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 COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF JUDGMENT BELOW

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QUESTION PRESENTED

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

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By order dated October 23, 2019, this Court invited Paul D. Clement to brief and argue this case, as *amicus curiae*, in support of the judgment below on the question presented by the petition.[1]

INTRODUCTION

This is a case about text, first principles, and precedent. All three strongly support affirmance.

First, and most obviously, there is no "removal clause" in the Constitution. Beyond the provisions for impeachment, the constitutional text is simply silent on the removal of executive officers, which is hardly a promising basis for invalidating an Act of Congress. Even apart from the telling absence of any textual limitation on Congress' power to impose modest restrictions on removal, the Constitution leaves to Congress all manner of questions about the organization and structure of executive-branch departments and officers. Decisions about how many executive departments to establish, which officers should discharge which duties, and which principal officers should supervise which inferior officers, were all left to Congress.

Second, given Congress' significant control over the structure of executive-branch agencies and officers, the argument that Congress cannot impose even modest restrictions on the President's ability to remove executive-branch officers makes little sense as

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[1] No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus curiae* and his law firm, made a monetary contribution toward its preparation or submission.

a matter of first principles. Far from foreclosing any congressional imposition on the executive, the framers gave Congress considerable flexibility in organizing and structuring executive-branch agencies. From the beginning, Congress exercised that authority to address the qualification and removal of executive-branch officers, and it has long recognized that certain executive-branch functions are better discharged by officials who do not serve at the pleasure of the President. The Constitution does prevent Congress from arrogating the authority to remove executive-branch officers to itself, but such efforts not only impermissibly cross the tracks of executive and legislative power, but are in substantial tension with the impeachment clauses. But as long as the President is the one exercising the power to remove executive-branch officers, modest restrictions on that authority do not cross a constitutional line.

Third, this Court's precedents reflect the fundamental distinction between forbidden efforts to assign the executive removal authority elsewhere and permissible restrictions on the President's removal authority. While this Court has invalidated the former, it has repeatedly upheld the latter. Indeed, every time the Court has confronted legislation that leaves removal authority with the President while imposing modest limits on his discretion, including restrictions identical to those at issue here, the vote has not been close.

While text, first principles, and precedent all support the decision reached below, there are two alternative grounds for affirmance. Initially, petitioner's injury is not traceable to the challenged

removal restriction, and its claim is not ripe in the absence of a concrete dispute about removal. Petitioner's claimed injury stems from an investigative demand and a petition to enforce it. The petition subsequently has been endorsed by an Acting Director and a Senate-confirmed Director who both believe they serve at the pleasure of the President. Even today, the Director could drop the petition and end this case if she thought it were an improper exercise of executive power, and she has made clear that she would honor a presidential direction to do just that. Under these circumstances, traceability is absent. Ripeness concerns reinforce the inappropriateness of deciding these critical constitutional questions in this context. Disputes about the Tenure of Office Act and the removal of Federal Trade Commissioners awaited a disputed effort to remove an officer. Simply put, a contested removal is the proper context to address a dispute over the President's removal authority.

Even apart from these jurisdictional issues, the Court can avoid the constitutional issue presented here by interpreting the key statutory phrase "inefficiency, neglect of duty, or malfeasance in office" in a manner that avoids constitutional difficulty. This Court has previously understood those same terms to give substantial discretion and control to the removing authority, and this case certainly presents no occasion to interpret them to magnify rather than avoid constitutional concerns. Unless a Constitution silent on the question of removal categorically forbids even the slightest constraint on the President's removal authority, the statute here is constitutional, and the judgment should be affirmed.

STATEMENT OF THE CASE

A. Constitutional Background

The Constitution provides explicit procedures for the "Appointments" of "Officers of the United States." U.S. Const. Art. II, §2, cl. 2. By contrast, "[t]here is no express provision respecting removals" outside the impeachment context. *Myers v. United States*, 272 U.S. 52, 109 (1926). Indeed, it appears that, apart from impeachment, the authority to remove executive-branch officials was not even discussed at the Constitutional Convention. *Id.* at 109-10.

The Constitution is likewise silent as to the number and structure of executive-branch departments. The Constitution clearly contemplated that some would be created, as evidenced by, *inter alia*, the President's authority to "require the Opinion, in writing, of the Principal Officer in each of the executive Departments." U.S. Const. Art. II, §2, cl. 1; *see also id.* Art. II, §2, cl. 2 (authorizing President to appoint officers "established by Law"). But it left the number and organizational details of such departments to Congress operating pursuant to its enumerated powers, including the Necessary and Proper Clause. That Clause grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" not just Congress' own powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* Art. I, §8, cl. 18.

Not surprisingly given the absence of any textual provision directly addressing removal, the framers were not of one view on whether the President had the

sole power to remove executive officers. In *Federalist 77*, for example, Hamilton took it for granted that "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers. *The Federalist No. 77*, at 407 (J.R. Pole ed., 2005). Madison, by contrast, rejected the view that the Senate should have any direct role in the removal of executive officers. 1 *Annals of Cong.* 481-82 (Joseph Gales ed., 1834).

There was greater agreement on the notion that, in establishing and structuring the new federal government, Congress could impose some limits on the President's discretion to remove certain officers. In particular, there was a recognition that certain functions should not be discharged by officers subject to completely unfettered presidential removal. Even Madison expressed the view that an executive-branch official exercising both executive and adjudicative functions "should not hold his office at the pleasure of the [E]xecutive." *Id.* at 636. And Chief Justice Marshall and a unanimous Supreme Court expressly assumed in *Marbury v. Madison* that not all executive officers must be "removable at the will of the Executive." 5 U.S. (1 Cranch) 137, 162 (1803).

When the First Congress created the first three executive departments (War, Foreign Affairs, and Treasury), it concluded, after much debate, that the heads of those Departments should be removable by the President at will. *See Myers*, 272 U.S. at 111-15. In establishing those Departments, however, Congress made dozens of other judgments about their structure and organization. In particular, the First Congress addressed the structure and organization of

the Treasury Department in some detail, and specified that Treasury officials could be removed if found to "offend against any of the prohibitions of this act." Act of Sept, 2, 1789, ch. 12, §3, 1 Stat. 65, 67. The First Congress authorized an Attorney General, but not a Justice Department, and specified that the Attorney General be "learned in the law." Judiciary Act of 1789, ch. 20, §35, 1 Stat. 73, 93.

The challenges of the Civil War and its aftermath caused Congress to revisit removal issues. Initially, Congress focused its attention on specific executive offices discharging unique functions. For instance, in 1863, Congress created the Office of the Comptroller of the Currency and made the Comptroller removable "by the President" only "by and with the advice and consent of the Senate." Act of Feb. 25, 1863, ch. 58, 12 Stat. 665, 665-66. Congress amended the statute one year later to provide for removal "by the President, upon reasons to be communicated by him to the Senate." Act of June 3, 1864, ch. 106, §1, 13 Stat. 99, 100. Later, when tensions between Congress and the President escalated during the administration of Andrew Johnson, Congress enacted the Tenure of Office Act, which required the President to obtain Senate consent before removing numerous executive officers. Ch. 154, 14 Stat. 430 (1867). Congress proceeded to pass other statutes placing comparable restrictions on other new officers. *See, e.g.*, Act of July 12, 1876, ch. 179, §6, 19 Stat. 78, 80-81.

Perhaps the most remarkable thing about the Tenure of Office Act is that this Court waited almost six decades to resolve its constitutionality. Even though the Act drew an immediate presidential

objection and veto, figured prominently in President's Johnson's impeachment, and generated continued objections from President after President, the Act's constitutionality remained unresolved by this Court. Even though countless individuals endured adverse actions by executive-branch officials subject to the Act, this Court had no occasion to address the Act's constitutionality until a deputy postmaster actually contested his removal without Senate consent and filed a suit for salary wrongfully withheld, which prompted the *Myers* decision.

In the post-reconstruction era, Congress began establishing specialized executive agencies with officers subject to presidential removal "for inefficiency, neglect of duty, or malfeasance in office." For example, the 1890 Customs Administrative Act provided:

> That there shall be appointed by the President, by and with the advice and consent of the Senate, nine general appraisers of merchandise.... Not more than five of such general appraisers shall be appointed from the same political party. They ... may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office.

Ch. 407, §12, 26 Stat. 131, 136 (1890); *see also, e.g.*, Act of Feb. 4, 1887, ch. 104, §11, 24 Stat. 379, 383 (Interstate Commerce Commission); Act of Sept. 26, 1914, Pub. L. No. 63-203, 38 Stat. 717, 718 (Federal Trade Commission (FTC)).

As with the Tenure of Office Act, the modest restrictions on removal reflected in these "inefficiency,

neglect of duty, or malfeasance" provisions endured for decades without generating a constitutional decision by this Court. That interval was particularly noteworthy because the new agencies routinely decided private parties' rights. Once again, it took an actual removal of a Federal Trade Commissioner in the absence of any stated cause to generate the kind of concrete controversy necessitating a constitutional decision. *See Humphrey's Executor v. United States*, 295 U.S. 602, 626-27 (1935) (unanimously upholding constitutionality of removal restriction).

This Court has confronted a handful of removal provisions in the years since *Myers* and *Humphrey's Executor*. The resulting precedents reflect a clear pattern. When the Court has confronted statutory provisions that assign the removal authority to someone other than the President (or to someone not subject to at-will removal by the President), the Court has been closely divided but has consistently invalidated efforts to assign the President's removal authority elsewhere. In *Myers*, for example, a closely divided Court struck down the post office's mini-Tenure of Office Act, because it improperly injected the Senate into the President's removal decision. Three Justices, including Justices Holmes and Brandeis, dissented and would have upheld even that direct congressional involvement in removal. *Myers*, 272 U.S. at 240-95 (Brandies, J., dissenting); *id.* at 295 (Holmes, J., dissenting).

More recently, the Court invalidated an effort to vest executive powers in the Comptroller General, an officer removable only by Congress for "inefficiency, neglect of duty, or malfeasance." *Bowsher v. Synar*,

478 U.S. 714 (1986). The Court, emphasizing that this "very broad" standard left the Comptroller General "subservient" to Congress, invalidated the law for impermissibly vesting executive authority in an officer not subject to executive removal. *Id.* at 729-30. And most recently, in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court invalidated a scheme of dual for-cause removal limitations as impermissibly insulating an officer discharging executive authority from removal by the President. 561 U.S. 477 (2010). Both *Bowsher* and *Free Enterprise Fund* prompted multiple-Justice dissents.

By contrast, when this Court has confronted statutes that leave removal authority with the President subject to the modest restriction that removal be for "inefficiency, neglect of duty, or malfeasance," it has uniformly rejected the challenge, and done so unanimously or nearly unanimously. In *Humphrey's Executor*, for example, the Court unanimously upheld the removal restrictions on Federal Trade Commissioners and rejected the President's claim to an unfettered constitutional right to remove those Commissioners. 295 U.S. at 626-28. Similarly, in *Wiener v. United States*, the Court unanimously rejected a presidential claim to at-will removal authority in the context of a statute that did not even expressly limit his removal authority. 357 U.S. 349 (1958). Finally, in *Morrison v. Olson*, a nearly unanimous Court rejected a challenge to a removal restriction on an Independent Counsel even on the assumption that she performed a "purely executive" function. 487 U.S. 654 (1988). Justice Scalia filed a lone dissenting opinion disagreeing with

the majority on multiple points including removal, the Independent Counsel's appointment by a three-judge court, her inferior-officer status, and her ability to expand her jurisdiction. *See id.* at 697-734 (Scalia, J., dissenting).

In short, every time this Court has confronted an effort to assign the President's removal authority elsewhere, it has rejected it in closely divided opinions that reflect the Constitution's silence and the framers' ambivalence on such questions. And every time this Court has confronted a provision that leaves the removal authority with the President, but imposes modest limits on his discretion, the Court has upheld the provision either unanimously or nearly so.

B. Statutory Background

Through its investigation into the 2008 financial crisis, a special commission formed by Congress concluded that "the failure … to give sufficient consideration to consumer protection … helped bring the financial system down." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report*, at 166 (2011). In particular, the commission found that the consumer-protection system was "too fragmented to be effective." *Id.* at 10. "There [were] seven different federal regulators involved in consumer rule writing or enforcement," which "undermine[d] accountability." *Id.* Congress sought to address this concern through the Consumer Financial Protection Act (CFPA), which is Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). That legislation created the Consumer Financial Protection Bureau (CFPB), "a new, streamlined" agency, S. Rep. No. 111-176, at 11,

whose "purpose" is to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive," 12 U.S.C. §5511(a).

Pursuant to its undoubted authority to structure and organize executive-branch agencies, Congress established the CFPB within the Federal Reserve System as an "independent bureau." *Id.* §5491(a). Consistent with its view that effective protection of consumer rights in financial markets demands continuity and expertise, Congress imposed some modest and familiar restrictions on removal of the Bureau's Director. While both appointment (subject to the Senate's advice and consent) and removal lay firmly with the President, Congress provided that the Director would serve a five-year term, but that "[t]he President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." *Id.* §5491(c)(1), (3).

Congress broke no new ground in so structuring the Bureau. The five-year term and single-director structure mirrors the Office of Special Counsel, 5 U.S.C. §1211(a)-(b), Office of the Comptroller of the Currency, 12 U.S.C. §2, and Social Security Administration, 42 U.S.C. §902(a) (six-year term). The "inefficiency, neglect of duty, or malfeasance in office" standard is the precise formulation found in dozens of other statutes and repeatedly upheld by this Court.[2] Indeed, the standard is so familiar that this

[2] In addition to the FTC Act, the same language appears in, *inter alia*, 5 U.S.C. §7104(b) (Federal Labor Relations Authority); *id.* §1202(d) (Merits System Protection Board); 42 U.S.C.

Court inferred its presence even when statutory text was silent in *Wiener* and *Free Enterprise Fund*. And like other financial regulators, the CFPB obtains funding primarily outside of the annual appropriations process. 12 U.S.C. §5497(a)(1); *see, e.g.*, *id.* §16 (Comptroller of the Currency); *id.* §243 (Federal Reserve Board); *id.* §§1815(d), 1820(e) (Federal Deposit Insurance Corporation).

The CFPB's powers resemble those of other federal regulatory bodies. The CFPB is responsible for administering various laws, *see id.* §5481(12), (14), and is authorized to "prescribe rules and issue orders and guidance … to administer and carry out the purposes and objectives" of those laws, *id.* §5512(b)(1). *See also id.* §5581(b)(5) (transferring most of FTC's authority to regulate financial conduct to CFPB). Unlike other agencies, however, a separate body (the Financial Stability Oversight Council) may set aside final CFPB regulations if it finds that they "would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." *Id.* §5513. The CFPB also may bring enforcement actions, *id.* §5564(a), subject to judicial review, *see id.* §§5563(b)(4), 5513(d).

"Before the institution of any [such] proceedings," the CFPB may issue a "civil investigative demand" (CID) to a person who "may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of CFPB-administered laws. *Id.* §5562(c)(1);

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§5841(e) (Nuclear Regulatory Commission); and *id.* §7171(b)(1) (Federal Energy Regulatory Commission).

cf., e.g., 15 U.S.C. §57b-1(c)(1) (same authority for FTC). The recipient of a CID may seek to negotiate modifications at a "meet and confer" with CFPB personnel, 12 C.F.R. §1080.6(c), and/or file a petition with the Director to modify or set aside the CID, 12 U.S.C. §5562(f); *see also* 12 C.F.R. §1080.6(f). If the recipient ultimately "fails to comply," the CFPB may file a petition to enforce the CID in federal district court. 12 U.S.C. §5562(e)(1); *cf., e.g.*, 15 U.S.C. §57b-1(e) (same authority for FTC).

C. Factual and Procedural Background

1. Petitioner Seila Law LLC is a law firm that provides "debt-relief services." Pet.App.1a. On February 27, 2017, the CFPB issued a CID to petitioner to determine, *inter alia*, whether petitioner had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services." Pet.App.10a. In particular, "numerous attorneys and other persons [allegedly] violated the Telemarketing Sales Rule, 16 C.F.R. pt. 310, by charging consumers illegal upfront fees for debt-relief services and deceiving consumers that they will not be charged such fees." CFPB.CA9.Br.7.

Approximately two weeks later, the Department of Justice (DOJ) made a public legal filing indicating that the President viewed the CFPA's removal provision as unduly interfering with his constitutional authority. Citing that development, petitioner petitioned the CFPB to modify or set aside the CID,

arguing, *inter alia*, that "an unconstitutional agency" had "issued" it. ER91; Pet.App.11a.[3]

The CFPB's then-Director, Richard Cordray, denied the petition, concluding that petitioner had waived any such objection by failing to assert it during the meet-and-confer proceeding, as CFPB rules demanded. Pet.App.10a; ER311-15. He thus ordered petitioner to comply with the CID. Pet.App.10a. Petitioner then submitted a response to the CID. Pet.App.10a-11a. The CFPB alerted petitioner to numerous deficiencies in the response, but petitioner "decline[d] the CFPB's request … to provide further information or documents." ER324.

2. On June 22, 2017, the CFPB filed a petition in the U.S. District Court for the Central District of California to enforce the CID. Pet.App.11a. The court granted the petition in part. The court was not persuaded that "the CFPB is unconstitutionally structured." Pet.App.12a. But it did agree with some of petitioner's objections to the scope of interrogatories. Pet.App.21a-22a. After modifying the interrogatories, the court granted the CFPB's petition. Pet.App.23a. Petitioner noticed an appeal to the Ninth Circuit on September 1, 2017. ER14.

D. Ninth Circuit Proceedings

1. On November 24, 2017, before the parties filed briefs on appeal, Director Cordray resigned, leading the President to designate Mick Mulvaney the Acting Director. *See* The White House, *Statement on President Donald J. Trump's Designation of OMB*

[3] "ER" references Excerpts of Record filed with the Ninth Circuit.

Director Mick Mulvaney as Acting Director of the Consumer Financial Protection Bureau (Nov. 24, 2017), https://go.usa.gov/xEXRs. The next day, the Office of Legal Counsel (OLC) released an opinion concluding that the President has authority to remove the Acting Director at will. *See Designating an Acting Director of the Bureau of Consumer Financial Protection*, 41 Op. O.L.C. 10 (Nov. 25, 2017) (slip op. 11) ("Congress does not, by purporting to give tenure protection to a Senate-confirmed officer, afford similar protection to an individual who temporarily performs the functions and duties of that office when it is vacant.").

As the CFPB repeatedly emphasized to the Ninth Circuit, "Acting Director Mulvaney … chose[] to ratify the Bureau's earlier decisions to issue, uphold, and petition to enforce the CID" against petitioner. CFPB.CA9.Br.1; *see also* CFPB.CA9.Br.10 ("In his capacity as the Bureau's Acting Director, Mr. Mulvaney ratified these decisions"); CFPB.CA9.Br.13-19. Thus, the CFPB itself made clear that this petition does not depend on the Director or Acting Director's removal status, as an Acting Director viewed by himself and the President as removable at-will had ratified it. Accordingly, the CFPB asked the Ninth Circuit to affirm "without addressing [petitioner's] constitutional challenge." CFPB.CA9.Br.10. The CFPB also argued that petitioner's constitutional argument failed on the merits. CFPB.CA9.Br.20-40.

2. The Ninth Circuit unanimously affirmed on the merits. Pet.App.1a-8a. The court explained that "the arguments for and against th[e] view" "that the CFPB's structure violates the Constitution's

separation of powers" "have been thoroughly canvassed in the majority, concurring, and dissenting opinions" in the D.C. Circuit's en banc decision in *PHH Corp. v. CFPB*, 881 F.3d 75 (2018), and it "agree[d] with the conclusion reached by the *PHH Corp.* majority." Pet.App.2a.

The court of appeals underscored that financial regulators like the CFPB have long been afforded "a measure of independence" and pointed to *Humphrey's Executor*, which "rejected a separation-of-powers challenge" to the FTC, "an agency similar in character to the CFPB." Pet.App.4a. Although the court recognized that the FTC has five Commissioners subject to "for-cause removal" instead of one Director, it noted that "the President can arguably exert more effective control over the agency if it is headed by a single individual rather than a multi-member body." Pet.App.6a. The court thus concluded that the "reasoning" of *Humphrey's Executor* "applies equally to the CFPB." Pet.App.4a.

The court recognized that the CFPB possesses "more executive power than the FTC did back in 1935." Pet.App.5a. But the court noted that *Morrison* "upheld the constitutionality of a for-cause removal restriction for an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing." Pet.App.5a. The court also noted that *Free Enterprise Fund* "left undisturbed a for-cause removal restriction for SEC Commissioners, who are charged with overseeing a board that exercises 'significant executive power.'" Pet.App.5a. The court then

disposed of petitioner's statutory arguments. Pet.App.6a-8a.

3. Petitioner sought review in this Court. In a response brief signed by both the Solicitor General and the CFPB's General Counsel, the government agreed with petitioner that the removal restriction is unconstitutional and urged the Court to grant certiorari. CFPB.Cert.Br.7. The brief noted that the new, Senate-confirmed CFPB Director (Kathleen Kraninger) "agrees that the removal restriction is unconstitutional." CFPB.Cert.Br.20. Director Kraninger relayed that position to Congress that same day: "Mindful of the Bureau's role as an Executive agency within the Executive Branch, I have decided that the Bureau should adopt the Department of Justice's view that the for-cause removal provision is unconstitutional." Letter from CFPB Director Kraninger to Mitch McConnell, Majority Leader, U.S. Senate 2 (Sept. 17, 2019) (citation omitted), https://bit.ly/2M5Bexv; Letter from CFPB Director Kraninger to Nancy Pelosi, Speaker, U.S. House of Representatives 2 (Sept. 17, 2019), https://bit.ly/34sLVk0 (same).

SUMMARY OF ARGUMENT

The constitutional issues addressed by petitioner, the Solicitor General, and numerous amici are undoubtedly important. They also have almost nothing to do with the actual dispute between petitioner and the CFPB that forms the basis of petitioner's invitation for this Court to decide these momentous constitutional issues.

This case involves an effort by the CFPB to enforce a garden-variety civil investigative demand.

The idea that either the CID or the CFPB's decision to go to court to enforce it had any real connection to the Director's removal status was always tenuous at best. But subsequent events have severed the connection entirely. Since the enforcement petition was first filed by Director Cordray, it has been maintained by an Acting Director subject to at-will removal and a Senate-confirmed Director who has adopted the considered view of OLC that she serves at the pleasure of the President. Director Kraninger retains the ability to drop this enforcement petition. That she has not done so despite her view that she serves at the pleasure of the President makes crystal clear that the enforcement action that forms the basis of petitioner's injury has nothing to do with the constitutional issue it asks this Court to decide. In Article III terms, petitioner's injury is not traceable to the constitutional issue it wishes to have adjudicated.

But even if there were a sufficient connection to satisfy Article III, prudential considerations would counsel against deciding this most consequential of constitutional issues in this most artificial of postures. The Director believes that she is entirely answerable to the President and serves at his pleasure. Whatever constitutional issue might lay dormant in the statutory structure is not present under the current circumstances. History teaches that there will be time enough to resolve this question in the context of a concrete dispute about an actual removal. The six decades that separated passage of the Tenure of Office Act and the actual removal and ensuing decision in *Myers* are a paragon of judicial restraint. There is no reason to rush to a decision here when the Director

believes that her actions are subject to unfettered presidential control.

If the Court nonetheless reaches the merits, it should affirm. Text, first principles, and precedent all support that result. The Constitution is silent on the question of removal, but it expressly grants Congress the power to structure and organize executive-branch agencies and officers. Congress addressed the qualifications and removal of executive officers from the beginning. And for almost 150 years, Congress has assigned specific responsibilities—ranging from monetary policy to whistleblower complaints—to executive officers removable for inefficiency, neglect of duty, or malfeasance. This Court has unanimously and repeatedly upheld the constitutionality of those provisions. Indeed, this Court's precedents draw a clear line between impermissible efforts to assign the President's removal authority elsewhere, and valid laws that leave removal authority with the President but impose modest restrictions on his discretion.

The parties attempt to distinguish *Humphrey's Executor* and, failing that, ask this Court to overrule it. They emphasize that the CFPB has a single Director, while *Humphrey's Executor* approved a multimember agency with partisan-balance restrictions. But that distinction gets matters backwards. If the purported constitutional problem is that the inefficiency-neglect-or-malfeasance standard unduly restricts the President's Article II authority, then layering that restriction on top of multimember and partisan-balance requirements only exacerbates the constitutional problem. The constitutionality of the CFPB follows *a fortiori* from *Humphrey's Executor*

and its progeny. And the parties' arguments to overrule those precedents do not come close to satisfying the demands of stare decisis. *Humphrey's Executor* was no small matter; it forms the basis for roughly a third of the modern federal government. And it does not stand alone. It has been repeatedly reaffirmed and extended unanimously or nearly so.

Finally, even if this Court had grave concerns with the CFPB's structure despite these clear precedents, the CFPA's removal provision can and should be interpreted to avoid any potential constitutional infirmity. The inefficiency-neglect-or-malfeasance standard is readily amenable to a construction that imposes no more restriction on the President's removal authority than Article II permits. Indeed, when this Court previously construed these terms in *Bowsher*, it characterized them as "very broad" and sufficiently capacious to leave an officer "subservient" to the removing authority.

In sum, this case presents a remarkably weak case for invalidating an Act of Congress. There is no actual contested removal, and the current Director views herself as serving at the pleasure of the President. The constitutional text is silent, and precedent strongly supports the Act's constitutionality. And the gravamen of the constitutional claim is that the CFPA's "very broad" terms, plainly amenable to a narrowing construction, unduly constrain the President. There is simply no adequate basis here to take the grave step of invalidating an Act of Congress.

ARGUMENT

I. Petitioner Suffers No Injury Traceable To Any Limitation On The President's Removal Authority, And Prudential Factors Counsel Against Deciding The Question Presented Without A Contested Removal.

1. Petitioner emphasizes that "[a]s it comes to the Court, this case presents only [one] question": whether the statutory limit on the President's power to remove the CFPB Director is constitutional. Pet.17. But that constitutional question has little connection to this enforcement action or petitioner's alleged Article III injury. In most of this Court's landmark removal cases, there has been no serious dispute about traceability or ripeness because the connection between the Article III injury and the removal restrictions was obvious and undeniable: The plaintiff was a federal officer that the President had actually removed from office, and the Article III injury was salary allegedly wrongfully withheld. If the contested removal was valid (and the removal restriction invalid), as in *Myers*, then the plaintiff's lawsuit failed. If, on the other hand, the contested removal was invalid (and the removal restriction valid), as in *Humphrey's Executor* and *Wiener*, then the plaintiff was entitled to compensation for salary wrongfully withheld. In either event, there was no concern about traceability or ripeness (or abstractness or lack of adversity between the parties). There was a direct line between the asserted injury (an improper removal) and the constitutional question (whether the restriction on the President's removal authority was permissible).

In this case, the connection between the removal restrictions and petitioner's Article III injury was far more attenuated from the beginning. The idea that either the CID or the effort to enforce it in court flowed from the Director being emboldened by his tenure provisions was always highly artificial. Whether the Director is removable at-will or for inefficiency, neglect, or malfeasance, such CIDs and enforcement petitions would remain commonplace. But even assuming there was a sufficient connection between the removal restrictions and this enforcement effort at the outset, subsequent events have severed it.

The enforcement petition was initially filed by Director Cordray, who was appointed the Bureau's first Director by President Obama. Even if Director Cordray understood himself to be insulated from at-will removal, and even if that insulation contributed to his decision to authorize this petition, Director Cordray voluntarily resigned on November 24, 2017. After his resignation, the President appointed Mick Mulvaney to serve as Acting Director. Before making that appointment, OLC articulated the considered view of the executive branch that the Acting Director was removable at-will and served at the pleasure of the President. *See supra* p.15. Acting Director Mulvaney personally endorsed that view. *See, e.g.*, Notice 2, *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, No. 3:16-cv-00356-WHB-JCG (S. D. Miss. Feb. 5, 2018), Dkt.231 ("In his capacity as Acting Director, Mr. Mulvaney is removable by the President at will.").

At that point, when both the Acting Director and the President understood the former to be serving at

the pleasure of the latter, the Acting Director (either on his own accord or at the express direction of the President) could have dropped this enforcement action. Indeed, with respect to *other* enforcement actions, Acting Director Mulvaney did just that. *See* Jolina C. Cuaresma, *Commissioning the Consumer Financial Protection Bureau*, 31:3 Loyola Consumer L. Rev. 426, 478 (2019). In this case, however, the CFPB repeatedly told the Ninth Circuit that the Acting Director ratified every relevant action taken during Director Cordray's tenure. CFPB.CA9.Br.1; Seila.CA9.Reply.8.[4] From that point forward, there was no longer any colorable basis to trace petitioner's injury from this enforcement action to the constitutional issue petitioner invites the Court to resolve. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (essential prerequisites of Article III must be satisfied at every stage).

That traceability problem was only magnified when the President appointed Director Kraninger, who has continued this enforcement proceeding and is on record as understanding herself to serve at the pleasure of the President. *See supra* p.17. That she takes that position is hardly surprising. The same "unitary executive" principles that undergird the government's view that even a modest restriction on the President's removal authority is unconstitutional would lead to an understanding that executive

[4] The government has since reiterated its view that ratification by an Acting Director eliminates any constitutional injury that may arise from the CFPA's removal provision. *See* Br. in Opp. 18-19, *All Am. Check Cashing, Inc. v. Consumer Fin. Prot. Bureau*, No. 19-432 (U.S. Nov. 6, 2019).

officials have an independent responsibility to interpret the Constitution and refrain from unconstitutional action. *Cf. Presidential Authority to Decline to Execute Unconstitutional Statutes*, 18 Op. O.L.C. 199, 201-02 (1994) ("*Myers* … vindicated the view that the President may refuse to comply with a statute that limits his constitutional powers if he believes it is unconstitutional."). Consistent with that view, Director Kraninger presumably believes that she is fully complying with the Constitution and undertaking no unconstitutional actions, including the continuation of this enforcement action, precisely because she believes that she serves at the pleasure of the President. This Court does not need to endorse that view to recognize that it eliminates any traceability between this enforcement action and the removal restriction petitioner seeks to challenge.[5]

2. Even apart from that jurisdictional defect, prudential factors strongly counsel against deciding these momentous constitutional issues in this context. History provides a powerful lesson that the correct posture to decide removal questions is in the context of an actual contested removal. Such cases provide a

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[5] Petitioner's severability argument does not cure this traceability problem. Multinational pharmaceutical companies aggrieved by the Affordable Care Act's bio-similars provisions cannot challenge the individual mandate with or without a severability argument. This Court did allow challenges to the legislative veto by parties aggrieved by closely related provisions, *see*, *e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678 (1987), but that is no precedent for this action, as the legislators insisted on the veto's validity. Given the current Director's twin views that she serves at the President's pleasure and that this enforcement action should continue, traceability is absent.

concrete set of facts and eliminate any doubts about traceability. They also sharpen the issues for judicial resolution. A contested for-cause removal would inform the meaning of the inefficiency-neglect-or-malfeasance standard. But even when the President does not have any reason for removal beyond wanting his "own selection," *Humphrey's Executor*, 295 U.S. at 618, an actual contested removal ensures that this Court is resolving an actual dispute rather than anticipating one. Here, not only does the President have his own person in the job, but she understands herself to serve at the pleasure of the President. That is not the recipe for a ripe removal dispute.

One of the most important and long-simmering constitutional disputes in our constitutional history was the constitutionality of the Tenure of Office Act. The dispute was long-simmering precisely because the courts did not rush to resolve it. Although the Act "was a thorn in the side" of the executive for decades, the federal courts never "entertained an action to adjudicate [its] constitutionality" for the first 50-some years of its existence. *Raines v. Byrd*, 521 U.S. 811, 826-27 (1997). It never "occurred" to President Johnson, Grant, Hayes, Garfield, Arthur, or Cleveland that he "might challenge the Act in an Article III court" "before he ever thought about firing a cabinet member." *Id.* at 827. Nor, evidently, did it occur to any private citizen aggrieved by a cabinet member's actions that she might challenge those actions on the ground that the inchoate limits on future removal interfered with the President's current ability to "control" the executive branch. The resulting decades of judicial restraint avoided "improperly and

unnecessarily plung[ing the Court] into [a] bitter political battle." *Id.*

History demonstrates not just the virtues of restraint, but that judicial patience is often rewarded with an actual dispute that properly presents the issues. In *Myers*, this Court ultimately opined on the constitutionality of the Act and the post office's "mini-Tenure of Office Act," *id.*, when a deputy postmaster was actually removed. The Court then clarified the reach of *Myers* in the context of actual removals in *Humphrey's Executor* and *Wiener*. The inefficiency-neglect-or-malfeasance standard for the removal of Federal Trade Commissioners had been on the books since 1914, *see* 38 Stat. 717, 718, but the Court waited until 1935 and an actual contested removal to unanimously uphold it.

To be sure, some subsequent decisions have addressed removal questions without awaiting a contested removal. But those cases involved Appointments Clause or other separation-of-powers issues that did not raise comparable ripeness concerns.[6] Moreover, while prudential concerns may

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[6] Both *Morrison* and *Free Enterprise Fund* involved Appointments Clause problems. That likewise explains *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), which set aside an exercise of Article III authority by a bankruptcy judge who lacked life tenure and was not appointed or confirmed consistent with Article III. *Id.* at 87-88. Like an improperly appointed executive officer, an improperly appointed judge cannot exercise Article III authority at all. Similarly, *Bowsher* involved the exercise of executive power by the Comptroller General, who was removable only by Congress, which "create[d] [a] here-and-now subservience to another

not loom as large in a case like *Bowsher*, where the claim is that the wrong branch was supervising an executive official, or a case like *Free Enterprise Fund*, where the President could not directly exercise any removal authority over certain officers exercising executive power, the argument for waiting for a contested removal is at its zenith when, as here, the removal authority remains with the President and the question is how much of a restriction on that authority is too much.

In sum, even assuming there are some cases where resolution of a constitutional removal question in the absence of a contested removal would be appropriate, this is plainly not one of them. The whole notion that petitioner is victimized by an officer wielding executive power yet insulated from presidential control has been overtaken by events. The current Director not only views herself as removable at-will, but has signed onto OLC's legal reasoning and allowed her lawyers to sign onto the Solicitor General's brief. Whatever was true when this suit was first filed, the theory of the unitary executive appears alive and well in the Director's office. The dispute here is not just unripe, but entirely theoretical. This case simply does not present a proper occasion for this Court to resolve the undoubtedly important question petitioner asks it to decide.

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branch." 478 U.S. at 727 n.5; *accord Synar v. United States*, 626 F. Supp. 1374, 1393 (D.D.C. 1986) (per curiam).

II. The CFPA And Its Removal Provision Are Constitutional.

If the Court does reach the question presented, it should hold the CFPA and its removal provision constitutional. Text, first principles, and precedent all support that result. That precedent cannot be distinguished, and the parties have not adequately justified discarding precedents that provide the cornerstone for much of the modern federal government.

A. The Constitution Gives Congress Considerable Discretion to Structure Executive Agencies and Offices.

Our Constitution has no "removal clause." Indeed, beyond debating impeachment, delegates to the Constitutional Convention do not appear to have discussed the subject of the removal of officers appointed by the President and confirmed by the Senate. *Myers*, 272 U.S. at 109-10. Because of the lack of any explicit textual commitment of the removal power to the President or serious debate about removal, the framers' views on the subject were remarkably heterodox. Hamilton expressed the belief in *Federalist 77* that removal authority was shared between the President and the Senate. In the First Congress, Madison expressed the view that the President alone could remove officers like the Secretary of State, but that "there may be strong reasons why an officer of [a different] kind should not hold his office at the pleasure of the [E]xecutive." 1 *Annals of Cong.* 636. And a few years later, Chief Justice Marshall expressed the view for a unanimous Court that Congress could restrict the President's

ability to remove certain officers. *Marbury*, 5 U.S. at 162.

The absence of a clause committing removal to the executive or any consensus view among the framers does not provide a promising foundation for invalidating an Act of Congress. But the burden on the challengers here is greater still because, while the Constitution is silent on removal authority, it makes clear that Congress has substantial discretion to structure and organize executive-branch departments and agencies. One can imagine a Constitution that gives the President carte blanche to organize the executive branch and determine whether the Attorney General needs a formal Department of Justice or whether monetary policy shall be conducted by the Treasury Department or a separate agency, but that is not the United States Constitution. Our Constitution vests the primary responsibility for establishing and organizing executive-branch agencies in the Congress.

While the Constitution certainly assumes that Congress will establish executive Departments, *see, e.g.*, U.S. Const. Art. II, §2, cl. 1, it leaves to Congress the details of how many, which responsibilities will be assigned where, and which inferior officers report to which principal officers. The Necessary and Proper Clause grants Congress the power to "make all laws which shall be necessary and proper for carrying into execution" not just Congress' own enumerated powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* Art. I, §8, cl. 18. Similarly, the Appointments Clause reflects Congress'

broad authority to establish and structure executive departments and offices by granting the President the authority to appoint principal officers "established by Law," while giving Congress apparently plenary authority to provide for the existence and appointment of inferior officers. *See id.* Art. II, §2, cl. 2. As this Court has summarized, quoting Madison, the powers to "'create[] the office, define[] the powers,'" and "'limit[] its duration'" have long been understood to be "'legislative.'" *Myers*, 272 U.S. at 128 (quoting 1 *Annals of Cong.* 581).

Given this clear grant of authority, one of the initial undertakings of the First Congress was to establish the first three executive departments and the office of Attorney General. *See generally* David P. Currie, *The Constitution in Congress: The Federalist Period 1789-1801* 36-47 (1997). Although the debates in the First Congress are not free from ambiguity, *see id.* at 40-41, they can be read to endorse the view this Court adopted in *Myers*, that only the President can exercise the removal authority. But beyond that, the First Congress viewed itself as having substantial discretion in structuring executive-branch departments and dictating the qualifications of certain officers.

For example, while the First Congress created the principal offices of the Secretaries of State, War, and Treasury and corresponding executive departments, when it came to the Attorney General, Congress established the office but not a corresponding Department of Justice. The First Congress specified that the Attorney General must be "learned in the law," Judiciary Act of 1789, ch. 20, §35, 1 Stat. 93,

without any apparent concern that the specification violated the "provisions of Article II," Currie, *supra*, at 43. Similarly, in debate over the Comptroller of the Treasury, Madison expressed the view that, because his duties were not purely executive, he should not serve at the pleasure of the President. *See id.* at 41 n.245. And, with respect to the Comptroller and other Treasury Department officers, Congress specified that such officers could be removed if found to "offend against any of the prohibitions of this act." Act of Sept, 2, 1789, ch. 12, §8, 1 Stat. 65, 67.

In subsequent years, Congress continued to prescribe the details of executive departments and, in doing so, sometimes circumscribed the President's discretion to appoint or remove certain officers. The Act establishing the First Bank of the United States established a greater degree of independence for this new financial institution, allowing the President to appoint only a minority of directors and making no provision for the President to direct the Bank in its operations. *See* Act of Feb. 25, 1791, ch. 10, §§1, 4, 11, 1 Stat. 191, 191-93, 196. In establishing the Office of the Comptroller of the Currency during the Civil War, Congress not only laid out in detail the functions and responsibilities of the office, Act of Feb. 25, 1863, ch. 58, §1, 12 Stat. 665, 665-66, but also provided for removal "by the President, upon reasons to be communicated by him to the Senate," Act of June 3, 1864, ch. 106, §1, 13 Stat. 99, 100, after initially requiring the Senate's consent. Moreover, beginning with the Interstate Commerce Commission in 1887, Congress repeatedly allocated specified responsibilities to multimember agencies whose principal officers were removable only for inefficiency,

neglect of duty, or malfeasance. *See* Act of Feb. 4, 1887, ch. 104, §11, 24 Stat. 379, 383. Today, a wide range of functions, from monetary policy to the handling of executive-branch whistleblower complaints, are performed by officials subject to an inefficiency-neglect-or-malfeasance standard. *See supra* n.2.

Congress has long recognized that some functions—*e.g.*, foreign relations, war powers, national security—are best discharged by officers who serve at the pleasure of the President. But even with respect to those responsibilities, it is Congress, and not the President unilaterally, that determines which officers discharge which responsibilities and which inferior officers report to which principal officers. *See, e.g.*, Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (consolidating 22 agencies into single Department of Homeland Security, with a Secretary removable at will). Congress likewise has long recognized the President's need to have complete discretion to remove those who fill the offices closest to him, such as White House officials and members of the Cabinet. *See, e.g.*, Act of August 12, 1970, Pub. L. No. 91-375, 84 Stat. 719, 777-78 (removing Post Office Department from Cabinet when replaced with public corporation). At the same time, however, Congress has repeatedly hewed to the view that the discharge of certain specialized roles should be insulated to a degree and are best discharged by someone who does "not hold his office at the pleasure of the [E]xecutive." 1 *Annals of Cong.* 636 (Madison).

B. Unanimous and Repeated Precedents of this Court Support the CFPB's Constitutionality.

This Court has squarely addressed the President's removal authority in roughly half-a-dozen cases. Those cases reflect a clear pattern. Whenever Congress has purported to arrogate removal authority over executive-branch officials to itself, or has prevented the President himself (or his at-will agents) from exercising the removal authority over executive-branch officers, this Court has rejected those efforts as inconsistent with Article II. *See Free Enter. Fund*, 561 U.S. at 492; *Bowsher*, 478 U.S. at 720; *Myers*, 272 U.S. at 107. Those decisions had to overcome the absence of clear text and the contrary views of Hamilton and other framers, so it is not surprising that they were generally closely divided. But when Congress tries to play a direct role in the removal of executive-branch officers, there is both a distinct problem with the Article I branch exercising an Article II power, *see Bowsher*, 478 U.S. at 726; *Myers*, 272 U.S. at 161, and tension with the Impeachment Clauses, which can be understood to articulate the exclusive basis for the House and Senate to remove executive-branch officials, *see* U.S. Const. Art. I, §3, cl. 7; §2, cl. 5; §3, cl. 6. Neither of those problems is present when Congress leaves the removal authority with the President while imposing modest restrictions on his discretion.

This Court's recent decision in *Free Enterprise Fund* likewise involved a congressional effort to prevent the President himself from exercising discretion to remove a principal officer. While

Congress avoided the more obvious problems with arrogating removal authority to itself, it still purported to assign the President's removal authority elsewhere. The President was categorically forbidden from exercising his own judgment in removing members of the Public Company Accounting Oversight Board (PCAOB); only the SEC could remove them, and only under a far more restrictive standard than inefficiency, neglect, or malfeasance. 561 U.S. at 503. *Free Enterprise Fund* thus distinguished both situations where the President retained the removal authority subject to modest restrictions and situations where an executive officer subject to at-will removal by the President was assigned removal authority subject to modest restrictions. *Id.* at 492-96. In both those situations, the President or his at-will agent retained the removal authority subject to modest restrictions repeatedly upheld by this Court. The statute in *Free Enterprise Fund* critically differed because it took the removal authority away from the President. *Id.* at 496.

On the other hand, whenever this Court has addressed statutes, like the CFPA, that leave the removal authority with the President, but restrain his discretion to a modest degree, this Court has upheld the statute and done so unanimously or nearly so. *See, e.g.*, *Humphrey's Executor*, 295 U.S. at 619-26 (unanimous); *Wiener*, 357 U.S. at 349-56 (unanimous); *Morrison*, 487 U.S. at 685-97 (7-1). *Humphrey's Executor* was the first case to squarely address such a statute. The President there relied on sweeping language in the then-recent *Myers* decision to argue that any restriction on the President's removal authority improperly intruded on the President's

Article II power. That position failed to garner a single vote. Instead, the Court unanimously upheld the FTC Act's removal restriction, which provided for presidential removal for "inefficiency, neglect of duty, or malfeasance in office," and unanimously rejected the President's claim that he had an Article II entitlement to have his "own selection" free from even modest fetters on his removal authority. *Humphrey's Executor*, 295 U.S. at 618-20, 625.

The Court again confronted a presidential challenge to any restriction on his removal authority in *Wiener*. Again, the Court was unanimous in rejecting the challenge and upholding the statute. 357 U.S. at 355-56. More recently, this Court rejected a challenge to, *inter alia*, the removal restrictions in the Independent Counsel Act over a single dissenting vote. The separation-of-powers issues in *Morrison* were hardly limited to the removal provision, which provided for the removal of the Independent Counsel by the Attorney General for "good cause," which the Court viewed as equivalent to the inefficiency-neglect-or-malfeasance standard in *Humphrey's Executor*. *See* 487 U.S. at 692 & n.32. But this Court's analysis of the removal provision is particularly instructive. While *Humphrey's Executor* and *Wiener* emphasized that the functions performed by the agencies at issue could be understood as "quasi-legislative" or "quasi-adjudicative," Chief Justice Rehnquist recognized that those agencies were still discharging Article II powers and extended those decisions to the Independent Counsel context, while forthrightly acknowledging that the Independent Counsel exercised "purely executive" powers. *Id.* at 688-90. Thus, *Morrison* recognized that the critical inquiry focused not on the

functions of the officer, but on whether the restrictions on the President (or the Attorney General, his at-will agent) unconstitutionally interfered with the President's Article II powers. The Court concluded that the Act's restrictions did not cross a constitutional line. *See id.* at 685-97.

These precedents clearly support the constitutionality of the CFPA and its removal restriction, as the court below found. Pet.App.1a-8a; *see also PHH Corp.*, 881 F.3d at 93-95. Most important, the CFPA leaves the removal authority with the President and imposes only the self-same restriction on that authority upheld in *Humphrey's Executor* and *Morrison*. This case thus clearly lies on the constitutional side of the line that divides permissible restrictions on the President's removal authority from improper efforts to reassign his removal authority elsewhere.

In addition, this Court's precedents underscore that the inefficiency-neglect-or-malfeasance standard imposes only a modest restriction on the President that is fully consistent with the discharge of his Article II powers. Even before *Myers* and *Humphrey's Executor*, the Court indicated that an inefficiency-neglect-or-malfeasance standard did not impermissibly constrain the President. *See Shurtleff v. United States*, 189 U.S. 311, 314 (1903). And more recently in *Bowsher*, the Court underscored that the inefficiency-neglect-or-malfeasance standard does not deprive the removing authority of effective control. To the contrary, the holding of *Bowsher* is that, by granting Congress the authority to remove the Comptroller General for inefficiency, neglect, or

malfeasance, the statute made the Comptroller General "subservient" to Congress. 478 U.S. at 730. Rather than viewing that standard as unduly constraining, this Court concluded that those "very broad" terms gave the removing authority the power to "sustain removal … for any number of actual or perceived transgressions." *Id.* at 729. In short, this Court's precedents—concerning both removal and the meaning of the inefficiency-neglect-or-malfeasance standard—strongly support the constitutionality of the CFPA and its removal restriction.

C. The Parties' Efforts to Distinguish *Humphrey's Executor* and its Progeny Fail, and Indeed Underscore the Single-Director Structure's Constitutionality.

Recognizing that this Court's precedents, particularly *Humphrey's Executor*, are a serious obstacle to their constitutional arguments, the parties struggle to distinguish them. They offer two principal distinctions. First, they point to a few miscellaneous features of the Director's tenure and powers, beyond the removal restriction, to suggest that the Director is distinctly unaccountable to the President. Second, they highlight the fact that *Humphrey's Executor* addressed restrictions on the President's authority to remove members of a *multimember* commission, rather than a single director. Neither effort succeeds, and the parties' emphasis that *Humphrey's Executor* involved a multimember agency cuts in exactly the wrong direction.

1. None of the miscellaneous features of the Director's tenure or powers meaningfully distinguishes this Court's precedents or makes a

constitutional difference. To be sure, the CFPB's responsibilities include some powers that are undeniably executive, but that hardly distinguishes it from the FTC, as the government concedes. CFPB.Br.27. And whatever can be said about the respective powers of the CFPB and the FTC, they are not as "purely executive" as those exercised by the Independent Counsel. *Morrison*, 487 U.S. at 689-90. The lesson of *Morrison* is that removal restrictions on executive-branch officers are permissible not because those officers are exercising something other than executive power, but because such modest restrictions on those exercising even "purely executive" power do not impermissibly intrude on the President's exercise of Article II authority. *Id.* at 691.

Petitioner also makes much of the fact that the CFPB "does not rely on standard congressional appropriations for its funding," Pet'r.Br.20, but that is true of virtually all financial regulators, *see, e.g.*, 12 U.S.C. §16 (Comptroller of the Currency); *id.* §243 (Federal Reserve Board); *id.* §§1815(d), 1820(e) (Federal Deposit Insurance Corporation). At any rate, petitioner's insistence that this "exempts the CFPB from the 'most potent form of [c]ongressional oversight,'" Pet'r.Br.20, is self-defeating. If the asserted problem is that the Director is insufficiently attentive to presidential direction, a degree of insulation from indirect *congressional* control via appropriations dependency and oversight would seem to be a feature, not a bug. *Cf. Morrison*, 487 U.S. at 702-05 (Scalia, J., dissenting). At a minimum, this insulation from Congress' ongoing control further distinguishes this case from cases like *Myers* and *Bowsher*.

Nor does it make any difference that Congress specified a five-year term for the CFPB Director. Congress routinely specifies terms for officers exercising executive powers, whether or not Congress imposes other restrictions on their removal. For example, Congress specifies a ten-year term for the FBI Director, Pub. L. No. 94-503, §203, 90 Stat. 2407 (1976), and an even longer 14-year term for members of the Federal Reserve Board, 12 U.S.C. §§241-242. Even when Congress does not otherwise limit the President's removal authority, as with the FBI Director, these longer terms create an expectation that such officers will not be routinely replaced with a change of administration and a felt-need to explain an earlier removal. But even when accompanied by an inefficiency-neglect-or-malfeasance standard, as with the Federal Reserve, such terms have never been understood to be constitutionally problematic. They certainly provide no basis to distinguish *Humphrey's Executor*, which involved a presidential effort to remove Humphrey before the expiration of his seven-year term. 295 U.S. at 618.

While none of these miscellaneous features serves to distinguish this Court's precedents or create any independent Article II difficulty, there are distinct features that give the President even greater control over the CFPB than over the FTC and other comparable entities. First, while the FTC has independent litigating authority in this Court in certain circumstances, 15 U.S.C. §56, the CFPB lacks such authority and depends on authorization from at-will officials at the Justice Department, 12 U.S.C. §5564(e). That reliance on the Solicitor General provides a powerful practical mechanism for

presidential control. *See, e.g.*, *FEC v. Beaumont*, 537 U.S. 1027 (2002) (granting petition filed on FEC's behalf and reversing despite FEC vote not to authorize a petition); Br. for the United States as Amicus Curiae, *Credit Suisse Sec. (USA) LLC v. Billing*, No. 05-1157 (U.S. Jan. 22, 2007) (reconciling position of SEC reflected in independently filed Second Circuit brief with conflicting position of DOJ's Antitrust Division). Second, the President has an important opportunity to control and overrule the CFPB via the Financial Stability Oversight Council. The President appoints a supermajority of the members of that Council, which has the statutorily granted power to veto any rule promulgated by the Director that the Council believes will "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U.S.C. §5513(a). There is no comparable check on the FTC or other agencies. Finally, as explained further below, the President is not saddled with any partisan-balance or multimember requirements when it comes to the Director. Together, these features make clear that there is less of a constitutional problem or intrusion on executive power here than in *Humphrey's Executor*, *Wiener*, and *Morrison*.

2. The parties' more concerted effort to distinguish *Humphrey's Executor* because that case involved a multimember agency and this case involves a single Director is not just unavailing, but counterproductive. Not only is that purported distinction unconvincing, especially in light of *Morrison*, but it cuts the wrong way and confirms that the CFPA is constitutional, *a fortiori*, in light of *Humphrey's Executor*. If it is unconstitutional to impose for-cause removal

restrictions on one officer exercising executive power, imposing those restrictions on five officers exercising executive power would seem five times worse. *Cf. Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995) (Article III "violated 40 times over when 40 final judgments are legislatively dissolved"). Moreover, if the alleged constitutional problem is that a principal officer is exercising executive power with insufficient presidential control, there is a greater, not a lesser problem, when multimember and partisan-balance requirements are layered on top of the kind of modest removal restrictions upheld in *Humphrey's Executor*, *Wiener*, and *Morrison*.

At the outset, the parties' effort to paint removal restrictions on individual executive officers, rather than multimember commissions, as anomalous or distinctly problematic fails. The First Congress imposed qualification limitations on the Attorney General and provided for removal upon violation of pertinent laws for high-ranking Treasury officials. The Civil War Congress imposed removal restrictions on the Comptroller of the Currency, and more recent Congresses have turned to single-director agencies with heads subject to for-cause removal to address specialized subjects where a degree of insulation from direct presidential control was deemed appropriate. When Congress created the Special Counsel in 1978 to address whistleblower complaints within the executive branch, it understandably wanted the Special Counsel to be insulated from unfettered at-will removal. Accordingly, it gave the new agency's sole head a five-year term and made the Special Counsel removable "by the President only for inefficiency, neglect of duty, or malfeasance in office." Civil Service

Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, 1122; *see also* George H.W. Bush, *Remarks on Signing the Whistleblower Protection Act of 1989* (Apr. 10, 1989) (approving decision to "retain[]" removal restriction). Similarly, in 1994, Congress shifted the leadership of the Social Security Administration to a single director removable only for cause. 42 U.S.C. §902(a). And in response to the housing crisis and the challenge of overseeing Fannie Mae and Freddie Mac, Congress created the Federal Housing Finance Agency with a single director removable for cause. 12 U.S.C. §§4511-12.

To be sure, Congress has also frequently assigned certain specialized responsibilities to multimember commissions, often with specific partisan-balance requirements. But there is not so much as a hint that Congress chose the multimember and partisan-balance format in an effort to grant the President *greater* control. To the contrary, the same impetus that caused Congress to want to impose modest removal restrictions to insulate a particular function from unfettered presidential control led Congress to go further in the direction of insulation by layering multimember and partisan-balance requirements on top of removal restrictions.

In all events, this Court has already considered *and rejected* the argument that *Humphrey's Executor* and *Wiener* are somehow limited to multimember entities and do not apply to single officers exercising executive power. In *Morrison*, this Court upheld the removal restrictions on the Independent Counsel, despite multiple features that exacerbated the intrusion on Article II power. The Ethics in

Government Act did not allow the President to remove the independent counsel *at all*; only the Attorney General could do so, and only "for 'good cause.'" *Morrison*, 487 U.S. at 696, 693. Moreover, the Independent Counsel was further insulated from presidential control based on her method of appointment: by a three-judge Article III court with zero presidential involvement. And neither the President nor the Attorney General could dictate the scope and duration of any investigation once authorized. *See* 28 U.S.C. §593(b) (1982 ed., Supp. V). But despite all those restrictions on presidential control, this Court upheld the Act and its removal provision, with just one dissenting vote and without so much as a hint that the counsel's sole-officer status made a constitutional difference.[7]

Petitioner attempts to distinguish *Morrison* as involving an inferior officer. Pet'r.Br.21. But while the Court's inferior-officer determination was critical to its Appointments Clause holding, as the three-judge panel's role would be plainly unconstitutional vis-à-vis a principal officer, it played no role in *Morrison*'s removal holding—a point Justice Scalia emphasized in his dissent. *Morrison*, 487 U.S. at 724 (Scalia, J.,

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[7] Justice Scalia's dissent did not suggest otherwise. In fact, much of his dissent focused on how the Act's appointment provisions had allowed "Congress [to] effectively compel[] a criminal investigation of a high-level appointee of the President" by an official who was appointed by Article III judges. *Morrison*, at 703, 715-23 (Scalia, J., dissenting). To be sure, Justice Scalia also would have found the act's removal provision infirm. *See id.* at 723-27. But he did not squarely confront whether Congress is powerless to impose *any* restrictions on the removal of any officer who exercises any executive power at all.

dissenting); *see also id.* at 689-93 (majority op.). It could hardly be otherwise, as *Myers* involved an inferior officer, and this Court has resolved most of its removal cases without any felt-need to address inferior-versus-principal officer status. Petitioner alternatively protests that "the challengers" in *Morrison* "did not argue that th[e] fact" that "the independent counsel was a single person" "alone rendered the Office of the Independent Counsel unconstitutional." Pet'r.Br.21. But that is presumably because they recognized that such an argument would be a non-starter, as a hydra-headed Independent Counsel would be even less subject to presidential control or accountability.

Indeed, in light of *Morrison*, it is clear that commissions subject to multimember and partisan-balance requirements and removal restrictions are *more* constitutionally problematic than single-Director agencies, not less. Before *Morrison*, one could have argued that Federal Trade and War Claims Commissioners were different because they discharged quasi-legislative or quasi-adjudicative functions. That would have been a hard line to police coherently (as the "quasi-" modifier suggests), and *Morrison* plainly rejected it in upholding removal restrictions on a single-officer discharging "core" and "purely executive" functions. After *Morrison* (and *Free Enterprise Fund*), the relevant question is whether officers exercising executive powers are too insulated from presidential control. *See Morrison*, 487 U.S. at 691; *Free Enter. Fund*, 561 U.S. at 496. And from that standpoint, multimember commissions and partisan-balance requirements only make matters worse.

As the parties emphasize, multimember agencies foster "deliberative group decisionmaking." CFPB.Br.29; *see* Pet'r.Br.20. But while that may be a virtue when it comes to *making* the laws, the framers deemed it a vice when it comes to executing them, which is why they rejected multimember executives or other proposals for an executive-by-committee. Where a multimember body is concerned, "though we may clearly see upon the whole that there has been mismanagement, … it may be impracticable to pronounce to whose account the evil which may have been incurred is truly chargeable." *The Federalist No. 70*, at 378 (Hamilton). Thus, far from facilitating the President's ability to "hold[] his subordinates accountable for their conduct," *Free Enter. Fund*, 561 U.S. at 496, assigning executive powers to multimember agencies frustrates it, by making it harder for the President to determine who should be held accountable if the agency fails to get the job done. Unlike with a multimember commission, "[t]he President need only remove and replace a single officer in order to transform the entire CFPB and the execution of the consumer protection laws it enforces." *PHH Corp.*, 881 F.3d at 98. Finally, while petitioner praises multimember commissions as being relatively impervious to "regulatory capture," Pet'r.Br.27, the same dynamic that makes them less liable to control by regulated parties makes them less amenable to presidential direction.

Partisan-balance requirements, like those Congress has imposed on the FTC, are even more problematic from the standpoint of the President's ability to control those exercising executive power. They virtually guarantee that some principal officers

exercising executive power will disagree with the President, yet this Court's precedents unanimously support Congress' ability to layer these additional restrictions on top of modest removal restrictions. The parties suggest that the President exercises a degree of control over multimember agencies based on the ability to select the chairperson. But that is not universally true, *see, e.g.*, 52 U.S.C. §30106(a)(5), and there is no guarantee that the chairperson will vote in the majority on important questions, *see, e.g.*, Sharon B. Jacobs, *Administrative Dissents*, 59 Wm. & Mary L. Rev. 541, 563 (2017) (discussing dissents by FCC chairpersons). In short, the argument that the President has more control over multimember agencies subject to both partisan-balance and removal restrictions than over single directors subject to removal restrictions gets matters backwards. What distinguishes this case from *Humphrey's Executor* makes the CFPA and its removal restriction constitutional *a fortiori*.

3. None of this suggests that there are no limits on Congress' ability to restrict the President's removal authority. This Court has already rejected efforts to assign the removal power elsewhere and to separate the President from removal decisions by multiple levels of for-cause protection. And nothing in this Court's precedents suggests that Congress is free to impose for-cause restrictions on the President's closest advisors. *See*, *e.g.*, Paul R. Verkuil, *The Statue of Independent Agencies After* Bowsher v. Synar, 1986 Duke L.J. 779, 794 (1986) ("nearly everyone would agree that Congress cannot impose removal restrictions on … cabinet officers"). But even if Congress cannot have it both ways and install a

cabinet officer in close proximity to the President while insulating her from unfettered presidential removal, history teaches that Congress is not powerless to insulate some functions from at-will presidential removal. When Congress' whole objective is to put some distance between a particular function and unfettered presidential direction, precedent and history teach that Congress may impose the modest restriction that the President remove the officer only for inefficiency, neglect, or malfeasance. That is the plain teaching of *Humphrey's Executor* and its progeny, and as long as those cases remain good law, the CFPA and its removal restriction are constitutional.

D. The Court Should Decline the Parties' Invitation to Overrule *Humphrey's Executor*.

Ultimately, the parties' concede the weakness of their efforts to distinguish *Humphrey's Executor* by asking this Court overrule it. That is a bold request. The decision was neither a sport nor a trifle. It is the cornerstone of the constitutionality of roughly a third of our modern federal government. It was a unanimous decision joined by Justices Brandeis, Cardozo, and Stone, so efforts to dismiss it as a product of hostility to President Roosevelt or the New Deal ring hollow. And the decision hardly stands alone. It was reaffirmed unanimously in *Wiener* and near-unanimously in *Morrison*. Thus, the parties really urge the overruling of multiple unanimous precedents of this Court that undergird the basic architecture of our government. They have not come

close to justifying that extraordinary—and extraordinarily disruptive—request.

"Departing from the doctrine of stare decisis is an 'exceptional action' demanding 'special justification.'" *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2101 (2018) (Roberts, C.J., dissenting)). That is true "even in constitutional cases." *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019). And it is particularly true here, where reliance interests are at their zenith. "In the [eight] decades since" *Humphrey's Executor* was decided, agencies covered by its holding "have become an accepted part of American government." Br. of United States 43 n.16, *Free Enter. Fund*, No. 08-861, 2009 WL 3290435 (U.S. Oct. 13, 2009); *see also In re Aiken Cty.*, 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("*Humphrey's Executor* is an entrenched Supreme Court precedent, protected by stare decisis."). Indeed, even the most intrepid administrative-law enthusiast would not venture to name all the many "federal agencies whose officers are covered by 'good cause' removal restrictions" identical to the one approved in *Humphrey's Executor*. *Morrison*, 487 U.S. at 692 n.31.

Unlike a situation like the legislative veto, where a dubious provision proliferated without approval by the Court, Congress has embedded this modest removal restriction into the very structure of countless federal agencies in express reliance on the reality that this Court has endorsed it unanimously and repeatedly. Every action of every one of those agencies would become subject to newfound constitutional challenges overnight if this Court were to reverse course and overrule *Humphrey's Executor* and its

progeny. In short, it is "hard to imagine a precedent whose overruling could more radically upend existing institutions." Daniel B. Rice & Jack Boeglin, *Confining Cases to Their Facts*, 105 Va. L. Rev. 865, 917 (2019).

Moreover, *Humphrey's Executor* and its progeny provide a perfectly workable standard: So long as Congress leaves removal authority with the President, and does not attempt to assign it elsewhere, it may impose modest restrictions on his authority. That basic distinction is easy to apply and harmonizes all of this Court's removal decisions.

Finally, as this Court recently reiterated, when it comes to constitutional interpretation, "something more than 'ambiguous historical evidence' is required before we will 'flatly overrule … major decisions of this Court.'" *Gamble*, 139 S. Ct. at 1969. Yet the relevant history here is ambiguous even as to the President's exclusive removal authority. *See, e.g.*, Currie, *supra*, at 41 ("[T]here was no consensus as to whether [the President] got that authority from Congress or from the Constitution itself."); John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1964 n.135 (2011) (Decision of 1789 did not address, much less decide, scope of Congress' authority "to reserve for itself limited power to remove an official who performed *some* executive functions"); *cf. The Federalist No. 77*, at 407 (Hamilton).

As to the question whether Congress can impose modest restrictions on the President's removal authority, the history is unambiguous. No one can deny that Congress has been imposing such

restrictions on agencies for nearly a century and a half, and doing so with the unanimous endorsement of this Court for 85 years. To change course now and call into question much of the structure of the federal government would be an overruling without precedent in the history of precedent.

III. At A Minimum, The CFPA Can And Should Be Interpreted To Avoid Any Constitutional Concern.

This Court has repeatedly held that "it is the duty of federal courts to construe a statute in order to save it from constitutional infirmities." *Morrison*, 487 U.S. at 682. That duty takes on extra significance when, as here, the challenged language "has not been tested in practice," and its metes and bounds remain uncertain. *Id.* To the extent the Court entertains grave constitutional doubts about the constitutionality of the CFPA's removal provision despite this Court's precedents, the Court can and should construe the provision to resolve that doubt in favor of preserving it. *Id.*; *see, e.g.*, *Shurtleff*, 189 U.S. at 311-17 (interpreting inefficiency-neglect-or-malfeasance provision to include notice-and-hearing requirement to avoid constitutional question).

This is not a case in which there is an obvious structural defect, like the assignment of the President's removal authority elsewhere. Rather, the gravamen of the parties' challenge is that the inefficiency-neglect-or-malfeasance standard imposes too much of a restriction on the President's removal authority. But unless even the slightest restriction on the President's removal authority crosses some implicit constitutional line, the inefficiency-neglect-or-

malfeasance standard is capable of being interpreted to impose only a permissible restriction. Put differently, as long as question is how much of a restriction is too much, the terms "inefficiency, neglect of duty, or malfeasance in office" can be interpreted to impose only a permissible degree of restraint.

The inefficiency-neglect-or-malfeasance standard has long been understood to be synonymous with a for-cause restriction and to require the President to have some reason, beyond simply wanting his "own man," to remove an officer. But beyond that baseline, the statutory terms do not erect any hard and fast rules about precisely how good the President's good cause must be. The statutory terms, particularly "inefficiency," are quite capacious. *See, e.g.*, *A Dictionary of the English Language* 491 (James Stormonth ed., 1895) (defining "Inefficient" to mean "not possessing the power or qualities desired; not efficacious; not active"; and "want of power or qualities to produce the effects desired; inactivity").

In fact, when this Court squarely confronted the inefficiency-neglect-or-malfeasance standard in *Bowsher*, it viewed the terms as "very broad" and allowing for removal "for any number actual or perceived transgressions of the [removing authority's] will." 478 U.S. at 729. The Court ultimately concluded that the standard gave the removing authority sufficient discretion to render the officer "subservient" to that authority. *Id.* at 730. Applying the same reasoning to the CFPA would plainly eliminate any constitutional doubt, as a standard that leaves an officer "subservient" to the President hardly poses an Article II problem.

Moreover, in an actual contested removal, the President would certainly be entitled to substantial deference in identifying inefficiency, neglect, or malfeasance. If a removed Director sued and contested his inefficiency, reviewing courts would be deferential to the President and could adjust the level of deference to avoid any constitutional difficulty. To be sure, the Senate might consider the strength of the President's justification in providing advice and consent concerning a successor. But that give-and-take between the political branches is often the preferred way to address separation-of-powers disputes. In addition, such a back-and-forth would equally follow from a statutory requirement that the President simply state his reason for a removal, and not even the parties have suggested that a mere statement-of-reasons requirement would unduly interfere with Article II.

Nothing in this Court's precedent forecloses the saving construction suggested by *Bowsher*. *Humphrey's Executor* provided no occasion to interpret the terms, as there was no dispute that Humphrey "was not removed from his office … on account of any inefficiency, neglect of duty, or malfeasance in office." Certificate from Court of Claims at 12, *Humphrey's Executor v. United States*, No. 667 (1935). President Roosevelt simply "ask[ed] for [Humphrey's] resignation" "[w]ithout any reflection at all upon [him] personally, *or upon the service [he] ha[d] rendered*" simply so he could have "his own man." *Id.* at 4 (emphasis added). Nor have subsequent cases beyond *Bowsher* definitively interpreted the inefficiency-neglect-or-malfeasance standard. Petitioner suggests that *Free Enterprise Fund* interpreted that standard

as prohibiting removal based on policy disagreements. Pet'r.Br.19. But the passage petitioner cites states only that "the Government does not contend that simple disagreement with the Board's policies or priorities could constitute 'good cause' for its removal." 561 U.S. at 502. And under the statute at issue there, Board members could only be removed under a much more demanding standard. *Id.* at 503. That "simple disagreement with … policies or priorities" failed that "unusually high standard," *id.*, does not foreclose an interpretation of the inefficiency-neglect-or-malfeasance standard that renders the CFPA constitutional, or even one that renders the Director "subservient" to the President.

Of course, it is difficult to pinpoint the precise construction of the inefficiency-neglect-or-malfeasance standard that would avoid the constitutional issue in this case. But that is because no Director has been removed for any reason, and the current Director believes she serves at the pleasure of the President. But in the event some Director some day is removed for a stated reason that the President deems sufficient and the Director deems insufficient, there would be ample flexibility in the "very broad" inefficiency-neglect-or-malfeasance standard to avoid any constitutional difficulty.

CONCLUSION

For the foregoing reasons, this Court should either deem this whole dispute premature or affirm the judgment below on the merits.

Respectfully submitted,

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