No. 17-20364

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PATRICK J. COLLINS; MARCUS J. LIOTTA; WILLIAM M. HITCHCOCK,

Plaintiffs-Appellants,

v.

STEVEN T. MNUCHIN, SECRETARY, U.S. DEPARTMENT OF TREASURY; DEPARTMENT OF THE TREASURY; FEDERAL HOUSING FINANCE AGENCY; JOSEPH M. OTTING,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas,
No. 4:16-cv-03113

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 29.2, I hereby certify that I am aware of no persons or entities, in addition to those listed in the party briefs, that have a financial interest in the outcome of this litigation. In addition, I hereby certify that I am aware of no persons with any interest in the outcome of this litigation other than the signatories to this brief and their counsel, and those identified in the other briefs filed in this case.

Dated: January 18, 2019

/s/ Elizabeth B. Wydra
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICI CURIAE*[1]

Amici are members of Congress who are familiar with the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (HERA), which established the Federal Housing Finance Agency (FHFA). Indeed, *amici* were sponsors of HERA, participated in drafting it, serve or served on committees with jurisdiction over the federal financial regulatory agencies and the banking industry, or served in the leadership when HERA was passed. They thus understand how critical the FHFA's independence is to the agency's ability to play its intended role effectively. *Amici* therefore have an interest in this case.

A full listing of *amici* appears in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2008, the nation confronted the worst financial disaster since the Great Depression, a crisis that "shattered" lives, "shuttered" businesses, "evaporated" savings, and caused millions of families to lose their homes. S. Rep. No. 111-176, at 39 (2010); *see id.* ("[T]he financial crisis has torn at the very fiber of our middle class."). At the heart of this crisis was the mortgage industry. As explained by the Financial Crisis Inquiry Commission, "[l]ending standards collapsed, and there was

[1] *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

a significant failure of accountability and responsibility throughout each level of the lending system." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 125 (2011), https://www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf. As loan originations and the volume of private-label mortgage-backed securitizations increased, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) increased their purchases of private-label mortgage-backed securities, including those backed by subprime and Alt-A loans. And at the peak of the crisis, nearly half of the nation's mortgage debt was owned or guaranteed by Fannie Mae and Freddie Mac in the form of whole loans, private-label securities holdings, and guaranteed securities. When home prices declined and delinquencies rose, Fannie and Freddie experienced billions in losses on loans and securities. *Id*. at 309-10.

Unsound practices at Fannie Mae and Freddie Mac in the years leading up to the crisis were made possible by the lax oversight of a weak regulator, the Office of Federal Housing Enterprise Oversight (OFHEO). Fannie and Freddie spent millions of dollars creating a sophisticated lobbying machine with "immense political power," which they used to ensure that this regulatory agency remained "largely toothless." *Id*. at 40, 311. When Fannie and Freddie made business decisions to enhance their growth, market share, and executive compensation, OFHEO simply

"took its eye off the ball," failing to rein them in despite their "increasing investments in risky mortgages and securities." *Id.* at 322-23, 122.

To correct these problems, prevent their reoccurrence, and stem the escalating housing crisis, Congress passed HERA in July 2008. Key to the legislation was the establishment of a new agency to oversee Fannie and Freddie, the FHFA. Given the failures of the previous regulatory regime and the disastrous consequences that resulted from those failures, Congress determined that the FHFA needed to be "a strong, independent regulator." H.R. Rep. No. 110-142, at 87 (2007). Accordingly, Congress provided that it would be led by a director whom the President could remove "for cause," 12 U.S.C. § 4512(b)(2), but not for policy differences alone—ensuring accountability while shielding the agency from undue political pressure. Congress also gave the FHFA the same budgetary independence that nearly all financial regulators share. Through these means, Congress sought to ensure that the new agency could fulfill its statutory mandate and robustly enforce the law.

Appellants claim that the FHFA's independence violates the Constitution's separation of powers. This argument is wholly without merit. The Framers empowered Congress to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers" of the federal government, U.S. Const. art. I, § 8, cl. 18, thus ensuring that future legislators would have the flexibility needed to structure the government so it could respond effectively to new challenges.

As Chief Justice John Marshall later observed, the Framers made no "unwise attempt" to dictate "the means by which government should, in all future time, execute its powers." *McCulloch v. Maryland*, 17 U.S. 316, 415 (1819). Their choice reflected an understanding that the Constitution was "intended to endure for ages to come, and consequently, to be adapted to the various *crises* of human affairs." *Id.* From the earliest days of the Republic, Congress has used this discretion to vary the organization of federal agencies, and to provide officers who implement regulatory statutes a measure of independence from presidential policy control.

Consistent with this constitutional design, the Supreme Court has long recognized that Congress may shield the heads of regulatory agencies from removal without cause. *See, e.g.*, *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935). In so doing, the Court has explained that when Congress sets conditions on the President's removal powers, "the real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). The Court has also held—repeatedly and uniformly—that the power to remove an officer for cause enables the President to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, because the President may remove any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly," *Free*

Enter. Fund v. PCAOB, 561 U.S. 477, 496, 484 (2010). Simply put, an officer whom the President can remove for cause is subject to "Presidential oversight." *Id.* at 509.

That precedent dictates the outcome here. The President's ability to remove the FHFA Director for cause gives the President "substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696. Neither the FHFA's leadership structure nor its funding source have any bearing on these principles. If the FHFA fails to execute the law faithfully, the solution is simple: the President can replace its Director.

In holding to the contrary, the panel decision misinterpreted Supreme Court precedent. Most significantly, it confused the accountability and oversight required by Article II (the ability to ensure that an agency is faithfully executing the law) with policymaking influence (the ability to affect which options an agency selects among the range of permissible policy choices). The cases on which the panel relied do not concern the President's ability to exert policy influence on a regulatory agency that is operating within its lawful mandate. Rather, those cases concern the President's ability to bring an agency in line if it shirks or exceeds its mandate. Where the President has that ability, as here, Article II is satisfied. In such cases, neither precedent nor the Constitution authorizes the judiciary to decide whether an agency's independence on discretionary policy matters "goes too far." *Collins v.*

Mnuchin, 896 F.3d 640, 662 (5th Cir. 2018). The Constitution assigns that judgment squarely to Congress.

ARGUMENT

I. Congress Has Broad Authority To Shape the Structure of the Federal Government and To Confer on Certain Officers a Degree of Independence from the President.

When the Framers drafted the Constitution, they gave Congress great flexibility to determine how best to shape the federal government. While the Framers anticipated the creation of "Departments," U.S. Const. art. II, § 2, cl. 1, they left unspecified what those departments would be, how they would be organized, and what connection they would have to the President. Likewise, while the Framers envisioned that "Officers of the United States" would be "established by Law," *id*. art. II, § 2, cl. 2, they provided few details concerning those officers' relationship with the President. *Cf. id*. art. II, § 2, cl. 1 (the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments").

Significantly, nowhere in the Constitution is the President given the power to remove these officers from their positions. Indeed, the Constitution addresses their removal only by giving Congress the power to impeach them. *Id*. art. II, § 4. Presidential removal authority was not discussed at the Constitutional Convention, and Alexander Hamilton assumed that the Senate's consent would be required. *See The Federalist No. 77*, at 459 (Clinton Rossiter ed., 1961).

That the Framers left open most questions concerning the federal government's departments and officers was no accident: the Convention rejected a plan that would have delineated in the Constitution itself the roles of specific executive departments and the relationships between their principal officers and the President. *See* 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911) (proposal specifying duties of six department secretaries, all serving the President "during pleasure").

The Framers chose instead to assign Congress broad discretion over the manner in which federal laws are executed, granting it the authority to "make all Laws which shall be necessary and proper for carrying into Execution ... all ... Powers vested by this Constitution in the Government of the United States." U.S. Const. art. I, § 8, cl. 18. This "is the one and only provision of the Constitution that directly addresses the establishment of the federal government," and it "gives the relevant power expressly to Congress." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 1986 (2011); *see* Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 Yale L.J. 1256, 1271 n.34 (2006) ("the intention was for Congress to shape the executive departments in the exercise of its powers under the Necessary and Proper Clause"). Under the Constitution, therefore, "Congress has plenary control over the

salary, duties, and even existence of executive offices," *Free Enter. Fund*, 561 U.S. at 500, wielding broad authority over the structure of federal agencies.

That power has important limits, to be sure. Congress may not structure agencies in a manner that prevents the President from ensuring the faithful execution of the laws. *Id.* at 484. Nor may Congress unduly intercede between the President and the officers who help him exercise his unique Article II powers, such as the conducting of foreign affairs. *See infra*. But when Congress legislates, as it did in creating the FHFA, on "issues over which Congress would have plenary policy control—and the President none—but for Congress's decision to delegate" responsibility to a federal agency, Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 Geo. Wash. L. Rev. 596, 610 (1989), the "text and structure of the Constitution impose few limits on Congress's ability to structure administrative government," Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984).

Legislative decisions in the early Republic confirm that Congress enjoys broad freedom to shape the government's administrative structure—and to grant certain officers a measure of independence from the President. *See Harmelin v. Michigan*, 501 U.S. 957, 980 (1991) ("actions of the First Congress" are "persuasive evidence of what the Constitution means"). In establishing the Departments of

Foreign Affairs, War, and Treasury, the First Congress utilized differing structures and created offices with differing degrees of independence from the President. In particular, the First Congress gave the President far more control over agencies that carry out the President's inherent constitutional powers than over those that do not.

For example, "[t]he departments of Foreign Affairs and War were denominated 'executive' departments," and their secretaries were simply directed to conduct business "'in such manner as the President of the United States shall from time to time order or instruct.'" Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239 (1989) (quoting Act of July 27, 1789, 1 Stat. 28, and Act of Aug. 7, 1789, 1 Stat. 49). "Matters were completely different as to the Department of Treasury," however. *Id*. at 240. It "was not referred to as an 'executive' department," and the legislation "was silent on the subject of presidential direction." *Id*. Meanwhile, an "elaborate set" of "officers and their responsibilities was spelled out in detail," *id*., and the Secretary "was given specific duties that made him in part an agent of Congress." David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 202 (1995).[2]

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[2] When Congress created a new Post Office in 1792 and a Navy Department in 1796, it followed the "two basic tracks" established earlier, Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 29-30 (1994), distinguishing departments "exclusively under presidential direction" from

The Treasury Department, moreover, included a Comptroller with significant statutory independence from the President. This Comptroller was empowered to make "final and conclusive" determinations of claims between the United States and its citizens. Act of Mar. 3, 1795, ch. 48, § 4, 1 Stat. 441, 442. Based on the Comptroller's duties, which partook "of a judiciary quality as well as executive," James Madison suggested "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government," 1 *Annals of Cong*. 636 (1789) (Joseph Gales ed., 1834). While Madison ultimately withdrew his proposal, "all thought the matter open for Congress' determination—that is, that Congress had significant flexibility in structuring the duties of this 'executive' officer." Lessig & Sunstein, *supra*, at 18; Mashaw, *supra*, at 1303 (lawmakers "emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President").

In sum, the Constitution's text, structure, drafting history, and early construction all tell the same story: Congress has considerable latitude when shaping the government's administrative structure. Rather than ossify that structure and

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those "also directed according to law," Mashaw, *supra*, at 1289, and giving the latter greater independence.

foreclose innovation, the Framers empowered future leaders to respond effectively "to the various *crises* of human affairs." *McCulloch*, 17 U.S. at 415.

II. Responding to the Devastating Housing Crisis of 2008, Congress Determined It Was Necessary To Establish the FHFA as a Strong and Independent Regulator.

In 2008, the nation was plunged into the worst financial disaster since the Great Depression. The crisis stemmed from a financial system pervaded by unsustainable risk and incapable of weathering a drop in housing prices. And at the peak of the housing crisis, nearly half of the nation's mortgage debt, including in the form of private securities, was owned or guaranteed by Fannie Mae and Freddie Mac, "the two massive government-sponsored enterprises (GSEs) created by Congress to support the mortgage market." Fin. Crisis Inquiry Comm'n, *The Financial Crisis Inquiry Report* 38 (2011) (hereinafter "*Report*"). Unsound practices—including poor corporate governance and risk management at the GSEs as they prioritized earnings growth—were made possible by the lax oversight of a weak and politically dependent regulatory agency. *Id.* at 323. By establishing the FHFA as "a strong, independent regulator" to oversee Fannie and Freddie, H.R. Rep. No. 110-142, at 87, Congress sought to correct these problems, prevent another GSE meltdown, and ensure that the GSEs were acting to further their missions.

Fannie Mae and Freddie Mac were chartered to promote American home ownership by freeing up mortgage capital: by purchasing mortgages from banks,

thrifts, and mortgage originators, the GSEs enable those entities to make new loans. *Report* 39. Despite the public mandate in their charters, however, Fannie and Freddie are shareholder-held corporations, giving them "dual missions" that include "maximiz[ing] returns for shareholders." *Id.*

Pursuing shareholder profit, Fannie and Freddie poured immense resources into shaping their regulatory environment during the late twentieth century, building "'the greatest, most sophisticated lobbying operation in the modern history of finance.'" Bethany Mclean, *Fannie Mae's Last Stand*, Vanity Fair (Feb. 2009), https://www.vanityfair.com/news/2009/02/fannie-and-freddie200902-2 (quoting former House Banking and Financial Services Chairman Jim Leach). Through their "well-oiled, well-financed and well-connected lobbying armada," they "spent years nurturing relationships with lawmakers," Jeanne Cummings, *Regulation Comes To Those Who Wait*, Politico (July 9, 2007), https://www.politico.com/story /2007/07/regulation-comes-to-those-who-wait-004835, spending more than $164 million on lobbying between 1999 and 2008, *Report* 41. In short, "Fannie and Freddie accumulated political clout," *id.*, which they used "to stymie effective regulation," Mclean, *supra*.

For instance, while Congress "imposed tougher, bank-style capital requirements and regulations on thrifts" after the savings and loan crisis, it allowed Fannie and Freddie to continue holding lower amounts of capital. *Report* 40. And

although Congress established OFHEO as a regulator for Fannie and Freddie, Congress placed it within the Department of Housing and Urban Development and deprived it of "legal powers comparable to those of bank and thrift supervisors." *Id*.

As a result, "OFHEO was structurally weak and almost designed to fail." *Id*. (quoting former director). And fail it did—in part because the "Fannie and Freddie political machine resisted any meaningful regulation using highly improper tactics." *Id*. at 42. As Fannie Mae's chief operating officer recalled: "The old political reality … was that we always won, we took no prisoners … we used to … be able to write, or have written rules that worked for us." *Id.* at 180. In short, OFHEO was not only a "largely toothless agency," *id.* at 311, but was further cowed by being "constantly subjected to malicious political attacks and efforts of intimidation," *id*. at 42 (quoting another former director).

By the twenty-first century, scandals engulfed Fannie and Freddie as it was discovered that their employees had long "manipulated accounting and earnings to trigger bonuses for senior executives." *Id*. at 180. Furthermore, to compete with Wall Street, Fannie and Freddie also ventured into acquiring subprime and Alt-A private-label mortgage-backed securities and "loosened their underwriting standards, purchasing and guaranteeing riskier loans." *Id.* at 122. But OFHEO overlooked the danger of these "increasing investments in risky mortgages and securities." *Id.* "The results would be disastrous for the companies, their

shareholders, and American taxpayers." *Id.* at 125. As mortgage delinquencies skyrocketed, "both GSEs began to take significant losses," particularly from their purchases of private-label Alt-A securities, and these losses "were ultimately borne by taxpayers." *Id*. at 123, 323. In the end, it was "the risky practices" of Fannie and Freddie, "undertaken to meet Wall Street's expectations for growth," that led to the need for Treasury to provide funding for them. *Id.* at 323.

Although OFHEO knew that "mortgage insurers were already seeing abuses" with these higher-risk loans, the agency regarded the developments as "not a 'significant supervisory concern.'" *Id.* at 123 (quoting agency report). Thus, even as the GSEs expanded efforts to "increase our penetration into subprime," *id*. at 180 (quoting Fannie Mae's then-CFO), "OFHEO never told the GSEs to stop. Rather, year after year, the regulator said that both companies had adequate capital, strong asset quality, [and] prudent credit risk management." *Id*. Simply put, "OFHEO took its eye off the ball." *Id*. at 322. Without a diligent regulator, Fannie and Freddie were allowed to increase their "investments in risky loans and securities" unchecked. *Id*. at 122.

To stem the escalating crisis across the private-label and GSE-securitized mortgage markets, and to help prevent another similar crisis, Congress in 2008 enacted "a sweeping rescue package aimed at resurrecting the housing market from its worst slump since the Great Depression and stabilizing the two largest mortgage

finance companies." Jeremy Pelofsky, *Bush Signs Housing Bill as Fannie Mae Grows*, Reuters (July 30, 2008), https://www.reuters.com/article/us-fannie-freddie-bush/bush-signs-housing-bill-as-fannie-mae-grows-idUSN3042756820080730.

Among its key reforms was the establishment of the FHFA as "a strong, independent regulator" that would "ensure that the government sponsored enterprises supporting the mortgage markets operate[d] in a safe and sound manner." H.R. Rep. No. 110-142, at 87. To enhance the agency's political independence while maintaining accountability and faithfulness to the law, Congress provided that the new agency would be "headed by a Director appointed by the President and confirmed by the Senate for a five-year term," *id.* at 88, whom the President could not remove for policy disagreements alone but could remove "for cause," 12 U.S.C. § 4512(b)(2). And to further shield the agency from undue political pressure, Congress provided that it would have independent funding, *id*. § 4516, like nearly all financial regulators.[3]

[3] Henry B. Hogue et. al, Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 27 (2017), https://fas.org/sgp/crs/misc/R43391.pdf; *see* S. Rep. No. 111-176, at 163 ("[T]he assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential to the independent operations of any financial regulator. This was a hard learned lesson from the difficulties faced by [OFHEO], which was subject to repeated Congressional pressure because it was forced to go through the annual appropriations process. It is widely acknowledged that this helped limit OFHEO's effectiveness.").

In sum, OFHEO's lack of independence prevented it from robustly enforcing the law; that mistake led to billions in federal bailouts and was one of the market-wide failures that contributed to the near-collapse of the American economy. In response, exercising the discretion afforded to it by the Constitution, Congress determined that a strong and independent regulator was needed to oversee Fannie Mae and Freddie Mac. As Congress recognized, it was critical that the new regulator be shielded from politically motivated pressure to weaken oversight because such pressure would undermine the agency's ability to fulfill its statutory mandate. As the next Section explains, Congress had every right to make that choice.

III. Congress Acted Well Within Its Constitutional Authority in Making the FHFA an Independent Agency Led by a Director Whom the President May Remove for Cause.

Consistent with the constitutional text and history discussed earlier, the Supreme Court has held—repeatedly and without exception—that Congress may limit the President's authority to remove certain officers without cause. In such cases, the only question is "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691.

Critically, the Court has explained that officers who may be removed for cause are "subject ... to Presidential oversight," because the President can remove any officer who is committing a "breach of faith," "neglecting his duties," or

"discharging them improperly." *Free Enter. Fund*, 561 U.S. at 509, 496, 484. Thus, where an officer "may be terminated for 'good cause,' the Executive ... retains ample authority to assure that the [officer] is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the [law]." *Morrison*, 487 U.S. at 692. In short, the ability to remove an officer for cause enables the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3.

For-cause tenure is also consistent with the President's exercise of the "executive Power," U.S. Const. art. II, § 1, cl. 1, particularly when applied to regulatory agencies created by Congress to implement legislative policies. As far back as *Marbury v. Madison*, Chief Justice Marshall distinguished between officers who help the President wield the unique powers granted to him by Article II, "in the exercise of which he is to use his own discretion," and officers who carry out "other duties" that "the legislature proceeds to impose on that officer." 5 U.S. 137, 165-66 (1803). The former officer "is the mere organ by whom [the President's] will is communicated," while the latter is "the officer of the law." *Id.* at 166. With respect to an officer in the latter category, Marshall concluded that "as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable." *Id.* at 162.

The Supreme Court affirmed these distinctions when it first addressed the constitutionality of for-cause tenure, *see Humphrey's Ex'r*, 295 U.S. at 627-28 (contrasting officers who are "restricted to the performance of executive functions" with those who "carry into effect legislative policies embodied in [a] statute"), and it has done so repeatedly since then, *see Wiener v. United States*, 357 U.S. 349, 353 (1958) (relying on the "sharp line of cleavage" between these categories); *Morrison*, 487 U.S. at 691 (explaining that "the functions of the officials in question must be analyzed" when deciding whether removal restrictions "impede the President's ability to perform his constitutional duty"). The Court has *never* held that the President has "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties." *Wiener*, 357 U.S. at 352.

Not even *Myers v. United States*, 272 U.S. 52 (1926), stands for so broad a proposition. The statute at issue there did more than limit the President's removal power: it gave a coordinate branch of government the right to block removals entirely, by conditioning them on "the advice and consent of the Senate." *Id.* at 107. The Court held that Congress could not claim for itself "the power to remove or the right to participate in the exercise of that power," because this "would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 161, 164; *accord Bowsher v. Synar*, 478 U.S. 714, 726 (1986). Requiring Senate consent, in

other words, could operate as a *complete* barrier to an officer's removal, preventing the President from ensuring faithful execution of the laws. *See Morrison*, 487 U.S. at 687 n.24.

In sum, while the Supreme Court has suggested that there are "some 'purely executive' officers who must be removable by the President at will if he is to be able to accomplish his constitutional role," *id*. at 690 (quoting *Myers*, 272 U.S. at 132-34), such officials do not include the heads of agencies, like the FHFA, that implement congressionally enacted regulatory measures. *See Free Enter. Fund*, 561 U.S. at 509 (where officers within the Securities and Exchange Commission are shielded from removal by "a single level of good-cause tenure," constitutional requirements are satisfied); *Wiener*, 357 U.S. at 353 (given "the function that Congress vested in the War Claims Commission," the President has no constitutional authority to remove commissioners without cause).

This precedent dictates the outcome here. Simply put, when the President may remove an officer for good cause, that officer is subject to "Presidential oversight." *Free Enter. Fund*, 561 U.S. at 509. Thus, the FHFA Director's removal provision gives the President "substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696.

Likewise, conditioning the Director's removal on good cause "does not interfere with the President's exercise of the 'executive Power.'" *Id*. at 689-90. The

FHFA is no more "an arm or an eye of the executive," *Humphrey's Ex'r*, 295 U.S. at 628, than the FTC was when *Humphrey's Executor* was decided. Indeed, the agency's role is materially indistinguishable: "filling in and administering the details embodied by th[e] general standard[s]" set forth in a statute regulating financial transactions. *Id*. While such duties may be executive in nature "to some degree," *Morrison*, 487 U.S. at 689 n.28, they do not represent any "core executive function" under Article II, *id.* at 688; *see PHH Corp. v. CFPB*, 881 F.3d 75, 84 (D.C. Cir. 2018) (en banc). In any event, the FHFA Director surely is not an officer "restricted to the performance of executive functions" and "charged with no duty at all related to either the legislative or judicial power," *Humphrey's Ex'r*, 295 U.S. at 627. And that is the *only* type of officer whom the Supreme Court has even suggested must be removable without cause. *Morrison*, 487 U.S. at 690.

Whether or not an agency is led by a multimember body has no bearing on these principles. The Supreme Court has never even implied that the decision-making attributes of multimember bodies have anything to do with the Court's approval of good-cause removal provisions. In *Humphrey's Executor*, for instance, the Court commented on the FTC's structure only while addressing a *statutory* question: whether Congress truly intended to limit removal of its commissioners to the causes listed in the statute. *See* 295 U.S. at 621-26. When the Court turned to answering the *constitutional* question—whether the removal provision violated

Article II—the Court did not, even once, discuss the agency's structure. *Id.* at 626-32. Attempts to distinguish single-director agencies here simply have "no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power." *PHH*, 881 F.3d at 79-80.

Moreover, conditioning the ability to remove a single director does not detract from the President's power any more than doing the same for the members of a board or commission. If anything, a multimember body serving staggered terms is *less* accountable to the President: Bringing such a body in line may require replacing several members, not just one, as well as the preliminary step of identifying *which* members are to blame for the agency's shortcomings. A single director, by contrast, offers a "clear and direct" line of accountability when an agency strays from its mandate. *Id.* at 98.

An agency's funding source is equally irrelevant. Even if one accepts the premise that an agency's need for congressional appropriations enables Presidents to "influence the policies" of that agency, *Collins*, 896 F.3d at 669 (citation omitted), that is beside the point.[4] The President's ability to remove an agency head for cause—standing alone—provides the accountability that Article II requires, because

[4] And notably, any influence a President exerts over an agency's policies through the appropriations process derives from the President's role in enacting legislation *under Article I*. *But see Collins*, 896 F.3d at 674 ("the FHFA's structure violates Article II").

the President may remove any officer who is committing a "breach of faith," "neglecting his duties," or "discharging them improperly." *Free Enter. Fund*, 561 U.S. at 496, 484. Nothing more is needed, at least with respect to regulatory agencies like the FHFA. *Morrison*, 487 U.S. at 690. Quite simply, there is no constitutional requirement that Presidents be able to dictate the policies of such agencies above and beyond what is needed to ensure faithful execution of the laws.

Thus, in every way that matters under the Constitution, the FHFA Director is indistinguishable from the officers addressed in Supreme Court precedent. That precedent teaches that the relevant distinction is not between agencies with different internal structures or funding sources, but rather between agencies with different roles. In other words, the validity of removal conditions "depend[s] upon the character of the office," *Humphrey's Ex'r*, 295 U.S. at 631, and on whether, in light of that character, the removal conditions "impede the President's ability to perform his constitutional duty," *Morrison*, 487 U.S. at 691. Here they do not. If the FHFA Director fails to execute the law faithfully, the solution is simple: the President can "remov[e] [him] from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483.

IV. The Panel Decision Misinterpreted Supreme Court Precedent.

In this case, the district court had it exactly right: "The FHFA's removal provision, when viewed in light of the agency's overall structure and purpose, does not impede the President's ability to perform his constitutional duty to take care that

the laws are faithfully executed." ROA.960. As explained above, the Supreme Court has long held that the ability to remove an officer for cause provides the accountability that enables the President to fulfill his constitutional role. The panel nevertheless decided that the FHFA Director, whom the President may remove for cause, is "not accountable to the President." *Collins*, 896 F.3d at 674.

In reaching that conclusion, the panel made a fundamental mistake, conflating two distinct concepts: (1) the accountability and oversight required by Article II—*i.e.*, the ability to ensure that an agency is faithfully executing the law, and (2) policymaking influence—*i.e.*, the ability to affect which options an agency selects among the range of permissible policy choices. By confusing true accountability, as the Supreme Court has defined it, with "an agency's practical degree of independence from presidential influence," *id*. at 661 (quoting academic article), the panel demanded more than what the Constitution requires—that the President enjoy some nebulous level of "influence" on the discretionary policy choices of regulatory agencies. The panel's analysis is at odds with Supreme Court precedent.

To start, *Free Enterprise Fund* was not about the President's ability to exert influence on the policies of an agency that is operating within its lawful mandate. It was about the President's ability to hold an agency accountable if it shirks or exceeds that mandate. There, the President was "powerless to intervene" if a member of the

Public Company Accounting Oversight Board were "neglecting his duties or discharging them improperly." 561 U.S. at 496, 484. Just as in *Myers* and *Bowsher*, the option of firing a rogue officer was taken entirely out of the President's hands—and with it "his ability to execute the laws." *Id*. at 496. Throughout the opinion, every reference to accountability, oversight, and supervision concerned the President's ability to guarantee the faithfulness of the officers who execute the laws. *See, e.g.*, *id*. at 484, 495, 496, 498. Nowhere did the Court suggest that the President must have some degree of "influence" over a regulatory agency's policy choices beyond this threshold.

The remedy that the Court imposed further confirms this interpretation. By eliminating the second, stacked layer of tenure protection that shielded Board members from removal without cause, the Court "le[ft] the President separated from Board members by only a single level of good-cause tenure." *Id*. at 509. With that arrangement in place, the Board was once again "subject ... to Presidential oversight." *Id.*; *see id.* at 496 (the President may "hold the Commission fully accountable for the Board's conduct, to the same extent that he may hold the Commission accountable for everything else that it does").

The Court never suggested that the Constitution prohibits a regulatory agency from being "excessively insulated," *Collins*, 896 F.3d at 664, from a President's policy agenda or ideological preferences. Indeed, it was the *dissent* that "dismisse[d]

the importance of removal as a tool of supervision" and focused instead on various factors that bear on "the President's 'power to get something done.'" *Free Enter. Fund*, 561 U.S. at 499 (quoting dissent). Like the panel here, the *Free Enterprise Fund* dissent canvassed matters such as "'who controls the agency's budget requests and funding,'" "'the relationships between one agency or department and another,'" and "whether ... officials support or 'resist' the President's policies." *Id.* at 499-500 (quoting dissent). But the Court rejected all this as irrelevant: "The Framers did not rest our liberties on such bureaucratic minutiae." *Id.* at 500.

The panel also misapprehended the significance of the second layer of for-cause tenure in *Free Enterprise Fund*. The problem was not that two independence-promoting features, operating simultaneously, made the Board "excessively insulated" in the "aggregate." *Collins*, 896 F.3d at 664. On this point the Court was clear: "This novel structure *does not merely add to the Board's independence, but transforms it*." *Free Enter. Fund*, 561 U.S. at 496 (emphasis added). Because of how the two layers worked together, the President was "powerless" to remove a Board member no matter the circumstances. *Id.* This created the same situation as in *Myers* and *Bowsher*: even if the President had cause to remove an officer, he could not do so without the acquiescence of a separate institution. That is why the Court observed that "[t]he President is stripped of the power our precedents have preserved." *Id.*

The panel also erred in interpreting *Morrison v. Olson*. According to the panel, "in *Morrison*, the Executive retained tools to meaningfully oversee the independent counsel, *despite the removal restriction*." *Collins*, 896 F.3d at 666 (emphasis added); *see id*. at 665 ("Congress, in effect, *compensated for the removal restriction* by providing the Executive Branch *other effective tools*" (emphasis added)). But, in fact, for-cause removal was *the chief tool* on which the Court relied in concluding that the President had sufficient control over the independent counsel to perform his constitutional duty: "*Most importantly*, the Attorney General retains the power to remove the counsel for 'good cause,' a power that ... provides the Executive with substantial ability to ensure that the laws are 'faithfully executed.'" *Morrison*, 487 U.S. at 696 (emphasis added).

In addition, *Morrison* (unlike this case) involved an officer vested with the "purely executive" function of criminal law enforcement. *Id.* at 690. That distinction explains why, in the final half-paragraph of its analysis, the Court's opinion briefly mentioned several other tools of presidential control beyond for-cause removal: the Court was *expanding* the types of officers whom Congress could shield from removal without cause, and this expansion into the President's core Article II domain arguably called for additional assurances of supervisory control. With respect to the types of regulatory agencies addressed in earlier precedent, like the FHFA, the Court in no way retreated from the doctrine that for-cause removal

power, standing alone, supplies the accountability required by Article II. Any doubt about that is dispelled by *Free Enterprise Fund*.

Based on its mistaken view of precedent, the panel embarked on an unwieldy and impressionistic appraisal of whether the FHFA's policymaking independence "goes too far." *Collins*, 896 F.3d at 662. No objective standards guide this inquiry. And the entire project is based on a false premise: that the Constitution requires Presidents to have some (unspecified) degree of policymaking influence on regulatory agencies beyond the ability to ensure faithful execution of the laws. As shown above, nothing supports that premise.[5]

In sum, the FHFA is plainly constitutional.

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[5] Compounding its use of the wrong standard, the panel erred in applying that standard. For instance, in concluding that "*Humphrey's Executor* ... is inapposite," the panel asserted that "[t]he FTC is ... structured to allow the President to choose a chairperson, which allows the Executive Branch to wield considerable influence over the agency's priorities and actions." *Id.* at 671-72. This, however, was not true when *Humphrey's Executor* was decided. Back then, "the Commissioners chose their own Chairman" and "elected to rotate the position annually and to deny the Chairman any special administrative responsibilities." Marc Winerman, *A Brief History of the Federal Trade Commission* 8 (2004), https://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf; *see* Pub. L. No. 63-203, § 1, 38 Stat. 717, 718 (1914).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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Dated: January 18, 2019

APPENDIX:
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Senator of Ohio

Cortez Masto, Catherine
Senator of Nevada

Van Hollen, Chris
Senator of Maryland

Warren, Elizabeth
Senator of Massachusetts

U.S. House of Representatives

Waters, Maxine
Representative of California

Clay, Wm. Lacy
Representative of Missouri

Cleaver, Emanuel
Representative of Missouri

Green, Al
Representative of Texas

Maloney, Carolyn B.
Representative of New York

Meeks, Gregory W.
Representative of New York

Pelosi, Nancy
Representative of California

Sherman, Brad
Representative of California

Vargas, Juan
Representative of California

Velázquez, Nydia M.
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on January 18, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed this 18th day of January, 2019.

/s/ Elizabeth B. Wydra
Elizabeth B. Wydra

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that the attached *amici* brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 14-point Times New Roman font.

Executed this 18th day of January, 2019.

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