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

REPLY BRIEF FOR THE PETITIONER

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Although this Court appointed an amicus curiae to defend the judgment below on the constitutional question presented, amicus spends much of his brief doing anything but. Amicus initially contends that, in lieu of affirming the judgment below, the Court should "deem this whole dispute premature" on some unspecified jurisdictional or prudential ground. Despite his limited remit, amicus effectively invites the Court to vacate the judgment below (on the ground that it lacks jurisdiction) or to dismiss the writ of certiorari (on the ground that it should not have granted it in the first place).

Those quixotic arguments lack merit. Indeed, they do not appear to have occurred to, much less been accepted by, a single judge to have considered the constitutional question presented. Those arguments are blocked by this Court's cases at every turn. And they mischaracterize the

nature of the separation-of-powers problem presented here, which inheres in every exercise of executive power by an official unaccountable to the President. The Court should reject amicus's efforts to derail the resolution of the question he was appointed to address.

When amicus finally turns to the merits of the constitutional question, he offers only an anemic defense of the court of appeals' judgment and reasoning. Astonishingly, amicus does not even cite, let alone come to grips with, the critical language in Article II of the Constitution. Instead, he seeks to relitigate the debate about historical and constitutional principles that this Court definitively settled in *Myers* v. *United States*, 272 U.S. 52 (1926), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

Those cases established the principle that Article II empowers the President to hold principal officers in the Executive Branch to account by removing them at will. Amicus proposes to supplant that principle with an amorphous test, seemingly drawn from *Morrison* v. *Olson*, 487 U.S. 654 (1988), that turns on whether a particular restriction on the President's removal power is sufficiently "modest." But the restriction at issue here is not and certainly was not intended to be modest, and amicus's test would allow Congress to limit the President's ability to remove even his closest advisers.

Like the court of appeals, amicus contends that *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), controls the outcome here. But *Humphrey's Executor* is distinguishable because it involved a restriction on the removal of members of a nonpartisan, multimember commission that the Court viewed (whether rightly or wrongly) as exercising no executive power. If the Court nevertheless concludes that the reasoning of *Humphrey's Executor* extends to the CFPB's very different structure,

it should overrule that decision. Amicus urges the Court to adhere to *Humphrey's Executor*, but he makes no serious effort to apply the Court's *stare decisis* framework. The Court should not allow an erroneous and already repudiated decision to stand on a question so fundamental to our constitutional structure.

As a last resort, and in yet another effort to deter the Court from resolving the constitutional question presented, amicus contends that the Court should avoid the question by construing the removal provision broadly to impose only a "permissible degree of restraint." But whatever that means (and even if it were textually possible), such a construction would not solve the constitutional problem, because amicus concedes it would not permit the President to replace the Director with a person of his own choosing.

For its part, the government concedes that the removal restriction is unconstitutional, but it asks the Court simply to sever the restriction from the remainder of Title X of the Dodd-Frank Act. The government offers no valid justification for reaching the severability question given the relief petitioner seeks. The civil investigative demand issued and enforced by an unaccountable director is void, and the only appropriate resolution is to order the denial of the CFPB's petition for enforcement.

Even if this case properly presented the severability question, the government offers only two and a half pages of argument that severance is warranted. But the Dodd-Frank Act's general severability clause cannot bear the weight the government places on it, and the text and legislative history confirm that Congress would not have created the CFPB if the Director were removable at will. The Court should reverse the judgment below and leave to Congress the quintessentially legislative decision of how the CFPB should function going forward.

A. There Is No Obstacle To Reaching The Constitutional Question Presented

1. Amicus contends (Br. 21-24) that a "jurisdictional defect" prevents this Court's review. Amicus does not deign to identify that defect, and none of the possibilities holds water.

a. Is it standing? Although amicus does not use that word, he primarily contends that petitioner suffered no injury traceable to the removal restriction. Traceability, of course, is one of the three elements of the Court's familiar test for standing. See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). But there cannot be a standing problem here because petitioner is the *defendant* in the CFPB's action to enforce its civil investigative demand. As amicus knows full well, Article III standing "ha[s] no bearing" on a defendant's "capacity to assert defenses." *Bond* v. *United States*, 564 U.S. 211, 217 (2011).

Moreover, even if it were somehow relevant here, standing is required only for "each type of relief sought," not for a particular argument made in support of that relief. *Summers* v. *Earth Island Institute*, 555 U.S. 488, 493 (2009); see *INS* v. *Chadha*, 462 U.S. 919, 936 (1983). To the extent petitioner, as defendant, could be said to have been seeking any relief at all, it was (and continues to be) the denial of the CFPB's petition. See *Bond*, 564 U.S. at 217.

In any event, even if it were proper to consider standing on an argument-by-argument basis, petitioner has a traceable injury because any action taken by an unaccountable director was void; in order to raise a constitutional objection, petitioner was not required to show that a hypothetical accountable director would have taken a different action. See Pet. Br. 35-37. And to the extent amicus is challenging "standing to appeal" distinct from

initial Article III standing, the district court's order enforcing the civil investigative demand (and the court of appeals' affirmance of that order) caused petitioner a concrete injury that is redressable by its reversal. See *Bond*, 564 U.S. at 217.

b. Is it mootness? Although amicus does not use that word either, he contends (Br. 22-23) that, even if there were a traceable injury at the start of the lawsuit, such an injury no longer exists because subsequent events "severed" the link between the removal restriction and the injury. But there can be no doubt that there remains a live and concrete dispute between the parties. The CFPB continues to prosecute the action here; petitioner continues to challenge the validity of both the civil investigative demand and the ensuing enforcement action. And any purported intervening ratification by an acting director would at most go to the appropriate remedy for a constitutional violation, not the threshold question of jurisdiction. See pp. 19-20, *infra*.

Nor does the fact that the CFPB has changed position and now agrees with petitioner on the first question presented "eliminate[]" jurisdiction, as amicus suggests (Br. 24). See *United States* v. *Windsor*, 570 U.S. 744, 758 (2013) (explaining that the parties' desire for the same "constitutional ruling" before this Court "does not eliminate the [Article III] injury"). The government not infrequently agrees with a petitioner on a question presented, and when it does, the Court's practice, as here, is to appoint an amicus. See, *e.g.*, *Holguin-Hernandez* v. *United States*, No. 18-7739 (argued Dec. 10, 2019). For mootness purposes, the critical fact is that the CFPB has not withdrawn the petition for enforcement; indeed, even before this Court, the CFPB seeks a different disposition than does petitioner. See Resp. Br. 49.

2. Amicus contends (Br. 24-27) that this Court should await another occasion to resolve the constitutional question presented because of "prudential factors." That contention fares no better.

Amicus seemingly suggests (Br. 25, 27) that the question presented is not "ripe" until a President tries to remove a CFPB director and that director contests the removal. But amicus does not appear to be invoking either constitutional or prudential ripeness (to the extent the latter remains a valid doctrine); instead, he appears to be asking the Court to dismiss the writ of certiorari and to postpone deciding the question presented, for decades if needed, until a contested removal occurs.

Whatever it is, that argument fundamentally misunderstands the nature of a separation-of-powers violation. "The structural principles secured by the separation of powers" not only "protect each branch of government from incursion by the others"; they "protect the individual as well." *Bond*, 564 U.S. at 222. The separation-of-powers problem identified by petitioner is not limited to instances in which a President disregards a removal restriction and attempts to remove an official who refuses to yield; rather, it infects every executive action an unconstitutionally structured agency takes. Where the constitutional structure is "compromised," a private party such as petitioner is entitled to "object." *Id.* at 223. Accordingly, the Court has recognized that "the claims of individuals," not those of government officials, "have been the principal source of judicial decisions concerning separation of powers and checks and balances." *Id.* at 222-223 (citing cases); see, *e.g.*, *Free Enterprise Fund*, 561 U.S. at 487, 491 n.2.

Indeed, the Court has already rejected an argument much like the one urged by amicus. In *Bowsher* v. *Synar*, 478 U.S. 714 (1986), appellants argued that "consideration of the effect of a removal provision is not 'ripe' until that

provision is actually used." *Id.* at 727 n.5. The Court disagreed, explaining that the "Comptroller General's presumed desire to avoid removal by pleasing Congress" creates a "here-and-now" separation-of-powers problem warranting immediate review. *Ibid.* (citation omitted); cf. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982). Here too, the Director's freedom from accountability creates an immediate diminution of the President's constitutional role.

In an apparent effort to skirt that authority, amicus suggests (Br. 27) that the CFPB's current director has conceded that she is removable at will in the absence of court action. That is wrong. The Director has merely taken the legal position that the removal restriction should be invalidated because the Constitution requires that she be removable at will. See Resp. Br. 46. But until this Court acts, the restriction remains in place, and the Director continues to exercise executive power outside the bounds of presidential control. And even if the Director had affirmatively stated that she intends slavishly to follow the President's direction, the Constitution would not allow the President's power to take care that the laws be faithfully executed to turn on the continuing grace of an agency head. This Court correctly granted the petition for certiorari out of a recognition that, even after the CFPB's change in position, the constitutional question presented warrants the Court's immediate consideration.

B. The Structure Of The Consumer Financial Protection Bureau Violates The Separation Of Powers

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

a. When amicus finally turns to the merits, he first contends (Br. 28-32) that, as a matter of constitutional text

and history, the CFPB's structure does not impermissibly restrict the President's removal power. Amicus glibly observes that "[o]ur Constitution has no 'removal clause.'" Br. 28. But he ignores the critical language of Article II itself: specifically, the language vesting "[t]he executive Power" in the "President of the United States of America," Art. II, § 1, cl. 1, who must "take Care that the Laws be faithfully executed," Art. II, § 3. That language governs this case, empowering the President to hold principal officers in the Executive Branch accountable by removing them at will. See Pet. Br. 15-19.

Having glided past the constitutional text, amicus gives short shrift to this Court's precedents that exhaustively canvass the relevant history. Amicus suggests (Br. 28) that the Framers held "heterodox" views on the President's authority to remove executive officers. Since shortly after the Founding, however, it has been the "settled" understanding that Article II empowers the President to remove principal officers. *Free Enterprise Fund*, 561 U.S. at 492; see Separation of Powers Scholars Br. 12-19.

Seeking to reopen the historical debate, amicus points to statements by Alexander Hamilton and Chief Justice Marshall. See Br. 28-29. In *Myers*, however, the Court considered those very statements and appropriately discounted them, noting that both men had subsequently changed their views on the question. See 272 U.S. at 136-139, 141-144. Amicus also seeks to sow doubt about James Madison's views, contending that he believed the Comptroller of the Treasury did not serve at the pleasure of the President. See Br. 31. But the Court also rejected that argument, this time in *Free Enterprise Fund*. Compare 561 U.S. at 500 n.6 (majority opinion) with *id.* at 530 (Breyer, J., dissenting). The Court's extensive analysis in

Myers and *Free Enterprise Fund*—based on a comprehensive survey of Founding-era history—closes the book on any debate about the Founders' views on the President's removal authority.

Amicus identifies various purported restrictions on the President's power over executive officers that have been "recognized" by Congress. See Br. 31-32. Of course, the relevant question here is not what Congress has attempted; it is what the Constitution permits. In any event, nearly all of amicus's examples relate to the President's *appointment* power, where Congress has dictated the "qualifications of certain officers." Br. 30-31. That is a different question. The Constitution gives Congress an explicit role in the process of appointing officers—and the implicit power, through legislation, to create and define executive offices. See Art. II, § 2, cl. 2. But the Constitution does not give Congress a similar role in the process of removal. See *Myers*, 272 U.S. at 115-116, 121-122.

b. Amicus next contends (Br. 33-37) that, under the Court's precedents, Congress is free to impose "modest" restrictions on the President's removal power as long as it does not either inject itself into individual removal decisions or prevent the President from exercising the removal authority altogether. That contention lacks merit.

As an initial matter, amicus assumes that there is a difference in kind between instances in which Congress "play[s] a direct role" in individual removal decisions (by requiring Senate consent, for example), and instances in which Congress prevents the President *ex ante* from removing officers except for certain enumerated causes (as in this case). Br. 33. Once again, the dissent in *Free Enterprise Fund* pressed that very point, but the Court rejected it in striking down a provision that limited the President's power of removal without giving that power to

Congress. Compare 561 U.S. at 514 (majority opinion) with *id.* at 535 (Breyer, J., dissenting).

The Court was right to reject that distinction in *Free Enterprise Fund*, and it should do so again here. As amicus recognizes, both situations "involve[] a congressional effort to prevent the President himself from exercising discretion to remove a principal officer." Br. 33. And an *ex ante* restriction on the President's removal power is arguably even more significant, because it amounts to a *categorical* incursion on the removal power. The case-by-case approach, by contrast, merely permits Congress to play some role in *particular* removal decisions, without constraining the President's authority to make those decisions in the first instance.

More fundamentally, the restriction at issue here, a limitation to removal for cause, is not "modest"—no matter how many times amicus slaps on that label. See, *e.g.*, Br. 1, 11, 34, 36, 41, 47-48. The Court has made clear that, at a minimum, such limitations prohibit removal by the President for a disagreement on policies or priorities, a lack of trust in the officer, or the simple desire to install someone of the President's own choosing. See *Free Enterprise Fund*, 561 U.S. at 487; *Wiener* v. *United States,* 357 U.S. 349, 356 (1958); *Humphrey's Executor*, 295 U.S. at 618-619, 625-626. Yet for "[t]he buck [to] stop[] with the President," that level of control is essential. *Free Enterprise Fund*, 561 U.S. at 493; see *Myers*, 272 U.S. at 134.

Free Enterprise Fund also precludes the possibility that a for-cause removal provision can be sustained as a "modest" restriction on the President's removal power. Amicus suggests (Br. 33-34) that the problem in that case was that the Securities and Exchange Commission (and not the President) had the power to apply the for-cause standard to remove the officers. That misses the point.

As the Court made clear, it was "[t]he added layer of tenure protection" for the officers that made the constitutional "difference," taking the restriction on the President's removal power beyond anything the Court had previously approved. 561 U.S. at 495.

Nor did the Court's decision turn on the precise contours of the for-cause limitation at issue; what mattered instead was that, in the face of a for-cause limitation, a supervising officer is not "fully responsible for what the [agency] does." 561 U.S. at 495. In short, a for-cause removal provision strikes at the heart of a President's constitutional authority to exercise the executive power and to ensure that the laws are faithfully executed. Such a provision cannot seriously be described as "modest."

If accepted, amicus's "modesty" test would have immodest effects. Amicus offers no principled basis why an identical for-cause removal limitation directed at a Cabinet official (or another close adviser) would not pass muster. He notes only that "nearly everyone would agree" that such a restriction would be impermissible. Br. 46 (citation omitted). True enough, but amicus's resort to crowd-sourcing illustrates why his test cannot be right: there is no valid limiting principle that would prevent future novel attempts to restrict the President's removal power. The Court should see amicus's test for what it is—an *ipse dixit* expedient for resolving this case in his favor.

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

With no support in the text, history, or other precedent, amicus seeks refuge in the Court's decision in *Humphrey's Executor*. See Br. 37-47. Leaving aside his odd approach to precedent (where the unanimity of a decision seemingly counts for more than the quality of its

reasoning), *Humphrey's Executor* cannot bear the enormous weight amicus places on it. *Humphrey's Executor* sets out a narrow exception to the general rule that Article II gives the President "exclusive power of removal," *Myers*, 272 U.S. at 122, and amicus offers no valid reason to extend that exception to a single-director agency such as the CFPB.

a. Amicus cannot seriously dispute that the paradigmatic independent agency has a multimember structure. Amicus purports to cite several examples of single-director structures predating *Myers*, but each is inapposite. See Br. 41. As to the Attorney General: the "learned in the law" qualification Congress imposed (and later revoked) is a *hiring criterion* fully consistent with the Appointments Clause. See Art. II, § 2, cl. 2. As to Treasury officials: the provision requiring removal of appointed Treasury officials if they committed "high misdemeanors" (a constitutionally permissible basis for Congress to impeach and remove executive officers, see Art. II, § 4), did not constrain the President's ability to remove those officials at will. See Act of Sept. 2, 1789, ch. 12, §§ 7-8, 1 Stat. 67. And as to the Comptroller of the Currency specifically: the removal provision the Civil War Congress enacted merely created a procedural requirement that the President "communicate[]" his reasons for removal to the Senate, without placing any limit on what reasons would suffice. See Act of June 3, 1864, ch. 106, § 1, 13 Stat. 100. The Comptroller thus was, and is, "removable at will by the President"—"[f]ull stop." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 177 n.4 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Once the underbrush is cleared away, amicus is left only with the familiar three other examples of single-director independent agencies: the Office of Special Counsel, the Social Security Administration, and the Federal

Housing Finance Agency. See Br. 41-42. As petitioner has already explained (Br. 23-24), those examples are controversial in themselves, and they are too isolated and recent to shore up the constitutionality of the CFPB.

b. In support of his effort to extend *Humphrey's Executor* to single-director structures, amicus cites *Wiener* and *Morrison*. See Br. 35-36. But those cases provide no basis for such an extension. *Wiener* is inapposite because the Court upheld the provision at issue—a limitation on removal of commissioners of the multimember War Claims Commission—on the ground that the Commission was an "adjudicatory body." 357 U.S. at 355-356; see *Free Enterprise Fund*, 561 U.S. at 507 n.10.

For its part, *Morrison* is inapposite because it involved not only an officer with far narrower jurisdiction than the CFPB Director, see Pet. Br. 21, but an *inferior* officer. While amicus would have the Court disregard that aspect of *Morrison*, see Br. 43-44, the distinction between principal and inferior officers matters in the context of the removal power. Only with respect to inferior officers may Congress vest appointments in the heads of departments rather than the President; when Congress does so (as in *Morrison*), it may also "limit and restrict" the "power of removal." *Free Enterprise Fund*, 561 U.S. at 493-494 (quoting *United States* v. *Perkins*, 116 U.S. 483, 485 (1886)).

c. Amicus next contends (Br. 40-42) that the CFPB's novel single-director structure is actually better from a separation-of-powers perspective than the multimember structure addressed in *Humphrey's Executor*, on the theory that a removal restriction on one official is preferable to restrictions on several. That creative contention disregards the acute peril of concentrating executive power in a single, unaccountable officer who is unimpeded by the need to engage in deliberative decisionmaking. See *PHH*,

881 F.3d at 183-188 (Kavanaugh, J., dissenting). As amicus correctly notes, multimember independent agencies are less efficient at "executing [the laws]" than single-director agencies such as the CFPB. Br. 45; see Current and Former Members of Congress Br. 18-19. But that is a virtue, not a vice, in a constitutional system that vests the power to execute the laws not in those agencies, but in the President.

In a related vein, amicus observes (Br. 45-46) that there are potential impediments to presidential control in the context of multimember commissions. For example, he notes that a chair selected by the President may not always vote in the majority and that party-balance requirements virtually guarantee that some members will disagree with the President. But that cannot possibly be worse than the single director of the CFPB, who exercises vast executive power and whom the President cannot direct unless the Director's and the President's terms happen to coincide. See Pet. Br. 29.

In the end, amicus goes so far as to suggest that the distinction between single-director and multimember structures cannot hold because "assigning executive powers to multimember agencies frustrates" "the President's ability to hold[] his subordinates accountable." Br. 45 (internal quotation marks and citation omitted). But if the Court were to agree with amicus that there is an accountability problem with multimember as well as single-director independent agencies, that would merely tee up the question whether *Humphrey's Executor* should be overruled.

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

If the Court concludes that *Humphrey's Executor* controls here, it should overrule it. Describing it with unwitting irony as "the cornerstone of the constitutionality of roughly a third of our modern federal government," Br. 47; cf. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (describing independent agencies as "a veritable fourth branch of the Government, which has deranged our three-branch legal theories"), amicus urges the Court to adhere to *Humphrey's Executor*. See Br. 47-50. Yet he neither defends its reasoning nor makes any serious effort to argue that the Court's *stare decisis* framework mandates its retention.

a. Amicus seemingly recognizes (Br. 35-36, 38, 44) that the Court has long since distanced itself from the reasoning of *Humphrey's Executor*. See, *e.g.*, *Morrison*, 487 U.S. at 689, 690 n.28; *id.* at 725 (Scalia, J., dissenting). Perhaps recognizing that *Humphrey's Executor* is a house built on sand, amicus contends (Br. 47) that overruling it would necessarily require the Court also to overrule *Wiener* or *Morrison*, but that is not so: those cases are distinguishable from this one and can be sustained on independent grounds. See p. 13, *supra*.

b. Without any defense of its reasoning, amicus is left to ask the Court to uphold the shell of *Humphrey's Executor* in the name of *stare decisis*. His arguments lack merit.

Amicus does not seriously engage with the historical evidence showing *Humphrey's Executor* to be one in a line of decisions resisting President Roosevelt's New Deal policies. See Pet. Br. 31-32; *Morrison*, 487 U.S. at 724 (Scalia, J., dissenting). Instead, amicus merely points out that *Humphrey's Executor* was unanimous. See Br. 47. Yet this Court has never stopped short of overruling a

precedent simply because of the number of Justices who voted in its favor. See, *e.g.*, *Hudson* v. *United States*, 522 U.S. 93 (1997) (overruling *United States* v. *Halper*, 490 U.S. 435 (1989)). The Court should not hesitate to do the same here, where the decision at issue itself departed from better-reasoned precedent and badly distorts a core precept of the constitutional structure.

Amicus contends that *Humphrey's Executor* "provide[s] a perfectly workable standard." Br. 49. But the standard he proposes—that Congress may impose "modest" restrictions on the President's removal authority—is not drawn from *Humphrey's Executor* at all; it is one of his own making. Amicus is not alone in abandoning the *Humphrey's Executor* standard; even before *Morrison*, the Court had distanced itself from it. See Pet. Br. 33-34. The fact that *Humphrey's Executor* stands alone—a derelict on the waters of the law—only underscores the need to overrule it once and for all.

Finally on this score, amicus contends that reliance interests are at their "zenith" because *Humphrey's Executor* is the "cornerstone" of the modern administrative state that Congress has since created. Br. 47-49; see House Br. 32. But amicus cites no case in which the Court has credited *congressional* reliance interests—much less in the context of the separation of powers where the whole issue is whether Congress may validly impose a limitation on another branch in the first place. To the contrary, the Court has explained that the fact a "legislative act[]" was based on the assumption it was constitutional is "not a compelling interest for *stare decisis*," or else Congress "could prevent [the Court] from overruling [its] own precedents." *Citizens United* v. *FEC*, 558 U.S. 310, 365 (2010).

At bottom, *Humphrey's Executor* is an aberrant decision that has been living on borrowed time. In the grand sweep of our Nation's history, *Humphrey's Executor* is of

comparatively recent vintage. And an erroneous decision that strikes at the very heart of the separation of powers should not be enshrined in law in perpetuity. The Court should not hesitate to overrule *Humphrey's Executor* if it concludes that doing so is necessary in order to resolve the constitutional question presented.

4. The Removal Provision At Issue Here Cannot Be Construed To Avoid The Constitutional Question

In a final effort to deter the Court from reaching the question he was appointed to address, amicus asks the Court to construe the removal provision at issue here narrowly so as to avoid any constitutional concern. See Br. 50-53; *PHH*, 881 F.3d at 130-134 (Griffith, J., concurring). But there is no "fairly possible" construction "by which the question may be avoided." *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).

Amicus contends that the language of the removal provision "can be interpreted to impose only a permissible degree of restraint." Br. 51. Whatever that means, it cannot be correct. The plain text of the removal provision contemplates only "[r]emoval for cause" and limits those causes to "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). *Humphrey's Executor*—on which amicus lavishes affection in every other respect—deemed materially identical language "unambiguous" and rejected more expansive interpretations. See 295 U.S. at 623-625. To the extent amicus relies on *Shurtleff* v. *United States*, 189 U.S. 311 (1903), the Court there broadly construed similar language simply because the statute contained no term limit—as the Court explained in *Humphrey's Executor* itself. See *Humphrey's Executor*, 295 U.S. at 621-623. And to the extent amicus relies on *Bowsher*, the Court hardly gave the removal provision there a "saving construction" (or any construction at all),

Br. 52; instead, it merely recognized that the provision gave Congress *some* ability to control an executive officer, and that *any* ability by Congress to control such an officer was constitutionally excessive. See 478 U.S. at 729-730.

In any event, whatever the exact contours of the removal provision at issue here, amicus concedes (Br. 35-36) that it cannot be construed to permit the President to remove the Director at will. The Court has already rejected such expansive interpretations of materially identical language, not just in *Humphrey's Executor* but elsewhere. See p. 10, *supra*. Yet in petitioner's view, that is what the Constitution would require—that the President be able to hold principal officers accountable by removing them based on a disagreement on policies or priorities, a lack of trust in the officer, or the simple desire to install someone of the President's own choosing. There is no available construction that would moot that question.

Finally on this issue, even if a constitutionally permissible construction were available, adopting it would not be a judicially modest course—as amicus seems to assume. Such a construction would be so "capacious" that it would effectively render the Director subject to substantial if not complete presidential control. See *PHH*, 881 F.3d at 123 (Wilkins, J., concurring); Lederman Br. 14 n.6. That would defang not only the removal provision at issue here, but also the many materially identical provisions that govern the removal of members of multimember commissions—a result that would be as significant as overruling *Humphrey's Executor* outright. Instead, the truly modest course is to distinguish *Humphrey's Executor*, reverse the court of appeals' judgment, and go no further.

C. The Court Should Reverse The Judgment Below And, If It Reaches The Question Of Severability, Invalidate Title X Of The Dodd-Frank Act

The government agrees with petitioner that the removal provision is unconstitutional, but it disagrees on the appropriate remedy. The Court should reverse the court of appeals' judgment and decline to reach the question of severability. But if it does reach that question, it should invalidate Title X of the Dodd-Frank Act in its entirety.

1. With regard to the CFPB's petition for enforcement itself, the government asks the Court to vacate the judgment below and remand for further proceedings. See Br. 49. Remarkably, the government offers no reason in its opening brief why vacatur, rather than reversal, would be the appropriate relief. As petitioner has explained (Br. 35-37), the impermissible restriction on the President's removal power voids the CFPB's executive actions in issuing and attempting to enforce the civil investigative demand, and petitioner is "entitled to relief." *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 (2018). The proper remedy is thus to reverse the court of appeals' judgment, which would have the effect of denying the CFPB's petition.

In support of his argument that this Court lacks jurisdiction, court-appointed amicus points to the purported ratification by an acting director. See Br. 23. That has nothing to do with jurisdiction, see p. 5, *supra*, but it also has no bearing on the appropriate remedy here. In its opening brief, the government does not invoke ratification in support of its proposed remedy, nor does it suggest that the issue of ratification would remain open on remand. See Br. 46-48. That is prudent, both because any alleged ratification cannot cure the constitutional defect in the CFPB's structure as a matter of law, see *CFPB* v. *RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784-785 (S.D.N.Y. 2018), appeal pending, No. 18-2743 (2d Cir.), and because

the CFPB offered no evidence in this case that ratification had in fact occurred, see Resp. C.A. Br. 9-10, 13, 19.

2. Once the Court orders the denial of the CFPB's petition for enforcement, it need not and should not address the question of severability. The disposition of the enforcement petition conclusively resolves the dispute between the parties, and even assuming that the Court has the Article III power to do so, reaching the severability question leaves the Court with no good option. See Pet. Br. 37-41. Indeed, even an amicus who supports affirmance recognizes that "the [C]ourt need not and probably should not address severability" where a "claim for relief d[oes] not rely on [it]." Harrison Br. 12 n.4. This is precisely such a case. Tellingly, in every case cited by the government in which the Court addressed a severability question, doing so was necessary to determine the scope of the requested relief. See Br. 46-48.

While some amici contend that the Court should address severability, their reasoning turns on the mistaken premise that deeming the removal provision severable would validate the civil investigative demand at issue here. See, *e.g.*, Harrison Br. 11-12. That is incorrect because the demand, issued and enforced by a Director operating without the requisite accountability to the President, constituted an invalid exercise of executive power. Severability is therefore relevant only to whether the Director can issue a *future* civil investigative demand—a question beyond the scope of this case.

3. The government offers a mere two and a half pages of argument on the severability question. See Br. 46-48. That argument—such as it is—rests primarily on the Dodd-Frank Act's general severability clause. See 12 U.S.C. 5302. But the government does not dispute that a severability clause merely creates a presumption that

Congress would prefer the statute without the invalid provision to no statute at all. Here, the general severability clause indicates that Congress did not intend for the *entire* Act to fall if any single provision were invalidated. But petitioner is contending only that the removal restriction is not severable from *one title* of the Act. There is no sound reason to treat a boilerplate severability clause in an 848-page omnibus act as a considered judgment by Congress that every single provision is severable from every single other provision—especially where Congress included a more specific severability clause in another title but not in Title X (even if that clause originated in a separate bill). See 15 U.S.C. 8232.

The government observes (Br. 48) that Congress created the CFPB for the purpose of remedying the previously fragmented regulatory structure that would be restored if the removal provision is not severable. That is true as far as it goes—but it does not go very far. As some of the CFPB's congressional proponents have confirmed, "severing the provision that ma[kes] [the] Director removable only for cause" would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." See Members of Congress Br. at 2, *PHH*, *supra* (filed Nov. 29, 2016) (No. 15-1177). Independence from the political process was central to the CFPB's design, and it is hard to believe that Congress would have given up its appropriations power if it had known that future presidents could exercise control over the CFPB. See Pet. Br. 42-45. To the extent the Court believes that the question is a close one—or that Congress would have preferred another option, such as a multimember structure—it should decline to address severability, allowing Congress to decide how to remedy the constitutional defect in the CFPB's structure in the first instance.

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The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2020