

No. 15-1177

IN THE
Morris Tyler Moot Court of Appeals at Yale

CONSUMER FINANCIAL PROTECTION BUREAU,
Petitioner,

v.

PHH CORPORATION, ET AL.
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Respondents in this Court, who were petitioners below, appeal a decision of the Consumer Financial Protection Bureau (CFPB). In the court below, Respondents sought only to vacate the administrative order. The court ruled for Respondents on three statutory questions and unanimously held that those statutory issues should vacate the CFPB's administrative order. Those holdings are uncontested. Over a dissenting opinion, the lower court also reached the constitutional question of whether the CFPB is permissibly structured, holding for Respondents and severing the for-cause removal protection for the Director of the Bureau. The questions presented are:

1. Whether it is necessary to reach the constitutional question when the uncontested statutory holdings below are sufficient to vacate the administrative order.
2. Whether the CFPB's structure as an independent agency led by a single Director removable only for cause satisfies the principle of separation of powers and, if not, whether the proper remedy is to sever the for-cause removal provision of the statute.

PARTIES TO THE PROCEEDING

The petitioner here and respondent below is the Consumer Financial Protection Bureau. The respondents here and petitioners below are PHH Corporation, PHH Mortgage Corporation, PHH Home Loans LLC, Atrium Insurance Corporation, and Atrium Reinsurance Corporation.

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OPINIONS BELOW

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STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on October 11, 2016. After timely filing, the petition for a writ of certiorari was granted. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) (2012).

STATUTORY PROVISIONS INVOLVED

The Consumer Financial Protection Bureau is governed by 12 U.S.C. §§ 5481-5603 (2012). Section 5491(b)(1) of this title provides for a single Director of the Bureau by establishing "the position of the Director, who shall serve as the head of the Bureau." Section 5491(c)(3) establishes statutory removal protection for the Director: "The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office." All other relevant statutory provisions can be found in the corresponding provisions of the United States Code.

STATEMENT

I. The Financial Crisis and the Consumer Financial Protection Bureau

Between 2007 and 2009, the United States experienced the most severe financial crisis since the Great Depression. U.S. gross domestic product fell by nearly 5 percent, and losses in national output were estimated to have ranged from several trillion to over \$10 trillion. U.S. Gov't Accountability Office, GAO-13-180, *Financial Regulatory Reform: Financial Crisis Losses and Potential Impacts of the Dodd-Frank Act* 12, 15 (2013). The impact of the crisis was felt not only

by large banks and businesses but also by the millions of everyday Americans who lost their savings and jobs. Just a single statistic reveals the widespread extent of the harm: between 2005 and 2011, American households lost an estimated \$9.1 trillion in home equity, partly due to predatory lending. *See id.* at 21, 53-54.

Weak enforcement of the laws was a key driver of the crisis. The Financial Crisis Inquiry Commission attributed the lax enforcement in part to powerful industry actors exercising undue influence on the financial regulatory commissions that were supposed to supervise them. Put simply, “[t]he sentries were not at their posts.” Fin. Crisis Inquiry Comm’n, *The Financial Crisis Inquiry Report*, at xviii (2011).

In July 2010, Congress responded by passing the Dodd-Frank Wall Street Reform and Consumer Protection Act. *See* Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Act was meant to address the abusive financial practices that lead to the crisis and encompassed myriad reforms, from the creation of the Financial Stability Oversight Council to new legal constraints on financial institutions. *See* Dodd-Frank Act §§ 1001-1100H; Staff of S. Comm. on Banking, Housing, & Urban Affairs, 111th Cong., *Brief Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (2010). Perhaps most importantly, Dodd-Frank established the first independent agency dedicated to overseeing the implementation of all major consumer financial protection laws—the Consumer Financial Protection Bureau (CFPB). The Bureau has broad-ranging authority to centralize and coordinate rulemaking and to act as the primary enforcer of a host of consumer financial protection laws. *See* David H. Carpenter, Cong. Res. Serv., R41338, *The Dodd-Frank Wall Street Reform and Consumer Protection Act, Title X: The Consumer Financial Protection Bureau* 3-4 (2010). It also exercises supervisory authority over an array of consumer

financial products and services, including credit card issuers, payday lenders, mortgage issuers, loan servicers, and money transfer services. *See id.*

Congress structured the Bureau as an independent agency, insulating it from the political influence that had impaired the effective functioning of financial regulators prior to the crisis. The Bureau is led by a Director who is appointed by the President with the advice and consent of the Senate, removable only for cause, and serves a fixed five-year term. *See* 12 U.S.C. § 5491(b), (c) (2012). The Dodd-Frank Act builds in a number of external checks that limit the Bureau's authority. For instance, the Act instructs the Director to establish a Consumer Advisory Board, which is to advise and consult with the Bureau on implementing and enforcing the consumer financial protection laws. *See* 12 U.S.C. § 5494 (2012). Additionally, the Bureau is required to report regularly to Congress, *see* 12 U.S.C. § 5496 (2012), and to coordinate and consult with other financial regulators, *see* 12 U.S.C. § 5495 (2012), several of which retain backup enforcement authority of the same consumer financial protection laws, *see, e.g.*, 12 U.S.C. § 5581(c) (2012). Notably, it appears that no member of Congress publicly raised constitutional concerns regarding the Bureau's structure during the extensive drafting process. Rather, Congress expected the new consumer watchdog to step in where other regulators had failed. *See* S. Rep. No. 111-176, at 10-11 (2010).

And the Bureau delivered. By 2015, the agency had already returned \$11 billion to more than 25 million consumers who were harmed by illegal financial practices. *See The Dodd-Frank Act Five Years Later: Are We More Free?*, 114th Cong. 9-10 (2015) (delivered statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC, and former Senior Counsel, CFPB). Through rulemakings and enforcement actions, the Bureau has addressed abuses in the payday and installment-lending, credit-card, mortgage, and banking industries as well. *See id.* To a great

extent, the Bureau’s “mere existence as a public watchdog serves as a powerful deterrent against predatory and exploitative industry practices.” *Id.* at 70 (prepared statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC, and former Senior Counsel, CFPB).

II. PHH’s Captive Reinsurance Scheme Dispute

The case at hand arises out of a complex financial scheme set up by PHH Corporation, a large home mortgage lender. PHH ran a captive reinsurance arrangement wherein PHH referred its borrowers to buy mortgage insurance from entities that purchased reinsurance from PHH’s wholly owned subsidiary, Atrium Insurance Corporation. *See PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 10 (D.C. Cir. 2016).

Before 2010, the Department of Housing and Urban Development (HUD) administered the Real Estate Settlement Procedures Act (RESPA) of 1974. Section 8(a) of RESPA prohibits certain kinds of referral payments, including payments from a mortgage insurer to a lender for referring a homebuyer. *See id.* at 11. Put simply, this provision aims to thwart self-dealing in mortgage insurance markets. HUD interpreted Section 8(c) of RESPA to establish a safe harbor that permitted captive reinsurance arrangements as long as the mortgage insurer paid no more than reasonable market value for the reinsurance. *See id.* This interpretation changed, however, when Congress transferred all of HUD’s consumer protection functions relating to RESPA to the newly created CFPB as a part of the efforts to centralize the oversight and administration of federal consumer financial protection laws. *See* 12 U.S.C. § 5581(b)(7) (2012).

In 2014, the CFPB initiated an administrative enforcement action against PHH, finding that PHH’s captive reinsurance arrangement violated the Bureau’s interpretation of Section 8. *See* 839 F.3d at 11-12. As a result, the Bureau ordered PHH to disgorge \$109 million and enjoined PHH from entering into future captive reinsurance arrangements. *See id.* at 12.

On appeal, Respondents asked the court to vacate the Bureau’s order. *See* Brief for Petitioner at 62, *PHH Corp.*, 839 F.3d 1 (No. 15-1177). The court below granted that relief by vacating the Bureau’s order on the basis of PHH’s statutory claims as to the Bureau’s application of RESPA and remanding the case for further proceedings. *See* 839 F.3d at 55. Even though PHH was granted its requested relief on statutory grounds, the court first considered the constitutionality of the Bureau’s independent single-director structure. *See id.* at 9 n.1. Holding that the Bureau’s structure violated separation of powers, the lower court severed the Director’s for-cause removal protections. *See id.* at 36-39; 12 U.S.C. § 5491(c)(3) (2012).

SUMMARY OF ARGUMENT

I.A. The most “deeply rooted [doctrine] * * * of constitutional adjudication” instructs federal courts to answer only necessary constitutional questions. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). To do otherwise would undermine a long line of Supreme Court precedent. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). To implement that doctrine, courts must consider nonconstitutional grounds for a decision before constitutional grounds, *see Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981), and must ask whether “[a] decision for petitioners on their statutory claim would provide the relief sought.” *Ricci v. DeStefano*, 557 U.S. 557, 576 (2009).

The lower court only reached the question of the CFPB’s constitutionality through a novel application of the constitutional necessity doctrine. The lower court’s uncontested statutory holding vacated the CFPB’s order at issue and provided Respondents with full relief. Thus, it is not necessary to reach the constitutional question, and the lower court’s constitutional decision should be vacated. *See Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam). While Respondents might attempt to manufacture a “necessary” issue by requesting a new form of relief,

recognizing such a tactic would unfairly prejudice the Bureau and undermine the constitutional necessity doctrine.

I.B. The lower court provides three rationales for reaching the constitutional issue, but none is supported by case law. First, the lower court cites cases that reach only necessary constitutional issues. Second, the proposed rule that courts should promptly decide structural questions goes against this Court's determination that such questions should require the highest degree of necessity. *See Am. Foreign Serv. Ass'n v. Garfinkel*, 490 U.S. 153, 161-62 (1989). Third, there is no rule that constitutional questions are necessary to address if they can provide broader relief than was initially requested by the party. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

I.C. The doctrine of constitutional necessity is firmly grounded in this Court's precedent and should be reinforced in this case. The doctrine incorporates the principle of judicial restraint, bolsters the separation of powers, and preserves the institution of judicial review. This Court requires "important reasons" to limit the doctrine of constitutional necessity, *see Light v. United States*, 220 U.S. 523, 538 (1911), and there is no such reason presented in this case. Therefore, this Court should vacate the lower court's gratuitous constitutional holding.

II.A. Should the Court choose to address the constitutional question, it should unambiguously find the Bureau's structure constitutional. In *Humphrey's Executor v. United States*, the Court upheld the constitutionality of the independent agency, characterized primarily by for-cause removal protection for the agency's leadership. 295 U.S. 602, 631-32 (1935). In the years since, the Court has time and again affirmed the validity of for-cause removal protections for agency heads. Statutory removal protections secure the separation of powers, as independent agencies are empowered to execute congressional commands while the President retains an

ultimate check in the capacity to remove agency heads for cause. Hence, not only does *Humphrey's Executor* serve as the basis for the Bureau's constitutionality, but it also makes clear that pointing to the Director's for-cause removal protection as a violation of the separation of powers misunderstands the fundamental form of the independent agency.

II.B. When moving beyond case law, this Court should not focus exclusively on the existence of historical precedent as a prerequisite for an agency's constitutionality. After all, a requirement that every agency have a historical predecessor would bar Congress from innovating in agency design. Still, history is instructive, and in this case, provides sufficient precedent for the CFPB. The Social Security Administration—another independent single-director agency with substantial lawmaking and enforcement authority—provides a close parallel to the Bureau. In fact, the same could be said of a host of financial regulators upon which the Bureau was expressly modeled. Likewise, several agencies possess the same combination of independent litigation authority and for-cause removal protection as the CFPB. Holding the Bureau's structure unconstitutional would have stark implications for these agencies, threatening their continued existence and our ability to govern ourselves effectively.

II.C. Looking beyond historical precedent, a functional analysis of the agency's role in the government and of Congress's intent in structuring the agency also supports the Bureau's constitutionality. The legislative history of the Dodd-Frank Act reflects the two chambers' shared understanding that an independent single-director agency would most effectively implement the federal consumer financial protection laws. Indeed, Congress's choice reflected an understanding that multimember leadership is notoriously ineffective, with partisan gridlock, long-running vacancies, hidden influence, and general dysfunction characterizing multimember agencies. The Court should not require all independent agencies to adopt a structural design that history has

shown to be inefficient and ineffective. Yet Congress did not ignore the imperatives of the constitutional principle of separation of powers in designing the Bureau. Congress built in a number of checks and balances to ensure that the Bureau cannot act in rogue fashion or out of line with the executive, legislature, or other financial regulators. Thus, these features of the agency’s design reveal that rather than violate the separation of powers, the Bureau respects it.

II.D. For these reasons, the Bureau’s structure is constitutional. However, if the Court were to find that the agency’s structure violated the separation of powers, along the lines of the lower court’s reasoning, then it should narrowly sever part of the statute establishing the Bureau in order to remedy the perceived constitutional violation. As this Court has held, facial invalidation of the entire agency or Dodd-Frank Act would be a step too far, particularly when the statute contains a severability clause. To the extent that the Court finds the agency’s enforcement authority problematic, the Court should sever part of this authority from the authorizing statute. If, instead, the Court finds the lack of presidential oversight to be the precise constitutional problem, then severing the Director’s for-cause removal protection would be the appropriate approach. In all instances, however, this Court should remain cautious about its exercise of “editorial freedom” in restructuring the agency.

ARGUMENT

I. THE COURT SHOULD NOT REACH THE QUESTION OF THE CFPB’S CONSTITUTIONALITY.

Today’s case asks the Court whether the most “deeply rooted [doctrine] * * * of constitutional adjudication” applies all of the time, or only most of the time. *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). That doctrine holds that federal courts should only decide constitutional issues when they must, not when they can. Nor when parties would merely prefer them to do so. In this case, the lower court deems the second question presented sufficiently

important to answer on first look. But this belies a longstanding line of this Court’s cases that federal courts should only answer necessary constitutional questions. Here, it is not necessary to answer the constitutional question about the CFPB’s structure. Indeed, the lower court’s rationales for reaching the constitutional question are inconsistent with this Court’s precedent. Instead of abandoning this Court’s long-established precedent or creating exceptions to it, the Court today should reaffirm the doctrine of constitutional necessity.

A. It is not necessary to reach the question of the CFPB’s constitutionality because Respondents were provided full relief on statutory grounds.

Justice Brandeis’s timeless concurrence in *Ashwander* identifies seven rules of constitutional avoidance that guide this Court’s jurisprudence. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). Today’s case involves the most fundamental of these rules: “[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.” *Id.*; *see also Hagans v. Lavine*, 415 U.S. 528, 547 (1985) (“[A] federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available.”). This doctrine transcends any particular case. *See Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549 (1947).

1. The lower court’s statutory holding provided the full relief sought by Respondents.

The Court’s clear rules for when federal courts should answer constitutional questions preclude the adjudication of the constitutional claim in this case. “[P]rior to reaching any constitutional questions, federal courts *must* consider nonconstitutional grounds for decision.” *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981) (emphasis added). That is, a court must first ask whether “[a] decision for petitioners on their statutory claim would provide the relief sought.” *Ricci v.*

DeStefano, 557 U.S. 557, 576 (2009) (citing *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); see also *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. 193, 205 (2009) (applying the same test). If so, then an affirmative ruling on the statutory issue renders resolution of the constitutional issue unnecessary. See, e.g., *Ricci*, 557 U.S. at 593 (declining to reach the unnecessary constitutional issue).

In this case, the lower court invites this Court to adopt a novel application of that most “deeply rooted” doctrine. To illustrate, let us contrast the lower court’s application of constitutional necessity in this case with that same court’s application of the doctrine in *Noel Canning v. N.L.R.B.*, 705 F.3d 490 (2013), *aff’d*, 134 S. Ct. 2550 (2014). While a different constitutional question, that case’s procedural stance with respect to the statutory and constitutional issues was nearly identical. In both *PHH* and *Noel Canning*, the petitioners in the lower court appealed an administrative decision with statutory and constitutional claims. In each, the statutory claims were sufficient to vacate and remand the administrative decision, while the constitutional claims may have provided broader relief. In *Noel Canning*, the D.C. Circuit found it necessary to first address the statutory question; in this case, the same court came to the opposite conclusion. Compare *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 9 n.1 (D.C. Cir. 2016) (“[W]e have no choice but to address the constitutional issue first.”), with *Noel Canning*, 705 F.3d 490, 493 (2013) (“[W]e must first rule on statutory objections * * *.”), *aff’d*, 134 S. Ct. 2550 (2014). Whereas the *Noel Canning* panel applied the constitutional necessity doctrine to hold that it could not rule on the constitutional question if it ruled in petitioner’s favor on the statutory issue, see 705 F.3d at 496, the lower court in this case decided that the constitutional question could not be avoided, see 839 F.3d at 9 n.1.

To put it simply, the lower court in this case misapplied the doctrine. *Gulf Oil* provides a clear mandate that all federal courts, including this one, *must* first consider nonconstitutional

grounds for a decision. *See* 452 U.S. at 99. The question is whether “[a] decision for [the party] on their statutory claim would provide the relief sought * * *.” *Ricci*, 557 U.S. at 576.

The relief sought by a party is not a matter of guesswork, nor is it a court’s choice: the court is to look to the relief sought *by the party*. *See id.* Parties must provide “a short conclusion stating the precise relief sought” in their lower-court brief. *See* Fed. R. App. P. 28(a)(9). Here, PHH’s conclusion, in its entirety stated, “For the foregoing reasons, the Decision and Order should be vacated.” Brief for Petitioner at 62, *PHH Corp.*, 839 F.3d 1 (No. 15-1177). The choice of relief sought was not arbitrary. Given that the jurisdiction of the lower court rested on 12 U.S.C. § 5563(4) (2012), which provides exclusive jurisdiction “to affirm, modify, terminate, or set aside, in whole or in part, the order of the Bureau,” Respondents asked the lower court to provide the full relief authorized by statute. Because the lower court held that resolving the case on statutory grounds would vacate the order below, *see* 839 F.3d at 55, reaching the constitutional question is unnecessary to provide the full relief that Respondents sought. In fact, addressing the constitutional question would entail exceeding the permissible bounds of judicial restraint.

2. *This Court should not entertain new requests for relief that attempt to manufacture a “necessary” constitutional claim.*

Respondents might attempt to request a new form of relief in this Court which was not requested in any lower court—a classic bait-and-switch. Clever enough drafting may even attempt to make necessary the unnecessary constitutional question, but the Court should not look kindly on such a ploy. First, this would prejudice Petitioner, who has received no notice of any new form of requested relief from the original order, and who has no opportunity to file a brief after Respondents file under the simultaneous filing rules of this Court.

Second, such an approach would be inconsistent with this Court’s practice. This Court normally “will not decide a constitutional question if there is some other ground upon which to

dispose of the case.” *Escambia County*, 466 U.S. at 51. Providing the full relief requested in the lower court constitutes grounds to dispose of the case. To hold otherwise would open the floodgates for novel constitutional claims for relief that are made in order to force reviewing courts to reach otherwise unnecessary constitutional issues. In *Escambia*, this Court declined to reach a constitutional question and remanded for a statutory determination because that statutory determination *might* have supported the requested relief. *See id.* Here, we already know that the statutory holding is sufficient, so vacatur is appropriate.

Third, this approach would incentivize lower courts to answer unnecessary constitutional questions. If creative pleading could make unnecessary constitutional questions “necessary” upon appeal to a higher court, lower courts would be compelled to answer these questions in anticipation of new requested relief. This would encourage courts to ignore *Gulf Oil’s* mandate that courts first decide nonconstitutional issues. *See* 452 U.S. at 99. This Court should not use this case as an opportunity to open the doors for parties to manufacture “necessary” constitutional disputes where none existed in the lower court.

The novel application of constitutional necessity by the lower court runs afoul of this Court’s clear direction. Indeed, it plainly undermines the “fundamental rule of judicial restraint” as outlined by this Court. *Jean v. Nelson*, 472 U.S. 846 (1985); *see, e.g., Kolender v. Lawson*, 461 U.S. 352, 361 n.10 (1983); *Gulf Oil Co.*, 452 U.S. at 99. This Court should hold the statutory grounds sufficient to provide relief and vacate the constitutional holding. *See Escambia County*, 466 U.S. at 51.

B. There is no basis to reach the unnecessary constitutional question under this Court’s precedent.

Dissenting from the lower court’s constitutional decision, Judge Henderson argues that it was unnecessary for the lower court to reach the constitutional question. *See* 839 F.3d at 56-60.

The majority's response to Judge Henderson's recognition of the doctrine of constitutional necessity is relegated to a two-paragraph footnote. *See* 839 F.3d at 9 n.1. While light on doctrinal analysis, perhaps tellingly so, the lower court outlines three arguments as to why the ordinary rule of constitutional necessity should not apply: (1) that this Court's decisions in *Free Enterprise*, *Morrison*, and *Buckley* provide a basis for reaching the constitutional issue, *see id.*; (2) that "[i]t can be irresponsible for a court to unduly delay ruling on such a fundamental and ultimately unavoidable structural challenge, given the systemic ramifications of such an issue," *id.*; and (3) that Petitioner's constitutional argument "would afford it broader relief than would its statutory arguments," *id.* Each of these arguments belies this Court's precedent.

1. *This Court does not reach unnecessary constitutional questions in the cases cited by the lower court.*

The lower court seeks refuge in three recent separation-of-powers decisions, as well as under the unassailable shelter of *exempli gratia*. *See* 839 F.3d at 9 n.1 ("See, e.g., *Free Enterprise Fund*, 561 U.S. at 490-91; *Morrison v. Olson*, 487 U.S. at 669-70; *Buckley v. Valeo*, 424 U.S. 1, 12."). We assume that the examples provided are the strongest. None supports the lower court.

Free Enterprise. The lower court first cites this Court's holding that invalidated dual-layer for-cause removal for officers. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). That case arose out of an entirely different procedural posture—a direct pleading in the District Court for the District of Columbia. This presents two issues that erode support for the lower court's reaching the constitutional question. First, there was no statutory issue in that case, and hence no way to avoid the constitutional question with a statutory holding. In their prayer for relief, the *Free Enterprise Fund* plaintiffs specifically requested:

1. an order and judgment declaring unconstitutional the provisions of the Act creating and empowering the Board;

2. an order and judgment enjoining the Board and its Members from carrying out any of the powers delegated to them by the Act;

3. an order and judgment enjoining the Board and its Members from taking any further action against Plaintiff[s] * * *.

Complaint for Declaratory and Injunctive Relief at 23, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 2007 WL 891675 (No. 1:06-cv-00217).

That is, the Court began with the constitutional issues relating to presidential removal power under separation-of-powers precisely because they were the only issues in that litigation. But the same cannot be said of the case at hand.

Morrison. Next, the lower court relies on a case for which there exists, in the words of the lower court, a “nearly universal consensus that the [holding] had been a mistake and that [the dissent] had been right * * *.” See 839 F.3d at 20; see *Morrison v. Olson*, 487 U.S. 654 (1988). Like *Free Enterprise*, *Morrison* presented only constitutional questions. See *id.* That is, the Court began with *Morrison*’s constitutional claims because those were the only issues on the table.

Buckley. *Buckley* presents a similar situation: the Court was faced exclusively with constitutional challenges to the relevant statute, the Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 3 (1971), *invalidated in part by Buckley v. Valeo*, 424 U.S. 1 (1976). Again, it should come as no surprise that the Court addressed the constitutional questions at the outset; there was no other issue to address.

Thus, these three cases do not support the lower court’s decision to decide an unnecessary constitutional question. And as demonstrated by Judge Henderson, nor do *Myers* or *Humphrey’s Executor*. See 839 F.3d at 58 (Henderson, J., concurring in part and dissenting in part). The lower court’s constitutional fast track finds no support in this Court’s case law.

2. *This Court does not reach unnecessary constitutional questions when those questions are structural.*

The lower court then proposes a new rule: otherwise unnecessary constitutional challenges should be decided when those challenges are structural. *See* 839 F.3d at 9 n.1. This Court has taken the opposite perspective. It is precisely for such structural questions that this Court demands the highest level of restraint from the lower federal courts, asking that they answer only “imperative” questions. *Am. Foreign Serv. Ass’n*, 490 U.S. at 161-62 (“In doing so, we emphasize that [the lower court] should not pronounce upon the relative constitutional authority of Congress and the Executive Branch unless it finds it imperative to do so. Particularly where, as here, a case implicates the fundamental relationship between the Branches, courts should be extremely careful not to issue unnecessary constitutional rulings.”). This Court demonstrates the same restraint. “Our reluctance to decide constitutional issues is especially great where, as here, they concern the relative powers of coordinate branches of government.” *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440 (1989) (deciding not to reach the constitutional questions); *see also* Brian C. Murchison, *Interpretation and Independence: How Judges Use the Avoidance Canon in Separation of Powers Cases*, 30 Ga. L. Rev. 85 (1995) (showing the ordinary rules’ extraordinary importance in separation-of-powers cases). The court below proposes a rule that forgoes the reasoned and established authority of this Court.

This Court’s case law also teaches courts not to answer structural questions unless they must. For instance, in *Department of Commerce v. U.S. House of Representatives*, this Court evaluated a claim relating to how representatives are apportioned among the states. *See* 525 U.S. 316 (1999). After finding that the Census Act prohibited the challenged use of statistical sampling, the Court held that “it [was] unnecessary to reach the constitutional question presented.” *Id.* at 343. In *Commodity Futures Trading Commission v. Schor*, this Court considered both statutory and constitutional challenges to an agency’s jurisdiction over a common-law counterclaim. *See* 478

U.S. 833 (1986). The Article III constitutional question presented was structural, but this Court made clear that it would only address the constitutional claim if the statutory claim proved unsuccessful. *See id.* at 847. This Court recently faced yet another choice between statutory and structural claims in *Bond v. United States*. 134 S. Ct. 2077 (2014). There, too, this Court began with the statutory question and left the important structural question for another day. *See id.* at 2087 (citing Justice Brandeis’s concurrence in *Ashwander*). Today, this Court should again affirm the long-held standard of avoiding unnecessary structural questions.

3. *This Court does not reach unnecessary constitutional questions to provide broader relief.*

The lower court then advances a third justification for reaching the constitutional question: Petitioners’ constitutional claim “would afford it broader relief than would its statutory arguments.” 839 F.3d at 9 n.1. The lower court cites no cases to support this proposition, nor any authority, binding or otherwise. There is simply no rule that courts must provide parties the broadest relief that the court can imagine. The closest case on point may be *Lyng v. Northwest Indian Cemetery Protective Association*, where this Court reached a constitutional claim after determining that the injunction issued by the district court likely would not have covered as many of the challenged agency activities without the constitutional holding. *See* 485 U.S. 439, 445-46 (1988). In other words, the constitutional claim was *necessary* to grant full relief to the parties. *Lyng* affirms the “fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” 485 U.S. at 445.

Indeed, this Court recently reaffirmed that the possibility of broader relief—as opposed to full relief—is not enough to make a constitutional question necessary. *See Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S.

67, 80-81 (2009) (“Given this statutory ground for relief, there is no due process issue alive in this case, and no warrant to answer a question that may be consequential in another case * * *.”). The clearest enunciation of this rule came in *Northwest Austin Municipal*, where a municipality challenged the Voting Rights Act on a narrow statutory ground and a broad constitutional ground. 557 U.S. 193 (2009). A statutory holding would have given the municipality the standing to seek an exemption from the Act, whereas a constitutional holding would have resolved the matter altogether. This Court declined to reach the constitutional question even though it would have provided broader relief. *See id.* at 211. Justice Thomas dissented on this point, stating that the “ultimate relief sought in this case is not bailout eligibility—it is bailout itself.” *Id.* at 212 (Thomas, J., concurring in judgment in part and dissenting in part). But the majority expressly held that the opportunity for broader relief did not make necessary a constitutional holding.¹ Thus, the lower court’s proposed rule is inconsistent with this Court’s precedent.

C. The Court should not create a new exception to the deeply rooted doctrine of constitutional necessity.

In adjudicating the CFPB’s constitutionality, the lower court departs from the most “deeply rooted” doctrine of constitutional adjudication. It invites this Court to create a new fast track for constitutional questions when those questions are structural or when a party may prefer constitutional relief to statutory relief. In so doing, the lower court forgets the “passive virtues” of judicial restraint and constitutional avoidance. *See* Alexander M. Bickel, *The Least Dangerous Branch* 111-29 (2d ed. 1986). The doctrine of constitutional necessity ensures that this Court does

¹ In fact, the petitioners in *Northwest Austin Mutual* had a much stronger argument than today’s Respondents, since the Petitioners in that case specifically sought relief on constitutional grounds. *See Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 212 (2009) (Thomas, J., dissenting); *see also* First Amended Complaint at 8, 557 U.S. 193 (D.D.C. 2009) (No. 06–1384). In this case, Respondents sought only to have the administrative holding vacated, so their necessity argument is much weaker.

not forget these rationales, which reinforce the constitutional principles of separation of powers and judicial restraint.

1. *The doctrine of constitutional necessity promotes judicial restraint, enhances the separation of powers, and preserves the legitimacy of the courts.*

The rule of constitutional necessity rests on solid ground. Rather than favoring any litigant or theory, this “fundamental rule of judicial restraint” operates to hold together our constitutional system. *Three Affiliated Tribes v. Wold Engineering, P.C.*, 467 U.S. 138, 157 (1984). And it minimizes the countermajoritarian difficulty by “increas[ing] the space for further reflection and debate at the local, state, and national levels * * *.” Cass R. Sunstein, *One Case at a Time* 4 (1999). Today, this Court should reaffirm the time-honored doctrine of constitutional necessity.

“[T]his Court has followed a policy of strict necessity in disposing of constitutional issues,” and that policy “is one of substance, grounded in considerations which transcend all such particular limitations.” *Rescue Army*, 331 U.S. at 568, 570. Judges and commentators have identified many of those considerations when it comes to judicial restraint, particularly as relates to constitutional necessity. For one, it is a doctrine that “recognizes the limitations of judges.” *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 204-05. “[T]he power to declare a legislative enactment void is one which the judge, conscious of the fallibility of human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility.” *Ashwander*, 297 U.S. at 345 (Brandeis, J., concurring). Put another way, judicial restraint minimizes the danger of “inherent[ly] self-aggrandizing” human beings. Frank M. Coffin, *The Federalist No. 86: On Relations Between the Judiciary and Congress*, in Robert A. Katzmann, *Judges and Legislators: Toward Institutional Comity* 25 (1988). This danger is no less present today than when Justice Brandeis wrote his concurrence in *Ashwander*; it should not be ignored.

The doctrine also bolsters the separation of powers. By promoting judicial restraint, it allows room for other branches and the states to interpret the Constitution. *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. Rev. 1003, 1035 (1994). Out of respect for the other branches' roles, statutes have long enjoyed a presumption of constitutionality. *See Brown v. Maryland*, 25 U.S. (12 Wheat) 419 (1827). And to overturn a law, "[t]he opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 128 (1810). Constitutional avoidance also recognizes "the necessity, if government is to function constitutionally, for each [branch] to keep within its power, including the courts; the inherent limitations of the judicial process, arising especially from its largely negative character and limited resources of enforcement; withal in the paramount importance of constitutional adjudication in our system." *Rescue Army*, 331 U.S. at 571; *see also* Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv. L. Rev. 405, 469 (1989) (noting that avoidance doctrine is "natural outgrowth" of separation-of-powers doctrine). By recognizing that it is inappropriate to decide the constitutional question today, the Court would reinforce the separation-of-powers principles at play.

Finally, federal courts increase their legitimacy when they exercise judicial restraint. Constitutional avoidance "seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections." *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *see* Felix Frankfurter & Adrian S. Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 637 (1938) (noting that courts "add[] excessive friction to the complicated workings of our government" when they answer unnecessary constitutional questions). This Court has noted that

periods of broad and aggressive judicial review have weakened the institution of judicial review. *See Rescue Army*, 331 U.S. at 549. This Court should take heed of this experience. Courts protect their ability to answer necessary questions by leaving unnecessary ones unanswered.

2. *This Court should not open the door to unnecessary constitutional decisions.*

There is no reason now to weaken our longstanding doctrine of constitutional necessity. Lower courts rely on that doctrine regularly. *See, e.g., Bandimere v. Sec. & Exch. Comm'n*, 844 F.3d 1168, 1171-72 (10th Cir. 2016); *Am. Civil Liberties Union v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir. 2013); *N.L.R.B. v. New Vista Nursing & Rehab.*, 719 F.3d 203, 213 (3d Cir. 2013); *Teltech Sys., Inc. v. Bryant*, 702 F.3d 232, 235 (5th Cir. 2012); *Wax v. Sec'y of Health & Human Servs.*, 108 Fed. Cl. 538, 540 (2012); *Anchustegui v. Dep't of Agric.*, 257 F.3d 1124, 1129 (9th Cir. 2001). Redoing the doctrine today would have unexpected and potentially undesirable effects on several such cases.

In part for this reason, this Court has long charted a clear course to avoid unnecessary constitutional questions, and that course “is not departed from without important reasons.” *Light v. United States*, 220 U.S. 523, 538 (1911). Today’s case does not present any such reasons. In fact, this Court has rejected each of the three reasons offered by the lower court for forgoing the constitutional necessity doctrine in the case at hand.² Although the lower court invites this Court

² The last time that this Court embraced a rule similar to that proposed by the lower court was in *Saucier v. Katz*, 553 U.S. 194 (2001), which instructed lower courts to decide constitutional questions before questions relating to qualified immunity. Although thorny issues of qualified immunity present compelling reasons to answer constitutional questions first, this Court promptly scaled back the *Saucier* ruling. *See Pearson v. Callahan*, 555 U.S. 223 (2009). In the words of Justice Breyer, it was the “failed *Saucier* experiment.” *Morse v. Frederick*, 551 U.S. 393, 432 (2007) (Breyer, J., concurring in judgment in part and dissenting in part); *see also* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. Cal. L. Rev. 1, 5-6 (2015). The *Saucier* experiment illustrates the danger of changing the doctrine of constitutional necessity.

to create a new rule of constitutional adjudication, this Court should decline this invitation, for there is insufficient justification for doing so.

Indeed, the most “deeply rooted” doctrine is a dangerous sandbox in which to craft new rules. Now is not the time to do so. This is especially true in the most fundamental realm of constitutional doctrine: the separation of powers. Today, we ask this Court to exercise restraint and to demand similar restraint of the lower courts. Modesty is difficult, and judges who practice restraint often go without recognition. But judicial restraint reinforces the judiciary’s ability to make decisions when it must. Here, the lower court provided full relief to Respondents on a statutory basis. Since the constitutional question is thus unnecessary, this Court should enforce its oldest doctrine and vacate the lower court’s gratuitous constitutional holding.

II. THE BUREAU’S INDEPENDENT SINGLE-DIRECTOR STRUCTURE IS CONSTITUTIONAL.

If the Court chooses to reach the question of the Bureau’s constitutionality, it should hold the agency’s structure constitutional. Case law, historical precedent, and a functional analysis of congressional intent, the agency’s actual design, and its role in the government all make clear that the independent single-director agency is lawful. The Bureau’s structural features, including for-cause removal protection for a single agency head and independent litigation authority, are common to other independent agencies. Moreover, the Bureau’s authority is checked by the President, Congress, and other financial regulatory agencies. However, if the Court finds the agency’s structure impermissible, it should remedy the constitutional concern by severing either the statutory scope of the Director’s authority or the Director’s for-cause removal protection.

A. Independent agencies have long been held constitutional.

The Court first upheld the constitutionality of independent agencies in 1935 and has reinforced that holding time and again. This case law on for-cause removal and its underlying logic

underscore the constitutionality of the CFPB and its independent single-director structure. Moreover, statutory removal protections strengthen the Framers' constitutional system of separation of powers by checking executive power and balancing the demands of the legislature and executive. As the Court has put it, "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question." *Humphrey's Executor*, 295 U.S. 602, 629-30 (1935).

1. *The Court has repeatedly reaffirmed the constitutionality of independent agencies like the CFPB.*

Although the Constitution does not contain any express language relating to the scope of the executive's removal power, the Court has outlined the fundamental principles governing that power. In *Myers v. United States*, the Court endorsed the President's power to remove the heads of executive agencies at will. 272 U.S. 52, 176-77 (1926).³ Later, recognizing Congress's intent to limit executive control over certain agencies, the Court upheld for-cause removal protections for independent agency heads in *Humphrey's Executor v. United States*. 295 U.S. 602, 631-32 (1935). As the Court stated,

The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted * * *. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will.

³ Although the lower court relies on *Myers v. United States* as establishing a default rule of presidential control over agency heads, 839 F.3d at 5, the Court has held that *Humphrey's Executor* "explicitly 'disapproved' the expressions in *Myers* supporting the President's inherent constitutional power to remove members of quasi-judicial bodies." *Wiener v. United States*, 357 U.S. 349, 352 (1958). *Morrison v. Olson* recognized an additional limitation on the applicability of *Myers* to the case at hand: whereas *Myers* focused on "prevent[ing] Congress from 'draw[ing] to itself . . . the power to remove,'" 487 U.S. 654, 686 (1988) (quoting *Myers*, 272 U.S. at 161), here, Congress has not drawn to itself the power to remove the Bureau's Director, but instead, has limited both its own and the President's power to remove the Director at will.

Id. at 629.

The Court’s holding that independent agencies are constitutional was subsequently reaffirmed many times. *See, e.g., Free Enter. Fund*, 561 U.S. at 493; *Morrison*, 487 U.S. at 686-93; *Bowsher v. Synar*, 478 U.S. 714, 725-26 (1986); *Wiener v. United States*, 357, U.S. 349, 352 (1958); *see also* Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238, 241 (explaining that *Morrison* “end[ed] speculation about the Court overturning *Humphrey’s Executor*”).

Humphrey’s Executor governs the case at hand: the CFPB Director’s for-cause removal protection cannot be the basis for invalidating the agency’s structure. Moreover, the Court has never held that the *combination* of statutory removal protection with other standard features of independent agency design can be the basis for holding the agency unconstitutional. In fact, the characteristics of agency independence discussed in *Humphrey’s Executor* illustrate just how squarely the CFPB falls within *Humphrey’s Executor’s* parameters. “The [agency] is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law.” 295 U.S. at 624. Moreover, the Court pointed out that the heads of independent agencies typically hold office for fixed terms. *See id.* The Bureau, too, is meant to implement the laws in a nonpartisan way, to exercise a combination of quasi-judicial and quasi-legislative powers, and to be led by a Director with a fixed term. Note, however, that the characteristics of independent agencies described in *Humphrey’s Executor* are not requirements. The critical requirements for independence are that the agency head be not “‘subject to anybody in the government but * * * only to the people of the United States’; [be] free from ‘political domination or control’ or the ‘probability or possibility of such a thing’; [and] be ‘separate and apart from any existing department of the government—not subject to the orders of

the President.”” 295 U.S. at 625. The CFPB Director fits this description. The lower court asserts that “*Humphrey’s Executor* cannot be stretched to cover this novel agency structure”—but it already does. 839 F.3d at 8.

2. *Statutory removal protection for the Director bolsters the separation of powers.*

Far from violating separation of powers, statutory removal protection upholds the constitutional principle of separation of powers. Because for-cause removal insulates the Director from being fired for purely political reasons, the Bureau has the latitude to implement the statutory design without relitigating the political battles that were fought when the Dodd-Frank Act was passed. At the same time, the Director does not enjoy absolute immunity for his or her decisions, since the President can still remove the Director for inefficiency, neglect of duty, or malfeasance. *See* 12 U.S.C. § 5491(c)(3) (2012). In this way, the Bureau is structured to safeguard the delicate balance of powers between the legislature and the executive. If separation of powers entails “dividing power among multiple entities and persons” to “protect individual liberty,” as the lower court states, the Bureau accomplishes precisely that. 839 F.3d at 28-29.

The Framers recognized the importance of independence in preserving the constitutional system of separation of powers and checks and balances. “James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings ‘should be free from the remotest influence, direct or indirect, of either of the other two powers.’” *Humphrey’s Executor*, 295 U.S. at 629-30 (citations omitted). Independence both ensures that the President cannot stymie the statutory design by threatening to remove the head of an agency tasked with administering the law and guarantees a measure of independence from the Congress. As Justice Story said, “[N]either of the departments in reference

to each other ‘ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.’” *Id.* (citations omitted).

B. Historical precedent reinforces the constitutionality of the CFPB’s structure.

Even if the Court were to look beyond case law for additional evidence of the Bureau’s constitutionality, the Court should avoid relying exclusively on historical precedent. Invoking the use of history in *Free Enterprise Fund* and *Noel Canning*, the court below argues that the Bureau can only be held constitutional if the same agency structure has existed before. *See* 839 F.3d at 21-25. But this logic is unsustainable. Requiring a historical predecessor for every agency would bar Congress from innovating and structuring institutions to respond to novel social or economic problems. Congress would never have been able to create the first independent agency, the Interstate Commerce Commission (ICC), for it would have lacked historical precedent; nor would the agencies that followed in the ICC’s footsteps, including the Federal Trade Commission—the agency that was upheld in *Humphrey’s Executor*—have existed. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 *Admin. L. Rev.* 1111, 1132-34 (2000). Even if the Bureau were the first of its kind, novelty should not imply unconstitutionality. Instead, the Court should analyze separation of powers not only using a historical lens, but also through a functional analysis.

Nonetheless, history provides firm footing for the CFPB. As another independent single-director agency with rulemaking and enforcement authority, the Social Security Administration (SSA) provides a close parallel to the Bureau. Despite the lower court’s attempts to impugn the SSA’s constitutionality, the SSA’s structure is largely undisputed, and the SSA provides strong historical precedent for the CFPB. This not only bolsters the Bureau’s constitutional footing, but also means that holding the Bureau unconstitutional risks invalidating the SSA.

1. *Declaring the Bureau unconstitutional would invalidate the structure of other major agencies, including the Social Security Administration.*

Holding the Bureau's single-head structure unconstitutional would entail invalidating the long-established design of other key administrative agencies, including the SSA. The SSA has been structured as a fully independent agency led by a single Commissioner, removable only for cause, since Congress passed the Social Security Independence and Program Improvements Act in 1994. *See* Pub. L. No. 103-296, §§ 101-102, 108 Stat. 1464, 1465-67 (1994).⁴ The law was enacted in response to the agency's perceived lack of independence from inappropriate political influence. *See* H.R. Rep. 103-670, at 89-90 (1994) (Conf. Rep.) (discussing the "policy errors resulting from inappropriate influence from outside the agency such as those occurring in the early 1980s"); Breger & Edles, 52 Admin L. Rev. at 1213. Congress emphasized that the new structure would aid the agency in administering the social security laws more effectively. "In providing that a single administrator, rather than a bipartisan board, will head the independent agency, the conferees place high priority on management efficiency, which they see as essential in enabling the independent SSA to address the problems that confront it." H.R. Rep. 103-670, at 89-90.

Despite the lower court's attempt to paint the SSA's uncontested structure as constitutionally suspect,⁵ the SSA supplies persuasive historical precedent for the Bureau's

⁴ The SSA's historical relevance is reinforced by the fact that the agency's single-Commissioner structure dates not just to 1994 but to 1946. When first established in 1935, the SSA was led by a three-person board. Then, in 1946, the board was replaced by a single Commissioner. The agency was later subsumed as a component of the Department of Health and Human Services. After a decade of congressional studies and hearings on how to structure the agency's leadership most effectively, the 1994 Social Security Independence and Program Improvements Act officially converted the SSA into a free-standing independent agency led by a single Commissioner who would only be removable for cause. *See* 58 Soc. Security Bull. 57, 57-59 (1995).

⁵ The opinion below contends that President Clinton's signing statement for the Social Security Independence and Program Improvements Act of 1994, 2 Pub. Papers 1471, 1472 (Aug. 15, 1994), reflected his view that the "change in the agency's structure was constitutionally

structure. To hold otherwise and invalidate the CFPB would imply the undoing of the SSA as well. The parallel extends beyond the common single-director leadership structure: both agencies also share broad rulemaking and enforcement authority. Congress has granted the Social Security Commissioner broad-ranging authority to lead and direct the agency's rulemaking and law enforcement, authorizing the Commissioner "to prescribe rules and regulations; establish, alter, consolidate, or discontinue organizational units and components of the agency * * *; and assign duties, and delegate, or authorize successive redelegations of, authority to act and to render decisions, to such officers and employees as the Commissioner may find necessary." *Id.* In alleging that the SSA does not "exercise the core executive power of bringing law enforcement actions," 839 F.3d at 20 n.5, the court below draws an arbitrary line between the scope of the power exercised by the two agencies. The authority exercised by the SSA is just as central to the administration of the social security laws as the CFPB's authority is to the administration of the consumer financial protection laws. To cast the agencies' shared structure as unconstitutional would have sweeping effects, not the least of which would be undermining an agency that administers benefits to sixty million Americans. *Policy Basics: Top Ten Facts About Social Security*, Ctr. on Budget & Pol'y Priorities (Aug. 12, 2016), <http://www.cbpp.org/research/social-security/policy-basics-top-ten-facts-about-social-security>. If historical precedent reinforces an

problematic" and therefore that the "status of that agency's structure . . . is constitutionally contested." 839 F.3d at 19. This mischaracterizes the language of the President's statement, which merely noted that "in the opinion of the Department of Justice, the provision that the President can remove the single Commissioner for neglect of duty or malfeasance in office raises a significant constitutional question" and that the President was willing "to work with the Congress on a corrective amendment that would resolve this constitutional question so as to eliminate the risk of litigation." 2 Pub. Papers at 1472. To read the signing statement to cast the eight-two-year-old SSA into constitutional doubt would be a hazardous use of historical precedent.

agency's constitutionality, then the SSA's eighty-two-year existence should provide sufficient authority for the CFPB.

By the same token, holding the CFPB's structure unconstitutional would threaten the existence of other financial regulatory agencies. In creating the Bureau, Congress modeled its structure and authority on other financial regulators already in existence or established contemporaneously. *See* S. Rep. No. 111-176, at 161 (2010) ("These [executive and administrative powers] are modeled on similar statutes governing the Office of the Comptroller of the Currency and the Office of Thrift Supervision * * *."). For instance, both the Federal Housing Finance Agency (FHFA) and the Office of the Comptroller of the Currency (OCC) also have single agency heads who are removable only for cause. *See* 12 U.S.C. §§ 4512, 4513 (2012) (FHFA); 12 U.S.C. § 2 (2012) (OCC). Thus, even a holding cabined to the financial sector would risk unraveling the current oversight of our national economy.

2. *The Bureau's litigation authority mirrors the independent enforcement powers of other agencies.*

Further reinforcing its constitutionality, the Bureau's litigation authority is patterned after historical precedent. Even before the Bureau, Congress had bestowed certain agencies with both statutory removal protection and the authority to bring and represent the agency in federal court. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 800, tbl.5 & n.167 (2013). To list a few examples:

Federal Energy Regulatory Commission. Like the Bureau, the Federal Energy Regulatory Commission has its own attorneys represent the Commission in "any civil action brought in

connection with any function carried out by the Commission” as authorized by law.⁶ 42 U.S.C. § 7171(i) (2012); *see also Frequently Asked Questions (FAQs): Court Cases*, Fed. Energy Regulatory Commission, <https://www.ferc.gov/resources/faqs/court-cases.asp> (“Do I need to consult with any other government lawyers concerning an appeal of a FERC decision? Generally, no. The FERC is an independent agency with independent litigation authority. * * * This means that FERC attorneys alone are responsible for the processing and defense of FERC appeals * * *.”).

Federal Labor Relations Authority. Likewise, the Federal Labor Relations Authority’s attorneys may appear for the agency “in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.” 5 U.S.C. § 7105(h) (2012).

Federal Maritime Commission. Following this pattern, the Federal Maritime Commission has the authority to enforce various international shipping laws in United States district courts as long as it provides notice to the Attorney General, just like the CFPB. *See* 46 U.S.C. § 41307 (2012).

Postal Service. Congress continues to give independent litigation authority to additional agencies. In 2006, the Postal Service’s litigation authority was modified to limit when the Department of Justice could represent the agency: that is, Congress required the agency to employ its own attorneys for litigation matters. *See* 39 U.S.C. § 409(g) (2012); Postal Accountability and Enhancement Act, Pub. L. No. 109-435, 120 Stat. 3198 (2006).

⁶ The authorizing statute carves out an exception for litigation before the Supreme Court as provided in 28 U.S.C. § 518 (2012), which is a common feature of statutes that provide agencies with independent litigation authority.

The court below contends that the “authority to bring law enforcement actions against private citizens * * * is the core of the executive power and the primary threat to individual liberty posed by executive power.” 839 F.3d at 19. But this power is not unique or new to the CFPB: the independent agencies listed above all have versions of it. Historical practice again vindicates the Bureau’s constitutionality.

C. The Bureau’s purpose and structure do not violate the separation of powers.

Although historical precedent is persuasive authority in the context of separation of powers questions, it does not end the analysis. In order to evaluate whether Congress violated the separation of powers, the Court should also look to “the language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates,” as the Court did when it evaluated the constitutionality of an independent agency for the first time in *Humphrey’s Executor*. 295 U.S. at 625. “[E]xamining how a particular provision, taken in context, is likely to function” illuminates whether it violates the separation of powers, since “the Constitution . . . contemplates that practice will integrate the dispersed powers into a *workable* government” *Free Enter. Fund*, 561 U.S. at 519 (Breyer, J., dissenting) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). Although there are no bright-line rules that govern separation-of-powers questions of this kind, a functional approach focused on statutory design and the agency’s purpose allows the court to understand the agency’s role in the context of the administrative state. *See id.*; *see also Humphrey’s Executor*, 295 U.S. at 625 (“While the general rule precludes the use of these debates to explain the meaning of the words of the statute, they may be considered as reflecting light upon its general purposes and the evils which it sought to remedy.”).

Analyzing this range of factors in conjunction with the history illuminates why the Bureau—with an individual director protected by for-cause removal provisions and independent litigation authority—should be held constitutional. First, the Dodd-Frank Act aimed to centralize and improve the administration of the consumer financial protection laws by avoiding the pitfalls of multimember leadership. Second, the CFPB’s authority is constrained by the President, Congress, and other agencies, to ensure the separation of powers.

1. *An independent single-director Bureau was intended to implement the consumer financial protection laws more effectively.*

In establishing the Bureau as an independent single-director agency, Congress intended to create an agency that could administer the consumer financial protection laws effectively and expediently. Both the Senate and House versions of the Dodd-Frank Act conceived of the agency as being led by a single Director who would be removable only for cause. *See* S. 3217, 111th Cong. § 1011(b), (c)(3) (2010) (as reported to Senate floor by Senate Committee on Banking, Housing, and Urban Affairs); H.R. 4173, 111th Cong. §§ 4101(b), 4102(b)(5) (2009) (as passed by House, Dec. 11, 2009). Although the House proposal envisioned the agency eventually becoming a multimember commission, *see* H.R. 4173, 111th Cong. §§ 4101-4103 (2009) (as passed by House, Dec. 11, 2009), when the two bills were reconciled, Congress kept a single Director for the agency, only removable for cause, who would hold a fixed five-year term. *See* H.R. Rep. 111-517, at 599-600 (2010) (Conf. Rep.). It was this version of the bill that both houses of Congress and the President enacted into law. *See* H.R. 4173, 111th Cong. (2010) (enacted).

Even members of the House lauded the independent single-director structure of the agency. As one member explained during floor debate, an independent director would ensure the energetic implementation of the consumer protection laws in the wake of the financial crisis.

Most importantly for my constituents, this bill establishes a Consumer Financial Protection Bureau to police lenders to ensure that the predatory lending * * * that ensnared so many unsuspecting Americans will be halted. Led by an independent director, this office will be able to act swiftly so consumers will not need to wait for an act of Congress for years and years and years to receive protection from unscrupulous behavior.

156 Cong. Rec. H52333, H5240 (June 30, 2010) (statement of Rep. Gregory Meeks, Member, H. Comm. on Fin. Servs.)

The legislative history does not reflect attempts to arrogate authority from the executive or intrude upon the separation of powers, but rather, illustrates the legislature’s effort to structure the Bureau to be able to better implement the laws that the two branches had jointly enacted.

2. *Multimember leadership is not constitutionally required and is less effective than a single director.*

As the SSA illustrates, multimember leadership has never been a constitutional requirement for an independent agency. Indeed, beyond for-cause removal, the Court has not held there to be any structurally required features of independent agencies. “The critical element of independence is the protection—conferred explicitly by statute or reasonably implied—against removal except ‘for cause.’” Breger & Edles, 52 Admin. L. Rev. at 1138. In fact, in reviewing the original structure of the first independent agency, scholars have “debunk[ed] the myth that there was a tie between the commission form and independence.” *Id.* at 1128. Although the ICC was structured as a multimember commission, the agency was not considered independent until a statute eliminated the Secretary of the Interior’s authority over the commission. *See id.* at 1129. As the drafter of the statute explained, the Secretary’s oversight “subjected both the commission and the Secretary to unnecessary administrative burdens without any countervailing benefits.” *Id.*

at 1130. Parallel reasoning guided the creation of independent agencies that have followed.⁷ For instance, in the context of the CFPB, statutory design evinces an understanding of the efficiency gains to be had from permitting an agency to be independent of constant political oversight.

Although multimember agencies are common, their structural shortcomings can impair their ability to function. For one, multimember agencies are often hampered by nomination delays, which can lead to members serving expired terms. To take just one example, the Federal Election Commission (FEC) is formally structured as a bipartisan commission of six members who are removable for cause. In practice, however, the agency is led by only five commissioners, four of whom are serving expired terms.⁸ See Matea Gold, *FEC Commissioner's Departure Sets Up Test of How Trump Will Approach Money in Politics*, Wash. Post., Feb. 19, 2017, https://www.washingtonpost.com/politics/fec-commissioners-departure-sets-up-test-of-how-trump-will-approach-money-in-politics/2017/02/19/9a707806-f6d8-11e6-9845-576c69081518_story.html. Facing similar troubles, the eighty-two-year-old Securities and Exchange Commission has two seated commissioners and three vacancies. These vacancies are often exacerbated by bipartisanship requirements. Partisan balance requirements are “associated with longer vacancy periods, which can affect both the outcomes and the volume of agency activity.” Datla & Revesz, 98 Cornell L. Rev. at 799. In addition, cross-party nomination

⁷ The D.C. Circuit itself has upheld agencies led by just one individual. See *Railroad Yardmasters of America v. Harris*, 721 F.2d 1332, 1340 (D.C. Cir. 1983) (refusing to hold unconstitutional an agency led by a board with two vacancies and just one sitting member).

⁸ In May 2015, the former chair of the FEC characterized the agency as “worse than dysfunctional” as a result of the “perpetual” stalemate between the six bipartisan commissioners. Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. Times, May 2, 2015, <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html>. The press furnished an even more dire description: “Some commissioners are barely on speaking terms, cross-aisle negotiations are infrequent, and with no consensus on which rules to enforce, the caseload against violators has plummeted.” *Id.*

requirements allow Congress and the President to game the appointments system to ensure strategic vacancies while limiting the agency's ability to function and implement the laws. *See id.*

Even with these statutory requirements, multimember agencies are rarely as neutral as they appear. The chair of a multimember agency typically holds his or her role at the will of the President and steers the agency's regulatory agenda in line with presidential policy preferences. *See id.* at 819-20. More generally, the President holds substantial policy sway over an agency's leadership in the form of the power of nomination and appointment. "The appointment power involves more than the occasional selection of individuals who are expected to have the desired outlook on relevant policy issues. * * * [I]mplicit in the selection itself is the choice of persons who will continue to be responsive to future presidential preferences." Robinson, 1988 Duke L.J. at 245. Presidential influence is even greater with agency members who seek the "possibility of future rewards for faithful service (including other high appointments in the government)." *Id.* While multimember structures may promise deliberative decisionmaking, they actually heighten the risks of agency capture, nonexpert political influence, and a lack of independence from executive control—defeating the central aims of creating an independent agency in the first place. Indeed, there is no correspondence between a multimember structure and the key element of independence: in one survey, scholars found approximately the same number of single-head agencies and multimember agencies without statutory removal protections. *See Datla & Revesz*, 98 Cornell L. Rev. at 792.

Requiring all agencies with rulemaking and enforcement authority to be multimember would subject them to the vagaries of vacancies and political gridlock. Mandating their heads to be removable at will by the President would eliminate agency independence and all but guarantee

the politicization of how the laws are administered. Both paths are hazardous and would have far-reaching implications for the future of the administrative state.

3. *The CFPB's authority is constrained by the President, Congress, and other agencies to further secure the separation of powers.*

The manifold checks on the Bureau's authority from the President, Congress, and other agencies further safeguard the separation of powers. First, the CFPB's independent litigation authority is constrained by statutory requirements to coordinate and consult with the Attorney General of the United States on all civil actions. The Bureau must notify the Attorney General whenever it commences a civil action, inform the Attorney General whenever the Bureau is party to any action, and consult with the Attorney General regarding any investigations and proceedings through formal agreements in order to ensure that the investigations are "conducted in a manner that avoids conflicts and does not impede the ability of the Attorney General to prosecute violations of Federal criminal law." 12 U.S.C. § 5564(d)(2) (2012). Although the Bureau may act in its own name with its own attorneys to enforce the Act's consumer protection provisions, *see id.* § 5564(b), it must request permission from the Attorney General before appearing before the Supreme Court in its own name, *see id.* § 5564(e). The Director is also required to appear before the Senate and House committees in semiannual hearings to provide reports on consumer financial protection progress and problems, the agency's budget requests, the significant rules, orders, and initiatives of the Bureau undertaken in the previous year and planned for the forthcoming year, and litigation to which the Bureau was a party, among other topics. *See* 12 U.S.C. § 5496 (2012). These provisions permit the President, who directly supervises the Attorney General, and Congress to check the Bureau's enforcement of the consumer financial protection laws against the government's broader litigation priorities.

Other financial regulatory bodies counterbalance the CFPB’s authority, too. All of the Bureau’s regulations are subject to review by the Financial Stability Oversight Council, which may set aside any regulation on safety and soundness concerns.⁹ *See* 12 U.S.C. § 5513(c)(4) (2012). Even if the Council does not have sufficient votes to veto the CFPB, any member of the Council may request a stay of the CFPB’s regulations for up to ninety days. *See* 12 U.S.C. § 5513(c)(1) (2012); *see also* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *Tex. L. Rev.* 15, 74-75 (2010). The Bureau must also coordinate with other financial regulators, including the SEC, the CFTC, the FTC, and state regulatory agencies. *See* 12 U.S.C. § 5495 (2012); *see also* *The Dodd-Frank Act Five Years Later: Are We More Free?*, 114th Cong. 78-79 (2015) (prepared statement of Deepak Gupta, Founding Principal, Gupta Wessler PLLC, and former Senior Counsel, CFPB) (“Not only are regulators permitted to object to the rules, their written objections must be included in the rule-making record, along with the Bureau’s response to their concerns. No other financial regulator faces these requirements.”). The Director must also consult with a Consumer Advisory Board, which is comprised of experts in consumer financial protection laws and financial products as well as representatives of communities that were disproportionately affected by the financial crisis.¹⁰ *See* 12 U.S.C. § 5494 (2012). Even as Congress sought to ensure the vigorous administration of the consumer financial protection laws

⁹ Just because the “veto power could not have been used in this case” to override the Director’s decision as to the application of the law to respondents, 839 F.3d at 16, does not mean that the Council’s veto power lacks force. To declare the Council’s check on the Bureau meaningless because the veto was not exercised in this particular case would entail casting aside a series of deliberate constraints that Congress wrote into the Dodd-Frank Act.

¹⁰ The Consumer Advisory Board was grounded in historical practice and existing agency structure: it parallels the Social Security Advisory Board, which serves a similar purpose in advising the Social Security Commissioner. *See* 42 U.S.C. § 903 (2012).

after the greatest financial crisis in generations, it remained cognizant of the constitutional importance of separation of powers.

“[T]he system of separated powers and checks and balances established in the Constitution was regarded by the Framers as ‘a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.’” *Morrison*, 487 U.S. at 693. To recast the constraints on the Bureau as no more than advisory would erase the vital role of the other branches in limiting the agency’s authority and guiding its decisionmaking. The court below rejects these restraints as insufficient without demarcating what checks and balances would be sufficient. Although Respondents contend that the only acceptable checks multimember structure or at-will removal, to reduce the principle of separation of powers to this false binary would make a mockery of the Constitution. If even thoughtful attempts to check an agency’s authority are invalidated as inadequate, then Congress is left with one hand tied behind its back in its efforts to craft a constitutional system of self-governance.

D. To address the lower court’s concerns, the Court could reduce the scope of the Director’s authority or sever the Director’s for-cause removal protection.

For the reasons outlined above, the Bureau’s structure as an independent agency is constitutional under Article II of the Constitution and structural separation-of-powers principles. However, if this Court were to deem the agency’s structure inadequate on the lower court’s reasoning, the proper remedy would be to reduce the Director’s authority. In the alternative, the Court could sever the Director’s for-cause removal protection.

As the lower court explained, this Court’s precedent on severability “demands a narrower remedy” than striking down the entire agency or Dodd-Frank Act. 839 F.3d at 37. “‘Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to the problem,’ severing any ‘problematic portions while leaving the remainder intact.’” *Free Enter.*

Fund, 561 U.S. at 508 (quoting *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 328-329 (2006)). The Court engages in partial invalidation instead of facial invalidation, as long as Congress would have preferred severance to facial invalidation and the statute would remain “fully operative as law” if the provision were severed. *Id.* at 508-09. When the statute contains a severability clause, as the Dodd-Frank Act does, *see* 12 U.S.C. § 5302 (2012), the courts are required to presume that Congress would have wanted to preserve as much of the statute as possible. *See Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 686 (1987). As the court below holds, the Dodd-Frank Act’s CFPB-related provisions can remain “fully operative as law” even if certain sections are severed. 839 F.3d at 38. The question, therefore, is which provision of the Act to sever so as to address the perceived constitutional problem while minimizing the extent to which the statute is invalidated.

The lower court’s primary objection related to the scope of the Director’s authority. Although the lower court appeared to use this case as an opportunity to question the validity of the eighty-two-year-old *Humphrey’s Executor* rule,¹¹ it remained clear that it was the scope of the Director’s authority that it found problematic. The Court took precisely this approach in *Free Enterprise Fund*, where it tailored the remedy to the constitutional violation at issue. In *Free Enterprise Fund*, the Court severed the for-cause removal protection for a subordinate agency

¹¹ The lower court’s opinion conceded that PHH “expressly preserved the argument that *Humphrey’s Executor* should be overruled.” 839 F.3d at 34 n.15. But this ignores the fact that this Court expressly upheld *Humphrey’s Executor* as recently as 2010. *See Free Enter. Fund*, 561 U.S. at 483, 493-496. Moreover, the doctrine is both entrenched in our case law and embedded in the structure of independent agencies across our government, reinforcing its status as an established constitutional principle. *See Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”). Not to mention that the constitutionality of for-cause removal is far from the issue presented in this case.

whose heads were doubly insulated from removal. *See* 561 U.S. at 508-10. However, the problem perceived by the court below in this case is distinct from that of *Free Enterprise Fund*, and the remedy should follow accordingly.

To provide an adequate remedy, the Court should sever the precise part of the agency's enforcement authority that it finds problematic. *See, e.g.*, 839 F.3d at 18, 27. For instance, the Court could sever 12 U.S.C. § 5515(c)(1) (2012), which grants the Bureau primary authority to enforce a federal consumer financial law relating to large banks, savings associations, and credit unions. Severing this provision would reduce the Bureau's enforcement authority while preserving the ability of other federal agencies to initiate enforcement proceedings and provide backup enforcement authority. *See* 12 U.S.C. § 5515(c)(2), (c)(3), 5581(c) (2012) (describing the backup and enforcement authorities of prudential financial regulators to enforce the federal consumer financial protection laws).

Of course, the Court may instead recognize that the scope of the Director's authority is appropriate but conclude in lieu that direct presidential oversight is constitutionally required. In that case, severing the for-cause provision of the statute would be the appropriate remedy, and the justification for doing so should follow the reasoning of the court below. *See* 839 F.3d at 37-39. By severing the Director's for-cause removal protection, the Court would draw a permanent line demarcating the extent of substantive lawmaking and enforcement authority that an independent agency is permitted before presidential oversight is required. The implications for the constitutionality of other agencies would be grave. Hence, the Court may find the exercise of such "editorial freedom" better suited to Congress instead of the courts. *Free Enter. Fund*, 561 U.S. at 510; *see also* 839 F.3d at 39 (contending that converting the Bureau to a multimember structure

would “take us far beyond our judicial capacity” while eliminating the Director’s independent status would not).

CONCLUSION

For the foregoing reasons, this Court should decline to reach the question of the CFPB’s constitutionality, and vacate the lower court’s judgment on that issue.

If this Court chooses to reach the question of the CFPB’s constitutionality, then the judgment of the court of appeals on that issue should be reversed.

If this Court chooses to reach the question of the CFPB’s constitutionality and it decides that the CFPB is unconstitutionally structured, then the judgment of the court of appeals to sever the for-cause removal provision should be affirmed.

Respectfully submitted,

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