S.C. 5412-5413.

2. Perhaps recognizing the flaws in its severability argument, petitioner principally contends (Br. 35-41) that the Court should reverse the court of appeals' judgment without addressing severability at all. But petitioner's attempt to avoid the severability question that this Court added is misguided.

Reversing the court of appeals' judgment outright would deprive the Bureau of ratification arguments that it preserved below but are not properly presented here. The Bureau argued in the court of appeals that if the removal restriction is unconstitutional, the CID could still be enforced because the Bureau's former Acting Director—who was removable at will—had ratified it. Gov't C.A. Br. 13-19. The Bureau urged in the alternative that it be permitted an opportunity to ratify the CID after the removal provision was severed. *Id.* at 43. Petitioner objected to those arguments on legal and factual grounds, and the Ninth Circuit did not resolve them because it upheld the removal restriction's constitutionality. Both petitioner and the government highlighted those arguments at the certiorari stage and agreed that ratification issues would not be before this Court. See Gov't Cert. Br. 18; Pet. Cert. Reply 5.

Petitioner was right then and wrong now. There are strong arguments in favor of ratification in these circumstances. See Br. in Opp. at 12-19, *All American Check Cashing, Inc.* v. *CFPB*, 140 S. Ct. 646 (2019) (No. 19-432). Contrary to petitioner's suggestion, the Court cannot dismiss the Bureau's efforts to enforce the CID without addressing those arguments. The Court should reject petitioner's about-face invitation to do so in the

first instance (either expressly or *sub silentio*) without the benefit of party briefing.

By contrast, the Court itself added the severability question. Presumably, it did so to avoid the need for lower courts to adjudicate the question in follow-on litigation, to eliminate any uncertainty in the interim about whether the Bureau can continue the critical work of implementing the consumer financial protection laws, and to make clear to regulated parties what rules and regulators govern their conduct. As a result, the question has been fully briefed by the parties, and it is entirely appropriate for the Court to answer it.

Petitioner is wrong to suggest (Br. 37-41) that the question is not squarely presented. Although petitioner contends (Br. 38) that the Court can provide complete relief without addressing severability, the ratification question that must be resolved before granting such relief depends on whether the removal restriction is severable from the rest of the Act. If it is, then the courts below must resolve whether the ratification was proper. And if it is not, the Bureau cannot ratify the CID at all since it does not validly exist. Determining the severability of the removal restriction therefore is necessary to resolving this case, and the question is fully briefed, broadly important, and straightforward. The Court should confirm that the severability clause means what it says and remand the case to the court of appeals to resolve any remaining case-specific ratification questions.

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For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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Solicitor General

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