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 FOR THE PROJECT ON GOVERNMENT OVERSIGHT AND MORTON ROSENBERG AS AMICI CURIAE SUPPORTING COURT-APPOINTED AMICUS CURIAE

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STATEMENT OF INTEREST[1]

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuses of power, and instances when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms for achieving a more effective, ethical,

[1] Both Petitioner and Respondent have lodged letters with the Court consenting to the filing of all amicus briefs. No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief 's preparation or submission.

and accountable federal government that safeguards constitutional principles. POGO frequently appears as amicus curiae before this Court, the federal courts of appeal, and the highest state courts to protect constitutional rights and the separation of powers.

Morton Rosenberg served as an analyst in the American Law Division of the Congressional Research Service for over three decades until his retirement in 2008. In that capacity, he advised Congress on numerous issues of constitutional law, administrative law, and congressional practice and procedure, with a special emphasis on Executive appointments. His scholarship has been relied upon by numerous courts, including this Court.[2]

Amici share a commitment to the significant role Congress plays in crafting Executive Branch functions that maintain a measure of independence for Executive officers, which provides space for informed, apolitical judgment and support for those seeking to root out corruption. Amici believe that one of the key tools in Congress's kit is

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[2] E.g., *SW Gen., Inc.* v. *N.L.R.B.*, 796 F.3d 67, 70 (D.C. Cir. 2015), *aff'd*, 137 S. Ct. 929 (2017) (citing Morton Rosenberg, Cong. Research Serv., 98–892 A, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative* (1998)); *N.L.R.B.* v. *SW Gen., Inc.*, 137 S. Ct. 929, 935, 936, 942 (2017) (citing same and Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil Rights* (1998)); *Trump* v. *Mazars USA, LLP*, 940 F.3d 710, 721, 742 (D.C. Cir. 2019) (citing Morton Rosenberg, Cong. Research Serv., RL 30319, *Presidential Claims of Executive Privilege: History, Law, Practice and Recent Developments* (Aug. 21, 2008) and Morton Rosenberg, *When Congress Comes Calling: A Study on the Principles, Practices, and Pragmatics of Legislative Inquiry* (2017)).

its broad authority to impose measures that limit the President's ability to remove Executive officials—just like the protections granted to the Director of the Consumer Financial Protection Bureau (CFPB) at issue in this case. Amici write to describe that Congress's authority to enact protections for Executive Branch officials even more robust than these has gone unquestioned since the Founding, and to explain the ways that Petitioner's challenge to the protections afforded the CFPB Director presents an unwarranted attempt to restrict the proper scope of Congress's power, and an intolerable threat to Congress's efforts to promote good government.

INTRODUCTION AND SUMMARY OF ARGUMENT

The challenge that Petitioner and its amici present to the CFPB's structure in this case rests on extraordinary claims about executive power. They insist that the Constitution forces the most *micro* of management approaches on the Chief Executive, dictating that the President retain authority to fire anyone within the Executive Branch at his pleasure. They maintain that for Congress to impose even the most modest of restrictions on that removal power—even to ask that he demonstrate some good cause for firing someone—represents an unconstitutional affront to executive authority, and an impermissible interference with the President's obligation to "Take Care that the laws be faithfully executed." U.S. Const. art. II, sec. 3. And to see their conception of executive power enshrined as fundamental law, the challengers stand ready to overturn any precedent or any destroy any component of the federal government that might stand in their way.

The challengers claim their sweeping conception of executive power is grounded in history, espousing a historical view at once so broad as to encompass the entire sweep of British history, yet so narrow as to locate a definitive resolution of the issue in a single legislative episode from the Founding Era: the "Decision of 1789." But their arguments overlook a vast middle ground: a history dating back to the Founding, in which Congress imposed a variety of conditions on the President's removal authority, *all* more restrictive than those at issue here—and did so without noted complaint. Amici will not recount that entire history here. Others, including the Court-Appointed Amicus, have highlighted some of the most important episodes already. Amici instead focus on cataloging the various types of restrictions that Congress has imposed, which serves to illustrate the breadth of Congress's power to place restrictions on removals of Executive officials and exposes fatal gaps in the challengers' constitutional theory. This broader historical perspective demonstrates that the Take Care Clause does not create the zone of interference-free, hands-on executive administration the challengers contend it does. Nor does it indicate some residuum of pure executive removal power that Congress cannot touch. Rather, the Take Care Clause requires that the President in removing officials, as it does in all things, to follow the design Congress has put into place, and to ensure that everyone else in the Executive Branch does as well.

That traditional balance of power was essential at the Founding, and it is essential that it be protected now. This is because Congress has now built centuries of lawmaking atop a conception of its own power under which it is permitted to enact laws that ensure independent decisionmaking in the most critical of agency actions, and protect

law-enforcement officials seeking to root out corruption within the Executive Branch from undue influence. A ruling for Petitioner would upset that balance, making the most essential of government functions subject to constitutional challenge, invalidating large swaths of the administrative estate, and threatening Congress's ability to ensure that officials within the Executive Branch maintain fidelity to the laws Congress has enacted, not fealty to the Executive.

ARGUMENT

I. The Founders saw no potential for conflict between congressional restrictions on removal of Executive officials and the President's Take Care obligation.

The challengers in this case contend that even the modest restrictions Congress has imposed on the President's authority to remove the Director of the CFPB, which allow dismissal only "for inefficiency, neglect of duty, or malfeasance in office," have no Founding-era pedigree. 12 U.S.C. § 5491(c)(1), (3). They insist instead that history requires the President's removal powers to remain absolute and immune from congressional interference, based entirely on their interpretation of the "Decision of 1789," colored by a dollop of English history. But that misreads both sides of the Anglo-American historical tradition, and mistakes how the Founders operated when they first started the Constitution into motion.

A. Founding-Era Congresses exercised broad authority to condition, and even control, removal of Executive officials.

1. The first weakness of the challengers' conception of the relevant history is the contention of some, including the separation-of-powers scholars on Petitioner's side, that the proper boundaries of Congress's authority to restrict the President's authority to remove Executive officials can be determined by looking to English history. Br. for Separation of Powers Scholars at 6-11. For one thing, the challenger's view of the relevant history focuses on the wrong end of the division of authority in England between the Crown and Parliament. If English history is any guide in determining the proper balance of removal power between Congress and the President within the American system, the relevant question is not, as the challengers maintain, whether the Crown possessed any right to remove royal officials. The question instead is whether *Parliament* had the authority to impose conditions on the Crown's removal authority. And the answer is that it did: Parliament frequently "provided [officials] 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." Daniel D. Birk, *Interrogating the Historical Basis for A Unitary Executive* 6 (Oct. 30, 2019), https://ssrn.com/abstract=3428737. So resort to English history is hardly helpful to the challengers.

But there is a deeper problem with the challengers' efforts to find English answers to the constitutional question of the meaning of "executive authority." This Court has cautioned that no real definition of that concept really existed at the Founding: "Many distinguished lawyers originally had very different opinions in regard to this

power from the one arrived at by this congress, but when the question was alluded to in after years they recognized that the decision of congress in 1789, and the universal practice of the government under it, had settled the question beyond any power of alteration." *Parsons* v. *United States*, 167 U.S. 324, 330 (1897). And the conception of executive power "which was given to the Constitution by Congress, after great consideration and discussion, was different" than the conception adopted by our English forebearers. *Parsons* v. *United States*, 30 Ct. Cl. 222, 241 (1895), *aff'd*, 167 U.S. 324 (1897). The Court has taken that caution to heart, which is why, other than a pair of sentences considering pre-Republic history in *Myers* v. *United States*, 272 U.S. 52, 118 (1926), none of this Court's major decisions on the Executive's removal authority have drawn from pre-Republic English history—not *Morrison* v. *Olson*, 487 U.S. 654 (1988), not *Free Enterprise Fund* v. *Pub. Co. Accounting Oversight Board*, 561 U.S. 477 (2010), and not *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). The entire enterprise of looking to English history is thus misguided.

2. In any event, English history is no substitute for American history. And that history shows that even as the Founders created a role for an energetic Executive under the new Constitution, they crafted an equally robust role for Congress in checking that Executive. They conceived of that role as including more than deciding how Executive offices should be structured and confirming the President's choices to fill those offices. They also envisioned Congress as having a vital role in checking the President's removal authority.

a. There is, of course, the long history of removal restrictions that that the Court-Appointed Amicus and other

amici have already catalogued. See Br. for Ct.-Appt'd Amicus at 7. Many of these used the same modest removal-restricting language that Congress used to protect the CFPB Director, and that this Court has specifically determined to be constitutional in *Morrison*, 487 U.S. 654, *Wiener* v. *United States*, 357 U.S. 349 (1958), and *Humphrey's Executor*, 295 U.S. at 626-28. That alone suggests that use of similar language here should pose no problem.

But equally salient evidence can be found in legislation enacted by the First Congress, which included many members "who had helped to compose or to ratify the Constitution itself." David P. Currie, *The Constitution in Congress* 4 (1997) (noting that the First Congress included James Madison, Oliver Ellsworth, Elbridge Gerry, Rufus King, Robert Morris, and William Paterson). The First Congress's legislation thus offers "weighty" and "contemporaneous" understanding of the President's removal power. *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); see also Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 852 (1989). And this early Congress employed an even freer hand in conditioning the President's removal authority than the examples that other amici have outlined.

b. Indeed, there are instances in which Congress effectively prevented the President from removing senior Executive officers at all—because Congress had directed that those offices be staffed by those outside the Executive Branch, which the President would then have no authority to remove. The most striking example of this phenomenon comes from an obscure agency called the Sinking Fund Commission, which was proposed by Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington. Act of Aug. 12, 1790, ch. 47, 1

Stat. 186. The Commission directed open market purchases of debt in the form of U.S. securities according to a statutory mandate, and it included John Adams, the Vice-President and President of the Senate, and John Jay, the Chief Justice of the Supreme Court. These *ex officio* members of the Commission were officers whom the President had no ability to remove or replace because they were independently selected members of different branches. But the votes of these *ex officio* Commission members were sometimes needed in order to initiate purchases. *Id.* § 2. This agency structure provided a measure of independence for the Commission's especially weighty responsibilities, ensuring, as Hamilton noted, that the funds set aside for the repayment of debt would "be inviolably appropriated to the payment of the principal of the said debt and shall on no account be diverted to any other [political] purpose." Alexander Hamilton, *Report to Continental Congress on a Letter from the Speaker of the Rhode Island Assembly, Philadelphia*, Dec. 16, 1782, https://founders.archives.gov/documents/Hamilton/01-03-02-0123.

b. Neither Petitioner nor its amici mention the Sinking Fund Commission. And while other critics of independent agencies have attempted to undermine the Commission's relevance in determining Congress's authority to restrict removal of Executive officials, these efforts miss the mark. For example, some discount the Commission because the legislation creating the fund "expressly authorized the President to approve the Commissioners' decisions" to purchase U.S. securities. Saikrishna Prakash, *Imperial from the Beginning, The Constitution of the Original Executive* 279-280 (2015). But whatever authority the President had to approve the Commissions' purchasing deci-

sions once they were made, nothing gave the President authority to direct the Commission to initiate those purchases in the first place. Just as the President today has no ability to lower interest rates unless a majority of the Federal Open Market Committee decides to take action to expand the money supply, President Washington in 1790 had no ability to initiate open market purchases without approval of a majority of the Sinking Fund Commission—and that required the vote of at least one *ex officio* member.[3]

Congress's power to create the Sinking Fund Commission, with its effective prohibition against removal of *ex officio* Commission members, is strong evidence that no one of the Founding Era would have blanched at Congress's enactment of the far more modest removal restrictions this Court blessed in *Morrison*, *Wiener*, and *Humphrey's Executor*—or the similarly modest removal protections that Congress has given to the CFPB Director. This example alone therefore refutes critics' claims that Congress lacked the authority to enact the restrictions at issue in this case.

3. But the Sinking Fund Commission is only one example. Early Congresses enacted numerous other controls

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[3] Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186. The statute provided that the "purchases to be made of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of Treasury, and the Attorney General." *Ibid.* The statute went on to provide that these Commissioners, "or any three of whom, with the approbation of the President of the United States, shall cause said purchases to be made in such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act." *Ibid.*

on the President's removal powers that were far more restrictive than the protections provided to the CFPB Director.

a. For instance, early Congresses prescribed a specified term of office for numerous Executive officials that precluded early removal by the President—the whole point of appointing officials for a specified term. To be sure, some statutes providing specified office terms contained provisions expressly allowing the President to remove the officer for pleasure during the term.[4] But where Congress refrained from providing such free-removal pro-

[4] E.g., Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87 (U.S. Marshal was appointed "for the term of four years, but shall be removable from office at pleasure."); Act of Mar. 26, 1804, ch. 38, § 2, 2 Stat. 283 (Governors of Louisiana and Orleans territories were appointed "for term of three years, unless sooner removed by the President"; same for the Secretary of those territories, but for "four years, unless sooner removed by the President"; but no such qualifier for the judges of the superior court and justices of the peace, who "shall hold their offices for the term of four years"); Act of June 4, 1812, ch. 95, 2 Stat. 743, 744, 746 (same as to governor and secretary, but judges were to "hold their office for the term of four years, unless sooner removed"); Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582 (district attorneys, collectors of customs, and several other officers thereinafter "appointed for the term of four years, * * * shall be removable from office at pleasure."); Act of Aug. 6, 1846, ch. 90, § 5, 9 Stat. 59, 60 (four PAS assistant treasurers "shall hold their respective offices for the term of four years, unless sooner removed therefrom"); Act of June 3, 1864, ch. 106, § 1, 13 Stat. 99 (PAS Comptroller of the Currency "shall hold his office for the term of five years unless sooner removed by the President, upon reasons to be communicated by him to the Senate"); Act of Feb. 12, 1873, ch. 131, § 1, 17 Stat. 424 (PAS Director of the Mint "shall hold his office for the term of five years, unless sooner removed by the President, upon reasons to be communicated by him to the Senate").

visions, it was understood that the President had no authority to fire the official until the conclusion of the official's statutory term. See Floyd Mechem, *The Law of Offices and Officers*, § 445 (1890), https://bit.ly/2G7r77Q ("When the President appoints an official, he is only free to remove that official when "the tenure of the office is not fixed by law, and no other provision is made for removals."). Indeed, *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) provides strong contemporary evidence of that understanding. The famous commission at issue in *Marbury* was based on a statute that provided tenure to justices of the peace—a non-Article III appointment—providing that the justice would "continue in office five years." Act of Feb. 27, 1801, ch. 15, § 11, 2 Stat. 103, 107. And Chief Justice Marshall, himself a former Secretary of State and thus no stranger to commissions and appointments, recognized that Congress's refusal to reserve to the President any removal power meant that the famous Mr. Marbury had been "appointed to an office, from which he is not removable at the will of the executive." 5 U.S. at 172.

b. Aside from statutes conveying officials tenure protections effectively *preventing* removal, Early Congresses also imposed controls on the removal process through statutes *requiring* removal in certain circumstances. As the Court-Appointed Amicus has noted (at 6) the First Congress demanded that the Presidents' choice of officials to run the Treasury Department could be removed if any were found to "offend against any of the prohibitions of" the laws governing the Department. Act of Sept, 2, 1789, ch. 12, § 3, 1 Stat. 65, 67. Inferior-officer clerks were made subject to that same removal conditions soon thereafter. Act of Mar. 3, 1791, ch. 18, § 1, 1 Stat. 215. And Congress

would go on to enact many similar removal-requiring statutes over the next century.[5]

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[5] See, e.g., Act of May 8, 1794, ch. 23, § 11, 1 Stat. 354, 359 (A deputy postmaster or other person authorized by the Postmaster General who demands or received more than authorized postage "shall be rendered incapable of holding any office or appointment under the United States."); Act of June 5, 1794, ch. 49, § 14, 1 Stat. 378, 380 (Presidentially appointed and Senate confirmed ("PAS") supervisors and inspector of the revenue "shall be disqualified from holding such appointment, for the term of seven years," if they traded in certain merchandise.); Act of Feb. 23, 1795, ch. 27, § 2, 1 Stat. 419 (An officer within the Treasury Department, Purveyor of Public Supplies, upon conviction of certain disqualifying acts, "shall be removed from office and be forever thereafter incapable of holding any office under the United States."); Act of Apr. 18, 1796, ch. 13, § 3, 1 Stat. 452, 453 (PAS agents for Indian trading houses, upon conviction for statutory offenses "shall be removed from such agency or employment, and forever thereafter be incapable of holding any office under the United States."); Act of Apr. 21, 1806, ch. 48, § 6, 2 Stat. 402, 403 (same for the later-created office of Superintendent of Indian Trade.); Act of July 9, 1798, ch. 70, § 17, 1 Stat. 580, 588 (Certain PAS Commissioners were empowered to appoint assessors, who upon failure to "perform any duty assigned by this act" under certain conditions, "shall be discharged from office."); Act of Mar. 28, 1812, ch. 46, § 6, 2 Stat. 696, 697 (PAS Quartermaster General and Commissary General "shall be removed from office, and be forever thereafter incapable of holding any office under the United States," for certain violations upon conviction.); Act of Apr. 25, 1812, ch. 68, § 10, 2 Stat. 716, 717 (PAS Commissioner of General Land Office, upon conviction against the prohibitions of the act "shall be removed from office."); Act of July 4, 1836, ch. 352, § 14, 5 Stat. 112 (Any appointed officer in the General Land Office involved in attempts or purchases of public lands "shall forthwith be removed from his office."); Act of May 7, 1822, ch. 107, § 17, 3 Stat. 693, 696 (Any person in relation to the collection of revenue "shall be removed from office" for receiving unauthorized fees for any service, and "moreover, on conviction thereof, pay a fine."); Act of July 17, 1854, ch. 84, § 6, 10 Stat. 306 (Register and the Receiver for the

4. These statutes went even further to control the President's removal authority than the removal restrictions this Court has previously approved—whether by effectively *negating* the President's removal authority, or effectively *forcing* the President's hand in removal. These statutes therefore confound any notion that the President—and the President alone—was historically understood to have exclusive authority to direct the removal of officials within the Executive Branch. To the contrary, this history illustrates a Founding-Era understanding that even at its outer bounds, Congress's authority to restrict the President's removal power posed no threat to the President's executive authority. And this was so even when those restrictions went so far as to constitute a virtual congressional commandeering of the removal process—a result that this Court determined to be unconstitutional in *Myers* and *Bowsher*. Accordingly, if there really is any mismatch between Founding Era tradition and this Court's doctrine that needs correcting, it would not seem to lie with the results in *Humphrey's Executor*, *Morrison*,

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Oregon and Washington Territories were "forthwith removed from office" on proof that either charged or received fees not authorized by law.); Act of June 11, 1864, ch. 119, 13 Stat. 123 (Any officer of the United States, including PAS department heads, when convicted of receiving pay for certain kinds of services in matters where the United States is a party was to be "incapable of holding any office of honor, trust, or profit under the government of the United States."); Act of June 20, 1864, ch. 136, § 2, 13 Stat. 137, 139 (Consular clerks had for-cause removal protections required to be submitted to Congress in writing.); Act of Mar. 3, 1869, ch. 125, § 3, 15 Stat. 321 (Consular officers were subject to removal for certain statutory violations.); Act of Feb. 12, 1873, ch. 131, § 1, 17 Stat. 424 (The Director of the Mint had removal conditioned on reasons communicated to the Senate.).

or any of this Court's later cases authorizing Congressional removal powers, as Petitioner and its amici suggest. It would seem instead to lie with the more restrictive results in *Myers* and *Bowsher* themselves.

B. As originally understood, the President's Take Care duties posed no obstacle to Congress's broad removal-restriction authority.

Just as the Founders' conception of Congress's power to control the President's removal power is far *broader* than challengers contend, the Founders' conception of the President's duty to "Take Care that the laws are faithfully executed" is far *narrower* than they contend.

1. From the beginning, the President's Take-Care duty was seen by the President's own Attorney General as imposing only a duty of "general superintendence" to ensure that officials within the Executive Branch do their jobs. The President and Accounting Officers, 1 Op. Att'y Gen. 624, 625 (1823). The that obligation has never been understood to be absolute, and has never required that the President have the power, or even the practical ability, to control the day-to-day actions of every official in the employ of the Executive Branch in order to discharge his duty. Rather, "[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." See Claims Under Treaty of 1819 with Spain, 16 Op. Att'y Gen. 317, 318 (1879). Indeed, "it would be an alarming doctrine, that congress cannot impose upon any executive officer rights secured and protected by the constitution; and in such cases the duty and responsibility grow out of and are subject to the control of the law, and not to the direction of the president." *Kendall* v. *U.S. ex rel.*

Stokes, 37 U.S. 524, 610 (1838). The Take Care obligation therefore requires only that the President exercise such authority over his subordinates as Congress has directed. No more.

2. The early history of United States Attorneys is a perfect example that refutes any notion that the President was required to have complete control over Executive officials. For the first 80 years of the Republic, neither the President nor the Attorney General had virtually any direct control over United States Attorneys. "Prosecution was decentralized during the federalist period, and it was conducted by district attorneys who were private practitioners employed by the United States on a fee-for-services basis." *In re Sealed Case*, 838 F.2d 476 at 526–527 (D.C. Cir. 1988) (Ginsberg, J., dissenting), *rev'd sub nom. Morrison* v. *Olson*, 487 U.S. 654 (1988); The Judiciary Act, Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. Each U.S. Attorney controlled his own district, and had no accountability by custom or statute to the Executive, despite being removable at will. Morton Rosenberg, Cong. Research Serv., *Validity of Designation of Bill Lann Lee as Acting Assistant Attorney General for Civil* Rights 9-15 (Jan. 1998). It was not until 1861 that Congress first charged the Attorney General "with the general superintendence and direction of the attorneys and marshals of all the districts in the United States and the Territories." Act of Aug. 2, 1861, ch. 37, 12 Stat. 285.

Indeed, not only did the President have little authority to control the actions of U.S. Attorneys, he also had little power to undo their misdeeds. Thus, even if a U.S. Attorney performed an action that the President disapproved of, that act remained binding, beyond the power of the

President to undo. Even removal would only preclude future potential bad acts. This meant that the early U.S. Attorneys were permitted to operate with more or less complete independence from Presidential control and oversight—a nod to the needs of a frontier country that could not afford extensive oversight. But this hands-off approach is completely incompatible with the micromanaging conception of the executive power, and the President's Take-Care obligation, that that Petitioner and amici claim to exist.

3. Furthermore, the manner in which Congress exercised its appointments power strikes a further blow to any notion that the Take Care Clause requires the President to maintain any unfettered right of removal. Even the First Congress exercised that authority to impose conditions that made it harder for the President to remove an officer the he did not like—if only because congressionally imposed appointment conditions might restrict the pool of potential replacements to candidates that the President might find even more unpalatable. From the very beginning, for example, Congress provided, in each district, a U.S. Attorney was to be a "person learned in the law." Act of Sept. 24, 1789, ch. 20, § 35, 1 Stat. 73, 92. So too was that qualification required for the Attorney General. *Id.* at 93. Often, would-be officers were prohibited from being interested or engaged in certain business that might relate to his or her office. E.g., Act of Feb. 23, 1795, ch. 27, § 2, 1 Stat. 419 (for the office of Purveyor of Public Supplies within the Treasury Department); Act of Aug. 26, 1852, ch. 91, § 2, 10 Stat. 30, 31 (Public Printer "shall be a practical printer, versed in the various branches"); Act of Mar. 3,

1853, ch. 97, § 3, 10 Stat. 209, 211 (no clerk shall be appointed in either of the four classes until examined and found qualified).[6]

The rules for vacancies likewise might force the President to stay his hand in removing an officer because they would force his choice of who could temporarily occupy the office. In the first Executive departments, an officer not appointed by the Executive, either a chief clerk or assistant, would automatically assume the charge of that office. That meant someone not of the President's choosing would become the acting department head until a recess appointment or Senate confirmation. Act of July 27, 1789,

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[6] Today, reasonable qualification restrictions for appointments are still not unusual. E.g., 6 U.S.C. § 113(a) ("A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force."); 6 U.S.C. § 313(c)(2) (qualifications for FEMA Administrator include "demonstrated ability" in emergency management and "not less than 5 years of executive leadership and management experience"); 10 U.S.C. § 132 (same for Deputy); 10 U.S.C. §§ 7013, 8013, 9013 (qualification of five years removed from active duty for each service secretary); 15 U.S.C. § 633(b)(1) (SBA Administrator "shall be a person of outstanding qualifications known to be familiar and sympathetic with small-business needs and problems"); 19 U.S.C. § 2171(b)(4) (one may not be appointed to be U.S. Trade Representative if they have "directly represented, aided, or advised a foreign entity" in a "negotiation, or trade dispute"); 22 U.S.C. § 2651a(g) (certain qualifications for certain State Department officers); 31 U.S.C. § 901(a)(3) (all departments' Chief Financial Officers required to have "extensive practical experience in financial management"); 49 U.S.C. § 106(c) (FAA Administrator must be a civilian and "have experience in a field directly related to aviation"); 50 U.S.C. § 3026(a)(3) ("Any individual nominated for appointment as Principal Deputy Director of National Intelligence shall have extensive national security experience and management expertise.").

§ 2, ch. 1, 1 Stat. 29 (Dep't of Foreign Affairs: chief clerk); Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 50 (Dep't of War: chief clerk); Act of Sept. 2, 1789, ch. 12, §§ 1, 7, 1 Stat. 65, 67 (Dep't of Treasury, the Assistant, appointed by the Secretary). Likewise, if a U.S. Attorney were removed, a district court could appoint a temporary replacement until the position could be permanently filled. Act of June 24, 1898, ch. 495, 30 Stat. 487. That meant turning over the choice of replacement to someone else entirely—potentially even a political opponent. Under those circumstances, any President would hesitate before removing an official. And while that barrier might be more practical than strictly legal, that did not make it any less real. And that is yet another incompatibility between hard historical reality and the supposedly unfettered discretion that the challengers claim the President must enjoy.

II. Protecting the Founders' broad conception of congressional removal authority is essential to protect key Executive officials from undue Presidential interference.

The Founding-Era tradition of protecting vital Executive Branch officials from political interference has present-day salience, because for the past 230 years, Congress has built the administrative state upon its longstanding understanding of the proper balance of power between Congress and the President, under which for-cause removal restrictions on Executive officials pose no constitutional problem. Congress has used that power to ensure that Executive officials have a measure of independence where they need it most: when executing responsibilities in offices of the utmost trust and consequence. Congress also deems "[i]nsulation from political concerns" to be most "advantageous in cases where it is

desirable for agencies to make decisions that are unpopular in the short run but beneficial in the long run," such as, for example, "the Fed's monetary policy decisions." See Henry B. Hogue et al., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 5 n. 16 (2017).

A. The challengers here seek to upset that balance. Petitioners make no bones about the fact that even the weakest form of their challenge, if successful, could render constitutionally "questionable" the status of numerous agency structures. Pet. Br. 23 (noting that its challenge could affect the Office of Special Counsel, the Social Security Administration, and the Federal Housing Finance Agency). In short, "this wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

B. And that is the *weak* form of Petitioner's challenge. In its stronger form, Petitioner would have the Court overrule *Humphrey's Executor* entirely, making it impossible to for Congress to impose even modest for-cause removal restrictions on Executive offices, despite the fact that the Court affirmed only a few terms ago the constitutionality of statutes "conferring good cause tenure on the principal officers of certain independent agencies." *Free Enterprise Fund*, 561 U.S. at 493. That would render unconstitutional huge swaths of the Executive Branch of Government, such as the Commodity Futures Trading Commission, the Federal Deposit Insurance Corporation, the Federal Housing Finance Authority, the National Credit Union Administration, and the Securities and Exchange Commission. Hogue et al. 15.

Overruling *Humphrey's Executor* could also result in the lifting for-cause removal restrictions from many statutes describing agency positions. This might be deemed

"saving" severable portions of those agency-enabling statutes. But it would be dangerous all the same, handing a weapon to Presidents to disable independent agencies they do not like—simply by removing the agency heads and allowing them to rot for want of anyone to run them.

Perhaps more importantly, overruling *Humphrey's Executor* would undermine *Humphrey's* progeny, including *Morrison* itself. And that would prove downright dangerous for the Republic. While the Independent Counsel statute at issue in *Morrison* has now lapsed, *Morrison* still stands for a vital principle of Republican governance: that Congress must be able to provide a measure of independence even for the most core of executive functions—law enforcement—where necessary to protect officials executing the highest of public charges: an investigation of the President himself. This is where restrictions on removal have proven to have the greatest consequence.

Where the President can only fire an independent prosecutor for cause, like in *Morrison* itself, that provides a measure of protection against naked politics and self-serving corruption of the kind that led to the creation of the Ethics in Government Act (and the Independent Counsel Statute) in the first place. It ensures that prosecutors can pursue investigations of alleged misconduct within the Executive Branch with the utmost vigor, free from potential coercion from a president who might otherwise be inclined to dangle the prosecutor's job in front of him.

A for-cause standard would also require the President to be transparent about his reasons for firing a prosecutor so that the public can evaluate the President's choices and judge him accordingly. And it ensures that the highest of

officials in our government, including the President himself, are subject to the same laws as everybody else, and are not able to use the immense powers of the Executive Branch to corrupt investigations against themselves, thereby freeing themselves from the constraints of the rule of law.

And it is easy to see what is likely to happen in the absence of such protections. Just look at the Teapot Dome Scandal. There, a member of the President's cabinet, someone hand-picked by the President, illegally sold rights to oil production on public lands. See Leslie E. Bennett, Brookings Institution, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal* (1999), https://bit.ly/2TNRmZ9. Understandably, when details of the scheme began to unfold over multiple years, the President was hesitant to think his appointee was capable of committing crimes, as it would consequentially call into question the President's judgment. The result? No Executive Branch investigation ensued. And the Attorney General did not act. There would have been no check on the President's cabinet appointee but for Congress's last-minute happenchance discovery of the scandal. Worse still, Congress had to enact a joint resolution to demand that the President cause a prosecution and appoint special counsel with all the powers of the Attorney General, and expressly stated independence from the Department of Justice. Act of Feb. 8, 1924, ch. 16, 43 Stat. 5, 6. All because the fox was guarding the hen house, and prosecutors were loath to investigate their bosses. The very people who were responsible for faithfully executing the laws, and for investigating and prosecuting those who did not, were the ones who did not act.

That is the epitome of the kind of "accumulations" of power that the Founders found most frightening in the Crown, "the very definition of tyranny," which they hoped to thwart with the creation of the Constitution. The Federalist No. 47 at 313 (James Madison) (Modern Library ed. 1937). And the likely abuses of power that will result when Presidents find themselves above the law presents a far more concrete threat to our constitutional order than Petitioner's abstract concerns about "liberty" and "tyranny" that might result because the CFPB is insulated from removal, has one director rather than three, or gets its funding from an independent source. After all, as Justice Jackson wrote, "men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring). The consequence, in short, of the Court's decision in this case could be nothing short of the future of our Republic and the rule of law itself.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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