NO. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF OF HAROLD H. BRUFF, JESSICA BULMAN-POZEN, JERRY L. MASHAW, GILLIAN METZGER, ANNE JOSEPH O'CONNELL, PETER M. SHANE, PETER L. STRAUSS, AND PAUL R. VERKUIL AS *AMICI CURIAE* IN SUPPORT OF COURT-APPOINTED *AMICUS CURIAE*, IN SUPPORT OF THE JUDGMENT BELOW

GILLIAN E. METZGER
Center for Constitutional Governance
Columbia Law School
435 West 116th Street
New York, NY 10027

PETER M. SHANE
The Ohio State University
Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210

LATIF M. NURANI *
JEFFREY M. BAYNE
**Counsel of Record*
Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000
latif.nurani@spiegelmcd.com

Counsel for Amici Curiae

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INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are professors of constitutional and administrative law who teach, research, and write in the area of separation of powers. *Amici* have an interest in ensuring that the Court's doctrine regarding presidential removal authority accords with the separation of powers principles found in the Constitution. *Amici* believe that their expertise would be of use to this Court in addressing the scope of presidential removal power and the importance of adhering to the Court's well-established case law in this area.

SUMMARY OF THE ARGUMENT

Created in 2010 as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, the Consumer Financial Protection Bureau (CFPB) is led by a single Director who is removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3). This structure of a single Director subject to for-cause removal is a constitutional exercise of Congress's power to structure the federal government and does not trench on the President's constitutional authority.

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[1] A list of *amici curiae* is provided in the Appendix. All parties have filed written blanket consent for the filing of *amicus* briefs. Pursuant to Rule 37.6, counsel for the *amici* certify that no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

I. The Constitution says very little about the structure of the federal government, and what it does say is compatible with for-cause removal restrictions for executive officers. Not only does the Constitution make no mention of removal, it also grants Congress broad power to structure the federal government as it believes "necessary and proper." The founding generation likely would not have understood the vesting of the executive power in the President to include unlimited removal authority, as such authority did not inhere in the executive power either as wielded by the King of England or as embodied in state constitutions. In addition, for-cause removal protections allow the President to ensure the lawful, diligent, and good-faith execution of the laws, and thus satisfy the President's obligation to "take Care that the Laws are faithfully executed" for most officials. U.S. Const., Art. II, § 3. And the Necessary and Proper Clause suggests that the Framers intended Congress to create offices and determine their tenure, as Parliament did in England.

For-cause removal protections, especially for financial regulators, also accord with historical practice. The First Congress's debate over the removal power in creating the initial departments of the federal government demonstrates the founding generation's uncertainty over the scope of presidential removal authority. Congress structured the Treasury Department in ways that would allow it some independence in operation, and debates over the removability of the Treasury Secretary and the Comptroller of the Currency were particularly contested. Further indicating its view that financial functions performed for the government should be insulated, Congress included members not subject to

presidential removal on a commission charged with purchasing the government's debt, and entrusted key financial stability tasks to a bank over which the President had very limited control. States also insulated financial regulators and soon developed the "inefficiency, neglect of office, and malfeasance" removal language for financial officials, among others. Congress drew on this state practice in creating independent regulatory agencies later in the nineteenth century and used this same language in creating the CFPB.

II. Eighty-five years ago, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), held that Congress may restrict the President's power to remove (at least some) principal officers. Since then, this Court has repeatedly upheld standard for-cause removal limits in a variety of contexts and established that the constitutionality of removal protections turns on their impact on the President's ability to perform constitutional functions. This Court applied that inquiry just ten years ago, striking down a removal arrangement with two levels of for-cause protection but upholding the statute at issue after excising one layer, leaving simply the same standard for-cause removal protection for principal officers at issue here. This long line of precedent has developed coherently over time and is fully compatible with the Constitution and historical practice. Overturning this jurisprudence would be fundamentally at odds with the basic principle of *stare decisis*.

III. Applying this Court's established analysis, under which the constitutionality of a removal provision turns particularly on its impact on the President's ability to take care that the laws be

faithfully executed, the removal protection for the CFPB Director is constitutional. This is the same removal protection that this Court has long upheld for other independent agencies performing similar financial regulatory functions, and the CFPB's single Director structure does not change the outcome here.

ARGUMENT

I. FOR-CAUSE REMOVAL PROVISIONS ARE CONSISTENT WITH THE CONSTITUTION AND DEEPLY ENTRENCHED IN HISTORICAL PRACTICE, ESPECIALLY FOR FINANCIAL OFFICIALS.

A. For-cause limits on presidential removal accord with the Constitution's text, structure, and original public meaning.

1. Article II indisputably vests "[t]he executive Power" in a single individual, the President. U.S. Const., Art. II, § 1. What this unitary executive structure entails for the scope of presidential authority over administration of the laws, however, is far from clear. The constitutional text provides few details on the shape of administrative government. Respecting "executive Departments," the Constitution is specific only in setting forth how principal and inferior officers may be appointed and in authorizing the President to obtain written opinions from principal officers "upon any Subject relating to the Duties of their respective Offices." *Id.* § 2. The Constitution obligates the President to "take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States," *id.* § 3, but does not further define the scope of the "Take Care" duty.

In almost all other respects, determining the structure and decisional mechanisms of administrative government falls within Congress's authority "to make all Laws which shall be necessary and proper for carrying into Execution the ... Powers [vested in Congress by Article I], and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." U.S. Const., Art. I, § 8. "The text of the Necessary and Proper Clause .... delegates to Congress broad and explicit (though not limitless) discretion to compose the government" and "requires deference to Congress's reasonable judgments about how to implement" constitutionally vested powers. John F. Manning, *The Supreme Court 2013 Term: Foreword: The Means of Constitutional Power*, 128 Harv. L. Rev. 1, 6, 53 (2014).

2. Importantly, the Constitution makes no explicit reference to the removal of officers (aside from impeachment, U.S. Const., Art. II, § 4). And Article II's text weighs heavily against the claim that the Constitution implicitly gives the President unlimited removal power over executive officers. In particular, the Opinions Clause recognizes that Congress may place duties in Heads of Departments and grants the President only the specific and limited power to request opinions on how these officers plan to perform their tasks. That specification is irreconcilable with the proposition that the Constitution grants the President unlimited authority over executive branch officials. See *id.* § 2; see also Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 32-38, 72 (1994). Further, the Appointments Clause expressly authorizes Congress to vest appointment of inferior officers in the "Courts of Law

or in the Heads of Department" instead of in the President and guarantees the President only power to appoint principal officers subject to Senate confirmation. U.S. Const., Art. II, § 2.

Because Article II is silent on non-impeachment removal, advocates of unlimited presidential removal power root their arguments primarily in Article II's Vesting and Take Care Clauses. They maintain that such a removal power over principal officers is part of the executive power and functionally necessary if the President is to ensure faithful execution of the laws. See, e.g., Pet. Br. at 10; Resp. Br. at 7. Neither clause can support such a reading.

3. To begin with, if the vesting of the executive power in the President included an unlimited removal power, that power would not be limited to principal officers. This argument thus amounts to the implausible and radical claim that by virtue of the executive power the President can remove any federal officer or employee at will. Michael W. McConnell, *The President Who Would Not Be King* (Jan. 20, 2020) (Princeton University Press forthcoming) (on file with author). This Court has long rejected that suggestion. See *Ex parte Hennen*, 38 U.S. 230, 260 (1839) (stating that "the President has certainly no power to remove" an inferior officer appointed by a head of department).

In addition, contrary to the unsupported dictum of Chief Justice (and former President) Taft in *Myers v. United States*, 272 U.S. 52, 118, (1926), an unlimited power of removal was unlikely to have been thought within the executive power prerogative of the Crown or an "inherent attribute of the 'executive power' as it was understood or practiced in

England." Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive* 5 (2019), https://ssrn.com/abstract=3428737.[2] English law appears to have regarded legislative control over removal terms as compatible with the King's possession of the executive power. Often Parliament expanded the range of officials serving for specified terms or at the King's pleasure, but Parliament could limit removability as well. Just a few years before adoption of the U.S. Constitution, Parliament created a number of commissions with extensive powers to audit, investigate, and bind executive departments, yet denied the King removal power. See Birk, *supra*, at 34-39 (prison officials would hold office so long as they "shall behave … well") (quoting 1754, 27 Geo. 2 c. 17, §§ 5, 7); Jane Manners & Lev Menand, *Faithful Administration and the Limits of Agency Independence* 40-41 (Jan. 12, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520377 (discussing early British experimentation).

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[2] The meaning of "executive power" has long been contested. A recent searching historical inquiry maintains that the phrase "executive power" in English law was not "a term of art for the basket of nonstatutory powers held by the British Crown," but rather "one specific item in a very long list of royal authorities" and prerogatives: "the power to execute the law." Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1173 (2019). Presumably, this power would not include violating the removal protections that the law contains. Another recent account argues that "executive power" in the Vesting Clause "comprises all unassigned national power that is neither legislative nor judicial in nature," but insists that exercises of such residual executive authority are defeasible by Congress. McConnell, *supra*, at 204-09. Strikingly, under either interpretation, the vesting of executive power would not convey to the President a power of removal beyond Congress's power to regulate.

Although many officers in eighteenth century English government were removable at the King's pleasure, 1 William Blackstone, *Commentaries on the Laws of England* *324 (1765), others who exercised significant regulatory and law enforcement authority "held their offices in fee simple, for life, or during good behavior." Birk, *supra*, at 40-41.[3] This included local officials acting on behalf of the Crown as well as central officials, such as "officers of the Exchequer and the Chancery, the first 'two great departments of state.'" *Id.* at 21-22 (quoting J.H. Baker, *An Introduction to English Legal History* 12 (4th ed. 2007)). And while the King's removal power was viewed as unconstrained with respect to the "Great Officers of State" such as the Chancellor and Treasurer, as well as for members of the Privy Council and royal advisors, these officers were understood to be, "effectively, extensions of the king himself" and exercised royal power in his stead. Birk, *supra*, at 6, 43. They were thus akin to that subset of principal officers, such as "the Secretaries of Defense and State … who have open-ended and sweeping portfolios to assist with the President's core constitutional responsibilities." *PHH Corp. v. CFPB*, 881 F.3d 75, 107 (D.C. Cir. 2018) (en banc). For ordinary administrators, in contrast, removability was established by legislation and was not clearly a manifestation of prerogative.

4. Although the meaning of the Take Care Clause is much disputed, see Manning, *supra*, at 45

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[3] As this suggests, a "grant of an office from the king was treated as a property right" when accompanied by provision for tenure, "and thus, even the king could not legally remove an officer with tenure absent a breach of the conditions of the grant." Birk, *supra*, at 21.

n.268, it does not appear in the section of Article II that defines presidential power, and the founding generation would likely have understood it as a source of presidential duty rather than authority. See Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2128 (2019). Far from being unique to the President, the Clause (and its Article II twin, the presidential oath) emerged from a long history of officer oaths that were required of far less significant officers in England, the colonies, and the newly independent states, where "faithful execution" was associated above all with a fiduciary obligation to obey the law and pursue "true, honest, diligent, due, skillful, careful, good faith and impartial" execution. *Id.* at 2118, 2141-78.

The Take Care Clause, like the Opinions Clause, is often thought to imply some supervisory role for the President over administration. See *id.* at 2126; Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 Yale L.J. 1836, 1875-86 (2015). But given that these faithful execution oaths long coexisted with the removal limits detailed above, that supervisory duty would not have been thought to entail an illimitable power of removal. Indeed, it is hard to derive an illimitable presidential removal power from the Take Care Clause unless faithful execution is read as requiring complete conformity by all executive branch officers with presidential discretion. Yet such a reading is at odds with the historical evidence of faithful execution's more limited meaning, except for those offices connected to the President's core constitutional responsibilities over which the President exercises "his own discretion." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803). For most officers, the Clause

would appear satisfied by a removal power sufficient to ensure adherence to law and honest, diligent, and good faith performance.

5. Further evidence against the claim that Article II accorded the President unlimited removal power comes from state constitutions, whether adopted before or after 1787, that were roughly contemporaneous with the federal text.[4] Vesting and Take Care Clause equivalents were prevalent in these constitutions, which also fractured gubernatorial control over state bureaucracies and provided state legislatures (among others) with appointment powers. Although these state constitutions said less on removal, some additionally gave the legislature a role in the removal of specific officers. Only two granted a general removal power to the governor, and that power was limited. For example, Maryland provided that the governor could remove "any civil officer" but only if not commissioned "during good behavior." Md. Const. 1776, Art. XLVIII; Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 18 U. Pa. J. Const. L. 323, 338-41, 343 n.66 (2016).

Granted, the presence of fractured executive branches differentiates state governmental structures from the federal context. Nonetheless, this evidence suggests that late eighteenth century Americans did not regard legislative control of removal terms as incompatible with either the vesting of executive power in a chief executive or the take care duty. Rather, policy debates regarding

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[4] Notably, this Court has treated early state constitutions as probative of the Constitution's original meaning even if not worded identically to the federal Constitution. See, e.g., *District of Columbia v. Heller*, 554 U.S. 570, 600-01 (2008).

tenure terms for most civil government officers were deemed appropriate for legislative resolution. As an example, in 1776 and 1778, Thomas Jefferson proposed legislation that would create state offices that would be held during good behavior. See 1 *The Papers of Thomas Jefferson 1760-76*, at 654-55 (Julian P. Boyd ed., 1950) (auditor general); see also 2 *The Papers of Thomas Jefferson 1777-79*, at 139-54 (Julian P. Boyd ed., 1950) (land office).

6. Reading Article II as conveying unlimited presidential removal authority also stands in tension with the Framers' decision to leave to Congress most of the power to design the federal executive branch. This decision to leave open most questions about the structure of the federal government was no accident. The Convention specifically rejected a plan to delineate in the Constitution the roles of specific executive departments. See 2 *The Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries). Treating agency design authority as comprised within the Necessary and Proper Clause was a plain recognition that, aside from methods of appointment, the design of the new government's administrative apparatus might vary over time and with the missions assigned to the departments.

Against the background of Parliament's ability to impose conditions on removal alongside creation of offices, the Necessary and Proper Clause's grant of design authority likely would be similarly read. Indeed, none other than James Madison wrote that under the proposed new Constitution, "[t]he tenure of the ministerial offices generally, will be a subject of legal regulation, conformably to the reason of the

case and the example of the State constitutions." The Federalist No. 39; McConnell, *supra*, at 208. As important, the Clause "requires deference to Congress's reasonable judgments about how to implement" constitutionally vested powers. Manning, *supra*, at 53. This, of course, does not mean that Congress may structure government in ways that violate the Constitution. But it does suggest that in cases of interpretive uncertainty—as surely exists with respect to removal—reasonable congressional determinations should be respected.

B. Longstanding historical practice accords with limits on presidential removal of important executive officials, especially financial regulators.

This Court has underscored the importance of longstanding historical practice in illuminating the meaning of the Constitution's separation of powers provisions. *NLRB v. Noel Canning*, 573 U.S. 513, 524-26 (2014). Tellingly, from nearly the beginning of the United States, Congresses have created financial regulators shielded from presidential direction, including both multi-member institutions and offices run by single Directors. In adopting for-cause removal protections, Congress also drew on a long history of removal limits in the states.

1. Early Congresses created financial institutions and officers with significant discretion and over which the President had little, if any, removal power.

1. In 1789, the First Congress created the first three departments of government: Foreign Affairs, War, and Treasury. An extended debate occurred

over whether the bill creating the Department of Foreign Affairs should specify that the Secretary of State was removable by the President. Underlying this debate was disagreement over how the Constitution treated removal, specifically whether it granted the power to remove to the President alone, required Senate consent, authorized Congress to vest removal in the President, or allowed removal only via impeachment. See Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1023 (2006). Ultimately, all three bills referred only obliquely to presidential removal, a result read by some as the First Congress endorsing the view of an illimitable presidential removal power. See Brief for Separation of Powers Scholars as *Amici Curiae* in Support of Petitioner at 12-19. Others dispute this conclusion, contending that "a close reading of the legislative history by prominent legal historians" shows "the House was divided … with roughly equal numbers believing that (a) the President had illimitable removal power; (b) Congress should get to determine the contours of the power to remove federal officers; and (c) the Senate must give advice and consent to the removal of officers appointed with advice and consent." Manning, *supra*, at 46 n.271 (citing David P. Currie, *The Constitution in Congress: The Federalist Period*, *1789–1801*, at 40-41 (1997); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 361 (1927)).

The mere fact of such an extended debate suggests that "even to the most informed of the founding generation, the removal question was

unsettled." Manning, *supra*, at 46 n.271.[5] As important, participants in the debates appeared to distinguish among the different officials involved, with the decision about presidential removal of the Secretary of Treasury proving the most contentious. Prakash, *supra*, at 1064-65. Indeed, focusing simply on the removal language ignores the fact that Congress affirmatively differentiated the Treasury Department from the other original departments in ways that significantly curtailed presidential control and augmented Congress's role. Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 40-42 (2012).

2. The distinctions Congress drew with respect to different executive officers are further evident with respect to the Comptroller of the Currency. The Office of the Comptroller was created within the Treasury Department by the same Act that referred to the Treasury Secretary as removable, Act of Sept. 2, 1789, ch. 12, § 7, 1 Stat. 65, 67, but that Act is silent on the removability of the Comptroller. Debate over the Act revealed different opinions as to the Comptroller's relationship to the President. Although Madison assumed presidential removability despite his own belief that the Comptroller's functions were

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[5] Indeed, as well-informed a founding generation reader as Alexander Hamilton initially read the Appointments Clause as requiring Senate consent to the presidential discharge of any Senate-confirmed officer, informing readers of the Federalist that "one of the advantages to be expected from the co-operation of the Senate, in the business of appointments" was that "[t]he consent of that body would be necessary to displace as well as to appoint," leading to stability in administration notwithstanding a change in the Presidency. The Federalist No. 77 (Alexander Hamilton).

"not purely of an executive nature," 1 *Annals of Cong.* 635 (1789) (Joseph Gales & William W. Seaton eds., 1834-56), Representative William Loughton Smith of South Carolina "approved the idea of having the Comptroller appointed for a limited time, but thought during that time he ought to be independent of the Executive, in order that he might not be influenced by that branch of the Government in his decisions," *id.* at 637. Even supporters of broad presidential removal authority acknowledge that the treatment of the Comptroller "suggests that the Decision of 1789 did not encompass the conclusion that the President had the power to remove all officers of the United States lacking constitutionally granted tenure." Prakash, *supra*, at 1071.

Apart from the issue of removal, Congress gave the Comptroller significant authority and independence. Initially authorizing the Comptroller to superintend accounts and countersign warrants drawn by the Secretary of the Treasury, Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 65, 66, Congress subsequently also gave it power "to institute suit for the recovery of" a "sum or balance reported to be due to the United States, upon the adjustment of [a tax officer's] account." Act of Mar. 3, 1797, ch. 20, § 1, 1 Stat. 512, 512. In addition, the Comptroller was one of the first officials in the United States given federal prosecutorial authority. Charles Tiefer, *The Constitutionality of Independent Officers as Check on Abuses of Executive Power*, 63 B.U. L. Rev. 59, 74 (1983). Over time, Congress continued to expand the Comptroller's responsibilities and tenure, experimenting with different types of removal protection. Brief for Court-Appointed *Amicus Curiae* in Support of Judgment Below ("*Amicus* Br.") at 6.

3. Equally telling are decisions by early Congresses to create institutions insulated from presidential removal power which were authorized to perform fiscal, regulatory, and monetary supply tasks for the federal government. One such agency was the Sinking Fund Commission, "proposed by Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington." Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies* 3 (2019), https://ssrn.com/abstract=3458182. In the Sinking Fund Act of Aug. 12, 1790, ch. 47, 1 Stat. 186, "Congress authorized open market purchases of debt, in the form of U.S. securities, 'under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General.'" Chabot, *supra*, at 3 (quoting the Sinking Fund Act at 186). Of the five Commission members, two—the President of the Senate (that is, the Vice President) and the Chief Justice—were not removable by the President at all. Indeed, prior to ratification of the Twelfth Amendment in 1804, there was no guarantee that the Vice President would even be of the same party as the President or of the three cabinet members serving ex officio. The Act required presidential agreement to such purchases of U.S. debt as the Commission might approve, but gave the President no power to initiate the purchase of debt except at the Commission's initiative. *Id*. at 4. One would expect the members of the First Congress who voted to create the Commission, as well as President Washington who signed the act into law, "to have a clear grasp on the original public meaning of the Constitution." *Id*.

Likewise, Congress structured the First Bank of the United States in such a manner that the President's authority—and indeed, the authority of the government over the Bank at all—was explicitly limited. The Bank's operating policies were left to the Bank's Directors who, in turn, were selected by shareholder vote. The United States was allowed to subscribe to no more than a fifth of the Bank's stock and thus would necessarily be a minority shareholder. When the Bank was re-chartered in 1816, the United States' minority status was cemented: the President was to appoint five Directors, not even enough for a quorum. Private shareholders chose the remaining twenty. Act of Feb. 25, 1791, ch. 10, §§ 4, 11, 1 Stat. 191, 192-93, 194-95. Neither version of the Bank statute included a provision for the President or the Secretary of the Treasury to direct the Bank in its operations. Yet although the constitutionality of the First Bank was hotly debated, no one objected to its creation on the grounds of separation of powers or the lack of presidential control, nor did Andrew Jackson some forty years later when he sent an 8,000-word message to Congress accompanying his veto of a bill to re-charter the Bank. Veto Message from Pres. Jackson Regarding the Bank of the United States (July 10, 1832), *in* 3 *A Compilation of the Messages and Papers of the Presidents* 1139 (1897).

The Bank might be thought irrelevant to presidential removal powers over executive officers because it was private and engaged in market activities. Of course, if viewed as a private entity, the Bank is a prime example of how the grant of the executive power did not vest control in the President over all administrative functions done for the federal government. In addition, "[t]he distinction we

perceive today between public and private entities was not developed during the colonial and early federal periods." Geoffrey Miller, *The Constitution as a Corporate Charter*, *in* Gary Lawson et al., *The Origins of the Necessary and Proper Clause* 146 (2010). Moreover, "the Bank had close links with the federal government …. [and] the states were prohibited from taxing the Bank. Given these factors, the Bank arguably would have been a government entity." Walter Dellinger & H. Jefferson Powell, *The Constitutionality of the Bank Bill: The Attorney General's First Constitutional Law Opinions*, 44 Duke L.J. 110, 131 (1994) (citations omitted).

2. Congress drew on similar state historical practice in developing standard removal protections for federal officers.

1. In short, that the United States' financial institutions and regulators would be insulated from direct presidential control seems to have been accepted by the nation's founders and early political figures. State constitutions likewise confirm a late eighteenth century view that significant independence with respect to the governance of state finance was compatible with the vesting of executive power in a governor. Almost all states that drafted constitutions around the time of the federal Constitution excluded the state's treasurer from close gubernatorial supervision and made the treasurer subject to legislative control. Shane, *supra*, at 338-39 (quoting provisions). Although many states had more fragmented executives in general, this singling out of state treasurers for legislative appointment suggests their identification of financial officers as performing more legislative functions.

2. The connection between state and federal approaches to removal grew even closer over the nineteenth century. Today's for-cause removal language emerged from state efforts in the early decades of the nineteenth century to develop removal provisions that would protect the public against official misconduct while also providing officers with some insulation against political pressure. Manners & Menand, *supra*, at 8.

Drawn from the English common law of municipal corporations and offices, "neglect of duty" appears to have meant "a pattern of failing to perform one's duties in a way that causes injury to others" while "malfeasance in office" meant "an illegal act in the execution of one's duties that causes injury to others." *Id*. at 7, 31-36. These terms represent the same ideas as underlay early faithful execution oaths, similarly used to control public officials. See Kent et al., *supra*, at 2117-18, 2169-78. States early on experimented with granting tenure for a term of years subject to removal on these grounds, and began adding "inefficiency" by the middle decades of the nineteenth century "to incentivize competent, methodical execution of the laws." Manners & Menand, *supra*, at 51-52. "Inefficiency" initially was understood in terms of ineffectiveness and then increasingly became associated with wasteful administration. *Id*. at 7, 55. Importantly, this language allowed "removal only in cases where officials act corruptly, neglect their statutory duties, or perform them in a manner so inexpert or wasteful that it harms the public good," but not for policy divergence. *Id*. at 9. Indeed, the inclusion of "inefficiency" was specifically aimed at removing political considerations from the staffing of executive offices, as evident by the repeated

invocation of "efficiency" by civil service reformers. *Id.* at 8, 56-59.

Congress drew on this state-developed removal language in 1887 in creating the Interstate Commerce Commission, and many times thereafter for other independent commissions exercising regulatory, investigatory, and adjudicatory authority. See *id.* at 8, 68-69. Over the last 133 years, the use of such for-cause limits on removal has become a deeply entrenched historical practice and a central feature of national administration.

II. THIS COURT'S LONGSTANDING PRECEDENT SUSTAINING FOR-CAUSE REMOVAL LIMITS AGAINST CONSTITUTIONAL CHALLENGE, INCLUDING FOR PRINCIPAL OFFICERS, SHOULD NOT BE OVERRULED.

This Court has long upheld the constitutionality of for-cause removal protections, even when the officials involved are principal officers. Under this precedent, removal limits are constitutional unless they impermissibly burden the President's ability to ensure that the laws are faithfully executed, which is assessed by looking at contextual factors such as the nature of the function involved. Deviating from this established jurisprudence would fly in the face of *stare decisis*.

A. Longstanding precedent sustains the constitutionality of for-cause removal protections for executive branch officers.

1. Ever since this Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), it has been clear that Congress can restrict

the President's power to remove (at least some) principal officers. *Humphrey's Executor* involved the exact same removal provision at issue here, authorizing the President to remove a member of the Federal Trade Commission (FTC) "'for inefficiency, neglect of duty, or malfeasance in office.'" *Id.* at 620 (quoting 15 U.S.C. § 41). The Court upheld this limit on removal, stating that "[w]e think it plain under the Constitution that illimitable power of removal is not possessed by the President." *Id.* at 629; see also *Wiener v. United States*, 357 U.S. 349, 356 (1958) (rejecting a claim of inherent executive power to remove members of the War Claims Commission at will). *Humphrey's Executor* followed earlier decisions upholding congressionally imposed removal limits. See *United States v. Perkins*, 116 U.S. 483, 486 (1886); see also *Marbury*, 5 U.S. at 157, 162 (concluding that an officer appointed by the President with Senate consent for a term appointment was not removable at will and had a right to his commission).

The Court again strongly reaffirmed the constitutionality of limitations on the President's removal power in *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988), and elsewhere accepted the constitutionality of removal restrictions without question. See *Mistretta v. United States*, 488 U.S. 361, 410-11 (1989) (emphasizing limitations on the President's power to remove members of the Sentencing Commission in upholding the latter's constitutionality); *Buckley v. Valeo*, 424 U.S. 1, 141 (1976) (citing *Humphrey's Executor* for the proposition that the President could not insist that members of the Federal Election Commission be removable at will); *Shurtleff v. United States*, 189 U.S. 311, 316-18 (1903) (rejecting officer's challenge

to removal but basing decision on construction of the statute at issue); *Parsons v. United States*, 167 U.S. 324, 334, 342-43 (1897) (same).

To be sure, this Court has acknowledged that *some* executive officials "must be removable by the President at will if he is to be able to accomplish his constitutional role." *Morrison*, 487 U.S. at 690. But in doing so, it has dismissed out-of-hand the suggestion that "the language of Article II vesting the executive power of the United States in the President requires that every officer of the United States exercising any part of [the executive] power must serve at the pleasure of the President and be removable by him at will." *Id.* at 690 n.29. Hence, although the Court invalidated the removal provision at issue in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), its decision turned on the "unusual … two layers of for-cause tenure" at issue, *id.* at 501. The Court made clear that it did not "take issue with for-cause limitations in general," *id.*, and its decision is understandable only as an affirmation that one level of "for cause" independence is constitutional. Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of* Myers, Humphrey's Executor, Morrison, *and* Freytag, 32 Cardozo L. Rev. 2255, 2274 (2011).

2. In short, as the D.C. Circuit stated in its en banc decision in *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018), this "Court has never struck down a statute conferring the standard for-cause protection at issue here." *Id.* at 78. *Myers v. United States*, 272 U.S. 52 (1926), is not to the contrary. Like *Free Enterprise*, *Myers* invalidated a distinct type of removal protection, one that prohibited the President

from removing postmasters without Senate advice and consent. *Id.* at 106-07. Granting Congress such "[a] direct … role in the removal of officers charged with the execution of the laws … is inconsistent with separation of powers," wholly separate from any impact on presidential authority. *Bowsher v. Synar*, 478 U.S. 714, 723-26 (1986) (distinguishing *Humphrey's Executor* on this basis).

3. Under this Court's jurisprudence sustaining removal limits for executive officers, the constitutionality of such limits turns on their impact on the President's ability to perform constitutional functions, in particular "the President's ability to ensure that the laws are faithfully executed." *Free Enterprise*, 561 U.S. at 498. In *Humphrey's Executor*, the Court stated 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" at issue. 295 U.S. at 631. For-cause removal protection was constitutional in the case of a member of the FTC because the Commission's duties were "predominantly quasi judicial and quasi legislative," by which the Court meant that the FTC was not involved in core or "purely executive" functions. See *id.* at 624, 628; see also *Wiener*, 357 U.S. at 353 ("the most reliable factor for drawing an inference regarding the President's power of removal … is the nature of the function that Congress vested").

This Court subsequently clarified in *Morrison* that the function an officer performs is relevant because it can affect how much impact a removal limit has on the President. Chief Justice Rehnquist's

majority opinion identified "the real question" as "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." 487 U.S. at 691. Applying this test, the Court upheld a for-cause removal protection for the independent counsel, concluding that the control and oversight measures provided—in particular, the Attorney General's ability to remove the officer for cause—were adequate "to ensure that the President is able to perform his constitutionally assigned duties." *Id.* at 696. The Court reached this result even though the counsel performed an executive law enforcement function involving "no small amount of discretion and judgment." *Id.* at 691. In *Free Enterprise*, the Court similarly focused on the impact that a removal provision had on the President, concluding that the double for-cause removal protection at issue went too far because it denied the President "the ability to oversee the Board" directly or through surrogates. 561 U.S. at 484, 496.

4. Thus, the validity of a limit on the President's removal authority is context-specific, focusing in particular on the official's responsibilities and the President's realistic ability to remove the official for cause—as well as other mechanisms of executive branch control. See *id.* at 496-97, 502-05; *Morrison*, 487 U.S at 691-93, 694-96. An official's status as a principal or inferior officer is not talismanic; it is simply another factor to consider in assessing the impact a for-cause removal provision has on "the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691-92, 695-96; *Humphrey's Executor*, 295 U.S. at 627-29; cf. *Free Enterprise*, 561 U.S. at 508 (remedying constitutional violation by severing removal

protection for inferior officers, leaving in place for-cause removal protection for principal officers, the members of the Securities and Exchange Commission).

B. This longstanding removal precedent should not be overruled.

Despite this extensive precedent, both Petitioner and Respondent urge the Court to overrule *Humphrey's Executor* and its progeny if the Court concludes these decisions cannot be distinguished. See Pet. Br. at 31; Resp. Br. at 44. Such a move would be wholly unjustified and incompatible with the basic principle of *stare decisis*. As this Court reiterated only last Term, "[*s*]*tare decisis* 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)); see also *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019). As a result, "even in constitutional cases, a departure from precedent 'demands special justification.'" *Gamble*, 139 S. Ct. at 1969 (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

In arguing for overruling, the parties castigate *Humphrey's Executor*'s reasoning, consistency with this Court's case law, and workability. See Pet. Br. at 31-34; Resp. Br. at 44-46. But *Humphrey's Executor* is well supported by constitutional text, structure, and history, as well as consistent with longstanding precedent. As important, the case law has reaffirmed and refined, as opposed to eroded, this decision over

time. In *Morrison*, for example, this Court reaffirmed *Humphrey's Executor*'s holding and the constitutionality of for-cause removal provisions, but refined the earlier decision's reasoning in important ways. See *Morrison*, 487 U.S. at 687-91 & n.28. It would defeat the very purpose of *stare decisis* to assess whether to overrule *Humphrey's Executor* in isolation from subsequent decisions that relied and elaborated upon it.

Perhaps the strongest argument for retaining *Humphrey's Executor*, however, is the tremendous disruption that overruling it would cause. The suggestion is nothing short of extraordinary that *Humphrey's Executor*'s sanction of removal limits for principal officers has not engendered extensive reliance. See Pet. Br. at 34; Resp. Br. at 45. According to the Administrative Conference of the United States, there are currently at least 30 agencies or subunits of agencies whose leaders are expressly granted for-cause removal protection by statute, and a good number more for which removal protection is assumed. Jennifer L. Selin & David E. Lewis, Admin. Conf. of the U.S., *Sourcebook of United States Executive Agencies* 44, 97 tbl.9 (2d ed. 2018). These include independent agencies with significant regulatory and enforcement authority, such as the FTC, the Federal Reserve, and the Federal Energy Regulatory Commission. Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies*), 98 Cornell L. Rev. 769, 784-86 (2013). In delegating substantial authority to agencies that it believed would enjoy removal protection, Congress has relied on this Court's longstanding jurisprudence sustaining removal limits as constitutional. And any decision by this Court overturning *Humphrey's Executor* would

no doubt trigger an avalanche of litigation challenging the constitutionality of these agencies. Were this Court to hold further that an unconstitutional removal provision is inseverable, the potential for disruption in federal government would be incalculable; a large swath of this nation's regulatory and enforcement apparatus would be at risk of being invalidated—including the independence of our central bank.

III. THE CFPB'S STRUCTURE OF A SINGLE DIRECTOR WITH FOR-CAUSE REMOVAL PROTECTION IS CONSTITUTIONAL.

Under this Court's well-established precedent, as well as the nation's longstanding practice regarding financial regulators, the CFPB's structure of a single Director serving a five-year term and subject to removal only for "inefficiency, neglect of office, or malfeasance" is constitutional. In claiming otherwise, both Petitioner and Respondent insist that the CFPB's lack of a multi-Director commission structure and the Director's principal-officer status render for-cause removal protections here novel and unconstitutional. Pet. Br. at 14-30; Resp. Br. at 26-39. Neither argument has merit.

1. As the Court-appointed *Amicus* emphasizes, "Congress broke no new ground" in structuring the CFPB. *Amicus* Br. at 11. Congress's decision to make the CFPB an independent agency with independent funding reflects its standard practice respecting financial regulators. Provision of a multi-year term for a principal officer with removal limited to "inefficiency, neglect of office, or malfeasance" is commonplace—and was upheld explicitly in *Humphrey's Executor* and implicitly in *Free*

Enterprise. The CFPB performs very similar functions to the FTC and other financial regulatory agencies like the SEC, whose members' for-cause protection against removal this Court has assumed. *Free Enterprise*, 561 U.S. at 487. Although the parties here make much of the CFPB's ability to bring enforcement actions on its own initiative, this Court upheld for-cause removal protection connected to similar prosecutorial functions in *Morrison*. Other independent agencies mirror the CFPB's single-director structure,[6] and Congress's efforts to insulate individual financial regulators date back to the Civil War and before. See *Amicus* Br. at 41-42; *supra* Part I.B.

2. Nothing in this Court's jurisprudence makes the number of officials involved determinative of whether a removal limit is constitutional. *Morrison* involved a single officer, while the War Claims Commission had three members and the FTC and Public Company Accounting Oversight Board each has five. But nowhere in these decisions did this Court put any weight on the number of executive officials involved in determining the constitutionality

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[6] Even multi-member bodies such as the FTC may sometimes act through a single member, e.g., 15 U.S.C. § 41 ("A vacancy in the Commission shall not impair the right of the remaining Commissioners to exercise all the powers of the Commission."). For example, at a time when the FTC had three vacancies, a single FTC Commissioner approved requiring modification of an antitrust consent agreement after the one other remaining Commissioner recused herself. FTC Press Release, *FTC Adds Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies* (Mar. 15, 2018), https://www.ftc.gov/news-events/press-releases/2018/03/ftc-adds-requirements-2014-order-remedy-corelogic-incs-compliance.

of the removal limits at issue—let alone make this factor categorically determinative as Petitioner and Respondent urge, see Pet. Br. at 15, Resp. Br. at 26. Although *Humphrey's Executor* referred to the FTC as a "body of experts" and a "quasi legislative and quasi judicial bod[y]," it did so to convey Congress's goal in creating the FTC and the function the agency performed, not to give the FTC's collective nature constitutional significance. *Humphrey's Executor*, 295 U.S. at 625, 629.

Instead, the relevant inquiry is whether the CFPB's structure "impede[s] the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. There is no support for the claim that a single Director is harder for the President to supervise than a multi-member commission. In fact, the opposite is the case. *Amicus* Br. at 19, 44-46. Both Petitioner and Respondent emphasize that multi-member commissions often have bi-partisan membership requirements and are headed by chairs who are removable at will. See Pet. Br. at 28-29; Resp. Br. at 36. But bipartisanship can impede rather than support presidential oversight, and chairs' policy preferences prevail only if a majority of the commission's members agree. *Amicus* Br. at 45-46. In any event, this Court has never suggested such features are constitutionally mandated, and practices differ at many multimember agencies. See, e.g., 12 U.S.C. § 241 (Federal Reserve headed by a seven-member Board of Governors with fourteen year terms and geographic, economic interest, and expertise requirements instead of bipartisanship); Selin & Lewis, *supra*, at 100 tbl.11 (listing different chair selection and retention rules for multimember bodies, including Senate confirmation and fixed terms for some).

3. Finally, the CFPB Director is removable for "inefficiency, neglect of duty, or malfeasance in office." As discussed above, historically this language was intended to shield government officers from political pressure and did not allow removal for simple policy disagreement. See *supra* at 19. Indeed, *Humphrey's Executor* stands as evidence of this point: The Court there rejected a removal based on disagreements over "the policies [and] the administering of the Federal Trade Commission," and emphasized that no one claimed this counted as inefficiency, neglect of duty, or malfeasance in office. 295 U.S. at 619, 626. The Court also described these terms as "definite and unambiguous." *Id.* at 623. Although this Court more recently has characterized these removal grounds as "very broad" in connection with a provision granting removal power to Congress, *Bowsher*, 478 U.S. at 729, it has continued to make clear that they do not support removal based simply on policy and political disagreement. *Free Enterprise*, 561 U.S. at 502 (describing *Humphrey's Executor* as rejecting removal on this ground). There is no significant contemporaneous discussion of the meaning of "inefficiency, neglect of duty, or malfeasance in office" with respect to the CFPB, and thus no suggestion that Congress meant to deviate from the standard meaning here. See also *PHH Corp.*, 881 F.3d at 121-23 (Wilkins, J., concurring) (concluding that, "[a]s interpreted by courts and agencies for over a century, 'inefficiency' … is best described as incompetence or deficient performance" and does not "allow removal for mere policy disagreements.")

Critically, however, removal of the CFPB Director for simple policy disagreement is not constitutionally required, as *Humphrey's Executor*

establishes. The "inefficiency, neglect of duty, and malfeasance in office" language, with its close connection to early understandings of faithful execution, allows the President to remove a CFPB Director who is incompetent, fails to perform her statutory responsibilities, engages in "misconduct," or in other ways abuses the power of her office. *Morrison,* 487 U.S. at 692-93. That scope of removal easily suffices to ensure that the President can "take Care that the Laws be faithfully executed."

CONCLUSION

For the reasons stated above, the Court should affirm the decision of the Ninth Circuit Court of Appeals.

Respectfully submitted,

GILLIAN E. METZGER

Center for Constitutional Governance
Columbia Law School
435 West 116th Street
New York, NY 10027

PETER M. SHANE

The Ohio State University
Moritz College of Law
55 West 12th Avenue
Columbus, OH 43210

LATIF M. NURANI *
JEFFREY M. BAYNE
**Counsel of Record*

Spiegel & McDiarmid LLP
1875 Eye Street, NW
Suite 700
Washington, DC 20006
(202) 879-4000
latif.nurani@
spiegelmcd.com

Counsel for Amici Curiae

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APPENDIX

Appendix

List of *Amici Curiae*[*]

Harold H. Bruff, Rosenbaum Professor of Law Emeritus and Dean Emeritus, University of Colorado Law School;

Jessica Bulman-Pozen, Professor of Law, Columbia Law School;

Jerry L. Mashaw, Sterling Professor of Law Emeritus and Professorial Lecturer, Yale University;

Gillian Metzger, Harlan Fiske Stone Professor of Constitutional Law, Columbia Law School;

Anne Joseph O'Connell, Adelbert H. Sweet Professor of Law, Stanford Law School;

Peter M. Shane, Jacob E. Davis and Jacob E. Davis II Chair in Law, The Ohio State University Moritz College of Law;

Peter L. Strauss, Betts Professor of Law Emeritus, Columbia Law School; and

Paul R. Verkuil, Senior Fellow and former Chairman, Administrative Conference of the United States; President Emeritus, The College of William & Mary.

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[*] *Amici* appear in their individual capacities; institutional affiliations are listed here for identification purposes only.