No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF OF CURRENT AND FORMER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF AFFIRMANCE

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INTEREST OF *AMICI CURIAE*[1]

Amici are current and former members of Congress who are familiar with the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376. Specifically, *amici* were sponsors of Dodd-Frank, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies, currently serve as members or in leadership, or served as Assistant to the President with responsibility for establishing the agency. They are thus familiar with the critical role that the Consumer Financial Protection Bureau plays in the legislative plan that Congress put in place to prevent debilitating national crises like the financial crisis of 2008, and they understand how the Bureau's leadership structure helps it to play that role most effectively. *Amici* thus have an interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, Congress enacted the Dodd-Frank Act in response to the financial crisis of 2008, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010). After

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[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici* or their counsel made a monetary contribution to its preparation or submission.

extensively studying the crisis, Congress determined that there was an abundance of legal authority to combat the mortgage abuses that precipitated the crisis, but that the fragmented manner in which this authority was apportioned among federal regulators had led to inaction and delay.

To solve this problem, Congress established a new federal agency, the Consumer Financial Protection Bureau (CFPB), with the sole mission of protecting Americans from harmful practices of the financial services industry. Congress's primary goal was to consolidate consumer-protection responsibilities in a single agency that would, unlike past regulators, give due priority to those responsibilities and robustly enforce the law. Congress also determined that two attributes would help the Bureau fulfill this mission most effectively: the ability to act promptly and decisively in response to new threats to consumers, and a degree of independence.

Those goals counseled in favor of an agency led by a single director, to avoid the delay and gridlock to which multimember commissions are susceptible. They also counseled in favor of allowing the President to remove this director for good cause—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—but not for policy differences alone. In making that choice, Congress relied on a long-established framework for economic regulators, *see Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935), a framework that ensures accountability while shielding the agency from undue political pressure.

In short, Congress carefully designed the CFPB so that it could best accomplish the critical tasks it was created to perform. And the Bureau has been markedly successful in fulfilling its statutory mission. Among other accomplishments, it has promulgated

new rules to end abusive mortgage practices and has recovered billions of dollars for defrauded consumers.

This is exactly the kind of success story that the Framers designed our Constitution to enable. Rather than decree for all time the administrative structure of the government, the Framers empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, ensuring that future legislators would have the flexibility needed to respond effectively to new challenges. Far from imbuing our national charter with a suspicion of innovation, Pet. Br. 22, or inscribing a "constitutional preference for multimember bodies," *id.* at 26, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its powers." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). As Chief Justice John Marshall observed, their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.*

That flexibility, of course, is limited by Article II and the separation of powers. But as this Court has long recognized, making the heads of regulatory agencies removable for good cause does not hinder the President's ability to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, or impede his exercise of the "executive Power," *id.* art. II, § 1, cl. 1; *see Humphrey's Ex'r*, 295 U.S. at 631-32 (upholding removal provision identical to CFPB Director's). That is because removal for good cause enables a President to fire any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 496, 484 (2010). As this Court

has explained, an officer whom the President can remove for good cause is subject to "Presidential oversight." *Id.* at 509. That does not change because the officer serves alone instead of as part of a multimember commission.

Indeed, this Court has struck down removal limits only where those limits could operate as a *complete barrier* to the firing of subordinate officers, no matter how incompetent they were or what type of wrongdoing they committed. The statutes invalidated in those cases all required other actors, such as the Senate, *Myers v. United States*, 272 U.S. 52, 107 (1926), Congress, *Bowsher v. Synar*, 478 U.S. 714, 726 (1986), or the commissioners of an independent agency, *Free Enter. Fund*, 561 U.S. at 486, to agree to a removal. Dependence on the acquiescence of another body to remove an officer "would make it impossible for the President ... to take care that the laws be faithfully executed," *Myers*, 272 U.S. at 164, because the President would be "powerless" to remove a rogue officer, *Free Enter. Fund*, 561 U.S. at 496, even if the officer were "neglecting his duties or discharging them improperly," *id.* at 484.

Here, the President's unobstructed power to remove the CFPB Director for good cause provides "substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison v. Olson*, 487 U.S. 654, 696 (1988). The President need not "cajole[]" anyone. Pet. Br. 32 (quoting *Free Enter. Fund*, 561 U.S. at 502). If the CFPB Director fails to execute the law faithfully, the solution is simple: the President can fire her.

Because that option satisfies constitutional requirements, the judiciary may not second-guess Congress's decision about how to structure the CFPB. The Constitution assigns that judgment squarely to Congress.

ARGUMENT

I. Congress Has Broad Authority To Shape the Structure of the Federal Government and To Confer a Degree of Independence on Certain Officers.

A. The Constitution gives Congress great flexibility in determining how best to shape the federal government. While the Framers anticipated the creation of "Departments," *see* U.S. Const. art. II, § 2, cl. 1, the Constitution left unspecified what those departments would be, how they would be organized, and the precise nature of their connection with the President. Likewise, while the Framers envisioned that "Officers of the United States" would be "established by Law," *id.* art. II, § 2, cl. 2, the Constitution provides few details concerning those officers' relationship with the President. *Cf. id.* art. II, § 2, cl. 1 ("he may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

It was no accident that the Constitution left open most questions concerning the federal government's departments and officers. The Framers deliberately rejected a plan that would have delineated in the Constitution the duties of six department secretaries while specifying that each would serve the President "during pleasure." 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (hereinafter "*Records*"). Instead, the Framers chose to assign Congress broad discretion over the manner in which federal laws are executed, granting it the authority to make all laws necessary and proper "for carrying into Execution ... *all* ... *Powers* vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18 (emphasis added); *see* 2 *Records* 345 (this authority includes the power to "establish all offices"). Significantly, the Constitution does not

"declare expressly by what authority removals from office are to be made." Letter from James Madison to Edmund Pendleton (June 21, 1789), https://founders.archives.gov/documents/Madison/01-12-02-0152.

The Constitution does, of course, place the "executive Power" in the President, whom it directs to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. But at the Founding, there was no consensus that "executive" power entailed an authority to remove officers, Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1790 (1996), much less an illimitable power to remove them *at will*. Indeed, "there is no evidence to support the assertion that the removal of executive officers was ... an inherent attribute of the 'executive power' as it was understood or practiced in England." Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive* 5 (Oct. 30, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3428737. To the contrary, throughout English history Parliament freely "altered modes of ... removing existing officers," "transferred ... removal power from the king to other officials," and "provided statutory tenure when it wished to make the officer independent of the king or when it had some other political or fiscal reason to do so." *Id.* at 6.[2]

Nor could it be deduced from state constitutions in the Founding era that the power of removal—much less an *illimitable* power of removal—was an inherent executive quality. For "in state and colonial

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[2] While *Myers v. United States* includes an "unsubstantiated assertion ... that the king's powers in fact included the power to remove executive officials," the opinion "contains nothing to support that point," or even to show "that the phrase 'the executive Power' referred to the king's powers." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 860 (1989).

governments at the time of the Constitutional Convention," the removal power was typically "lodged in the Legislatures or in the courts." *Myers*, 272 U.S. at 118; *see* 1 Annals of Cong. 534 (1798) (Joseph Gales ed., 1834) (White) ("This is a doctrine not to be learned in American Governments.... Each State has an Executive Magistrate; but look at his powers, and I believe it will not be found that he has in any one, of necessity, the right of appointing or removing officers.").

B. Because the Constitution is silent on removal authority, the issue came to the fore when Congress debated the creation of the federal government's first departments and offices. Petitioner invokes the ensuing "Decision of 1789" in insisting that "[s]ince 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*." Pet. Br. 15 (emphasis added); *see id.* at 18. But that is simply false. The Decision of 1789 addressed only *who*, if anyone, possesses inherent removal power under the Constitution—it did not address, much less resolve, the extent to which legislation may condition removal on specified causes.

As the House of Representatives considered legislation establishing a Foreign Affairs Secretary in 1789, disagreement arose about whether to declare that the President could remove the Secretary from office. Some Representatives thought that the President and the Senate inherently shared removal authority, while others thought that such authority rested with the President alone, and still others maintained that "since the Constitution did not provide one way or the other, Congress was free ... to give the President removal power or not." David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch.

Roundtable 161, 198 (1995). The final legislation, a result of parliamentary maneuvering, *id.* at 200-01, obliquely signaled that the President could remove the Secretary without identifying the source of this power, *see* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29 (providing for scenarios in which the Secretary "shall be removed from office by the President"), and thus "left presidential removal to shadowy implication," Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1052 (2006).

Even taking the most robust view of its significance, the Decision of 1789 did no more than confirm that "the constitution vested the power of removal in the President alone." 1 Annals of Cong. 398 (Vining); *Myers*, 272 U.S. at 119 ("the real point which was considered and decided" was whether the Senate's role in appointments also "ma[d]e the Senate part of the removing power").

During the 1789 debate, members explained that requiring Senate approval could make it impossible for presidents to fire officers who were failing to execute the law faithfully. As Madison remarked, "if you ... say he shall not be displaced but by and with the advice and consent of the Senate, the President is no longer answerable for the conduct of the officer; all will depend upon the Senate." 1 Annals of Cong. 395; *see id.* at 516 (Madison) ("if the officer when once appointed is not to depend upon the President for his official existence, but upon a distinct body, ... I do not see how the President can take care that the laws be faithfully executed").

That danger prompted Madison to reverse his earlier view, *see id.* at 389, that Congress had *total* legislative control over removals. For "the consequences of this doctrine" would be that Congress could "exclude the President altogether from exercising any authority

in the removal of officers," assigning that authority instead to the Senate, the House, or both. *Id.* at 515.

Whether Congress could limit presidential removals in other ways—without requiring the consent of another body—was not at issue. During the entire debate, only three Representatives made statements indicating a belief "that the constitutional power of removal is *illimitable*." James Hart, *The American Presidency in Action: 1789*, at 206 (1948). And "these assertions were never really contested," because the debate focused on the prior question of where the removal power was lodged, not on "whether it was a power that Congress could modify or abridge." Prakash, *supra*, at 1072.

The Decision of 1789 therefore established only that the President's "power includes, *as a general matter*, the authority to remove those who assist him in carrying out his duties." *Free Enter. Fund*, 561 U.S. at 513-14 (emphasis added). It did not concern the scope of Congress's power to modify that "default rule." *Id.* at 509. Indeed, just days after the Decision, Madison remarked that while his belief in inherent presidential removal authority "prevailed," this principle "is subject to various modifications, by the power of the Legislature to limit the duration of laws creating offices, or the duration of the appointments for filling them, and by the power over the salaries and appropriations." Letter from James Madison to Edmund Pendleton, *supra*.

In the following decades, Congress's power to modify the President's removal authority remained widely accepted. *See In re Hennen*, 38 U.S. 230, 259 (1839) ("All offices, the tenure of which is not fixed by the Constitution *or limited by law* ... must be ... subject to removal at pleasure." (emphasis added)); 1 James Kent, *Commentaries on American Law* 289 (1826) (The

Decision of 1789 "amounted to a legislative construction of the constitution.... It applies equally to every other officer of government appointed by the president and senate, *whose term of duration is not specifically declared*." (emphasis added)); *Com. ex rel. Reynolds v. Bussier*, 5 Serg. & Rawle 451, 460-61 (Pa. 1819) (citing the Decision for the proposition that "[a]s to the tenure of ministerial offices in general, there can be no doubt, but it is during pleasure, *unless the law by which the office is established order it otherwise*" (emphasis added)).

Indeed, *Marbury v. Madison* declared that Congress could deny the President removal power over certain officers entirely, *see* 5 U.S. 137, 156-57, 167-68 (1803), and this proposition was the basis for its conclusion that William Marbury had a legal right to his commission: "when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled." *Id.* at 162. Regardless of whether that conclusion was necessary to *Marbury*'s holding, it illustrates that the Decision of 1789 was not seen as resolving the scope of Congress's power to limit presidential removals.

Consistent with this understanding, when Congress later set four-year terms for certain officers, it deemed it necessary to provide that those officers nevertheless "shall be removable from office at pleasure." Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582. If Congress thought the President had an illimitable power to remove all officers at will, it would have been unnecessary to clarify that removals could be made "at pleasure" during these four-year terms. *Id.*

In sum, "the Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President." Prakash, *supra*, at 1073. "The decision was not

regarded either as embracing officers with fixed term, or as affecting Congress's right to fix official terms, except perhaps those of certain principal offices standing in a peculiarly close relation to the 'political powers' of the President." Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 379 (1927).

C. Other early statutes and legislative debates confirm that the Constitution affords Congress the ability to grant certain officers a measure of independence from the President.

Founding-era legislation "created commissions and boards outside of any of the major departments" to carry out various functions. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1291 (2006). For example, to help effectuate a monetary policy, the First Congress established a committee empowered to purchase public debt. The President could not instigate these purchases, and two of the committee's five leaders were *ex officio* members whom the President could not remove from office—the Vice President (then a political rival, not a running mate) and the Chief Justice. Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186. This committee was the brainchild of Alexander Hamilton, who consistently advocated its independence to prevent politicians from raiding its funds "when immediate exigencies press ... rather than resort to new taxes." Report on a Plan for the Further Support of Public Credit (Jan. 16, 1795), https://founders.archives.gov/documents/Hamilton/01-18-02-0052-0002.

Similarly, when creating the Treasury Department, Congress recognized that its Secretary—unlike the previously established Secretaries of Foreign Affairs and War—should not be a mere instrument of the

President's will. *See* 1 Annals of Cong. 532 (Vining) ("The Departments of Foreign Affairs and War are peculiarly within the powers of the President ...."). Whereas Congress simply ordered those other two Secretaries to "perform and execute such duties as shall from time to time be enjoined on or intrusted to him by the President," Act of July 27, 1789, ch. 4, § 1, 1 Stat. at 29; *see* Act of Aug. 7, 1789, ch. 7, § 1, 1 Stat. 49, 50, it gave the Treasury Secretary detailed responsibilities that effectuated congressional policies and "made him in part an agent of Congress," Currie, *supra*, at 202. When the House sought to make the Secretary removable by the President, the Senate balked, leading to an impasse between the bodies. *See* Hart, *supra*, at 217 ("[S]enators who had favored presidential removal of the *other* Secretaries were at first against his removal of the Secretary of the *Treasury*."). Only the Vice President's tiebreaking vote led the Senate to approve the legislation, while still refusing to explicitly "acknowledge the Power of removal in the President." Prakash, *supra*, at 1064 (quoting Letter from Thomas Hartley to William Irvine (Aug. 17, 1789)).

By no means, therefore, was it generally accepted that *every* principal office, regardless of its function, was inherently subject to presidential removal—much less an illimitable power to remove *at will*. This was evident also in the discussions surrounding another officer within the proposed Treasury Department, a Comptroller who would be empowered "to superintend the adjustment and preservation of the public accounts" and to "direct prosecutions ... for debts ... due to the United States." Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 65, 66. Because the Comptroller's duties partook "of a judiciary quality as well as executive," Madison argued that there were "strong reasons why an officer of this kind should not hold his office at the

pleasure of the executive." 1 Annals of Cong. 636. He explained:

> Whatever ... may be my opinion with respect to the tenure by which an executive officer may hold his office according to the meaning of the constitution, I am very well satisfied, that a modification by the Legislature may take place in such as partake of the judicial qualities, and that the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed.

Id.

Madison further noted that, given the Comptroller's statutory responsibilities, the office was not intended "merely to assist [the President] in the performance of duties." *Id.* at 638 ("I do not say the office is either executive or judicial; I think it rather distinct from both, though it partakes of each ...."). Others advocated that the Comptroller be "appointed for a limited time" and that "during that time he ought to be independent of the Executive, in order that he might not be influenced by that branch of the Government in his decisions." *Id.* at 637 (Smith). The key point was that "the nature of this office" meant that "a modification might take place." *Id.* at 638 (Madison).

Likewise, when Congress created a new Post Office, it detailed an elaborate set of responsibilities for the Postmaster General and his subordinates, deleting prior references to presidential control. *Compare* Act of Feb. 20, 1792, ch. 7, 1 Stat. 232, 232-39, *with* Act of Sept. 22, 1789, ch. 16, § 1, 1 Stat. 70, 70. In contrast, when creating the Navy Department, Congress simply directed its Secretary "to execute such orders as he shall receive from the President." Act of Apr. 30, 1798, ch. 35, § 1, 1 Stat. 553, 553. Once again, Congress

distinguished those departments "exclusively under presidential direction" from those "also directed according to law," Mashaw, *supra*, at 1289, and gave the latter greater independence.

D. Contemporary Attorney General opinions also recognized Congress's power to assign independent decision-making authority to officials besides the President. These opinions are at odds with the notion that the President must exert the type of total policy control over all federal agencies that would demand an illimitable power to remove at will.

As one opinion explained, "[t]he constitution assigns to Congress the power of designating the duties of particular officers: the President is only required to take care that they execute them faithfully." *The President and Accounting Offices*, 1 U.S. Op. Att'y Gen. 624, 625-26 (1823). Thus, where a duty is assigned by statute, the President "is not to perform the duty, but to see that the officer assigned by law performs his duty *faithfully*—that is, *honestly*: not with perfect correctness of judgment, but *honestly*." *Id.* at 626. If the officer entrusted with that duty selects one option "while the President prefers another, the President cannot interfere ... because the selection is referred by law to the judgment of the [officer] alone, without any reference to any controlling power in the President." *Id.*; *accord Accounts and Accounting Offices*, 2 U.S. Op. Att'y Gen. 507, 509-10 (1832) (concluding that "the decision of the Comptroller in this case is conclusive upon the executive branch").[3]

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[3] Not every Attorney General took this view, *see Relation of the President to the Executive Departments*, 7 U.S. Op. Att'y Gen. 453, 464 (1855), but the "fluctuation of opinion" on the matter, *id.*, only

To be sure, Attorney General opinions also affirmed the President's power to remove lower-level officers. But they rooted this power in the need to ensure the faithful execution of the laws. *See, e.g.*, *Power of the President Respecting Pension Cases*, 4 U.S. Op. Att'y Gen. 515, 515 (1846) ("the President is to take care that [officers] execute their duties faithfully and honestly," and thus he has "the power of removal" over "unfaithful subordinates"); *The Jewels of the Princess of Orange*, 2 U.S. Op. Att'y Gen. 482, 489 (1831) (if "a district attorney was prosecuting a suit ... for the purpose of oppressing an individual ... such a prosecution would not be a faithful execution of the law"); 1 U.S. Op. Att'y Gen. at 626 (if "the postmaster should make a corrupt appointment ... the laws in such a case have not been faithfully executed").

Consistent with a regime of good-cause tenure, these opinions emphasize that the President need not ensure that an officer tasked with statutory duties acts "with perfect correctness of judgment" in the President's view, but rather that the officer "performs his duty *faithfully*." *Id.*

* * *

In sum, the Constitution's text, history, and early construction all confirm that Congress has considerable latitude in shaping the government's structure and conferring a degree of independence on certain officers. There has never been a constitutional rule that the President's removal power is illimitable or that all principal officers, regardless of their function, must be removable by the President "at will." Pet. Br. 15.

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underscores the absence of any clear rule against assigning independent decisions to officials besides the President.

II. Exercising the Flexibility Afforded by the Constitution, Congress Determined that an Independent Bureau with a Single Director Could Best Combat the Abuses that Caused the Devastating 2008 Financial Crisis.

In 2008, the nation was plunged into the worst financial crisis since the Great Depression, a calamity that destroyed livelihoods and pushed the country to the brink of economic ruin. In response, Congress held more than fifty hearings in which it evaluated the causes of the financial crisis to "assess the types of reforms needed." S. Rep. No. 111-176, at 44. Based on that investigation, Congress concluded that the crisis was largely caused by "a long-standing failure of our regulatory structure to keep pace with the changing financial system," particularly "the proliferation of poorly underwritten mortgages with abusive terms." *Id.* at 40, 11.

The source of this "spectacular failure ... to protect average American homeowners," *id.* at 15, was the fact that consumer financial protection was "governed by various agencies with different jurisdictions and regulatory approaches," resulting in a "disparate regulatory system" that did not "aggressive[ly] enforce[] against abusive and predatory loan products," H.R. Rep. No. 111-367, pt. 1, at 91 (2009). This fragmented structure "resulted in finger pointing among regulators and inaction when problems with consumer products and services arose." S. Rep. No. 111-176, at 168; *see Perspectives on the Consumer Financial Protection Agency: Hearing Before the H. Fin. Servs. Comm.*, 111th Cong. 2 (2009) (statement of Chairman Frank) ("I think it is fair to say that no calluses will be found on the hands of those in the Federal bank regulatory agencies who had consumer responsibilities."). Thus, as *amici* came to understand, the problem was not a

lack of authority to prevent consumer financial abuses, but rather how that authority was organized and exercised. *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 Brook. J. Corp. Fin. & Com. L. 25, 33 (2012).

To remedy these failures and establish a regulatory framework that could "respond to the challenges of a 21st century marketplace," S. Rep. No. 111-176, at 42, Congress enacted the Dodd-Frank Act. Critical to the Act was the creation of the CFPB, an agency with the sole responsibility of protecting consumers from harmful practices of the financial services industry. Congress sought to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection," leaving "inter-agency finger pointing in the past." *Id.* at 11, 168. These reforms, Congress concluded, could prevent "a recurrence of the same problems" that fostered the financial crisis and the near-collapse of the American economy. *Id.* at 42.

Congress also determined that two attributes would help the Bureau fulfill its mission most effectively: (1) the ability to act promptly and decisively in response to new threats to consumers and (2) freedom from political gamesmanship and undue industry influence.

To enable prompt responses to abusive financial practices before they destabilize the economy, Congress determined that the CFPB should be led by a single director. A major cause of the financial crisis was the failure of regulators to use their authority "in a timely way" to address new consumer abuses, *id.* at 17; *see, e.g.*, *id.* at 16-23, and lawmakers viewed this lack of responsiveness as "underscoring the importance of creating a dedicated consumer entity" that could "respond quickly and effectively to these new threats to

consumers," *id.* at 18. What was needed was a "streamlined" regulator to write new rules and "enforce those rules consistently." *Id.* at 11.

Thus, while initial proposals envisioned a multi-member commission, *see* H.R. 3126, 111th Cong. § 112 (2009), lawmakers ultimately concluded that the Bureau's effectiveness would be hampered by the delay and gridlock to which such bodies are susceptible. After all, as *amici* well know, the same regulatory paralysis that spurred the financial crisis, S. Rep. No. 111-176, at 168, is an all-too-common affliction of agencies led by commissions. *See* Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 20 (2011) (the Federal Reserve Board's response to the proliferation of subprime mortgages was "divided from the beginning"); Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest To Undermine the Consumer Financial Protection Bureau*, 31 Rev. Banking & Fin. L. 881, 919 (2012) (scholars associate the single-director model with greater "efficiency and accountability" (quotation marks omitted)).

Indeed, the very agency on which the Bureau was originally patterned—the Consumer Product Safety Commission (CPSC), *see* Elizabeth Warren, *Unsafe at Any Rate*, 5 Democracy J. 8 (2007)—supplied a perfect example. While the CPSC had achieved some successes, its five-member structure seriously hampered its effectiveness. In 1987, the U.S. Government Accountability Office concluded that this structure fostered instability and delay, and suggested that the agency "could benefit by changing to a single administrator," which was the leadership structure of nearly all health and safety regulators. U.S. Gov't Accountability Office, GAO/HRD-84-47, *Consumer Product Safety Commission: Administrative Structure Could Benefit from Change* 3, 6, 9-10 (1987). That

recommendation was never adopted, however, and by 2008 the CPSC had "fallen far short of its statutory mandate" and was "widely regarded as one of the least politically independent and influential agencies in government." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 67, 71 (2010).

Notwithstanding initial proposals for a multimember commission, therefore, Congress held additional hearings on "how best to approach various aspects of financial regulatory reform." H.R. Rep. No. 111-702, at 56 (2011). Given the speed with which financial practices can evolve and new abuses materialize, legislators came to recognize that it was particularly important that a regulator be capable of responding promptly to new developments. Revised legislation was therefore introduced that replaced the agency's commission structure with a single director. *Id.* at 57; *see* Discussion Draft of Consumer Financial Protection Agency Act of 2009, § 112(a)(1) (Sept. 25, 2009); *Perspectives on the CFPA*, *supra*, at 1 (statement of Chairman Frank) ("Since [the introduction of the initial legislation], we have had the benefit of a lot of conversation. Today's legislation reflects further conversation.").

At the same time, "Congress determined that, to prevent problems that had handicapped past regulators, the new agency needed a degree of independence." *PHH Corp. v. CFPB*, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc). Before the crisis, the political branches intensely pressured the financial regulatory agencies at the behest of industry lobbyists to prevent robust oversight. *See, e.g.*, Fin. Crisis Inquiry Comm'n, *supra*, at 40-42, 53. In debates over the Bureau, "consumer advocates urged a more independent agency, fearing industry capture and heavy-handed

political interference by Congress and the White House." Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 339 (2013); *see, e.g.*, S. Rep. No. 111-176, at 24 (recounting testimony recommending "improving regulatory independence").

Congress thus made the Bureau's directors removable by the President for good cause—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. § 5491(c)(3)—but not for policy differences alone. Congress appreciated that good-cause tenure would give the Bureau the independence necessary to regulate effectively. *See, e.g.*, Block-Lieb, *supra*, at 38 (removal limits "are intended to permit appointees both to develop expertise on technical subjects and to take politically unpopular action" (quotation marks omitted)); Barkow, *supra*, at 17 (independence "allow[s] an agency to protect the diffuse interest of the general public" that otherwise would be "outgunned" by "well-financed and politically influential special interests"). Reflecting that principle, virtually all financial regulators are headed by officers who are removable only for good cause. *See* Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15-17 (2017).[4]

Opponents of an independent, single-director Bureau raised the same policy objections to that structure

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[4] To further promote a "strong and independent Bureau," S. Rep. No. 111-176, at 174, Congress also funded the CFPB outside of the appropriations process, an "absolutely essential" feature for "any financial regulator," *id.* at 163. Indeed, nearly all financial regulators have independent funding. Wilmarth, *supra*, at 951. At the same time, however, Congress incorporated other checks on the Bureau, many of which were unprecedented for financial regulators. *See* Block-Lieb, *supra*, at 43-55; Levitin, *supra*, at 343-62; Wilmarth, *supra*, at 908-11.

that litigants have since reframed as constitutional defects. *See, e.g.*, *Perspectives on the CFPA*, *supra*, at 6 (statement of Rep. Hensarling). But Congress ultimately chose a single-director structure for the Bureau, with lawmakers repeatedly emphasizing the importance of speed and decisiveness in rooting out financial-product abuses. *See, e.g.*, 156 Cong. Rec. S2631 (daily ed. Apr. 26, 2010) (statement of Sen. Whitehouse) ("We need a regulator … who can monitor the market and act quickly when there is a consumer hazard."); *id.* at H5240 (daily ed. June 30, 2010) (statement of Rep. Meeks) ("Led by an independent director, this office will be able to act swiftly so consumers will not need to wait ... to receive protection from unscrupulous behavior.").[5]

In sum, the CFPB's structure reflects a considered decision, maintained in the face of vocal opposition during months of debate, that this structure would best enable the Bureau to "keep pace with the changing financial system" and avert another devastating regulatory failure. S. Rep. No. 111-176, at 40. As the next section explains, Congress had every right to make that choice.

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[5] As these comments underscore, Congress's foremost concern was consolidating responsibility for consumer financial protection in a single agency capable of responding promptly to new developments. That overriding goal refutes Petitioner's assertion that, if forced to choose, Congress "surely" would have prioritized the Bureau's removal provision over its single-director structure, or that Congress regarded independence as "the" defining feature of the Bureau. Pet. Br. 42, 44. And the entire history of the legislation belies Petitioner's absurd claim that Congress would have preferred "the status quo" of no Bureau at all, with consumer responsibilities still scattered across the administrative landscape, *id.* at 46-47, to a Bureau whose director could be removed at will.

III. Congress Acted Well Within Its Constitutional Authority in Structuring the CFPB with a Director Whom the President May Remove for Good Cause.

Repeatedly and without exception, this Court has upheld the constitutionality of good-cause removal limits. Petitioner argues, however, that this precedent is a "narrow exception" to a rule that presidents must be able to remove principal officers "at will," and that this Court should not "extend" that precedent to single-director agencies because doing so is a greater intrusion on presidential power. Pet. Br. 4, 10-12.

Not a single link in this chain is sound. No "rule" requires at-will removal, no "extension" is required, and an independent director is no less accountable to the President than an independent board or commission. Implicitly conceding as much, Petitioner alternatively asks this Court to jettison nearly a century of precedent. Pet. Br. 31-34. There is no reason to do so.

A. Because the President may remove the CFPB Director for good cause, the President can "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. As this Court recently explained, officers who may be removed for good cause are "subject ... to Presidential oversight," because the President is capable of removing any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund*, 561 U.S. at 509, 496, 484. Thus, when an officer "may be terminated for 'good cause,' the Executive ... retains ample authority to assure that the [officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [law]." *Morrison*, 487 U.S. at 692.

The President's ability to remove the CFPB

Director for good cause therefore gives him "substantial ability to ensure that the laws are 'faithfully executed.'" *Id.* at 696. If the Director fails to execute the law faithfully, the solution is simple: the President can "remov[e] [her] from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483.

The CFPB Director's good-cause tenure is also consistent with the vesting of the "executive Power" in the President. U.S. Const. art. II, § 1, cl. 1. This Court has suggested (though never held) that "there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role." *Morrison*, 487 U.S. at 690 (citing *Myers*, 272 U.S. at 132-34). Whether an official falls within that group depends on "the function that Congress vested" in the official. *Wiener v. United States*, 357 U.S. 349, 353 (1958). And however broad that theoretical group may be, it does not include the heads of regulatory agencies implementing legislative policies. *Humphrey's Ex'r*, 295 U.S. at 629 ("illimitable power of removal is not possessed by the President in respect of officers of th[is] character"); *Free Enter. Fund*, 561 U.S. at 509 (constitutional requirements are satisfied where officers within the Securities and Exchange Commission are shielded from removal by "a single level of good-cause tenure").

Indeed, as far back as *Marbury v. Madison*, this Court recognized that Congress may impose specific duties on officers who do not serve "merely to execute the will of the President" in carrying out those duties. 5 U.S. at 166 (contrasting such duties with those of the Foreign Affairs Secretary, who was directed "to conform precisely to the will of the President").

When this Court first addressed the constitutionality of good-cause tenure in *Humphrey's Executor*, it similarly distinguished officers who merely serve as

the "subordinate and aid" of the President from officers who "carry into effect legislative policies embodied in [a] statute in accordance with the legislative standard therein prescribed." 295 U.S. at 627-28. And this Court has repeatedly reaffirmed that "the functions of the officials in question" are critical, while clarifying that the constitutionality of removal conditions turns not on labels but rather on whether those conditions "impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. This Court has *never* held that the President has inherent power to remove all federal officials at will, "no matter what the relation of the executive to the discharge of their duties." *Wiener*, 357 U.S. at 352.

Not even *Myers* stands for so broad a proposition. The statute there did more than limit the President's removal authority: it gave another branch of government the power to block removals entirely, by conditioning them on "the advice and consent of the Senate." 272 U.S. at 107. That requirement could operate as a *complete* barrier to an officer's removal, making it "impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 164.

Thus, "the only issue actually decided in *Myers*" was that presidential removals could not be conditioned on "the advice and consent of the Senate." *Morrison*, 487 U.S. at 687 n.24 (quotation marks omitted). And statutes "that provide[] for direct congressional involvement over the decision to remove" are "nothing like" statutes that make officers "removable by the President for specified causes." *Bowsher*, 478 U.S. at 725 n.4.

While *Myers* included broad statements implying that Congress could not restrict the President's removal authority in other ways, even contemporary

critics of the decision acknowledged that this was only an inference following from "the logic of the case." Corwin, *supra*, at 358. And "[t]he assumption" that *Myers* established any such proposition "was short-lived." *Wiener*, 357 U.S. at 352. Within a decade, a unanimous Court—including all four Justices from the *Myers* majority still on the bench—swept away this broad *dicta* and emphasized "the narrow point actually decided." *Humphrey's Ex'r*, 295 U.S. at 626.

Under long-established principles, therefore, conditioning the CFPB Director's removal on good cause does not unduly "interfere with the President's exercise of the 'executive Power.'" *Morrison*, 487 U.S. at 690. The Bureau is not merely "an arm or an eye of the executive." *Humphrey's Ex'r*, 295 U.S. at 628. Unlike, say, the Departments of Defense and State, its role is "filling in and administering the details embodied by th[e] general standard[s]" set forth in a statute regulating aspects of commerce. *Id.* While such duties are executive in nature "to some degree," *Morrison*, 487 U.S. at 689 n.28, the CFPB Director surely is not "charged with no duty at all related to either the legislative or judicial power." *Humphrey's Ex'r*, 295 U.S. at 627. And that type of "purely executive" officer is the *only* type that this Court has even suggested must be removable at will. *Morrison*, 487 U.S. at 690.

B. Whether an agency is led by one person or several makes no constitutional difference. This Court has never implied that the legitimacy of good-cause tenure has anything to do with the attributes of multimember bodies. In *Humphrey's Executor*, this Court commented on the Federal Trade Commission's structure only in conducting a *statutory* analysis of the intent behind its removal provision. 295 U.S. at 621-26. When answering the *constitutional* question—whether that provision violated Article II—this Court

did not, even once, discuss the agency's structure. *Id.* at 626-32.

Instead, the validity of removal conditions "depend[s] upon the character of the office," *id.* at 631, and on whether, in light of that character, the removal conditions prevent the President from performing his constitutional duty, *Morrison*, 487 U.S. at 691. The CFPB is indistinguishable in this respect from other independent regulators, which have been a part of this nation for most of its history. *See* An Act to Regulate Commerce, ch. 104, § 11, 24 Stat. 379, 383 (1887).

Moreover, requiring good cause for the Director's removal does not detract from presidential power any more than applying the same requirement to the members of a board or commission. If anything, a multimember body serving staggered terms is *less* accountable to the President. Bringing such a body in line may require replacing several members, not just one, after identifying which are to blame for the agency's failings. A single director, by contrast, offers a "clear and direct" line of accountability when an agency strays from its mandate. *PHH Corp.*, 881 F.3d at 98.

C. Petitioner's contrary argument conflates two distinct concepts: the accountability and oversight required by Article II (the ability to ensure that an agency is faithfully executing the law) and policymaking influence (the ability to steer an agency's agenda and dictate which options it selects among the range of permissible choices). By confusing true accountability, as this Court has defined it, with the success of a President's ideological agenda, Petitioner essentially argues that presidents must enjoy total control over the policies and priorities of every regulatory agency. *See* Pet. Br. 28-34.

The Constitution does not require that, nor does

this Court's precedent. *Free Enterprise Fund*, for example, did not concern the President's ability to influence the "policies or priorities," 561 U.S. at 502, of an agency that is operating within its lawful mandate. Rather, it addressed the President's ability to hold an agency accountable if it shirks or exceeds that mandate. As this Court explained, the second layer of good-cause tenure shielding the Public Company Accounting Oversight Board did "not merely add to the Board's independence, but transform[ed] it." *Id.* at 496. Because of how the two layers of tenure worked together, the President was "powerless" to remove a Board member, *id.* at 496, even if that member were "neglecting his duties or discharging them improperly," *id.* at 484.

This created the same situation as in *Myers* and *Bowsher*: even if the President had cause to remove an officer, he could not do so without the approval of others. The option of firing a rogue officer was taken entirely out of the President's hands—and with it "his ability to execute the laws." *Id.* at 496. That is why this Court observed that "[t]he President is stripped of the power our precedents have preserved." *Id.*

Indeed, every reference to accountability in *Free Enterprise Fund* concerns the President's ability to guarantee the *faithfulness* of the officers who execute the laws. *See, e.g.*, *id.* at 484, 495, 496, 498. Nothing in the opinion suggests that, beyond this threshold, the President must have some nebulous degree of influence over a regulatory agency's agenda. The remedy this Court adopted undercuts any such notion. With "the President separated from Board members by only a single level of good-cause tenure," the Board became "subject ... to Presidential oversight." *Id.* at 509. The President's ability to fire Securities and Exchange Commissioners for good cause allowed him to "hold the

Commission *fully accountable* for the Board's conduct." *Id.* at 496 (emphasis added).[6]

Tellingly, it was the *dissent* in *Free Enterprise Fund* that "dismisse[d] the importance of removal as a tool of supervision" and focused instead on various other factors that bear on "the President's 'power to get something done.'" *Id.* at 499 (quoting dissent). Just like Petitioner, *see* Pet. Br. 12, 28-30, the dissent canvassed matters such as "'who controls the agency's budget requests and funding'" and "whether ... officials support or 'resist' the President's policies." *Free Enter. Fund*, 561 U.S. at 499-500 (quoting dissent); *see* Pet. Br. 28 (emphasizing "control over the agency's budget, personnel, and agenda").

This Court rejected "such bureaucratic minutiae" as irrelevant. *Free Enter. Fund*, 561 U.S. at 500. What mattered, this Court said, was that the statute "withdraws from the President any decision on whether ... good cause exists" to fire an officer. *Id.* at 495. *That* is why the Board was "not accountable to the President." *Id.* Here, the decision to remove the Director remains firmly with the President, to whom the CFPB is fully accountable.

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[6] Petitioner's misunderstanding of *Free Enterprise Fund* is evident in its baffling claim that "the second layer of for-cause insulation ... only marginally diminished presidential authority over and above a single-layer multimember structure." Pet. Br. 29.

CONCLUSION

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

Respectfully submitted,

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APPENDIX:

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Senator of Ohio

Baldwin, Tammy
Senator of Wisconsin

Booker, Cory A.
Senator of New Jersey

Coons, Christopher A.
Senator of Delaware

Cortez Masto, Catherine
Senator of Nevada

Dodd, Christopher J.
Former Senator of Connecticut

Durbin, Richard J.
Senator of Illinois

Feinstein, Dianne
Senator of California

Frank, Barney
Former Representative of Massachusetts

Harkin, Tom
Former Senator of Iowa

Johnson, Tim
Former Senator of South Dakota

Kanjorski, Paul E.
Former Representative of Pennsylvania

Kaufman, Ted
Former Senator of Delaware

Klobuchar, Amy
Senator of Minnesota

Markey, Edward J.
Senator of Massachusetts

Menendez, Robert
Senator of New Jersey

Merkley, Jeffrey A.
Senator of Oregon

Reed, Jack
Senator of Rhode Island

Sanders, Bernard
Senator of Vermont

Schatz, Brian
Senator of Hawai'i

Schumer, Charles E.
Senator of New York

Van Hollen, Chris
Senator of Maryland

Warren, Elizabeth
Senator of Massachusetts

LIST OF *AMICI* – cont'd

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Senator of Oregon