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

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

2. Whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. 5491(c)(3) can be severed from the remainder of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

CORPORATE DISCLOSURE STATEMENT

Petitioner Seila Law LLC has no parent corporation, and no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 923 F.3d 680. The order of the district court granting in part respondent's petition to enforce a civil investigative demand (Pet. App. 9a-23a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2019. The petition for a writ of certiorari was filed on June 28, 2019, and granted on October 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in an appendix to this brief.

STATEMENT

The Consumer Financial Protection Bureau is an agency like no other. Headed by a single director who does not answer to the President, the CFPB exercises vast executive power against private parties. This case presents the fundamental question whether the CFPB's novel structure violates the separation of powers.

As the Court has consistently recognized, the Constitution empowers the President to hold executive officers accountable by removing them from office. That power is critical to the President's enumerated responsibility to take care that the laws be faithfully executed. While the Court has in limited circumstances upheld the constitutionality of certain multimember "independent" agencies, whose leading officers the President can remove only for cause, it has never upheld the constitutionality of an independent agency that exercises significant executive authority but is led by a single person.

In 2010, Congress created the CFPB, an agency with precisely that structure. Headed by a single director removable only for cause, the CFPB possesses substantial executive authority, including the power to implement and enforce a vast array of federal consumer-protection laws. The questions presented in this case are, first, whether the Constitution permits such a structure, and second, whether, if the structure is unconstitutional, the limitation on the President's ability to remove the Director of the CFPB can be severed from the remainder of Title X of the Dodd-Frank Act.

Petitioner in this case is a law firm that helps individuals resolve their debts. As part of an investigation into whether petitioner violated certain federal laws, the CFPB issued a civil investigative demand seeking information and documents. Petitioner objected to the de-

mand on the ground that the CFPB was unconstitutionally structured; the CFPB petitioned a federal district court for enforcement. The district court granted the petition, and the court of appeals affirmed. It held that the CFPB's structure did not violate the separation of powers, on the ground that this Court's decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), which upheld certain restrictions on the removal of federal officers, dictated the outcome here.

The court of appeals' decision was incorrect. *Humphrey's Executor* has no application to the CFPB's single-director independent-agency structure. That structure has few parallels in American history, poses a unique threat to individual liberty, and unduly inhibits the President's ability to supervise the exercise of the executive power. In any event, *Humphrey's Executor* was badly reasoned, wrongly decided, and should be overruled. Whether the Court distinguishes or overturns that case, it should hold that the CFPB's structure violates the separation of powers and reverse the court of appeals' judgment.

Once the Court orders the denial of the CFPB's petition for enforcement, its work is appropriately at an end. The government contends that the Court should rewrite the statute by severing the provision limiting the President's ability to remove the Director of the CFPB. It would be prudent to allow Congress to determine how to remedy the constitutional defect in the CFPB's structure in the first instance. But if the Court reaches the question of severability, it should invalidate Title X of the Dodd-Frank Act in its entirety.

A. Background

1. Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," Art. II, § 1, cl. 1, who must "take Care that the Laws be faithfully executed," Art. II, § 3. Since 1789, those provisions have "been understood to empower the President to keep [federal] officers accountable—by removing them from office, if necessary." *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 483 (2010).

In its landmark decision in *Myers* v. *United States*, 272 U.S. 52 (1926), this Court recognized the President's broad authority to supervise, direct, and remove subordinate officers in the Executive Branch. Writing for the Court, Chief Justice Taft confirmed that the President retains the "exclusive power [to] remov[e]" principal executive officers from duty. *Id.* at 122. "[T]o hold otherwise," he explained, "would make it impossible for the President, in case of political or other differences with * * * Congress, to take care that the laws be faithfully executed." *Id.* at 164.

The Court recognized a narrow exception to that principle in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). There, the Court upheld a statute protecting the multiple commissioners of the Federal Trade Commission (FTC) from removal except for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. 41. Reasoning that the President's removal power "will depend upon the character of the office" at issue, the Court stated that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628, 631. Instead, the FTC exercised only "quasi-legislative or quasi-judicial powers," acting as a "body of experts" with staggered terms who "gain experience by length of service." *Id.* at 624-625, 628.

The Court has similarly sustained the restriction of the President's power to remove commissioners of the War Claims Commission, a multimember body with "intrinsic judicial character," on the ground that Congress was permitted to insulate members of an "adjudicatory body" from removal. *Wiener* v. *United States*, 357 U.S. 349, 355-356 (1958). And it has sustained restrictions on the power of principal executive officers, themselves accountable to the President, to remove their own inferior officers. See *Morrison* v. *Olson*, 487 U.S. 654, 691-693 (1988); *United States* v. *Perkins*, 116 U.S. 483, 485 (1886).

The Court recently reaffirmed that, apart from those limited exceptions, the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513-514. Accordingly, it has refused to extend *Humphrey's Executor* to "new situation[s]" not previously encountered by the Court. *Id.* at 483, 513.

2. In 2007, Elizabeth Warren, then a professor at Harvard Law School, proposed a new, independent federal agency called the Financial Product Safety Commission. Envisioned as an analog to the multimember Consumer Product Safety Commission, the proposed agency would enforce existing consumer financial-protection laws and ensure that consumer financial products, such as mortgages, car loans, and credit cards, meet certain minimum standards. See Elizabeth Warren, *Unsafe at Any Rate*, Democracy, Summer 2007, at 8, 16-17.

That idea gained the backing of the Obama Administration in 2009, when the Department of the Treasury proposed the creation of the Consumer Financial Protection Agency—an independent agency designed to ensure that "consumer protection regulations are written fairly and enforced vigorously." Department of the Treasury,

Financial Regulatory Reform: A New Foundation 55 (2009). The Treasury suggested that the agency be "structured to promote its independence and accountability," with a multimember board and a director "represent[ing] a diverse set of viewpoints and experiences." *Id.* at 58.

In 2010, Congress responded to those proposals by creating the Consumer Financial Protection Bureau. It did so in the Consumer Financial Protection Act, which was enacted as Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1955. The CFPB was tasked with "implement[ing] and * * * enforc[ing]" federal law related to the "markets for consumer financial products and services." 12 U.S.C. 5511(a).

In line with then-Professor Warren's and the Obama Administration's initial proposals, Congress classified the CFPB as an "independent bureau." 12 U.S.C. 5491(a). But deviating from the initial proposals and even from the original bill passed by the House of Representatives, see H.R. 4173, 111th Cong. § 4103 (Dec. 11, 2009), Congress structured the CFPB as an agency headed by a single director. See 12 U.S.C. 5491(b)(1). Appointed by the President and confirmed by the Senate, the Director serves for a term of five years (and may remain in office thereafter until a successor has been confirmed). See 12 U.S.C. 5491(b)(2), (c)(1)-(2). Of central importance here, the President may not remove the Director except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

Congress endowed the CFPB with sweeping powers. As an initial matter, Congress consolidated in the CFPB "all authority to prescribe rules or issue orders or guidelines pursuant to any [f]ederal consumer financial law," 12 U.S.C. 5581(a)(1)(A), including some eighteen preexisting

federal consumer-protection laws, see 12 U.S.C. 5481(12), (14). Congress also created a new prohibition on "any unfair, deceptive, or abusive act or practice" by participants in the consumer-finance industry, 12 U.S.C. 5536(a)(1)(B), and it authorized the CFPB to issue regulations identifying such acts or practices, see 12 U.S.C. 5531(a)-(b). And Congress gave the CFPB broad "[e]nforcement [p]owers," 124 Stat. 2018, including the powers to conduct investigations, to issue subpoenas and civil investigative demands, and to file lawsuits in federal court to impose civil penalties, see 12 U.S.C. 5562, 5564(a), (f). The CFPB has approximately nineteen currently pending enforcement actions. See Br. in Opp. at 16 n.2, *All American Check Cashing, Inc.* v. *CFPB*, No. 19-432 (Nov. 6, 2019).

The CFPB's authority extends beyond financial-services providers to any business or individual engaged in a broad range of regulated activity. See 12 U.S.C. 5481(6), (15). As a result, the CFPB "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

So as further to ensure the CFPB's independence, Congress chose to exempt it from the normal congressional appropriations process. The CFPB receives most of its funding from the Federal Reserve System, within which it is nominally located; each year, the Director may request, and the Federal Reserve must provide, an amount the Director deems "reasonably necessary to carry out" the CFPB's duties, not to exceed a set percentage (currently 14% after statutory adjustments) of the Federal Reserve's total operating expenses at the time. 12 U.S.C. 5497(a)(1), (2)(A)(iii), (2)(B). If necessary, the Director may also request appropriations of additional funds from Congress. See 12 U.S.C. 5497(e).

B. Facts And Procedural History

1. Petitioner is a California-based law firm operated by a solo practitioner. It offers a wide variety of legal services to individual clients, including assistance in obtaining relief from consumer debt. In 2017, the CFPB issued a civil investigative demand as part of an investigation into whether petitioner violated federal consumer-financial law in marketing its services. The demand requested various information and documents from petitioner about its organization and practices. Pet. App. 10a; C.A. Dkt. 14-2, at 271-278.

Petitioner asked the CFPB to set aside the civil investigative demand. See 12 U.S.C. 5562(f); 12 C.F.R. 1080.6(e). As is relevant here, petitioner asserted that the demand was invalid because the CFPB's structure violated the separation of powers by vesting significant executive power in a single director removable only for cause. The CFPB denied petitioner's request to set aside the demand. Petitioner submitted partial responses to the demand, reiterated its objections, and declined to provide further information or documents. Pet. App. 10a-11a.

2. Proceeding under a cause of action created by Title X of the Dodd-Frank Act, see 12 U.S.C. 5562(e)(1), the CFPB filed a petition to enforce the demand against petitioner in the United States District Court for the Central District of California. In response, petitioner renewed its defense that the demand was invalid because the CFPB's structure was unconstitutional. The district court rejected that defense; it narrowed the scope of the investigative demand in one respect and then granted the petition subject to that modification. Pet. App. 9a-23a.

3. The court of appeals affirmed, agreeing with the district court that the CFPB's structure was constitutional. Pet. App. 1a-8a.

At the outset, the court of appeals recognized that "[t]he arguments for and against" the view that the CFPB's structure violates the separation of powers had been "thoroughly canvassed" in the various opinions in the District of Columbia Circuit's en banc decision in *PHH*, *supra*. Pet. App. 2a (citation omitted). That decision produced seven opinions that span over 125 pages of the Federal Reporter, with a majority of the court holding that the CFPB's structure was constitutional and three judges dissenting from that holding. See *PHH*, 881 F.3d at 93; *id.* at 137-164 (Henderson, J., dissenting); *id.* at 164-200 (Kavanaugh, J., joined by Randolph, J., dissenting).

Seeing "no need to re-plow the same ground," the court of appeals in this case offered only a "brief" explanation of why it agreed with the *PHH* majority. Pet. App. 2a. The court of appeals began by observing that, in *Humphrey's Executor*, this Court had upheld the structure of the Federal Trade Commission. *Id.* at 4a. The court acknowledged that "the CFPB possesses substantially more executive power than the FTC did back in 1935," when *Humphrey's Executor* was decided. *Id.* at 5a. And it further recognized that the leadership of the CFPB by a single director creates a "structural difference" from the multimember FTC that "[s]ome have found * * * dispositive." *Ibid.* Yet the court of appeals took the view that this Court's decision in *Morrison* "preclude[d] drawing a constitutional distinction between multi-member and single-individual leadership structures." *Id.* at 5a-6a. Because the court viewed *Humphrey's Executor* and *Morrison* as "controlling," it held that the CFPB's structure was constitutional. *Id.* at 6a.

The court of appeals acknowledged that petitioner's argument was "not without force." Pet. App. 3a. But the court of appeals concluded that, while "[t]he Supreme

Court is of course free to revisit those precedents," it was not. *Id.* at 6a.

4. This Court subsequently granted certiorari. The court of appeals has stayed its mandate pending the Court's decision. See C.A. Dkt. 49.

SUMMARY OF ARGUMENT

Congress structured the CFPB as an independent agency headed by a single director. By insulating the Director of the CFPB from removal at will by the President while empowering him to exercise substantial executive power, Congress breached the President's core prerogatives under Article II of the Constitution. The CFPB's structure goes well beyond anything this Court has previously allowed and badly flouts the separation of powers.

The appropriate remedy for the constitutional violation here is to deny the CFPB's petition to enforce the civil investigative demand issued to petitioner. In granting that relief, the Court should decline the government's invitation to rewrite the statute by engaging in "severance," instead leaving to Congress the determination of how to address the constitutional defect in the CFPB's structure. But if the Court decides to engage in severability analysis, it should invalidate Title X of the Dodd-Frank Act in its entirety.

I. The CFPB is headed by a single director removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). That single-director independent-agency structure violates the separation of powers.

A. Article II of the Constitution vests the entire executive power in the President with the directive that the laws be faithfully executed. Since the earliest days of the Republic, it has been recognized that Article II empowers the President to hold principal officers in the Executive

Branch to account by removing them at will. This Court most famously stated that rule in its landmark decision in *Myers* v. *United States*, 272 U.S. 52 (1926), and it confirmed it less than a decade ago in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010). Because the structure of the CFPB violates that rule, it is unconstitutional.

B. The court of appeals considered itself bound to uphold the CFPB's constitutionality by the Court's decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). But this case is a far cry from *Humphrey's Executor*, in which the Court permitted a restriction on the removal of members of a nonpartisan, multimember commission that it viewed (whether rightly or wrongly) as exercising no executive power. The CFPB, by contrast, is headed by a single person answerable to no one; indisputably wields substantial executive power; and even obtains its funding outside the traditional appropriations process.

Nor does this Court's subsequent decision in *Morrison* v. *Olson*, 487 U.S. 654 (1988), upholding a restriction on the removal of the independent counsel, dictate the result here. That case involved a restriction on the Attorney General's removal of an inferior officer, and no party argued that the fact that the independent counsel was a single person rendered the Office of the Independent Counsel unconstitutional.

C. Upholding the CFPB's constitutionality would require the Court to extend the reasoning of *Humphrey's Executor* to agencies headed by single principal officers. There is no valid justification for doing so.

1. The Court places heavy emphasis on historical practice when assessing questions concerning the separation of powers. With a single principal officer as its head, the CFPB is a historical anomaly. Indeed, there appear to be only three other instances in history of agencies that

have purported to pair such a structure with removal protections for their leaders. Those agencies are all of recent vintage and widely questioned legitimacy.

2. The CFPB's single-director structure diminishes freedom from governmental tyranny. As the Constitution itself implicitly recognizes, multimember bodies protect the people from arbitrary decisionmaking. A multimember structure fosters deliberation and impedes regulatory capture. The lack of that protection is particularly alarming as to the CFPB, whose director wields enormous rulemaking and law-enforcement powers that, when exercised without political accountability, pose a serious threat to individual liberty.

3. As compared to a multimember structure, a single-director structure unduly limits the President's ability to control an agency. With a multimember commission, the President typically appoints the chair, who controls the agency's budget, personnel, and agenda. The CFPB lacks that avenue of presidential control—a problem only exacerbated by the fact that the length of the Director's tenure may preclude the President from having any meaningful influence on the CFPB's agenda. Accordingly, the Court should refuse to extend *Humphrey's Executor* to the CFPB.

D. If the Court nevertheless determines that *Humphrey's Executor* is controlling, it should overrule it. With scant analysis and in the midst of the notorious New Deal standoff between the Court and President Franklin Roosevelt, *Humphrey's Executor* blithely discarded the reasoning of Chief Justice Taft's exhaustive opinion less than a decade earlier in *Myers*. The Court has repudiated *Humphrey's Executor* in its subsequent separation-of-powers decisions, casting doubt on its core rationale and looking elsewhere to resolve those cases. *Humphrey's*

Executor has become a derelict on the waters of the law, and the time has come for the Court to scuttle it.

II. If the Court holds that the CFPB's structure violates the separation of powers, it should reverse the court of appeals' judgment.

A. Because this case arises out of the CFPB's petition to enforce the civil investigative demand issued to petitioner, a determination that the CFPB is unconstitutionally structured is sufficient to resolve it. In light of that structural defect, the civil investigative demand was issued by an agency that lacked the power to take that unquestionably executive action. The Court should reverse the court of appeals' judgment, which would have the effect of denying the CFPB's petition for enforcement.

B. The government contends that the Court should rewrite the statute by severing the provision limiting the President's ability to remove the Director. As a matter of first principles, it is questionable whether the Court has the power to engage in such "severance" where, as here, no party is seeking, affirmatively and prospectively, to invalidate an entire legislative act. Regardless, the Court is not required to address severability, and there is particularly good reason to refrain from doing so here.

The severability doctrine leaves the Court with no good option: it allows the Court either to sever the provision protecting the Director from removal or to invalidate Title X of the Dodd-Frank Act in its entirety. But there can be little doubt that the Congress that created the CFPB would have preferred a third alternative: structuring the CFPB as a multimember commission. Because that option is not available under the severability doctrine, the judicially restrained course is to decline to engage in such a speculative and artificially constrained ex-

ercise in lawmaking. Instead, the Court should allow Congress to determine how to remedy the constitutional defect in the CFPB's structure in the first instance.

C. If the Court reaches the question of severability, it should invalidate Title X in its entirety. As the text of Title X makes clear and the legislative history confirms, Congress's foremost goal in structuring the CFPB was to create an agency independent from outside influence. To give the President the power to remove the Director at will would radically reshape the CFPB, creating a mutant version of the agency that Congress envisioned—one that would still be unaccountable to Congress, yet fully within presidential control.

While the Dodd-Frank Act has a general severability clause, it is best read to provide that the various titles of the Act are severable from each other, not that individual provisions are severable from the title in which they reside. That clause, located hundreds of pages from the provision at issue here, says nothing about a congressional preference for a CFPB operating completely under presidential control over no CFPB at all.

If the Court reaches the question of severability, therefore, it should invalidate Title X in its entirety. In order to resolve the dispute before it, however, the Court need only reverse the court of appeals' judgment and bring this enforcement proceeding by an unconstitutionally structured agency to an end.

ARGUMENT

I. THE STRUCTURE OF THE CONSUMER FINANCIAL PROTECTION BUREAU VIOLATES THE SEPARATION OF POWERS

As this Court has long recognized, Article II of the Constitution confers broad power on the President to remove executive officers whom he appoints. In creating

the CFPB, however, Congress insulated its Director from removal except for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). The Court has not permitted such restrictions on the President's power to remove principal officers except in the context of multimember commissions. It should not expand that limited exception here to the single-director structure of the CFPB. Doing so would leave no meaningful limiting principle on Congress's ability to insulate executive officers from removal, contravening the Framers' decision to vest executive authority solely in the President.

A. The CFPB's Structure Violates The Rule Against Restrictions On The President's Ability To Remove Executive Officers

Article II of the Constitution vests the entire executive power in the President. Since the beginning of the Republic, it has been recognized that Article II empowers the President to hold principal officers in the Executive Branch accountable by removing them at will. By permitting the President to remove the Director of the CFPB only for cause, Congress violated that rule, concentrating substantial governmental power in a person answerable to no one.

1. a. The Constitution "divide[s]" the federal government's powers into "three defined categories, Legislative, Executive and Judicial." *INS* v. *Chadha*, 462 U.S. 919, 951 (1983). It makes "each branch responsible ultimately to the people," thereby "protect[ing] liberty." *Bowsher* v. *Synar*, 478 U.S. 714, 722 (1986); see The Federalist No. 51 (Madison) (Clinton Rossiter ed., 1961).

Article II of the Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." Art. II, § 1, cl. 1. And it directs that the President must "take Care that the Laws be faithfully

executed." Art. II, § 3. By vesting all of the Nation's executive power in a single, elected official, the Constitution ensures that the people have the ultimate say in how the laws are executed.

In adopting that structure for the Executive Branch, the Framers considered and rejected proposals for a plural executive. The Framers understood that, if the executive power were "subject, in whole or in part, to the control and co-operation of others," it would "deprive" the people of their "two greatest securities" for the "faithful exercise of any delegated power"—namely, the "restraints of public opinion" and the "opportunity of discovering * * * the misconduct of the persons they trust." The Federalist No. 70, at 424, 428-429 (Hamilton); see *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment). Accordingly, the Framers "insist[ed]" upon "unity in the Federal Executive" to "ensure both vigor and accountability." *Printz* v. *United States*, 521 U.S. 898, 922 (1997).

b. Of course, the President cannot act alone. In order to carry out his duties, the President must have the assistance of subordinate officers. To ensure that "[t]he buck stops with the President," however, Article II "empower[s] the President to keep [executive] officers accountable," including "by removing them from office." *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477, 483, 493 (2010). That fundamental principle has been recognized since the earliest debates in the First Congress, which counted as members many of the Framers. See *Bowsher*, 478 U.S. at 723-724.

In 1789, Congress created the first Cabinet departments. In the debate over the Department of Foreign Affairs, Congress considered a bill that included language expressly providing that the Secretary of State would be removable by the President. Some members expressed

concern that such language might cast doubt on the principle that Article II itself confers on the President the power to remove executive officers. In particular, James Madison opposed the proposed language, emphatically stating that, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Congress 463 (1789) (Joseph Gales ed., 1834). That understanding carried the day: as this Court has recognized, the "prevail[ing]" view was that "the executive power" vested in the President by Article II "included a power to oversee executive officers through removal." *Free Enterprise Fund*, 561 U.S. at 492 (citation omitted); see Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1030-1032 (2006).

The Decision of 1789 provides "contemporaneous and weighty evidence of the Constitution's meaning." *Bowsher*, 478 U.S. at 723 (internal quotation marks and citation omitted). And after 1789, the view that Article II empowers the President to remove principal officers became the "settled and well understood construction of the Constitution." *Free Enterprise Fund*, 561 U.S. at 492 (citation omitted).

In the landmark case of *Myers* v. *United States*, 272 U.S. 52 (1926), this Court reaffirmed the principle that the President's Article II authority necessarily includes the "exclusive power of removal." *Id.* at 122. In an opinion written by Chief Justice Taft, the Court invalidated a statute requiring the President to seek Senate consent before removing certain postmasters. After a comprehensive discussion of the Decision of 1789, the Court concluded that the requirement of Senate consent "denied" the President the "unrestricted power" to remove appointed officers. *Id.* at 176. The Court reasoned that, just as the Pres-

ident's ability to "select those who [are] to act for him under his direction in the execution of the laws" is "essential" to the exercise of "his executive power," so too is his ability to "remov[e]" those officers "without delay" in order to "supervise and guide" their actions. *Id.* at 117, 134-135. "[T]o hold otherwise," the Court explained, "would make it impossible" for the President to "take care that the laws be faithfully executed." *Id.* at 164.

The Court recently reiterated that principle in *Free Enterprise Fund*. Without the removal power, the Court explained, the President cannot "be held fully accountable" for the exercise of executive power, "greatly diminish[ing]" his "intended and necessary responsibility." 561 U.S. at 514 (quoting The Federalist No. 70, at 429). The "traditional default rule," therefore, is that the President has the authority to remove officers whom he appoints. *Id.* at 509.

2. Under the rule recognized by Congress in the Decision of 1789 and confirmed by this Court in *Myers* and *Free Enterprise Fund*, the President must have the power to remove the Director of the CFPB at will.

As a preliminary matter, the Director of the CFPB is indisputably a principal officer for purposes of the Appointments Clause, requiring appointment by the President with the Senate's advice and consent. See U.S. Const. Art. II, § 2, cl. 2; *Free Enterprise Fund*, 561 U.S. at 510. She alone heads the agency; she is neither directed nor supervised by any superior officer appointed by the President. See 12 U.S.C. 5491(b)(1). The Director also exercises substantial executive power, including the authority to conduct investigations, issue subpoenas and civil investigative demands, and file lawsuits in federal court to impose civil penalties on private individuals. See 12 U.S.C. 5562, 5564(a), (f).

Despite possessing that executive power, however, the Director is removable only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). That limitation to removal for cause prohibits the President from removing the Director based on "disagreement with [her] policies or priorities," *Free Enterprise Fund*, 561 U.S. at 502, or simply replacing the Director with a person "of [the President's] own choosing," *Wiener* v. *United States*, 357 U.S. 349, 356 (1958).

The limitation on the President's ability to remove the Director plainly violates the rule that Article II gives the President the "exclusive power of removal." *Myers*, 272 U.S. at 122. Accordingly, absent some permissible exception to that rule, the CFPB's structure is unconstitutional.

B. No Exception To The Rule Applies To The CFPB

Despite the foregoing logic, the court of appeals considered itself bound to uphold the CFPB's constitutionality by *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Morrison* v. *Olson*, 487 U.S. 654 (1988). See Pet. App. 3a. Neither case addresses the circumstances presented by the CFPB's novel structure.

1. As to *Humphrey's Executor*: in that case, the Court upheld a statute protecting the multiple commissioners of the Federal Trade Commission (FTC) from removal except for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. 41. Reasoning that the President's removal power "will depend upon the character of the office" at issue, the Court noted that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." 295 U.S. at 627-628, 631. Instead, the FTC exercised only "quasi-legislative or quasi-judicial powers," with its limited "powers of investigation" serving only the legislative purpose of making reports and recommendations to Congress. *Id.* at 621, 628. The FTC

consisted of five commissioners "called upon to exercise the trained judgment of a body of experts," serving staggered terms to foster collective expertise. *Id.* at 620, 624. That deliberative, multimember body was also "non-partisan," with no more than three commissioners of the same political party. See *id.* at 620, 624-625.

The CFPB's structure deviates from the FTC's, as described in *Humphrey's Executor*, in all of those respects. As the court of appeals acknowledged, the CFPB "possesses substantially more executive power than the FTC did back in 1935." Pet. App. 5a. For example, unlike the FTC at the time of *Humphrey's Executor*, the CFPB can obtain retrospective penalties for statutory violations. See p. 19, *supra*. And all of the CFPB's power is vested in a single director, not a multimember "body of experts" like the FTC. *Humphrey's Executor*, 295 U.S. at 624; see Daniel A. Crane, *Debunking 'Humphrey's Executor,'* 83 Geo. Wash. L. Rev. 1835, 1864 (2015) (Crane).

Removing the CFPB still further from the political branches—and distinguishing it further from the 1935 FTC—the CFPB does not rely on standard congressional appropriations for its funding. "[L]ike nearly all other administrative agencies," the FTC "is and always has been subject to the appropriations process." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 146 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting). The CFPB, by contrast, receives automatic funding from the Federal Reserve. See p. 7, *supra*. That exempts the CFPB from the "most potent form of [c]ongressional oversight." S. Doc. No. 26, 95th Cong., 1st Sess. 42 (1977); see The Federalist No. 58 (Madison). And it eliminates the President's ability to exert control through the budgeting process.

In short, the CFPB is "not even a distant cousin of the FTC blessed by *Humphrey's Executor*." *PHH*, 881 F.3d at 146 (Henderson, J., dissenting). Permitting the

CFPB's structure would require a considerable extension of that decision.

2. As to *Morrison*: the Court there upheld a statute insulating an independent counsel appointed under the Ethics in Government Act from removal by the Attorney General except "for good cause." 28 U.S.C. 596(a)(1). To be sure, the independent counsel was a single person. But the challengers did not argue that this fact alone rendered the Office of the Independent Counsel unconstitutional. See *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting).

In any event, the independent counsel was also "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. As a result, the Court "had no occasion to consider the validity of removal restrictions affecting principal officers, officers with broad statutory responsibilities, or officers involved in executive branch policy formulation." The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 124, 169 (1996). On each of those grounds, *Morrison* is inapplicable here.

C. The Court Should Not Extend The *Humphrey's Executor* Exception To The CFPB

The Court should decline to extend the exception recognized in *Humphrey's Executor* to a single-director agency such as the CFPB. A single-director structure with for-cause removal is different from a multimember structure as a matter of historical practice, protection against governmental tyranny, and presidential control. Extending *Humphrey's Executor* to this case would leave no meaningful limit on Congress's ability to insulate executive officers from removal. The Court should instead apply the default rule from *Myers*, dating back to 1789, and

hold that the CFPB's structure violates the separation of powers.

1. The CFPB's Structure Is A Historical Anomaly

In separation-of-powers cases, the Court "put[s] significant weight upon historical practice" in determining whether one branch of the government has transgressed constitutional boundaries. *Zivotofsky* v. *Kerry*, 135 S. Ct. 2076, 2091 (2015) (citation omitted). While "[d]eeply embedded traditional ways of conducting government cannot supplant the Constitution," they can "give meaning to the words of a text or supply them." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). For that reason, "[p]erhaps the most telling indication of [a] severe constitutional problem" in the structure of a governmental entity is "the lack of historical precedent" for it. *Free Enterprise Fund*, 561 U.S. at 505 (citation omitted). Historical practice weighs strongly against upholding the CFPB's structure.

a. As a historical matter, "each of the independent agencies has traditionally operated—and each continues to operate—as a multi-member 'body of experts appointed by law and informed by experience.'" *PHH*, 881 F.3d at 170 (Kavanaugh, J., dissenting) (quoting *Humphrey's Executor*, 295 U.S. at 624). Since their inception, independent agencies entrusted with substantial executive authority have been structured as multimember commissions. See Senate Committee on Governmental Affairs, 5 *Study on Federal Regulation, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977). Over the last century, Congress has established numerous such agencies, making the multimember structure "synonymous with independence." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev.

1111, 1135-1137 (2000) (Breger & Edles); see *Free Enterprise Fund*, 561 U.S. at 547 (Breyer, J., dissenting); *PHH*, 881 F.3d at 173 (Kavanaugh, J., dissenting) (compiling examples).

The CFPB's structure substantially departs from that norm. While the agency initially proposed by then-Professor Warren and later by the Obama Administration followed the multimember model, Congress ultimately structured the CFPB to be headed by a single director removable only for cause—and to be exempt from the standard process for congressional appropriations to boot. See pp. 6-7, *supra*. The result? "Few bureaucratic agencies in American history, if any, have combined the vast power and lack of public accountability of the CFPB." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 856 (2013).

b. To the best of our knowledge, Congress has attempted to implement a single-director independent-agency structure only three other times: the Office of Special Counsel, established in 1978; the Social Security Administration, restructured in 1994; and the Federal Housing Finance Agency, established in 2008. The legitimacy of each of those recent efforts is questionable.

The Office of Special Counsel has always been viewed as a "controversial anomaly." K. William O'Connor, Foreword to Shigeki J. Sugiyama, *Protecting the Integrity of the Merit System: A Legislative History of the Merit System Principles, Prohibited Personnel Practices and the Office of the Special Counsel*, at v (1985); see Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. O.L.C. 120, 120-121 (1978). And it presents less reason for concern than the CFPB, because the Office of Special Counsel "has a narrow jurisdiction" and primarily "enforc[es] personnel laws against government agencies and government employees" instead of against

private citizens. *PHH*, 881 F.3d at 175 (Kavanaugh, J., dissenting).

Similarly, the legitimacy of the Social Security Administration has been contested ever since it was restructured as an independent agency in 1994, with President Clinton stating at the time that the "single Commissioner" structure posed a "significant constitutional question" and noting his willingness "to work with the Congress on a corrective amendment." Presidential Statement on Signing the Social Security Independence and Program Improvements Act of 1994, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994); Breger & Edles 1207-1208 & n.492. Again, there is less reason for concern than with the CFPB, because the Social Security Administration's primary function is to adjudicate claims for benefits, rather than to exercise core executive power by bringing enforcement actions against private entities.

Finally, the Federal Housing Finance Agency (FHFA) is the CFPB's contemporary. See Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654. Its structure was recently invalidated by the en banc Fifth Circuit. See *Collins* v. *Mnuchin*, 938 F.3d 553, 587-588, pet. for cert. pending, No. 19-422 (filed Sept. 25, 2019). And even FHFA poses less reason for concern than the CFPB, because it regulates government-sponsored entities rather than purely private actors.

Even if the legitimacy of the "handful of isolated" examples were settled, they would count for little in the face of the ordinary historical practice. *Free Enterprise Fund*, 561 U.S. at 505; see *NLRB* v. *Noel Canning*, 134 S. Ct. 2550, 2563-2564 (2014); *Chadha*, 462 U.S. at 942 n.13. Given the lack of historical support for single-director independent agencies, the Court should decline to extend the reasoning of *Humphrey's Executor* to that context.

2. The CFPB's Structure Lacks An Important Check Against Governmental Tyranny

By combining a single-director structure with a limitation on the President's removal power, the CFPB lacks important protections from governmental tyranny that are integral to the separation of powers. Extending the reasoning of *Humphrey's Executor* to the CFPB would pose an acute threat to individual liberty.

a. The Framers embraced the diffusion of governmental power as a "vital check against tyranny," *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976) (per curiam), and an essential means of "preserv[ing] individual freedom," *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). That understanding motivated the Framers not only to separate power between the three branches, but also to divide power within the branches among multiple entities and persons. Congress thus consists of the Senate and the House of Representatives, each with numerous "Members." See U.S. Const. Art. I, §§ 1-3; The Federalist No. 63, at 384-386 (Madison). And the Supreme Court consists of multiple "Judges," including the Chief Justice. See U.S. Const. Art. III, § 1; The Federalist No. 65, at 399 (Hamilton).

The one exception is the President—the sole head of the Executive Branch—and that exception proves the rule. The Framers consciously established a unitary executive, concerned that a divided executive branch would be outmatched by the more formidable legislative branch. See pp. 16-17, *supra*; *Morrison*, 487 U.S. at 698-699 (Scalia, J., dissenting); The Federalist No. 51, at 322-323. At the same time, precisely to curb the threat to individual liberty that might otherwise be posed by a unitary executive, the Framers made the President accountable to the people through a national election. See U.S. Const. Art. II, § 1; The Federalist No. 70, at 424.

The Constitution therefore reflects the principle that multimember bodies serve as stronger bulwarks against arbitrary decisionmaking than do single-member bodies. The only single-member office in the Constitution—the presidency—was established on the condition that the officeholder would answer directly to the people. See *Clinton*, 520 U.S. at 711-712 (Breyer, J., concurring in the judgment).

b. The basic constitutional threat posed by independent agencies is that they exercise executive power unchecked by the President—and therefore unaccountable to the people. See *Free Enterprise Fund*, 561 U.S. at 498. The more typical multimember structure mitigates that threat by reflecting the constitutional preference for multimember bodies. In particular, two features of a multimember structure serve as a check on an independent agency's untrammeled exercise of power.

First, by requiring consensus to act, a multimember structure prevents any one member from engaging in arbitrary decisionmaking. See Edith Ramirez, *The FTC: A Framework for Promoting Competition and Protecting Consumers*, 83 Geo. Wash. L. Rev. 2049, 2053 (2015). The multimember structure "foster[s] more deliberative decision making," based on a diversity of viewpoints, tending to yield less extreme outcomes and fewer aberrant actions. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 794 (2013) (Datla & Revesz); see Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 Admin. L. Rev. 689, 696 (2013). And if an agency were to go "too far in one direction," the multimember structure has "a built-in monitoring system": dissenting members may voice their concern openly, "alert[ing] Congress and the public" to the

agency's aberrant decision. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 41 (2010).

Second, a multimember structure impedes regulatory capture—a risk anticipated by then-Professor Warren in her original proposal for a multimember consumer-protection agency. See Elizabeth Warren, *Unsafe at Any Rate*, Democracy, Summer 2007, at 8, 18 (Warren). A multimember structure makes regulatory capture more difficult for the simple reason that a majority of the membership, rather than just one individual, must be captured. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 Vand. L. Rev. 599, 611 (2010); Robert E. Cushman, *The Independent Regulatory Commissions* 153 (1941).

c. Not only does the CFPB deviate from the more typical multimember structure, but it poses an even greater risk of tyranny because it "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Critically, that power is not checked even by Congress because the CFPB is exempt from the appropriations process. See p. 7, *supra*.

Accordingly, the Director alone ultimately possesses "authority to prescribe rules or issue orders or guidelines" pursuant to the Dodd-Frank Act or any of eighteen preexisting federal consumer-protection laws. 12 U.S.C. 5581(a)(1)(A); see 12 U.S.C. 5481(12), (14). The Director alone ultimately has the power to identify "any unfair, deceptive, or abusive act or practice" by participants in the consumer-finance industry. 12 U.S.C. 5536(a)(1)(B); see 12 U.S.C. 5481(6), (26), 5531(a)-(b). And the Director alone possesses vast enforcement powers, including the powers to conduct investigations, to issue subpoenas and civil investigative demands, and to file lawsuits in federal

court to impose civil penalties on private individuals. See pp. 6-7, *supra*. Other than the President, the Director arguably "enjoys more unilateral authority than any other official in any of the three branches." *PHH*, 881 F.3d at 166 (Kavanaugh, J., dissenting). Yet unlike the President, the Director possesses unilateral authority that is unchecked by the people.

That sweeping authority underscores the separation-of-powers problem with the CFPB's structure. Extending the reasoning of *Humphrey's Executor* to the CFPB would be unwarranted.

3. The CFPB's Structure Unduly Limits Presidential Control Over The Exercise Of The Executive Power

A single-director structure is also meaningfully different from a multimember structure on the critical question of presidential control. See *Free Enterprise Fund*, 561 U.S. at 500-501.

With a multimember structure, the President can ordinarily exercise some influence over an independent agency by appointing members (whose terms are staggered) and by designating the chair. See *PHH*, 881 F.3d at 189 n.15, 191 (Kavanaugh, J., dissenting). The "ability of the President to retain policy influence through the selection of the chair" is particularly important because the chair is generally a multimember commission's "most dominant figure," with control over the agency's budget, personnel, and agenda. Datla & Revesz 818-819 (citation omitted).

The President possesses far less ability to control the single director of the CFPB. To be sure, with a single-director structure, the President "knows exactly where to turn" if he disagrees with the CFPB's enforcement of the federal consumer-protection laws. *PHH*, 881 F.3d at 98. But there is little the President can actually do once he

turns there. By contrast, "[b]ecause of the special powers and prerogatives of agency chairmen," the President can "exercise nearly total control over th[e] agency's basic policy agenda" simply by installing a more sympathetic chair at a multimember commission. Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238, 245 n.24.

What is more, because the Director serves a five-year and not a four-year term, the potential for conflict between the Director and the President will only grow in the coming years. The current director, appointed in 2018, could serve until 2023, several years after the 2020 election; a director appointed in 2023 could serve until 2028, nearly the entire term of the President elected in 2024; and a subsequent director appointed in 2028 could serve until 2033—thus exceeding the entire term of the President elected in 2028. As a result, whereas the President almost always has the ability to influence a multimember commission over the course of his term, the President may have no ability to influence the CFPB at all.

If anything, the CFPB's structure limits presidential control even more significantly than the removal restriction that this Court invalidated in *Free Enterprise Fund*. There, the Court considered the novel structure of the Public Company Accounting Oversight Board, under which the Board's members could be removed only for cause by the Securities and Exchange Commission, whose commissioners themselves could be removed only for cause. See 561 U.S. at 505. The Court struck down that structure even though the second layer of for-cause insulation afforded the Board's members only slightly greater protection from removal—and thus only marginally diminished presidential authority over and above a single-layer multimember structure. Here, by contrast, a future President could be stuck with a single director not of his

own choosing; be unable to remove that director at will; and be unable indirectly to control that director through the budgeting process.

Even more than in *Free Enterprise Fund*, then, it is clear that the CFPB's novel structure "does not merely add to the [agency's] independence, but transforms it." 561 U.S. at 496. Expanding the *Humphrey's Executor* exception to this context not only would be inconsistent with *Free Enterprise Fund* but would give Congress free rein to limit the President's removal power. The Director of the CFPB exercises core executive power by performing "law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691; see pp. 6-7, *supra*. If restrictions on her removal are permissible, it is hard to see why Congress would stop there. Without some limiting principle, Congress could insulate *any* executive officer from removal, enabling it to reshape the Executive Branch and to override the Framers' "conscious[] deci[sion] to vest Executive authority in one person rather than several." *Clinton*, 520 U.S. at 712 (Breyer, J., concurring in the judgment).

In sum, because the CFPB's structure lacks firm footing in historical practice and poses a unique threat of governmental tyranny, the Court should not extend the narrow exception to the President's removal authority recognized in *Humphrey's Executor* to the CFPB. Instead, the Court should apply the "traditional default rule" that the President has the authority to remove executive officers whom he appoints, *Free Enterprise Fund*, 561 U.S. at 509, and hold that the CFPB's structure violates the separation of powers.

D. In The Alternative, ***Humphrey's Executor*** Should Be Overruled

As explained above, *Humphrey's Executor* does not come close to controlling the result here. But if the Court were to conclude otherwise, petitioner respectfully submits that, in light of its gross departure from constitutional text, history, and precedent, *Humphrey's Executor* should be overruled. See *PHH*, 881 F.3d at 125 n.2 (Griffith, J., concurring in the judgment) (observing that *Humphrey's Executor* "appear[s] at odds with the text and original understanding of Article II"); *id.* at 179 n.7 (Kavanaugh, J., joined by Randolph, J., dissenting) (observing that, "[a]s a matter of first principles, there [is] a strong argument" that "independent agencies violate Article II").

1. *Humphrey's Executor* was poorly reasoned and wrongly decided. Less than a decade earlier, the Court in *Myers* had exhaustively canvassed the historical record, concluding that Article II provides the President with the "exclusive power of removal" of executive officers. 272 U.S. at 122; see pp. 17-18, *supra*. Yet "in six quick pages devoid of textual or historical precedent for the novel principle it set forth," the Court in *Humphrey's Executor* "gutt[ed]" the Court's "carefully researched and reasoned 70-page opinion" in *Myers*. *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting).

In light of the historical context, the Court's decision in *Humphrey's Executor* was unsurprising. It was one of a line of decisions issued in the mid-1930s that resisted President Franklin Roosevelt's New Deal policies—decisions that have been largely repudiated in the following decades. See Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 94 (Miller). In fact, on the same day that *Humphrey's Executor* was decided, two other signif-

icant decisions adverse to President Roosevelt were released, earning the day the title of "Black Monday" for his administration. Crane 1845; see *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555 (1935). *Humphrey's Executor* should be understood against that backdrop. Cf. *Mitchell* v. *Helms*, 530 U.S. 793, 828-829 (2000) (plurality opinion); *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 120-121 & n.16 (1996) (Souter, J., dissenting).

The Court's reasoning in *Humphrey's Executor*, moreover, has not stood the test of time. In *Humphrey's Executor*, the Court upheld the limitation on the President's ability to remove members of the Federal Trade Commission on the ground that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628. But in *Morrison*, the Court cast serious doubt on that reasoning, recognizing that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." 487 U.S. at 690 n.28. While dissenting from the outcome in *Morrison* itself, Justice Scalia noted with approval that the Court had "swept" *Humphrey's Executor* "into the dustbin of repudiated constitutional principles." *Id.* at 725.

Humphrey's Executor is also difficult to square with this Court's most recent decision on the President's removal power, *Free Enterprise Fund*. There, the Court repeatedly emphasized the central role of the President in a government that is accountable to the governed, reasoning that a "clear and effective chain of command" is necessary to make the Executive Branch ultimately "dependen[t] on the people." 561 U.S. at 498, 501. Congress cannot "reduce the Chief Magistrate to a cajoler-in-chief,"

the Court explained, because the President's power to execute the laws includes "the authority to remove those who assist him in carrying out his duties." *Id.* at 502, 513-514.

Even setting aside this Court's most recent decisions, members of the Court and commentators alike have long criticized *Humphrey's Executor*, with some viewing it as "one of the more egregious opinions" ever issued by this Court. Miller 93; see, *e.g.*, *Bowsher*, 478 U.S. at 761 n.3 (White, J., dissenting); *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487-488 (1952) (Jackson, J., dissenting); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 611-612 (1984); Robert E. Cushman, *The Constitutional Status of the Independent Regulatory Commission*, 24 Cornell L. Rev. 163, 173 (1939).

2. The doctrine of *stare decisis* cannot rescue *Humphrey's Executor*. To begin with, *stare decisis* is "at its weakest" in the context of constitutional interpretation, because this Court's decisions can be altered only by constitutional amendment. *Agostini* v. *Felton*, 521 U.S. 203, 235 (1997). If this Court were to leave *Humphrey's Executor* in place, it would leave a black mark at the core of the structural Constitution. And doing so in the name of *stare decisis* would be ironic when, in initiating the error, *Humphrey's Executor* itself gave "shoddy treatment" to Chief Justice Taft's earlier opinion in *Myers*. *Morrison*, 487 U.S. at 725 (Scalia, J., dissenting).

In addition, *Humphrey's Executor* has failed to yield a workable rule of decision. Its reasoning is out of step with the Court's subsequent decisions evaluating the constitutionality of restrictions on removal. See, *e.g.*, *Morrison*, 487 U.S. at 691-692 (citing the limited jurisdiction and tenure of a purely executive inferior officer); *Bowsher*, 478

U.S. at 726-727 (citing congressional self-aggrandizement); *Wiener*, 357 U.S. at 356 (citing the adjudicatory function of the officer).

Nor do reliance interests command adherence to *Humphrey's Executor*. Given the widespread criticism of that decision and its evident conflict with *Myers*, congressional limitations on the President's ability to remove members of multimember commissions have always operated under the sword of Damocles. If there were ever any doubt about that, the Court dispelled it in *Free Enterprise Fund* when it noted that it was not "reexamin[ing]" *Humphrey's Executor* because "[t]he parties [had] not ask[ed]" it to do so. 561 U.S. at 483.

To be sure, overruling *Humphrey's Executor* would make it easier for the President to remove executive officials, and Congress may have to amend the constituting statutes of independent agencies to provide for at-will removal. But this Court "has never suggested that the convenience of government officials should count in the balance of *stare decisis*, especially when weighed against the interests of citizens" in the security that the separation of powers provides. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2447 (2019) (Gorsuch, J., concurring in the judgment). There is no valid justification for perpetuating the constitutional problems that *Humphrey's Executor* has created—all at the expense of the people and their liberty. In sum, while petitioner believes it is unnecessary to overrule *Humphrey's Executor* in order to reverse the judgment below, the Court should not hesitate to do so if it were to conclude otherwise.

II. THE COURT SHOULD REVERSE THE JUDGMENT BELOW AND, IF IT REACHES THE QUESTION OF SEVERABILITY, INVALIDATE TITLE X OF THE DODD-FRANK ACT

The appropriate remedy for the constitutional violation in this case is to reverse the court of appeals' judgment, which would have the effect of denying the CFPB's petition to enforce the civil investigative demand issued to petitioner. At the certiorari stage, the government contended that the Court should rewrite the statute by "sever[ing] the provision limiting the President's authority to remove the Bureau's Director," Resp. Br. 16, and the Court directed the parties to brief and argue the question of severability. Under the circumstances presented here, however, the most prudent course of action is for the Court to decline to reach the question of severability, allowing Congress to determine how to remedy the constitutional defect in the CFPB's structure in the first instance. If the Court does reach the question of severability, it should invalidate Title X in its entirety.

A. The Court Should Reverse The Judgment Below

This case arises out of the CFPB's petition to enforce the civil investigative demand issued to petitioner. See 12 U.S.C. 5562(e)(1). If the Court concludes that the CFPB's structure is unconstitutional, the proper remedy in this case is to reverse the judgment below and thereby order the denial of the CFPB's petition for enforcement.

As the Court has explained, a party that raises a "timely challenge" to the constitutional validity of the structure of an agency is entitled to "whatever relief may be appropriate if a [constitutional] violation indeed occurred." *Ryder* v. *United States*, 515 U.S. 177, 182-183 (1995). In a wide variety of contexts, the Court has set

aside actions by officers laboring under structural constitutional defects. See, *e.g.*, *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055-2056 (2018); *Stern* v. *Marshall*, 564 U.S. 462, 503 (2011); *Ryder*, 515 U.S. at 188; *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 & n.40 (1982).

In particular, because an agency with a structural constitutional defect lacks the authority to take executive action, any exercise of executive power by the agency is void. See *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 822, 828 (D.C. Cir. 1993), cert. granted, 512 U.S. 1218, and cert. dismissed, 513 U.S. 88 (1994); see also *Noel Canning* v. *NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), aff'd, 134 S. Ct. 2550 (2014). That principle applies with full force to the exercise of power by an officer who has been impermissibly insulated from removal by the President. Article II vests the entire executive power in the President and charges him with ensuring the proper administration of the laws. If the President lacks the ability to remove an agency's head, the agency is unaccountable and cannot be "entrusted with executive powers." *Bowsher*, 478 U.S. at 732.

That is precisely what took place here. The CFPB exercised executive power by issuing and attempting to enforce a civil investigative demand to investigate potential violations of consumer-protection laws. But the Director lacked the presidential supervision necessary to exercise that power, rendering the CFPB without authority to do so. And petitioner made a timely challenge to that exercise of power by raising the unconstitutionality of the CFPB's structure as a defense to the petition for enforcement. See D. Ct. Opp. to Pet. 3-8. The "here-and-now" impact of the impermissible limitation on the President's removal power renders the CFPB's actions void,

Bowsher, 478 U.S. at 727 n.5, and petitioner is consequently "entitled to relief," *Lucia*, 138 S. Ct. at 2055.

Dismissing the underlying petition to enforce the civil investigative demand would provide the relief petitioner sought, furthering the "structural purposes" of the separation of powers and "creat[ing] incentives" for litigants to challenge structural constitutional defects. *Lucia*, 138 S. Ct. at 2055 n.5 (alterations and citations omitted). The Court should therefore reverse the court of appeals' judgment, which would have the effect of denying the CFPB's petition.

B. The Court Should Not Address The Question Of Severability In This Case

Once the Court orders the denial of the CFPB's petition for enforcement, its work is appropriately at an end. That relief conclusively resolves the dispute between the parties. The Court should decline the government's invitation to go further and rewrite the statute by engaging in "severance." Instead, the Court should leave to Congress the policy-laden choice of how the CFPB should function going forward.

1. As a preliminary matter, in the proceedings below, petitioner did not countersue or independently seek affirmative relief preventing the agency from acting in the future. In that respect, this case is similar to other cases in the pipeline that present similar constitutional questions. See Pet. at 7, *All American Check Cashing, Inc.* v. *CFPB*, No. 19-432 (cert. denied Dec. 9, 2019) (constitutional defense to a CFPB enforcement action under 12 U.S.C. 5531(a)); Pet. at 14, *Collins*, *supra* (constitutional challenge to past agency action by FHFA).

This case thus differs from cases in which a party seeks, affirmatively and prospectively, to invalidate an entire legislative act. See, *e.g.*, *Free Enterprise Fund*, 561

U.S. at 487 & J.A. at 71 (seeking to "enjoin[] the [PCAOB] and its [m]embers from carrying out any of the powers delegated to them by the [Sarbanes-Oxley] Act"); *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320, 324-325 (2006) (seeking to enjoin the enforcement of a state parental-notification law); *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 682-683 (1987) (seeking to invalidate federal employee-protection law containing legislative-veto provision). In those cases, the Court necessarily considers severability—*i.e.*, whether to invalidate the entire law or merely a portion of it—to decide whether the plaintiff can obtain the full relief it is seeking.

Here, by contrast, the Court can provide complete relief to respondent simply by ending this enforcement proceeding. The Court need go no further. Indeed, it is questionable whether the Court even has Article III power to invalidate statutory provisions under the guise of "severability" when doing so is unnecessary to provide complete relief. See *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring). After all, the judicial power is the power "to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision." Samuel F. Miller, *Lectures on the Constitution of the United States* 314 (1891); see William Baude, *The Judgment Power*, 96 Geo. L.J. 1807, 1811 (2008). It would seem to exceed those bounds for a federal court to take an eraser to statutory provisions when doing so will have no bearing on the judgment in the pending case.

2. Putting aside that difficult question of judicial power, the Court is not *required* to address severability when it determines that a federal statute suffers from a constitutional defect. See, *e.g.*, *Stern*, 564 U.S. at 503; *Legal Services Corp.* v. *Velazquez*, 531 U.S. 533, 549 (2001);

Colorado Republican Federal Campaign Committee v. *FEC*, 518 U.S. 604, 625 (1996).

Most relevant for present purposes, the Court has declined to address severability when it would have little effect on the party seeking relief. For example, in *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122 (1819) (Marshall, C.J.), the Court concluded that a state bankruptcy law violated the Contracts Clause, but it "confined" its holding to "the case actually under consideration." *Id.* at 207-208. The only relief the Court granted was to decree that the state law was "no bar to the action" before the Court; it did not ask whether the law was invalid in its entirety. *Id.* at 208. More recently, in *Printz*, *supra*, the Court held that a provision of federal law violated the Tenth Amendment, but it declined to resolve whether that provision was severable. See 521 U.S. at 935. The Court explained that it had "no business answering" the severability question because it did not affect the case before it. *Ibid.*

The Court should follow the same course here. It should avoid unnecessary "statutory surgery," *Bowsher*, 478 U.S. at 736, by holding the civil investigative demand invalid and leaving it at that.

3. There is particularly good reason to refrain from addressing severability in this context. Under the familiar test for severability, the question is whether Congress would have enacted "those provisions which are within its power, independently of those which are not." *Murphy*, 138 S. Ct. at 1482 (citation and alterations omitted). Applied here, that test would leave the Court with an unattractive binary choice: to sever the limitation on removal from the remainder of Title X, leaving the Director removable by the President at will despite Congress's obvious intent to insulate the CFPB from presidential influence, see pp. 42-44, *infra*, or to invalidate the CFPB in its entirety.

The Congress that created the CFPB would surely have chosen a different option (assuming it were constitutionally able to do so, see pp. 31-34, *supra*): to structure the CFPB as a multimember commission. In fact, Congress seriously contemplated a multimember commission throughout the legislative process. That was the structure proposed in the original bill in the House of Representatives. See H.R. 3126, 111th Cong., 1st Sess. § 112 (July 8, 2009). Subsequent markups of the bill vacillated between multimember and single-director structures. Compare, *e.g.*, House Committee on Financial Services, 111th Cong., *Discussion Draft of Consumer Financial Protection Agency Act of 2009*, § 112 (Sept. 25, 2009) (single-director structure), with H.R. Rep. No. 367, 111th Cong., 1st Sess., pt. 1, at 8-9, 93, 96, 98 (2009) (multimember structure).

The House ultimately agreed on a "compromise" in which the proposed Consumer Financial Protection Agency would initially be led by a single director but then would convert to a multimember commission after two years. See H.R. 4173, 111th Cong., 1st Sess. §§ 4101(b), 4102-4103 (as passed by House, Dec. 11, 2009); 155 Cong. Rec. 30,826-30,827 (2009) (Rep. Waxman). The Senate, by contrast, proposed structuring the Bureau of Consumer Financial Protection as a single-director agency, and that structure ultimately emerged from the reconciliation process. See H.R. 4173, 111th Cong., 2d Sess. § 1011(b) (as passed by Senate, May 20, 2010); H.R. Rep. No. 517, 111th Cong., 2d Sess. 874 (2010) (Conf. Rep.).

Given Congress's desire to make the CFPB independent and its serious consideration of a multimember structure, it is all but certain that Congress would have preferred an independent, multimember CFPB to a single-director agency under direct presidential control. Yet

even assuming that such a structure would be constitutional, see pp. 31-34, *supra*, that is not a result the Court could mandate under existing severability doctrine. Time and again, the Court has emphasized that it may use severability only to delete statutory provisions, not to revise the statutory language more broadly. See, *e.g.*, *Hill* v. *Wallace*, 259 U.S. 44, 68-70 (1922). But that is precisely what would be required to restructure the CFPB as a multimember commission: the Court would need to specify how many members to place on the commission, whether and how their terms would be staggered, how the chair would be selected, and so on.

In the end, if the Court reaches the question of severability, it will have only two options: to make the Director of the CFPB removable at will or to eliminate the CFPB altogether. In light of that unpalatable choice, the judicially modest course is not to reach severability at all. Instead, the Court should simply hold that the CFPB's structure violates the separation of powers and enter judgment for petitioner. In the interim, the CFPB will be on notice of its unconstitutionality—just as it has been since the Director acknowledged its constitutional defect several months ago. More importantly, Congress will be on notice that it should amend the Dodd-Frank Act to remedy that defect—and that it, not this Court, should make that quintessentially legislative decision in the first instance.

C. The Limitation On The President's Ability To Remove The Director Of The CFPB Is Not Severable From The Remainder Of Title X

As petitioner has argued throughout this case, the appropriate remedy under a severability analysis is to invalidate the entirety of Title X of the Dodd-Frank Act, which establishes the CFPB and sets forth the provisions governing the agency's conduct. See Pet. Cert. Reply Br. 2-

3; Pet. C.A. Br. 30-31; D. Ct. Opp. to Pet. 7. If the Court reaches the question of severability, it should hold that the limitation on the President's ability to remove the Director of the CFPB in Section 5491(c)(3) cannot be severed from the remainder of Title X.

As noted above, the central inquiry under severability analysis is whether Congress would have enacted "those provisions which are within its power, independently of those which are not." *Murphy*, 138 S. Ct. at 1482 (citation and alterations omitted). That assessment turns primarily on whether the statute "will function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. The Court has long avoided giving a statute "an effect altogether different from that sought by the measure viewed as a whole," which "can be a more extreme exercise of the judicial power than striking the whole statute." *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) (citation omitted).

Applying that test here, the Court should hold that the limitation on removal in Section 5491(c)(3) is not severable from the remainder of Title X. Rendering the Director removable by the President at will would radically reshape the CFPB and create an agency that the Congress that enacted the Dodd-Frank Act would surely not have wanted.

1. Independence from political accountability—and from the President in particular—lies at the heart of the CFPB. In the very sentence that establishes the CFPB, Congress expressly characterizes it as an "independent" bureau, see 12 U.S.C. 5491(a)—a term connoting that an agency's principal officers are insulated from presidential control. See *Free Enterprise Fund*, 561 U.S. at 483;

Buckley, 424 U.S. at 136. In creating the CFPB, therefore, Congress "tie[d] [its] very existence to its freedom from the President." *PHH*, 881 F.3d at 161 (Henderson, J., dissenting). Congress also transferred powers from presidentially supervised agencies and vested them in the CFPB, outside the President's direct control. See 12 U.S.C. 5581. Those structural features show that Congress affirmatively sought to prevent the President from exercising control over the CFPB.

Congress underscored its intent to make the CFPB independent from outside influence in other ways, too. While Congress nominally located the CFPB within the Federal Reserve System (itself an independent agency), Congress exempted the CFPB's rules and orders from review by the Federal Reserve's Board of Governors—unlike those of other bureaus. See 12 U.S.C. 5492(c)(3). Congress also exempted the CFPB from consulting with the Office of Management and Budget on matters related to its financial planning. See 12 U.S.C. 5497(a)(4)(E).

Most tellingly, Congress did not just seek to insulate the CFPB from presidential control; it gave up its own control of the CFPB through the appropriations process. As James Madison famously wrote in the Federalist Papers, Congress's "power over the purse" may be the people's "most complete and effectual weapon * * * for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure." The Federalist No. 58, at 359. Congress itself has described the appropriations process as the "most potent form" of oversight in its arsenal. S. Doc. No. 26, 95th Cong., 1st Sess. 42 (1977). Yet Congress ceded that authority when it allowed the CFPB to obtain funding automatically from the Federal Reserve. See 12 U.S.C. 5497(a). If Congress had known that the President would retain his principal means of control over the CFPB, it is highly unlikely that

Congress would have given up its own, creating an agency that is perversely more insulated from Congress than it is from the President.

The relevant legislative history confirms that the CFPB's proponents considered the agency's independence to be the defining feature of its design. The initial proposals from then-Professor Warren and the Obama Administration envisioned an independent agency. See Warren 16-17; Department of the Treasury, *Financial Regulatory Reform: A New Foundation* 58 (2009). So too did the original bills introduced in Congress. See p. 6, *supra*. The floor statements in support of the agency also "highlighted, more than any other consideration, the CFPB's need for independence." *PHH*, 881 F.3d at 162 (Henderson, J., dissenting). And some of the CFPB's congressional proponents have since confirmed that "freedom from political gamesmanship" was one of the "key attributes" that they believed the agency needed in order to "remain a vigilant guardian of consumers' interests." See Members of Congress Br. at 13, *PHH*, *supra* (Mar. 31, 2017) (No. 15-1177).

Severing the removal provision would strip the CFPB of its independence and subject it to presidential control without plenary congressional oversight. That "would have seemed exactly backwards" to the Congress that created the CFPB. *Murphy*, 138 S. Ct. at 1483. Indeed, severance would amount to a far "more extreme exercise of the judicial power than striking the whole statute," *National Federation of Independent Business*, 567 U.S. at 692 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting), because it would fly in the face of Congress's affirmative and deliberate decision *not* to grant the President control over the CFPB's powers. Severing the rempoval provision would thus "alter[] the balance of powers between the

Legislative and Executive Branches" in a way that Congress could not possibly have envisioned, and it would leave the agency "function[ing] in a *manner* [in]consistent" with Congress's actual intent. *Alaska Airlines*, 480 U.S. at 685.

2. The Dodd-Frank Act's general severability clause does not alter the analysis. See 12 U.S.C. 5302. As the Court has explained, severability "rarely turn[s] on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968). To be sure, a severability clause creates a presumption that Congress would prefer the statute without the invalid provision to no statute at all. See *Alaska Airlines*, 480 U.S. at 686. But if ever there were a case where that presumption carries little force, it is here: the severability clause applies to the entire, 848-page Dodd-Frank Act, and it appears almost 600 pages before the removal provision at issue. Compare Dodd-Frank Act § 3, 124 Stat. 1390 (12 U.S.C. 5302), with *id.* § 1011(c)(3), 124 Stat. 1964 (12 U.S.C. 5491(c)(3)).

What is more, the general severability clause indicates at most that Congress viewed the various *titles* as severable from each other, and petitioner agrees that the CFPB's unconstitutional structure casts no doubt on the validity of the Dodd-Frank Act beyond Title X. Whatever its boilerplate language, the clause does not reflect a congressional judgment that every single provision within each title is severable from the title in which it resides. The best evidence of that? When Congress wanted specific provisions within a title of the Dodd-Frank Act to be severable, it included an *additional* severability clause within that title. See Dodd-Frank Act § 542, 124 Stat. 1596 (15 U.S.C. 8232). Congress conspicuously did not do so in Title X.

Put simply, the Dodd-Frank Act's general severability clause says nothing about Congress's intent on the specific question whether Congress would have preferred a mutant CFPB stripped of its core structural feature to no CFPB at all. See *PHH*, 881 F.3d at 163 (Henderson, J., dissenting). And the weak presumption triggered by the general severability clause is easily rebutted by the overwhelming evidence that Congress believed the independence of the CFPB's Director from presidential control to be of paramount importance. See pp. 42-45, *supra*.

3. Holding that the removal provision cannot be severed would restore the status quo before the enactment of the Dodd-Frank Act—pending, of course, any action by Congress in response to the Court's decision. It would not eliminate federal consumer-financial protection; instead, it would return authority under the eighteen preexisting federal consumer-protection laws to other federal agencies—ironically enough, most of them independent, multimember agencies—to administer and enforce those laws. See 12 U.S.C. 5481(12), (14), 5581(a)(2)(A). While federal law would no longer broadly prohibit "any unfair, deceptive, or abusive act[s] or practice[s]" by participants in the consumer-finance industry, 12 U.S.C. 5536(a)(1)(B), the vast majority of federal consumer-protection law would remain on the books and subject to enforcement.

It is true, of course, that Congress showed that it wanted the CFPB to exist by creating the agency. It is also true that, according to the legislative history, Congress enacted the CFPB out of concern that the agencies previously tasked with administering the federal consumer-protection laws had not given their enforcement sufficient attention. But that should carry little weight in the severability analysis. After all, "Congress's intent to enact a statute" for a certain purpose is always "apparent from the existence" of the statute itself. *Alaska Airlines*,

480 U.S. at 685 n.7. If that alone were the test, then every invalid statutory provision would be severable as long as the remainder of the statute could function on its own.

Rather, the relevant inquiry is this: would the Congress that enacted the Dodd-Frank Act have preferred the previous regime, which included enforcement of eighteen consumer-protection laws by several independent agencies? Or would Congress have preferred a regime in which the President had control over the agency tasked with enforcing those statutes, yet in which it had surrendered its own primary means of control over that same agency? It does not take a Ouija board to figure out the answer.

* * * * *

The CFPB is a historical anomaly—an agency exercising enormous executive power and headed by a single director who is insulated from presidential removal. It has no place in our constitutional structure. The Court should hold that the CFPB's structure violates the separation of powers and reverse the court of appeals' judgment. The Court should allow Congress to determine how to remedy the constitutional defect in the CFPB's structure in the first instance. But if the Court reaches the question of severability, it should invalidate Title X of the Dodd-Frank Act in its entirety.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 1 of Article II of the United States Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America. * * *

Section 3 of Article II of the United States Constitution provides in relevant part:

> [The President] shall take Care that the Laws be faithfully executed[.] * * *

Section 5491 of Title 12 of the United States Code provides in relevant part:

> **(a)** Bureau established
>
> There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of Title 5.
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>
> **(b)** Director and Deputy Director
>
> > **(1)** In general
> >
> > There is established the position of the Director, who shall serve as the head of the Bureau.
> >
> > **(2)** Appointment
> >
> > Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

* * *

(c) Term

(1) In general

The Director shall serve for a term of 5 years.

(2) Expiration of term

An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.

(3) Removal for cause

The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office.

Section 5497 of Title 12 of the United States Code provides in relevant part:

(a) Transfer of funds from Board of Governors

(1) In general

Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year).

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall

be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

(i) 10 percent of such expenses in fiscal year 2011;

(ii) 11 percent of such expenses in fiscal year 2012; and

(iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter.

(B) Adjustment of amount

The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer.

(C) Reviewability

Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.

* * *

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

When making a determination under subparagraph (A), the Director shall prepare a report regarding the funding of the Bureau, including the assets and liabilities of the Bureau, and the extent to which the funding needs of the Bureau are anticipated to exceed the level of the amount set forth in subsection (a)(2). The Director shall submit the report to the President and to the Committee on Appropriations of the Senate and the Committee on Appropriations of the House of Representatives.

(2) Authorization of appropriations

If the Director makes the determination and submits the report pursuant to paragraph (1), there are hereby authorized to be appropriated to the Bureau, for the purposes of carrying out the authorities granted in Federal consumer financial law, $200,000,000 for each of fiscal years 2010, 2011, 2012, 2013, and 2014.

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