No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

BRIEF FOR THE STATES OF TEXAS, ALABAMA, ARKANSAS, GEORGIA, INDIANA, KANSAS, LOUISIANA, NEBRASKA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONER

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant
Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

LANORA C. PETTIT
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Kyle.Hawkins@oag.texas.gov
(512) 936-1700

QUESTIONS PRESENTED

1. Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

2. Whether, assuming the Bureau is found unconstitutional, 12 U.S.C. § 5491(c)(3) can be severed from the Dodd Frank Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Page(s)

Cases (continued):

Page(s)

Cases (continued):

Page(s)

Cases (continued):

Constitutional Provisions, Statutes, and Rules

Page(s)

Constitutional Provisions, Statutes, and Rules (ctd.):

Page(s)

Miscellaneous

Page(s)

Miscellaneous (ctd.):

Page(s)

Miscellaneous (ctd.):

Page(s)

Miscellaneous (ctd.):

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arkansas, Georgia, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia.[1] As this Court has long recognized, States have "special solicitude" to challenge unlawful federal Executive Branch actions. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Such solicitude is necessary because States, whose law may be preempted by federal agencies run amok, stand in a unique position to guard "the public interest in protecting separation of powers by curtailing unlawful executive action." *Texas v. United States*, 809 F.3d 134, 187 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam).

In this case, the Consumer Financial Protection Bureau (CFPB) has wielded its unchecked power to compel Seila Law LLC, a private law firm, to provide information as part of an investigation into whether it violated the Telemarketing Sales Rule, 16 C.F.R. pt. 310, while providing debt-relief services to its clients. States enforce robust consumer protections, including limitations on unfair trade practices and law firms' marketing activities. If Congress wishes to permit federal agencies to assist or preempt States in protecting consumers and policing deceptive trade practices, it must do so in a manner consistent with Article II of the Constitution. For the reasons set out below, the CFPB's structure violates the

[1] No counsel for any party authored this brief, in whole or in part. No person or entity other than amici contributed monetarily to its preparation or submission.

Constitution. Moreover, the CFPB's for-cause removal protections cannot, consistent with congressional design, be severed from the provisions empowering the CFPB to oversee vast swaths of federal economic regulation.

SUMMARY OF ARGUMENT

I. The "ultimate purpose" of the structural provisions of the Constitution "is to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991). That is why the Framers viewed the "principle of separation of powers"—both horizontally among the three co-equal branches of the federal government and vertically between those branches and the States—"as the absolute central guarantee of a just government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J. dissenting); *see also, e.g.*, *New York v. United States*, 505 U.S. 144, 181 (1992). This case calls upon the Court to vindicate that principle by striking down an unlawful enforcement action pursued by an administrative agency built around a single unaccountable and unchecked administrator.

That agency—the CFPB—was created in 2010 under Title X of the Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd Frank"). Dodd Frank "transfers to the Bureau much of the authority to regulate consumer financial products and services that had been vested in other federal agencies." Resp. Br. 3. Unlike the federal agencies the CFPB replaced, however, the CFPB is headed neither by a group of commissioners nor by an individual who is removable at will by the President. Instead, the CFPB is headed by a single director who is appointed by the President, with the advice and consent of the Senate to a five-year term. 12 U.S.C. § 5491(b)-(c). She may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3).

The CFPB's structure is virtually unprecedented. To date, this Court has never ruled upon the legality of an "independent agency exercising substantial executive authority" that "has . . . been headed by a *single person*." *PHH Corp v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (emphasis in original). Amici are aware of only one other federal agency with an analogous structure and scope of authority: the Federal Housing Finance Agency (FHFA), which was created shortly before the CFPB. *See* Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008). Like the CFPB, the FHFA is headed by a single director who serves a five-year term and is removable only for cause. 12 U.S.C. § 4512(a)-(b). Since the petition was filed, a splintered Fifth Circuit has held that the FHFA's structure impermissibly "infringes Article II." *Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc). The court reasoned that when an agency is headed by a single director, limits on the President's removal power "do[] not fit within the recognized exception for independent agencies."[2] *Id.*

A. This Court should adopt the view of the Fifth Circuit majority and the dissents in *PHH.* As one member of this Court has noted, the directors of the CFPB and FHFA "possess[] more unilateral authority—that is, authority to take action on one's own, subject to no check—than any single commissioner or board member in any other independent agency in the U.S. Government." *PHH Corp.*, 881 F.3d at 166-67 (Kavanaugh, J., dissenting).

The Constitution forbids concentrating such unchecked authority in a sole, unaccountable administrator charged with overseeing an agency that wields executive power. This Court has permitted multi-member commissions on the basis that such a structure poses less of a threat to individual liberty than a single-headed commission and permits "precedents and traditions and a continuous policy and would be free from the effect of . . . changing incumbency." 51 Cong. Rec. 10,376 (1914) (Federal Trade Commission); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). An agency built around a sole administrator, by contrast, is unchecked by the constraints of group decisionmaking among members appointed by different presidents. *PHH Corp.*, 881 F.3d at 166, 178 (Kavanaugh, J., dissenting) (citing 5 Senate Committee on Governmental Affairs, Study on

[2] Both parties have sought certiorari in the *Collins* case. *See Mnuchin v. Collins*, No. 19-563; *Collins v. Mnuchin*, No. 19-422.

Federal Regulations, S. Doc. No. 95-91, at 35 (1977)); *see also Collins*, 938 F.3d at 599-607 (Oldham, J., concurring) (tracing history of presidential removal powers to founding period). A single director thus "poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than a multimember independent agency does." *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting).

B. This concentration of power in the hands of a single, unaccountable director also impedes the vertical separation of powers within our federal system. No less than the horizontal separation of powers, "[f]ederalism also protects the liberty of all persons . . . by ensuring that laws enacted in excess of delegated governmental power cannot direct or control their actions." *Bond v. United States*, 564 U.S. 211, 222 (2011). The CFPB should be reviewed with care as it reflects a significant change to the distribution of power, shifting the primary authority of protecting individual consumers from States to the federal government. Moreover, the structure of the CFPB significantly impedes the vertical separation of powers because the President cannot ensure that all officers wielding federal executive power row in the same regulatory direction. The result is that States can be left adrift as to how and to what extent they may enforce their own laws, to the detriment of the consumers that Dodd Frank was nominally passed to protect.

II. These structural defects cannot be removed from the CFPB without destroying the integrity of the vessel created by Congress to hold the numerous powers assigned by Dodd Frank.

A. Before the Court can reach the question, this case runs aground because the CFPB lacked capacity to file it. As the party invoking federal jurisdiction, the CFPB must establish the right and power to bring its claim. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 n.4 (1992). Capacity to sue is a fundamental, if often undiscussed, component of that right. Because the removal protection was in place at the time it brought suit, the CFPB lacked such capacity. Severance of Section 5491(c)(3) cannot salvage the CFPB's proceeding because it cannot solve that problem.

B. Moreover, Section 5491(c)(3) is not severable from the remainder of Title X. Severability turns on a deceptively simple counterfactual: Would Congress have passed Dodd Frank, creating and empowering the CFPB as it currently exists, had it known that the director would not be protected from presidential influence? Dodd Frank has a severability clause, indicating a congressional preference against invalidating the entirety of Dodd Frank, which addresses many issues unrelated to the CFPB. 12 U.S.C. § 5302. Nevertheless, when weighed against the statute's history and structure (as this Court's precedent requires), the evidence shows that Congress would not have granted the CFPB many of the powers contained in Title X had Congress known that the director would be removable at will. Such a grant would have moved enormous economic power from entities over which Congress had significant influence to an individual over whom it would have almost no influence. Such an outcome is implausible. Though, in theory, the Court could determine whether Congress would have wanted an accountable CFPB to exercise particular powers, it is up to Congress to engage in this fundamentally legislative act. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2319 (2016).

ARGUMENT

The CFPB has the power to "seek to implement and, where applicable, enforce Federal consumer financial law" as a means of ensuring that "all consumers have access to markets for consumer financial products and services" and that these markets be "fair, transparent, and competitive." 12 U.S.C. § 5511(a). The CFPB may also proscribe rules implementing consumer-protection laws; conduct investigations of market actors; and enforce consumer-protection laws in administrative proceedings and in federal court. *See, e.g.*, *id.* §§ 5511(c), 5562-64. Its actions preempt any state law to the contrary. U.S. CONST. art. VI, cl. 2. The consolidation of such sweeping power in the hands of an administrative agency headed by a single director runs afoul of both the horizontal and vertical separation of powers. The history and structure of the CFPB show that this structure is integral to its function and cannot be severed.

I. The CFPB's Design Violates the Structural Protections of the Constitution.

Our constitutional design is built on the bedrock principle that "[t]he accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny." THE FEDERALIST No. 47, at 298 (Madison) (C. Rossiter ed., 1961). To guard against such oppression, the Founders divided power horizontally among the three co-equal branches of the federal government and vertically between that government and the States. By concentrating vast swaths of federal power in the hands of one bureaucrat, the CFPB departs from these moorings.

A. The CFPB's structure violates the Constitution's horizontal separation of powers by insulating an executive officer from Presidential oversight.

The Constitution vests "[t]he executive power" in the President and compels him to "take care that the laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3. Precedent provides that removal restrictions such as those applicable to the CFPB are permissible only for multi-member commissions—not for those headed by a single director.

1. The President must retain the power to remove at will individuals who wield executive power.

Article II bestows "[t]he executive power" in a single, unitary executive. It makes "emphatically clear from start to finish" that "the president would be personally responsible for his branch." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005). The Framers demanded "unity in the Federal Executive" to guarantee "both vigor and accountability." *Printz v. United States*, 521 U.S. 898, 922 (1997); THE FEDERALIST No. 70, at 427 (Hamilton) (noting that without such unity, the people lose their "two greatest securities" against public malfeasance, the "restraints of public opinion" and the "opportunity of discovering" any abuse of trust). This unitary Executive further promotes "[d]ecision, activity, secre[c]y, and d[i]spatch" in ways that a "greater number" cannot. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1414, at 283 (1833).

Of course, as a practical matter, the President cannot carry out the full scope of "the executive power" on his own. This is why, "as part of his executive power," the President may "select those who [are] to act for him under his direction in the execution of the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). Selecting assistants and deputies lies at the heart of "the executive power," which necessarily includes the "power of appointing, overseeing, and controlling those who execute the laws." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 492 (2010) (quoting 1 ANNALS OF CONG. 463 (1789) (Joseph Gales ed., 1834) (remarks of James Madison)).

The President's essential power to select administrative officials necessarily includes the power to "remov[e] those for whom he cannot continue to be responsible." *Myers*, 272 U.S. at 117; *see also PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting) ("To supervise and direct executive officers, the President must be able to remove those officers at will."); Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1215 (2014) ("The text and structure of Article II provide the President with the power to control subordinates within the executive branch.").

Since the Founding, it has been understood that the removal power is necessary "to keep [executive] officers accountable." *Free Enter. Fund*, 561 U.S. at 483; *cf.*

Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1067 (2006) ("After a great deal of high-level debate leading to the Decision of 1789, Congress decided that the President has a constitutional right to remove" principal officers.). This view "soon became the 'settled and well understood construction of the Constitution.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839)).

After all, if the President could not remove agents, then a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him . . . that he must fear and, in the performance of his functions, obey.") (quotation marks omitted). That risk, in turn, would intolerably impinge on the President's duty to execute the law and upend the chain of command upon which the Executive Branch relies to function properly. *See Free Enter. Fund*, 561 U.S. at 513-14. Put simply, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484; *accord* THE FEDERALIST No. 70, at 423 (noting that the Executive cannot properly function if power, though "vest[ed] ostensibly in one man," remains "subject in whole or in part to the control and cooperation of others").

The Court recognized this common-sense understanding in *Myers v. United States*, when it struck down as unconstitutional a statutory provision that restricted the President's power to remove certain executive officers. 272 U.S. at 176. The Court held: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. If the President lacked the exclusive power of removal, he could not "'take care that the laws be faithfully executed.'" *Id.* at 164.

This Court has repeatedly reaffirmed the *Myers* rule to the present day. It did so most recently in *Free Enterprise Fund*, reiterating that the President's executive power "includes, as a general matter, the authority to remove those who assist him in carrying out his duties" to faithfully execute the laws. 561 U.S. at 513-14. "Without such power, the President could not be held fully accountable" for how executive power is exercised, and "[s]uch diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id.* at 514 (quoting THE FEDERALIST No. 70, at 478 (Hamilton) (J. Cooke ed., 1961)); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (Agencies "have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.").

2. Congress may restrict the President's removal power only as to independent, multi-headed commissions.

This Court has recognized only one narrow exception to the general rule in *Myers*. In 1935, this Court held that

Congress could create "independent" agencies headed by commissions or boards whose members were not removable at will and would operate free of the President's supervision and direction. *Humphrey's Ex'r*, 295 U.S. at 625, 631-32.

Humphrey's Executor concerned President Franklin Roosevelt's dispute with a commissioner of the Federal Trade Commission. President Roosevelt attempted to fire the commissioner, but the commissioner contested his removal, claiming that he was protected against firing by the FTC's for-cause removal provision. *Id.* at 621-22. Before this Court, the Roosevelt Administration relied in "chief" on *Myers* and its articulation of the Article II executive power. *Id.* at 626.

In a thinly reasoned opinion, this Court rejected that argument and held that Article II did not forbid Congress to create an independent agency "wholly disconnected from the executive department." *Id.* at 630. The Court deferred to the FTC's "nonpartisan" nature and its charge to "act with entire impartiality" while "exercis[ing] the trained judgment of a body of experts appointed by law and informed by experience." *Id.* at 624 (quotation marks omitted). Where those two features are present, this Court held, Congress may validly limit the President's power to remove the commissioners. *Id.* at 628-30.

Predictably, following *Humphrey's Executor*, independent agencies came to populate all corners of the federal government. There is "no authoritative list" of such agencies. JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES

12 (2d ed. 2018); *id.* at 5 (estimating that approximately 80 exist). But they clearly "play[] a significant role in the U.S. Government" and "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting). Several of these agencies affect the lives of countless Americans in significant ways, including the Federal Reserve Board, the Federal Communications Commission, the Federal Deposit Insurance Company (FDIC), the Securities and Exchange Commission (SEC), and many others. *Id.* at 173; *see also* SELIN & LEWIS, *supra*, at 97 (listing agencies with for-cause removal protections).

Importantly, almost without exception, these agencies share the two features recognized in *Humphrey's Executor*: (1) leadership composed of multiple members who (2) are appointed at staggered terms. As this Court observed in *Humphrey's Executor*, the FTC had five members with staggered terms, and no more than three of them could be of the same political party. 295 U.S. at 619-20. The Court thus held that the Commission was a "body of experts" deliberately "so arranged that the membership would not be subject to complete change at any one time." *See id.* at 624. Those features have come to be regarded as the *Humphrey's Executor* exception to the general rule in *Myers*. *See, e.g.*, *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (upholding the removal provisions of the three-member War Claims Commission); *see also Free Enter. Fund*, 561 U.S. at 483 ("In *Humphey's Executor*, . . . we held that 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.").

In the past, courts have pointed to two reasons why the Constitution may tolerate limits on the President's power to remove the heads of independent agencies headed by multiple members serving staggered terms. *First*, "[i]n the absence of Presidential control, the multi-member structure of independent agencies serves as a critical substitute check on the excesses of any individual independent agency head." *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). That is, "[t]he multi-member structure thereby helps to prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty." *Id.*; *see also Collins*, 938 F.3d at 587-88. This structure further discourages arbitrary, unsound agency actions driven by the whims of the one individual. *Id.* Each commissioner or board member, in other words, acts as a check on the others through the process of "deliberate decisionmaking." Kirti Datla & Richard Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013).[3]

[3] As a practical matter, the President has also maintained significant pull over these agencies, if not direct control, because he can typically appoint the chair. *See PHH*, 881 F.3d at 189 n.15 (Kavanaugh, J., dissenting). Because the chair is usually a multi-member commission's "most dominant figure," this allows the President to "retain policy influence" by setting the agency's budget and agenda. Datla & Revesz, *supra*, at 818-19.

Second, multi-member independent agencies have a historical tradition since *Humphrey's Executor*. *PHH Corp.*, 881 F.3d at 177-78 (Kavanaugh, J., dissenting) (citing, *e.g.*, *Free Enter. Fund*, 561 U.S. at 547 (Breyer, J., dissenting)); *Collins*, 938 F.3d at 600-04 (Oldham, J., concurring). In separation-of-power cases, "historical practice matters." *PHH Corp.*, 881 F.3d at 182-83 (Kavanaugh, J., dissenting). For example, in *National Labor Relations Board v. Noel Canning*, this Court relied on "[l]ong settled and established practice" to reach "a proper interpretation of constitutional provisions regulating the relationship between Congress and the President." 573 U.S. 513, 524 (2014) (quotation marks omitted).[4]

Those legislators who supported and continue to defend Dodd Frank read these cases to "allow[] Congress to provide limited protection against removal" whenever it decides that an officer should "perform [his] duties without executive leave" and "free from executive control." Amicus Br. of U.S. House of Representatives 7-8,

---

[4] To be sure, history includes some agencies headed by single individuals who have served fixed terms. *See* SELIN & LEWIS, *supra*, at 48-49. But those agency heads typically lack for-cause removal protection. *Id.* Apart from the FHFA and CFPB, only two agencies (the Office of the Special Counsel and the Social Security Administration) have single heads with removal protections, and those two have jurisdictions limited to enforcing federal law against federal officers or pertaining to federal spending. *Id.* For the reasons Petitioner explains (at 23-24), the legitimacy of these agencies is also subject to question.

(filed by divided Bipartisan Legal Advisory Group) [hereinafter "*Seila* House Br."]. Such a rule is without limits and is irreconcilable with *Myers*, *Noel Canning*, and *Free Enterprise Fund*. Moreover, it would undermine the foundational principle that the three branches of government are to be co-equal so that "[a]mbition [may] be made to counteract ambition." THE FEDERALIST No. 51, at 319 (Madison). The Founders "fortif[ied]" the Executive, making it the only place in our government where power is concentrated in the hands of a single individual, precisely because "[i]n republican government the legislative authority necessarily predominates." *Id.* at 319-20. If Congress could simply decide that it wanted certain duties to be performed "free from executive control," *Seila* House Br. 8, such measures would be for naught. *See* Resp. Br. 26-30.

In sum, only independent agencies with several directors serving staggered terms can possibly fall within the *Humphrey's Executor* exception to the *Myers* rule. To hold otherwise would erode the Founder's use of diffuse and checked power to protect liberty.

3. The CFPB's structure unconstitutionally vests unchecked power in a single director removable only for cause.

This Court's precedent thus makes clear that the CFPB's structure is impermissible under Article II. *See Myers*, 272 U.S. at 117. Unlike the multi-member boards approved in *Humphrey's Executor* and its progeny, the CFPB is headed by a single director. 12 U.S.C. § 5491(b). She serves a five-year term and may only be fired for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c). And she wields "unmistakably executive responsibilities." *PHH Corp.*, 881 F.3d at 80 (majority op.).

The director wields that executive power over nineteen different federal consumer-protection statutes, some of which have existed for many years, but others of which were created in Dodd Frank itself. David H. Carpenter, Cong. Research Serv., R.41839, *Limitations on the Secretary of the Treasury's Authority to Exercise the Powers of the Bureau of Consumer Financial Protection* 1 (2011), https://www.llsdc.org/assets/DoddFrank-docs/crs-r41839.pdf. She may investigate compliance with those statutes. 12 U.S.C. § 5512(b)(1). She may (as she did in this case) issue civil-investigative demands. *Id.* § 5562(c). She may institute enforcement actions and conduct "adjudication proceedings." *Id.* § 5563(a). And she may sue in state or federal court to enforce consumer-protection laws. *Id.* § 5564.

Those facts reveal the fundamental flaw in the Ninth Circuit's conclusion that this case is "control[led by the] standard enunciated in *Morrison v. Olson*." Pet. App. 12a. As this Court explained in *Free Enterprise Fund*, it "considered the status of inferior officers in *Morrison*," including whether Congress may limit an agency head's ability to terminate an inferior officer at will. 561 U.S. at 494. The Court concluded that Congress may do so in light of the inferior officer's "limited jurisdiction and tenure and lac[k] [of] policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691. But the Court said nothing about whether Congress may impose similar limits on the President's ability to remove a principal officer who has "all but exclusive power to make and enforce rules" under numerous federal statutes, *PHH Corp.*, 881 F.3d at 153 (Henderson, J., dissenting), on topics "covering everything from home finance to student loans to credit cards to banking practices," *id.* at 165 (Kavanaugh, J., dissenting). *Cf. Free Enter. Fund*, 561 U.S. at 494-95 (limiting *Morrison* to its facts). Instead, the extent of the CFPB's ability to set and enforce federal economic policy demonstrates why this case is controlled by the Court's original *Myers* rule.

Myers provides that the President's subordinates must be removable at will. *Humphrey's Executor* creates a narrow exception for multi-director independent agencies with directors serving staggered terms. Because the CFPB has a sole director, appointed for a term of five years and removable only for cause, its structure falls outside that exception, thus violating Article II by preventing the President from carrying out the executive power.

B. The CFPB's structure poses grave threats to the vertical separation of powers in our federal system.

The CFPB's structure is especially troubling because it also erodes the vertical separation of powers. The CFPB was designed, not only to concentrate power from "seven different federal regulators" that have previously overseen consumer financial products, but also to eliminate supposed "regulatory arbitrage between federal regulators and the [S]tates." S. Rep. 111-176, at 10 (2010). In so doing, Dodd Frank worked a major change in our federal system by taking the primary role of protecting consumers from States and placing it in a federal agency. The Court should scrutinize this shift carefully because federalism—no less than the separation of federal powers—serves to "protect[] the liberty of the individual" by "denying any one government complete jurisdiction over all the concerns of public life." *Bond*, 564 U.S. at 222.[5] By insulating the CFPB director from presidential control, Dodd Frank exacerbates the impact of this shift by empowering a second captain to chart the course for federal economic policy. This leaves state regulators without a clear guide as to how to navigate complex federal regulations, and by extension, to enforce their own laws to protect their own citizens.

1. Dodd Frank shifts the balance of power between the national and state governments.

Since the Founding, States have generally been the first line of defense for consumers. Indeed, this view was so engrained that Alexander Hamilton scoffed at the idea that federal officials would even want to become involved in the "administration of private justice between the citizens of the same State." THE FEDERALIST NO. 17, at 114 (opining that such "domestic" matters "hold out slender allurements to ambition" for national actors).

This principle has extended to state regulation of consumer financial products. Our system has long allowed

---

[5] *See also, e.g.*, *New York*, 505 U.S. at 181 (citing *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

banks and other financial institutions to opt whether to be chartered—and therefore primarily regulated—under federal or state law. *See generally* Marc Labonte, Cong. Research Serv., R.44918, *Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework* (2017), https://fas.org/sgp/crs/misc/R44918.pdf. Consumer financial products in particular were usually regulated at the state level, including, for example: insurance, 15 U.S.C. §1011 et seq.; mortgages, Andra Ghent, *The Historical Origins of America's Mortgage Laws*, Research Inst. For Hous. Am. (2012), https://www.mba.org/assets/Documents/Research/RIHA/82406_11922_RIHA_Origins_Report.pdf; disclosure rules for local distribution of securities, Labonte, *supra*, at 25; and the rates that banks may charge on credit cards, *Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 318 n.31 (1978).

As the economy developed, financial institutions became larger, leading to efforts to make laws more uniform across states or to calls for federal regulation. Ghent, *supra*, at 3 & n.1. Nevertheless, States have maintained a significant role in regulating financial services and service providers within their borders. *Id.*; Labonte, *supra*, at 24-26. To this day, States remain the chartering authority and primary regulators of 78% of the nation's banks and 23,000 non-depository financial-services providers.[6]

---

[6] *Examining De-Risking and Its Effect on Access to Financial Services Before the Subcommittee on Financial Institutions and Consumer Credit, House Committee on Financial*

The advent of the CFPB worked a significant shift of this authority. The jurisdiction of federal financial regulators has typically been defined either by the type of institution (*e.g.*, the Federal Reserve) or the type of product (*e.g.*, the SEC). The CFPB, by contrast, seeks to regulate institutions, activities, and products based largely on the identity of the end user. Labonte, *supra*, at Figure 1. This grants the CFPB regulatory authority throughout the financial sector and beyond. 12 U.S.C. §§ 5481(6), 5481(15), 5536(a)(1)(B) (providing regulatory authority to those engaged in a broad range of regulated activity). And it leads to considerable gray area for the agency to define its own jurisdiction.[7]

The effects of this transfer of authority are significant. Money moves like the tide in a constant competition for limited capital. This leads to difficult policy questions regarding how to balance competing interests. For example, community banks can be the best way to promote small business, but they lack the resources to shoulder

---

Services, 115th Cong. 2d. (2018) (Testimony of Bryan A. Schneider, Secretary of Illinois Department of Financial and Professional Regulation Division of Banking, on Behalf of the Conference of State Bank Supervisors (CSBS)), https://www.csbs.org/sites/default/files/2018-02/De-Risking%20Hill%20Testimony%20Feb_15_FINAL.2.pdf.

[7] *Cf.*, Letter from Brian Schatz et al. to Leandra English as "Acting Director, Consumer Financial Protection Bureau," and Mick Mulvaney, Director, Office of Management and Budget (Feb. 7, 2018) (discussing the CFPB's aborted probe into Equifax data breach).

heavy reporting requirements.[8] Allowing the sellers of large commercial goods to compete with financial institutions may be the best way to ensure that consumers receive competitive financing arrangements, but the results can appear to some to be unfair or to lack transparency.[9] Before Dodd Frank, individual state legislatures could decide what solutions were right for their communities. Now, in the name of preventing "regulatory arbitrage," S. Rep. 111-176, at 10, Congress has allowed a single, unelected and unaccountable bureaucrat what is effectively a veto over these legislatures' chosen solutions.

2. The CFPB's structure exacerbates these federalism concerns by creating two sources of federal financial law.

This regulatory veto is particularly problematic because the CFPB's structure places the director outside of the control of the President who was provided unified authority to execute laws precisely so that a "dependence on the people" serves as the "primary control on the government." THE FEDERALIST No. 51 at 319. The CFPB's remit is capacious, but it must work with others both in state and federal governments to ensure a properly functioning marketplace. The President's inability to oversee that cooperation at the federal level impacts not only the

---

[8] CSBS, *Relationship Lending Model at Risk?*, Nov. 9, 2017, https://www.csbs.org/relationship-lending-model-risk.

[9] Letter from Rob Portman, et al., to Richard Cordray, Director CFPB (Oct. 30, 2013).

ability of individuals to comply with federal law but that of States to enforce their own sovereign policies.

While extremely powerful, the CFPB has to coordinate with other regulators on several different levels. At the policy-setting level, "while the Act would seem to divide" the world cleanly between consumer and other types of financial products, "in practice, the realities of technology and economics belie such a clean parceling of responsibility." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Similarly, at the enforcement level, the CFPB has full, direct supervisory authority only over institutions of a certain size. SUSAN BERSON & DAVID BERSON, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: FROM LEGISLATION TO IMPLEMENTATION TO LITIGATION 53-54 (2012). Preexisting regulators retain direct supervision of other institutions' compliance with CFPB regulations, though they must respond to recommendations from the CFPB within a certain period. *Id.*

These complex interdependencies mean that by necessity as much as by statute, the CFPB must coordinate with federal agencies that are accountable to the President and with States to accomplish its regulatory functions. State financial regulatory authorities have long had working relationships with federal regulators charged with overseeing the safety and soundness of our financial institutions. Labonte, *supra*, at Table 1 (listing regulators). Maintaining consistency and clarity in these relationships is crucial because under the Supremacy Clause, and this Court's jurisprudence, the actions of all federal regulators preempt state laws and regulations to the contrary. *E.g.*, *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). Because these federal and state agencies have interlocking jurisdictions, arbitrary shifts in policy at one regulator can throw the entire system into disarray. Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1903-05 (2019). It is for that reason that until 2008, nearly all federal regulators were multi-member independent agencies whose structure was designed specifically to improve that consistency. S. Doc. 95-91 at 29-30. The exceptions were Bureaus within the Department of Treasury that were (and are) accountable to the President (*e.g.*, the Comptroller of the Currency).

The advent of the CFPB has complicated these relationships by creating the possibility of inconsistent federal economic policies. By way of example, consider the transaction undertaken by parents in Kansas who wish to wire money to a child, who is studying at a university in Virginia. This sounds like a simple transaction. But, in reality, this type of "money services business" touches the jurisdiction of two state banking authorities (in Kansas and Virginia) as well as multiple federal agencies, including the CFPB, Treasury's Financial Crimes Enforcement Network, and the Internal Revenue Service. *See generally* Schneider, *supra* n.6. If criminal charges become necessary, the Department of Justice and the local Office of the U.S. Attorney may also become involved. That is a lot of regulators patrolling the same pool of entities.

To keep themselves from colliding, regulators have written agreements to share information and coordinate examination and enforcement activities. *Id.* at 6-7. These agreements are crucial because investigating and prosecuting widespread financial crimes that affect multiple consumers is both time-consuming and expensive. Comment Letter from John Ryan, President Conference of State Bank Supervisors, to Monica Jackson, CFPB (May 21, 2018), https://www.csbs.org/comment-letter-request-information-regarding-bureaus-supervision-program. Without these agreements, duplicated efforts would hinder enforcement at both the state and federal levels.

The CFPB's unprecedented structure interferes with these necessary relationships. To function properly, intergovernment agreements require clear channels of authority and consistent enforcement. The structure of the CFPB obstructs these channels because it allows for the very real possibility that the CFPB's director and the President will be of different political parties and pursue different policy aims. *See* Resp. Br. 28-29. This can lead to States receiving both unclear and inconsistent guidance on how to navigate enforcing their own policies in compliance with federal law.

First, by granting unilateral executive authority to the CFPB's director, Dodd Frank created two binding sources of federal financial law. Because the CFPB and the Treasury Department are federal agencies, their interpretations of any law that arguably falls within their jurisdiction preempt state law. *City of Arlington v. FCC*, 569 U.S. 290, 296-97 (2013). If these agencies do not agree, there would be two source of federal law that are theoretically binding on States and their citizens. Even on a temporary basis, this is impermissible because the

Constitution does not permit such "a sort of junior-varsity" President. *Mistretta v United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). But because the CFPB's director is appointed for five years, it is possible that this lack of clarity could persist for more than an entire presidential term.

An exaggerated example of this confusion can be seen when Leandra English claimed to be the CFPB director and continued the policies that her predecessor had put into place. This effort was supported by several Senators. Letter from Schatz, *supra* n.7. At the same time the President's choice, Acting Director Mick Mulvaney began to chart a new course, leaving States and regulated entities having to choose between the two. *Id.*

Second, for the reasons discussed above, because the CFPB's structure lacks the traditional features designed to promote consistency in financial policy, any change of regime can bring wide swings in policy choices and enforcement priorities. *See* Christopher L. Peterson, Consumer Fed'n of Am., *Dormant: The Consumer Financial Protection Bureau's Law Enforcement Program in Decline* (2019), https://consumerfed.org/reports/dormant-the-consumer-financial-protection-bureaus-law-enforcement-program-in-decline/ (analyzing statistical changes between Cordray and his successors). This can harm individual rights and impede the ability of States to enforce their own laws.

Again, this is best shown by way of example: After the 2016 election but before the resignation of Director Cordray, the CFPB brought an enforcement action against four payday lenders in Kansas, which was promptly dropped after Acting Director Mulvaney took office. *Cf.* Steve Vockrodt, *CFPB drops Kansas payday lending case, stoking fears Trump is backing off the industry*, THE KANSAS CITY STAR, Jan. 19, 2018, https://www.kansascity.com/news/politics-government/article195623824.html. It is unknowable how much this aborted case cost these companies, but we do know that had Cordray not resigned to run for Governor of Ohio, it may have been fully litigated without an accountable officer ever being able to review its merits. Moreover, Kansas had to decide whether to shift resources to pursue a state enforcement action, notwithstanding any preexisting divisions of labor with other regulators. Such an about-face may have been impracticable or impossible, and it would have been unnecessary had the CFPB either had a traditional multi-headed structure or had been accountable to the President.

* * *

In sum, federal financial regulations have long been promulgated by groups of experts, who have worked with their state counterparts to promote stability in the marketplace. In a supposed effort to protect consumers, Dodd Frank reversed course and poured enormous amounts of economic power into the hands of one individual. This individual can—without input from either the President or any state legislature—make or unmake policies that impact millions of people and billions of dollars. No matter how benevolent the intention, that is the very essence of financial dictatorship and cannot be squared with the structural provisions of our Constitution that are premised on the dispersion of power.

II. The Court Cannot Save This Enforcement Proceeding by Severing the Director's For-Cause Removal Protections.

The Court cannot resolve these fundamental problems with the CFPB's structure by deleting the for-cause removal protections from 12 U.S.C. § 5491(c)(3). Severability is a question of statutory interpretation: Assuming that the removal protections cannot be enforced, can the remainder of Title X of the Dodd Frank Act be enforced in a manner consistent with the statute's language, structure, and drafting history? This question often involves difficult counterfactuals about what Congress would have wanted had it known that the statute it created would not withstand constitutional scrutiny. The Court need not delve into these issues because, regardless of severability, this case would need to be dismissed because the CFPB lacked capacity to bring it. If the Court does reach the question, however, the structure and history of Dodd Frank amply demonstrate that the CFPB director's removal protection cannot be severed from those provisions creating and empowering her office.

A. Regardless of severability, this enforcement proceeding must be dismissed for lack of capacity.

As an initial matter, regardless of severability, this enforcement action must be dismissed for lack of capacity to bring it. The CFPB filed this action to enforce a civil-investigative demand. Pet App. 10a-11a.; *see* 12 U.S.C. § 5562(e)(1). The CFPB, "as the part[y] now asserting federal jurisdiction, [carries] the burden of establishing [its] standing under Article III." *Daimler*

Chrysler Corp. v. Cuno, 547 U.S. 332, 342 (2006); *see also Allen v. Wright*, 468 U.S. 737, 752 (1984) (stating that the Court may not entertain a case where "the particular plaintiff is [not] entitled to an adjudication of the particular claims asserted"). It must also show that it had capacity to sue. *E.g.*, *Moffat Tunnel League v. United States*, 289 U.S. 113, 118-19 (1933); *Relfe v. Rundle*, 103 U.S. 222, 224 (1880). Whether the CFPB has met this burden is measured at the time that the complaint was filed. *Lujan*, 504 U.S. at 569-70.

The CFPB did not have capacity to sue when this action was filed in mid-2017. So long as the constitutionally impermissible removal protections have remained in place, the director of the CFPB could not bring this enforcement action because there was no constitutional statute granting her such power. *See Free Enter. Fund*, 561 U.S. at 513 (holding that "the reporting requirements and auditing standards to which [petitioners] are subject will be enforced only be a constitutional agency accountable to the Executive"); *Collins*, 938 F.3d at 594-95; *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 827-28 (D.C. Cir. 1993); *accord Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) ("This Court has held that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief.") (quoting *Ryder v. United States*, 515 U.S. 177, 182 (1995)). Nothing this Court holds about Section 5491(c)(3)'s future can change whether the CFPB had capacity in the past.

B. The for-cause removal provision is not severable from the remainder of Title X of Dodd Frank.

If the Court does reach the question of severability, it should hold that Section 5491(c)(3) is not severable from the remainder of Title X of Dodd Frank, which created and empowered the CFPB. It is well established that severability is a question of statutory interpretation that turns on whether Congress would have created the CFPB with its myriad powers had it known that the director's for-cause removal protections were not enforceable. Though Dodd Frank contains a boilerplate severability clause, the history of these powers and the structure of the statute demonstrate that Congress would not have created the CFPB as it did with an accountable director. Though the Court could, in theory, determine which powers Congress would have provided to an accountable director, the Court's jurisprudence does not permit such an effort to "'substitute the judicial for the legislative department of the government.'" *Hellerstedt*, 136 S. Ct. at 2319 (quoting *Reno v. ACLU*, 521 U.S. 844, 884-85 n.49 (1997)).

Though courts will avoid invalidating more of an act than necessary to remedy a constitutional defect, severability is ultimately a question of legislative intent. *Free Enter. Fund*, 561 U.S. at 508. Courts should not leave pieces of a statute afloat when "it is evident that [Congress] would not have enacted those provisions which are within its power, independently of that which is not." *Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932). To do so would exchange one separation-of-powers problem for another as the Court would be amending Dodd Frank to something that Congress likely would "never have been willing, by itself, to enact." *Pollock v. Farmer's Loan & Tr. Co.*, 158 U.S. 601, 636 (1895) (quotation marks omitted); *Hellerstedt*, 136 S. Ct. at 2319.

As with any question of statutory interpretation, the first source of congressional intent is the text. Dodd Frank has a severability clause. 12 U.S.C. § 5302.[10] This clause is evidence that Congress had a "preference for a narrow judicial remedy" if certain provisions were held unenforceable. *Hellerstedt*, 136 S. Ct. at 2319. But this Court has repeatedly held that such a clause "'is an aid merely; not an inexorable command.'" *Id.* (quoting *Reno*, 521 U.S. at 884-85 n.49); *Hill v. Wallace*, 259 U.S. 44, 70 (1922). *Contra* Resp. Br. 46-47. Indeed, far from conclusive, this Court has stated that 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).

In addition to the severability clause, the Court will consider the structure and statutory history of Dodd Frank to determine whether Congress intended the statute to survive without Section 5491(c)(3). For example, the Court looks to whether the statute (or titles within it) could perform any work independent of the severed provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (citing *Hill*, 259 U.S. at 70-72). This is a necessary

---

[10] In fact, the statute has two. Title V, which addresses insurance, has a separate severability clause. 15 U.S.C. § 8232. No such title-specific severance clause exists in Title X.

inquiry because if a statute could not operate as a law absent the unconstitutional provision, it is strong evidence that Congress would not have passed the statute without that provision. *Id.* at 684-85. Once again, bare functionality is insufficient to save the rest of the statute because severability—like all issues of statutory interpretation—turns on "whether the statute will function in a *manner* consistent with the intent of Congress." *Id.* at 685 (emphasis in original). If the impermissible provision is "so interwoven with" the remainder of the statute "that they cannot be separated" without unravelling the entire statutory scheme designed by Congress, the Court will treat the provision as inseverable. *Hill*, 259 U.S. at 70; *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1482-83 (2018).

Congress likely would have passed much of Dodd Frank without Section 5491(c)(3). The statute is nearly 1,000 pages long statute, is divided into sixteen titles, and addresses numerous topics that have nothing to do with the CFPB. For example, Amici are aware of no concrete evidence that Congress would have preferred not to adopt the provision of Dodd Frank that requires the SEC and the Commodity Futures Trading Commission to create detailed new regulations about the swaps and derivatives markets had it known that the CFPB director would have been accountable to the President. 15 U.S.C. § 8302. For these unrelated provisions, located in different titles of the Act, the severability clause is likely conclusive.

By contrast, there is considerable evidence that Title X of Dodd Frank would not "function in a *manner* consistent with the intent of Congress" were the CFPB director to be directly accountable to the President. *Brock*, 480 U.S. at 685. This includes the historical context of the powers granted to the CFPB, the structure of the CFPB itself, and actions taken by the CFPB's creators to preserve its original structure.

First, there is the history of the CFPB's powers themselves, which fall into two categories: those transferred from other agencies and those created by Dodd Frank. Carpenter, *supra*, at 1. The majority of the powers that were transferred to the CFPB came from other independent agencies, such as the Federal Reserve, FDIC, or FTC. *Id.* at 3-4. Congress developed these agencies over a period of decades so that they function relatively independently from the Executive Branch. A corollary to that independence, however, has long been understood to be that these agencies would be subject to *greater* influence from the Legislative Branch. *See, e.g.*, *Waters v. Wachovia Bank, N.A.*, 550 U.S. 1, 12 (2007). It is unlikely that Congress would have transferred power from such agencies to the CFPB, had it known a court would "effectively turn[] the CFPB into an instrumentality of the President." *PHH Corp.*, 881 F.3d at 83 (majority op.).

That Congress *did not* intend such an outcome is confirmed by how Congress treated the CFPB's new powers in the gap period between Dodd Frank's effective date and when this administrative leviathan reached its full size. Dodd Frank effectively transferred the powers discussed above from their original agencies on July 21, 2011; its first director was not confirmed until January

2012. During this interregnum, Congress authorized the Treasury Secretary "to perform the functions of the Bureau under . . . subtitle [F]," which included the transferred power. Carpenter, *supra*, at 2-3. But the Secretary was *not* allowed to exercise—even temporarily—"[t]he Bureau's newly established authorit[y]." *Id.* at 5-6 (listing excluded authorities). If Congress refused to allow a terminable-at-will officer to exercise the full power of the CFPB even temporarily, it defies belief that Congress would have wanted to allow such an officer to exercise such authority on a permanent basis.

Second, additional structural protections of the CFPB effectively insulate the CFPB from any significant influence from Congress. For example, the director of the CFPB may requisition up to 14% of the combined earnings of the Federal Reserve System outside the ordinary appropriations process after statutory adjustments. *See* Pet. Br. 7; *see also* 12 U.S.C. §§ 5497(a)(1), (2)(A)(iii), (2)(B). This translates to hundreds of millions of dollars per quarter over which Congress has no control. *See, e.g.*, Letter from Kathleen L. Kraninger, Director of the CFPB, to Jerome Powell, Chairman, Board of Governors of the Federal Reserve System (Sept. 24, 2019) (requesting $223,300,000 for FY2020 Q1). Self-funding agencies such as the CFPB are rare because appropriations are considered the "most potent form of [c]ongressional oversight." 2 Senate Comm. on Gov't Operations, Cong. Oversight of Regulatory Agencies, 95th Cong., 1st Sess. 42 (1977). In the past, self-funding agencies have always been created to be "independent of the President" as well. Charles Kruly, *Self-funding and*

Agency Independence, 81 GEO. WASH. L. REV. 1733, 1738 (2013). It is "most unlikely" (*Murphy*, 138 S. Ct. at 1482) that Congress would have consolidated power from numerous independent agencies in an officer directly accountable to the President and simultaneously insulate that officer from its own power of the purse. *See* THE FEDERALIST No. 58, at 359 (Madison) (describing the "power over the purse" as Congress's "most complete and effectual weapon" to "obtain[] a redress of every grievance").[11]

Third, since before its passage, the architects of the CFPB have repeatedly confirmed that they considered its single-headed structure crucial to its function. For example, as Petitioner explains (at 40), the Senate refused to pass a House-endorsed version of the CFPB headed by a multi-member commission. On the day Dodd Frank became effective, the House again passed a bill that would have replaced the current structure with the traditional multi-member board approved by *Humphrey's Executor*. *See* BERSON & BERSON, *supra*, 39 & n.1. Again the Senate refused to pass it, and President Obama threatened a veto. *Id.* In the intervening years, numerous legislators have urged that a removable-at-will director would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." Brief of Members of Congress Supporting Rehearing En Banc at 2, 5, *PHH Corp.*, 881 F.3d 75. *But see Seila* House Br.

[11] For other examples of how Dodd Frank insulated the CFPB from existing checks on power, see Pet. Br. 43.

10 n.4 (arguing without explanation that provision should be severed).

In light of this history, it is clear that Congress did not intend for the CFPB, as it exists, to be headed by an individual who is accountable to the President. Thus Section 5491(c)(3) cannot be severed from Title X of Dodd Frank. It is theoretically possible for the Court to "go through the individual components" of the statute to determine which powers Congress might have allowed such an officer to wield. *Hellerstedt*, 136 S. Ct. at 2319-20. But that is the type of "quintessentially legislative work" that this Court's severance jurisprudence does not permit. *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006).

[Remainder of page intentionally left blank.]

CONCLUSION

The judgment of the court of appeals should be reversed, and the enforcement action against Seila Law dismissed.

Respectfully submitted.

STEVE MARSHALL
Attorney General of Alabama

LESLIE RUTLEDGE
Attorney General of Arkansas

CHRISTOPHER M. CARR
Attorney General of Georgia

CURTIS T. HILL, JR.
Attorney General of Indiana

DEREK SCHMIDT
Attorney General of Kansas

JEFF LANDRY
Attorney General of Louisiana

DOUG PETERSON
Attorney General of Nebraska

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

LANORA C. PETTIT
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Kyle.Hawkins@oag.texas.gov
(512) 936-1700

MIKE HUNTER
Attorney General of
Oklahoma

ALAN WILSON
Attorney General of
South Carolina

JASON R. RAVNSBORG
Attorney General of
South Dakota

SEAN REYES
Attorney General of
Utah

PATRICK MORRISEY
Attorney General of
West Virginia

DECEMBER 2019