No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

BRIEF FOR RESPONDENT SUPPORTING VACATUR

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. 5491(c)(3) violates the separation of powers by prohibiting the President from removing the Director of the Consumer Financial Protection Bureau except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether, if 12 U.S.C. 5491(c)(3) violates the separation of powers, it can be severed from the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 923 F.3d 680. The order of the district court (Pet. App. 9a-23a) is not published in the Federal Supplement but is available at 2017 WL 6536586.

JURISDICTION

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this brief. App., *infra*, 1a-22a.

STATEMENT

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (Dodd-Frank Act or Act). The legislation provided "a direct and comprehensive response to the financial crisis that nearly crippled the U.S. economy beginning in 2008." S. Rep. No. 176, 111th Cong., 2d Sess. 2 (2010) (Senate Report). Its overarching purpose was to "promote the financial stability of the United States" through the establishment of measures designed to improve accountability, resiliency, and transparency in the financial system. *Ibid.*

Among other things, the Act created the Financial Stability Oversight Council to "monitor emerging risks to U.S. financial stability," Senate Report 2; granted financial regulators orderly liquidation authority to prevent future bailouts of financial institutions, *id.* at 4; imposed new limitations on certain high-risk financial activity by banks and bank holding companies, *id.* at 8; and authorized regulation of over-the-counter derivatives that many believed were a key contributor to the financial crisis, *id.* at 32. Finally, as most pertinent here, the Act established the Consumer Financial Protection Bureau (Bureau or CFPB) to ensure "that all consumers have access to markets for consumer financial products and services and that markets for [such] products and services are fair, transparent, and competitive." Dodd-Frank Act § 1021(a), 124 Stat. 1979 (12 U.S.C. 5511(a)).

a. The Dodd-Frank Act vests the new Bureau with authority to regulate a substantial segment of the Nation's economy. The Act directly prohibits any "covered person"—generally an entity or person involved in "offering or providing a consumer financial product or

service"—or any "service provider" from "engag[ing] in any unfair, deceptive, or abusive act or practice." 12 U.S.C. 5481(6)(A), 5536(a)(1)(B). And it authorizes the Bureau to issue regulations adopting requirements for "covered person[s]" and "service provider[s]" for the purpose of preventing them from engaging in such acts or practices. 12 U.S.C. 5531(b). In addition, the Act transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies, including the authority to prescribe regulations implementing 18 other federal consumer protection statutes, ranging from the Equal Credit Opportunity Act and the Fair Credit Reporting Act to the Fair Debt Collection Practices Act and the Truth in Lending Act. 12 U.S.C. 5481(12) and (14), 5581. The laws administered by the Bureau are referred to collectively as "[f]ederal consumer financial law." 12 U.S.C. 5481(14).

The Bureau is also authorized to conduct investigations, initiate administrative adjudications, and commence civil actions to seek penalties and appropriate legal and equitable relief for violations of federal consumer financial law. 12 U.S.C. 5562-5565. Potential relief includes restitution, disgorgement, an injunction, and civil monetary penalties of up to $1,000,000, adjusted for inflation, "for each day during which such violation continues." 12 U.S.C. 5565(a) and (c); see 12 C.F.R. 1083.1.

Before the Bureau institutes an enforcement proceeding, it may issue a civil investigative demand (CID) to any person whom the Bureau has reason to believe "may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation" of federal consumer financial law. 12 U.S.C. 5561(5), 5562(c)(1). A person

served with such a demand must provide the Bureau with the demanded items. 12 U.S.C. 5562(c)(1)(A)-(E). If the person objects to all or part of the demand, the person may petition the Bureau for an order modifying it or setting it aside. 12 U.S.C. 5562(f)(1). Although the Bureau's CIDs are not self-enforcing, if the person refuses to comply, the Bureau may petition a district court to enforce the demand. 12 U.S.C. 5562(e)(1).

b. The Dodd-Frank Act establishes the Bureau as an "independent bureau" within the Federal Reserve System. 12 U.S.C. 5491(a). The Bureau is headed by a single Director, appointed by the President with the advice and consent of the Senate. 12 U.S.C. 5491(b)(1)-(2). The Director serves for a five-year term, although he or she may continue serving as Director "until a successor has been appointed and qualified." 12 U.S.C. 5491(c)(1)-(2). Under the provision at issue here, the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3).

The Bureau's operations are largely funded from the combined earnings of the Federal Reserve System. See 12 U.S.C. 5497(a)(1)-(2) (establishing a cap of 12% of the Federal Reserve System's total 2009 operating expenses, adjusted annually by any increase in the employment cost index). The Director may also request additional funds from Congress if necessary. See 12 U.S.C. 5497(e).

c. Section 3 of the Dodd-Frank Act, entitled "Severability," provides that "[i]f any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of

the provisions of such to any person or circumstance shall not be affected thereby." 124 Stat. 1390 (12 U.S.C 5302).

2. a. Petitioner is a law firm that provides "debt-relief services" to its clients. Pet. App. 1a. The Bureau issued a CID to petitioner, requesting written answers to interrogatories and the production of documents to aid the Bureau's investigation into potential enforcement action for violations of federal consumer financial law. *Id.* at 10a. Petitioner initially asked the Bureau to modify or set aside the demand, which the Bureau's Director denied. *Ibid.* Petitioner then responded to the demand, but the Bureau considered the response inadequate in various ways. *Id.* at 10a-11a. After petitioner declined to modify its response to comply, the Bureau filed a petition to enforce the demand in district court. *Id.* at 11a.

The district court granted in part the petition to enforce. Pet. App. 9a-23a. The court rejected petitioner's claim that the removal restriction unconstitutionally insulated the Bureau's Director from presidential control, concluding that the restriction did not interfere "with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Id.* at 12a-13a (citation omitted).[1]

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[1] In the alternative, the district court concluded that, even if the removal restriction unconstitutionally encroached upon executive authority in some contexts, the Bureau could at least lawfully issue and seek to enforce a CID, because "Congress unquestionably wields the subpoena power" and can "establish offices that 'perform duties . . . in aid of [its own] functions.'" Pet. App. 14a (citation omitted). The Bureau did not defend that erroneous rationale in the court of appeals, see Resp. C.A. Br. 22 n.4, and the court of appeals did not rely on it.

The district court also largely rejected petitioner's statutory challenges to the CID, except for ordering one modification limiting the demand's request for certain information and documents. Pet. App. 23a. With that modification, the district court granted the Bureau's petition for enforcement and ordered petitioner to comply within 10 days. *Ibid.* The court of appeals stayed the district court's order pending appeal. C.A. Doc. 8 (Sept. 13, 2017).

b. The court of appeals affirmed. Pet. App. 1a-8a. The court observed that the arguments for and against the constitutionality of the Director's removal restriction "have been thoroughly canvassed in the majority, concurring, and dissenting opinions in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc)." *Id.* at 2a. The court saw "no need to re-plow the same ground" and only "explain[ed] in brief why [it] agree[d] with the conclusion reached by the *PHH Corp.* majority." *Ibid.*

The court of appeals acknowledged that "[t]he Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments," and that petitioner's challenge to the constitutionality of the statutory restriction on removing the Director "is not without force." Pet. App. 3a. But it concluded that the restriction was permissible under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Morrison* v. *Olson*, 487 U.S. 654 (1988). Pet. App. 3a. The court explained that the Director "is subject to the same for-cause removal restriction" that applied to the members of the Federal Trade Commission (FTC) in *Humphrey's Executor*, and that the Bureau and the FTC both "exercise[] quasi-legislative and

quasi-judicial powers," such that the agencies may "discharge[] those responsibilities independently of the President's will." *Id.* at 4a.

The court of appeals found irrelevant any differences between the FTC and the Bureau. Pet. App. 4a-5a. It reasoned that, although the Bureau "possesses substantially more executive power than the FTC did back in 1935," *Morrison* upheld "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." *Id.* at 5a. And the court concluded that *Morrison* likewise "preclude[d] drawing a constitutional distinction between multi-member and single-individual leadership structures." *Id.* at 5a-6a.

Like the district court, the court of appeals rejected petitioner's statutory objections to the CID. Pet. App. 6a-8a. It therefore affirmed the district court's order directing petitioner to comply with the demand. *Id.* at 8a. The court of appeals subsequently stayed the mandate for a 90-day period and, if petitioner sought certiorari, "until final disposition by the Supreme Court." C.A. Doc. 49 (June 18, 2019).

SUMMARY OF ARGUMENT

I. Article II of the Constitution provides that "[t]he executive Power shall be vested in [the] President" alone, U.S. Const. Art. II, § 1, Cl. 1, and that he shall "take Care that the Laws be faithfully executed," Art. II, § 3. Since 1789, it has been generally recognized that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 492 (2010) (quoting 1 Annals of Cong. 463 (1789) (Joseph

Gales ed., 1834) (Madison)) Accordingly, the Court has recognized that, "as a general matter," the President must have the "power to remove" principal officers "who assist him in carrying out his duties." *Id.* at 513-514.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court recognized a limited exception to that general rule for a multimember, "quasi-legislative" and "quasi-judicial" commission. That exception should not be expanded to single-headed agencies for several reasons. First, the rationale for the exception necessarily rests on the structure of multimember bodies, not on their rulemaking and adjudicative functions alone. Second, consistent with that rationale, the exception has historically been applied only to multimember bodies; removal restrictions on single-headed agencies are relatively new and have been subject to constitutional objection from their inception. Third, single-headed independent agencies would pose heightened dangers to the President's control of the Executive Branch. Fourth, extending *Humphrey's Executor* to this context would allow Congress to turn virtually the entire Executive Branch into a series of independent Departments with Heads shielded from presidential supervision and accountability. If the Court were to conclude that *Humphrey's Executor* requires upholding the removal restriction at issue, the decision should be narrowed or overruled as necessary.

II. Because the statutory restriction on the President's authority to remove the Bureau's Director is unconstitutional, it should be invalidated. This Court, however, should sever the provision from the remainder of the Act. When the Court finds a statutory provision unconstitutional, even in the absence of a severability clause, the Court's normal rule is to invalidate only the

unconstitutional provision, leaving the rest of the Act intact. Where Congress has included an express severability clause, the Court applies it according to its terms, absent strong evidence that Congress intended otherwise. The Dodd-Frank Act includes an express severability clause, providing that "[i]f any provision of this Act * * * is held to be unconstitutional, the remainder of this Act * * * shall not be affected thereby." 12 U.S.C 5302. And there is no evidence—much less strong evidence—that Congress intended otherwise.

ARGUMENT

The Constitution vests "[t]he executive Power" in one individual—the "President of the United States." U.S. Const. Art. II, § 1, Cl. 1. That is no accident. The Framers sought to ensure that the executive power would be wielded in a manner that is both decisive and politically accountable. By vesting the executive power in the President alone, the Constitution ensures that *all* exercises of this great power of the government are ultimately subject to the will of the people. The statutory restriction on the President's authority to remove the CFPB Director contravenes this basic principle.

In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), this Court recognized that "as a general matter," to maintain accountability to and dependence on the people, the President must possess "the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. *Id.* at 513-514. While the Court has recognized a narrow exception for multimember, quasi-legislative and quasi-judicial commissions, that exception cannot plausibly be extended to the CFPB—a single-headed agency "exercis[ing] substantial executive power similar to the power exercised by heads of Executive

Branch departments." Pet. App. 3a. Otherwise, Congress could impose similar restrictions on virtually any governmental agency. And that, in turn, would immunize massive exercises of governmental power from the very political accountability that is at the core of the Constitution's system of separated powers.

Accordingly, the restriction on the President's authority to remove the Director should be declared unconstitutional and, in accordance with the Dodd-Frank Act's express severability clause, severed from the remainder of the statute.

I. THE STATUTORY RESTRICTION ON THE PRESIDENT'S ABILITY TO REMOVE THE BUREAU'S DIRECTOR VIOLATES THE SEPARATION OF POWERS

Article II of the Constitution provides that "[t]he executive Power shall be vested" in the President alone, U.S. Const. Art. II, § 1, Cl. 1, who is obligated to "take Care that the Laws be faithfully executed," Art. II, § 3. "The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known." *Printz* v. *United States*, 521 U.S. 898, 922 (1997). The Framers "sought to encourage energetic, vigorous, decisive, and speedy execution of the laws by placing in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches, the Constitution divides among many." *Clinton* v. *Jones*, 520 U.S. 681, 712 (1997) (Breyer, J., concurring in the judgment). "Energy in the executive," Hamilton explained, "is a leading character in the definition of good government," and is essential to "the steady administration of the laws." *The Federalist No. 70*, at 471 (Hamilton) (Jacob Ernest Cooke ed., 1961). Unity of authority is a necessary "ingredient[]." *Id.* at 472. And the Constitution vests that

unified authority in an elected President to ensure that a "dependence on the people" is the "primary controul on the government." *The Federalist No. 51*, at 349 (Madison) (Jacob Ernest Cooke ed., 1961).

Of course, "the President alone and unaided could not execute the laws." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). "[A]s part of his executive power," the President therefore must "select those who [are] to act for him under his direction in the execution of the laws." *Ibid.* Accordingly, the Appointments Clause provides that the President must appoint principal officers with the advice and consent of the Senate, and inferior officers—who generally work under the supervision of principal officers, *Edmond* v. *United States*, 520 U.S. 651, 662-663 (1997)—must be appointed in the same manner unless Congress provides for their appointment by the President alone, the Heads of Departments, or the Courts of Law. U.S. Const. Art. II, § 2, Cl. 2.

Just as the President's ability to "select[] * * * administrative officers is essential" to the exercise of "his executive power," so too is his ability to "remov[e] those for whom he can not continue to be responsible." *Myers*, 272 U.S. at 117. "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, *overseeing, and controlling* those who execute the laws." *Free Enterprise Fund,* 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (Madison)) (emphasis added). "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher* v. *Synar*, 478 U.S. 714, 726 (1986) (citation omitted). This case concerns whether Congress may restrict the President's ability to remove the

single principal officer of an agency exercising "substantial executive power." Pet. App. 3a. It may not.

A. As A General Rule, The President Must Possess Unrestricted Authority To Remove Principal Executive Officers

A series of decisions—one by the First Congress and three from this Court—make clear that, as a general rule, Article II requires that the President have unrestricted removal power over principal executive officers.

1. The Decision of 1789

The First Congress extensively debated the scope of the President's removal authority over principal officers when creating the first three executive Departments. On May 19, 1789, Representative James Madison, before the Committee of the Whole, moved for the creation of the Departments of Foreign Affairs, War, and the Treasury. See Debates in the House of Representatives (Debates), in 10 *Documentary History of the First Federal Congress of the United States of America* 725 (Charlene Bangs Bickford et al. eds., 1992) (*History of First Congress*). The motion proposed that each Department be headed with a Secretary, "who shall be appointed by the president, by and with the advice and consent of the senate, and to be removable by the president." *Ibid.* The motion passed, *id.* at 740, and the first bill to create the Department of Foreign Affairs was taken up on June 16, 1789. See Debates, in 11 *History of First Congress* 860 (1992).

As Madison would subsequently explain in a letter to Thomas Jefferson, the bill "gave birth to a very interesting constitutional question—by what authority removals from office were to be made." Letter from James Madison to Thomas Jefferson (June 30, 1789),

in 16 *History of the First Congress* 893 (2004). Four possibilities were advanced: (1) that "no removal could be made but by way of impeachment"; (2) that the means of removal "devolved on the Legislature, to be disposed of as might be proper"; (3) that the power of removal should jointly "belong[] to the President and Senate"; and (4) that "the Executive power being generally vested in the President, and the Executive function of removal not expressly taken away, it remained with the President." *Ibid.*

Immediately upon the introduction of the first bill, Representative Alexander White moved to delete a provision providing that the Secretary was "to be removed at the will of the President." Debates, in 11 *History of First Congress* 860 (1992). Over the course of several months during the summer of 1789, the House and then the Senate "passionately debated the removal provision." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1031 (2006); see *id.* at 1029-1034. "The view that 'prevailed' * * * was that the executive power included a power to oversee executive officers through removal; because that traditional executive power was not 'expressly taken away, it remained with the President.'" *Free Enterprise Fund*, 561 U.S. at 492 (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 *History of First Congress* 893 (2004)).

The First Congress memorialized its resolution of the constitutional question in two ways. It struck the removal provision, thereby avoiding any implication that the power was granted by the statute; and it amended a separate provision to provide that the Chief Clerk would take custody of the departmental papers

"whenever the said principal officer * * * shall be removed from Office by the President," Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29, thereby acknowledging the President's inherent constitutional removal authority. See Akhil Reed Amar, *America's Unwritten Constitution* 321 (2012). Similar language was included in the enacted bills creating the Departments of War and the Treasury. Act of Aug. 7, 1789, ch. 7, § 2, 1 Stat. 50; Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 67.

The view of the First Congress "soon became the 'settled and well understood construction of the Constitution.'" *Free Enterprise Fund*, 561 U.S. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)). "This 'Decision of 1789' provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher*, 478 U.S. at 723-724 (citation omitted).

***2.* Myers**

This Court first addressed the constitutional authority of the President to remove principal officers in *Myers* v. *United States*, *supra*. The case concerned President Wilson's removal of Frank Myers, a postmaster of the first class—an inferior officer who, like all principal officers, had been presidentially appointed with the advice and consent of the Senate. *Myers*, 272 U.S. at 106. Federal law at the time provided that such postmasters "shall be appointed and may be removed by the President by and with the advice and consent of the Senate and shall hold their offices for four years unless sooner removed or suspended." *Id.* at 107. Less than three years into Myers' four-year term, the President requested Myers' resignation. *Id.* at 106. When Myers refused, however, the President ordered his removal

without the Senate's consent. *Ibid.* Myers brought suit in the Court of Claims to recover his salary from the date of his removal through the end of his appointed four-year term. *Ibid.*

This Court explained that the case "present[ed] the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Myers*, 272 U.S. at 106. The Court observed that, although appointment of principal and inferior officers is addressed in Article II, § 2, "no express provision" of the Constitution addresses the removal of such officers, except through impeachment. *Id.* at 109. And it acknowledged that the "subject was not discussed in the Constitutional Convention." *Id.* at 109-110. "[A]fter an examination of the record," however, the Court possessed "not the slightest doubt" that the decision of the First Congress "was, and was intended to be, a legislative declaration that the power to remove officers appointed by the President and the Senate vested in the President alone." *Id.* at 114. In a comprehensive 70-page analysis, the Court "concur[red]" in that view for several reasons. *Id.* at 115.

The Court first focused on Article II's vesting of "the executive power in the President" alone and its charge that the President would "take care that th[e laws] be faithfully executed." *Myers*, 272 U.S. at 117; see *id.* at 115-118. The debates in the Constitutional Convention, the Court explained, "indicated an intention to create a strong Executive, and after a controversial discussion the executive power of the Government was vested in one person." *Id.* at 116. Because no one person could possibly carry out that function "alone and unaided,"

the executive power must, "even in the absence of express words," include the authority to "select those who were to act for him under his direction." *Id.* at 117. And the Court reasoned that "in the absence of any express limitation respecting removals, [just] as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Ibid.*

The Court also found support in the express vesting of the appointment power in the President. *Myers*, 272 U.S. at 119-125. The Court relied on the "well approved principle" that "the power of appointment carrie[s] with it the power of removal." *Id.* at 119. Indeed, with only "one or two exceptions," even the opponents of the bills establishing the first executive Departments agreed with that principle. *Ibid.* "[T]hose in charge of and responsible for administering functions of government who select their executive subordinates need in meeting their responsibility to have the power to remove those whom they appoint" after they have lost confidence in them. *Ibid.*

The Court rejected any suggestion that the "power to make provision for removal" of officers appointed by the President might be "vested in the Congress" under Article I. *Myers*, 272 U.S. at 125; *id.* at 125-131. The Court acknowledged that "[t]he powers relative to offices are partly Legislative and partly Executive." *Id.* at 128 (citation omitted). "The Legislature creates the office, defines the powers, limits its duration and annexes a compensation." *Ibid.* But "[t]his done," the Court explained, "the Legislative power ceases." *Ibid.*

The Court further reasoned that allowing Congress to limit the President's removal authority would grant it the "means of thwarting the Executive in the exercise

of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible." *Myers*, 272 U.S. at 131; see *id.* at 131-135. In executing the laws, the Court explained, "the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it." *Id.* at 134. In undertaking that important task, the President "must place in each member of his official family, and his chief executive subordinates, implicit faith." *Ibid.* And therefore, the Court concluded, he must have "an unrestricted power to remove" those officers "[t]he moment that he loses confidence in the[ir] intelligence, ability, judgment or loyalty." *Ibid.*

The Court observed that the First Congress's resolution of the removal question was quickly "accepted as a final decision of the question by all branches of the Government." *Myers*, 272 U.S. at 136. "The acquiescence" in the decision "for nearly three-quarters of a century" was "affirmed by this Court" in statutory cases like *Hennen*, *supra*, and *Parsons* v. *United States*, 167 U.S. 324, 330 (1897). *Myers*, 272 U.S. at 148; see *id.* at 153. "Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-four years." *Id.* at 145. And although disputes between Congress and the Executive would subsequently lead Congress to "enact legislation to curtail the then acknowledged powers of the President," *id.* at 165; see *id.* at 165-166 (citing, *e.g.*, the Tenure of Office Act, ch. 154, 14 Stat. 430), the Court noted that "[t]he attitude of the

Presidents on this subject ha[d] been unchanged and uniform to the present day whenever an issue ha[d] clearly been raised," *id.* at 169. The Court refused to "set aside" the First Congress's construction simply "because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the States which attempted to withdraw from the Union at the time of the Civil War." *Id.* at 174-175. Accordingly, the Court declared that "the provision of the law of 1876, by which the unrestricted power of removal of first class postmasters is denied to the President, is in violation of the Constitution, and invalid." *Id.* at 176.

3. **Humphrey's Executor**

Nine years later, the Court recognized the only exception to the general rule that the President must have unrestricted power to remove principal executive officers. In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court upheld a restriction on the President's authority to remove commissioners of the multimember Federal Trade Commission (FTC). Section 1 of the FTC Act, ch. 311, 38 Stat. 717, created the commission comprising five members to be appointed by the President with the advice and consent of the Senate. See *Humphrey's Executor*, 295 U.S. at 619-620. It provided that the commissioners would serve for staggered seven-year terms. *Id.* at 620. It required that no more than three of the five commissioners be members of the same political party. *Ibid.* And it stated that "[a]ny commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Ibid.* (quoting FTC Act § 1, 38 Stat. 718).

The Act declared unlawful "unfair methods of competition in commerce," and it empowered the Commission, among other things, to prevent certain persons from engaging in "unfair methods of competition" through administrative adjudication proceedings that resulted in cease-and-desist orders. *Humphrey's Executor*, 295 U.S. at 620 (citation omitted). The Act granted the Commission "powers of investigation in respect of certain corporations subject to the act, and in respect of other matters," the results of which were reported to Congress with recommendations for additional legislation. *Id.* at 621. And the Act provided that, "in any suit in equity" brought by the Attorney General under the antitrust laws, the court may "refer said suit to the [FTC], as a master in chancery, to ascertain and report an appropriate form of decree," which the court may then "adopt or reject" "in whole or in part." *Ibid.* (citation omitted).

William Humphrey had been appointed commissioner in 1931 by President Hoover for a seven-year term. *Humphrey's Executor*, 295 U.S. at 618. After a presidential election the following year, President Roosevelt asked Humphrey for his resignation. *Ibid.* The President stated that, in his view, "the aims and purposes of the Administration with respect to the work of the Commission c[ould] be carried out most effectively with personnel of [his] own selection." *Ibid.*

After Humphrey refused to resign, the President removed him. *Humphrey's Executor*, 295 U.S. at 619. But Humphrey never acquiesced in the order. *Ibid.* After his death, the executor of his estate brought suit in the Court of Claims to recover Humphrey's salary as a commissioner from the date of his removal until his death in 1934. *Id.* at 618. The Court of Claims certified

two questions to this Court: (1) whether the FTC Act restricted the President's authority to remove commissioners of the FTC except upon "inefficiency, neglect of duty, or malfeasance in office"; and (2) if so, whether that restriction on the President's removal power was constitutional. *Id.* at 619 (citation omitted).

As to the first question, the Court held that the causes for removal listed in Section 1 of the FTC Act were exclusive. *Humphrey's Executor*, 295 U.S. at 621-626. The Court reasoned that "the fixing of a definite term subject to removal for cause, unless there be some countervailing provision," indicates Congress's intent "that the term is not to be curtailed in the absence of such cause." *Id.* at 623. And it held that this indication was confirmed by the "character of the commission" as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* at 624.

The Court explained that the commissioners were "called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Humphrey's Executor*, 295 U.S. at 624 (citation omitted). And it reasoned that the fixed terms and the removal restriction were necessary to ensure that the commissioners served "long enough to give them an opportunity to acquire the expertness in dealing with these special questions * * * that comes from experience," and that the Commission's membership "would not be subject to complete change at any one time." *Ibid.* (citation omitted). In other words, because Congress had set out "to create a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority," the grounds of removal had to be exclusive: allowing commissioners to serve "at the mere will of the President"

might "thwart, in large measure, the very ends which Congress sought to realize." *Id.* at 625-626.

As to the second question, the Court acknowledged that the *Myers* decision had "fully review[ed] the general subject of the power of executive removal" and "examine[d] at length the historical, legislative and judicial data bearing upon the question, beginning with what is called 'the decision of 1789' in the first Congress and coming down almost to the day when the opinions were delivered." *Humphrey's Executor*, 295 U.S. at 626. But the Court characterized *Myers* as "actually decid[ing] * * * only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress." *Ibid.* The Court asserted that "[t]he office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case [could not] be accepted as controlling [its] decision" in the case before it. *Id.* at 627. And in a cursory six-page analysis, the Court "disapproved" much of *Myers*' reasoning. *Id.* at 626.

In the Court's view, unlike the postmaster in *Myers*, the FTC commissioners were not "purely executive officers." *Humphrey's Executor*, 295 U.S. at 632. Rather, repeating its characterization from the statutory analysis, the Court reasoned that the Commission was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Id.* at 628. "Such a body," the Court explained, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Ibid.* Rather, in "filling in and administering the details embodied by [the FTC Act's] general standard," the Court stated that "the commission acts in part quasi-legislatively and in part

quasi-judicially." *Ibid.* "In making investigations and reports thereon for the information of Congress, * * * it acts as a legislative agency." *Ibid.* And in acting "as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." *Ibid.*

The Court concluded that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause[] will depend upon the character of the office." *Humphrey's Executor*, 295 U.S. at 631. For "purely executive officers," like the postmaster in *Myers*, the President alone must retain the unrestricted power to remove. *Id.* at 632. "[A]s to officers of the kind here under consideration," the Court held that "no removal [could] be made during the prescribed term for which the officer is appointed, except for one or more of the causes named." *Ibid.* And as for other officers, the Court "le[ft] such cases * * * for future consideration and determination as they may arise." *Ibid.*

Humphrey's Executor was later held to authorize a similar removal restriction for members of the War Claims Commission, a three-member body that was charged with adjudicating war-related compensation claims. See *Wiener* v. *United States,* 357 U.S. 349, 356 (1958). And it has been understood to apply to other multimember commissions with similar features and functions. See *Morrison* v. *Olson,* 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting).

***4.* Free Enterprise Fund**

Finally, in *Free Enterprise Fund*, the Court reaffirmed that "as a general matter," the President must possess "the authority to remove those who assist him in carrying out his duties," 561 U.S. at 513-514, and held

that the "limited restrictions on the President's removal power" that had previously been upheld should not be materially extended in novel ways, *id.* at 495. *Free Enterprise Fund* concerned the constitutionality of the for-cause removal restriction on members of the Public Company Accounting Oversight Board (PCAOB), a five-member regulatory board created by the Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley Act), Pub. L. No. 107-204, 116 Stat. 745, to provide tighter regulation and investigation of, and enforcement against, the accounting industry in the wake of several celebrated accounting scandals. *Free Enterprise Fund*, 561 U.S. at 484; see *id.* at 485 (detailing the PCAOB's powers). Members of the PCAOB were appointed to staggered five-year terms by the Securities and Exchange Commission (SEC). *Id.* at 484. The PCAOB operated under the SEC's oversight, but the PCAOB's members could be removed by the SEC only under a particularly high standard of cause. *Id.* at 486. And although the statute creating the SEC does not contain any express restriction on the President's authority to remove SEC commissioners, the Court decided the case on the understanding that the President must satisfy the *Humphrey's Executor* standard to do so. *Id.* at 487.

After the PCAOB initiated an investigation of an accounting firm, the firm and a nonprofit organization of which it was a member brought suit seeking a declaratory judgment that the removal restriction on the PCAOB's members violated the separation of powers. *Free Enterprise Fund*, 561 U.S. at 487. The plaintiffs argued, in particular, that members of the SEC were themselves removable by the President only for cause,

and thus PCAOB members were impermissibly insulated from the President's control by two layers of for-cause removal protection. See *id.* at 483-484.

The Court first addressed the President's authority to remove principal officers. It discussed the First Congress's adoption of the view that "the executive power included a power to oversee executive officers through removal." *Free Enterprise Fund*, 561 U.S. at 492. It described the "landmark case of *Myers*" as "reaffirm[ing]" that principle. *Ibid.* And it described *Humphrey's Executor* as holding only that *Myers* did not "prevent Congress from conferring good-cause tenure on the principal officers of certain independent agencies" characterized "as 'quasi-legislative and quasi-judicial' rather than 'purely executive.'" *Id.* at 493 (citation omitted).

As for inferior officers, the Court observed that when Congress vests their appointment in a Department Head, it is that person, rather than the President, who "enjoys the power of removal." *Free Enterprise Fund*, 561 U.S. at 493 (citing *Myers*, 272 U.S. at 119, 127). The Court noted that it had also previously "upheld for-cause limitations on that power" in two cases. *Ibid.* In *United States* v. *Perkins*, 116 U.S. 483 (1886), the Court upheld a restriction on the Secretary of the Navy's power to remove a naval cadet-engineer during peacetime without making a misconduct finding or convening a court-martial. *Id.* at 485. And in *Morrison* v. *Olson*, *supra*, the Court upheld a statute that required the Attorney General to show "good cause" for removal of an independent counsel appointed to investigate and prosecute serious crimes committed by certain high-ranking executive officers. 487 U.S. at 685-693.

The Court explained, however, that the Sarbanes-Oxley Act presented a "new situation not yet encountered by the Court." *Free Enterprise Fund*, 561 U.S. at 483. In its previous cases in which the Court had upheld "limited restrictions on the President's removal power," "[i]t was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard." *Id.* at 495. By contrast, the Sarbanes-Oxley Act created executive officers insulated from presidential control not only through their own "unusually high standard" for removal, *id.* at 503, but also through the good-cause protection for SEC commissioners who could remove them, "withdraw[ing] from the President any decision on whether" the high standard was met, *id.* at 495.

The Court concluded that "[t]his novel structure does not merely add to the Board's independence, but transforms it." *Free Enterprise Fund*, 561 U.S. at 496. "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee," the President could "neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith." *Ibid.* The Court held that such an arrangement "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,' because Article II 'makes a single President responsible for the actions of the Executive Branch.'" *Id.* at 496-497 (citation omitted).

The Court rejected the PCAOB's argument that the Court's conclusion was "contradicted by the past practice of Congress." *Free Enterprise Fund*, 561 U.S. at 505. It observed that the parties had "identified only a handful of isolated positions in which inferior officers

might be protected by two levels of good-cause tenure." *Ibid.* Far from undermining its holding, the Court reasoned that "the lack of historical precedent" was "[p]erhaps the most telling indication of the severe constitutional problem." *Ibid.* (citation omitted).

B. The *Humphrey's Executor* Exception Should Not Be Extended To A Single-Headed Agency Like The Bureau

The question presented here is whether the *Humphrey's Executor* exception for multimember, "quasi-legislative" and "quasi-judicial" bodies should be expanded to single-headed agencies. The answer is no, for four related reasons. First, the rationale for the *Humphrey's Executor* exception necessarily rests in part on the structure of multimember bodies, not on their rulemaking and adjudicative functions alone, which are executive in nature in this context. Second, consistent with the rationale for the exception, it has historically been applied only to multimember bodies; removal restrictions on single-headed agencies are relatively new and have been subject to constitutional objection from their inception. Third, single-headed independent agencies would pose heightened dangers to the President's control of the Executive Branch. Fourth, extending *Humphrey's Executor* to single-headed agencies would lack any meaningful limiting principle, and thus would allow Congress to turn virtually the entire Executive Branch into a series of independent Departments with Heads shielded from presidential supervision and accountability.

1. *Humphrey's Executor* recognized an exception to the President's unrestricted removal power over principal executive officers for members of a commission with staggered terms established as a "quasi-legislative" or "quasi-judicial" "body of experts," which was intended

to operate in an interactive and deliberative manner and was "so arranged that the membership would not be subject to complete change at any one time." 295 U.S. at 624, 628; see *id.* at 631 (emphasizing that its holding "depend[ed] upon the character of the office"). The rationale for that exception is tied to the structural attributes of such a commission, not just its rulemaking and adjudicative functions. Indeed, the exception cannot properly be based on such functions alone, because "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted). The structure of the FTC is the only reason *Humphrey's Executor* could plausibly describe that commission as "quasi-legislative" and "quasi-judicial," and thus is the critical reason why the Court upheld the restriction on the President's authority to remove its members.

a. As then-Judge Kavanaugh has noted, "the multi-member structure of independent agencies is not an accident." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 186 (D.C. Cir. 2018) (en banc) (dissenting). An extensive study of independent agencies conducted in 1977 by the Senate Committee on Governmental Affairs concluded that "[t]he size of the commission, the length of [its members'] terms, and the fact that they do not all lapse at one time are key elements of the independent structure." *Study on Federal Regulation, Vol. V, Regulatory Organization*, S. Doc. No. 91, 95th Cong., 2d Sess. 35 (1977) (*Study on Federal Regulation*). These features were "the basic structural features which [had] marked every independent regulatory commission, beginning with" the Interstate Commerce Commission in the 1880s. *Id.* at 36. It has been generally recognized

that a removal restriction is concomitant of such a body. Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941).

Restricting the President's power to remove the members of such agencies was generally thought, for example, to reinforce the long-term continuity and expertise that the structure of multimember agencies with staggered-term memberships was designed to promote. See Marshall J. Breger & Gary J. Edles, *Established By Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1137-1138 (2000). As the 1977 Senate study observed, "regulatory policies would tend to be more permanent and consistent to the extent that they were not identified with any particular administration or party," and "[a]brupt change would therefore be minimized." *Study on Federal Regulation* 29-30; see 51 Cong. Rec. 10,376 (1914) (contemplating that FTC "would have precedents and traditions and a continuous policy and would be free from the effect of * * * changing incumbency"). Ensuring that "[a] multimember agency structure * * * will not be immediately influenced by changes in Presidential administrations" requires protecting the ability of "the members [to] serve their full terms." Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 795 (2013).

This justification for independence, however, does not apply to a single-headed agency. The agency completely turns over when the agency head's term expires, and is heavily influenced at that point by any intervening changes in presidential administrations. Rather than promoting continuity and expertise, restricting the President's authority to remove the head of such an

agency merely saddles an incoming President with a principal executive officer whom he did not appoint and with whom he may not agree, until that officer's term expires or the President can establish cause for removal—at which point the President can replace the agency head with an individual who aligns with his views.

Removal restrictions were also intended to promote the deliberative group decisionmaking that the structure of multimember agencies was already designed to facilitate. The Senate study concluded that the "[c]hief" consideration in determining whether to create an independent commission, rather than a standard executive agency, "is the relative importance to be attached to group decision-making." *Study on Federal Regulation* 79. Similarly, Professor Kenneth Culp Davis expressed the view that independent commissions were often created because they exercise adjudicative functions, and that these bodies should have multiple members "just as we want appellate courts to be made up of plural members, to protect against the idiosyncrasies of a single individual." *Administrative Law of the Seventies* § 1.09-1, at 15 (1976); see Datla & Revesz 794 (noting that "a multimember structure can foster more deliberative decision making," which is thought to "lead[] to better-informed and reasoned policy outcomes from the agency"). Removal restrictions facilitate a frank and open exchange of views among the members of such bodies.

Again, this justification is inapplicable to single-headed agencies. Instead, a single-headed executive agency embodies a quintessentially executive structure. "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more

eminent degree than the proceedings of any great number." *The Federalist No. 70*, at 472 (Hamilton) (Jacob Ernest Cooke ed., 1961); see *Clinton,* 520 U.S. at 712 (Breyer, J., concurring in the judgment) (describing how the Founders "consciously decid[ed] to vest Executive authority in one person rather than several," in contrast with their vesting of legislative and judicial powers in multimember bodies). Rather than deliberation, such a unitary structure permits the officer to act with "vigor." *Printz*, 521 U.S. at 922. The Constitution, however, specifies the official who must exercise that sort of executive power: the President, acting either personally or through subordinate officers who are accountable to him and whose actions he can control. The Constitution leaves no room for "a sort of junior-varsity" President. *Mistretta* v. *United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting).

b. Nor can the rulemaking or adjudicative functions of an agency alone justify characterizing it as "quasi-legislative" or "quasi-judicial." Describing those powers themselves as anything less than fully executive when exercised by a single-headed executive-branch agency would have been wrong even when *Humphrey's Executor* was decided, and it is untenable today. Instead, the exercise of rulemaking and adjudicative functions by such an agency is—and must be—the exercise of *executive* power.

Before *Humphrey's Executor*, the Court on several occasions recognized that executive agencies exercised executive power even when promulgating regulations or adjudicating disputes pursuant to federal statutes. "[F]rom the beginning of the government, the Congress has conferred upon executive officers the power to make regulations." *Panama Ref. Co.* v. *Ryan*, 293 U.S.

388, 428 (1935). Likewise, an "executive department charged with the duty of enforcing [an] Act" may properly "interpret[]" the meaning of the statutes that it administers, *Tagg Bros. & Moorhead* v. *United States*, 280 U.S. 420, 435 (1930), and may act as a "tribunal" to adjudicate disputes between parties, *Morgan* v. *Daniels*, 153 U.S. 120, 124 (1894). In both instances, however, the Executive Branch is exercising executive power. Accordingly, even at the time of *Humphrey's Executor*, the Court could not plausibly have described the FTC's functions as "quasi-legislative" and "quasi-adjudicative," if the agency instead had consisted of a single Secretary rather than a multimember commission. Such an agency would have been virtually indistinguishable from other executive Departments. See *Freytag* v. *Commissioner*, 501 U.S. 868, 911 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("[O]ur cases demonstrate [that] a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned.") (citation omitted; brackets in original).

The Court's modern decisions, moreover, make crystal clear that agencies engaged in rulemaking and adjudicative functions are wielding executive power in the constitutional sense. Although "[a]gencies make rules * * * and conduct adjudications * * * and have done so since the beginning of the Republic," and "[t]hese activities take 'legislative' and 'judicial' forms," at bottom "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" when performed by the Executive Branch. *City of Arlington* v. *FCC*, 569 U.S. 290, 304 n.4 (2013) (citation omitted); see *INS* v. *Chadha*, 462 U.S. 919, 953

n.16 (1983) (although the Attorney General's administration of the Immigration and Nationality Act "may resemble 'lawmaking,'" he nevertheless "acts in his presumptively Art. II capacity" and "does not exercise 'legislative' power").

As noted, this Court has already acknowledged that the FTC's powers "at the time of *Humphrey's Executor*" would now "be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 690 n.28 (citation omitted). And the executive power exercised by independent agencies has only expanded since then. Unlike the FTC in 1935, the FTC, the CFPB, and myriad other independent agencies now have the ability to bring enforcement suits in federal court seeking retrospective relief, compare FTC Act § 5, 38 Stat. 719, with, *e.g.*, 15 U.S.C. 45(m), 12 U.S.C. 5564(a), which "cannot possibly be regarded" as anything other than an exercise of the executive power and duty vested solely in the President. *Buckley* v. *Valeo*, 424 U.S. 1, 138 (1976) (per curiam).

For those reasons, *Humphrey's Executor*'s "quasi-legislative" and "quasi-judicial" characterizations are best regarded as referring to the *manner* in which a multimember body is intended to operate—through an interactive deliberative process and voting in the nature of a true "legislative" or "judicial" body—not to its functions. Because the CFPB exercises indisputably executive functions in a quintessentially executive manner, those characterizations are inapt—and the *Humphrey's Executor* exception does not apply.

2. The historical dearth of single-headed independent agencies underscores why *Humphrey's Executor* should not be extended to this new context. This Court

has recognized that "'long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions' regulating the relationship between Congress and the President." *NLRB* v. *Noel Canning*, 573 U.S. 513, 524 (2014) (brackets and citation omitted). Novelty in this context can itself be a "telling indication of [a] severe constitutional problem." *Free Enterprise Fund*, 561 U.S. at 505 (citation omitted). Defenders of the removal restriction on the Director, however, have identified only a handful of agencies in the history of the Republic headed by a single principal officer subject to for-cause removal. All of them are recent innovations whose constitutionality has been disputed.

In 1978, for example, Congress established the Office of Special Counsel, headed by a Special Counsel who is appointed by the President by advice and consent of the Senate for a term of 5 years, removable only for "inefficiency, neglect of duty, or malfeasance in office." Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 202(a), 92 Stat. 1122. The Office does not regulate private citizens, but instead is responsible for enforcing certain laws governing federal employment, such as civil-service personnel protections and restrictions on political conduct by government employees. 5 U.S.C. 1212 (2012 & Supp. V 2017). The Office of Legal Counsel nevertheless contemporaneously objected that "Congress may not condition the President's power to remove the Special Counsel." *Memorandum Opinion for the General Counsel, Civil Service Commission*, 2 Op. O.L.C. 120, 122 (1978). And President Reagan vetoed subsequent legislation regarding the Office of Special Counsel, citing "serious constitutional concerns" about the agency's independent status. See *Memorandum of*

Disapproval on a Bill Concerning Whistleblower Protection, Pub. Papers 1391, 1392 (Oct. 26, 1988).[2]

In 1994, Congress removed the Social Security Administration (SSA) from the Department of Health and Human Services, creating a standalone agency headed by a single commissioner appointed for a six-year term and removable only for cause. Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 102, 108 Stat. 1466. SSA does not bring enforcement actions against private citizens, but rather primarily engages in adjudication of private claims for benefits. In President Clinton's signing statement, he nevertheless made clear that "in the opinion of the Department of Justice, the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question." *Statement on Signing the Social Security Independence and Program Improvements Act of 1994*, Pub. Papers 1471, 1472 (Aug. 15, 1994).

During the 2008 financial crisis, Congress created the Federal Housing Finance Agency (FHFA) to oversee Fannie Mae and Freddie Mac. 12 U.S.C. 4511. Like the CFPB, the FHFA is also headed by a single Director subject to removal only for cause. 12 U.S.C. 4512. That, of course, is neither surprising nor probative, as Section 4512 was enacted roughly contemporaneously with the Dodd-Frank Act. For substantially the same

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[2] President Bush signed legislation the following year even though it "retain[ed]" the removal restriction. *Remarks on Signing the Whistleblower Protection Act of 1989*, Pub. Papers 391 (Apr. 10, 1989). But the Executive Branch had been clear about its constitutional objections, and the bill was the result of a "compromise" intended to partially address those concerns. 135 Cong. Rec. 5032-5033 (1989).

reasons offered here, the United States has explained that the removal restriction on the FHFA Director is also unconstitutional. See Dep't of Treasury Supp. Br. at 20-23, *Collins* v. *Mnuchin*, No. 17-20364 (5th Cir. Jan. 11, 2019). The Fifth Circuit recently agreed. *Collins* v. *Mnuchin*, 938 F.3d 553 (2019) (en banc), petition for cert. pending, No. 19-422 (filed Sept. 25, 2019).

Finally, the *PHH* majority pointed to President Lincoln's failure to object to a removal restriction briefly imposed on the Comptroller of the Currency in 1863. 881 F.3d at 104. But the Comptroller was likely an inferior rather than a principal officer; he worked "under the general direction of the Secretary of the Treasury." Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. And in any event, the restriction on his removal was repealed one year later. See Act of June 3, 1864, ch. 106, 13 Stat. 99. The Court in *Myers* rightly declined to place any weight on President Lincoln's decision to carefully pick his constitutional battles with the Republican Congress in the heat of the Civil War. See *Myers*, 272 U.S. at 165.

3. Although the inapplicability of the rationale of *Humphrey's Executor* is a sufficient basis not to extend that exception to single-headed agencies, applying the exception to such agencies would also pose unique threats to the President's control over the exercise of executive power. The President's removal authority over individual officers on a multimember commission is identical to his authority over a single head, but a single-headed independent agency presents a greater risk than a multimember independent agency of taking actions or adopting policies inconsistent with the President's executive policy.

Unlike a multimember commission, which generally must engage in at least some degree of deliberation and

collaboration, a single Director can decisively implement his own views and exercise discretion without those structural constraints. Indeed, it is for precisely that reason that the Framers adopted a strong, unitary Executive—headed by the President—rather than a weak, divided one. See pp. 10-12, *supra*. Vesting executive power in a single person not answerable to the President "does not merely add" to the intrusion on executive authority, "but transforms it." *Free Enterprise Fund*, 561 U.S. at 496.

The difference in decisionmaking is reinforced by the difference in the timing and composition of appointments to the two types of agencies. For a multimember commission with staggered terms, the President is generally assured to have an opportunity to appoint at least some of its members, and the partisan-balance requirement that is common for such commissions further increases the likelihood that at least some of the holdover members share the President's views. Many multimember commissions, moreover, afford the President the unfettered ability to appoint and remove their chairs, which is a significant means of influence. See Datla & Revesz 796-797 & n.146. By contrast, the statutory term of a single agency head may insulate that principal officer from presidential control for a significant portion of the President's term in office. And where the single head has a term greater than four years, a President may never have the opportunity to appoint that officer. See 12 U.S.C. 5491(c)(1).

To be sure, the frequency with which the threat of departures from the President's executive policy materializes will depend on the particular circumstances, but the "added" risk of such departures "makes a differ-

ence." *Free Enterprise Fund*, 561 U.S. at 495. The interference with executive power caused by the removal restriction on the Bureau's Director is exacerbated by both the Bureau's single-headed nature and its wide-ranging policymaking and enforcement authority over private conduct.

4. Finally, if *Humphrey's Executor* were extended to single-headed agencies like the Bureau, there would be no meaningful limiting principle. If the Director—responsible for enforcing, interpreting, and adjudicating 19 different statutes—may be insulated from supervision by the President, it is difficult to see why Congress could not equally impose removal restrictions on every principal executive officer.

After all, each of them heads "an administrative body created by Congress to carry into effect legislative policies embodied in [their organic] statute[s] in accordance with the legislative standard therein prescribed." *Humphrey's Executor*, 295 U.S. at 628. And trying to draw lines among them based on their perceived importance cannot establish the "high walls and clear distinctions" that are "judicially defensible in the heat of interbranch conflict." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995). The *PHH* majority's vague suggestion that "the nature of the agency's function" would prevent this "[s]lippery [s]lope" is thus illusory. 881 F.3d at 106. Extending *Humphrey's Executor* to the CFPB would "provide[] a blueprint for extensive expansion of the legislative power" by "impair[ing] [the President] in the performance of [his] constitutional duties" to oversee the exercise of executive power. *Free Enterprise Fund*, 561 U.S. at 500 (citations omitted).

The *PHH* majority attempted to carve off "Cabinet-level officers," based on their presence in the presidential line of succession and their ability under the 25th Amendment to remove the President temporarily from office. 881 F.3d at 107. But the presidential line of succession is entirely within the control of Congress. U.S. Const. Art. II, § 1, Cl. 6; 3 U.S.C. 19. And the 25th Amendment similarly provides for the temporary removal of the President by "the Vice President and a majority of either the principal officers of the executive departments *or of such other body as Congress may by law provide*." U.S. Const. Amend. XXV, § 4 (emphasis added). Even if there is a core set of executive officers who must be included in such a body, there is no sound basis for limiting the scope of the President's removal authority vested by Article II based on an unrelated constitutional amendment adopted in 1967.

The *PHH* majority also suggested that at least a few "core" executive Departments might be distinguishable because they assist the President in exercising inherent constitutional powers "specifically identified in Article II"—"prominently, the Secretaries of Defense and State." 881 F.3d at 107. Even if that were so, it would not prevent Congress from restricting the President's authority over the overwhelming majority of the "vast power" of the modern administrative state, which "touches almost every aspect of daily life," by virtue of statutory, rather than inherent constitutional, authority —*e.g.*, the Departments of Labor, Health and Human Services, and so forth. See *Free Enterprise Fund*, 561 U.S. at 499. The Framers could not possibly have envisioned such a limited role for the chief Executive when they vested the President alone with "*[t]he* executive Power" and charged him to "take Care that *the*

Laws be faithfully executed." U.S. Const. Art. II, §§ 1, 3 (emphases added).

C. The Contrary Reasoning Of The Ninth And D.C. Circuits Is Erroneous

Neither the decision below nor the D.C. Circuit's en banc decision in *PHH* successfully justifies extending *Humphrey's Executor* to this new context.

1. The Ninth Circuit principally reasoned that this Court had already extended *Humphrey's Executor* to single-headed executive agencies in *Morrison*, *supra*. See Pet. App. 4a-5a; accord *PHH*, 881 F.3d at 97. But *Morrison* is inapposite. To be sure, the Court there disregarded the "purely executive" nature of the independent counsel, reasoning that "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 690-691. But critically, the Court emphasized that its negative answer rested on its view that the independent counsel was "an inferior officer * * * with limited jurisdiction and tenure and lack[of] policymaking or significant administrative authority." *Id.* at 691; see *id.* at 671-672; see also *Free Enterprise Fund*, 561 U.S. at 494 ("We * * * considered the status of inferior officers in *Morrison*."). Indeed, in *Free Enterprise Fund*, the Court never even mentioned *Morrison*'s "real question," and it made clear that, at least for "principal officers," the *Humphrey's Executor* exception for "'quasi-legislative and quasi-judicial'" officers is the sole exception from the general rule of unrestricted presidential removal. *Id.* at 493 (citation omitted). Here, "no one disputes[] the Director is a *principal officer*." *PHH*, 881 F.3d at 152 (Henderson, J., dissenting).

Although the *PHH* majority noted that "[t]he degree of removal constraint effected by a single layer of for-cause protection is the same whether that protection shields a principal or inferior officer," 881 F.3d at 97 n.2, the distinction between principal officers and inferior officers appointed by Department Heads is fundamental. The fact that the Appointments Clause allows Congress to exempt the appointment of inferior officers from Senate confirmation, U.S. Const. Art. II, § 2, Cl. 2, has historically been part of the justification for why Congress may exempt at least certain inferior officers from the general rule of unrestricted removal. See *Myers*, 272 U.S. at 127 (citing *Perkins*, 116 U.S. at 485).

Moreover, that textual distinction reflects common sense: "[t]he more important the officer's assignments, the more directly his actions implicate the President's responsibility to faithfully execute the laws." *PHH*, 881 F.3d at 152 (Henderson, J., dissenting). Imposing for-cause removal restrictions on inferior officers poses fewer constitutional concerns given the principle that such officers generally may be removed for "failure to accept supervision" from "principal officers who (being removable at will) have the President's complete confidence." *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting). And while *Morrison* permitted a limited incursion on that principle for the independent counsel, it relied heavily on the perceived "necessary independence of the office" while engaged in the "limited" task of investigating and prosecuting high-ranking executive officials. *Id.* at 691-693.

By contrast, allowing removal restrictions for the principal officers of even single-headed executive agencies would thwart the Framers' design that "those who are employed in the execution of the law will be in their

proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Free Enterprise Fund*, 561 U.S. at 498 (quoting 1 Annals of Cong. 499 (Madison)). Simply put, "*Morrison* did not hold—or even hint—that a single *principal* officer could be the sole head of an independent regulatory agency with broad enforcement, rulemaking, and adjudication powers." *PHH*, 881 F.3d at 195 (Kavanaugh, J., dissenting).

2. The *PHH* majority also claimed to identify a "longstanding tradition of affording some independence to the government's financial functions." 881 F.3d at 91. But most of the financial regulators identified by the D.C. Circuit are multimember commissions created more than a hundred years after the Founding. See *id.* at 92. As for the court's discussion of individual officers, its historical analysis cannot withstand scrutiny.

The D.C. Circuit observed that the First Congress "specified the responsibilities of the Treasury Secretary and other officers in the Treasury Department in some detail." *PHH*, 881 F.3d at 91. But just as with the Secretaries of Foreign Affairs and War, the First Congress recognized that the Treasury Secretary was removable by the President at will. See Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 67. Indeed, the startling implication of the *PHH* majority's reasoning that Congress could restrict the President's ability to remove the Treasury Secretary only underscores that "this wolf comes as a wolf." *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

The D.C. Circuit next claimed that it was at least unclear whether the original Comptroller of the Treasury could be removed only "if found to 'offend against any

of the prohibitions of th[e] act.'" *PHH*, 881 F.3d at 91. But the section of the Act on which the *PHH* majority relied refers to punishment and automatic removal from office for anyone who violates the conflict-of-interest provisions in the Act, including the Treasury Secretary himself. See Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 67 (prohibiting any "person appointed to any office instituted by this act" from, *e.g.*, "carrying on the business of trade or commerce"). That provision plainly did not impliedly restrict the President's constitutional authority to remove the Comptroller or the Secretary. See *Free Enterprise Fund*, 561 U.S. at 517 (Breyer, J., dissenting) (acknowledging that the Act "did not directly limit the President's authority to *remove* any of those officials").[3]

The *PHH* majority lastly claimed that the current Comptroller of the Currency is "insulated from removal." 881 F.3d at 97 (citing 12 U.S.C. 2); see *id.* at 91. But the cited provision provides that the Comptroller will "hold his office for a term of five years *unless sooner removed by the President*." 12 U.S.C. 2 (emphasis added). It does not provide any insulation from removal, but merely requires the President to "communicate[]" his reasons for removal to the Senate, whatever

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[3] The D.C. Circuit also attributed to Madison the view that the Comptroller "should not hold his office at the pleasure of the Executive branch." *PHH*, 881 F.3d at 91 (quoting 1 Annals of Cong. 612). "But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of 'years, unless sooner removed by the President'; he would thus be 'dependent upon the President, because he can be removed by him,' and also 'dependent upon the Senate, because they must consent to his [reappointment] for every term of years.'" *Free Enterprise Fund*, 561 U.S. at 500 n.6 (quoting 1 Annals of Cong. 612).

those reasons may be. *Ibid.* The Comptroller therefore serves at the pleasure of the President.

3. Finally, in his *PHH* concurrence, Judge Griffith suggested that any constitutional concern about the removal restriction for the Director could be alleviated by interpreting the removal standard—"inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3)—to impose "only a minimal restriction on the President's removal power, even permitting him to remove the Director for ineffective policy choices." 881 F.3d at 124. To be sure, this Court's cases have given conflicting signals about the breadth of that standard, compare *Bowsher*, 478 U.S. at 729, with *Free Enterprise Fund*, 561 U.S. at 502, and the United States agrees that, where the standard can constitutionally be applied at all, it should be interpreted as broadly as textually possible in light of the serious constitutional concerns. But even broadly construed, such a restriction on the President's power to remove the sole principal officer of an executive agency is unconstitutional.

As the Court explained in *Myers*, "[e]ach head of a department is and must be the President's *alter ego*" in whom the President places his "implicit faith." 272 U.S. at 133-134. Such officers are the "arm[s]" and "eye[s] of the executive." *Humphrey's Executor*, 295 U.S. at 628. The President cannot be forced to retain and monitor such officers until a federal court is satisfied that he has offered "a reasoned, non-pretextual explanation" for their termination. *PHH*, 881 F.3d at 135 (Griffith, J., concurring in the judgment). The contrary rule would be deeply problematic even within one Administration. It would be nonsensical between two of them, potentially requiring a new President to maintain the Cabinet of a prior President until he could complete the

"time-consuming and cumbersome" process of their removal for cause. *Id.* at 201 n.1 (Randolph, J., dissenting). The President "must have the power to remove" such principal officers "[t]he moment that he loses confidence in the[ir] intelligence, ability, judgment or loyalty." *Myers*, 272 U.S. at 134.

D. If This Court Were To Conclude That *Humphrey's Executor* Cannot Be Distinguished, It Should Narrow Or Overrule That Decision

For these reasons, *Humphrey's Executor* does not control this case. Because "the narrow point actually decided [in *Humphrey's Executor*] was only" that Congress could limit the President's ability to remove a commissioner of the multimember FTC, statements in that opinion "beyond the point involved * * * do not come within the rule of *stare decisis*." *Humphrey's Executor*, 295 U.S. at 626 (distinguishing *Myers* in this fashion). That is all the more so since *Humphrey's Executor* expressly left "for future consideration and determination" whether Congress may restrict the President's power to remove principal officers different from "such as that [were] [t]here involved." *Id.* at 632.

If the Court were to conclude, however, that *Humphrey's Executor* or any of its progeny requires upholding the removal restriction for the Bureau's Director, those decisions should be narrowed or overruled as necessary. *Stare decisis* is "not an inexorable command." *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991). And the doctrine "is at its weakest when [the Court] interpret[s] the Constitution because [the] interpretation can be altered only by constitutional amendment or by overruling [the] prior decisions." *Janus* v. *American Fed'n of State, County, & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018) (citation omitted). In considering whether *stare*

decisis justifies the maintenance of an erroneous constitutional holding, the Court has considered (1) "the quality of [a prior decision's] reasoning," (2) "its consistency with other related decisions," (3) "developments since the decision was handed down," (4) "the workability of the rule it established," and (5) "reliance on the decision." *Id.* at 2478-2479; see *Franchise Tax Bd.* v. *Hyatt*, 139 S. Ct. 1485, 1499 (2019). None of those factors justifies preserving *Humphrey's Executor* to the extent it would apply to the CFPB.

First, as explained, the reasoning for *Humphrey's Executor* does not withstand careful analysis. Even at the time of the decision, there was little reason to conclude that the FTC exercised anything other than executive authority. See pp. 30-31, *supra*. Second, the decision was concededly inconsistent with the exhaustive and careful reasoning of the *Myers* decision, *Humphrey's Executor*, 295 U.S. at 626, and, if applied to the novel structure of the CFPB, would be inconsistent with the Court's subsequent decision in *Free Enterprise Fund*, see pp. 32-37, *supra*. Third, legal developments since *Humphrey's Executor* have only clarified that independent agencies exercise executive power—particularly those agencies like the CFPB that have the authority to bring enforcement actions in federal court seeking civil penalties. See pp. 31-32, *supra.* Fourth, if extended to single-headed agencies, *Humphrey's Executor* would not provide a workable rule for distinguishing between principal executive officers whose removal may or may not be restricted. See pp. 37-39, *supra*. And fifth, there are minimal reliance interests in the removability of principal executive officers, particularly for single-headed independent agencies given their novelty. See pp. 32-35, *supra*. Taken together, these factors

amply provide "special justifications," *Janus*, 138 S. Ct. at 2486 (brackets and citation omitted), for overruling or narrowing *Humphrey's Executor* as necessary.

II. THE REMOVAL RESTRICTION IS SEVERABLE FROM THE REST OF THE DODD-FRANK ACT

Because the statutory restriction on the President's authority to remove the Bureau's Director is unconstitutional, it should be invalidated. This Court, however, "should refrain from invalidating more of the statute than is necessary." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987) (citation omitted). When the Court finds a statutory provision unconstitutional, even in the absence of a severability clause, the Court's "normal rule" is to sever the provision from the rest of the Act, *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 329 (2006) (citation omitted), unless it is "'evident'" that the Congress that enacted the invalid provision "would have preferred" that those additional provisions be invalidated as well. *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted). Where Congress has included an express severability clause, the Court applies it according to its terms, absent "strong evidence that Congress intended otherwise." *Alaska Airlines*, 480 U.S. at 686.

The Court has generally severed unconstitutional restrictions on the removal of executive officers while maintaining the unchallenged portions of the relevant statutes. Of particular relevance here, in *Free Enterprise Fund*, the Court held that the invalid removal restriction on members of the PCAOB was severable from the rest of the Sarbanes-Oxley Act. Even without a severability clause, the Court held that it was not "'evident'" that Congress "would have preferred no Board at all to a Board whose members are removable at will."

Free Enterprise Fund, 561 U.S. at 509 (citation omitted). The same result follows *a fortiori* here.

The Dodd-Frank Act provides that "[i]f any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." Dodd-Frank Act, § 3, 124 Stat. 1390 (12 U.S.C 5302). That language is "unambiguous." *Chadha*, 462 U.S. at 932. The removal restriction at 12 U.S.C. 5491(c)(3) is a "provision of this Act," 12 U.S.C. 5302; see Dodd-Frank Act § 1011(c)(3), 124 Stat. 1964. If this Court holds the removal provision "to be unconstitutional," Congress plainly intended for the "remainder of th[e] Act * * * not [to] be affected thereby." 12 U.S.C. 5302.

After the invalidation of the removal provision, the Dodd-Frank Act, including its Bureau-related provisions, will remain "fully operative." *Free Enterprise Fund*, 561 U.S. at 509 (citation omitted). And there is no evidence—much less strong evidence—that Congress would have preferred that the remaining provisions also be invalidated. The Dodd-Frank Act addresses a host of issues arising from the financial crisis, and it contains hundreds of provisions designed to "promote the financial stability of the United States by improving accountability and transparency in the financial system, to end 'too big to fail', to protect the American taxpayer by ending bailouts, [and] to protect consumers from abusive financial services practices." 124 Stat. 1376; see p. 2, *supra*. Petitioner has not pointed to

strong evidence that Congress would have chosen to enact none of those provisions if the Bureau's Director were subject to at-will removal by the President.

Even considering only the Bureau-specific provisions contained in Title X of the Dodd-Frank Act, 124 Stat. 1955, there is no basis to conclude that Congress would have preferred to have no Bureau at all rather than a Bureau headed by a Director who would be removable like almost all other single-headed agencies. Congress charged the Bureau with implementing and enforcing "[f]ederal consumer financial law," 12 U.S.C. 5511(a), because, among other things, the existing system for protecting consumers "suffer[ed] from a number of serious structural flaws" caused by "conflicting regulatory missions, fragmentation, and regulatory arbitrage," Senate Report 10. Nothing in the statutory text or history of the Bureau's creation suggests, much less clearly demonstrates, that Congress would have preferred, for example, that the regulatory authority vested in the Bureau revert back to the seven federal agencies that previously administered those responsibilities if a court were to invalidate the Director's removal restriction.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals for further proceedings.

Respectfully submitted.

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APPENDIX

1. U.S. Const. Art. II, § 1, Cl. 1 provides in pertinent part:

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

2. U.S. Const. Art. II, § 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

3. U.S. Const. Art. II, § 3 provides in pertinent part:

* * * he shall take Care that the Laws be faithfully executed * * *

4. 12 U.S.C. 5302 provides:

Severability

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

5. 12 U.S.C. 5481 provides in pertinent part:

Definitions

Except as otherwise provided in this title,[1] for purposes of this title,[1] the following definitions shall apply:

* * * * *

(12) Enumerated consumer laws

Except as otherwise specifically provided in section 5519 of this title, subtitle G or subtitle H, the term "enumerated consumer laws" means—

(A) the Alternative Mortgage Transaction Parity Act of 1982 (12 U.S.C. 3801 et seq.);

(B) the Consumer Leasing Act of 1976 (15 U.S.C. 1667 et seq.);

(C) the Electronic Fund Transfer Act (15 U.S.C. 1693 et seq.), except with respect to section 920 of that Act [15 U.S.C. 1693*o*-2];

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[1] See References in Text note below.

(D) the Equal Credit Opportunity Act (15 U.S.C. 1691 et seq.);

(E) the Fair Credit Billing Act (15 U.S.C. 1666 et seq.);

(F) the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.), except with respect to sections 615(e) and 628 of that Act (15 U.S.C. 1681m(e), 1681w);

(G) the Home Owners[2] Protection Act of 1998 (12 U.S.C. 4901 et seq.);

(H) the Fair Debt Collection Practices Act (15 U.S.C. 1692 et seq.);

(I) subsections (b) through (f) of section 43 of the Federal Deposit Insurance Act (12 U.S.C. 1831t(c)[(b)]-(f));

(J) sections 502 through 509 of the Gramm-Leach-Bliley Act (15 U.S.C. 6802-6809) except for section 505 [15 U.S.C. 6805] as it applies to section 501(b) [15 U.S.C. 6801(b)];

(K) the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2801 et seq.);

(L) the Home Ownership and Equity Protection Act of 1994 (15 U.S.C. 1601 note);

(M) the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.);

(N) the S.A.F.E. Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.);

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[2] So in original. Probably should be "Homeowners".

(O) the Truth in Lending Act (15 U.S.C. 1601 et seq.);

(P) the Truth in Savings Act (12 U.S.C. 4301 et seq.);

(Q) section 626 of the Omnibus Appropriations Act, 2009 (Public Law 111-8) [12 U.S.C. 5538]; and

(R) the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701).

* * * * *

(14) Federal consumer financial law

The term "Federal consumer financial law" means the provisions of this title,[1] the enumerated consumer laws, the laws for which authorities are transferred under subtitles F and H, and any rule or order prescribed by the Bureau under this title,[1] an enumerated consumer law, or pursuant to the authorities transferred under subtitles F and H. The term does not include the Federal Trade Commission Act [15 U.S.C. 41 et seq.].

* * * * *

6. 12 U.S.C. 5491 provides:

Establishment of the Bureau of Consumer Financial Protection

(a) Bureau established

There is established in the Federal Reserve System, an independent bureau to be known as the "Bureau of Consumer Financial Protection", which shall regulate

the offering and provision of consumer financial products or services under the Federal consumer financial laws. The Bureau shall be considered an Executive agency, as defined in section 105 of title 5. Except as otherwise provided expressly by law, all Federal laws dealing with public or Federal contracts, property, works, officers, employees, budgets, or funds, including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Bureau.

(b) Director and Deputy Director

(1) In general

There is established the position of the Director, who shall serve as the head of the Bureau.

(2) Appointment

Subject to paragraph (3), the Director shall be appointed by the President, by and with the advice and consent of the Senate.

(3) Qualification

The President shall nominate the Director from among individuals who are citizens of the United States.

(4) Compensation

The Director shall be compensated at the rate prescribed for level II of the Executive Schedule under section 5313 of title 5.

(5) Deputy Director

There is established the position of Deputy Director, who shall—

(A) be appointed by the Director; and

(B) serve as acting Director in the absence or unavailability of the Director.

(c) Term

(1) In general

The Director shall serve for a term of 5 years.

(2) Expiration of term

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

(3) Removal for cause

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

* * * * *

7. 12 U.S.C. 5497 provides in pertinent part:

Funding; penalties and fines

(a) Transfer of funds from Board Of Governors

(1) In general

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

(2) Funding cap

(A) In general

Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to—

* * * * *

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

(B) Adjustment of amount

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

* * * * *

(e) Authorization of appropriations; annual report

(1) Determination regarding need for appropriated funds

(A) In general

The Director is authorized to determine that sums available to the Bureau under this section will not be sufficient to carry out the authorities of

the Bureau under Federal consumer financial law for the upcoming year.

(B) Report required

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

(2) Authorization of appropriations

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

* * * * *

8. 12 U.S.C. 5512(a) provides:

Rulemaking authority

(a) In general

The Bureau is authorized to exercise its authorities under Federal consumer financial law to administer, enforce, and otherwise implement the provisions of Federal consumer financial law.

9. 12 U.S.C. 5513(a) provides:

Review of Bureau regulations

(a) Review of Bureau regulations

On the petition of a member agency of the Council, the Council may set aside a final regulation prescribed by the Bureau, or any provision thereof, if the Council decides, in accordance with subsection (c), that the regulation or provision 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.

10. 12 U.S.C. 5531 provides in pertinent part:

Prohibiting unfair, deceptive, or abusive acts or practices

(a) In general

The Bureau may take any action authorized under part E to prevent a covered person or service provider from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.

(b) Rulemaking

The Bureau may prescribe rules applicable to a covered person or service provider identifying as unlawful unfair, deceptive, or abusive acts or practices in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service. Rules under this section may include requirements for the purpose of preventing such acts or practices.

* * * * *

11. 12 U.S.C. 5536 provides in pertinent part:

Prohibited acts

(a) In general

It shall be unlawful for—

(1) any covered person or service provider—

(A) to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law; or

(B) to engage in any unfair, deceptive, or abusive act or practice;

(2) any covered person or service provider to fail or refuse, as required by Federal consumer financial law, or any rule or order issued by the Bureau thereunder—

(A) to permit access to or copying of records;

(B) to establish or maintain records; or

(C) to make reports or provide information to the Bureau; or

(3) any person to knowingly or recklessly provide substantial assistance to a covered person or service provider in violation of the provisions of section 5531 of this title, or any rule or order issued thereunder, and notwithstanding any provision of

this title,[1] the provider of such substantial assistance shall be deemed to be in violation of that section to the same extent as the person to whom such assistance is provided.

* * * * *

12. 12 U.S.C. 5562 provides in pertinent part:

Investigations and administrative discovery

(a) Joint investigations

(1) In general

The Bureau or, where appropriate, a Bureau investigator, may engage in joint investigations and requests for information, as authorized under this title.[1]

* * * * *

(b) Subpoenas

(1) In general

The Bureau or a Bureau investigator may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, documents, or other material in connection with hearings under this title.[1]

* * * * *

[1] See References in text note below.

[1] See References in Text note below.

[1] See References in Text note below.

(c) Demands

(1) In general

Whenever the Bureau has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to a violation, the Bureau may, before the institution of any proceedings under the Federal consumer financial law, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to—

(A) produce such documentary material for inspection and copying or reproduction in the form or medium requested by the Bureau;

(B) submit such tangible things;

(C) file written reports or answers to questions;

(D) give oral testimony concerning documentary material, tangible things, or other information; or

(E) furnish any combination of such material, answers, or testimony.

* * * * *

(e) Petition for enforcement

(1) In general

Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or re-

production of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Bureau, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section.

* * * * *

(f) Petition for order modifying or setting aside demand

(1) In general

Not later than 20 days after the service of any civil investigative demand upon any person under subsection (b), or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Bureau investigator named in the demand, such person may file with the Bureau a petition for an order by the Bureau modifying or setting aside the demand.

* * * * *

(h) Jurisdiction of court

(1) In general

Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the

matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section.

(2) Appeal

Any final order entered as described in paragraph (1) shall be subject to appeal pursuant to section 1291 of title 28.

13. 12 U.S.C. 5563(a) provides:

Hearings and adjudication proceedings

(a) In general

The Bureau is authorized to conduct hearings and adjudication proceedings with respect to any person in the manner prescribed by chapter 5 of title 5 in order to ensure or enforce compliance with—

(1) the provisions of this title,[1] including any rules prescribed by the Bureau under this title;[1] and

(2) any other Federal law that the Bureau is authorized to enforce, including an enumerated consumer law, and any regulations or order prescribed thereunder, unless such Federal law specifically limits the Bureau from conducting a hearing or adjudication proceeding and only to the extent of such limitation.

[1] See References in Text note below.

14. 12 U.S.C. 5564(a) provides:

Litigation authority

(a) In general

If any person violates a Federal consumer financial law, the Bureau may, subject to sections 5514, 5515, and 5516 of this title, commence a civil action against such person to impose a civil penalty or to seek all appropriate legal and equitable relief including a permanent or temporary injunction as permitted by law.

15. 12 U.S.C. 5565 provides in pertinent part:

Relief available

(a) Administrative proceedings or court actions

(1) Jurisdiction

The court (or the Bureau, as the case may be) in an action or adjudication proceeding brought under Federal consumer financial law, shall have jurisdiction to grant any appropriate legal or equitable relief with respect to a violation of Federal consumer financial law, including a violation of a rule or order prescribed under a Federal consumer financial law.

(2) Relief

Relief under this section may include, without limitation—

(A) rescission or reformation of contracts;

(B) refund of moneys or return of real property;

(C) restitution;

(D) disgorgement or compensation for unjust enrichment;

(E) payment of damages or other monetary relief;

(F) public notification regarding the violation, including the costs of notification;

(G) limits on the activities or functions of the person; and

(H) civil money penalties, as set forth more fully in subsection (c).

* * * * *

(c) Civil money penalty in court and administrative actions

(1) In general

Any person that violates, through any act or omission, any provision of Federal consumer financial law shall forfeit and pay a civil penalty pursuant to this subsection.

(2) Penalty amounts

(A) First tier

For any violation of a law, rule, or final order or condition imposed in writing by the Bureau, a civil penalty may not exceed $5,000 for each day during which such violation or failure to pay continues.

(B) Second tier

Notwithstanding paragraph (A), for any person that recklessly engages in a violation of a Federal

consumer financial law, a civil penalty may not exceed $25,000 for each day during which such violation continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), for any person that knowingly violates a Federal consumer financial law, a civil penalty may not exceed $1,000,000 for each day during which such violation continues.

* * * * *

16. 12 U.S.C. 5581 provides in pertinent part:

Transfer of consumer financial protection functions

(a) Defined terms

For purposes of this part—

(1) the term "consumer financial protection functions" means—

(A) all authority to prescribe rules or issue orders or guidelines pursuant to any Federal consumer financial law, including performing appropriate functions to promulgate and review such rules, orders, and guidelines; and

(B) the examination authority described in subsection (c)(1), with respect to a person described in section 5515(a) of this title; and

(2) the terms "transferor agency" and "transferor agencies" mean, respectively—

(A) the Board of Governors (and any Federal reserve bank, as the context requires), the Federal Deposit Insurance Corporation, the Federal Trade Commission, the National Credit Union Administration, the Office of the Comptroller of the Currency, the Office of Thrift Supervision, and the Department of Housing and Urban Development, and the heads of those agencies; and

(B) the agencies listed in subparagraph (A), collectively.

(b) In general

Except as provided in subsection (c), consumer financial protection functions are transferred as follows:

(1) Board of Governors

(A) Transfer of functions

All consumer financial protection functions of the Board of Governors are transferred to the Bureau.

(B) Board of Governors authority

The Bureau shall have all powers and duties that were vested in the Board of Governors, relating to consumer financial protection functions, on the day before the designated transfer date.

(2) Comptroller of the Currency

(A) Transfer of functions

All consumer financial protection functions of the Comptroller of the Currency are transferred to the Bureau.

(B) Comptroller authority

The Bureau shall have all powers and duties that were vested in the Comptroller of the Currency, relating to consumer financial protection functions, on the day before the designated transfer date.

(3) Director of the Office of Thrift Supervision

(A) Transfer of functions

All consumer financial protection functions of the Director of the Office of Thrift Supervision are transferred to the Bureau.

(B) Director authority

The Bureau shall have all powers and duties that were vested in the Director of the Office of Thrift Supervision, relating to consumer financial protection functions, on the day before the designated transfer date.

(4) Federal Deposit Insurance Corporation

(A) Transfer of functions

All consumer financial protection functions of the Federal Deposit Insurance Corporation are transferred to the Bureau.

(B) Corporation authority

The Bureau shall have all powers and duties that were vested in the Federal Deposit Insurance Corporation, relating to consumer financial protection functions, on the day before the designated transfer date.

(5) Federal Trade Commission

(A) Transfer of functions

The authority of the Federal Trade Commission under an enumerated consumer law to prescribe rules, issue guidelines, or conduct a study or issue a report mandated under such law shall be transferred to the Bureau on the designated transfer date. Nothing in this title[1] shall be construed to require a mandatory transfer of any employee of the Federal Trade Commission.

(B) Bureau authority

(i) In general

The Bureau shall have all powers and duties under the enumerated consumer laws to prescribe rules, issue guidelines, or to conduct studies or issue reports mandated by such laws, that were vested in the Federal Trade Commission on the day before the designated transfer date.

(ii) Federal Trade Commission Act

Subject to part B, the Bureau may enforce a rule prescribed under the Federal Trade Commission Act [15 U.S.C. 41 et seq.] by the Federal Trade Commission with respect to an unfair or deceptive act or practice to the extent that such rule applies to a covered person or service provider with respect to the offering or provision of a consumer financial product or

[1] See References in Text note below.

service as if it were a rule prescribed under section 5531 of this title.

* * * * *

(6) National Credit Union Administration

(A) Transfer of functions

All consumer financial protection functions of the National Credit Union Administration are transferred to the Bureau.

(B) National Credit Union Administration authority

The Bureau shall have all powers and duties that were vested in the National Credit Union Administration, relating to consumer financial protection functions, on the day before the designated transfer date.

(7) Department of Housing and Urban Development

(A) Transfer of functions

All consumer protection functions of the Secretary of the Department of Housing and Urban Development relating to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5102 [5101] et seq.), and the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.) are transferred to the Bureau.

(B) Authority of the Department of Housing and Urban Development

The Bureau shall have all powers and duties that were vested in the Secretary of the Department of Housing and Urban Development relating to the Real Estate Settlement Procedures Act of 1974 (12 U.S.C. 2601 et seq.), the Secure and Fair Enforcement for Mortgage Licensing Act of 2008 (12 U.S.C. 5101 et seq.), and the Interstate Land Sales Full Disclosure Act (15 U.S.C. 1701 et seq.), on the day before the designated transfer date.

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