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 Amici Curiae Public Citizen, Americans for Financial Reform Education Fund, Consumer Federation of America, Consumer Reports, National Association of Consumer Advocates, Tzedek DC, and U.S. Public Interest Research Group Education Fund, Inc., in Support of Affirmance

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INTEREST OF AMICI CURIAE[1]

The amici submitting this brief are consumer organizations with an interest in the constitutional analysis that determines whether the structure of the Consumer Financial Protection Bureau (CFPB) is consistent with separation-of-powers principles.

Public Citizen is a nonprofit consumer-advocacy organization with members in every state. It appears before Congress, administrative agencies, and courts to advocate strong consumer financial protections and government accountability. Public Citizen has participated as an amicus in many separation-of-powers cases in this Court and courts of appeals.

Americans for Financial Reform Education Fund (AFREF) is an independent, nonprofit coalition of more than 200 consumer, investor, labor, civil-rights, business, faith-based, and community groups working to lay the foundation for a strong, stable, and ethical financial system. Through policy analysis, education, and outreach, AFREF advocates stronger consumer financial protections. AFREF supported the CFPB's creation and strongly supports its mission to protect consumers.

The Consumer Federation of America (CFA) is an association of nearly 300 nonprofit consumer organizations established in 1968 to advance consumer interests through research, advocacy, and education. Ensuring a fair financial marketplace has long been a top priority for CFA.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amici curiae made a monetary contribution to preparation or submission of the brief. Counsel for both parties have filed blanket consents to the filing of amicus briefs.

Consumer Reports is an expert, independent, non-profit organization, founded in 1936, that works side by side with consumers for a fair, transparent, truthful, and safe marketplace. It is the world's largest independent product-testing organization, using its dozens of labs, auto test center, and survey research department to rate thousands of products and services annually. It has been active for decades on a wide range of policy issues affecting consumers, including steadfast support for the CFPB and its mission.

The National Association of Consumer Advocates (NACA) is a nonprofit corporation whose members are lawyers, law professors, and students practicing or studying consumer-protection law. NACA's mission is to promote justice for consumers through information-sharing among consumer advocates and to serve as a voice for its members and consumers in the struggle to curb unfair and oppressive business practices.

Tzedek DC is a nonprofit public-interest organization dedicated to safeguarding rights and interests of low-income District of Columbia residents facing debt-related crises, through litigation, policy advocacy, and preventative education. Tzedek DC and its client communities have a substantial interest in the continued, robust work of the CFPB, the only federal agency dedicated solely to consumer financial protection.

U.S. Public Interest Research Group Education Fund, Inc. is an independent, non-partisan, nonprofit organization working for consumers and the public interest. It supported the CFPB's creation, arguing for a robust, independent federal agency whose sole mission is to protect consumers from harmful financial products and services.

SUMMARY OF ARGUMENT

Inattention by federal financial regulatory agencies and limitations on their authority contributed significantly to the 2008 financial crisis that destabilized the American economy and caused grave hardship to consumers. *See PHH Corp. v. CFPB*, 881 F.3d 75, 77–78 (D.C. Cir. 2018). Responding to market and regulatory failures that fueled this "Great Recession," Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010). In that Act, Congress created the Consumer Financial Protection Bureau (CFPB). To ensure that consumer financial protections would have the undivided attention of an agency able to withstand political pressure and avoid capture by regulated industries, Congress gave the CFPB significant autonomy, including "the authority and accountability to ensure that existing consumer protection laws and regulations are comprehensive, fair, and vigorously enforced." H.R. Conf. Rep. No. 111-517, at 874 (2010).

Congress transferred authority from other agencies to the CFPB to ensure consistent and vigorous consumer protection, and it gave the new agency rulemaking and enforcement authority under consumer-protection statutes including the Truth in Lending Act, Fair Credit Reporting Act, Equal Credit Opportunity Act, and Fair Debt Collection Practices Act. Congress also granted the CFPB regulatory and enforcement authority to combat unfair, deceptive, and abusive consumer financial products and practices. By 2017, the CFPB had provided nearly $12 billion in relief to millions of consumers. *See* https://www.consumerfinance.gov/about-us/blog/six-years-serving-you/.

Protecting the agency's independence was important to Congress's objectives of ensuring the agency's dedication to consumer protection and avoiding the failures of existing agencies. *See*, *e.g.*, H.R. Conf. Rep. No. 111-517, at 874; S. Rep. No. 111-176, at 10–11 (2010). Those failures, Congress determined, were largely attributable to regulators' focusing on interests of the financial industry at the expense of consumers' needs. *See id*. As Senator Cardin put it, "This legislation will create a consumer bureau … that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure." 156 Cong. Rec. S5871 (July 15, 2010). To that end, Congress placed the agency under a director appointed by the President, confirmed by the Senate, and removable by the President for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(c)(3).

This Court has long held such tenure protections constitutional for officers engaged in rulemaking and enforcement tasks that Congress believes require independence and expertise. In *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), the Court upheld legislation conferring protection against at-will presidential removal on commissioners of the Federal Trade Commission, who exercise authority similar to the CFPB's. The Court has repeatedly reaffirmed and extended that precedent, rejecting arguments that for-cause limits on removal of executive officers impede the President's performance of constitutionally assigned functions.

This Court's decisions do not support the proposition that Congress may confer executive authority on a tenure-protected principal officer only if the officer serves on a multi-member commission. Adherence to

the multi-member commission model is not essential to the logic of this Court's repeated holdings that for-cause removal provisions do not prevent the President from performing his constitutional functions.

The assertion that the CFPB poses a greater threat of "tyranny" than multi-member commissions, or agencies whose directors can be fired without cause by the President, adds nothing to the analysis of whether it improperly infringes upon the President's Article II powers. Although separation-of-powers principles derive from the Framers' conceptions of how best to protect liberty, decisions about whether a statute violates Article II do not turn on generalizations about tyranny, which fail to address the decisive issue: whether the statute prevents the President from fulfilling his constitutional function. Broad assertions about tyranny also overlook significant checks on the CFPB's authority that render implausible the contention that it poses a threat of tyranny greater than that presented by other agencies—whether they are independent or headed by officers terminable at will by the President.

Finally, although Congress has more often constituted independent agencies as multi-member commissions than as single-director bureaus, historical novelty is not a basis for striking down a statute on separation-of-powers grounds. Conferring significant executive power on single officers is no more novel today than multi-member commissions were when this Court decided *Humphrey's Executor* in 1935. The principal difference is that the CFPB's independence is supported by 85 years of precedents upholding delegation of authority to officers protected from at-will termination by the President.

ARGUMENT

I. Long-established principles support the CFPB's constitutionality.

Under this Court's precedent, the question whether the President must have unfettered power to remove the heads of agencies such as the CFPB has a straightforward answer: no. The Court long ago held that delegation of similar powers to another independent agency, the FTC, does not interfere with the President's ability to carry out his constitutional functions. *See Humphrey's Executor*, 295 U.S. at 629.

Humphrey's Executor and other decisions upholding statutes protecting executive officers' tenure reflect a broader principle. Proper consideration of separation-of-powers challenges to statutes validly enacted by Congress and signed by the President requires recognition that "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

The Constitution establishes some bright-line rules—such as that legislation must satisfy requirements of bicameralism and presentment, *INS v. Chadha*, 462 U.S. 919 (1983), that appointment of federal officers must comply with the Appointments Clause, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and that courts may adjudicate only cases and controversies, *e.g.*, *Flast v. Cohen*, 392 U.S. 83 (1968). But claims that legislation unduly restricts the general authority of one branch of government require a more nuanced analysis. The proper approach "give[s] life to

[the Framers'] view of the appropriate relationship among the three coequal Branches" by preventing "encroachment and aggrandizement" of one at the expense of another, but permits laws that "to some degree commingle the functions of the Branches." *Mistretta v. United States*, 488 U.S. 361, 380, 382 (1989).

Unless a statute improperly grants Congress or the judiciary a direct role in performing executive functions, "in determining whether [a statute] disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon v. Admin. of Gen. Servs.*, 433 U.S. 425, 443 (1977). This "pragmatic, flexible approach," *id.* at 442, allows Congress to assign executive functions to officers protected against at-will removal by the President, if Congress determines that "a degree of independence from the Executive, such as that afforded by a 'good cause' removal standard, is necessary to the proper functioning of the agency or official." *Morrison v. Olson*, 487 U.S. 654, 691 n.30 (1988); *see*, *e.g.*, *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Executor,* 295 U.S. at 629–31. Thus, "Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

In such circumstances, the President's ability (or that of a presidential subordinate) to remove an officer for cause provides "ample authority" for "the President to ensure the 'faithful execution' of the laws." *Morrison*, 487 U.S. at 692. Tenure protections therefore do not "unduly trammel[] on executive authority."

Id. at 691; *see also Free Enter. Fund*, 561 U.S. at 495. The functions Congress may delegate to officers removable only for cause, or agencies headed by such officers, include enforcement or prosecutorial functions, adjudicatory functions, rulemaking functions, or a combination of the three. *See*, *e.g.*, *Morrison*, 487 U.S. at 691; *Wiener*, 357 U.S. at 356; *Humphrey's Executor*, 295 U.S. at 628–29. The CFPB performs exactly such functions.

II. Arguments that the CFPB's structure is unconstitutional distort separation-of-powers principles.

The arguments offered by the Solicitor General and by Seila Law in this case misread this Court's decisions to erect a rigid principle that tenure-protected executive authority may be delegated only to multimember commissions. The Court's decisions, however, do not suggest that the use of a commission or single-director structure is determinative. Congress's choice to vest the CFPB's leadership in a single, tenure-protected director with a five-year term, viewed together with other features of the agency's structure, does not unconstitutionally circumscribe presidential authority.

A. This Court's precedents permit Congress to create independent single-director agencies.

1. *Humphrey's Executor* is not a narrow exception to a general rule of at-will removal.

Myers v. United States, 272 U.S. 52 (1926), held, over dissents from Justices Holmes and Brandeis as well as McReynolds, that Congress cannot give *itself* a role in removing executive officers (outside the constitutional impeachment process) by requiring congressional consent to their removal. Although the majority

opinion contained broad dicta, the issue presented in the case was whether Congress could "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power." *Id.* at 161. The Court's holding was that it could not. *Id.*; *see also id.* at 107 (citing the statutory provision at issue, which required the Senate's advice and consent to presidential removal of first-class postmasters).

The Solicitor General and Seila Law would read *Myers* overbroadly to establish a general rule that executive branch officers must be terminable at will by the President (or an officer subject to at-will removal by the President). That rule, they contend, is subject at most to two narrow exceptions, established by *Humphrey's Executor* and *Morrison*, for agencies headed by expert, multi-member boards and for inferior officers. *See id.* at 164–65, 176. This Court, however, has repeatedly rejected that expansive reading of *Myers*.

Humphrey's Executor—a unanimous opinion joined by Justices of such divergent viewpoints as Hughes, Stone, Brandeis, and Cardozo, on the one hand, and McReynolds, Sutherland, Butler, and Van Devanter, on the other—held that *Myers* is limited to forbidding congressional participation in removing executive officers. *See* 295 U.S. at 626. *Humphrey's Executor* expressly disapproved statements in *Myers* that went beyond that holding to suggest that officers cannot be protected against at-will removal by the President. *Id.*; *see also Ashwander v. TVA*, 297 U.S. 288, 352–53 & n.11 (1936) (Brandeis, J., concurring) (citing *Humphrey's Executor* as a "recent example" of a case that properly "overrule[d]" an "earlier decision[] shown, upon fuller consideration, to be erroneous").

Humphrey's Executor was neither an aberration nor rendered obsolete by the changes in the Court's composition and jurisprudence that came soon after. Rather, in the generation that followed, *Humphrey's Executor* was repeatedly cited as correctly rejecting unnecessary pronouncements in *Myers*. *See*, *e.g.*, *United States v. Lovett*, 328 U.S. 303, 328 (1946) (Frankfurter, J., concurring); *Green v. United States*, 355 U.S. 184, 197 n.16 (1957) (Black, J.). And in the Court's seminal decision in *Youngstown*, Justice Jackson's opinion cited the attempted removal in *Humphrey's Executor* as an example of the situation where the President's "power is at its lowest ebb" because he has "take[n] measures incompatible with the expressed or implied will of Congress." *Youngstown*, 343 U.S. at 637–38 & n.4 (Jackson, J., concurring). Other Justices in the *Youngstown* majority invoked Justices Holmes's and Brandeis's *dissents* in *Myers* as exemplifying the proper approach to questions of presidential authority and separation of powers. *See id.* at 610 (Frankfurter, J., concurring); *id.* at 629 (Douglas, J., concurring).

In contrast to *Humphrey's Executor*, *Myers* quickly became synonymous with the error of expressing broad views unnecessary to the decision of a case. *See*, *e.g.*, *Wright v. United States*, 302 U.S. 583, 604 (1938) (Stone, J., joined by Brandeis, J., dissenting in part); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 136 (1951). As the Court put it two decades after *Humphrey's Executor*, "[t]he assumption was short-lived that the *Myers* case recognized the President's inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties and no matter what

restrictions Congress may have imposed regarding the nature of their tenure." *Wiener*, 357 U.S. at 352.

More recent cases underscore that *Humphrey's Executor*, not Seila Law and the Solicitor General, sets forth the correct, authoritative view of *Myers*. In *Buckley v. Valeo*, for example, this Court recognized that "the President may not insist" that significant regulatory and enforcement functions "be delegated to an appointee of his removable at will." 424 U.S. at 141 (citing *Humphrey's Executor*, 295 U.S. 602); *see also id*. at 276 (White, J., concurring in part and dissenting in part) (describing *Myers*'s narrow holding and *Humphrey's Executor*'s limitation of "the reach of *Myers*" to that holding).

Likewise, *Bowsher v. Synar*, 478 U.S. 714 (1986), reaffirmed *Humphrey's Executor*'s understanding of *Myers*. *Bowsher* held that executive functions cannot be delegated to an officer removable by Congress, *see id*. at 725–26, but did not accept the broader argument that executive officers must be removable at the President's will. *See id*. at 724–25.

In *Morrison*, the seven-Justice majority opinion, written by Chief Justice Rehnquist, again emphasized the narrowness of *Myers*'s holding. *See* 487 U.S. at 686. The Court observed that *Bowsher* had rejected the view that *Myers* requires unfettered presidential removal power. *See id*. at 689 n.26 ("[A]s Justice White noted in dissent in [*Bowsher*], the argument [that the President must have absolute discretion to discharge purely executive officials at will] was clearly not accepted by the Court at that time.").

This Court's decision in *Free Enterprise Fund* neither supports the broad reading of *Myers* on which the challenges to the CFPB's authority rest, nor suggests

that *Humphrey's Executor* and *Morrison* are no longer good law. Rather, *Free Enterprise Fund* repeatedly acknowledges that Congress may limit presidential removal of officers performing executive functions. *See* 561 U.S. at 483, 493–95. *Free Enterprise Fund*'s "modest" holding is that Congress may not impose *multiple* layers of tenure protection, by vesting power to remove an officer for cause in another officer who is removable by the President only for cause. *Id.* at 501.

Moreover, *Free Enterprise Fund* goes out of its way to emphasize that an executive officer may be given tenure protection, as long as either the President, or an officer removable at will by the President, retains authority to remove the officer for cause. As the Court put it, "The point is not to take issue with for-cause limitations in general; *we do not do that*." *Id*. (emphasis added). In light of that explicit statement, *Free Enterprise Fund* lends no support for a broad reading of *Myers*. Indeed, *Free Enterprise Fund* remedied the violation it found by severing the unconstitutional second layer of tenure protection and vesting at-will removal power over officers of the Public Company Accounting Oversight Board (PCAOB) in the *tenure-protected* members of the Securities and Exchange Commission (SEC). *See id*. at 509. The Court thus acknowledged that the SEC's own exercise of significant executive authority, including both regulatory and enforcement powers, poses no constitutional problem.

2. Congress's power to require for-cause removal is not limited to multi-member commissions and inferior officers.

The Solicitor General and Seila Law not only overstate *Myers*'s sway, but also posit unwarranted limits on what they call the "limited exception" to *Myers*

established by *Humphrey's Executor* and its progeny. U.S. Br. 8; Pet. Br. 8. Nothing in this Court's opinions, however, suggests that their reasoning is limited to multi-member boards. *Humphrey's Executor* and *Wiener* both mention that the officers in question served on multi-member commissions. *See Humphrey's Executor*, 295 U.S. at 624; *Wiener*, 357 U.S. at 350. And *Humphrey's Executor* referred to Congress's intent, in creating the FTC, to delegate authority to a "body of experts." 295 U.S. at 624, 625. But in neither case did the Court identify the agency's multi-member structure as the reason its independence did not infringe presidential authority. Nor did the Court suggest that checks imposed on commissioners by the need to obtain concurrence from fellow commissioners were essential to the agency's constitutionality because they substituted for presidential supervision. Rather, the Court held that delegating independent authority to perform the functions assigned to the agency (subject to the President's power to remove its principal officers for cause) did not exceed Congress's power. *See Wiener*, 357 U.S. at 353–56; *Humphrey's Executor*, 295 U.S. at 628–32.

Morrison confirms that the constitutionality of tenure protection does not depend on whether a protected officer sits on a multi-member commission. *Morrison* holds that the constitutionality of a special prosecutor's office headed by a single officer protected against at-will removal is governed by the same test applied in *Humphrey's Executor* and *Wiener*: whether assigning the functions at issue to an officer with a measure of independence from the President impedes the President's ability to perform his constitutional role. *See* 487 U.S at 691.

Further, to the extent that *Humphrey's Executor*, by describing the functions performed by the FTC as "quasi legislative" and "quasi judicial," 295 U.S. at 624, might leave doubt about the scope of its holding, *Morrison* explicitly holds that for-cause removal limitations are constitutional for officers performing purely "executive" functions as the Court now uses that term. *See* 487 U.S. at 688–91; *see also PHH*, 881 F.3d at 87. The Solicitor General likewise acknowledges that the powers to which *Humphrey's Executor* applied those labels are "executive" within the tripartite framework of powers established by Articles I, II, and III: They involve the administration and enforcement of legislation, rather than the enactment of legislation or the judicial resolution of cases and controversies. U.S. Br. 32. *Morrison* affirms that the power to remove an officer performing such executive functions for "good cause" gives the President "ample authority" to "ensure the faithful execution of the laws." 487 U.S. at 692, 693. *See also Free Enter. Fund*, 561 U.S. at 495 (holding that for-cause removal power is the "most important[]" guarantee of the President's ability to carry out his Article II duties).

Morrison's recognition that for-cause removal adequately protects the President's authority over offices directed by single officers is not limited to inferior officers. Although the independent counsel's inferior-officer status was critical to *Morrison*'s holding that her court appointment satisfied the Appointments Clause, *see* 487 U.S. at 670–77, *Morrison*'s analysis of the constitutionality of limiting presidential removal authority did not turn on that point. The Court's separation-of-powers analysis mentioned that the independent counsel was an inferior officer, *see* 487 U.S. at 691, only as part of its explanation that the independent

counsel's functions were not so critical to presidential authority that they could not be vested in an independent officer.

Indeed, *Morrison* applied the same separation-of-powers standard that *Humphrey's Executor* had used to determine the constitutionality of tenure protection for principal officers: 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; *see also PHH*, 881 F.3d at 87–88. Under *Morrison*, the issue for both inferior and principal officers is whether "a measure of independence … interferes with the President's constitutional duty and prerogative to oversee the executive branch and take care that the laws be faithfully executed." *Id.* at 96 n.2. "The question whether a removal restriction unconstitutionally constrains presidential power thus does not track whether the shielded official is a principal or inferior officer." *Id.*

The Solicitor General concedes that *Morrison* is fatal to any claim that *Humphrey's Executor*'s holding does not apply to officers exercising executive functions. U.S. Br. 32. The Solicitor General therefore seeks to reconceive *Humphrey's Executor*'s references to the "quasi legislative" and "quasi judicial" *functions* performed by the FTC as requirements that an independent agency have the *structure* of a multi-member legislative or judicial body. *Id.* But neither the words nor reasoning of *Humphrey's Executor* support that rewrite: The Court made plain that it was using those terms to describe the nature of the FTC's duties and powers, not how many members it had. *See* 295 U.S. at 628 ("In administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details

embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially."). The Court's holding thus stands for the proposition that bestowing those functions on officers protected against at-will removal by the President is not "an unconstitutional interference with the executive power of the President." *Id.* at 626.

The Solicitor General's new reading of *Humphrey's Executor*, beyond being unsupported by the opinion, is inconsistent with basic separation-of-powers principles. Indeed, the Solicitor General's reading is at odds with his own theory of why the CFPB is unconstitutional, which rests on the notion that unrestricted Presidential removal authority is essential to ensuring that executive authority is in the hands of "the President alone." U.S. Br. 10. If, however, placing executive functions in the hands of a multi-member commission whose members have tenure protection does not infringe on the President's exclusive authority, vesting the same executive functions in a single officer with the same insulation from unfettered Presidential control likewise cannot do so.

This Court's latest word on the subject, *Free Enterprise Fund*, supports neither limiting *Humphrey's Executor* to multi-member commissions, nor limiting or disregarding *Morrison*. *Free Enterprise Fund* repeatedly cites *Morrison* as established law. See 561 U.S. at 483, 494, 495, 502. And *Free Enterprise Fund*'s reiteration that Congress may delegate executive functions to tenure-protected officers nowhere suggests that Congress's power is limited to members of multi-member commissions or inferior officers. *Free Enterprise Fund* states without any such qualification that Congress may "create independent agencies run by principal officers appointed by the President, whom the

President may not remove at will but only for good cause." 561 U.S. at 483.

3. Neither petitioner nor the Solicitor General justifies overruling *Humphrey's Executor*.

As an alternative to imposing unwarranted limits on *Humphrey's Executor*, the Solicitor General and Seila Law propose overruling it. Both fall far short of presenting the "special justification" that this Court has "always required" for such a step. *Dickerson v. United States*, 530 U.S. 428, 443 (2000); *see also Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019).

Determining whether such a special justification exists requires considering "the quality of [a decision's] reasoning, the workability of the rule it established, its consistency with other related decisions, … and reliance on the decision." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2178 (2019). "And the strength of the case for adhering to such decisions grows in proportion to their 'antiquity.'" *Gamble*, 139 S. Ct. at 1969. All these factors strongly support *Humphrey's Executor*.

As to the opinion's reasoning, quibbles with its "quasi legislative" and "quasi judicial" terminology aside, the core of the opinion's rationale—that limits on at-will removal of officers with regulatory, adjudicatory, and enforcement functions do not prevent the President from fulfilling his constitutionally assigned duties—is sound. Indeed, that rationale is much more consistent with the body of separation-of-powers jurisprudence developed by this Court over the intervening decades than is *Myers*'s long-disapproved, expansive dicta.

As demonstrated above, *Humphrey's Executor* is no outlier; it has been applied by this Court in a string of

cases and cited with approval in many more of the Court's separation-of-powers decisions. The decision has not proved "unworkable" in practice. Rather, over the 85 years since its issuance, *Humphrey's Executor* has been integrated into the framework of this Court's separation-of-powers analysis, and also relied on by Congress and the President to create independent agencies and support their operations in a large number of areas, including regulation of securities, commodity trading, financial institutions, energy markets, election laws, consumer-product safety, telecommunications, and labor-management relations. In the meantime, the power of the Presidency has remained unimpaired, to say the least. The Solicitor General and Seila Law have identified no special justification for ripping out the foundation of a significant part of the edifice of the modern federal government.

Similarly, there is no cause to question the continued viability of *Morrison*. Congress eventually made the policy decision that the independent-counsel statute should be allowed to lapse. *See* 28 U.S.C. § 599. That choice does not reflect a consensus that *Morrison*—a near-unanimous opinion by the then-Chief Justice—was wrongly decided. Still less does it establish that *Morrison*'s approach to separation-of-powers issues was unreasoned, unworkable, or inconsistent with the body of this Court's precedent.

B. The CFPB does not infringe on presidential authority.

The degree of independence accorded the CFPB's director, in the context of the agency's other structural features, does not infringe on the President's Article II powers and responsibilities. The CFPB's authority to regulate consumer financial transactions under a

defined set of statutes is, by nature, suitable for delegation to an entity with a degree of independence: The agency does not perform "core executive functions" necessarily vested in officers who "must directly answer to the President's will"; it operates in an area where regulators "have long been permissibly afforded a degree of independence." *PHH*, 881 F.3d at 84.

That the CFPB also exercises significant (civil) enforcement authority does not, as the Solicitor General and Seila Law suggest, transform its independence into an infringement on core Presidential authority. *See* U.S. Br. 32; Pet. Br. 30. Although the Solicitor General asserts that such law-enforcement powers are "vested solely in the President," U.S. Br. 32, the authority it cites, *Buckley v. Valeo*, in fact held that while officials exercising such authority must be appointed in compliance with the Appointments Clause, the President "may not insist" on the right to terminate them at will. 424 U.S. at 141. Seila Law, for its part, quotes *Morrison*'s recognition that law enforcement functions are "typically … undertaken by officials within the Executive Branch." Pet. Br. 30 (quoting 487 U.S. at 691). *Morrison*, however, held that restricting presidential removal of officials engaged in the archetypal law-enforcement function of criminal prosecution does not impede the President's performance of his Article II powers. *See* 487 U.S. at 691–92 & n.31.

Morrison reflects a lasting principle of American government: While law enforcement is an executive function, individual law-enforcement decisions are typically insulated from direct Presidential control. Longstanding traditions, embodied in White House and Department of Justice directives, limit White House involvement in and communications with the

Department about individual enforcement decisions.[2] As a result "[p]rosecutorial independence has become a cornerstone of American democracy, built into the way the country is governed." Green & Roiphe, *Can the President Control the Department of Justice?*, 70 Ala. L. Rev. 1, 4 (2018). Although that tradition generally reflects historical practice and executive self-restraint rather than statutory guarantees, its existence powerfully refutes the view that the authority to give directions concerning enforcement matters, backed by unlimited power to terminate the responsible officers without cause, is critical to the President's ability to fulfill his Article II responsibilities. Rather, as *Morrison* holds, the power to remove for cause enables the President to ensure that the laws are faithfully executed, while allowing officers with law enforcement authority "no small amount of discretion and judgment in deciding how to carry out [their] duties." 487 U.S. at 691.

With respect to the CFPB director, the President retains the most important means of ensuring faithful execution of law-enforcement functions—the ability to dismiss for cause. *See id.* at 696. That authority is limited neither by multiple layers of tenure protection nor by any other impediments of the kind that troubled this Court in *Free Enterprise Fund*.

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[2] *See*, *e.g.*, Donald F. McGahn II, Counsel to the President, Memorandum, Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), a*vailable at* https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfef4d530000; Eric Holder, Attorney General of the United States, Memorandum, Communications with the White House and Congress (May 11, 2009), https://www.justice.gov/oip/foia-library/communications_with_the_white_house_and_congress_2009.pdf/download.

Other mechanisms for holding the CFPB accountable to the executive buttress the removal power. When the CFPB engages in policymaking by promulgating regulations, its regulations are subject to review and, under statutorily defined circumstances, veto by the Financial Stability Oversight Council, a body dominated by presidential appointees. *See PHH*, 881 F.3d at 98; *id.* at 120 (Wilkins, J., concurring). This constraint, allowing direct control over CFPB actions by officers removable at will by the President, reinforces the supervisory authority inherent in the President's for-cause removal power. The agency is also required to coordinate and consult with other executive agencies in carrying out its duties. *See id.* at 119 (Wilkins, J., concurring). As in *Morrison*, these features, on top of the critical for-cause removal power, "give the Executive Branch sufficient control … to ensure that the President is able to perform his constitutionally assigned duties." 487 U.S. at 696.

The agency's single-director structure does not tilt the balance against its constitutionality. That the agency can be held accountable through a single director enhances a President's ability to determine its direction by appointing a successor if the director resigns or is terminated for cause. *PHH*, 881 F.3d at 97–98. Other possible agency designs, such as multimember commissions with staggered terms, increase the likelihood that a President will be able to make at least one appointment but reduce the efficacy of any single appointment in influencing the agency's direction. The choice between a single director and a commission, in short, involves tradeoffs with cross-cutting implications for presidential influence. As long as Congress's choices do not prevent the President from performing his constitutional functions, debates over

which structural arrangement would render an agency marginally more or less responsive to presidential oversight do not render those choices impermissible.

Seila Law's debatable suggestion that a multimember commission may be less susceptible to "regulatory capture," Pet. Br. 27, is even less relevant to separation-of-powers concerns: Regulatory capture is a policy concern as to which Congress is entitled to make a policy judgment, not a question of interference with presidential authority.

Congress's choice of a funding mechanism that, within limits, frees the agency from reliance on annual appropriations also respects presidential authority. Funding an agency outside the appropriations process is a legitimate way to protect its independence that principally affects Congress's power, not the President's. *PHH*, 881 F.3d at 96.[3] The funding provision—under which the agency's access to funding outside the appropriations process is capped, may always be changed in annual spending bills, and is subject to reporting requirements to ensure oversight by Congress and the President—does not undermine the features of the agency that ensure constitutionally sufficient presidential authority Nothing in the funding mechanism prevents the President from playing his role in the budgetary process: He may propose in his budget and appropriations requests that the agency's funding be altered, and he has the same power to veto any spending bill that does not conform to his wishes

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[3] The President's role in agency budget requests is more a matter of "bureaucratic minutiae" than a significant means of exercising Article II powers. *Free Enter. Fund*, 561 U.S. at 499–500.

regarding the agency's funding that he has with respect to any other agency.

III. Separation-of-powers analysis does not rest on ad hoc judgments about "tyranny."

Seila Law's assertion that only members of multimember agencies may be protected from at-will presidential removal rests in part on a novel approach to separation-of-powers analysis—one turning on ad hoc judgments about whether particular institutional arrangements are likely to foster "tyranny." Pet. Br. 25. Under this view, single-director independent agencies violate separation-of-powers principles because they supposedly create a greater risk of arbitrary decisionmaking and abuse of power than do multi-member boards whose actions require deliberative "consensus." *Id.* at 26.

The Framers undoubtedly aimed to secure liberty in devising the Constitution—a point summed up in the first half of Justice Jackson's much-quoted observation: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). This Court's decisions, however, have never elevated the amorphous question of whether particular institutional arrangements "secure liberty" into a separation-of-powers standard. For example, in *Free Enterprise Fund*, the only mention of "liberty" is one sentence repeating the generalization that the Framers saw "structural protections against abuse of power [as] critical to preserving liberty." 561 U.S. at 501 (quoting *Bowsher*, 478 U.S. at 730). Rather, the Court's separation-of-powers analysis has focused on whether branches are exercising powers expressly

assigned to other branches, whether one branch has aggrandized itself at the expense of another, and whether a branch has been prevented from performing constitutionally assigned functions. *See Mistretta*, 488 U.S. at 381–83.

There are good reasons for focusing separation-of-powers analysis on structural considerations rather than attempting to discern effects of particular arrangements on the ultimate goal of securing liberty. Framers of constitutions, like authors of statutes, rarely pursue any objective at all costs. *See Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987). That long-recognized proposition was the point of Justice Jackson's observation in *Youngstown* that "[t]he actual art of governing under our Constitution" requires that the recognition that power is diffused to secure liberty be tempered by the need to allow "practice [to] integrate the dispersed powers into a workable government." *Youngstown*, 343 U.S. at 634.

Focusing on "tyranny" as the controlling factor is particularly inapt where claims of exclusive presidential authority are concerned, because *centralization* of executive power in the President is an exception to the Constitution's *diffusion* of power to secure liberty. Concentration of authority in the hands of a single, powerful chief executive poses potential threats to liberty, as exemplified by the seizure of private property that triggered *Youngstown*. *See* 343 U.S. at 634, 655 (Jackson, J., concurring).

The claim that presidential control of enforcement and prosecutorial authority enhances liberty is especially problematic. Direct presidential interference with enforcement decisions is generally regarded as improper, as is the threat (or reality) of removal of a

prosecutor or other enforcement officer because of particular investigative, prosecutorial, or enforcement choices. *See*, *e.g.*, Driesen, *Firing U.S. Attorneys: An Essay*, 60 Admin. L. Rev. 707 (2008); *see also* Green & Roiphe, *supra*, at 62–63 (discussing scandal resulting from President Nixon's interference in the ITT case). Political manipulation of investigations and law enforcement matters, not protection of the professional independence of enforcement officers, poses the threat of "tyranny."

Adjudicatory and regulatory powers demanding expert judgment and adherence to statutory policies implicate similar considerations. Insulating officers who perform such functions from at-will presidential removal (but not removal for incompetence or malfeasance) *enhances* liberty by protecting the integrity with which public duties are performed. *See*, *e.g.*, *Humphrey's Executor*, 295 U.S. at 625; *Wiener*, 357 U.S. at 356.

Moreover, even while conflating separation-of-powers analysis with a free-ranging inquiry into the effects of an agency's powers and structure on liberty, the critique of the CFPB ignores substantial constraints on the agency's power to infringe liberty—in particular, constraints imposed by statutory limits on the agency's powers and the courts' ability to enforce those limits through judicial review. *See*, *e.g.*, 12 U.S.C. § 5563(b)(4). To be sure, neither the judiciary nor the legislature can substitute itself for the President in performing functions constitutionally assigned to the executive branch. *See*, *e.g.*, *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274–75 (1991); *Bowsher*, 478 U.S. at 734. When courts protect the people's liberties from arbitrary or unlawful agency action, however, they are

not usurping executive power, but performing their assigned judicial function. *See*, *e.g.*, *Zivotofsky v. Clinton*, 566 U.S. 189, 194–96 (2012). And if separation-of-powers analysis is to be supplanted by an inquiry into threats of "tyranny," there is no reason not to consider checks imposed by other branches—just as Seila Law itself proposes to substitute the constraint imposed by the need for agreement among multiple commissioners for the constraint imposed by presidential supervision. *See* Pet. Br. 26. Judicial review is surely a more secure hedge against tyranny than the need for commissioners of the same agency to agree before acting.

Indeed, the Constitution diffuses power to secure liberty principally by assigning power to each branch to check infringements of liberty by the other branches. The Framers believed that "checks and balances were the foundation of a structure of government that would protect liberty." *Bowsher*, 478 U.S. at 722. Ignoring those checks makes little sense when one is inquiring whether a delegation of power threatens *tyranny*, as distinct from threatening the President's performance of his assigned functions.

The mistake of confusing separation-of-powers analysis with a charter to inquire into the effects of a particular institutional arrangement on liberty is confirmed by such an inquiry's manipulable nature. Seila Law's attempts to distinguish the single-director Office of Special Counsel and Social Security Administration from the CFPB illustrate the point. In Seila Law's view, those agencies are more acceptable from a separation-of-powers standpoint because their powers pose less threat of tyranny than those the CFPB wields. *See* Pet. Br. 23–24. The Office of Special Counsel, however, has authority to police personnel practices by agencies and take enforcement actions

against government employees—individuals with the full range of constitutional rights of U.S. citizens. Among the rules the Office enforces are those prohibiting improper political activity by government employees and protecting employees from improper political pressures from agency superiors. Its actions have direct implications for the liberties of government workers and the public as a whole, which are affected by political influences brought to bear on or by the civil service. *See Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 565 (1973).

The Social Security Administration, although not a law-enforcement agency, administers the federal statutory scheme that most broadly affects all Americans: Social Security. The Administration makes decisions that affect access by tens of millions of Americans to statutory entitlements essential to their livelihoods. The agency has the potential to exert great power over the large majority of Americans who will never be affected directly by federal prosecutorial or enforcement authority.

By comparison, the CFPB's sphere of authority is economic regulation, which affects liberties that receive minimal substantive protection under the due process clause. *See*, *e.g.*, *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955). And *procedural* due process rights for those affected by such regulation are fully protected by judicial review of CFPB actions.

The suggestion that an agency that regulates economic matters to protect consumers poses a greater threat of tyranny than agencies that affect individual rights in other ways reveals that the effort to insert a tyranny criterion into separation-of-powers analysis is

misguided. The constitutionality of these agencies does not turn on ad hoc judgments about whether protecting the liberty interests they affect requires three commissioners rather than one director; it depends on whether the functions they perform can permissibly be delegated to officers independent of the President (a test all three agencies satisfy under *Humphrey's Executor*, *Wiener*, and *Morrison*). Placing the CFPB, the Social Security Administration, or the Office of Special Counsel under control of multiple commissioners might or might not be better policy, but *that* issue is for Congress to decide.

IV. Congress may innovate in structuring agencies.

Both the Solicitor General and Seila Law assert that Congress has historically designed independent agencies as multi-member commissions, and that the novelty of the CFPB's single-director structure is a key indicator of its unconstitutionality. SG Br. 33–34; Pet. Br. 23–24. That form of reliance on historical precedent, however, lacks support in this Court's decisions—in particular, in *Free Enterprise Fund* and *NLRB v. Noel Canning*, 573 U.S. 513 (2014), which the parties cite to support their claimed reliance on history.

Noel Canning addressed specific constitutional text empowering the President to make appointments without Senate advice and consent during "the recess" of the Senate. The ambiguity of that term led the Court to consult "settled and established practice" in "determining the true construction of a constitutional provision the phraseology of which is … of doubtful meaning." *Id.* at 524 (citations omitted). By contrast, the argument against the CFPB's constitutionality does not invoke history to illuminate ambiguous

constitutional language. *Noel Canning* does not suggest that historical novelty of an institutional arrangement implies that it violates separation of powers.

Free Enterprise Fund's use of history is also very different from that of the CFPB's critics. *Free Enterprise Fund* begins by applying separation-of-powers principles: It analyzes whether the two-layer tenure protection afforded PCAOB members prevented the President from performing his assigned constitutional functions by precluding him from determining whether there was cause for the removal of PCAOB members. The decision holds that the two-layer protection "transform[ed]" the Board's independence and "subvert[ed] the President's ability to ensure that the laws are faithfully executed," 561 U.S. at 496, 498, unlike a single layer of for-cause removal protection, *see id*. at 495 (citing *Morrison*, 487 U.S. at 695–96).

Only after considering the statute under applicable separation-of-powers principles does *Free Enterprise Fund* turn to history—to address a *defense* of the two-layer structure based on "the past practice of Congress." *Id*. at 505. It is in that context that *Free Enterprise Fund* refers to the "lack of historical precedent" for two-layer tenure protection. *Id*. The opinion does not suggest that the Court would have condemned the agency's structure for novelty alone had it not concluded that the structure prevented the President from fulfilling constitutionally assigned functions.

The historical-precedent argument, moreover, proves too much. The independent commission was novel once, too. By most accounts, the most prominent early example was the Interstate Commerce Commission, which was created in 1887, was separated from

the Interior Department in 1889, and received significant ratemaking authority in 1906. *See* Breger & Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1128–30 (2000). Between that time and *Humphrey's Executor* in 1935, Congress created a few more agencies headed by tenure-protected commissions, most notably the Federal Reserve Board in 1913 and the FTC in 1914. *See id.* at 1116 n.14, 1132. But the constitutionality of tenure protection remained contested, especially after *Myers*. Between *Myers* and *Humphrey's Executor*, the few independent-commission statutes Congress enacted did not include express tenure protections. *See Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting).

If the "historical precedent" argument were correct, *Humphrey's Executor* would have come out differently. At the time, the "novelty" of a tenure-protected, multi-member regulatory commission was similar to, if not greater than, that of the CFPB. The regulatory commission structure had been used in a few instances dating back less than 50 years, to a point in time already a century into this country's constitutional history, and its constitutionality was contested for much of that time. Here, by comparison, analogous recent statutory grants of significant authority to single, tenure-protected officers date back over 40 years, to the creation of the Office of Special Counsel and the independent-counsel statute in 1978, and about 25 years to the creation of a tenure-protected Social Security Administrator in 1994. Thus, the multi-member commission structure held constitutional in 1935 was roughly comparable in novelty to the single-officer structure challenged today.

One difference, however, is striking: Unlike in 1935, it has now been repeatedly established by this Court, for 85 years, that Congress may protect officers exercising significant executive authority against at-will removal. In 1935, the very concept of tenure-protected officers was contested; now, the dispute concerns details of agency structure, not the greater issue of independence from the President. And even the degree to which the details are controversial is limited: The independent-counsel statute's constitutionality was settled 30 years ago in *Morrison*, and neither the Office of Special Counsel nor the Social Security Administration appears to have ever faced a serious constitutional challenge. The assertion that their constitutionality has been "contested ever since" their creation, Pet. Br. 24, is backed only by statements noting theoretical questions about their constitutionality, not by a history of actual controversy.

The larger point is that the degree of novelty is not determinative. "Our constitutional principles of separated powers are not violated ... by mere anomaly or innovation." *Mistretta,* 488 U.S. at 385. Where the Constitution permits delegation of authority to an independent agency—here, authority to regulate and enforce the fairness of commercial practices—Congress's decision to do so is not unconstitutional because the agency does not conform to a "traditional" commission structure.

The "traditional" form has advantages and disadvantages. It may foster deliberation, or it may lead to agency paralysis due to internal division or lack of a quorum. The choice of form is for Congress, and the perceived novelty of the structure is not itself an infringement of presidential authority that violates constitutional separation-of-powers principles. If exercise

of the authority delegated to a tenure-protected officer does not prevent the President from performing his constitutionally assigned functions, the statute does not violate Article II.

CONCLUSION

This Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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