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 *AMICI CURIAE* OF TWENTY-SEVEN MEMBERS OF THE U.S. HOUSE OF REPRESENTATIVES IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

Amici are the twenty-seven members of the United States House of Representatives listed in the Appendix. They include two members of the Bipartisan Legal Advisory Group—Minority Leader Kevin McCarthy and Minority Whip Steve Scalise—and Republican members of the U.S. House Committee on Financial Services, which has jurisdiction over the CFPB. As federal officials and members of the legislative branch, they have a strong interest in upholding the constitutional separation of powers. In particular, they seek to ensure that the laws they enact will be implemented and enforced by an executive branch that is accountable to an elected President, who is accountable to the American people.

In addition, *amici* have a direct stake in the "severability" question. Under Article I, Congress has the authority to decide the scope of statutory powers that the President is authorized to exercise. Thus, if this Court strikes down the removal restriction in this case, it should likewise invalidate the statutory powers that Congress granted to the CFPB's independent Director. This Court should not automatically reassign those powers to the President, which would usurp the legislative role. Congress deliberately withheld the CFPB's powers from the President, and Congress must decide whether they should be reenacted under the President's control.[1]

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[1] No counsel for any party authored this brief in any part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written blanket consent to the filing of amicus briefs.

SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau is an unprecedented threat to the separation of powers and to the democratic legitimacy of the federal government. By design, it is one of the nation's most powerful executive agencies. It has vast power to regulate the national economy by setting consumer-protection policy and enforcing federal law. Under the Constitution, this agency cannot be allowed to operate as a Platonic guardian without any popular control. It must be accountable to the President, who is directly accountable to the American people.

This Court has never upheld a restriction on the removal of a principal executive officer like the head of the CFPB, and it should not start now. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court upheld a restriction on a principal officer only by relying on the explicit premise that the office was "neither political nor executive." *Id.* at 624. As Acting Attorney General Robert H. Jackson recognized, *Humphrey's Executor* thus "did not disturb" the rule that the President has inherent authority over the removal of "*executive* officers." Power of the President to Remove Members of the Tennessee Valley Authority from Office, 39 Op. Att'y Gen. 145, 146 (1938).

A half-century later, in *Morrison v. Olson*, 487 U.S. 654 (1988), this Court for the first time upheld an executive removal restriction. Over the past three decades, that decision has been gradually discredited as Justice Scalia's dissent has been vindicated. But even on its own terms, *Morrison* applied only to an "inferior" officer, whose duties were strictly "limited."

Id. at 691. It did not authorize a removal restriction on a *principal* executive officer.

Here, unlike in *Humphrey's Executor* and *Morrison*, the Director of the CFPB is unquestionably a principal executive officer. She wields a formidable array of core executive powers—enforcing a phalanx of federal laws, filing enforcement actions directly in federal court, and setting broad-based government policies through substantive executive rulemaking. These distinct powers are far more "executive" than those of the officer in *Humphrey's Executor*. Nor are they anything like the relatively "limited" executive powers of the inferior officer in *Morrison*.

Accordingly, this case presents a novel question that this Court has never addressed: May Congress restrict the President's ability to remove a principal executive officer? The answer to that question is no. "Our Constitution was adopted to enable the people to govern themselves," which in turn "requires that a President chosen by the entire Nation oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). For this reason, Article II vests "the executive power" in the President alone, and charges him alone with the duty to "take Care that the Laws be faithfully executed." That requires him—and ultimately the voters who elect him—to have direct and meaningful control over the principal components of the executive branch. Because the CFPB Director is undeniably a principal executive officer—and indeed, the head of an entire executive department—she must be removable at will. Otherwise, the CFPB would be entirely free from any "dependence on the people," which is the "primary control on the government." *Id.* at 501 (quoting The Federalist No. 51, at 349 (Madison) (Jacob Ernest Cooke ed., 1961)).

The removal restriction is not "severable" because it is a fundamental feature of the CFPB's design. It is not an extraneous feature that can be excised by judicial fiat. Congress did not authorize the President to control the CFPB's vast array of statutory powers, and never even considered doing so. For this Court to do so now would be a major usurpation of the legislative role, granting powers to the President that Congress never authorized him to wield.

ARGUMENT

I. Congress Cannot Restrict The Removal Of Principal Executive Officers

A. Removal Is A Vital Element Of "The Executive Power"

The Constitution provides that "[t]he executive Power shall be vested" in the President, who must "take Care that the Laws be faithfully executed." U.S. Const., art. II, § 1, cl. 1; § 3. As Justice Scalia explained, this provision does not grant the President "*some* of the executive power, but *all* of the executive power." *Morrison*, 487 U.S. at 705 (Scalia, J., dissenting). This is not an arid legalism but a central feature of the constitutional design. In order for our democracy to function, executive officers must be accountable to the President because he alone is accountable to the voters. If any part of the executive branch cannot be controlled by the President then it cannot be controlled by the people, who are the ultimate sovereigns in our system of government.

Entrusting the executive power to a single elected President was no accident. The founders had seen the pitfalls of divided executive authority under the Continental Congress and the Articles of Confederation, and they drafted the Constitution to avoid this evil. "The debates in the Constitutional Convention indicated an intention to create a strong executive, and after a controversial discussion the executive power of the government was vested in one person." *Myers v. United States*, 272 U.S. 52, 116–17 (1926). As Hamilton explained, placing the executive power "in a single hand" was deemed essential to the energy that is "a leading character in the definition of good government." The Federalist No. 70, at 423-24. Madison too recognized that Article II was built on the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good." 1 Annals of Cong. 499 (J. Gales ed. 1789). In short, ensuring the unity of the Executive Branch would make it not only more accountable, but also more effective.

Of course, the framers recognized that "the President alone and unaided could not execute the laws." *Myers*, 272 U.S. at 117. But because the duty of faithful execution ultimately resides in the President, any officers who wield the executive power must be his "subordinates" and "act for him under his direction." *Id*. They cannot be chief executives in their own right, but must "be considered as the assistants or deputies of the Chief Magistrate . . . and ought to be subject to his superintendence." The Federalist No. 72, at 436 (Hamilton). This explains why Article II gives the President "the general administrative control of those executing the laws," which requires the "power of removing those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117,

164. After all, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (internal quotation marks omitted).

This Court has repeatedly reaffirmed the importance of the President's removal power, including in its recent decision in *Free Enterprise Fund*. As the Court there explained, "[t]he Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so." *Free Enter. Fund*, 561 U.S. at 513. "That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *Id.* at 513-14. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 514. "Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* (quoting The Federalist No. 70, at 478).

Indeed, the President's removal power has even more relevance today than it did at the founding. "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund*, 561 U.S. at 499. That is why the removal power continues to rank among those that "the Constitution … vests … in the President," and that "'the Legislature has no right to diminish or modify.'" *Id.* at 500 (quoting 1 Annals of Cong., at 463 (J. Madison)).

In the span between *Myers* and *Free Enterprise Fund*, this Court has strayed somewhat from the constitutional design by upholding "limited restrictions on the President's removal power." *Id.* at 495. As explained below, however, the present case does not fit within those "limited restrictions." *Id.* This Court has never upheld a restriction on removing a principal executive officer like the head of the CFPB, and doing so now would be an unprecedented incursion on the President's Article II authority.

B. *Humphrey's Executor* Does Not Apply To Executive Officers

This Court has never overturned its general holding that the President's "power of appointment to executive office carries with it, as a necessary incident, the power of removal." *Myers*, 272 U.S. at 126. Although the Court upheld a significant removal restriction ten years later in *Humphrey's Executor*, it did so only by finding that the officer there—a member of the FTC—was not part of the executive branch and did not exercise any "executive power in the constitutional sense." 295 U.S. at 628. However dubious that particular description of the FTC and its powers may have been, it was the clear premise of the Court's holding. Accordingly, *Humphrey's Executor* does not apply to actual executive officers with undeniable executive power.

The Court's opinion in *Humphrey's Executor* was quite clear on this point. It did not assail the general rule that officers "in the executive department" are "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." 295 U.S. at 627. Instead, the Court reasoned that "the President's illimitable power of removal" does not apply "in respect of *other than* executive officers." *Id.* at 631 (emphasis added). The Court's decision thus rested on the premise that the FTC's "duties are *neither political nor executive*," and that the agency "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* at 624, 628 (emphasis added). The agency acted only "in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* at 628. The agency was "wholly disconnected from the executive department," and was "created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Id.* at 630.

Since the Court did not understand the officer in *Humphrey's Executor* to exercise any executive power under Article II, it had no occasion to consider the issue of true executive officers. Instead, it expressly declined to decide that issue. It chose to "leave such cases . . . for future consideration and determination as they may arise." *Id.* at 632. The Court thus expressly disavowed any holding that those who *do* exercise executive power could be subject to removal restrictions.

The limited scope of *Humphrey's Executor* was immediately clear. As Acting Attorney General Robert H. Jackson explained, *Humphrey's Executor* "limited the application of the *Myers* case but did not disturb the ruling therein as applied to *executive* officers." 39 Op. Att'y Gen. at 146. Instead, the Court "relied upon the distinguishable fact that the [FTC] exercises quasi-legislative and quasi-judicial functions and is not a part of the executive branch." *Id.* This was hardly a controversial characterization of the decision, since it tracked precisely what the Court had said in its own opinion.

The Court again confirmed this understanding in *Wiener v. United States*, 357 U.S. 349 (1958), which reaffirmed that "officials who [are] part of the Executive establishment [are] thus removable by virtue of the President's constitutional powers" to supervise the executive branch. *Id.* at 353 (citing *Humphrey's Executor*, 295 U.S. at 625-26). That case involved the War Claims Commission, a multi-member body responsible for "adjudicat[ing]" claims for government benefits from those who had "suffered personal injury or property damage at the hands of the enemy in connection with World War II." *Id.* at 350. The Commission was an Article I tribunal that adjudicated claims of purely "public rights"—something Congress could have done by itself if it wished. *Cf. N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 67-68 (1982). To decide whether the commissioners were "executive" officers subject to removal, the Court looked to "the nature of the function that Congress vested in" them. *Wiener*, 357 U.S. at 353. And because they did not exercise any executive power but were a purely "adjudicatory body," they fell outside the scope of the President's inherent removal authority. *Id.* at 356.

In *Free Enterprise Fund*, this Court again underscored that *Humphrey's Executor* does not extend to those deploying executive power. When the Court discussed cases involving "principal executive officers," it noted that *Humphrey's Executor* involved only a "principal officer"—not an *executive* officer. 561

U.S. at 483. And when the Court stated that "Congress can, under certain circumstances, create independent agencies run by principal officers," it pointedly did not say that they could be principal *executive* officers. *Id*. Likewise, the Court described *Humphrey's Executor* as applying to "principal officers of certain independent agencies," without calling them *executive*. *Id*. at 493.

More important, because *Humphrey's Executor* did not address officers exercising "executive power," the Court could and did hold in *Free Enterprise Fund* that an agency may not wield substantial "executive power without the Executive's oversight." *Id*. at 498. That would "subvert[] the President's ability to ensure that the laws are faithfully executed." *Id*. Accordingly, *Free Enterprise Fund's* square holding is that officials who exercise the *President's* "executive power" must be subject to the President's "oversight," *id*., which is not possible if he cannot remove them at will.

C. *Morrison* Does Not Apply To Principal Officers

In *Morrison v. Olson*, this Court for the first time upheld a restriction on the President's power to remove an executive officer. Most observers now agree with Justice Scalia's classic dissent in that case explaining why the decision was so profoundly wrong. *See* 487 U.S. at 697 (Scalia, J., dissenting). But even assuming *Morrison* remains good law, its holding was limited to "inferior officers." *Id*. at 672-73 (majority op.); *see also Free Enter. Fund*, 561 U.S. at 494 (noting that *Morrison* considered only "the status of inferior officers"). Accordingly, *Morrison* said nothing about whether Congress may limit the President's power to remove *principal* executive officers.

Moreover, the test that *Morrison* established makes clear that removal restrictions on principal executive officers are flatly unconstitutional. Under that test, which made clear that *Humphrey's Executor* does not apply to executive officers, Congress may not restrict the removal of an executive officer (even an inferior one) if doing so would "interfere with the President's exercise of the 'executive power'" or "his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II." *Morrison*, 487 U.S. at 689-90. For inferior officers, that is a fact-intensive inquiry. The removal restriction in *Morrison* passed muster only because the inferior officer there had "limited jurisdiction and tenure," and "lack[ed] policymaking or significant administrative authority." *Id.* at 691. Accordingly, if she had had significant "policymaking" or "administrative" authority, then restricting her removal would have been unconstitutional despite her inferior status. *Id.*

By contrast, restricting the removal of *principal* executive officers has never been authorized and is *per se* unconstitutional because they inherently exercise significant "policymaking" and "administrative" power. By definition, a principal officer is one of substantial "rank and authority" who is not subject to the control of any other appointed official, and who supervises others who have substantial authority themselves. *Id.* at 671. For officials who exercise such a substantial portion of the President's executive power, any restriction on removal would "unduly trammel" the President's "executive authority." *Id.* at 658.

Morrison itself recognized that certain executive officers are "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id*. at 691-92. If the rule were otherwise, then Congress could cripple the President's authority by preventing him from removing even his closest Cabinet secretaries such as the Attorney General, the Secretary of State, or the Secretary of the Treasury. Nor is this category limited to Cabinet secretaries. For example, because "the Secretary of the Navy [is] a principal officer and the head of a department," restricting his removal has always been "widely regarded as unconstitutional and void," both before and after the *Morrison* decision. *Free Enter. Fund*, 561 U.S. at 494 n.3. Likewise, and for the same reason, Congress may not "deprive the President of adequate control over" an agency that "is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Id*. at 508.

Drawing a bright line limiting *Morrison* to inferior executive officers also has a solid basis in precedent dating back to the founding. "Under the traditional default rule, removal is incident to the power of appointment." *Free Enter. Fund*, 561 U.S. at 509. And since "the power of appointment and removal is clearly provided" to the President, Congress may not limit this power "save by the specific exception as to inferior offices." *Myers*, 272 U.S. at 126-27. That "exception" has a limited rationale: Because Congress may empower "the Heads of Departments" to *appoint* inferior officers, it may also restrict their power to *remove* inferior officers. *Id*. (citing *United States v. Perkins*, 116 U.S. 483, 485 (1886)). *Morrison* and

Perkins thus sustained "restrictions on the power of principal executive officers . . . to remove their own inferiors." *Free Enter. Fund*, 561 U.S. at 494.

By contrast, there is no basis in text or precedent for restricting the removal of *principal* executive officers. Just as Congress cannot diminish the President's power to appoint such officers, neither can it limit his power to remove them. Indeed, impinging on the President's removal power would be even worse than curtailing his appointment power, since "it is only the authority that can remove [an officer], and not the authority that appointed him, that he must . . . obey." *Bowsher*, 478 U.S. at 726 (internal quotation marks omitted). Destroying the President's ability to control principal executive officers through the removal power would be a "new type of restriction" that this Court has never blessed, and that would have unprecedented consequences for the President's Article II authority. *Free Enter. Fund*, 561 U.S. at 514.

II. The CFPB Director Must Be Removable At Will Because She Exercises Substantial Executive Power

Under Article II, the Director of the CFPB must be removable at will because she is a principal executive officer who wields a substantial portion of "the executive power" vested in the President. She is responsible for enforcing no fewer than 19 different statutes covering an enormous swath of the nation's economy, 18 of which were previously enforced by a host of different agencies. She has the power to issue subpoenas and file enforcement actions directly in federal district court, seeking not only prospective injunctive relief but retrospective penalties and disgorgement that routinely reach into the millions of dollars. She exercises substantial policymaking and administrative authority, as she is empowered to promulgate binding regulations and direct an army of subordinates to enforce them.

In light of the unprecedented scope and nature of these extensive executive powers, allowing the Director to operate free from any electoral control poses an unprecedented threat to our representative democracy. It threatens not only the constitutional authority of our elected President, but also the most basic principles of political accountability that undergird our Constitution. This Court has never tolerated such an affront to the separation of powers. Allowing it now would take a wrecking ball to one of the central pillars of our constitutional architecture.

A. The CFPB Director Is An *Executive* Officer

There can be no serious question that the CFPB is an executive agency, and its Director an executive officer. The primary hallmark of executive power is the performance of "law enforcement functions that typically have been undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691. The "enforcement power, exemplified by [the] discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress." *Buckley v. Valeo*, 424 U.S. 1, 138 (1976). In particular, "[a] lawsuit is the ultimate remedy for a breach of the law," and this type of enforcement measure is plainly entrusted to the control of "the President" under Article II. *Id*. Accordingly, "conducting civil litigation in the courts of the United States for vindicating public rights" is a quintessential executive function. *Id*. at 140. And that is exactly what the CFPB does.

One of the chief purposes of the CFPB was to ensure that consumer-protection laws are "enforced vigorously." Department of the Treasury, *Financial Regulatory Reform: A New Foundation* 55 (2009). Under the Dodd-Frank Act, the agency is empowered to "implement and . . . enforce" a phalanx of federal statutes related to the "markets for consumer financial products and services." 12 U.S.C. § 5511(a). The Act enumerates 18 pre-existing "[f]ederal consumer financial law[s]," and also prohibits a new category of "unfair, deceptive, or abusive act[s] or practice[s]," and authorizes the CFPB to enforce them all. *Id*. §§ 5536(a)(1)(B), 5581(a)(1)(A). Many of these 19 statutes lack a private right of action, but Congress granted the CFPB a formidable array of "[e]nforcement [p]owers." 124 Stat. 2018. These include the power to issue subpoenas directed toward enforcement, and to file lawsuits directly in federal district court seeking penalties or other "legal and equitable relief." 12 U.S.C. §§ 5562(a)-(c), 5564(a), (f).

All of these are plainly "law enforcement functions" that are "typically . . . undertaken by officials within the Executive Branch." *Morrison*, 487 U.S. at 691. Indeed, before the CFPB was created, officials in multiple other executive agencies *did* undertake these enforcement functions with respect to all of the pre-existing statutes that the CFPB now enforces. *See* 12 U.S.C. §§ 5481(12), 5581 (transferring executive authority from seven other agencies to CFPB).

In addition, the CFPB also has power to engage in binding rulemaking. It has "authority to prescribe rules or issue orders or guidelines pursuant to" the laws above. 12 U.S.C. §§ 5581(a)(1)(A), 5481(12), (14). In particular, it may promulgate substantive regulations to define "unfair, deceptive, or abusive act[s] or practice[s]." *Id.* §§ 5531(a)–(b); 5536(a)(1)(B). Because this is part of the agency's charge to "implement the legislative mandate" for the laws it administers, it too "is the very essence of 'execution' of the law." *Bowsher*, 478 U.S. at 733. Indeed, one of the primary justifications for agency rulemaking is that agencies are part of a "political branch," subject to a President who is "directly accountable to the people" for regulatory decisions. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 865 (1984). Allowing agency rulemaking to be *insulated* from political accountability would make a mockery of that justification.

The CFPB's functions are far more executive in character than the FTC's were at the time of *Humphrey's Executor* in 1935. First, and perhaps most significantly, "[u]nder its original statutory mandate, which was still in place at the time of *Humphrey's Executor*, the FTC had no power to sue in federal district court." Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1864 (2015). Second, the FTC was also limited to prospective relief, and could not seek "retrospective" remedies such as disgorgement or other penalties. *Heater v. FTC*, 503 F.2d 321, 321-26 (9th Cir. 1974); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948) (The FTC's role was "not to punish or to fasten liability on respondents for past conduct but to ban specific practices for the future in accordance with the general mandate of Congress."). And third, the FTC was not understood to have substantive rulemaking authority until at least 1962. *See Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 & n.27 (D.C. Cir. 1973).

Accordingly, the FTC in 1935 was "quasi-legislative" because it was tasked only with "making investigations and reports . . . for the information of Congress," but did not enforce the law through substantive rulemaking or otherwise. *Humphrey's Executor*, 295 U.S. at 628. Because Congress itself could conduct investigations, it could have given the same power to a non-executive body. Likewise, the FTC was "quasi-judicial" because it was designed to function as a "judicial aid," like a "master in chancery," working to "ascertain and report an appropriate form of decree" in particular cases. *Id.* at 621, 628. *See Crowell v. Benson*, 285 U.S. 22, 61 (1932) (noting that "masters in chancery" are "always subject to the direction of the court, and their reports are essentially advisory"). The FTC in 1935 thus acted as "a legislative agency" and an "agency of the judiciary," but not as an executive agency, because it did not have the power to enforce federal law. *Humphrey's Executor*, 295 U.S. at 628.

The CFPB differs in every critical respect. It can file lawsuits directly in federal district court to enforce federal law. 12 U.S.C. § 5564(a). It can seek "disgorgement" and other retrospective "penalties" as part of its enforcement efforts. *Id.* § 5565(a)(2). And it has broad substantive rulemaking power to implement the statutes that it enforces. *Id.* § 5512. These powers are undeniably "executive," in a way that the powers of the FTC at the time of *Humphrey's Executor* were not.[2]

In any event, it makes no difference even if "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28. At most, that means that this Court might apply the constitutional rule of *Humphrey's Executor* differently today if the same facts arose again. It does not affect the substance of the rule endorsed in that case, namely, that restricting removal of a principal officer is constitutional only if the officer is "neither political nor executive." *Humphrey's Executor*, 295 U.S. at 624. Nor does it make the CFPB's powers any less "executive" in character today.

B. The CFPB Director Is A *Principal* Officer

Because the CFPB Director exercises executive power, her removal cannot be restricted unless she is an "inferior" officer with strictly "limited duties" like the officer in *Morrison*, 487 U.S. at 671. But she is not. She is plainly a principal officer under any plausible test.

As this Court has explained, "[w]hether one is an 'inferior' officer depends on whether he has a superior," as "'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United*

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[2] In addition, the CFPB has far more adjudicatory authority than the FTC did in 1935, because the CFPB not only acts in an advisory capacity to courts, but has the power to issue "final decision[s] and order[s]" with their own legal effect. 12 C.F.R. § 1081.402(b).

States, 520 U.S. 651, 662–63 (1997). The CFPB Director easily qualifies as a principal officer under that test. No other appointed official can remove her, nor does any other official supervise or oversee her decisions, much less have the power to reverse them.

The sole exception is that a two-thirds vote of the Financial Stability Oversight Council can revoke a regulation issued by the Director if the rule puts "the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." *See* 12 U.S.C. § 5513(a). This is not a meaningful control, however, because it does not apply to the Director's enforcement powers at all, *id.*, and even in rulemaking the standard is "unlikely to be met in practice in most cases." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 172 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Accordingly, the possibility of a veto in certain rare circumstances does not convert the Director into an inferior officer.

The Director's status as a principal officer is also clear from the factors considered in *Morrison*. She is not "subordinate" to or "subject to removal by a higher Executive Branch official." 487 U.S. at 671. Her powers are far from "limited." *Id.* She is the federal czar of consumer protection, and within this domain she has ultimate "authority to formulate policy for the Government [and] the Executive Branch." *Id.* Indeed, Congress specifically provided that the CFPB may "establish . . . general policies" for "all executive and administrative functions" it performs. 12 U.S.C. § 5492(a). In addition, the Director is not "limited in jurisdiction" to address a particular offense or controversy that has arisen. *Morrison*, 487 U.S. at 672.

Instead, she has a wide range of "ongoing responsibilities that extend beyond the accomplishment of" any particular "mission that she was appointed for" or "authorized . . . to undertake" in any particular case. *Id*. Accordingly, the Director is "the regulator of first resort and the primary law enforcement authority for a vital sector of our economy." *Free Enter. Fund*, 561 U.S. at 508. That makes her precisely the type of principal officer who must remain firmly within the President's control, lest she "subvert[] the President's ability to ensure that the laws are faithfully executed." *Id*. at 498.

The lack of presidential control is especially offensive to Article II because the Director is not only a principal officer but the head of an entire executive department. As this Court has explained, restricting removal of "a principal officer and the head of a department" has been "widely regarded as unconstitutional" throughout our nation's history, and "is universally [so] regarded today." *Free Enter. Fund*, 561 U.S. at 494 n.3. The CFPB undoubtedly "constitutes a 'Department'" since it "is a freestanding component of the Executive Branch, not subordinate to or contained within any other such component." *Id.* at 511. And the Director is the department "head" because she has complete control over it. Insulating her from removal is thus a flagrant Article II violation.

Even more troubling, the CFPB also operates without the strings attached to Congress's power of the purse. *See* 12 U.S.C. § 5497(a). Unlike other executive agencies, the CFPB operates based on an independent funding stream that comes directly from the Federal Reserve, *id.*, "outside of the congressional appropriations process." CFPB, Strategic Plan:

FY2013-FY2017, 36 (Apr. 2013), *available at* https://files.consumerfinance.gov/f/strategic-plan.pdf. As a practical matter, this frees the agency from the substantial practical control that the President and Congress usually exercise through the annual budget.

The lack of political accountability has real consequences. For example, when President Trump took office he was unable to replace the CFPB director and was thus unable to control how the nation's consumer-protection laws would be implemented and enforced. As a result, the agency promulgated a major executive regulation without the support of the newly elected President or either house of Congress. 82 Fed. Reg. 54472 (Nov. 17, 2017). Although the Trump administration has now moved to repeal that rule, the repeal likely will not take effect until the final year of the President's first term. Moreover, the President's inability to remove the CFPB Director at the beginning of his term led to a circus in which the former Director attempted to choose his own successor by transferring power to his chief of staff at midnight "on the day after Thanksgiving." *English v. Trump*, 279 F. Supp. 3d 307, 313-15 (D.D.C. 2018). And similar absurdities could recur next year. For example, if the voters elect President Elizabeth Warren, they will nevertheless be stuck with several more years of executive enforcement and policymaking from the unremovable, unaccountable, Trump-appointed CFPB Director. No matter how clearly the voters express their will, they will not be able to change the agency's policy. This is not how democracy is supposed to work.

III. The Removal Restriction Is Not "Severable"

Separation-of-powers principles also dictate that this Court cannot enhance the President's power by giving him a slew of new statutory powers that Congress never granted him. The President's powers are limited and enumerated. He cannot exercise any statutory authority that Congress did not affirmatively give him. Here, however, Congress made clear that it did not authorize him to exercise the CFPB's newly created powers. It made the agency independent precisely to ensure that the President would *not* have control over those powers.

Indeed, Congress transferred many of the CFPB's powers *away* from the President, by giving the CFPB the power to administer multiple statutes previously administered by executive agencies under the President's control. 12 U.S.C. §§ 5481(12), 5581. Accordingly, it would usurp the legislative role to strike the removal restriction while leaving the agency's powers in place under the President's control. That would give the President not only the new powers that Congress deliberately denied him, but also the old powers that Congress affirmatively took away from him. Instead, the only way to respect the constitutional balance is to invalidate both the removal restriction and all of the new powers that Congress improperly vested in the agency. Whether to create these powers under the President's control presents a novel issue that must be addressed by Congress, not by this Court.

The "inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress" without the invalid portion. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987).

In general, courts should "act cautiously" and "refrain from invalidating more of the statute than is necessary." *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality op.). But courts also must be cautious not to strike an essential provision in a way that would create a substantially new law never enacted through bicameralism and presentment. *See INS v. Chadha*, 462 U.S. 919, 951-59 (1983). "This would, to some extent, substitute the judicial for the legislative department of the government," and in substance "make a new law, not . . . enforce an old one." *United States v. Reese*, 92 U.S. 214, 221 (1875).

The threat is especially pronounced when partial invalidation would cause the statutory scheme to operate not just differently, but directly *contrary* to the legislative design. The very "touchstone" of the remedial inquiry is that "a court cannot use its remedial powers to circumvent the intent of the legislature" as expressed in the statutory text. *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006) (internal quotation marks omitted). And contravening statutory limits on the President's power would impose "a far more serious invasion of the legislative domain than [courts] ought to undertake." *Id.* (internal quotation marks omitted).

For example, in *Buckley v. Valeo*, Congress granted certain powers to the independent Federal Elections Commission, but unconstitutionally denied the President the power to appoint the commissioners. 424 U.S. at 140-42. The proper remedy was not to rewrite the statute by giving the President the power to appoint the commissioners, much less to exercise the powers that Congress had given them. Instead, the Court let *Congress* decide what to do. In the meantime, from March until May of 1976, neither the FEC nor anyone else could exercise the powers that had been improperly assigned to the agency. That changed only when Congress enacted a new statute conferring the proper appointment authority on the President. *See* FEC, *Thirty Year Report* 6 (Sept. 2005), *available at* https://www.fec.gov/resources/about-fec/reports/30year.pdf.

Likewise, in *Bowsher v. Synar*, Congress gave new executive powers to the Comptroller General, but unconstitutionally denied the President the power to remove him. This Court held that because the removal provision was unconstitutional, the Comptroller General "may not exercise the powers conferred upon him." 478 U.S. at 736 n.10. The Court refused to sever the removal provision and make him "subservient to the Executive Branch," because that would give the President control over a new set of powers that Congress had deliberately withheld from him. *Id*. at 734. That would not only "alter the balance that Congress had in mind," but effectively create a new "statute that Congress would probably have refused to adopt." *Id*. at 735.

Similarly, when this Court held in *Northern Pipeline* that Congress could not give bankruptcy judges the power to adjudicate certain common-law claims, it did not reassign that power to the existing Article III courts. The Court refused to "assume . . . that Congress' choice would be to have these cases routed to the United States district court of which the bankruptcy court is an adjunct." 458 U.S. at 87 n.40 (internal quotation marks omitted). Instead, the Court simply enjoined the bankruptcy judges from exercising the power that had been improperly vested in them, thus giving "Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication." *Id*. at 88.

This Court should follow the same course here. It should not unilaterally confer the CFPB's vast new powers on the President, but should let Congress decide whether to do so. Congress expressly declared that it was creating an "independent" agency that would be free from political control. 12 U.S.C. § 5491(a). Because the creation of such a powerful *political* agency was never put to the test of bicameralism and presentment, it is impossible to know (and doubtful at best) whether Congress would have created the agency under the President's control. Indeed, it is especially unlikely that Congress would have given the President control over the CFPB while keeping in place the restrictions on Congress' own control over the agency's annual budget. As explained by one of the sponsors of the Dodd-Frank Act, the core "principles" behind the CFPB required it to have both an "independent head" and an "independent budget" so that it could wield its consolidated powers with full "autonomy." 156 Cong. Rec. 2755 (statement of Sen. Dodd). Congress therefore never would have passed a law which disabled its own ability to control the CFPB but also bestowed plenary control on the President.[3]

[3] It makes no difference that the Dodd-Frank Act contains a severability clause. 12 U.S.C. § 5302. Indeed, "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968). The clause here does not address whether Congress meant for the CFPB to continue operating without its fundamental structure intact, much less whether Congress meant to bestow the agency's vast new powers on the President.

In fact, *amici* have already demonstrated that Congress can and should address any constitutional deficiencies through the legislative process. Since the enactment of the Dodd-Frank Act, Republicans in Congress, including *amici*, have proposed legislation that would allow the President to remove the agency's Director with or without cause, subject the agency to the congressional appropriations process, and to restructure the agency as a multi-member bipartisan commission, among other proposals. *See* Financial CHOICE Act of 2017, H.R. 10, 115th Cong. §§ 711, 712 (2017); Financial Product Safety Commission Act of 2018, H.R. 5266, 115th Cong. § 2 (2018). As these examples illustrate, such policy judgments regarding CFPB restructuring are best left to Congress.

In these circumstances, giving the President control over the CFPB's vast new powers would not "remedy" the constitutional violation but would simply transform it from a violation of Article II to a violation of Article I. *See* U.S. Const., art. I, § 7 (bicameralism and presentment). It would usurp the legislative power by granting the President significant new statutory powers that Congress deliberately withheld from him when it sought to create the CFPB as an independent agency. In this regard, the present case is not like *Free Enterprise Fund*. There, severing the removal restriction preserved the independence of the agency's statutory powers by "leav[ing] the President separated from [them] . . . [by] a single level of good-cause tenure." 561 U.S. at 509. Here, no such "separat[ion]" would remain. Severing the removal restriction would thus improperly grant the CFPB's new statutory powers directly to the President's control. Only Congress can properly decide whether to do that. If this Court were to do so instead, it would not be exercising judicial modesty but the precise opposite.

CONCLUSION

The Court should reverse the decision below.

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