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Manuel Farach

United States Patent and Trademark Office v. Booking.Com B. V., Case No. 19–46 (2020).
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Post-judgment intervention is generally not permitted and permitted only when the intervention does not seek to attack the judgment.

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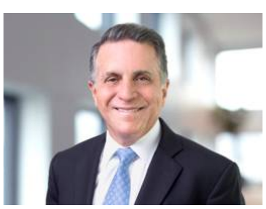

Manuel Farach
member > fort lauderdale

T (954) 356-2528
mfarach@mcglinchey.com

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES PATENT AND TRADEMARK OFFICE ET AL. *v.* BOOKING.COM B. V.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19–46. Argued May 4, 2020—Decided June 30, 2020

A generic name—the name of a class of products or services—is ineligible for federal trademark registration. Respondent Booking.com, an enterprise that maintains a travel-reservation website by the same name, sought federal registration of marks including the term "Booking.com." Concluding that "Booking.com" is a generic name for online hotel-reservation services, the U. S. Patent and Trademark Office (PTO) refused registration. Booking.com sought judicial review, and the District Court determined that "Booking.com"—unlike the term "booking" standing alone—is not generic. The Court of Appeals affirmed, finding no error in the District Court's assessment of how consumers perceive the term "Booking.com." The appellate court also rejected the PTO's contention that, as a rule, combining a generic term like "booking" with ".com" yields a generic composite.

Held: A term styled "generic.com" is a generic name for a class of goods or services only if the term has that meaning to consumers. Pp. 6–14.

(a) Whether a compound term is generic turns on whether that term, taken as a whole, signifies to consumers a class of goods or services. The courts below determined, and the PTO no longer disputes, that consumers do not in fact perceive the term "Booking.com" that way. Because "Booking.com" is not a generic name to consumers, it is not generic. Pp. 6–7.

(b) Opposing that determination, the PTO urges a nearly *per se* rule: When a generic term is combined with a generic Internet-domain-name suffix like ".com," the resulting combination is generic. The rule the PTO proffers is not borne out by the PTO's own past practice and lacks support in trademark law or policy. Pp. 7–14.

(1) The PTO's proposed rule does not follow from *Goodyear's India*

Rubber Glove Mfg. Co. v. *Goodyear Rubber Co.*, 128 U. S. 598. *Goodyear*, the PTO maintains, established that adding a generic corporate designation like "Company" to a generic term does not confer trademark eligibility. According to the PTO, adding ".com" to a generic term—like adding "Company"—can convey no source-identifying meaning. That premise is faulty, for only one entity can occupy a particular Internet domain name at a time, so a "generic.com" term could convey to consumers an association with a particular website. Moreover, an unyielding legal rule that entirely disregards consumer perception is incompatible with a bedrock principle of the Lanham Act: The generic (or nongeneric) character of a particular term depends on its meaning to consumers, *i.e.*, do consumers in fact perceive the term as the name of a class or, instead, as a term capable of distinguishing among members of the class. Pp. 8–11.

(2) The PTO's policy concerns do not support a categorical rule against registration of "generic.com" terms. The PTO asserts that trademark protection for "Booking.com" would give the mark owner undue control over similar language that others should remain free to use. That concern attends any descriptive mark. Guarding against the anticompetitive effects the PTO identifies, several doctrines ensure that registration of "Booking.com" would not yield its holder a monopoly on the term "booking." The PTO also doubts that owners of "generic.com" brands need trademark protection in addition to existing competitive advantages. Such advantages, however, do not inevitably disqualify a mark from federal registration. Finally, the PTO urges that Booking.com could seek remedies outside trademark law, but there is no basis to deny Booking.com the same benefits Congress accorded other marks qualifying as nongeneric. Pp. 11–14.

915 F. 3d 171, affirmed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, ALITO, SOTOMAYOR, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. SOTOMAYOR, J., filed a concurring opinion. BREYER, J., filed a dissenting opinion.

SUPREME COURT OF THE UNITED STATES

No. 19–46

UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL., PETITIONERS *v.* BOOKING.COM B. V.

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

[June 30, 2020]

JUSTICE GINSBURG delivered the opinion of the Court.

This case concerns eligibility for federal trademark registration. Respondent Booking.com, an enterprise that maintains a travel-reservation website by the same name, sought to register the mark "Booking.com." Concluding that "Booking.com" is a generic name for online hotel-reservation services, the U. S. Patent and Trademark Office (PTO) refused registration.

A generic name—the name of a class of products or services—is ineligible for federal trademark registration. The word "booking," the parties do not dispute, is generic for hotel-reservation services. "Booking.com" must also be generic, the PTO maintains, under an encompassing rule the PTO currently urges us to adopt: The combination of a generic word and ".com" is generic.

In accord with the first- and second-instance judgments in this case, we reject the PTO's sweeping rule. A term styled "generic.com" is a generic name for a class of goods or services only if the term has that meaning to consumers. Consumers, according to lower court determinations uncontested here by the PTO, do not perceive the term

"Booking.com" to signify online hotel-reservation services as a class. In circumstances like those this case presents, a "generic.com" term is not generic and can be eligible for federal trademark registration.

I

A

A trademark distinguishes one producer's goods or services from another's. Guarding a trademark against use by others, this Court has explained, "secure[s] to the owner of the mark the goodwill" of her business and "protect[s] the ability of consumers to distinguish among competing producers." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985); see S. Rep. No. 1333, 79th Cong., 2d Sess., 3 (1946) (trademark statutes aim to "protect the public so it may be confident that, in purchasing a product bearing a particular trade-mark which it favorably knows, it will get the product which it asks for and wants to get"). Trademark protection has roots in common law and equity. *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (slip op., at 2). Today, the Lanham Act, enacted in 1946, provides federal statutory protection for trademarks. 60 Stat. 427, as amended, 15 U. S. C. §1051 *et seq.* We have recognized that federal trademark protection, supplementing state law, "supports the free flow of commerce" and "foster[s] competition." *Matal*, 582 U. S., at ___, ___–___ (slip op., at 3, 4–5) (internal quotation marks omitted).

The Lanham Act not only arms trademark owners with federal claims for relief; importantly, it establishes a system of federal trademark registration. The owner of a mark on the principal register enjoys "valuable benefits," including a presumption that the mark is valid. *Iancu* v. *Brunetti*, 588 U. S. ___, ___ (2019) (slip op., at 2); see §§1051, 1052. The supplemental register contains other product and service designations, some of which could one day gain eligibility for the principal register. See §1091. The supplemental register accords more modest benefits; notably, a listing on that register announces one's use of the designation to others considering a similar mark. See 3 J. McCarthy, Trademarks and Unfair Competition §19:37 (5th ed. 2019) (hereinafter McCarthy). Even without federal registration, a mark may be eligible for protection against infringement under both the Lanham Act and other sources of law. See *Matal*, 582 U. S., at ___–___ (slip op., at 4–5).

Prime among the conditions for registration, the mark must be one "by which the goods of the applicant may be distinguished from the goods of others." §1052; see §1091(a) (supplemental register contains "marks capable of distinguishing . . . goods or services"). Distinctiveness is often expressed on an increasing scale: Word marks "may be (1) generic; (2) descriptive; (3) suggestive; (4) arbitrary; or (5) fanciful." *Two Pesos*, *Inc.* v. *Taco Cabana*, *Inc.*, 505 U. S. 763, 768 (1992).

The more distinctive the mark, the more readily it qualifies for the principal register. The most distinctive marks—those that are "'arbitrary' ('Camel' cigarettes), 'fanciful' ('Kodak' film), or 'suggestive' ('Tide' laundry detergent)"—may be placed on the principal register because they are "inherently distinctive." *Wal-Mart Stores*, *Inc.* v. *Samara Brothers*, *Inc.*, 529 U. S. 205, 210–211 (2000). "Descriptive" terms, in contrast, are not eligible for the principal register based on their inherent qualities alone. *E.g.*, *Park 'N Fly*, *Inc.* v. *Dollar Park & Fly*, *Inc.*, 718 F. 2d 327, 331 (CA9 1983) ("Park 'N Fly" airport parking is descriptive), rev'd on other grounds, 469 U. S. 189 (1985). The Lanham Act, "liberaliz[ing] the common law," "extended protection to descriptive marks." *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 171 (1995). But to be placed on the principal register, descriptive terms must achieve significance "in the minds of the public" as identifying the applicant's goods or services—a quality called "acquired distinctiveness" or "secondary meaning." *Wal-Mart Stores*, 529 U. S., at 211 (internal quotation marks omitted); see §1052(e), (f). Without secondary meaning, descriptive terms may be eligible only for the supplemental register. §1091(a).

At the lowest end of the distinctiveness scale is "the generic name for the goods or services." §§1127, 1064(3), 1065(4). The name of the good itself (*e.g.*, "wine") is incapable of "distinguish[ing] [one producer's goods] from the goods of others" and is therefore ineligible for registration. §1052; see §1091(a). Indeed, generic terms are ordinarily ineligible for protection as trademarks at all. See Restatement (Third) of Unfair Competition §15, p. 142 (1993); *Otokoyama Co.* v. *Wine of Japan Import*, *Inc.*, 175 F. 3d 266, 270 (CA2 1999) ("[E]veryone may use [generic terms] to refer to the goods they designate.").

B

Booking.com is a digital travel company that provides hotel reservations and other services under the brand "Booking.com," which is also the domain name of its website.[1] Booking.com filed applications to register four marks in connection with travel-related services, each with different visual features but all containing the term "Booking.com."[2]

Both a PTO examining attorney and the PTO's Trademark Trial and Appeal Board concluded that the term "Booking.com" is generic for the services at issue and is therefore unregistrable. "Booking," the Board observed, means making travel reservations, and ".com" signifies a

[1] A domain name identifies an address on the Internet. The rightmost component of a domain name—".com" in "Booking.com"—is known as the top-level domain. Domain names are unique; that is, a given domain name is assigned to only one entity at a time.

[2] For simplicity, this opinion uses the term "trademark" to encompass the marks whose registration Booking.com seeks. Although Booking.com uses the marks in connection with services, not goods, rendering the marks "service marks" rather than "trademarks" under 15 U. S. C. §1127, that distinction is immaterial to the issue before us.

commercial website. The Board then ruled that "customers would understand the term BOOKING.COM primarily to refer to an online reservation service for travel, tours, and lodgings." App. to Pet. for Cert. 164a, 176a. Alternatively, the Board held that even if "Booking.com" is descriptive, not generic, it is unregistrable because it lacks secondary meaning.

Booking.com sought review in the U. S. District Court for the Eastern District of Virginia, invoking a mode of review that allows Booking.com to introduce evidence not presented to the agency. See §1071(b). Relying in significant part on Booking.com's new evidence of consumer perception, the District Court concluded that "Booking.com"—unlike "booking"—is not generic. The "consuming public," the court found, "primarily understands that BOOKING.COM does not refer to a genus, rather it is descriptive of services involving 'booking' available at that domain name." *Booking.com B.V.* v. *Matal*, 278 F. Supp. 3d 891, 918 (2017). Having determined that "Booking.com" is descriptive, the District Court additionally found that the term has acquired secondary meaning as to hotel-reservation services. For those services, the District Court therefore concluded, Booking.com's marks meet the distinctiveness requirement for registration.

The PTO appealed only the District Court's determination that "Booking.com" is not generic. Finding no error in the District Court's assessment of how consumers perceive the term "Booking.com," the Court of Appeals for the Fourth Circuit affirmed the court of first instance's judgment. In so ruling, the appeals court rejected the PTO's contention that the combination of ".com" with a generic term like "booking" "is *necessarily* generic." 915 F. 3d 171, 184 (2019). Dissenting in relevant part, Judge Wynn concluded that the District Court mistakenly presumed that "generic.com" terms are usually descriptive, not generic.

We granted certiorari, 589 U. S. ___ (2019), and now affirm the Fourth Circuit's decision.

II

Although the parties here disagree about the circumstances in which terms like "Booking.com" rank as generic, several guiding principles are common ground. First, a "generic" term names a "class" of goods or services, rather than any particular feature or exemplification of the class. Brief for Petitioners 4; Brief for Respondent 6; see §§1127, 1064(3), 1065(4) (referring to "the generic name for the goods or services"); *Park 'N Fly*, 469 U. S., at 194 ("A generic term is one that refers to the genus of which the particular product is a species."). Second, for a compound term, the distinctiveness inquiry trains on the term's meaning as a whole, not its parts in isolation. Reply Brief 9; Brief for Respondent 2; see *Estate of P. D. Beckwith*, *Inc.* v. *Commissioner of Patents*, 252 U. S. 538, 545–546 (1920). Third, the relevant meaning of a term is its meaning to consumers. Brief for Petitioners 43–44; Brief for Respondent 2; see *Bayer Co.* v. *United Drug Co.*, 272 F. 505, 509 (SDNY 1921) (Hand, J.) ("What do the buyers understand by the word for whose use the parties are contending?"). Eligibility for registration, all agree, turns on the mark's capacity to "distinguis[h]" goods "in commerce." §1052. Evidencing the Lanham Act's focus on consumer perception, the section governing cancellation of registration provides that "[t]he primary significance of the registered mark to the relevant public . . . shall be the test for determining whether the registered mark has become the generic name of goods or services." §1064(3).[3]

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[3]The U. S. Patent and Trademark Office (PTO) suggests that the primary-significance test might not govern outside the context of §1064(3), which subjects to cancellation marks previously registered that have "become" generic. See Reply Brief 11; Tr. of Oral Arg. 19. To

Under these principles, whether "Booking.com" is generic turns on whether that term, taken as a whole, signifies to consumers the class of online hotel-reservation services. Thus, if "Booking.com" were generic, we might expect consumers to understand Travelocity—another such service—to be a "Booking.com." We might similarly expect that a consumer, searching for a trusted source of online hotel-reservation services, could ask a frequent traveler to name her favorite "Booking.com" provider.

Consumers do not in fact perceive the term "Booking.com" that way, the courts below determined. The PTO no longer disputes that determination. See Pet. for Cert. I; Brief for Petitioners 17–18 (contending only that a consumer-perception inquiry was unnecessary, not that the lower courts' consumer-perception determination was wrong). That should resolve this case: Because "Booking.com" is not a generic name to consumers, it is not generic.

III

Opposing that conclusion, the PTO urges a nearly *per se* rule that would render "Booking.com" ineligible for registration regardless of specific evidence of consumer perception. In the PTO's view, which the dissent embraces, when a generic term is combined with a generic top-level domain

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so confine the primary-significance test, however, would upset the understanding, shared by Courts of Appeals and the PTO's own manual for trademark examiners, that the same test governs whether a mark is registrable in the first place. See, *e.g.*, *In re Cordua Restaurants*, *Inc.*, 823 F. 3d 594, 599 (CA Fed. 2016); *Nartron Corp.* v. *STMicroelectronics*, *Inc.*, 305 F. 3d 397, 404 (CA6 2002); *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F. 3d 137, 144 (CA2 1997); Trademark Manual of Examining Procedure §1209.01(c)(i), p. 1200–267 (Oct. 2018), http://tmep.uspto.gov. We need not address today the scope of the primary-significance test's application, for our analysis does not depend on whether one meaning among several is "primary." Sufficient to resolve this case is the undisputed principle that consumer perception demarcates a term's meaning.

like ".com," the resulting combination is generic. In other words, every "generic.com" term is generic according to the PTO, absent exceptional circumstances.[4]

The PTO's own past practice appears to reflect no such comprehensive rule. See, *e.g.*, Trademark Registration No. 3,601,346 ("ART.COM" on principal register for, *inter alia*, "[o]nline retail store services" offering "art prints, original art, [and] art reproductions"); Trademark Registration No. 2,580,467 ("DATING.COM" on supplemental register for "dating services"). Existing registrations inconsistent with the rule the PTO now advances would be at risk of cancellation if the PTO's current view were to prevail. See §1064(3). We decline to adopt a rule essentially excluding registration of "generic.com" marks. As explained below, we discern no support for the PTO's current view in trademark law or policy.

A

The PTO urges that the exclusionary rule it advocates follows from a common-law principle, applied in *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598 (1888), that a generic corporate designation added to a generic term does not confer trademark eligibility. In *Goodyear*, a decision predating the Lanham Act, this Court held that "Goodyear Rubber Company" was not "capable of exclusive appropriation." *Id.*, at 602. Standing alone, the term "Goodyear Rubber" could not serve as a trademark because it referred, in those days, to "well-known classes of goods produced by the process known as Goodyear's invention." *Ibid.* "[A]ddition of the word 'Company'" supplied no protectable meaning, the Court concluded,

[4] The PTO notes only one possible exception: Sometimes adding a generic term to a generic top-level domain results in wordplay (for example, "tennis.net"). That special case, the PTO acknowledges, is not presented here and does not affect our analysis. See Brief for Petitioners 25, n. 6; Tr. of Oral Arg. 25–26.

because adding "Company" "only indicates that parties have formed an association or partnership to deal in such goods." *Ibid.* Permitting exclusive rights in "Goodyear Rubber Company" (or "Wine Company, Cotton Company, or Grain Company"), the Court explained, would tread on the right of all persons "to deal in such articles, and to publish the fact to the world." *Id.*, at 602–603.

"Generic.com," the PTO maintains, is like "Generic Company" and is therefore ineligible for trademark protection, let alone federal registration. According to the PTO, adding ".com" to a generic term—like adding "Company"—"conveys no additional meaning that would distinguish [one provider's] services from those of other providers." Brief for Petitioners 44. The dissent endorses that proposition: "Generic.com" conveys that the generic good or service is offered online "and nothing more." *Post*, at 1.

That premise is faulty. A "generic.com" term might also convey to consumers a source-identifying characteristic: an association with a particular website. As the PTO and the dissent elsewhere acknowledge, only one entity can occupy a particular Internet domain name at a time, so "[a] consumer who is familiar with that aspect of the domain-name system can infer that BOOKING.COM refers to *some* specific entity." Brief for Petitioners 40. See also Tr. of Oral Arg. 5 ("Because domain names are one of a kind, a significant portion of the public will always understand a generic '.com' term to refer to a specific business . . . ."); *post*, at 7 (the "exclusivity" of "generic.com" terms sets them apart from terms like "Wine, Inc." and "The Wine Company"). Thus, consumers could understand a given "generic.com" term to describe the corresponding website or to identify the website's proprietor. We therefore resist the PTO's position that "generic.com" terms are capable of signifying only an entire class of online goods or services and, hence, are categorically incapable of identifying a source.[5]

The PTO's reliance on *Goodyear* is flawed in another respect. The PTO understands *Goodyear* to hold that "Generic Company" terms "are ineligible for trademark protection *as a matter of law*"—regardless of how "consumers would understand" the term. Brief for Petitioners 38. But, as noted, whether a term is generic depends on its meaning to consumers. *Supra*, at 6. That bedrock principle of the Lanham Act is incompatible with an unyielding legal rule that entirely disregards consumer perception. Instead, *Goodyear* reflects a more modest principle harmonious with Congress' subsequent enactment: A compound of generic elements is generic if the combination yields no additional meaning *to consumers* capable of distinguishing the goods or services.

The PTO also invokes the oft-repeated principle that "no matter how much money and effort the user of a generic term has poured into promoting the sale of its merchandise

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[5] In passing, the PTO urges us to disregard that a domain name is assigned to only one entity at a time. That fact, the PTO suggests, stems from "a functional characteristic of the Internet and the domain-name system," and functional features cannot receive trademark protection. Brief for Petitioners 32. "[A] product feature is functional, and cannot serve as a trademark," we have held, "if it is essential to the use or purpose of the article or if it affects the cost or quality of the article." *TrafFix Devices*, *Inc.* v. *Marketing Displays*, *Inc.*, 532 U. S. 23, 32 (2001) (internal quotation marks omitted); see §1052(e) (barring from the principal registrar "any matter that, as a whole, is functional"). This case, however, does not concern trademark protection for a feature of the Internet or the domain-name system; Booking.com lays no claim to the use of unique domain names generally. Nor does the PTO contend that the particular domain name "Booking.com" is essential to the use or purpose of online hotel-reservation services, affects these services' cost or quality, or is otherwise necessary for competitors to use. In any event, we have no occasion to decide the applicability of §1052(e)'s functionality bar, for the sole ground on which the PTO refused registration, and the sole claim before us, is that "Booking.com" is generic.

. . . , it cannot deprive competing manufacturers of the product of the right to call an article by its name." *Abercrombie & Fitch Co.* v. *Hunting World*, *Inc.*, 537 F. 2d 4, 9 (CA2 1976). That principle presupposes that a generic term is at issue. But the PTO's only legal basis for deeming "generic.com" terms generic is its mistaken reliance on *Goodyear*.

While we reject the rule proffered by the PTO that "generic.com" terms are generic names, we do not embrace a rule automatically classifying such terms as nongeneric. Whether any given "generic.com" term is generic, we hold, depends on whether consumers in fact perceive that term as the name of a class or, instead, as a term capable of distinguishing among members of the class.[6]

B

The PTO, echoed by the dissent, *post*, at 10–12, objects that protecting "generic.com" terms as trademarks would

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[6] Evidence informing that inquiry can include not only consumer surveys, but also dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning. Surveys can be helpful evidence of consumer perception but require care in their design and interpretation. See Brief for Trademark Scholars as *Amici Curiae* 18–20 (urging that survey respondents may conflate the fact that domain names are exclusive with a conclusion that a given "generic.com" term has achieved secondary meaning). Moreover, difficult questions may be presented when a term has multiple concurrent meanings to consumers or a meaning that has changed over time. See, *e.g.*, 2 J. McCarthy, Trademarks and Unfair Competition §12:51 (5th ed. 2019) (discussing terms that are "a generic name to some, a trademark to others"); *id.*, §12:49 ("Determining the distinction between generic and trademark usage of a word . . . when there are no other sellers of [the good or service] is one of the most difficult areas of trademark law."). Such issues are not here entailed, for the PTO does not contest the lower courts' assessment of consumer perception in this case. See Pet. for Cert. I; Brief for Petitioners 17–18. For the same reason, while the dissent questions the evidence on which the lower courts relied, *post*, at 7–8, 9, we have no occasion to reweigh that evidence. Cf. *post*, at 1–2 (SOTOMAYOR, J., concurring).

disserve trademark law's animating policies. We disagree.

The PTO's principal concern is that trademark protection for a term like "Booking.com" would hinder competitors. But the PTO does not assert that others seeking to offer online hotel-reservation services need to call their services "Booking.com." Rather, the PTO fears that trademark protection for "Booking.com" could exclude or inhibit competitors from using the term "booking" or adopting domain names like "ebooking.com" or "hotel-booking.com." Brief for Petitioners 27–28. The PTO's objection, therefore, is not to exclusive use of "Booking.com" as a mark, but to undue control over similar language, *i.e.*, "booking," that others should remain free to use.

That concern attends any descriptive mark. Responsive to it, trademark law hems in the scope of such marks short of denying trademark protection altogether. Notably, a competitor's use does not infringe a mark unless it is likely to confuse consumers. See §§1114(1), 1125(a)(1)(A); 4 McCarthy §23:1.50 (collecting state law). In assessing the likelihood of confusion, courts consider the mark's distinctiveness: "The weaker a mark, the fewer are the junior uses that will trigger a likelihood of consumer confusion." 2 *id.*, §11:76. When a mark incorporates generic or highly descriptive components, consumers are less likely to think that other uses of the common element emanate from the mark's owner. *Ibid.* Similarly, "[i]n a 'crowded' field of look-alike marks" (*e.g.*, hotel names including the word "grand"), consumers "may have learned to carefully pick out" one mark from another. *Id.*, §11:85. And even where some consumer confusion exists, the doctrine known as classic fair use, see *id.*, §11:45, protects from liability anyone who uses a descriptive term, "fairly and in good faith" and "otherwise than as a mark," merely to describe her own goods. 15 U. S. C. §1115(b)(4); see *KP Permanent Make-Up*, *Inc.* v. *Lasting Impression I*, *Inc.*, 543 U. S. 111, 122–123 (2004).

These doctrines guard against the anticompetitive effects the PTO identifies, ensuring that registration of "Booking.com" would not yield its holder a monopoly on the term "booking." Booking.com concedes that "Booking.com" would be a "weak" mark. Tr. of Oral Arg. 66. See also *id.*, at 42–43, 55. The mark is descriptive, Booking.com recognizes, making it "harder . . . to show a likelihood of confusion." *Id.*, at 43. Furthermore, because its mark is one of many "similarly worded marks," Booking.com accepts that close variations are unlikely to infringe. *Id.*, at 66. And Booking.com acknowledges that federal registration of "Booking.com" would not prevent competitors from using the word "booking" to describe their own services. *Id.*, at 55.

The PTO also doubts that owners of "generic.com" brands need trademark protection in addition to existing competitive advantages. Booking.com, the PTO argues, has already seized a domain name that no other website can use and is easy for consumers to find. Consumers might enter "the word 'booking' in a search engine," the PTO observes, or "proceed directly to 'booking.com' in the expectation that [online hotel-booking] services will be offered at that address." Brief for Petitioners 32. Those competitive advantages, however, do not inevitably disqualify a mark from federal registration. All descriptive marks are intuitively linked to the product or service and thus might be easy for consumers to find using a search engine or telephone directory. The Lanham Act permits registration nonetheless. See §1052(e), (f). And the PTO fails to explain how the exclusive connection between a domain name and its owner makes the domain name a generic term all should be free to use. That connection makes trademark protection more appropriate, not less. See *supra*, at 9.

Finally, even if "Booking.com" is generic, the PTO urges, unfair-competition law could prevent others from passing off their services as Booking.com's. Cf. *Genesee Brewing Co.*

v. *Stroh Brewing Co.*, 124 F. 3d 137, 149 (CA2 1997); *Blinded Veterans Assn.* v. *Blinded Am. Veterans Foundation*, 872 F. 2d 1035, 1042–1048 (CADC 1989). But federal trademark registration would offer Booking.com greater protection. See, *e.g.*, *Genesee Brewing*, 124 F. 3d, at 151 (unfair-competition law would oblige competitor at most to "make more of an effort" to reduce confusion, not to cease marketing its product using the disputed term); *Matal*, 582 U. S., at ___ (slip op., at 5) (federal registration confers valuable benefits); Brief for Respondent 26 (expressing intention to seek protections available to trademark owners under the Anticybersquatting Consumer Protection Act, 15 U. S. C. §1125(d)); Brief for Coalition of .Com Brand Owners as *Amici Curiae* 14–19 (trademark rights allow mark owners to stop domain-name abuse through private dispute resolution without resorting to litigation). We have no cause to deny Booking.com the same benefits Congress accorded other marks qualifying as nongeneric.

* * *

The PTO challenges the judgment below on a sole ground: It urges that, as a rule, combining a generic term with ".com" yields a generic composite. For the above-stated reasons, we decline a rule of that order, one that would largely disallow registration of "generic.com" terms and open the door to cancellation of scores of currently registered marks. Accordingly, the judgment of the Court of Appeals for the Fourth Circuit regarding eligibility for trademark registration is

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 19–46

UNITED STATES PATENT AND TRADEMARK OFFICE, ET AL., PETITIONERS *v.* BOOKING.COM B. V.

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

[June 30, 2020]

JUSTICE SOTOMAYOR, concurring.

The question before the Court here is simple: whether there is a nearly *per se* rule against trademark protection for a "generic.com" term. See *ante*, at 7–8; *post*, at 10 (BREYER, J., dissenting). I agree with the Court that there is no such rule, a holding that accords with how the U. S. Patent and Trademark Office (PTO) has treated such terms in the past. See *ante*, at 8 (noting that the "PTO's own past practice appears to reflect no such comprehensive rule"). I add two observations.

First, the dissent wisely observes that consumer-survey evidence "may be an unreliable indicator of genericness." *Post*, at 9–10. Flaws in a specific survey design, or weaknesses inherent in consumer surveys generally, may limit the probative value of surveys in determining whether a particular mark is descriptive or generic in this context. But I do not read the Court's opinion to suggest that surveys are the be-all and end-all. As the Court notes, sources such as "dictionaries, usage by consumers and competitors, and any other source of evidence bearing on how consumers perceive a term's meaning" may also inform whether a mark is generic or descriptive. *Ante*, at 11, n. 6.

Second, the PTO may well have properly concluded, based on such dictionary and usage evidence, that Booking.com is in fact generic for the class of services at issue here, and the District Court may have erred in concluding to the contrary. But that question is not before the Court. With these understandings, I concur in the Court's opinion.

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[June 30, 2020]

JUSTICE BREYER, dissenting.

What is Booking.com? To answer this question, one need only consult the term itself. Respondent provides an online booking service. The company's name informs the consumer of the basic nature of its business and nothing more. Therein lies the root of my disagreement with the majority.

Trademark law does not protect generic terms, meaning terms that do no more than name the product or service itself. This principle preserves the linguistic commons by preventing one producer from appropriating to its own exclusive use a term needed by others to describe their goods or services. Today, the Court holds that the addition of ".com" to an otherwise generic term, such as "booking," can yield a protectable trademark. Because I believe this result is inconsistent with trademark principles and sound trademark policy, I respectfully dissent.

I

A

Trademark law protects those "'distinctive marks—words, names, symbols, and the like'" that "'distinguish a particular artisan's goods from those of others.'" *Matal* v. *Tam*, 582 U. S. ___, ___ (2017) (slip op., at 2) (quoting *B&B Hardware, Inc.* v. *Hargis Industries, Inc.*, 575 U. S. 138, 142 (2015)). To determine whether a given term is sufficiently distinctive to serve as a trademark, courts generally place it in one of five categories. The first four kinds of terms are eligible for federal trademark registration. The fifth is not.

I list the first three only to give context and allow comparisons. They are: (1) "'fanciful'" terms, such as "Kodak" (film); (2) "'arbitrary'" terms, such as "Camel" (cigarettes); and (3) "'suggestive'" terms, such as "Tide" (laundry detergent). *Ante,* at 3. These kinds of terms are "'inherently distinctive.'" *Ibid.* The public can readily understand that they identify and distinguish the goods or services of one firm from those of all others. See *Two Pesos, Inc.* v. *Taco Cabana, Inc.*, 505 U. S. 763, 768 (1992). By preventing others from copying a distinctive mark, trademark law "protect[s] the ability of consumers to distinguish among competing producers" and "secure[s] to the owner of the mark the goodwill of his business." *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U. S. 189, 198 (1985). Ultimately, the purpose of trademark law is to "foster competition" and "suppor[t] the free flow of commerce." *Matal*, 582 U. S., at ___ (slip op., at 3) (internal quotation marks omitted).

This case concerns two further categories. There are "descriptive" terms, such as "Best Buy" (electronics) or "First National Bank" (banking services), that "immediately conve[y] information concerning a feature, quality, or characteristic" of the producer's goods or services. *In re North Carolina Lottery*, 866 F. 3d 1363, 1367 (CA Fed. 2017). A descriptive term can be registered as a trademark only if it acquires "secondary meaning"—*i.e.,* the public has come to associate it with a particular firm or its product. *Two Pesos*, 505 U. S., at 769.

There are also "generic" terms, such as "wine" or "haircuts." They do nothing more than inform the consumer of the kind of product that the firm sells. We have called generic terms "descriptive of a class of goods." *Goodyear's India Rubber Glove Mfg. Co.* v. *Goodyear Rubber Co.*, 128 U. S. 598, 602 (1888). And we have said that they simply convey the "genus of which the particular product is a species." *Park 'N Fly*, 469 U. S., at 196. A generic term is not eligible for use as a trademark. That principle applies even if a particular generic term "ha[s] become identified with a first user" in the minds of the consuming public. *CES Publishing Corp.* v. *St. Regis Publications, Inc.*, 531 F. 2d 11, 13 (CA2 1975) (Friendly, J.). The reason is simple. To hold otherwise "would grant the owner of the mark a monopoly, since a competitor could not describe his goods as what they are." *Ibid.*

Courts have recognized that it is not always easy to distinguish generic from descriptive terms. See, *e.g., Abercrombie & Fitch Co.* v. *Hunting World, Inc.*, 537 F. 2d 4, 9 (CA2 1976) (Friendly, J.). It is particularly difficult to do so when a firm wishes to string together two or more generic terms to create a compound term. Despite the generic nature of its component parts, the term as a whole is not necessarily generic. In such cases, courts must determine whether the combination of generic terms conveys some distinctive, source-identifying meaning that each term, individually, lacks. See 2 J. McCarthy, Trademarks and Unfair Competition §12:39 (5th ed. June 2020 update) (McCarthy). If the meaning of the whole is no greater than the sum of its parts, then the compound is itself generic. See *Princeton Vanguard, LLC* v. *Frito-Lay North Am., Inc.*, 786 F. 3d 960, 966–967 (CA Fed. 2015); *In re Gould Paper Corp.*, 834 F. 2d 1017, 1018 (CA Fed. 1987) (registration is properly denied if "the separate words joined to form a compound have a meaning identical to the meaning common usage would ascribe to those words as a compound"); see also 2 McCarthy §12:39 (collecting examples of compound terms held to be generic).

In *Goodyear,* 128 U. S. 598, we held that appending the word "'Company'" to the generic name for a class of goods does not yield a protectable compound term. *Id.,* at 602–603. The addition of a corporate designation, we explained, "only indicates that parties have formed an association or partnership to deal in such goods." *Id.,* at 602. For instance, "parties united to produce or sell wine, or to raise cotton or grain," may well "style themselves Wine Company, Cotton Company, or Grain Company." *Ibid.* But they would not thereby gain the right to exclude others from the use of those terms "for the obvious reason that all persons have a right to deal in such articles, and to publish the fact to the world." *Id.,* at 603. "[I]ncorporation of a company in the name of an article of commerce, without other specification," we concluded, does not "create any exclusive right to the use of the name." *Ibid.*

I cannot agree with respondent that the 1946 Lanham Act "repudiate[d] *Goodyear* and its ilk." Brief for Respondent 39. It is true that the Lanham Act altered the common law in certain important respects. Most significantly, it extended trademark protection to descriptive marks that have acquired secondary meaning. See *Qualitex Co.* v. *Jacobson Products Co.*, 514 U. S. 159, 171 (1995). But it did not disturb the basic principle that *generic* terms are ineligible for trademark protection, and nothing in the Act suggests that Congress intended to overturn *Goodyear*. We normally assume that Congress did not overturn a common-law principle absent some indication to the contrary. See *Astoria Fed. Sav. & Loan Assn.* v. *Solimino*, 501 U. S. 104, 108 (1991). I can find no such indication here. Perhaps that is why the lower courts, the Trademark Trial and Appeal Board (TTAB), the U. S. Patent and Trademark Office's (PTO) Trademark Manual of Examining Procedure (TMEP), and leading treatises all recognize *Goodyear*'s continued validity. See, *e.g., In re Detroit Athletic Co.*, 903 F. 3d 1297, 1304 (CA Fed. 2018); *In re Katch, LLC*, 2019 WL 2560528, *10 (TTAB 2019); TMEP §§1209.03(d) (Oct. 2018); 2 McCarthy §12:39; 4 L. Altman & M. Pollack, Callmann on Unfair Competition, Trademarks and Monopolies §18:11 (4th ed., June 2020 update).

More fundamentally, the *Goodyear* principle is sound as a matter of law and logic. *Goodyear* recognized that designations such as "Company," "Corp.," and "Inc." merely indicate corporate form and therefore do nothing to distinguish one firm's goods or services from all others'. 128 U. S., at 602. It follows that the addition of such a corporate designation does not "magically transform a generic name for a product or service into a trademark, thereby giving a right to exclude others." 2 McCarthy §12:39. In other words, where a compound term consists simply of a generic term plus a corporate designation, the whole is *necessarily* no greater than the sum of its parts.

B

This case requires us to apply these principles in the novel context of internet domain names. Respondent seeks to register a term, "Booking.com," that consists of a generic term, "booking" (known as the second-level domain) plus ".com" (known as the top-level domain). The question at issue here is whether a term that takes the form "generic.com" is generic in the ordinary course. In my view, appending ".com" to a generic term ordinarily yields no meaning beyond that of its constituent parts. Because the term "Booking.com" is just such an ordinary "generic.com" term, in my view, it is not eligible for trademark registration.

Like the corporate designations at issue in *Goodyear*, a top-level domain such as ".com" has no capacity to identify and distinguish the source of goods or services. It is merely a necessary component of any web address. See 1 McCarthy §7:17.50. When combined with the generic name of a class of goods or services, ".com" conveys only that the owner operates a website related to such items. Just as "Wine Company" expresses the generic concept of a company that deals in wine, "wine.com" connotes only a website that does the same. The same is true of "Booking.com." The combination of "booking" and ".com" does not serve to "identify a particular characteristic or quality of some thing; it *connotes the basic nature of that thing*"—the hallmark of a generic term. *Blinded Veterans Assn.* v. *Blinded Am. Veterans Foundation*, 872 F. 2d 1035, 1039 (CADC 1989) (Ginsburg, J. for the court) (emphasis added; internal quotation marks omitted).

When a website uses an inherently distinctive second-level domain, it is obvious that adding ".com" merely denotes a website associated with that term. Any reasonably well-informed consumer would understand that "post-it.com" is the website associated with Post-its. See *Minnesota Min. & Mfg. Co.* v. *Taylor*, 21 F. Supp. 2d 1003, 1005 (Minn. 1998). Likewise, "plannedparenthood.com" is obviously just the website of Planned Parenthood. See *Planned Parenthood Federation of Am., Inc.* v. *Bucci*, 1997 WL 133313, *8 (SDNY, Mar. 24, 1997). Recognizing this feature of domain names, courts generally ignore the top-level domain when analyzing likelihood of confusion. See *Brookfield Communications, Inc.* v. *West Coast Entertainment Corp.*, 174 F. 3d 1036, 1055 (CA9 1999).

Generic second-level domains are no different. The meaning conveyed by "Booking.com" is no more and no less than a website associated with its generic second-level domain, "booking." This will ordinarily be true of any generic term plus ".com" combination. The term as a whole is just as generic as its constituent parts. See 1 McCarthy §7:17.50; 2 *id.*, §12:39.50.

There may be exceptions to this rule in rare cases where the top-level domain interacts with the generic second-level domain in such a way as to produce meaning distinct from that of the terms taken individually. See *ante,* at 8, n. 4. Likewise, the principles discussed above may apply differently to the newly expanded universe of top-level domains, such as ".guru," ".club," or ".vip," which may "conve[y] information concerning a feature, quality, or characteristic" of the website at issue. *In re North Carolina Lottery*, 866 F. 3d, at 1367; see also Brief for International Trademark Association as *Amicus Curiae* 10–11; TMEP § 1209.03(m). These scenarios are not presented here, as "Booking.com" conveys only a website associated with booking.

C

The majority believes that *Goodyear* is inapposite because of the nature of the domain name system. Because only one entity can hold the contractual rights to a particular domain name at a time, it contends, consumers may infer that a "generic.com" domain name refers to some specific entity. *Ante*, at 9.

That fact does not distinguish *Goodyear*. A generic term may suggest that it is associated with a specific entity. That does not render it nongeneric. For example, "Wine, Inc." implies the existence of a specific legal entity incorporated under the laws of some State. Likewise, consumers may perceive "The Wine Company" to refer to some specific company rather than a genus of companies. But the addition of the definite article "the" obviously does not transform the generic nature of that term. See *In re The Computer Store, Inc.*, 211 USPQ 72, 74–75 (TTAB 1981). True, these terms do not carry the exclusivity of a domain name. But that functional exclusivity does not negate the principle animating *Goodyear*: Terms that merely convey the nature of the producer's business should remain free for all to use. See 128 U. S., at 603.

This case illustrates the difficulties inherent in the majority's fact-specific approach. The lower courts determined (as the majority highlights), that consumers do not use the term "Booking.com" to refer to the class of hotel reservation websites in ordinary speech. 915 F. 3d 171, 181–183 (CA4 2019); *ante,* at 7. True, few would call Travelocity a "Booking.com." *Ibid.* But literal use is not dispositive. See 915 F. 3d, at 182; *H. Marvin Ginn Corp.* v. *International Assn.*

of Fire Chiefs, Inc., 782 F. 2d 987, 989–990 (CA Fed. 1986). Consumers do not use the term "Wine, Incs." to refer to purveyors of wine. Still, the term "Wine, Inc." is generic because it signifies only a company incorporated for that purpose. See *Goodyear*, 128 U. S., at 602–603. Similarly, "Booking, Inc." may not be trademarked because it signifies only a booking company. The result should be no different for "Booking.com," which signifies only a booking website.

More than that, many of the facts that the Court supposes may distinguish some "generic.com" marks as descriptive and some as generic are unlikely to vary from case to case. There will never be evidence that consumers literally refer to the relevant class of online merchants as "generic.coms." Nor are "generic.com" terms likely to appear in dictionaries. And the key fact that, in the majority's view, distinguishes this case from *Goodyear*—that only one entity can own the rights to a particular domain name at a time—is present in every "generic.com" case. See *ante*, at 9.

What, then, stands in the way of automatic trademark eligibility for every "generic.com" domain? Much of the time, that determination will turn primarily on survey evidence, just as it did in this case. See 915 F. 3d, at 183–184.

However, survey evidence has limited probative value in this context. Consumer surveys often test whether consumers associate a term with a single source. See 2 McCarthy §12:14–12:16 (describing types of consumer surveys). But it is possible for a generic term to achieve such an association—either because that producer has enjoyed a period of exclusivity in the marketplace, *e.g.*, *Kellogg Co.* v. *National Biscuit Co.*, 305 U. S. 111, 118–119 (1938), or because it has invested money and effort in securing the public's identification, *e.g.*, *Abercrombie*, 537 F. 2d, at 9. Evidence of such an association, no matter how strong, does not negate the generic nature of the term. *Ibid*. For that reason, some courts and the TTAB have concluded that survey evidence is generally of little value in separating generic from descriptive terms. See *Schwan's IP, LLC* v. *Kraft Pizza Co.*, 460 F. 3d 971, 975–976 (CA8 2006); *Hunt Masters, Inc.* v. *Landry's Seafood Restaurant, Inc.*, 240 F. 3d 251, 254–255 (CA4 2001); *A. J. Canfield Co.* v. *Honickman*, 808 F. 2d 291, 301–303 (CA3 1986); *Miller Brewing Co.* v. *Jos. Schlitz Brewing Co.*, 605 F. 2d 990, 995 (CA7 1979); *In re Hikari Sales USA, Inc.*, 2019 WL 1453259, *13 (TTAB 2019). Although this is the minority viewpoint, see 2 McCarthy §12:17.25, I nonetheless find it to be the more persuasive one.

Consider the survey evidence that respondent introduced below. Respondent's survey showed that 74.8% of participants thought that "Booking.com" is a brand name, whereas 23.8% believed it was a generic name. App. 66. At the same time, 33% believed that "Washingmachine.com"—which does not correspond to any company—is a brand, and 60.8% thought it was generic. *Ibid.*

What could possibly account for that difference? "Booking.com" is not *inherently* more descriptive than "Washingmachine.com" or any other "generic.com." The survey participants who identified "Booking.com" as a brand likely did so because they had heard of it, through advertising or otherwise. If someone were to start a company called "Washingmachine.com," it could likely secure a similar level of consumer identification by investing heavily in advertising. Would that somehow transform the nature of the term itself? Surely not. This hypothetical shows that respondent's survey tested consumers' association of "Booking.com" with a particular company, not anything about the term itself. But such association does not establish that a term is nongeneric. See *Kellogg*, 305 U. S., at 118–119; *Abercrombie*, 537 F. 2d, at 9.

Under the majority's approach, a "generic.com" mark's eligibility for trademark protection turns primarily on survey data, which, as I have explained, may be an unreliable indicator of genericness. As the leading treatise writer in this field has observed, this approach "[d]iscard[s] the predictable and clear line rule of the [PTO] and the Federal Circuit" in favor of "a nebulous and unpredictable zone of generic name and top level domain combinations that somehow become protectable marks when accompanied by favorable survey results." 1 McCarthy §7:17.50. I would heed this criticism. In my view, a term that takes the form "generic.com" is not eligible for federal trademark registration, at least not ordinarily. There being no special circumstance here, I believe that "Booking.com" is a generic term not eligible for federal registration as a trademark.

II

In addition to the doctrinal concerns discussed above, granting trademark protection to "generic.com" marks threatens serious anticompetitive consequences in the online marketplace.

The owners of short, generic domain names enjoy all the advantages of doing business under a generic name. These advantages exist irrespective of the trademark laws. Generic names are easy to remember. Because they immediately convey the nature of the business, the owner needs to expend less effort and expense educating consumers. See Meystedt, What Is My URL Worth? Placing a Value on Premium Domain Names, 19 Valuation Strategies 10, 12 (2015) (Meystedt) (noting "ability to advertise a single URL and convey exactly what business a company operates"); cf. Folsom & Teply, Trademarked Generic Words, 89 Yale L. J. 1323, 1337–1338 (1980) (Folsom & Teply) (noting "'free advertising' effect"). And a generic business name may create the impression that it is the most authoritative and trustworthy source of the particular good or service. See Meystedt 12 (noting that generic domain names inspire "[i]nstant trust and credibility" and "[a]uthority status in an industry"); cf. Folsom & Teply 1337, n. 79 (noting that consumers may believe that "no other product is the 'real thing'"). These advantages make it harder for distinctively named businesses to compete.

Owners of generic domain names enjoy additional competitive advantages unique to the internet—again, regardless of trademark protection. Most importantly, domain name ownership confers automatic exclusivity. Multiple brick-and-mortar companies could style themselves "The Wine Company," but there can be only one "wine.com." And unlike the trademark system, that exclusivity is worldwide.

Generic domains are also easier for consumers to find. A consumer who wants to buy wine online may perform a keyword search and be directed to "wine.com." Or he may simply type "wine.com" into his browser's address bar, expecting to find a website selling wine. See Meystedt 12 (noting "ability to rank higher on search engines" and "ability to use existing type-in traffic to generate additional sales"); see also 915 F. 3d, at 189 (Wynn, J., concurring in part and dissenting in part). The owner of a generic domain name enjoys these benefits not because of the quality of her products or the goodwill of her business, but because she was fortunate (or savvy) enough to be the first to appropriate a particularly valuable piece of online real estate.

Granting trademark protection to "generic.com" marks confers additional competitive benefits on their owners by allowing them to exclude others from using *similar* domain names. Federal registration would allow respondent to threaten trademark lawsuits against competitors using domains such as "Bookings.com," "eBooking.com," "Booker.com," or "Bookit.com." Respondent says that it would not do so. See Tr. of Oral Arg. 55–56. But other firms may prove less restrained.

Indeed, why would a firm want to register its domain name as a trademark unless it wished to extend its area of exclusivity beyond the domain name itself? The domain name system, after all, already ensures that competitors cannot appropriate a business's actual domain name. And unfair-competition law will often separately protect businesses from passing off and false advertising. See *Genesee Brewing Co.* v. *Stroh Brewing Co.*, 124 F. 3d 137, 149 (CA2 1997); 2 McCarthy §12:2.

Under the majority's reasoning, many businesses could obtain a trademark by adding ".com" to the generic name of their product (*e.g.*, pizza.com, flowers.com, and so forth). As the internet grows larger, as more and more firms use it to sell their products, the risk of anticompetitive consequences grows. Those consequences can nudge the economy in an anticompetitive direction. At the extreme, that direction points towards one firm per product, the opposite of the competitive multifirm marketplace that our basic economic laws seek to achieve.

Not to worry, the Court responds, infringement doctrines such as likelihood of confusion and fair use will restrict the scope of protection afforded to "generic.com" marks. *Ante,* at 12–13. This response will be cold comfort to competitors of "generic.com" brands. Owners of such marks may seek to extend the boundaries of their marks through litigation, and may, at times succeed. See, *e.g.*, *Advertise.com* v. *AOL, LLC*, 2010 WL 11507594 (CD Cal.) (owner of "Advertising.com" obtained preliminary injunction against competitor's use of "Advertise.com"), vacated in part, 616 F. 3d 974 (CA9 2010). Even if ultimately unsuccessful, the threat of costly litigation will no doubt chill others from using variants on the registered mark and privilege established firms over new entrants to the market. See Brief for Electronic Frontier Foundation as *Amicus Curiae* 19–20.

*   *   *

In sum, the term "Booking.com" refers to an internet booking service, which is the generic product that respondent and its competitors sell. No more and no less. The same is true of "generic.com" terms more generally. By making such terms eligible for trademark protection, I fear that today's decision will lead to a proliferation of "generic.com" marks, granting their owners a monopoly over a zone of useful, easy-to-remember domains. This result would tend to inhibit, rather than to promote, free competition in online commerce. I respectfully dissent.

Syllabus

SUPREME COURT OF THE UNITED STATES

Syllabus

SEILA LAW LLC *v.* CONSUMER FINANCIAL PROTECTION BUREAU

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

No. 19–7. Argued March 3, 2020—Decided June 29, 2020

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act; and Congress enacted a new prohibition on unfair and deceptive practices in the consumer-finance sector. 12 U. S. C. §5536(a)(1)(B). In doing so, Congress gave the CFPB extensive rulemaking, enforcement, and adjudicatory powers, including the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, prosecute civil actions in federal court, and issue binding decisions in administrative proceedings. The CFPB may seek restitution, disgorgement, injunctive relief, and significant civil penalties for violations of the 19 federal statutes under its purview. So far, the agency has obtained over $11 billion in relief for more than 25 million consumers.

Unlike traditional independent agencies headed by multimember boards or commissions, the CFPB is led by a single Director, §5491(b)(1), who is appointed by the President with the advice and consent of the Senate, §5491(b)(2), for a five-year term, during which the President may remove the Director only for "inefficiency, neglect of duty, or malfeasance in office," §§5491(c)(1), (3). The CFPB receives its funding outside the annual appropriations process from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments.

In 2017, the CFPB issued a civil investigative demand to Seila Law LLC, a California-based law firm that provides debt-related legal services to clients. The civil investigative demand (essentially a subpoena) sought information and documents related to the firm's business practices. Seila Law asked the CFPB to set aside the demand on the ground that the agency's leadership by a single Director removable only for cause violated the separation of powers. When the CFPB declined, Seila Law refused to comply with the demand, and the CFPB filed a petition to enforce the demand in District Court. Seila Law renewed its claim that the CFPB's structure violated the separation of powers, but the District Court disagreed and ordered Seila Law to comply with the demand. The Ninth Circuit affirmed, concluding that Seila Law's challenge was foreclosed by *Humphrey's Executor* v. *United States*, 295 U. S. 602, and *Morrison* v. *Olson*, 487 U. S. 654.

Held: The judgment is vacated and remanded.

923 F. 3d 680, vacated and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I, II, and III, concluding:

1. Appointed *amicus* raises three threshold arguments for why this Court may not or should not reach the merits of petitioner's constitutional challenge, but they are unavailing. Pp. 8–11.

2. The CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers. Pp. 11–30.

(a) Article II vests the entire "executive Power" in the President alone, but the Constitution presumes that lesser executive officers will assist the President in discharging his duties. The President's executive power generally includes the power to supervise—and, if necessary, remove—those who exercise the President's authority on his behalf. The President's removal power has long been confirmed by history and precedent. It was recognized by the First Congress in 1789, confirmed by this Court in *Myers* v. *United States*, 272 U. S. 52, and reiterated in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477. In *Free Enterprise Fund*, the Court recognized that it had previously upheld certain congressional limits on the President's removal power. But the Court declined to extend those limits to "a new situation not yet encountered by the Court." 561 U. S., at 483. *Free Enterprise Fund* left in place only two exceptions to the President's unrestricted removal power. First, *Humphrey's Executor* permitted Congress to give for-cause removal protection to a multimember body of experts who were balanced along partisan lines, appointed to staggered terms, performed only "quasi-legislative" and "quasi-judicial functions," and were said not to exercise any executive power. Second, *Morrison* approved for-cause removal protection for an *inferior* officer—the independent counsel—who had limited duties and no policymaking or administrative authority. Pp. 11–16.

(b) Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. The New Deal-era FTC upheld in *Humphrey's Executor* bears little resemblance to the CFPB. Unlike the multiple Commissioners of the FTC, who were balanced along partisan lines and served staggered terms to ensure the accumulation of institutional knowledge, the CFPB Director serves a five-year term that guarantees abrupt shifts in leadership and the loss of agency expertise. In addition, the Director cannot be dismissed as a mere legislative or judicial aid. Rather, the Director possesses significant administrative and enforcement authority, including the power to seek daunting monetary penalties against private parties in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.

The logic of *Morrison* also does not apply. The independent counsel approved in *Morrison* was an inferior officer who lacked policymaking or administrative authority and exercised narrow authority to initiate criminal investigations and prosecutions of Governmental actors identified by others. By contrast, the CFPB Director is a principal officer whose duties are far from limited. The Director promulgates binding rules fleshing out 19 consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. And the Director brings the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions.

The question here is therefore whether to extend the *Humphrey's Executor* and *Morrison* exceptions to a "new situation." *Free Enterprise Fund,* 561 U. S., at 433. Pp. 16–18.

(c) The Court declines to extend these precedents to an independent agency led by a single Director and vested with significant executive power. Pp. 18–30.

(1) The CFPB's structure has no foothold in history or tradition. Congress has provided removal protection to principal officers who alone wield power in only four isolated instances: the Comptroller of the Currency (for a one-year period during the Civil War); the Office of Special Counsel; the Administrator of the Social Security Administration; and the Director of the Federal Housing Finance Agency. Aside from the one-year blip for the Comptroller of the Currency, these examples are modern and contested; and they do not involve regulatory or enforcement authority comparable to that exercised by the CFPB. Pp. 18–21.

(2) The CFPB's single-Director configuration is also incompatible with the structure of the Constitution, which—with the sole exception of the Presidency—scrupulously avoids concentrating power in the hands of any single individual. The Framers' constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials may wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual who is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. And the Director may do so without even having to rely on Congress for appropriations. While the CFPB's independent, single-Director structure is sufficient to render the agency unconstitutional, the Director's five-year term and receipt of funds outside the appropriations process heighten the concern that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499. Pp. 21–25.

(3) *Amicus* raises three principal arguments in the agency's defense. First, *amicus* challenges the textual basis for the President's removal power and highlights statements from individual Framers expressing divergent views on the subject. This Court's precedents, however, make clear that the President's removal power derives from the "executive Power" vested exclusively in the President by Article II. And this Court has already discounted the founding-era statements cited by *amicus* in light of their context. Second, *amicus* claims that *Humphrey's Executor* and *Morrison* establish a general rule that Congress may freely constrain the President's removal power, with only two limited exceptions not applicable here. But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception. Finally, *amicus* submits that this Court can cure any constitutional defect in the CFPB's structure by interpreting the language "inefficiency, neglect of duty, or malfeasance in office," 12 U. S. C. §5491(c)(3), to reserve substantial discretion to the President. But *Humphrey's Executor* implicitly rejected this position, and the CFPB's defenders have not advanced any workable standard derived from the statutory text. Nor have they explained how a lenient removal standard can be squared with the Dodd-Frank Act as a whole, which makes

plain that the CFPB is an "independent bureau." §5491(a).

The dissent advances several additional arguments in the agency's defense, but they have already been expressly considered and rejected by the Court in *Free Enterprise Fund.* Pp. 25–30.

THE CHIEF JUSTICE, joined by JUSTICE ALITO and JUSTICE KAVANAUGH, concluded in Part IV that the Director's removal protection is severable from the other provisions of the Dodd-Frank Act that establish the CFPB and define its authority. Pp. 30–37.

ROBERTS, C. J., delivered the opinion of the Court with respect to Parts I, II, and III, in which THOMAS, ALITO, GORSUCH, and KAVANAUGH, JJ., joined, and an opinion with respect to Part IV, in which ALITO and KAVANAUGH, JJ., joined. THOMAS, J., filed an opinion concurring in part and dissenting in part, in which GORSUCH, J., joined. KAGAN, J., filed an opinion concurring in the judgment with respect to severability and dissenting in part, in which GINSBURG, BREYER, and SOTOMAYOR, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 19–7

SEILA LAW LLC, PETITIONER *v.* CONSUMER FINANCIAL PROTECTION BUREAU

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

[June 29, 2020]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court with respect to Parts I, II, and III.

In the wake of the 2008 financial crisis, Congress established the Consumer Financial Protection Bureau (CFPB), an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent. In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history. Instead of placing the agency under the leadership of a board with multiple members, Congress provided that the CFPB would be led by a single Director, who serves for a longer term than the President and cannot be removed by the President except for inefficiency, neglect, or malfeasance. The CFPB Director has no boss, peers, or voters to report to. Yet the Director wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U. S. economy. The question before us is whether this arrangement violates the Constitution's separation of powers.

Under our Constitution, the "executive Power"—all of it—is "vested in a President," who must "take Care that the

Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. Because no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance. Ten years ago, in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010), we reiterated that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties," *id.*, at 513–514. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.*, at 514.

The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers* v. *United States*, 272 U. S. 52 (1926). Our precedents have recognized only two exceptions to the President's unrestricted removal power. In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. And in *United States* v. *Perkins*, 116 U. S. 483 (1886), and *Morrison* v. *Olson*, 487 U. S. 654 (1988), we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.

We are now asked to extend these precedents to a new configuration: an independent agency that wields significant executive power and is run by a single individual who cannot be removed by the President unless certain statutory criteria are met. We decline to take that step. While we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director. Such an agency lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control.

We therefore hold that the structure of the CFPB violates the separation of powers. We go on to hold that the CFPB Director's removal protection is severable from the other statutory provisions bearing on the CFPB's authority. The agency may therefore continue to operate, but its Director, in light of our decision, must be removable by the President at will.

I

A

In the summer of 2007, then-Professor Elizabeth Warren called for the creation of a new, independent federal agency focused on regulating consumer financial products. Warren, Unsafe at Any Rate, Democracy (Summer 2007). Professor Warren believed the financial products marketed to ordinary American households—credit cards, student loans, mortgages, and the like—had grown increasingly unsafe due to a "regulatory jumble" that paid too much attention to banks and too little to consumers. *Ibid.* To remedy the lack of "coherent, consumer-oriented" financial regulation, she proposed "concentrat[ing] the review of financial products in a single location"—an independent agency modeled after the multimember Consumer Product Safety Commission. *Ibid.*

That proposal soon met its moment. Within months of Professor Warren's writing, the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes. In the aftermath, the Obama administration embraced Professor Warren's recommendation. Through the Treasury Department, the administration encouraged Congress to establish an agency with a mandate to ensure that "consumer protection regulations" in the financial sector "are written fairly and enforced vigorously." Dept. of Treasury, Financial Regulatory Reform: A New Foundation 55 (2009). Like Professor Warren, the administration envisioned a traditional independent agency, run by a multimember board with a "diverse set of viewpoints and experiences." *Id.*, at 58.

In 2010, Congress acted on these proposals and created the Consumer Financial Protection Bureau (CFPB) as an independent financial regulator within the Federal Reserve System. Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), 124 Stat. 1376. Congress tasked the CFPB with "implement[ing]" and "enforc[ing]" a large body of financial consumer protection laws to "ensur[e] that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U. S. C. §5511(a). Congress transferred the administration of 18 existing federal statutes to the CFPB, including the Fair Credit Reporting Act, the Fair Debt Collection Practices Act, and the Truth in Lending Act. See §§5512(a), 5481(12), (14). In addition, Congress enacted a new prohibition on "any unfair, deceptive, or abusive act or practice" by certain participants in the consumer-finance sector. §5536(a)(1)(B). Congress authorized the CFPB to implement that broad standard (and the 18 pre-existing statutes placed under the agency's purview) through binding regulations. §§5531(a)–(b), 5581(a)(1)(A), (b).

Congress also vested the CFPB with potent enforcement powers. The agency has the authority to conduct investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and prosecute civil actions in federal court. §§5562, 5564(a), (f). To remedy violations of federal consumer financial law, the CFPB may seek restitution, disgorgement, and injunctive relief, as well as civil penalties of up to $1,000,000 (inflation adjusted) for each day that a violation occurs. §§5565(a), (c)(2); 12 CFR §1083.1(a), Table (2019). Since its inception, the CFPB has obtained over $11 billion in relief for over 25 million consumers, including a $1 billion penalty against a single bank in 2018. See CFPB, Financial Report of the Consumer Financial Protection Bureau, Fiscal Year 2015, p. 3; CFPB, Bureau of Consumer Financial Protection Announces Settlement With Wells Fargo for Auto-Loan Administration and Mortgage Practices (Apr. 20, 2018).

The CFPB's rulemaking and enforcement powers are coupled with extensive adjudicatory authority. The agency may conduct administrative proceedings to "ensure or enforce compliance with" the statutes and regulations it administers. 12 U. S. C. §5563(a). When the CFPB acts as an adjudicator, it has "jurisdiction to grant any appropriate legal or equitable relief." §5565(a)(1). The "hearing officer" who presides over the proceedings may issue subpoenas, order depositions, and resolve any motions filed by the parties. 12 CFR §1081.104(b). At the close of the proceedings, the hearing officer issues a "recommended decision," and the CFPB Director considers that recommendation and "issue[s] a final decision and order." §§1081.400(d), 1081.402(b); see also §1081.405.

Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director. 12 U. S. C. §5491(b)(1). The CFPB Director is appointed by the President with the advice and consent of the Senate. §5491(b)(2). The Director serves for a term of five years, during which the President may remove the Director from office only for "inefficiency, neglect of duty, or malfeasance in office." §§5491(c)(1), (3).

Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process through bank assessments. Each year, the CFPB requests an amount that the Director deems "reasonably necessary to carry out" the agency's duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve (inflation adjusted). §§5497(a)(1), (2)(A)(iii), 2(B). In recent years, the CFPB's annual budget has exceeded half a billion dollars. See CFPB, Fiscal Year 2019: Ann. Performance Plan and Rep., p. 7.

B

Seila Law LLC is a California-based law firm that provides debt-related legal services to clients. In 2017, the CFPB issued a civil investigative demand to Seila Law to determine whether the firm had "engag[ed] in unlawful acts or practices in the advertising, marketing, or sale of debt relief services." 2017 WL 6536586, *1 (CD Cal., Aug. 25, 2017). See also 12 U. S. C. §5562(c)(1) (authorizing the agency to issue such demands to persons who "may have any information[] relevant to a violation" of one of the laws enforced by the CFPB). The demand (essentially a subpoena) directed Seila Law to produce information and documents related to its business practices.

Seila Law asked the CFPB to set aside the demand, objecting that the agency's leadership by a single Director removable only for cause violated the separation of powers. The CFPB declined to address that claim and directed Seila Law to comply with the demand.

When Seila Law refused, the CFPB filed a petition to enforce the demand in the District Court. See §5562(e)(1) (creating cause of action for that purpose). In response, Seila Law renewed its defense that the demand was invalid and must be set aside because the CFPB's structure violated the

Constitution. The District Court disagreed and ordered Seila Law to comply with the demand (with one modification not relevant here).

The Court of Appeals affirmed. 923 F. 3d 680 (CA9 2019). The Court observed that the "arguments for and against" the constitutionality of the CFPB's structure had already been "thoroughly canvassed" in majority, concurring, and dissenting opinions by the en banc Court of Appeals for the District of Columbia Circuit in *PHH Corp.* v. *CFPB*, 881 F. 3d 75 (2018), which had rejected a challenge similar to the one presented here. 923 F. 3d, at 682. The Court saw "no need to re-plow the same ground." *Ibid.* Instead, it provided a brief explanation for why it agreed with the *PHH* Court's core holding. The Court took as its starting point *Humphrey's Executor*, which had approved for-cause removal protection for the Commissioners of the Federal Trade Commission (FTC). In applying that precedent, the Court recognized that the CFPB wields "substantially more executive power than the FTC did back in 1935" and that the CFPB's leadership by a single Director (as opposed to a multimember commission) presented a "structural difference" that some jurists had found "dispositive." 923 F. 3d, at 683–684. But the Court felt bound to disregard those differences in light of our decision in *Morrison*, which permitted a single individual (an independent counsel) to exercise a core executive power (prosecuting criminal offenses) despite being insulated from removal except for cause. Because the Court found *Humphrey's Executor* and *Morrison* "controlling," it affirmed the District Court's order requiring compliance with the demand. 923 F. 3d, at 684.

We granted certiorari to address the constitutionality of the CFPB's structure. 589 U. S. ___ (2019). We also requested argument on an additional question: whether, if the CFPB's structure violates the separation of powers, the CFPB Director's removal protection can be severed from the rest of the Dodd-Frank Act.

Because the Government agrees with petitioner on the merits of the constitutional question, we appointed Paul Clement to defend the judgment below as *amicus curiae*. He has ably discharged his responsibilities.

II

We first consider three threshold arguments raised by the appointed *amicus* for why we may not or should not reach the merits. Each is unavailing.

First, *amicus* argues that the demand issued to petitioner is not "traceable" to the alleged constitutional defect because two of the three Directors who have in turn played a role in enforcing the demand were (or now consider themselves to be) removable by the President at will. Brief for Court-Appointed *Amicus Curiae* 21–24. *Amicus* highlights the Government's argument below that the demand, originally issued by former Director Richard Cordray, had been ratified by an *acting* CFPB Director who, according to the Office of Legal Counsel (OLC), was removable by the President at will. See Brief for Appellee in No. 17–56324 (CA9), pp. 1, 10, 13–19 (citing Designating an Acting Director of the Bureau of Consumer Financial Protection, 41 Op. OLC ___, ___ (Nov. 25, 2017)). *Amicus* further observes that current CFPB Director Kathleen Kraninger, now responsible for enforcing the demand, agrees with the Solicitor General's position in this case that her for-cause removal protection is unconstitutional. See Brief for Respondent on Pet. for Cert. 20; Letter from K. Kraninger, CFPB Director, to M. McConnell, Majority Leader, U. S. Senate, p. 2 (Sept. 17, 2019); Letter from K. Kraninger, CFPB Director, to N. Pelosi, Speaker, U. S. House of Representatives, p. 2 (Sept. 17, 2019).[1] In *amicus*' view, these developments reveal that the demand would have been issued—and would continue

[1] Director Kraninger did not indicate whether she would disregard her statutory removal protection if the President attempted to remove her without cause.

to be enforced—even in the absence of the CFPB Director's removal protection, making the asserted separation of powers dispute "artificial." Brief for Court-Appointed *Amicus Curiae* 22.

Even if that were true, it would not deprive us of jurisdiction. *Amicus*' traceability argument appears to challenge petitioner's Article III standing. See *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560 (1992) (explaining that the plaintiff's injury must be "fairly traceable to the challenged action of the defendant" (internal quotation marks and alterations omitted)). But *amicus*' argument does not cast any doubt on the jurisdiction of the District Court because petitioner is *the defendant* and did not invoke the Court's jurisdiction. See *Bond* v. *United States*, 564 U. S. 211, 217 (2011) (When the plaintiff has standing, "Article III does not restrict the opposing party's ability to object to relief being sought at its expense.").

It is true that "standing must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Hollingsworth* v. *Perry*, 570 U. S. 693, 705 (2013) (internal quotation marks omitted). But petitioner's appellate standing is beyond dispute. Petitioner is compelled to comply with the civil investigative demand and to provide documents it would prefer to withhold, a concrete injury. That injury is traceable to the decision below and would be fully redressed if we were to reverse the judgment of the Court of Appeals and remand with instructions to deny the Government's petition to enforce the demand.

Without engaging with these principles, *amicus* contends that a litigant wishing to challenge an executive act on the basis of the President's removal power must show that the challenged act would not have been taken if the responsible official had been subject to the President's control. See Brief for Court-Appointed *Amicus Curiae* 21–24. Our precedents say otherwise. We have held that a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a "counterfactual world" in which the Government had acted with constitutional authority. *Free Enterprise Fund*, 561 U. S., at 512, n. 12. In the specific context of the President's removal power, we have found it sufficient that the challenger "sustain[s] injury" from an executive act that allegedly exceeds the official's authority. *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986).

Second, *amicus* contends that the proper context for assessing the constitutionality of an officer's removal restriction is a contested removal. See Brief for Court-Appointed *Amicus Curiae* 24–27. While that is certainly one way to review a removal restriction, it is not the only way. Our precedents have long permitted private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power while insulated from removal by the President. See *Bowsher*, 478 U. S., at 721 (lawsuit filed by aggrieved third party in the absence of contested removal); *Free Enterprise Fund*, 561 U. S., at 487 (same); *Morrison*, 487 U. S., at 668–669 (defense to subpoena asserted by third party in the absence of contested removal). Indeed, we have expressly "reject[ed]" the "argument that consideration of the effect of a removal provision is not 'ripe' until that provision is actually used," because when such a provision violates the separation of powers it inflicts a "here-and-now" injury on affected third parties that can be remedied by a court. *Bowsher*, 478 U. S., at 727, n. 5 (internal quotation marks omitted). The Court of Appeals therefore correctly entertained petitioner's constitutional defense on the merits.

Lastly, *amicus* contends that we should dismiss the case because the parties agree on the merits of the constitutional question and the case therefore lacks "adverseness." Tr. of

Oral Arg. 42–43, 45–46. That contention, however, is foreclosed by *United States* v. *Windsor*, 570 U. S. 744 (2013). There, we explained that a lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction—even if "the Executive may welcome" an adverse order that "is accompanied by the constitutional ruling it wants." *Id.*, at 758. Here, petitioner and the Government disagree about whether petitioner must comply with the civil investigative demand. The lower courts sided with the Government, and the Government has not volunteered to relinquish that victory and withdraw the demand. To the contrary, while the Government agrees that the agency is unconstitutionally structured, it believes it may nevertheless enforce the demand on remand. See *infra*, at 30. Accordingly, our "decision will have real meaning" for the parties. *INS* v. *Chadha*, 462 U. S. 919, 939 (1983). And, as in *Windsor*, any prudential concerns with deciding an important legal question in this posture can be addressed by "the practice of entertaining arguments made by an *amicus* when the Solicitor General confesses error with respect to a judgment below," which we have done. 570 U. S., at 760.

We therefore turn to the merits of petitioner's constitutional challenge.

III

We hold that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers.

A

Article II provides that "[t]he executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." Art. II, §1, cl. 1; *id.*, §3. The entire "executive Power" belongs to the President alone. But because it would be "impossib[le]" for "one man" to "perform all the great business of the State," the Constitution assumes that lesser executive officers will "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939).

These lesser officers must remain accountable to the President, whose authority they wield. As Madison explained, "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). That power, in turn, generally includes the ability to remove executive officials, for it is "only the authority that can remove" such officials that they "must fear and, in the performance of [their] functions, obey." *Bowsher*, 478 U. S., at 726 (internal quotation marks omitted).

The President's removal power has long been confirmed by history and precedent. It "was discussed extensively in Congress when the first executive departments were created" in 1789. *Free Enterprise Fund*, 561 U. S., at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Ibid.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). The First Congress's recognition of the President's removal power in 1789 "provides contemporaneous and weighty evidence of the Constitution's meaning," *Bowsher*, 478 U. S., at 723 (internal quotation marks omitted), and has long been the "settled and well understood construction of the Constitution," *Ex parte Hennen*, 13 Pet. 230, 259 (1839).

The Court recognized the President's prerogative to remove executive officials in *Myers* v. *United States*, 272 U. S. 52. Chief Justice Taft, writing for the Court, conducted an exhaustive examination of the First Congress's determination in 1789, the views of the Framers and their contemporaries, historical practice, and our precedents up until that point. He concluded that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Id.*, at 163–164 (emphasis added). Just as the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." *Id.*, at 117. "[T]o hold otherwise," the Court reasoned, "would make it impossible for the President . . . to take care that the laws be faithfully executed." *Id.*, at 164.

We recently reiterated the President's general removal power in *Free Enterprise Fund*. "Since 1789," we recapped, "the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." 561 U. S., at 483. Although we had previously sustained congressional limits on that power in certain circumstances, we declined to extend those limits to "a new situation not yet encountered by the Court"—an official insulated by *two* layers of for-cause removal protection. *Id.,* at 483, 514. In the face of that novel impediment to the President's oversight of the Executive Branch, we adhered to the general rule that the President possesses "the authority to remove those who assist him in carrying out his duties." *Id.,* at 513–514.

Free Enterprise Fund left in place two exceptions to the President's unrestricted removal power. First, in *Humphrey's Executor*, decided less than a decade after *Myers*, the Court upheld a statute that protected the Commissioners of the FTC from removal except for "inefficiency, neglect of duty, or malfeasance in office." 295 U. S., at 620 (quoting 15 U. S. C. §41). In reaching that conclusion, the Court stressed that Congress's ability to impose such removal restrictions "will depend upon the character of the office." 295

U. S., at 631.

Because the Court limited its holding "to officers of the kind here under consideration," *id.,* at 632, the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court. Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the executive power." *Id.,* at 628. Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." *Ibid.* It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. *Ibid.* "To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive *power* in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers." *Ibid.* (emphasis added).[2]

The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." *Id.*, at 624; see *id.*, at 619–620. The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." *Id.*, at 624 (internal quotation marks omitted). And the Commissioners' staggered, seven-year terms enabled the

[2] The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time. As we observed in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Id.,* at 690, n. 28. See also *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (even though the activities of administrative agencies "take 'legislative' and 'judicial' forms," "they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'" (quoting Art. II, §1, cl. 1)).

agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time." *Ibid.*

In short, *Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power. Consistent with that understanding, the Court later applied "[t]he philosophy of *Humphrey's Executor*" to uphold for-cause removal protections for the members of the War Claims Commission—a three-member "adjudicatory body" tasked with resolving claims for compensation arising from World War II. *Wiener* v. *United States*, 357 U. S. 349, 356 (1958).

While recognizing an exception for multimember bodies with "quasi-judicial" or "quasi-legislative" functions, *Humphrey's Executor* reaffirmed the core holding of *Myers* that the President has "unrestrictable power . . . to remove purely executive officers." 295 U. S., at 632. The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed "a field of doubt" that the Court left "for future consideration." *Ibid.*

We have recognized a second exception for *inferior* officers in two cases, *United States* v. *Perkins* and *Morrison* v. *Olson*.[3] In *Perkins*, we upheld tenure protections for a naval cadet-engineer. 116 U. S., at 485. And, in *Morrison*, we upheld a provision granting good-cause tenure protection to

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[3] Article II distinguishes between two kinds of officers—principal officers (who must be appointed by the President with the advice and consent of the Senate) and inferior officers (whose appointment Congress may vest in the President, courts, or heads of Departments). §2, cl. 2. While "[o]ur cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers," we have in the past examined factors such as the nature, scope, and duration of an officer's duties. *Edmond* v. *United States*, 520 U. S. 651, 661 (1997). More recently, we have focused on whether the officer's work is "directed and supervised" by a principal officer. *Id.,* at 663.

an independent counsel appointed to investigate and prosecute particular alleged crimes by high-ranking Government officials. 487 U. S., at 662–663, 696–697. Backing away from the reliance in *Humphrey's Executor* on the concepts of "quasi-legislative" and "quasi-judicial" power, we viewed the ultimate question as whether a removal restriction is of "such a nature that [it] impede[s] the President's ability to perform his constitutional duty." 487 U. S., at 691. Although the independent counsel was a single person and performed "law enforcement functions that typically have been undertaken by officials within the Executive Branch," we concluded that the removal protections did not unduly interfere with the functioning of the Executive Branch because "the independent counsel [was] an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Ibid.*

These two exceptions—one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *PHH*, 881 F. 3d, at 196 (Kavanaugh, J., dissenting) (internal quotation marks omitted).

B

Neither *Humphrey's Executor* nor *Morrison* resolves whether the CFPB Director's insulation from removal is constitutional. Start with *Humphrey's Executor*. Unlike the New Deal-era FTC upheld there, the CFPB is led by a single Director who cannot be described as a "body of experts" and cannot be considered "non-partisan" in the same sense as a group of officials drawn from both sides of the aisle. 295 U. S., at 624. Moreover, while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise.

In addition, the CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U. S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey's Executor*.[4]

The logic of *Morrison* also does not apply. Everyone agrees the CFPB Director is not an inferior officer, and her duties are far from limited. Unlike the independent counsel, who lacked policymaking or administrative authority,

[4] The dissent would have us ignore the reasoning of *Humphrey's Executor* and instead apply the decision only as part of a reimagined *Humphrey's*-through-*Morrison* framework. See *post*, at 18, n. 7, 19–22 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent). But we take the decision on its own terms, not through gloss added by a later Court in dicta. The dissent also criticizes us for suggesting that the 1935 FTC may have had lesser responsibilities than the present FTC. See *post*, at 27, n. 10. Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court.

the Director has the sole responsibility to administer 19 separate consumer-protection statutes that cover everything from credit cards and car payments to mortgages and student loans. It is true that the independent counsel in *Morrison* was empowered to initiate criminal investigations and prosecutions, and in that respect wielded core executive power. But that power, while significant, was trained inward to high-ranking Governmental actors identified by others, and was confined to a specified matter in which the Department of Justice had a potential conflict of interest. By contrast, the CFPB Director has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions.

In light of these differences, the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison* alone.

C

The question instead is whether to extend those precedents to the "new situation" before us, namely an independent agency led by a single Director and vested with significant executive power. *Free Enterprise Fund*, 561 U. S., at 483. We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.

1

"Perhaps the most telling indication of [a] severe constitutional problem" with an executive entity "is [a] lack of historical precedent" to support it. *Id.,* at 505 (internal quotation marks omitted). An agency with a structure like that of the CFPB is almost wholly unprecedented.

After years of litigating the agency's constitutionality, the Courts of Appeals, parties, and *amici* have identified "only a handful of isolated" incidents in which Congress has provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission. *Ibid.* "[T]hese few scattered examples"—four to be exact—shed little light. *NLRB* v. *Noel Canning*, 573 U. S. 513, 538 (2014).

First, the CFPB's defenders point to the Comptroller of the Currency, who enjoyed removal protection for *one year* during the Civil War. That example has rightly been dismissed as an aberration. It was "adopted without discussion" during the heat of the Civil War and abandoned before it could be "tested by executive or judicial inquiry." *Myers*, 272 U. S., at 165. (At the time, the Comptroller may also have been an inferior officer, given that he labored "under the general direction of the Secretary of the Treasury." Ch. 58, 12 Stat. 665.)[5]

Second, the supporters of the CFPB point to the Office of the Special Counsel (OSC), which has been headed by a single officer since 1978.[6] But this first enduring single-leader office, created nearly 200 years after the Constitution was ratified, drew a contemporaneous constitutional objection from the Office of Legal Counsel under President Carter and a subsequent veto on constitutional grounds by President Reagan. See Memorandum Opinion for the General Counsel, Civil Service Commission, 2 Op. OLC 120, 122 (1978); Public Papers of the Presidents, Ronald Reagan, Vol. II, Oct. 26, 1988, pp. 1391–1392 (1991).[7] In any event,

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[5] The dissent suggests that the Comptroller still enjoyed some degree of insulation after his removal protection was repealed because the President faced a new requirement to "communicate[ ]" his "reasons" for terminating the Comptroller to the Senate. *Post,* at 15 (quoting Act of June 3, 1864, ch. 106, §1, 13 Stat. 100). But the President could still remove the Comptroller for any reason so long as the President was, in the dissent's phrase, "in a firing mood." *Post*, at 15.

[6] The OSC should not be confused with the independent counsel in *Morrison* or the special counsel recently appointed to investigate allegations related to the 2016 Presidential election. Despite sharing similar titles, those individuals have no relationship to the OSC.

[7] An Act similar to the one vetoed by President Reagan was eventually

the OSC exercises only limited jurisdiction to enforce certain rules governing Federal Government employers and employees. See 5 U. S. C. §1212. It does not bind private parties at all or wield regulatory authority comparable to the CFPB.

Third, the CFPB's defenders note that the Social Security Administration (SSA) has been run by a single Administrator since 1994. That example, too, is comparatively recent and controversial. President Clinton questioned the constitutionality of the SSA's new single-Director structure upon signing it into law. See Public Papers of the Presidents, William J. Clinton, Vol. II, Aug. 15, 1994, pp. 1471–1472 (1995) (inviting a "corrective amendment" from Congress). In addition, unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.

The only remaining example is the Federal Housing Finance Agency (FHFA), created in 2008 to assume responsibility for Fannie Mae and Freddie Mac. That agency is essentially a companion of the CFPB, established in response to the same financial crisis. See Housing and Economic Recovery Act of 2008, 122 Stat. 2654. It regulates primarily Government-sponsored enterprises, not purely private actors. And its single-Director structure is a source of ongoing controversy. Indeed, it was recently held unconstitutional by the Fifth Circuit, sitting en banc. See *Collins* v. *Mnuchin*, 938 F. 3d 553, 587–588 (2019).

With the exception of the one-year blip for the Comptroller of the Currency, these isolated examples are modern and contested. And they do not involve regulatory or enforcement authority remotely comparable to that exercised by

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signed by President George H. W. Bush after extensive negotiations and compromises with Congress. See Public Papers of the Presidents, George H. W. Bush, Vol. I, Apr. 10, 1989, p. 391 (1990).

the CFPB. The CFPB's single-Director structure is an innovation with no foothold in history or tradition.[8]

2

In addition to being a historical anomaly, the CFPB's single-Director configuration is incompatible with our constitutional structure. Aside from the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual.

"The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty." *Bowsher*, 478 U. S., at 730. Their solution to governmental power and its perils was simple: divide it. To prevent the "gradual concentration" of power in the same hands, they enabled "[a]mbition . . . to counteract ambition" at every turn. The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison). At the highest level, they "split the atom of sovereignty" itself into one Federal Government and the States. *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (slip op., at 9) (internal quotation marks omitted). They then divided the "powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial." *Chadha*, 462 U. S., at 951.

They did not stop there. Most prominently, the Framers bifurcated the federal legislative power into two Chambers: the House of Representatives and the Senate, each composed of multiple Members and Senators. Art. I, §§2, 3.

The Executive Branch is a stark departure from all this

[8] The dissent categorizes the CFPB as one of many "financial regulators" that have historically enjoyed some insulation from the President. See *post*, at 11–16. But even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league. It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens. See *supra,* at 4–5. And, of course, it is the only agency of its kind run by a single Director.

division. The Framers viewed the legislative power as a special threat to individual liberty, so they divided that power to ensure that "differences of opinion" and the "jarrings of parties" would "promote deliberation and circumspection" and "check excesses in the majority." See The Federalist No. 70, at 475 (A. Hamilton); see also *id*., No. 51, at 350. By contrast, the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities. See *id*., No. 70, at 475–478. As Madison put it, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id*., No. 51, at 350.

The Framers deemed an energetic executive essential to "the protection of the community against foreign attacks," "the steady administration of the laws," "the protection of property," and "the security of liberty." *Id*., No. 70, at 471. Accordingly, they chose not to bog the Executive down with the "habitual feebleness and dilatoriness" that comes with a "diversity of views and opinions." *Id*., at 476. Instead, they gave the Executive the "[d]ecision, activity, secrecy, and dispatch" that "characterise the proceedings of one man." *Id*., at 472.

To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides "a single object for the jealousy and watchfulness of the people." *Id.,* at 479. The President "cannot delegate ultimate responsibility or the active obligation to supervise that goes with it," because Article II "makes a single President responsible for the actions of the Executive Branch." *Free Enterprise Fund*, 561 U. S., at 496–497 (quoting *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (BREYER, J., concurring in judgment)).

The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's oversight, "the chain of dependence [is] preserved," so that "the lowest officers, the middle grade, and the highest" all "depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (J. Madison).

The CFPB's single-Director structure contravenes this carefully calibrated system by vesting significant governmental power in the hands of a single individual accountable to no one. The Director is neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is. The Director does not even depend on Congress for annual appropriations. See The Federalist No. 58, at 394 (J. Madison) (describing the "power over the purse" as the "most compleat and effectual weapon" in representing the interests of the people). Yet the Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

The CFPB Director's insulation from removal by an accountable President is enough to render the agency's structure unconstitutional. But several other features of the CFPB combine to make the Director's removal protection even more problematic. In addition to lacking the most direct method of presidential control—removal at will—the agency's unique structure also forecloses certain indirect methods of Presidential control.

Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one. That means an unlucky President might get elected on a consumer-protection platform and enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda. To make matters worse, the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies.

The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operation of administrative agencies. See Art. I, §7, cl. 2; Art. II, §3. And, for the past century, the President has annually submitted a proposed budget to Congress for approval. See Budget and Accounting Act, 1921, ch. 18, §201, 42 Stat. 20. Presidents frequently use these budgetary tools "to influence the policies of independent agencies." *PHH*, 881 F. 3d, at 147 (Henderson, J., dissenting) (citing Pasachoff, The President's Budget as a Source of Agency Policy Control, 125 Yale L. J. 2182, 2191, 2203–2204 (2016)). But no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year to fund the agency's chosen priorities. And the Director receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499.[9]

3

Amicus raises three principal arguments in the agency's defense. At the outset, *amicus* questions the textual basis for the removal power and highlights statements from Madison, Hamilton, and Chief Justice Marshall expressing "heterodox" views on the subject. Brief for Court-Appointed *Amicus Curiae* 4–5, 28–29. But those concerns are misplaced. It is true that "there is no 'removal clause' in the Constitution," *id.*, at 1, but neither is there a "separation of powers clause" or a "federalism clause." These foundational doctrines are instead evident from the Constitution's vesting of certain powers in certain bodies. As we have explained many times before, the President's removal power stems from Article II's vesting of the "executive Power" in the President. *Free Enterprise Fund*, 561 U. S., at 483 (quoting Art. II, §1, cl. 1). As for the opinions of Madison, Hamilton, and Chief Justice Marshall, we have already considered the statements cited by *amicus* and discounted them in light of their context (Madison), the fact they reflect initial impressions later abandoned by the speaker (Hamilton), or their subsequent rejection as ill-considered dicta

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[9] *Amicus* and the dissent try to diminish the CFPB's insulation from Presidential control by observing that the CFPB's final rules can be set aside by a super majority of the Financial Stability and Oversight Council (FSOC). See Brief for Court-Appointed *Amicus Curiae* 40; *post*, at 33, n. 13, 36. But the FSOC's veto power is statutorily reserved for extreme situations, when two-thirds of the Council concludes that a CFPB regulation would "put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk." 12 U. S. C. §§5513(a), (c)(3). That narrow escape hatch has no impact on the CFPB's enforcement or adjudicatory authority and has never been used in the ten years since the agency's creation. It certainly does not render the CFPB's independent, single-Director structure constitutional.

(Chief Justice Marshall). See *Free Enterprise Fund*, 561 U. S., at 500, n. 6 (Madison); *Myers*, 272 U. S., at 136–139, 142–144 (Hamilton and Chief Justice Marshall).[10]

Next, *amicus* offers a grand theory of our removal precedents that, if accepted, could leave room for an agency like the CFPB—and many other innovative intrusions on Article II. According to *amicus*, *Humphrey's Executor* and *Morrison* establish a general rule that Congress may impose "modest" restrictions on the President's removal power, with only two limited exceptions. Brief for Court-Appointed *Amicus Curiae* 33–37. Congress may not reserve a role *for itself* in individual removal decisions (as it attempted to do in *Myers* and *Bowsher*). And it may not eliminate the President's removal power altogether (as it effectively did in

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[10] The dissent likewise points to Madison's statement in The Federalist No. 39 that the "tenure" of "ministerial offices generally will be a subject of legal regulation." *Post*, at 10 (quoting The Federalist No. 39, p. 253 (J. Cooke ed. 1961)). But whatever Madison may have meant by that statement, he later led the charge in contending, on the floor of the First Congress, that "inasmuch as the power of removal is of an Executive nature . . . it is beyond the reach of the Legislative body." 1 Annals of Cong. 464 (1789); see also *id.*, at 462–464, 495–496. Like the dissent in *Free Enterprise Fund*, the dissent goes on to "attribute[] to Madison a belief that . . . the Comptroller[] could be made independent of the President. But Madison's actual proposal, consistent with his view of the Constitution, was that the Comptroller hold office for a term of 'years, unless sooner removed by the President'; he would thus be 'dependent upon the President, because he can be removed by him,' and also 'dependent upon the Senate, because they must consent to his [reappointment] for every term of years.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 499, 500 n. 6 (2010) (citation omitted) (quoting 1 Annals of Cong. 612). See *post*, at 10, n. 4. The dissent further notes that, at the time of the founding, some States placed limitations on their Governors' removal power. See *post*, at 7. But the Framers hardly viewed State Governors as a reliable guide in fashioning the Federal Executive. Indeed, they expressly rejected the "executive council" structure favored by most States, fearing that subjecting the President to oversight, as the States had, would "distract and . . . enervate the whole system of administration" and inject it with "habitual feebleness and dilatoriness." The Federalist No. 70, at 473, 476 (A. Hamilton).

Free Enterprise Fund). Outside those two situations, *amicus* argues, Congress is generally free to constrain the President's removal power. See also *post*, at 16–22 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent) (expressing similar view).

But text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception. While we do not revisit *Humphrey's Executor* or any other precedent today, we decline to elevate it into a freestanding invitation for Congress to impose additional restrictions on the President's removal authority.[11]

Finally, *amicus* contends that if we identify a constitutional problem with the CFPB's structure, we should avoid

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[11] Building on *amicus*' proposal, the dissent would endorse whatever "the times demand, so long as the President retains the ability to carry out his constitutional functions." *Post*, at 4. But that amorphous test provides no real limiting principle. The "clearest" (and only) "example" the dissent can muster for what may be prohibited is a for-cause removal restriction placed on the President's "close military or diplomatic advisers." *Post*, at 17. But that carveout makes no logical or constitutional sense. In the dissent's view, for-cause removal restrictions are permissible because they guarantee the President "meaningful control" over his subordinates. *Post*, at 28 (internal quotation marks and alterations omitted); see also *post*, at 8, 20, 26, 36. If that is the theory, then what is the harm in giving the President the same "meaningful control" over his close advisers? The dissent claims to see a constitutional distinction between the President's "own constitutional duties in foreign relations and war" and his duty to execute laws passed by Congress. *Post*, at 13. But the same Article that establishes the President's foreign relations and war duties expressly entrusts him to take care that the laws be faithfully executed. And, from the perspective of the governed, it is far from clear that the President's core and traditional powers present greater cause for concern than peripheral and modern ones. If anything, "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, *heightens* the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U. S., at 499 (emphasis added).

it by broadly construing the statutory grounds for removing the CFPB Director from office. See Brief for Court-Appointed *Amicus Curiae* 50–53; Tr. of Oral Arg. 57–62. The Dodd-Frank Act provides that the Director may be removed for "inefficiency, neglect of duty, or malfeasance in office." 12 U. S. C. §5491(c)(3). In *amicus*' view, that language could be interpreted to reserve substantial discretion to the President. Brief for Court-Appointed *Amicus Curiae* 51.

We are not persuaded. For one, *Humphrey's Executor* implicitly rejected an interpretation that would leave the President free to remove an officer based on disagreements about agency policy. See 295 U. S., at 619, 625–626. In addition, while both *amicus* and the House of Representatives invite us to adopt whatever construction would cure the constitutional problem, they have not advanced any workable standard derived from the statutory language. *Amicus* suggests that the proper standard might permit removals based on *general* policy disagreements, but not *specific* ones; the House suggests that the permissible bases for removal might vary depending on the context and the Presidential power involved. See Tr. of Oral Arg. 58–60, 76–77. They do not attempt to root either of those standards in the statutory text. Further, although nearly identical language governs the removal of some two-dozen multimember independent agencies, *amicus* suggests that the standard should vary from agency to agency, morphing as necessary to avoid constitutional doubt. Tr. of Oral Arg. 55–56. We decline to embrace such an uncertain and elastic approach to the text.

Amicus and the House also fail to engage with the Dodd-Frank Act as a whole, which makes plain that the CFPB is an "independent bureau." 12 U. S. C. §5491(a); see also 44 U. S. C. §3502(5) (listing the CFPB as an "independent regulatory agency"). Neither *amicus* nor the House explains how the CFPB would be "independent" if its head were required to implement the President's policies upon pain of removal. See Black's Law Dictionary 838 (9th ed. 2009) (defining "independent" as "[n]ot subject to the control or influence of another"). The Constitution might of course compel the agency to be dependent on the President notwithstanding Congress's contrary intent, but that result cannot fairly be inferred from the statute Congress enacted.

Constitutional avoidance is not a license to rewrite Congress's work to say whatever the Constitution needs it to say in a given situation. Without a proffered interpretation that is rooted in the statutory text and structure, and would avoid the constitutional violation we have identified, we take Congress at its word that it meant to impose a meaningful restriction on the President's removal authority.

The dissent, for its part, largely reprises points that the Court has already considered and rejected: It notes the lack of an express removal provision, invokes Congress's general power to create and define executive offices, highlights isolated statements from individual Framers, downplays the decision of 1789, minimizes *Myers*, brainstorms methods of Presidential control short of removal, touts the need for creative congressional responses to technological and economic change, and celebrates a pragmatic, flexible approach to American governance. See *post*, at 1–25, 32–33, 38.

If these arguments sound familiar, it's because they are. They were raised by the dissent in *Free Enterprise Fund*. Compare *post*, at 1–25, 32–33, 38, with *Free Enterprise Fund*, 561 U. S., at 515–524, 530 (BREYER, J., dissenting). The answers to these repeated concerns (beyond those we have already covered) are the same today as they were ten years ago. Today, as then, Congress's "plenary control over the salary, duties, and even existence of executive offices" makes "Presidential oversight" *more* critical—not less—as the "[o]nly" tool to "counter [Congress's] influence." *Id.*, at 500 (opinion of the Court). Today, as then, the various "bureaucratic minutiae" a President might use to corral agency personnel is no substitute for at will removal. *Ibid.* And today, as always, the urge to meet new technological and societal problems with novel governmental structures must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility. *Id.,* at 499.

As we explained in *Free Enterprise Fund*, "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Ibid.* While "[n]o one doubts Congress's power to create a vast and varied federal bureaucracy," the expansion of that bureaucracy into new territories the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people. *Ibid.*

IV

Having concluded that the CFPB's leadership by a single independent Director violates the separation of powers, we now turn to the appropriate remedy. We directed the parties to brief and argue whether the Director's removal protection was severable from the other provisions of the Dodd-Frank Act that establish the CFPB. If so, then the CFPB may continue to exist and operate notwithstanding Congress's unconstitutional attempt to insulate the agency's Director from removal by the President. There is a live controversy between the parties on that question, and resolving it is a necessary step in determining petitioner's entitlement to its requested relief.

As the defendant in this action, petitioner seeks a straightforward remedy. It asks us to deny the Government's petition to enforce the civil investigative demand and dismiss the case. The Government counters that the demand, though initially issued by a Director unconstitutionally insulated from removal, can still be enforced on remand because it has since been ratified by an Acting Director accountable to the President. The parties dispute whether this alleged ratification in fact occurred and whether, if so, it is legally sufficient to cure the constitutional defect in the original demand. That debate turns on case-specific factual and legal questions not addressed below and not briefed here. A remand for the lower Courts to consider those questions in the first instance is therefore the appropriate course—unless such a remand would be futile.

In petitioner's view, it would be. Before the Court of Appeals, petitioner contended that, regardless of any ratification, the demand is unenforceable because the statutory provision insulating the CFPB Director from removal cannot be severed from the other statutory provisions that define the CFPB's authority. See Brief for Appellant in No. 17–56324 (CA9), pp. 27–28, 30–32. If petitioner is correct, and the offending removal provision means the entire agency is unconstitutional and powerless to act, then a remand would be pointless. With no agency left with statutory authority to maintain this suit or otherwise enforce the demand, the appropriate disposition would be to reverse with instructions to deny the Government's petition to enforce the agency's demand for documents and dismiss the case, as petitioner requests.

Accordingly, there is a live controversy over the question of severability. And that controversy is essential to our ability to provide petitioner the relief it seeks: If the removal restriction is not severable, then we must grant the relief requested, promptly rejecting the demand outright. If, on the other hand, the removal restriction is severable, we must instead remand for the Government to press its ratification arguments in further proceedings. Unlike the lingering ratification issue, severability presents a pure question of law that has been fully briefed and argued by the parties. We therefore proceed to address it.[12]

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[12] JUSTICE THOMAS believes that any ratification is irrelevant. In his

It has long been settled that "one section of a statute may be repugnant to the Constitution without rendering the whole act void." *Loeb* v. *Columbia Township Trustees*, 179 U. S. 472, 490 (1900) (quoting *Treasurer of Fayette Cty.* v. *People's & Drovers' Bank*, 47 Ohio St. 503, 523, 25 N. E. 697, 702 (1890)). Because a "statute bad in part is not necessarily void in its entirety," "[p]rovisions within the legislative power may stand if separable from the bad." *Dorchy* v. *Kansas*, 264 U. S. 286, 289–290 (1924).

"Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enterprise Fund*, 561 U. S., at 508 (internal quotation marks omitted). Even in the absence of a severability clause, the "traditional" rule is that "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U. S. 678, 685 (1987). When Congress has expressly provided a severability clause, our task is simplified. We will presume "that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision . . . unless there is strong evidence that Congress intended otherwise." *Id.,* at 686.

The only constitutional defect we have identified in the CFPB's structure is the Director's insulation from removal. If the Director were removable at will by the President, the

view, even if the issuance of the demand and initiation of this suit have been validly ratified, Director Kraninger's activities in litigating the case—after inheriting it from an Acting Director, but before becoming removable at will herself in light of our decision—present a distinct constitutional injury requiring immediate dismissal. See *post*, at 17–19 (opinion concurring in part and dissenting in part). But whether and when the temporary involvement of an unconstitutionally insulated officer in an otherwise valid prosecution requires dismissal falls outside the questions presented, has not been fully briefed, and is best resolved by the lower courts in the first instance.

constitutional violation would disappear. We must therefore decide whether the removal provision can be severed from the other statutory provisions relating to the CFPB's powers and responsibilities.

In *Free Enterprise Fund*, we found a set of unconstitutional removal provisions severable even in the absence of an express severability clause because the surviving provisions were capable of "functioning independently" and "nothing in the statute's text or historical context [made] it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will." 561 U. S., at 509 (internal quotation marks omitted).

So too here. The provisions of the Dodd-Frank Act bearing on the CFPB's structure and duties remain fully operative without the offending tenure restriction. Those provisions are capable of functioning independently, and there is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred *no* CFPB to a CFPB supervised by the President. Quite the opposite. Unlike the Sarbanes-Oxley Act at issue in *Free Enterprise Fund*, the Dodd-Frank Act contains an express severability clause. There is no need to wonder what Congress would have wanted if "any provision of this Act" is "held to be unconstitutional" because it has told us: "the remainder of this Act" should "not be affected." 12 U. S. C. §5302.

Petitioner urges us to disregard this plain language for three reasons. None is persuasive. First, petitioner dismisses the clause as non-probative "boilerplate" because it applies "to the entire, 848-page Dodd-Frank Act" and "appears almost 600 pages before the removal provision at issue." Brief for Petitioner 45. In petitioner's view, that means we cannot be certain that Congress really meant to apply the clause to each of the Act's provisions. But boilerplate is boilerplate for a reason—because it offers tried-and-true language to ensure a precise and predictable result.

That is the case here. The language unmistakably references "*any* provision of this Act." 12 U. S. C. §5302 (emphasis added). And it appears in a logical and prominent place, immediately following the Act's title and definitions sections, reinforcing the conclusion that it applies to the entirety of the Act. Congress was not required to laboriously insert duplicative severability clauses, provision by provision, to accomplish its stated objective.

Second, petitioner points to an additional severability clause in the Act that applies only to one of the Act's subtitles. See 15 U. S. C. §8232. In petitioner's view, that clause would be superfluous if Congress meant the general severability clause to apply across the Act. But "our preference for avoiding surplusage constructions is not absolute." *Lamie* v. *United States Trustee*, 540 U. S. 526, 536 (2004). In this instance, the redundant language appears to reflect the fact that the subtitle to which it refers originated as a standalone bill that was later incorporated into Dodd-Frank. Compare 15 U. S. C. §8232 with H. R. 2571, 111th Cong., 1st Sess., §302 (2009). And petitioner does not offer any construction that would give effect to both provisions, making the redundancy both inescapable and unilluminating. See *Microsoft Corp.* v. *i4i L. P.*, 564 U. S. 91, 106 (2011) ("The canon against superfluity assists only where a competing interpretation gives effect to every clause and word of a statute." (internal quotation marks omitted)).

Finally, petitioner argues more broadly that Congress would not have wanted to give the President unbridled control over the CFPB's vast authority. Petitioner highlights the references to the CFPB's independence in the statutory text and legislative history, as well as in Professor Warren's and the Obama administration's original proposals. See Brief for Petitioner 43–44 (collecting examples). And petitioner submits that Congress might not have exempted the CFPB from congressional oversight via the appropriations process if it had known that the CFPB would come under executive control.

These observations certainly confirm that Congress preferred an independent CFPB to a dependent one; but they shed little light on the critical question whether Congress would have preferred a dependent CFPB to *no agency at all.* That is the only question we have the authority to decide, and the answer seems clear. Petitioner assumes that, if we eliminate the CFPB, regulatory and enforcement authority over the statutes it administers would simply revert back to the handful of independent agencies previously responsible for them. See *id.*, at 46. But, as the Solicitor General and House of Representatives explain, that shift would trigger a major regulatory disruption and would leave appreciable damage to Congress's work in the consumer-finance arena. See Reply Brief for Respondent 21–22; Tr. of Oral Arg. 67–68. One of the agencies whose regulatory authority was transferred to the CFPB no longer exists. See 12 U. S. C. §§5412–5413 (Office of Thrift Supervision). The others do not have the staff or appropriations to absorb the CFPB's 1,500-employee, 500-million-dollar operations. And none has the authority to administer the Dodd-Frank Act's new prohibition on unfair and deceptive practices in the consumer-finance sector. Given these consequences, it is far from evident that Congress would have preferred no CFPB to a CFPB led by a Director removable at will by the President.

JUSTICE THOMAS would have us junk our settled severability doctrine and start afresh, even though no party has asked us to do so. See *post*, at 15–16, 21–24 (opinion concurring in part and dissenting in part). Among other things, he objects that it is sheer "speculation" that Congress would prefer that its consumer protection laws be enforced by a Director accountable to the President rather than not at all. *Post*, at 23–24. We think it clear that Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect we identify today.

And such an approach by this Court can come as no surprise to Congress, which was on notice of constitutional objections to single-Director agencies by multiple past Presidents from both political parties, *supra*, at 19–20, and enacted Dodd-Frank against the background of our established severability doctrine.

As in every severability case, there may be means of remedying the defect in the CFPB's structure that the Court lacks the authority to provide. Our severability analysis does not foreclose Congress from pursuing alternative responses to the problem—for example, converting the CFPB into a multimember agency. The Court's only instrument, however, is a blunt one. We have "the negative power to disregard an unconstitutional enactment," *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923); see *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803), but we cannot re-write Congress's work by creating offices, terms, and the like. "[S]uch editorial freedom . . . belongs to the Legislature, not the Judiciary." *Free Enterprise Fund*, 561 U. S., at 510.

Because we find the Director's removal protection severable from the other provisions of Dodd-Frank that establish the CFPB, we remand for the Court of Appeals to consider whether the civil investigative demand was validly ratified.

* * *

A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today. In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead. While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power.

The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people.

The judgment of the United States Court of Appeals for the Ninth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 19–7

SEILA LAW LLC, PETITIONER *v.* CONSUMER FINANCIAL PROTECTION BUREAU

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

[June 29, 2020]

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and dissenting in part.

The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), rather than overruling it. At the same time, the Court takes an aggressive approach on severability by severing a provision when it is not necessary to do so. I would do the opposite.

Because the Court takes a step in the right direction by limiting *Humphrey's Executor* to "multimember expert agencies that *do not wield substantial executive power*," *ante*, at 16 (emphasis added), I join Parts I, II, and III of its opinion. I respectfully dissent from the Court's severability analysis, however, because I do not believe that we should address severability in this case.

I

The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people. The Court concludes that it is not strictly necessary for us to overrule that decision. See *ante*, at 2, 13–17. But with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*. In a future case, I would repudiate what is left of this erroneous precedent.

A

"The Constitution does not vest the Federal Government with an undifferentiated 'governmental power.'" *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 67 (2015) (THOMAS, J., concurring in judgment). It sets out three branches and vests a different form of power in each—legislative, executive, and judicial. See Art. I, §1; Art. II, §1, cl. 1; Art. III, §1.

Article II of the Constitution vests "[t]he executive Power" in the "President of the United States of America," §1, cl. 1, and directs that he shall "take Care that the Laws be faithfully executed," §3. Of course, the President cannot fulfill his role of executing the laws without assistance. See *Myers* v. *United States*, 272 U. S. 52, 117 (1926). He therefore must "select those who [are] to act for him under his direction in the execution of the laws." *Ibid.* While these officers assist the President in carrying out his constitutionally assigned duties, "[t]he buck stops with the President." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 493 (2010). "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Id.*, at 483. The Framers "insist[ed]" upon "unity in the Federal Executive" to "ensure both vigor and accountability" to the people. *Printz* v. *United States*, 521 U. S. 898, 922 (1997); see also *ante*, at 22.

Despite the defined structural limitations of the Constitution and the clear vesting of executive power in the President, Congress has increasingly shifted executive power to a *de facto* fourth branch of Government—independent agencies. These agencies wield considerable executive power without Presidential oversight. They are led by officers who are insulated from the President by removal restrictions, "reduc[ing] the Chief Magistrate to [the role of] cajoler-in-chief." *Free Enterprise Fund*, 561 U. S., at 502. But "[t]he people do not vote for the Officers of the United

States. They instead look to the President to guide the assistants or deputies subject to his superintendence." *Id.*, at 497–498 (alterations, internal quotation marks and citation omitted). Because independent agencies wield substantial power with no accountability to either the President or the people, they "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.* v. *CFPB*, 881 F. 3d 75, 165 (CADC 2018) (Kavanaugh, J., dissenting).

Unfortunately, this Court "ha[s] not always been vigilant about protecting the structure of our Constitution," at times endorsing a "more pragmatic, flexible approach" to our Government's design. *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 115–116 (2015) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). Our tolerance of independent agencies in *Humphrey's Executor* is an unfortunate example of the Court's failure to apply the Constitution as written. That decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design.

B

1

The lead up to *Humphrey's Executor* begins with this Court's decision in *Myers*, 272 U. S. 52. *Myers* involved a federal statute that prohibited the President from removing certain postmasters except "by and with the advice and consent of the Senate." *Id.*, at 107 (internal quotation marks omitted). The question presented was "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id.*, at 106. In a 70-page opinion by Chief Justice Taft, the Court held that the Constitution did vest such power in the President.

The Court anchored its analysis in evidence from the founding era. It acknowledged that the "subject [of removal] was not discussed in the Constitutional Convention," *id.*, at 109–110, but it reviewed in detail the First Congress' vigorous debate about the removal of executive officers in what is known as the Decision of 1789, *id.*, at 111–135.[1] In the course of analyzing the Decision of 1789, the Court explained that Article II vests "the executive power of the Government . . . in one person"—the President—and that the executive power includes the authority to "select those who [are] to act for him under his direction in the execution of the laws." *Id.*, at 116–117. Reiterating the position of James Madison and other Members of the First Congress, the Court noted that allowing limits on the President's removal authority would grant Congress "the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible." *Id.*, at 131. After "devot[ing] much space to [the] discussion and decision of the question of the Presidential power of removal in the First Congress" as well as its understanding of the executive power, *id.*, at 136, the Court concluded that "the power to remove officers appointed by the President and the Senate vested in the President alone," *id.*, at 114. It repeatedly described this removal power as "unrestricted." *Id.*, at 115, 134, 150, 172, 176.

The Court noted that the First Congress' understanding of the removal question was quickly "accepted as a final decision of the question by all branches of the Government."

[1] For a comprehensive review of the Decision of 1789, see Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021 (2006).

Id., at 136. The decision was "affirmed by this Court in unmistakable terms." *Id.*, at 148, 152–153 (discussing *Ex parte Hennen*, 13 Pet. 230, 259 (1839); *Parsons* v. *United States*, 167 U. S. 324, 330 (1897)). Presidents had "uniform[ly]" adopted the First Congress' view "whenever an issue ha[d] clearly been raised." *Myers*, 272 U. S., at 169. And "Congress, in a number of acts, followed and enforced the legislative decision of 1789 for seventy-four years." *Id.*, at 145. While disputes with President Andrew Johnson over Reconstruction led Congress to "enact legislation to curtail the then acknowledged powers of the President," *id.*, at 165, the *Myers* Court declined to give these politically charged acts any weight, *id.,* at 175–176.

After exhaustively analyzing the historical evidence, the Court had "no hesitation in holding that [the First Congress'] conclusion [was] correct." *Id.*, at 176. Accordingly, the Court held that "the provision of the law [at issue], by which the unrestricted power of removal of first class postmasters is denied to the President, [was] in violation of the Constitution, and invalid." *Ibid.*

2

Nine years after *Myers*, the Court decided *Humphrey's Executor*. That case arose from the attempted removal of Commissioner William Humphrey from the Federal Trade Commission (FTC). In 1931, President Herbert Hoover appointed Humphrey to serve a 7-year term as one of the FTC's five Commissioners. By all accounts, Humphrey proved to be a controversial figure. See Crane, Debunking *Humphrey's Executor*, 83 Geo. Wash. L. Rev. 1836, 1841 (2015); Winerman, The FTC at Ninety: History Through Headlines, 72 Antitrust L. J. 871, 878–879 (2005); Yoo, Calabresi, & Nee, The Unitary Executive During the Third Half-Century, 1889–1945, 80 Notre Dame L. Rev. 1, 64 (2004). He reportedly "vowed not to approve any Commission action that did not have as its goal to help business help itself," "threaten[ed] criminal prosecution against other commissioners who publicly dissented," and "called his fellow commissioners men drunk with their own greatness" when they voted to initiate an investigation. Crane, *supra*, at 1841 (internal quotation marks omitted).

Less than two years into Humphrey's term, newly inaugurated President Franklin D. Roosevelt wrote Humphrey a letter, asking for his resignation. The President explained that, in his view, "the aims and purposes of the Administration with respect to the work of the Commission [could] be carried out most effectively with personnel of [his] own selection." *Humphrey's Executor*, 295 U. S., at 618 (internal quotation marks omitted). A little over a month after his first letter, President Roosevelt wrote Humphrey again to ask for his resignation. The letter stated: "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the [FTC], and, frankly, I think it is best for the people of this country that I should have a full confidence." *Id.*, at 619 (internal quotation marks omitted). Humphrey declined to resign. In October 1933, President Roosevelt informed Humphrey that he was removed from his position. Humphrey did not comply, continuing "to insist that he was still a member of the commission, entitled to perform its duties and receive the compensation provided by law." *Ibid.*

Four months later, Humphrey died. The executor of his estate brought suit in the Court of Claims, seeking to recover Humphrey's salary from the date of his removal until the date of his death. The Court of Claims certified two questions to this Court: (1) whether §1 of the Federal Trade Commission Act of 1914, ch. 311, 38 Stat. 717, prohibited the President from removing FTC Commissioners except for "inefficiency, neglect of duty, or malfeasance in office," and (2) if so, whether that restriction was constitutional. 295 U. S., at 619 (internal quotation marks omitted).

The Court answered both of these questions in favor of

Humphrey's estate. It first held that the FTC Act "limit[ed] the executive power of removal to the causes enumerated" therein—inefficiency, neglect of duty, or malfeasance in office. *Id.*, at 626. In the Court's view, this construction of the Act was clear from "the face of the statute" and "the character of the commission," *id.*, at 624, which the Court described as a "body of experts" that operates "independent of executive authority . . . and free to exercise its judgment without the leave or hindrance of any other official," *id.*, at 625–626.

Then, notwithstanding the text of Article II of the Constitution and the decision in *Myers*, the Court held that the Act's restriction on the President's authority to remove Commissioners was constitutional. The Court acknowledged that the "recently decided" *Myers* decision had "fully review[ed] the general subject of the power of executive removal" and "examine[d] at length the historical, legislative and judicial data bearing upon the question." *Humphrey's Executor*, 295 U. S., at 626. And it conceded that executive officers are "subject to the exclusive and illimitable power of removal by the Chief Executive." *Id.*, at 627; see also *id.*, at 631 (recognizing "the President's illimitable power of removal" over executive officers).[2] The Court, however, claimed that "[t]he office of a postmaster is so essentially unlike the office [of an FTC Commissioner] that the decision in the *Myers* case [could not] be accepted as control-

[2] The explicit and repeated recognition of the President's "illimitable power" in *Humphrey's Executor* highlights the dissent's error in claiming that *Humphrey's Executor* "abandoned [the] view" set out in *Myers* v. *United States*, 272 U. S. 52 (1926). *Post*, at 17 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (hereinafter dissent). *Humphrey's Executor* did not abandon *Myers*; it distinguished *Myers* based on the flawed premise that the FTC exercised "quasi-legislative" and "quasi-judicial" power that is not part of "the executive power vested by the Constitution in the President." *Humphrey's Executor*, 295 U. S., at 628; see also *infra*, at 9–11.

ling." *Id.*, at 627. In the Court's view, unlike the postmaster in *Myers*, FTC commissioners did not qualify as "purely executive officers." 295 U. S., at 632.

The Court grounded its analysis in its assertion that the FTC "occupies no place in the executive department and . . . exercises no part of the executive power vested by the Constitution in the President." *Id.*, at 628. Rather, in the Court's view, by "filling in and administering the details embodied by [the FTC Act's] general standard[,] the commission act[ed] in part quasi-legislatively and in part quasi-judicially." *Ibid.* The Court stated that the FTC acted "as a legislative agency" by "making investigations and reports thereon for the information of Congress" and acted "as an agency of the judiciary" when performing its role "as a master in chancery under rules prescribed by the court." *Ibid.* "Such a body," the Court explained, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Ibid.*

After distinguishing "purely executive officers" from officers exercising "quasi-legislative or quasi-judicial powers," *ibid.*, the Court held that "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by . . . precluding a removal except for cause, will depend upon the character of the office," *id.*, at 631. "[P]urely executive officers" are subject to the President's "unrestrictable power . . . to remove." *Id.*, at 632. But with regard to "quasi-legislative" and "quasi-judicial" officers, the Court concluded that "no removal [could] be made . . . except for one or more of the causes named." *Ibid.*

3

Humphrey's Executor laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as "quasi-legislative" and "quasi-judicial." Unlike the thorough analysis in *Myers*, the Court's thinly reasoned decision is completely "devoid of textual or historical precedent for the novel principle it set forth." *Morrison* v. *Olson*, 487 U. S. 654, 726 (1988) (Scalia, J., dissenting). The exceptional weakness of the reasoning could be a product of the circumstances under which the case was decided—in the midst of a bitter standoff between the Court and President Roosevelt[3]—or it could be just another example of this Court departing from the strictures of the Constitution for a "more pragmatic, flexible approach" to our government's design. *Perez*, 575 U. S., at 116 (opinion of THOMAS, J.) (internal quotation marks omitted). But whatever the motivation, *Humphrey's Executor* does not comport with the Constitution.

Humphrey's Executor relies on one key premise: the notion that there is a category of "quasi-legislative" and "quasi-judicial" power that is not exercised by Congress or the Judiciary, but that is also not part of "the executive power vested by the Constitution in the President." *Humphrey's Executor*, *supra*, at 628. Working from that premise, the Court distinguished the "illimitable" power of removal recognized in *Myers*, *Humphrey's Executor*, 295

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[3] A number of historical sources indicate that President Roosevelt saw *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), as an attack on his administration. Given the Court's recent decision in *Myers*, the Roosevelt administration was reportedly "stunned" by the Court's decision in *Humphrey's Executor*, and the President was particularly annoyed that the decision "ma[de] it appear that he had been willfully violating the Constitution." See W. Leuchtenberg, The Supreme Court Reborn 78 (1995). Justice Jackson, who was serving in the Roosevelt administration at the time, stated in an interview that "'the decision that made Roosevelt madder at the Court than any other decision was that . . . little case of *Humphrey's Executor* v. *United States*. The President thought they went out of their way to spite him personally.'" E. Gerhart, America's Advocate: Robert H. Jackson 99 (1958) (quoting 1949 interview with Justice Jackson).

U. S., at 627–628, and upheld the FTC Act's removal restriction, while simultaneously acknowledging that the Constitution vests the President with the entirety of the executive power, *id.*, at 628.

The problem is that the Court's premise was entirely wrong. The Constitution does not permit the creation of officers exercising "quasi-legislative" and "quasi-judicial powers" in "quasi-legislative" and "quasi-judicial agencies." *Id.,* at 628–629. No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U. S. 457, 472 (2001), and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III, *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011). Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. See Art. I, §1; Art. II, §1, cl. 1; Art. III, §1. Free-floating agencies simply do not comport with this constitutional structure. "[A]gencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution." *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J., dissenting). But "[t]he mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *Id.*, at 487–488.

That is exactly what happened in *Humphrey's Executor*. The Court upheld the FTC Act's removal restriction by using the "quasi" label to support its claim that the FTC "exercise[d] no part of the executive power vested by the Constitution in the President." *Humphrey's Executor*, *supra*, at 628. But "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison*, *supra*, at 690, n. 28; see *ante*, at 14, n. 2; see *post*, at 18, n. 7 (KAGAN, J., concurring in judgment with respect to severability and dissenting in part).

C

Today's decision constitutes the latest in a series of cases that have significantly undermined *Humphrey's Executor*. First, in *Morrison*, the Court repudiated the reasoning of the decision. 487 U. S., at 689. Then, in *Free Enterprise Fund*, we returned to the principles set out in the "landmark case of *Myers*." 561 U. S., at 492. And today, the Court rightfully limits *Humphrey's Executor* to "multimember expert agencies that do not wield substantial executive power." *Ante*, at 16. After these decisions, the foundation for *Humphrey's Executor* is not just shaky. It is nonexistent.

This Court's repudiation of *Humphrey's Executor* began with its decision in *Morrison*. There, the Court upheld a statute insulating an independent counsel from removal by the Attorney General absent a showing of "good cause." *Morrison*, *supra*, at 659–660. In doing so, the Court set aside the reasoning of *Humphrey's Executor*. It recognized that *Humphrey's Executor* "rel[ied] on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* . . . from those in *Myers*." 487 U. S., at 689. But it then immediately stated that its "present considered view is that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction on the President's power to remove an official cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Ibid.* The Court also rejected *Humphrey's Executor*'s conclusion that the FTC did not exercise executive power, stating that "the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive.'" *Morrison*, *supra*, at 690, n. 28. The lone dissenter, Justice Scalia, disagreed with much of the Court's analysis but noted that the Court had rightfully "swept" *Humphrey's Executor* "into the dustbin of repudiated constitutional principles." 487 U. S., at 725. Thus, all Members of the Court who heard *Morrison* rejected the core rationale of *Humphrey's Executor*.

The reasoning of the Court's decision in *Free Enterprise Fund* created further tension (if not outright conflict) with *Humphrey's Executor*. In *Free Enterprise Fund*, the Court concluded that a dual layer of for-cause removal restrictions for members of the Public Company Accounting Oversight Board violated the Constitution. In its analysis, the Court recognized that allowing officers to "execute the laws" beyond the President's control "is contrary to Article II's vesting of the executive power *in the President*." 561 U. S., at 496 (emphasis added). The Court acknowledged that "the executive power include[s] a power to oversee executive officers through removal." *Id.*, at 492. And it explained that, without the power of removal, the President cannot "be held fully accountable" for the exercise of the executive power, "'greatly diminish[ing] the intended and necessary responsibility of the chief magistrate himself.'" *Id.*, at 514 (quoting The Federalist No. 70, p. 478 (J. Cooke ed. 1961) (A. Hamilton)). Accountability, the Court repeatedly emphasized, plays a central role in our constitutional structure. See, *e.g.*, *Free Enterprise Fund*, 561 U. S., at 498 ("[E]xecutive power without the Executive's oversight . . . subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"); *id.*, at 513 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so"). *Humphrey's Executor* is at odds with every single one of these principles:

It ignores Article II's Vesting Clause, sidesteps the President's removal power, and encourages the exercise of executive power by unaccountable officers. The reasoning of the two decisions simply cannot be reconciled.

Finally, today's decision builds upon *Morrison* and *Free Enterprise Fund*, further eroding the foundation of *Humphrey's Executor*. The Court correctly notes that "[t]he entire 'executive Power' belongs to the President alone." *Ante*, at 11. The President therefore must have "power to remove—and thus supervise—those who wield executive power on his behalf." *Ante*, at 2. As a result, the Court concludes that *Humphrey's Executor* must be limited to "multimember expert agencies that *do not wield substantial executive power*." *Ante,* at 16 (emphasis added). And, at the same time, it recognizes (as the Court did in *Morrison*) that "[t]he Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." *Ante*, at 14, n. 2. In other words, *Humphrey's Executor* does not even satisfy its own exception.

In light of these decisions, it is not clear what is left of *Humphrey's Executor*'s rationale.[4] But if any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies

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[4] The dissent, while vigorously defending the holding of *Humphrey's Executor*, can muster no defense for the reasoning of the decision. The dissent does not defend the notion of "quasi" powers or "quasi" agencies, recognizing that the power exercised by the FTC was executive power. See *post*, at 18, n. 7. And, in 39 pages, it cannot explain how any aspect of *Humphrey's Executor* (other than its holding) survived *Morrison* v. *Olson*, 487 U. S. 654 (1988), and *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). Instead, the dissent simply claims that *Humphrey's Executor* was "extended" and "clarified" in *Morrison*, *post*, at 19, attempting to breathe validity into *Humphrey's Executor* through the Court's *Morrison* decision. But the dissent's reading of *Morrison* as "extend[ing] *Humphrey's* domain" is baffling. *Post*, at 19. *Morrison* expressly repudiated the substantive reasoning of *Humphrey's Executor*. See *supra*, at 11–12.

that currently exercise vast executive power outside the bounds of our constitutional structure.

* * *

Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty. We have a "responsibility to 'examin[e] without fear, and revis[e] without reluctance,' any 'hasty and crude decisions' rather than leaving 'the character of [the] law impaired, and the beauty and harmony of the [American constitutional] system destroyed by the perpetuity of error.'" *Gamble* v. *United States*, 587 U. S. ___, ___ (2019) (THOMAS, J., concurring) (slip op., at 7) (quoting 1 J. Kent, Commentaries on American Law 444 (1826); some alterations in original). We simply cannot compromise when it comes to our Government's structure. Today, the Court does enough to resolve this case, but in the future, we should reconsider *Humphrey's Executor in toto*. And I hope that we will have the will to do so.

II

While I think that the Court correctly resolves the merits of the constitutional question, I do not agree with its decision to sever the removal restriction in 12 U. S. C. §5491(c)(3). See *ante*, at 30–36; *post*, at 37. To resolve this case, I would simply deny the Consumer Financial Protection Bureau (CFPB) petition to enforce the civil investigative demand.

A

Article III of the Constitution vests "[t]he judicial Power of the United States" in the "supreme Court" and the lower federal courts established by Congress. §1. "[T]he judicial power is, fundamentally, the power to render judgments in individual cases" or controversies that are properly before the court. *Murphy* v. *National Collegiate Athletic Assn.*, 584 U. S. ___, ___–___ (2018) (THOMAS, J., concurring) (slip op., at 2–3); see also *Plaut* v. *Spendthrift Farm*, *Inc.*, 514 U. S. 211, 219 (1995) ("'[A] "judicial Power" is one to render dispositive judgments'"); Baude, The Judgment Power, 96 Geo. L. J. 1807, 1815–1816 (2008). "[T]he power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). In the context of a constitutional challenge, "[i]t amounts to little more than the negative power to disregard an unconstitutional enactment." *Ibid.*; see also Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 936 (2018). Thus, if a party argues that a statute and the Constitution conflict, "then courts must resolve that dispute and, . . . follow the higher law of the Constitution." *Murphy*, 584 U. S., at ___ (THOMAS, J., concurring) (slip op., at 3).

Consistent with this understanding, "[e]arly American courts did not have a severability doctrine." *Id.*, at ___ (slip op., at 2) (citing Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 769 (2010)). If a statute was unconstitutional, the court would just decline to enforce the statute in the case before it. 584 U. S., at ___ (THOMAS, J., concurring) (slip op., at 3). That was the end of the matter. "[T]here was no 'next step' in which [a] cour[t]" severed portions of a statute. Walsh, *supra*, at 777.

Our modern severability precedents create tension with this historic practice. Instead of declining to enforce an unconstitutional statute in an individual case, this Court has stated that courts must "seve[r] and excis[e]" portions of a statute to "remedy" the constitutional problem. *United States* v. *Booker*, 543 U. S. 220, 245 (2005); *Alaska Airlines*, *Inc.* v. *Brock*, 480 U. S. 678, 686 (1987). The Court's rhetoric when discussing severance implies that a court's decision to sever a provision "formally suspend[s] or erase[s it], when [the provision] actually remains on the books as a law." Mitchell, *supra*, at 1017. The Federal Judiciary does not have the power to excise, erase, alter, or otherwise strike down a statute. *Murphy*, *supra*, at ___ (THOMAS, J., concurring) (slip op., at 4); Mitchell, *supra*, at 936. And the Court's reference to severability as a "remedy" is inaccurate. Traditional remedies—like injunctions, declarations, or damages—"'operate with respect to specific parties,' not 'on legal rules in the abstract.'" *Murphy*, *supra*, at ___ (THOMAS, J., concurring) (slip op., at 3) (quoting Harrison, Severability, Remedies, and Constitutional Adjudication, 83 Geo. Wash. L. Rev. 56, 85 (2014)).

Because the power of judicial review does not allow courts to revise statutes, Mitchell, *supra*, at 983, the Court's severability doctrine must be rooted in statutory interpretation. But, even viewing severability as an interpretive question, I remain skeptical of our doctrine. As I have previously explained, "the severability doctrine often requires courts to weigh in on statutory provisions that no party has standing to challenge, bringing courts dangerously close to issuing advisory opinions." *Murphy*, 584 U. S., at ___ (concurring opinion) (slip op., at 5). And the application of the doctrine "does not follow basic principles of statutory interpretation." *Id.*, at ___ (slip op., at 4). Instead of determining the meaning of a statute's text, severability involves "nebulous inquir[ies] into hypothetical congressional intent." *Booker*, *supra,* at 320, n. 7 (THOMAS, J., dissenting in part).

B

Consistent with the traditional understanding of the judicial power, I would deny CFPB's petition to enforce the civil investigative demand that it issued to Seila. See §5562(e)(1). Seila "challenge[d] the validity of both the civil investigative demand and the ensuing enforcement action." Reply Brief for Petitioner 5. Seila has not countersued or sought affirmative relief preventing the CFPB from acting in the future; it simply asks us to "reverse the court of appeals' judgment." Brief for Petitioner 35. I would do just that. As the Court recognizes, the enforcement of a civil investigative demand by an official with unconstitutional removal protection injures Seila. See *ante*, at 9–10. Presented with an enforcement request from an unconstitutionally insulated Director, I would simply deny the CFPB's petition for an order of enforcement. This approach would resolve the dispute before us without addressing the issue of severability.

The Court, however, does more. In the plurality's view,[5] because the CFPB raised a ratification argument before the Court of Appeals, we can (and should) reach the question of severability. See *ante*, at 30–31. But as explained more fully below, resolving this question is wholly unnecessary. Regardless of whether the CFPB's ratification theory is valid, the Court of Appeals on remand must reach the same outcome: The CFPB's civil investigative demand cannot be enforced against Seila.

The ratification argument presented by the CFPB is quite simple. Since its creation in 2010, the CFPB has had three Directors—first Director Richard Cordray, then Acting Director Mick Mulvaney, and now Director Kathleen Kraninger. The CFPB's first Director, Director Cordray, issued a civil investigative demand to Seila and initiated the enforcement action. The CFPB has conceded that these actions were unconstitutional. But, in the Ninth Circuit, the CFPB argued that the investigative demand was ratified by Acting Director Mulvaney, who it claimed was *not* insulated by the removal provision. Brief for Appellee in No. 17–56324, pp. 13–19. In the CFPB's view, the President could

[5] The dissent provides no analysis of severability, simply stating "*if* the agency's removal provision is unconstitutional, it should be severed." *Post,* at 37.

remove Acting Director Mulvaney at will because the "removal provision by its terms applies only to 'the Director,' not to an Acting Director," and the Federal Vacancy Reform Act "does not limit the President's ability to designate a different person as Acting Director." *Id.*, at 14. Based on this ratification theory, the CFPB asked the Ninth Circuit to affirm the District Court's order granting the CFPB's petition to enforce its investigative demand.

The CFPB does not ask this Court to address ratification on the merits, but it does rely on its unresolved ratification theory to assert that the Court should reach severability. In doing so, the CFPB relies on the same theory that it presented to the Ninth Circuit. Thus, the only live ratification claim is the theory that Acting Director Mulvaney ratified the civil investigative demand. See *ante*, at 30–31.[6]

The resolution of the CFPB's Acting-Director ratification theory, however, has no bearing on the outcome of the dispute before us and therefore provides no basis for addressing severability. If the Acting Director did not ratify the investigative demand, then there is obviously no need to address severability. And even if he did, the Court still does not need to address severability because the alleged ratification does not cure the constitutional injury—enforcement of an investigative demand by an unconstitutionally insulated Director. Seila "challenge[d] the validity of both the civil investigative demand *and the ensuing enforcement action*." Reply Brief for Petitioner 5 (emphasis added). Acting Director Mulvaney may (or may not) have properly ratified

[6] The Court-appointed *amicus* suggests that the CFPB's current Director, Director Kraninger, ratified the enforcement proceeding by maintaining the suit after she stated her belief that the removal provision is unconstitutional. But the CFPB expressly disclaimed the notion that Director Kraninger had the power to ratify the civil investigative demand, stating that she "remains statutorily insulated from removal, regardless whether she believes the law is invalid." Reply Brief for Respondent 7.

the issuance of the investigative demand and the initiation of the enforcement proceedings. But he certainly could not ratify the continuance of the enforcement action by his successor, Director Kraninger. *Id.*, at 7. Thus, even if the CFPB's ratification theory is valid, Seila still has an injury: It has been (and continues to be) subjected to enforcement of an investigative demand by Director Kraninger, who "remains statutorily insulated from removal." Reply Brief for Respondent 7; see also *Free Enterprise Fund*, 561 U. S., at 513; *ante*, at 10. Thus, we should decline to enforce the civil investigative demand against Seila. See *supra,* at 14–15.

Ultimately, I cannot see how the resolution of the severability question affects the dispute before us. And even if severability could affect this case in some hypothetical scenario, I would not reach out to resolve the issue given my growing discomfort with our current severability precedents.

C

Confident that it can address the question of severability, the plurality moves on to conduct its analysis. It starts by pointing to the severability clause in the Dodd-Frank Act. See *ante*, at 33. That clause states: "If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." §5302. The plurality states that "[i]f the Director were removable at will by the President, the constitutional violation would disappear." *Ante*, at 32–33. Then, relying on language in the severability clause, it concludes that the removal provision, §5491(c)(3), should be severed.

The plurality suggests that its analysis is a matter of simply enforcing the "plain language" of the severability clause. See *ante*, at 33. But I am not sure it is that simple. For one, the plurality does not actually analyze the statutory language.[7] Second, the analysis the plurality does provide looks nothing like traditional statutory interpretation. Generally, when we interpret a statute, we do not hold that the text sets out a "presum[ption]" that can be rebutted by looking to atextual evidence of legislative intent. *Ante*, at 32. A text-based interpretation does not allow a free-ranging inquiry into what "'Congress, faced with the limitations imposed by the Constitution, would have preferred'" had it known of a constitutional issue. *Ante*, at 33 (quoting *Free Enterprise Fund*, *supra*, at 509). Nor does it consider whether Congress would have wanted to avoid "a major regulatory disruption." *Ante*, at 35. Statutory interpretation focuses on the text.

Even treating the question as a matter of pure statutory interpretation and assuming that the plurality points to the correct language, the text of the severability clause cannot, in isolation, justify severance of the removal provision. In

[7] The severability clause refers to three alternative scenarios: (1) a "provision of [the] Act . . . is held to be unconstitutional"; (2) "an amendment made by [the] Act . . . is held unconstitutional"; and (3) "the application of [a] provision or amendment [of the Act] to any person or circumstance is held to be unconstitutional." 12 U. S. C. §5302. The plurality assumes, with no analysis, that this case falls in the first scenario, calling for a provision to be severed from the Dodd-Frank Act. See *ante*, at 33. But, as discussed below, there is no single "provision" of the Act that has led to the constitutional injury in this case. See *infra*, at 20–21. It is the attempted enforcement of a civil investigative demand under §5562(e)(1) by an unconstitutionally insulated Director that causes the constitutional injury in this case. There is at least a nonfrivolous argument that this case implicates the third scenario contemplated by the severability clause—*i.e.,* "the application of [a] provision" in a certain "circumstance." §5302. If that were so, the text of the severability clause would not require any "provision" to be severed; the unconstitutional application of §5562(e)(1) simply would not affect other provisions of the Dodd-Frank Act. Such a reading would be consistent with the traditional limits on the judicial power. See *supra*, at 14–15.

some instances, a constitutional injury arises as a result of two or more statutory provisions operating together. See, *e.g.*, *Free Enterprise Fund*, *supra*, at 509 (stating that the convergence of "a number of statutory provisions" produce a constitutional violation); *Booker*, 543 U. S., at 316–317 (opinion of THOMAS, J.) (explaining that "the concerted action of [18 U. S. C.] §3553(b)(1) *and* the operative Guidelines *and* the relevant Rule of Criminal Procedure resulted in unconstitutional judicial factfinding"); Lea, Situation Severability, 103 Va. L. Rev. 735, 778–780 (2017) (discussing statutory convergences). That is precisely the situation we have in this case. As in *Free Enterprise Fund*, the provision requiring "good-cause removal is only one of [the] statutory provisions that, working together, produce a constitutional violation." 561 U. S., at 509. The constitutional violation results from, at a minimum, the combination of the removal provision, 12 U. S. C. §5491(c)(3), and the provision allowing the CFPB to seek enforcement of a civil investigative demand, §5562(e)(1). When confronted with two provisions that operate together to violate the Constitution, the text of the severability clause provides no guidance as to *which* provision should be severed. Thus, we must choose, based on something other than the severability clause, which provision to sever.

Without text to guide us, the severability inquiry moves away from statutory interpretation and falls back on this Court's questionable precedents. See *Murphy*, 584 U. S., at ___–___ (THOMAS, J., concurring) (slip op., at 4–6). An analysis of the Court's decisions in *Booker* and *Free Enterprise Fund* illustrates the Court's approach to determining which provision to sever when confronting an injury caused by an unconstitutional convergence of multiple statutory provisions.

In *Booker*, a Rule of Criminal Procedure, a subset of provisions in the Sentencing Guidelines, and a statutory provision operated together to require unconstitutional judicial factfinding. To determine which aspect of the sentencing scheme to sever, the Court sought to divine "what Congress would have intended in light of the Court's constitutional holding." *Booker*, 543 U. S., at 246 (internal quotation marks omitted). The Court "recognize[d] that sometimes severability questions . . . can arise [in the context of] a legislatively unforeseen constitutional problem." *Id.*, at 247. But it nonetheless felt qualified to craft a remedy that would "move sentencing in Congress' preferred direction." *Id.*, at 264. Surprisingly, that "move" did not involve enforcing the constitutional aspects of Congress' sentencing scheme. The Court stated that "we cannot assume that Congress, if faced with the statute's invalidity in key applications, would have preferred to apply the statute in as many other instances as possible." *Id.*, at 248.[8] Despite the fact that there were a plethora of cases in which mandatory Sentencing Guidelines would have posed no constitutional problem, the Court decided to "sever and excise . . . the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range," along with another provision which was not even at issue in the case. *Id.*, at 259. In essence, the Court crafted a new sentencing scheme, transforming the Sentencing Guidelines into an entirely discretionary system based on its estimation that Congress would have wanted that result.

The Court in *Free Enterprise Fund* declined to explicitly engage in *Booker*'s free-wheeling inquiry into Congress' hypothetical preferences, but it did not replace that inquiry with a clear standard. In that case, the Court held that a

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[8] This statement in *Booker* is irreconcilable with the plurality's assertion here that "Congress would prefer that we use a scalpel rather than a bulldozer in curing the constitutional defect." *Ante,* at 35. Thus, it appears that the plurality either *sub silentio* "junk[s] our settled severability doctrine," *ibid.*, or invokes, without explanation, different assumptions for different cases.

"number of statutory provisions . . . , working together, produce[d] a constitutional violation" similar to the violation at issue here. *Free Enterprise Fund*, 561 U. S., at 509. The Court decided to sever the Board's removal restriction. It explicitly recognized that there were multiple ways to address the constitutional injury, stating that the Court could, for example, "blue-pencil a sufficient number of the Board's responsibilities," or "restrict the Board's enforcement powers." *Ibid.* But it described these alternative options as involving "editorial freedom—far more extensive than [the] holding today—[that] belongs to the Legislature, not the Judiciary." *Id.*, at 510. The Court did not explain, however, why the option that it chose was not also "editorial freedom" that belongs to the Legislature or why the alternatives involved "more extensive" "editorial freedom" than its preferred option. *Ibid.* The most that the Court provided was a suggestion that fewer provisions would have to be severed under its approach. *Id.*, at 509–510.

Today's plurality opinion provides no further guidance. In fact, the plurality does not even recognize that it has made a choice between the provisions that cause the constitutional injury. It merely states that "[i]f the Director were removable at will by the President, the constitutional violation would disappear." *Ante*, at 32–33. Fair enough. But if the Director lacked executive authority under the statute to seek enforcement of a civil investigative demand, §5562(e)(1), the constitutional violation in this case would also disappear. The plurality thus *chooses* which of the provisions to sever.

In short, when multiple provisions of law combine to cause a constitutional injury, the Court's current approach allows the Court to decide which provision to sever. The text of a severability clause does not guide that choice. Nor does the practice of early American courts. See *supra*, at 14–15. The Court is thus left to choose based on nothing more than speculation as to what the Legislature would have preferred. And the result of its choice can have a dramatic effect on the governing statutory scheme. See *Booker*, *supra*, at 259 (converting the entirety of the Sentencing Guidelines from a mandatory to a discretionary system). This is not a simple matter of following the "plain language" of a statute. *Ante*, at 33. It is incumbent on us to take a close look at our precedents to make sure that we are not exceeding the scope of the judicial power.

* * *

Given my concerns about our modern severability doctrine and the fact that severability makes no difference to the dispute before us, I would resolve this case by simply denying the CFPB's petition to enforce the civil investigative demand.

SUPREME COURT OF THE UNITED STATES

No. 19–7

SEILA LAW LLC, PETITIONER *v.* CONSUMER FINANCIAL PROTECTION BUREAU

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

[June 29, 2020]

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, concurring in the judgment with respect to severability and dissenting in part.

Throughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to. In particular, the Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads. The Federal Reserve Board. The Federal Trade Commission (FTC). The National Labor Relations Board. Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause—most often phrased as inefficiency, neglect of duty, or malfeasance in office. Those statutes, whose language the Court has repeatedly approved, provide the model for the removal restriction before us today. If precedent were any guide, that provision would have survived its encounter with this Court—and so would the intended independence of the Consumer Financial Protection Bureau (CFPB).

Our Constitution and history demand that result. The text of the Constitution allows these common for-cause removal limits. Nothing in it speaks of removal. And it grants Congress authority to organize all the institutions of American governance, provided only that those arrangements allow the President to perform his own constitutionally assigned duties. Still more, the Framers' choice to give the political branches wide discretion over administrative offices has played out through American history in ways that have settled the constitutional meaning. From the first, Congress debated and enacted measures to create spheres of administration—especially of financial affairs—detached from direct presidential control. As the years passed, and governance became ever more complicated, Congress continued to adopt and adapt such measures—confident it had latitude to do so under a Constitution meant to "endure for ages to come." *McCulloch* v. *Maryland*, 4 Wheat. 316, 415 (1819) (approving the Second Bank of the United States). Not every innovation in governance—not every experiment in administrative independence—has proved successful. And debates about the prudence of limiting the President's control over regulatory agencies, including through his removal power, have never abated.[1] But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.

The Court today fails to respect its proper role. It recognizes that this Court has approved limits on the President's removal power over heads of agencies much like the CFPB. Agencies possessing similar powers, agencies charged with

[1] In the academic literature, compare, *e.g.,* Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001) (generally favoring presidential control over agencies), with, *e.g.,* Strauss, Overseer, or "The Decider"? The President in Administrative Law, 75 Geo. Wash. L. Rev. 696, 704, 713–715 (2007) (generally favoring administrative independence).

similar missions, agencies created for similar reasons. The majority's explanation is that the heads of those agencies fall within an "exception"—one for multimember bodies and another for inferior officers—to a "general rule" of unrestricted presidential removal power. *Ante,* at 13. And the majority says the CFPB Director does not. That account, though, is wrong in every respect. The majority's general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority's work—between multimember bodies and single directors—does not respond to the constitutional values at stake. If a removal provision violates the separation of powers, it is because the measure so deprives the President of control over an official as to impede his own constitutional functions. But with or without a for-cause removal provision, the President has at least as much control over an individual as over a commission—and possibly more. That means the constitutional concern is, if anything, ameliorated when the agency has a single head. Unwittingly, the majority shows why courts should stay their hand in these matters. "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration" and the way "political power[] operates." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 523 (2010) (BREYER, J., dissenting).

In second-guessing the political branches, the majority second-guesses as well the wisdom of the Framers and the judgment of history. It writes in rules to the Constitution that the drafters knew well enough not to put there. It repudiates the lessons of American experience, from the 18th century to the present day. And it commits the Nation to a static version of governance, incapable of responding to new conditions and challenges. Congress and the President established the CFPB to address financial practices that had brought on a devastating recession, and could do so again.

Today's decision wipes out a feature of that agency its creators thought fundamental to its mission—a measure of independence from political pressure. I respectfully dissent.

I

The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable governance—all stand against the majority's opinion. They point not to the majority's "general rule" of "unrestricted removal power" with two grudgingly applied "exceptions." *Ante,* at 13, 16. Rather, they bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties. And most relevant here, they give Congress wide leeway to limit the President's removal power in the interest of enhancing independence from politics in regulatory bodies like the CFPB.

A

What does the Constitution say about the separation of powers—and particularly about the President's removal authority? (Spoiler alert: about the latter, nothing at all.)

The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase. See Schoolhouse Rock! Three Ring Government (Mar. 13, 1979), http://www.youtube.com/watch?v=pKSGyiT-o3o ("Ring one, Executive. Two is Legislative, that's Congress. Ring three, Judiciary"). The Constitution's first three articles, the majority recounts, "split the atom of sovereignty" among Congress, the President, and the courts. *Ante,* at 21 (internal quotation marks omitted). And by that mechanism, the Framers provided a "simple" fix "to governmental power and its perils." *Ibid.*

There is nothing wrong with that as a beginning (except the adjective "simple"). It is of course true that the Framers lodged three different kinds of power in three different entities. And that they did so for a crucial purpose—because, as James Madison wrote, "there can be no liberty where the legislative and executive powers are united in the same person[] or body" or where "the power of judging [is] not separated from the legislative and executive powers." The Federalist No. 47, p. 325 (J. Cooke ed. 1961) (quoting Baron de Montesquieu).

The problem lies in treating the beginning as an ending too—in failing to recognize that the separation of powers is, by design, neither rigid nor complete. Blackstone, whose work influenced the Framers on this subject as on others, observed that "every branch" of government "supports and is supported, regulates and is regulated, by the rest." 1 W. Blackstone, Commentaries on the Laws of England 151 (1765). So as James Madison stated, the creation of distinct branches "did not mean that these departments ought to have no partial agency in, or no controul over the acts of each other." The Federalist No. 47, at 325 (emphasis deleted).[2] To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government "absolutely separate and distinct." *Id.,* at 327. Or as Justice Story reiterated a half-century later: "[W]hen we speak of a separation of the three great departments of government," it is "not meant to affirm, that they must be kept wholly and entirely separate." 2 J. Story, Commentaries on the Constitution of the United States §524, p. 8 (1833). Instead, the branches have—as they must for the whole arrangement to work—"common link[s] of connexion [and] dependence." *Ibid.*

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[2] The principle of separation of powers, Madison continued, maintained only that "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution[] are subverted." The Federalist No. 47, at 325–326.

One way the Constitution reflects that vision is by giving Congress broad authority to establish and organize the Executive Branch. Article II presumes the existence of "Officer[s]" in "executive Departments." §2, cl. 1. But it does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires. See *ante,* at 11 ("The entire 'executive Power' belongs to the President alone"). Instead, Article I's Necessary and Proper Clause puts those decisions in the legislature's hands. Congress has the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" not just its own enumerated powers but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." §8, cl. 18. Similarly, the Appointments Clause reflects Congress's central role in structuring the Executive Branch. Yes, the President can appoint principal officers, but only as the legislature "shall . . . establish[] by Law" (and of course subject to the Senate's advice and consent). Art. II, §2, cl. 2. And Congress has plenary power to decide not only what inferior officers will exist but also who (the President or a head of department) will appoint them. So as Madison told the first Congress, the legislature gets to "create[] the office, define[] the powers, [and] limit[] its duration." 1 Annals of Cong. 582 (1789). The President, as to the construction of his own branch of government, can only try to work his will through the legislative process.[3]

[3] Article II's Opinions Clause also demonstrates the possibility of limits on the President's control over the Executive Branch. Under that Clause, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." §2, cl. 1. For those in the majority's camp, that Clause presents a puzzle: If the President must always have the direct supervisory control they posit, including by threat of removal, why would he ever need a constitutional warrant to demand agency heads' opinions? The Clause becomes at least redundant—

The majority relies for its contrary vision on Article II's Vesting Clause, see *ante,* at 11–12, 25, but the provision can't carry all that weight. Or as Chief Justice Rehnquist wrote of a similar claim in *Morrison* v. *Olson*, 487 U. S. 654 (1988), "extrapolat[ing]" an unrestricted removal power from such "general constitutional language"—which says only that "[t]he executive Power shall be vested in a President"—is "more than the text will bear." *Id.,* at 690, n. 29. Dean John Manning has well explained why, even were it not obvious from the Clause's "open-ended language." Separation of Powers as Ordinary Interpretation, 124 Harv. L. Rev. 1939, 1971 (2011). The Necessary and Proper Clause, he writes, makes it impossible to "establish a constitutional violation simply by showing that Congress has constrained the way '[t]he executive Power' is implemented"; that is exactly what the Clause gives Congress the power to do. *Id.,* at 1967. Only "a *specific* historical understanding" can bar Congress from enacting a given constraint. *Id.,* at 2024. And nothing of that sort broadly prevents Congress from limiting the President's removal power. I'll turn soon to the Decision of 1789 and other evidence of Post-Convention thought. See *infra*, at 9–13. For now, note two points about practice before the Constitution's drafting. First, in that era, Parliament often restricted the King's power to remove royal officers—and the President, needless to say, wasn't supposed to be a king. See Birk, Interrogating the Historical Basis for a Unitary Executive, 73 Stan. L. Rev. (forthcoming 2021). Second, many States at the time allowed limits on gubernatorial removal power even though their constitutions had similar vesting clauses. See Shane, The Originalist Myth of the Unitary Executive, 19 U. Pa. J. Const. L. 323, 334–344 (2016). Historical understandings thus belie the majority's

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though really, inexplicable—under the majority's idea of executive power.

"general rule."

Nor can the Take Care Clause come to the majority's rescue. That Clause cannot properly serve as a "placeholder for broad judicial judgments" about presidential control. Goldsmith & Manning, The Protean Take Care Clause, 164 U. Pa. L. Rev. 1835, 1867 (2016); but see *ante,* at 11–12, 27–28, n. 11 (using it that way). To begin with, the provision—"he shall take Care that the Laws be faithfully executed"—speaks of duty, not power. Art. II, §3. New scholarship suggests the language came from English and colonial oaths taken by, and placing fiduciary obligations on, all manner and rank of executive officers. See Kent, Leib, & Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. 2111, 2121–2178 (2019). To be sure, the imposition of a duty may imply a grant of power sufficient to carry it out. But again, the majority's view of that power ill comports with founding-era practice, in which removal limits were common. See, *e.g.,* Corwin, Tenure of Office and the Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 385 (1927) (noting that New York's Constitution of 1777 had nearly the same clause, though the State's executive had "very little voice" in removals). And yet more important, the text of the Take Care Clause requires only enough authority to make sure "the laws [are] faithfully executed"—meaning with fidelity to the law itself, not to every presidential policy preference. As this Court has held, a President can ensure "'faithful execution' of the laws"—thereby satisfying his "take care" obligation—with a removal provision like the one here. *Morrison*, 487 U. S., at 692. A for-cause standard gives him "ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation's] provisions." *Ibid.*

Finally, recall the Constitution's telltale silence: Nowhere does the text say anything about the President's power to remove subordinate officials at will. The majority professes unconcern. After all, it says, "neither is there a 'separation of powers clause' or a 'federalism clause.'" *Ante,* at 25. But those concepts are carved into the Constitution's text—the former in its first three articles separating powers, the latter in its enumeration of federal powers and its reservation of all else to the States. And anyway, at-will removal is hardly such a "foundational doctrine[]," *ibid.*: You won't find it on a civics class syllabus. That's because removal is a *tool*—one means among many, even if sometimes an important one, for a President to control executive officials. See generally *Free Enterprise Fund,* 561 U. S., at 524 (BREYER, J., dissenting). To find that authority hidden in the Constitution as a "general rule" is to discover what is nowhere there.

B

History no better serves the majority's cause. As Madison wrote, "a regular course of practice" can "liquidate & settle the meaning of" disputed or indeterminate constitutional provisions. Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908); see *NLRB* v. *Noel Canning*, 573 U. S. 513, 525 (2014). The majority lays claim to that kind of record, asserting that its muscular view of "[t]he President's removal power has long been confirmed by history." *Ante*, at 12. But that is not so. The early history—including the fabled Decision of 1789—shows mostly debate and division about removal authority. And when a "settle[ment of] meaning" at last occurred, it was not on the majority's terms. Instead, it supports wide latitude for Congress to create spheres of administrative independence.

1

Begin with evidence from the Constitution's ratification. And note that this moment is indeed the beginning: Delegates to the Constitutional Convention never discussed whether or to what extent the President would have power to remove executive officials. As a result, the Framers advocating ratification had no single view of the matter. In Federalist No. 77, Hamilton presumed that under the new Constitution "[t]he consent of [the Senate] would be necessary to displace as well as to appoint" officers of the United States. *Id.,* at 515. He thought that scheme would promote "steady administration": "Where a man in any station had given satisfactory evidence of his fitness for it, a new president would be restrained" from substituting "a person more agreeable to him." *Ibid.* By contrast, Madison thought the Constitution allowed Congress to decide how any executive official could be removed. He explained in Federalist No. 39: "The tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions." *Id.,* at 253. Neither view, of course, at all supports the majority's story.[4]

The second chapter is the Decision of 1789, when Congress addressed the removal power while considering the bill creating the Department of Foreign Affairs. Speaking through Chief Justice Taft—a judicial presidentialist if ever there was one—this Court in *Myers* v. *United States*, 272 U. S. 52 (1926), read that debate as expressing Congress's judgment that the Constitution gave the President illimitable power to remove executive officials. The majority rests

[4] The majority dismisses Federalist Nos. 77 and 39 as "reflect[ing] initial impressions later abandoned." *Ante,* at 26, and n. 10. But even Hamilton's and Madison's later impressions are less helpful to the majority than it suggests. Assuming Hamilton gave up on the Senate's direct participation in removal (the evidence is sketchy but plausible), there is no evidence to show he accepted the majority's view. And while Madison opposed the first Congress's enactment of removal limits (as the majority highlights), he also maintained that the legislature had constitutional power to protect the Comptroller of the Treasury from at-will firing. See *infra*, at 12–13. In any event, such changing minds and inconstant opinions don't usually prove the existence of constitutional rules.

its own historical claim on that analysis (though somehow also finding room for its two exceptions). See *ante,* at 12–13. But Taft's historical research has held up even worse than *Myers*' holding (which was mostly reversed, see *infra*, at 17–18). As Dean Manning has concluded after reviewing decades' worth of scholarship on the issue, "the implications of the debate, properly understood, [are] highly ambiguous and prone to overreading." Manning, 124 Harv. L. Rev., at 1965, n. 135; see *id.,* at 2030–2031.

The best view is that the First Congress was "deeply divided" on the President's removal power, and "never squarely addressed" the central issue here. *Id.,* at 1965, n. 135; Prakash, New Light on the Decision of 1789, 91 Cornell L. Rev. 1021, 1072 (2006). The congressional debates revealed three main positions. See Corwin, 27 Colum. L. Rev., at 361. Some shared Hamilton's Federalist No. 77 view: The Constitution required Senate consent for removal. At the opposite extreme, others claimed that the Constitution gave absolute removal power to the President. And a third faction maintained that the Constitution placed Congress in the driver's seat: The legislature could regulate, if it so chose, the President's authority to remove. In the end, Congress passed a bill saying nothing about removal, leaving the President free to fire the Secretary of Foreign Affairs at will. But the only one of the three views definitively rejected was Hamilton's theory of necessary Senate consent. As even strong proponents of executive power have shown, Congress never "endorse[d] the view that [it] lacked authority to modify" the President's removal authority when it wished to. Prakash, *supra,* at 1073; see Manning, *supra,* at 1965, n. 135, 2030–2031. The summer of 1789 thus ended without resolution of the critical question: Was the removal power "beyond the reach of congressional regulation?" Prakash, *supra,* at 1072.

At the same time, the First Congress gave officials handling financial affairs—as compared to diplomatic and military ones—some independence from the President. The title and first section of the statutes creating the Departments of Foreign Affairs and War designated them "executive departments." Act of July 27, 1789, ch. 4, 1 Stat. 28; Act of Aug. 7, 1789, ch. 7, 1 Stat. 49. The law creating the Treasury Department conspicuously avoided doing so. See Act of Sept. 2, 1789, ch. 12, 1 Stat. 65. That difference in nomenclature signaled others of substance. Congress left the organization of the Departments of Foreign Affairs and War skeletal, enabling the President to decide how he wanted to staff them. See Casper, An Essay in Separation of Powers, 30 Wm. & Mary L. Rev. 211, 239–241 (1989). By contrast, Congress listed each of the offices within the Treasury Department, along with their functions. See *ibid.* Of the three initial Secretaries, only the Treasury's had an obligation to report to Congress when requested. See §2, 1 Stat. 65–66. And perhaps most notable, Congress soon deemed the Comptroller of the Treasury's settlements of public accounts "final and conclusive." Act of Mar. 3, 1795, ch. 48, §4, 1 Stat. 441–442. That decision, preventing presidential overrides, marked the Comptroller as exercising independent judgment.[5] True enough, no statute shielded the

[5] As President Jefferson explained: "[W]ith the settlement of the accounts at the Treasury I have no right to interfere in the least," because the Comptroller of the Treasury "is the sole & supreme judge for all claims of money against the US. and would no more receive a direction from me" than would "one of the judges of the supreme court." Letter from T. Jefferson to B. Latrobe (June 2, 1808), in Thomas Jefferson and the National Capital 429, 431 (S. Padover ed. 1946). A couple of decades later, Attorney General William Wirt reached the same conclusion, stating that "the President has no right to interpose in the settling of accounts" because Congress had "separated" the Comptroller from the President's authority. 1 Op. Atty. Gen. 636, 637 (1824); 1 Op. Atty. Gen. 678, 680 (1824). And indeed, Wirt believed that Congress could restrict the President's authority to remove such officials, at least so long as it "express[ed] that intention clearly." 1 Op. Atty. Gen. 212, 213 (1818).

Comptroller from discharge. But even James Madison, who at this point opposed most removal limits, told Congress that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure" of the Secretary or President. 1 Annals of Cong. 612. At the least, as Professor Prakash writes, "Madison maintained that Congress had the [constitutional] authority to modify [the Comptroller's] tenure." Prakash, *supra*, at 1071.

Contrary to the majority's view, then, the founding era closed without any agreement that Congress lacked the power to curb the President's removal authority. And as it kept that question open, Congress took the first steps—which would launch a tradition—of distinguishing financial regulators from diplomatic and military officers. The latter mainly helped the President carry out his own constitutional duties in foreign relations and war. The former chiefly carried out statutory duties, fulfilling functions Congress had assigned to their offices. In addressing the new Nation's finances, Congress had begun to use its powers under the Necessary and Proper Clause to design effective administrative institutions. And that included taking steps to insulate certain officers from political influence.

2

As the decades and centuries passed, those efforts picked up steam. Confronting new economic, technological, and social conditions, Congress—and often the President—saw new needs for pockets of independence within the federal bureaucracy. And that was especially so, again, when it came to financial regulation. I mention just a few highlights here—times when Congress decided that effective governance depended on shielding technical or expertise-based functions relating to the financial system from political pressure (or the moneyed interests that might lie behind it). Enacted under the Necessary and Proper Clause, those measures—creating some of the Nation's most enduring institutions—themselves helped settle the extent of Congress's power. "[A] regular course of practice," to use Madison's phrase, has "liquidate[d]" constitutional meaning about the permissibility of independent agencies. See *supra,* at 9.

Take first Congress's decision in 1816 to create the Second Bank of the United States—"the first truly independent agency in the republic's history." Lessig & Sunstein, The President and the Administration, 94 Colum. L. Rev. 1, 30 (1994). Of the twenty-five directors who led the Bank, the President could appoint and remove only five. See Act of Apr. 10, 1816, §8, 3 Stat. 269. Yet the Bank had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today. Of course, the Bank was controversial—in large part because of its freedom from presidential control. Andrew Jackson chafed at the Bank's independence and eventually fired his Treasury Secretary for keeping public moneys there (a dismissal that itself provoked a political storm). No matter. Innovations in governance always have opponents; administrative independence predictably (though by no means invariably) provokes presidential ire. The point is that by the early 19th century, Congress established a body wielding enormous financial power mostly outside the President's dominion.

The Civil War brought yet further encroachments on presidential control over financial regulators. In response to wartime economic pressures, President Lincoln (not known for his modest view of executive power) asked Congress to establish an office called the Comptroller of the Currency. The statute he signed made the Comptroller removable only with the Senate's consent—a version of the old Hamiltonian idea, though this time required not by the Constitution itself but by Congress. See Act of Feb. 25, 1863, ch. 58, 12 Stat. 665. A year later, Congress amended the statute to permit removal by the President alone, but only upon "reasons to be communicated by him to the Senate." Act of June 3, 1864, §1, 13 Stat. 100. The majority dismisses the original version of the statute as an "aberration." *Ante,* at 19. But in the wake of the independence given first to the Comptroller of the Treasury and then to the national Bank, it's hard to conceive of this newest Comptroller position as so great a departure. And even the second iteration of the statute preserved a constraint on the removal power, requiring a President in a firing mood to explain himself to Congress—a demand likely to make him sleep on the subject. In both versions of the law, Congress responded to new financial challenges with new regulatory institutions, alert to the perils in this area of political interference.[6]

And then, nearly a century and a half ago, the floodgates opened. In 1887, the growing power of the railroads over the American economy led Congress to create the Interstate

[6] The Comptroller legislation of the Civil War provided a key precedent for what *does* appear a historical "aberration"—the Tenure of Office Act of 1867. See ch. 154, 14 Stat. 430. Anxious to prevent President Andrew Johnson from interfering with reconstruction policies—including through his command of the military—Congress barred presidential removal of any Senate-confirmed officials without the Senate's consent. The law thus severed the President's removal authority over even officials like the Secretaries of War and State. The statute became the basis for the Nation's first presidential impeachment, but was repealed in 1887. See Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. In one sense, the two-decade-long existence of the Tenure of Office Act reveals the 19th-century political system's comfort with expansive restrictions on presidential removal. But the ultimate repudiation of the law, and the broad historical consensus that it went too far, just as strongly shows the limits that system later accepted on legislative power—that Congress may not impose removal restrictions preventing the President from carrying out his own constitutionally assigned functions in areas like war or foreign affairs. See *Morrison* v. *Olson,* 487 U. S. 654, 689–691 (1988) (recognizing that limit as the constitutional standard).

Commerce Commission. Under that legislation, the President could remove the five Commissioners only "for inefficiency, neglect of duty, or malfeasance in office"—the same standard Congress applied to the CFPB Director. Act of Feb. 4, 1887, §11, 24 Stat. 383. More—many more—for-cause removal provisions followed. In 1913, Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability. See Act of Dec. 23, 1913, ch. 6, 38 Stat. 251. The next year, Congress provided similar protection to the FTC in the interest of ensuring "a continuous policy" "free from the effect" of "changing [White House] incumbency." 51 Cong. Rec. 10376 (1914). The Federal Deposit Insurance Corporation (FDIC), the Securities and Exchange Commission (SEC), the Commodity Futures Trading Commission. In the financial realm, "independent agencies have remained the bedrock of the institutional framework governing U. S. markets." Gadinis, From Independence to Politics in Financial Regulation, 101 Cal. L. Rev. 327, 331 (2013). By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. See *Free Enterprise Fund*, 561 U. S., at 541 (BREYER, J., dissenting). So year by year by year, the broad sweep of history has spoken to the constitutional question before us: Independent agencies are everywhere.

C

What is more, the Court's precedents before today have accepted the role of independent agencies in our governmental system. To be sure, the line of our decisions has not run altogether straight. But we have repeatedly upheld provisions that prevent the President from firing regulatory officials except for such matters as neglect or malfeasance. In those decisions, we sounded a caution, insisting that Congress could not impede through removal restrictions the

President's performance of his own constitutional duties. (So, to take the clearest example, Congress could not curb the President's power to remove his close military or diplomatic advisers.) But within that broad limit, this Court held, Congress could protect from at-will removal the officials it deemed to need some independence from political pressures. Nowhere do those precedents suggest what the majority announces today: that the President has an "unrestricted removal power" subject to two bounded exceptions. *Ante*, at 2.

The majority grounds its new approach in *Myers*, ignoring the way this Court has cabined that decision. *Myers*, the majority tells us, found an unrestrained removal power "essential to the [President's] execution of the laws." *Ante,* at 13 (quoting *Myers,* 272 U. S., at 117). What the majority does not say is that within a decade the Court abandoned that view (much as later scholars rejected Taft's one-sided history, see *supra,* at 10–11). In *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935), the Court unceremoniously—and unanimously—confined *Myers* to its facts. "[T]he narrow point actually decided" there, *Humphrey's* stated, was that the President could "remove a postmaster of the first class, without the advice and consent of the Senate." 295 U. S., at 626. Nothing else in Chief Justice Taft's prolix opinion "c[a]me within the rule of *stare decisis*." *Ibid.* (Indeed, the Court went on, everything in *Myers* "out of harmony" with *Humphrey's* was expressly "disapproved." 295 U. S., at 626.) Half a century later, the Court was more generous. Two decisions read *Myers* as standing for the principle that Congress's own "participation in the removal of executive officers is unconstitutional." *Bowsher* v. *Synar*, 478 U. S. 714, 725 (1986); see *Morrison*, 487 U. S., at 686 ("As we observed in *Bowsher*, the essence" of "*Myers* was the judgment that the Constitution prevents Congress from draw[ing] to itself" the power to remove (internal quotation marks omitted)). *Bowsher* made clear that *Myers* had nothing to say about Congress's power to enact a provision merely "limit[ing] the President's powers of removal" through a for-cause provision. 478 U. S., at 724. That issue, the Court stated, was "not presented" in "the *Myers* case." *Ibid.* Instead, the relevant cite was *Humphrey's*.

And *Humphrey's* found constitutional a statute identical to the one here, providing that the President could remove FTC Commissioners for "inefficiency, neglect of duty, or malfeasance in office." 295 U. S., at 619. The *Humphrey's* Court, as the majority notes, relied in substantial part on what kind of work the Commissioners performed. See *id.,* at 628, 631; *ante,* at 14. (By contrast, nothing in the decision turned—as the majority suggests, see *ante,* at 14–15—on any of the agency's organizational features. See *infra*, at 30.) According to *Humphrey's*, the Commissioners' primary work was to "carry into effect legislative policies"—"filling in and administering the details embodied by [a statute's] general standard." 295 U. S., at 627–628. In addition, the Court noted, the Commissioners recommended dispositions in court cases, much as a special master does. Given those "quasi-legislative" and "quasi-judicial"—as opposed to "purely executive"—functions, Congress could limit the President's removal authority. *Id.,* at 628.[7] Or said another way, Congress could give the FTC some "independen[ce from] executive control." *Id.,* at 629.

About two decades later, an again-unanimous Court in

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[7] The majority is quite right that today we view *all* the activities of administrative agencies as exercises of "the 'executive Power.'" *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (quoting Art. II, §1, cl.1); see *ante,* at 14, n. 2. But we well understand, just as the *Humphrey's* Court did, that those activities may "take 'legislative' and 'judicial' forms." *Arlington*, 569 U. S., at 305, n. 4. The classic examples are agency rulemakings and adjudications, endemic in agencies like the FTC and CFPB. In any event, the Court would soon make clear that Congress can also constrain the President's removal authority over officials performing even the most "executive" of functions. See *infra*, at 19–20.

Wiener v. *United States*, 357 U. S. 349 (1958), reaffirmed *Humphrey's*. The question in *Wiener* was whether the President could dismiss without cause members of the War Claims Commission, an entity charged with compensating injuries arising from World War II. Disdaining *Myers* and relying on *Humphrey's*, the Court said he could not. The Court described as "short-lived" *Myers*' view that the President had "inherent constitutional power to remove officials, no matter what the relation of the executive to the discharge of their duties." 357 U. S., at 352.[8] Here, the Commissioners were not close agents of the President, who needed to be responsive to his preferences. Rather, they exercised adjudicatory responsibilities over legal claims. Congress, the Court found, had wanted the Commissioners to do so "free from [political] control or coercive influence." *Id.,* at 355 (quoting *Humphrey's*, 295 U. S., at 629). And that choice, as *Humphrey's* had held, was within Congress's power. The Constitution enabled Congress to take down "the Damocles' sword of removal" hanging over the Commissioners' heads. 357 U. S., at 356.

Another three decades on, *Morrison* both extended *Humphrey's* domain and clarified the standard for addressing removal issues. The *Morrison* Court, over a one-Justice dissent, upheld for-cause protections afforded to an independent counsel with power to investigate and prosecute crimes committed by high-ranking officials. The Court well understood that those law enforcement functions differed from the rulemaking and adjudicatory duties highlighted in

[8] Expressing veiled contempt as only he could, Justice Frankfurter wrote for the Court that Chief Justice Taft's opinion had "laboriously traversed" American history and that it had failed to "restrict itself to the immediate issue before it." 357 U. S., at 351. No wonder *Humphrey's* had "narrowly confined the scope of the *Myers* decision." 357 U. S., at 352. Justice Frankfurter implied that the "Chief Justice who himself had been President" was lucky his handiwork had not been altogether reversed. *Id.,* at 351.

Humphrey's and *Wiener*. But that difference did not resolve the issue. An official's functions, *Morrison* held, were relevant to but not dispositive of a removal limit's constitutionality. The key question in all the cases, *Morrison* saw, was whether such a restriction would "impede the President's ability to perform his constitutional duty." 487 U. S., at 691. Only if it did so would it fall outside Congress's power. And the protection for the independent counsel, the Court found, did not. Even though the counsel's functions were "purely executive," the President's "need to control the exercise of [her] discretion" was not "so central to the functioning of the Executive Branch as to require" unrestricted removal authority. *Id.,* at 690–691. True enough, the Court acknowledged, that the for-cause standard prevented the President from firing the counsel for discretionary decisions or judgment calls. But it preserved "ample authority" in the President "to assure that the counsel is competently performing" her "responsibilities in a manner that comports with" all legal requirements. *Id.,* at 692. That meant the President could meet his own constitutional obligation "to ensure 'the faithful execution' of the laws." *Ibid.*; see *supra,* at 8.[9]

[9] Pretending this analysis is mine rather than *Morrison*'s, the majority registers its disagreement. See *ante,* at 27–28, n. 11. In its view, a test asking whether a for-cause provision impedes the President's ability to carry out his constitutional functions has "no real limiting principle." *Ibid.* If the provision leaves the President with constitutionally sufficient control over some subordinates (like the independent counsel), the majority asks, why not over even his close military or diplomatic advisers? See *ibid.* But the Constitution itself supplies the answer. If the only presidential duty at issue is the one to ensure faithful execution of the laws, a for-cause provision does not stand in the way: As *Morrison* recognized, it preserves authority in the President to ensure (just as the Take Care Clause requires) that an official is abiding by law. See 487 U. S., at 692. But now suppose an additional constitutional duty is implicated—relating, say, to the conduct of foreign affairs or war. To carry out those duties, the President needs advisers who will (beyond complying with law) help him devise and implement policy. And that means he

The majority's description of *Morrison*, see *ante,* at 15–16, is not true to the decision. (Mostly, it seems, the majority just wishes the case would go away. See *ante,* at 17, n. 4.) First, *Morrison* is no "exception" to a broader rule from *Myers*. *Morrison* echoed all of *Humphrey's* criticism of the by-then infamous *Myers* "dicta." 487 U. S., at 687. It again rejected the notion of an "all-inclusive" removal power. *Ibid.* It yet further confined *Myers*' reach, making clear that Congress could restrict the President's removal of officials carrying out even the most traditional executive functions. And the decision, with care, set out the governing rule—again, that removal restrictions are permissible so long as they do not impede the President's performance of his own constitutionally assigned duties. Second, as all that suggests, *Morrison* is not limited to inferior officers. In the eight pages addressing the removal issue, the Court constantly spoke of "officers" and "officials" in general. 487 U. S., at 685–693. By contrast, the Court there used the word "inferior" in just one sentence (which of course the majority quotes), when applying its general standard to the case's facts. *Id.,* at 691. Indeed, Justice Scalia's dissent emphasized that the counsel's inferior-office status played no role in the Court's decision. See *id.,* at 724 ("The Court could have resolved the removal power issue in this case by simply relying" on that status, but did not). As Justice Scalia noted, the Court in *United States* v. *Perkins*, 116 U. S. 483, 484–485 (1886), had a century earlier allowed Congress to restrict the President's removal power over inferior officers. See *Morrison*, 487 U. S., at 723–724. Were that *Morrison*'s basis, a simple citation would have sufficed.

Even *Free Enterprise Fund*, in which the Court recently held a removal provision invalid, operated within the framework of this precedent—and in so doing, left in place

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needs the capacity to fire such advisers for disagreeing with his policy calls.

a removal provision just like the one here. In that case, the Court considered a "highly unusual" scheme of double for-cause protection. 561 U. S., at 505. Members of an accounting board were protected from removal by SEC Commissioners, who in turn were protected from removal by the President. The Court found that the two-layer structure deprived the President of "adequate control" over the Board members. *Id.,* at 508. The scheme "impaired" the President's "ability to execute the laws," the Court explained, because neither he nor any fully dependent agent could decide "whether[] good cause exists" for a discharge. *Id.,* at 495–496. That holding cast no doubt on ordinary for-cause protections, of the kind in the Court's prior cases (and here as well). Quite the opposite. The Court observed that it did not "take issue with for-cause limitations in general"—which *do* enable the President to determine whether good cause for discharge exists (because, say, an official has violated the law). *Id.,* at 501. And the Court's solution to the constitutional problem it saw was merely to strike one level of insulation, making the Board removable by the SEC at will. That remedy left the SEC's own for-cause protection in place. The President could thus remove Commissioners for malfeasance or neglect, but not for policy disagreements. See *ante,* at 28.

So caselaw joins text and history in establishing the general permissibility of for-cause provisions giving some independence to agencies. Contrary to the majority's view, those laws do not represent a suspicious departure from illimitable presidential control over administration. For almost a century, this Court has made clear that Congress has broad discretion to enact for-cause protections in pursuit of good governance.

D

The deferential approach this Court has taken gives Congress the flexibility it needs to craft administrative agencies. Diverse problems of government demand diverse solutions. They call for varied measures and mixtures of democratic accountability and technical expertise, energy and efficiency. Sometimes, the arguments push toward tight presidential control of agencies. The President's engagement, some people say, can disrupt bureaucratic stagnation, counter industry capture, and make agencies more responsive to public interests. See, well, Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2331–2346 (2001). At other times, the arguments favor greater independence from presidential involvement. Insulation from political pressure helps ensure impartial adjudications. It places technical issues in the hands of those most capable of addressing them. It promotes continuity, and prevents short-term electoral interests from distorting policy. (Consider, for example, how the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.) Of course, the right balance between presidential control and independence is often uncertain, contested, and value-laden. No mathematical formula governs institutional design; trade-offs are endemic to the enterprise. But that is precisely why the issue is one for the political branches to debate—and then debate again as times change. And it's why courts should stay (mostly) out of the way. Rather than impose rigid rules like the majority's, they should let Congress and the President figure out what blend of independence and political control will best enable an agency to perform its intended functions.

Judicial intrusion into this field usually reveals only how little courts know about governance. Even everything I just said is an over-simplification. It suggests that agencies can easily be arranged on a spectrum, from the most to the least presidentially controlled. But that is not so. A given agency's independence (or lack of it) depends on a wealth of features, relating not just to removal standards, but also to appointments practices, procedural rules, internal organization, oversight regimes, historical traditions, cultural norms, and (inevitably) personal relationships. It is hard to pinpoint how those factors work individually, much less in concert, to influence the distance between an agency and a President. In that light, even the judicial opinions' perennial focus on removal standards is a bit of a puzzle. Removal is only the most obvious, not necessarily the most potent, means of control. See generally *Free Enterprise Fund*, 561 U. S., at 524 (BREYER, J., dissenting). That is because informal restraints can prevent Presidents from firing at-will officers—and because other devices can keep officers with for-cause protection under control. Of course no court, as *Free Enterprise Fund* noted, can accurately assess the "bureaucratic minutiae" affecting a President's influence over an agency. *Id.*, at 500 (majority opinion); *ante,* at 30 (reprising the point). But that is yet more reason for courts to defer to the branches charged with fashioning administrative structures, and to hesitate before ruling out agency design specs like for-cause removal standards.

Our Constitution, as shown earlier, entrusts such decisions to more accountable and knowledgeable actors. See *supra,* at 4–9. The document—with great good sense—sets out almost no rules about the administrative sphere. As Chief Justice Marshall wrote when he upheld the first independent financial agency: "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument." *McCulloch*, 4 Wheat., at 415. That would have been, he continued, "an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly." *Ibid.* And if the Constitution, for those reasons, does not lay out immutable rules, then neither should judges. This Court has usually respected that injunction. It has declined to second-guess the work of the political branches in creating independent agencies like the CFPB. In reversing course today—in spurning a "pragmatic, flexible approach to American governance" in favor of a dogmatic, inflexible one, *ante,* at 29—the majority makes a serious error.

II

As the majority explains, the CFPB emerged out of disaster. The collapse of the subprime mortgage market "precipitat[ed] a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." *Ante,* at 3. In that moment of economic ruin, the President proposed and Congress enacted legislation to address the causes of the collapse and prevent a recurrence. An important part of that statute created an agency to protect consumers from exploitative financial practices. The agency would take over enforcement of almost 20 existing federal laws. See 12 U. S. C. §5581. And it would administer a new prohibition on "unfair, deceptive, or abusive act[s] or practice[s]" in the consumer-finance sector. §5536(a)(1)(B).

No one had a doubt that the new agency should be independent. As explained already, Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC. See *supra,* at 11–16. And agencies of that kind had administered most of the legislation whose enforcement the new statute transferred to the CFPB. The law thus included an ordinary for-cause provision—once again, that the President could fire the CFPB's Director only for "inefficiency, neglect of duty, or malfeasance in office." §5491(c)(3). That standard would allow the President to discharge the Director for a failure to "faithfully execute[]" the law, as well as for basic incompetence. U. S. Const., Art. II, §3; see *supra,* at 8, 20. But it would not permit removal for policy differences.

The question here, which by now you're well equipped to answer, is whether including that for-cause standard in the statute creating the CFPB violates the Constitution.

A

Applying our longstanding precedent, the answer is clear: It does not. This Court, as the majority acknowledges, has sustained the constitutionality of the FTC and similar independent agencies. See *ante,* at 2, 13–16. The for-cause protections for the heads of those agencies, the Court has found, do not impede the President's ability to perform his own constitutional duties, and so do not breach the separation of powers. See *supra,* at 18–22. There is nothing different here. The CFPB wields the same kind of power as the FTC and similar agencies. And all of their heads receive the same kind of removal protection. No less than those other entities—by now part of the fabric of government—the CFPB is thus a permissible exercise of Congress's power under the Necessary and Proper Clause to structure administration.

First, the CFPB's powers are nothing unusual in the universe of independent agencies. The CFPB, as the majority notes, can issue regulations, conduct its own adjudications, and bring civil enforcement actions in court—all backed by the threat of penalties. See *ante,* at 1; 12 U. S. C. §§5512, 5562–5565. But then again, so too can (among others) the FTC and SEC, two agencies whose regulatory missions parallel the CFPB's. See 15 U. S. C. §§45, 53, 57a, 57b–3, 78u, 78v, 78w. Just for a comparison, the CFPB now has 19 enforcement actions pending, while the SEC brought 862 such actions last year alone. See Brief for Petitioner 7; SEC, Div. of Enforcement 2019 Ann. Rep. 14. And although the majority bemoans that the CFPB can "bring the coercive power of the state to bear on millions of private citizens," *ante,* at 18, that scary-sounding description applies to most independent agencies. Forget that the more relevant factoid for those many citizens might be that the CFPB has recovered over $11 billion for banking consumers. See *ante,* at 5. The key point here is that the CFPB got the mass of its regulatory authority from other independent agencies that had brought the same "coercive power to bear." See 12 U. S. C. §5581 (transferring power from, among others, the Federal Reserve, FTC, and FDIC). Congress, to be sure, gave the CFPB new authority over "unfair, deceptive, or abusive act[s] or practice[s]" in transactions involving a "consumer financial product or service." §§5517(a)(1), 5536(a)(1). But again, the FTC has power to go after "unfair or deceptive acts or practices in or affecting commerce"—a portfolio spanning a far wider swath of the economy. 15 U. S. C. §45(a)(1).[10] And if influence on economic life is the measure, consider the Federal Reserve, whose every act has global consequence. The CFPB, gauged by that comparison, is a piker.

Second, the removal protection given the CFPB's Director

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[10] The majority suggests that the FTC was a different animal when this Court upheld its independent status in *Humphrey's*. See *ante,* at 17. But then, as now, the FTC's organic statute broadly "empowered and directed" the agency "to prevent persons" or businesses "from using unfair methods of competition in commerce." Act of Sept. 26, 1914, §5, 38 Stat. 719. To fulfill that mandate, the agency could and did run investigations, bring administrative charges, and conduct adjudications. See *ibid.*; §6(a), *id.*, at 721; FTC Ann. Rep. (1935) (describing the FTC's extensive enforcement activities in the year before *Humphrey's*). And if any person refused to comply with an order, the agency could seek its enforcement in federal court under a highly deferential standard. See §5, 38 Stat. 720; *FTC* v. *Pacific States Paper Trade Assn.*, 273 U. S. 52, 63 (1927). Still more, the FTC has always had statutory rulemaking authority, even though (like several other agencies) it relied on adjudications until the 1960s. See §6(g), 38 Stat. 722; *National Petroleum Refiners Assn.* v. *FTC*, 482 F. 2d 672, 686 (CADC 1973). (The majority's reply that a court including Charles Evans Hughes, Louis Brandeis, Benjamin Cardozo, and Harlan Stone somehow misunderstood these powers, see *ante,* at 17, n. 4, lacks all plausibility.) And in any case, the relevant point of comparison is the present-day FTC, which remains independent even if it now has some expanded powers—and which remains constitutional under not only *Humphrey's* but also *Morrison*. See *supra,* at 18–20.

is standard fare. The removal power rests with the President alone; Congress has no role to play, as it did in the laws struck down in *Myers* and *Bowsher*. See *supra,* at 17–18. The statute provides only one layer of protection, unlike the law in *Free Enterprise Fund*. See *supra,* at 21–22. And the clincher, which you have heard before: The for-cause standard used for the CFPB is identical to the one the Court upheld in *Humphrey's*. Both enable the President to fire an agency head for "inefficiency, neglect of duty, or malfeasance in office." See 12 U. S. C. §5491(c)(3); 15 U. S. C. §41; *supra,* at 18. A removal provision of that kind applied to a financial agency head, this Court has held, does not "unduly trammel[] on executive authority," even though it prevents the President from dismissing the official for a discretionary policy judgment. *Morrison*, 487 U. S., at 691. Once again: The removal power has not been "completely stripped from the President," providing him with no means to "ensure the 'faithful execution' of the laws." *Id.,* at 692; see *supra,* at 20. Rather, this Court has explained, the for-cause standard gives the President "ample authority to assure that [the official] is competently performing his or her statutory responsibilities in a manner that comports with" all legal obligations. 487 U. S., at 692; see *supra,* at 20. In other words—and contra today's majority—the President's removal power, though not absolute, gives him the "meaningful[] control[]" of the Director that the Constitution requires. *Ante,* at 23.

The analysis is as simple as simple can be. The CFPB Director exercises the same powers, and receives the same removal protections, as the heads of other, constitutionally permissible independent agencies. How could it be that this opinion is a dissent?

B

The majority focuses on one (it says sufficient) reason:

The CFPB Director is singular, not plural. "Instead of placing the agency under the leadership of a board with multiple members," the majority protests, "Congress provided that the CFPB would be led by a single Director." *Ante,* at 1.[11] And a solo CFPB Director does not fit within either of the majority's supposed exceptions. He is not an inferior officer, so (the majority says) *Morrison* does not apply; and he is not a multimember board, so (the majority says) neither does *Humphrey's*. Further, the majority argues, "[a]n agency with a [unitary] structure like that of the CFPB" is "novel"—or, if not quite that, "almost wholly unprecedented." *Ante,* at 2, 18. Finally, the CFPB's organizational form violates the "constitutional structure" because it vests power in a "single individual" who is "insulated from Presidential control." *Ante,* at 2–3, 23.

I'm tempted at this point just to say: No. All I've explained about constitutional text, history, and precedent invalidates the majority's thesis. But I'll set out here some more targeted points, taking step by step the majority's reasoning.

First, as I'm afraid you've heard before, the majority's "exceptions" (like its general rule) are made up. See *supra,*

[11] The majority briefly mentions, but understandably does not rely on, two other features of Congress's scheme. First, the majority notes that the CFPB receives its funding outside the normal appropriations process. See *ante*, at 24–25. But so too do other financial regulators, including the Federal Reserve Board and the FDIC. See 12 U. S. C. §§243, 1815(d), 1820(e). And budgetary independence comes mostly at the expense of Congress's control over the agency, not the President's. (Because that is so, it actually works to the President's advantage.) Second, the majority complains that the Director's five-year term may prevent a President from "shap[ing the agency's] leadership" through appointments. *Ante*, at 24. But again that is true, to one degree or another, of quite a few longstanding independent agencies, including the Federal Reserve, the FTC, the Merit Systems Protection Board, and the Postal Service Board of Governors. See, *e.g.*, §§241, 242; 15 U. S. C. §41; 5 U. S. C. §§1201, 1202; 39 U. S. C. §202. (If you think the last is unimportant, just ask the current President whether he agrees.)

at 16–22. To begin with, our precedents reject the very idea of such exceptions. "The analysis contained in our removal cases," *Morrison* stated, shuns any attempt "to define rigid categories" of officials who may (or may not) have job protection. 487 U. S., at 689. Still more, the contours of the majority's exceptions don't connect to our decisions' reasoning. The analysis in *Morrison*, as I've shown, extended far beyond inferior officers. See *supra,* at 20–21. And of course that analysis had to apply to *individual* officers: The independent counsel was very much a person, not a committee. So the idea that *Morrison* is in a separate box from this case doesn't hold up.[12] Similarly, *Humphrey's* and later precedents give no support to the majority's view that the number of people at the apex of an agency matters to the constitutional issue. Those opinions mention the "groupness" of the agency head only in their background sections. The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception. So if the majority really wants to see something "novel," *ante,* at 2, it need only look to its opinion.

By contrast, the CFPB's single-director structure has a fair bit of precedent behind it. The Comptroller of the Currency. The Office of the Special Counsel (OSC). The Social Security Administration (SSA). The Federal Housing Finance Agency (FHFA). Maybe four prior agencies is in the eye of the beholder, but it's hardly nothing. I've already

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[12] The majority, seeking some other way to distinguish *Morrison*, asserts that the independent counsel's "duties" were more "limited" than the CFPB Director's. *Ante*, at 17–18. That's true in a sense: All (all?) the special counsel had to do was decide whether the President and his top advisers had broken the law. But I doubt (and I suspect Presidents would too) whether the need to control those duties was any less "central to the functioning of the Executive Branch" than the need to control the CFPB's. *Morrison*, 487 U. S., at 691–692. And in any event, as I've shown, *Morrison* did much more than approve a specific removal provision; it created a standard to govern all removal cases that is at complete odds with the majority's reasoning. See *supra,* at 19–21.

explained why the earliest of those agencies—the Civil-War-era Comptroller—is not the blip the majority describes. See *supra,* at 14–15. The office is one in a long line, starting with the founding-era Comptroller of the Treasury (also one person), of financial regulators designed to do their jobs with some independence. As for the other three, the majority objects: too powerless and too contested. See *ante,* at 18–21. I think not. On power, the SSA runs the Nation's largest government program—among other things, deciding all claims brought by its 64 million beneficiaries; the FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely; and the OSC prosecutes misconduct in the two-million-person federal workforce. All different from the CFPB, no doubt; but the majority can't think those matters beneath a President's notice. (Consider: Would the President lose more votes from a malfunctioning SSA or CFPB?) And controversial? Well, yes, they are. Almost *all* independent agencies are controversial, no matter how many directors they have. Or at least controversial among Presidents and their lawyers. That's because whatever might be said in their favor, those agencies divest the President of some removal power. If signing statements and veto threats made independent agencies unconstitutional, quite a few wouldn't pass muster. Maybe that's what the majority really wants (I wouldn't know)—but it can't pretend the disputes surrounding these agencies had anything to do with whether their heads are singular or plural.

Still more important, novelty is not the test of constitutionality when it comes to structuring agencies. See *Mistretta* v. *United States*, 488 U. S. 361, 385 (1989) ("[M]ere anomaly or innovation" does not violate the separation of powers). Congress regulates in that sphere under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat Clause. See *supra,* at 6. The Framers understood that new times would often require new measures, and exigencies often demand innovation. See *McCulloch*, 4 Wheat., at 415; *supra,* at 24. In line with that belief, the history of the administrative sphere—its rules, its practices, its institutions—is replete with experiment and change. See *supra,* at 9–16. Indeed, each of the agencies the majority says now fits within its "exceptions" was once new; there is, as the saying goes, "a first time for everything." *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 549 (2012). So even if the CFPB differs from its forebears in having a single director, that departure is not itself "telling" of a "constitutional problem." *Ante,* at 18. In deciding what *this* moment demanded, Congress had no obligation to make a carbon copy of a design from a bygone era.

And Congress's choice to put a single director, rather than a multimember commission, at the CFPB's head violates no principle of separation of powers. The purported constitutional problem here is that an official has "slip[ped] from the Executive's control" and "supervision"—that he has become unaccountable to the President. *Ante,* at 23, 25 (internal quotation marks omitted). So to make sense on the majority's own terms, the distinction between singular and plural agency heads must rest on a theory about why the former more easily "slip" from the President's grasp. But the majority has nothing to offer. In fact, the opposite is more likely to be true: To the extent that such matters are measurable, individuals are easier than groups to supervise.

To begin with, trying to generalize about these matters is something of a fool's errand. Presidential control, as noted earlier, can operate through many means—removal to be sure, but also appointments, oversight devices (*e.g.,* centralized review of rulemaking or litigating positions), budgetary processes, personal outreach, and more. See *Free Enterprise Fund*, 561 U. S., at 524 (BREYER, J., dissenting);

supra, at 23–24.[13] The effectiveness of each of those control mechanisms, when present, can then depend on a multitude of agency-specific practices, norms, rules, and organizational features. In that complex stew, the difference between a singular and plural agency head will often make not a whit of difference. Or to make the point more concrete, a multimember commission may be harder to control than an individual director for a host of reasons unrelated to its plural character. That may be so when the two are subject to the same removal standard, or even when the individual director has greater formal job protection. Indeed, the very category of multimember commissions breaks apart under inspection, spoiling the majority's essential dichotomy. See generally Brief for Rachel E. Barkow et al. as *Amici Curiae*. Some of those commissions have chairs appointed by the President; others do not. Some of those chairs are quite powerful; others are not. Partisan balance requirements, term length, voting rules, and more—all vary widely, in ways that make a significant difference to the ease of presidential control. Why, then, would anyone

[13] To use one important example, Congress provided for executive oversight of all the CFPB's rulemaking. The Financial Stability Oversight Council can veto by a two-thirds vote any CFPB regulation it deems a threat to the "safety and soundness" of the financial system. 12 U. S. C. §5513(a). The FSOC is chaired by the Treasury Secretary, and most of its members are under the direct supervision of the President. See §5321. So the majority is wrong in saying that the CFPB's Director can "*unilaterally*" issue final regulations. *Ante*, at 23 (emphasis in original). Indeed, the President has more control over rulemaking at the CFPB than at any similar independent agency. And the majority is similarly wrong to think that because the FSOC has not yet issued a formal veto, its review authority makes no practical difference. See *ante,* at 25, n. 9. Regulatory review, whether by the Office of Management and Budget or the FSOC, usually relies more on the threat of vetoes than on their execution. OMB casts a long shadow over rulemaking in the Executive Branch, but rarely uses its veto pen. See Sunstein, The Office of Information and Regulatory Affairs: Myths and Realities, 126 Harv. L. Rev. 1838, 1846–1847, n. 37 (2013).

distinguish along a simple commission/single-director axis when deciding whether the Constitution requires at-will removal?

But if the demand is for generalization, then the majority's distinction cuts the opposite way: More powerful control mechanisms are needed (if anything) for commissions. Holding everything else equal, those are the agencies more likely to "slip from the Executive's control." *Ante,* at 25. Just consider your everyday experience: It's easier to get one person to do what you want than a gaggle. So too, you know exactly whom to blame when an individual—but not when a group—does a job badly. The same is true in bureaucracies. A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. Indeed, that is *why* Congress so often resorts to hydra-headed agencies. "[M]ultiple membership," an influential Senate Report concluded, is "a buffer against Presidential control" (especially when combined, as it often is, with partisan-balance requirements). Senate Committee on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 95–91, vol. 5, p. 75 (1977). So, for example, Congress constructed the Federal Reserve as it did because it is "easier to protect a board from political control than to protect a single appointed official." R. Cushman, The Independent Regulatory Commissions 153 (1941).[14] It is hard to know why Congress did not

[14] I could go on. A recent study prepared for the Administrative Conference of the United States noted that "[g]overnance by multiple members limits the President's influence." J. Selin & D. Lewis, Sourcebook of United States Executive Agencies 89 (2d ed. 2018). And the General Accounting Office has recognized that the desire for "greater independence" is what "most likely explains why the Congress in the past has opted to head independent regulatory bodies with multimember commissions rather than single administrators." Hearing before the Senate Subcommittee on the Consumer of the Committee on Commerce, Science, and Transportation, 100th Cong., 1st Sess., 135 (1987) (Statement of F.

take the same tack when creating the CFPB. But its choice brought the agency only closer to the President—more exposed to his view, more subject to his sway. In short, the majority gets the matter backward: Where presidential control is the object, better to have one than many.

Because it has no answer on that score, the majority slides to a different question: Assuming presidential control of any independent agency is vanishingly slim, is a single-head or a multi-head agency more capable of exercising power, and so of endangering liberty? See *ante,* at 21–23. The majority says a single head is the greater threat because he may wield power "*unilaterally*" and "[w]ith no colleagues to persuade." *Ante,* at 23 (emphasis in original). So the CFPB falls victim to what the majority sees as a constitutional anti-power-concentration principle (with an exception for the President).

If you've never heard of a statute being struck down on that ground, you're not alone. It is bad enough to "extrapolat[e]" from the "general constitutional language" of Article II's Vesting Clause an unrestricted removal power constraining Congress's ability to legislate under the Necessary and Proper Clause. *Morrison*, 487 U. S., at 690, n. 29; see *supra,* at 7. It is still worse to extrapolate from the Constitution's general structure (division of powers) and implicit values (liberty) a limit on Congress's express power to create administrative bodies. And more: to extrapolate from such sources a distinction as prosaic as that between the SEC and the CFPB—*i.e.,* between a multi-headed and single-headed agency. That is, to adapt a phrase (or two) from our precedent, "more than" the emanations of "the text will bear." *Morrison*, 487 U. S., at 690, n. 29. By using abstract separation-of-powers arguments for such purposes, the Court "appropriate[s]" the "power delegated to Congress

Frazier).

by the Necessary and Proper Clause" to compose the government. Manning, Foreword: The Means of Constitutional Power, 128 Harv. L. Rev. 1, 78 (2014). In deciding for itself what is "proper," the Court goes beyond its own proper bounds.

And in doing so, the majority again reveals its lack of interest in how agencies work. First, the premise of the majority's argument—that the CFPB head is a mini-dictator, not subject to meaningful presidential control, see *ante*, at 23—is wrong. As this Court has seen in the past, independent agencies are not fully independent. A for-cause removal provision, as noted earlier, leaves "ample" control over agency heads in the hands of the President. *Morrison*, 487 U. S., at 692; see *supra*, at 20. He can discharge them for failing to perform their duties competently or in accordance with law, and so ensure that the laws are "faithfully executed." U. S. Const., Art. II, §3; see *supra,* at 8, 20. And he can use the many other tools attached to the Office of the Presidency—including in the CFPB's case, rulemaking review—to exert influence over discretionary policy calls. See *supra*, at 33, and n. 13. Second, the majority has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director (even supposing that were a suitable issue for a court to address). *Ante*, at 21, 23. Maybe the CFPB would be. Or maybe not. Although a multimember format tends to frustrate the President's control over an agency, see *supra*, at 34–35, it may not lessen the agency's own ability to act with decision and dispatch. (Consider, for a recent example, the Federal Reserve Board.) That effect presumably would depend on the agency's internal organization, voting rules, and similar matters. At the least: If the Court is going to invalidate statutes based on empirical assertions like this one, it should offer some empirical support. It should not pretend that its assessment that the CFPB wields more power more dangerously than the SEC comes from someplace in the Constitution. But today the majority fails to accord even that minimal respect to Congress.

III

Recall again how this dispute got started. In the midst of the Great Recession, Congress and the President came together to create an agency with an important mission. It would protect consumers from the reckless financial practices that had caused the then-ongoing economic collapse. Not only Congress but also the President thought that the new agency, to fulfill its mandate, needed a measure of independence. So the two political branches, acting together, gave the CFPB Director the same job protection that innumerable other agency heads possess. All in all, those branches must have thought, they had done a good day's work. Relying on their experience and knowledge of administration, they had built an agency in the way best suited to carry out its functions. They had protected the public from financial chicanery and crisis. They had governed.

And now consider how the dispute ends—with five unelected judges rejecting the result of that democratic process. The outcome today will not shut down the CFPB: A different majority of this Court, including all those who join this opinion, believes that *if* the agency's removal provision is unconstitutional, it should be severed. But the majority on constitutionality jettisons a measure Congress and the President viewed as integral to the way the agency should operate. The majority does so even though the Constitution grants to Congress, acting with the President's approval, the authority to create and shape administrative bodies. And even though those branches, as compared to courts, have far greater understanding of political control mechanisms and agency design.

Nothing in the Constitution requires that outcome; to the contrary. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring). The Framers took pains to craft a document that would allow the structures of governance to change, as times and needs change. The Constitution says only a few words about administration. As Chief Justice Marshall wrote: Rather than prescribing "immutable rules," it enables Congress to choose "the means by which government should, in all future time, execute its powers." *McCulloch*, 4 Wheat., at 415. It authorizes Congress to meet new exigencies with new devices. So Article II does not generally prohibit independent agencies. Nor do any supposed structural principles. Nor do any odors wafting from the document. Save for when those agencies impede the President's performance of his own constitutional duties, the matter is left up to Congress.

Our history has stayed true to the Framers' vision. Congress has accepted their invitation to experiment with administrative forms—nowhere more so than in the field of financial regulation. And this Court has mostly allowed it to do so. The result is a broad array of independent agencies, no two exactly alike but all with a measure of insulation from the President's removal power. The Federal Reserve Board; the FTC; the SEC; maybe some you've never heard of. As to each, Congress thought that formal job protection for policymaking would produce regulatory outcomes in greater accord with the long-term public interest. Congress may have been right; or it may have been wrong; or maybe it was some of both. No matter—the branches accountable to the people have decided how the people should be governed.

The CFPB should have joined the ranks. Maybe it will still do so, even under today's opinion: The majority tells Congress that it may "pursu[e] alternative responses" to the identified constitutional defect—"for example, converting the CFPB into a multimember agency." *Ante*, at 36. But there was no need to send Congress back to the drawing board. The Constitution does not distinguish between single-director and multimember independent agencies. It instructs Congress, not this Court, to decide on agency design. Because this Court ignores that sensible—indeed, that obvious—division of tasks, I respectfully dissent.

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-12619

D.C. Docket No. 1:18-cv-20653-UU

CARMELA DEROY,

Plaintiff - Appellee,

versus

CARNIVAL CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(June 30, 2020)

Before ROSENBAUM, GRANT, and HULL, Circuit Judges.

ROSENBAUM, Circuit Judge:

Fans of movies set in medieval times know that the narrow slits in otherwise seemingly impenetrable castle walls allowed castle defenders to launch arrows at approaching castle attackers.[1] This architectural feature was designed to protect the archer while still allowing the archer to defend the castle.[2] It is known as a "loophole."[3]

But arrows were not the only thing that could fit through castle-wall loopholes. Sometimes children and small adults could as well.[4] And they could use them to escape the thick castle walls.[5]

It's not clear that the figurative usage of the term "loophole" derives from a reference to the architectural feature. But the parallels between the two usages are nonetheless obvious. Figuratively, "loophole" has come to mean "[a]n outlet or means of escape[;] [o]ften applied to an ambiguity or omission in a statute, etc., which affords opportunity for evading its intention." *Loop-hole*, Oxford English Dictionary, https://www.oed.com/view/Entry/110180 (last visited June 29, 2020).

Here, Plaintiff-Appellee Carmela DeRoy attempts to take advantage of a supposed loophole in the forum-selection clause of a contract she entered into with

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[1] *Loophole*, Grammarist, https://grammarist.com/interesting-words/loophole/ (last visited June 29, 2020); *Loophole*, Online Etymology Dictionary, https://www.etymonline.com/word/loophole (last visited June 29, 2020).

[2] *Loophole*, Grammarist, *supra* note 1.

[3] *What's the origin of "loophole"?*, The Straight Dope (Feb. 6, 2003), https://www.straightdope.com/columns/read/2071/whats-the-origin-of-loophole/; *see also Loophole*, Dictionary by Merriam-Webster, https://www.merriam-webster.com/dictionary/loophole (last visited June 29, 2020) (defining "loophole" secondarily as, among other things, "a small opening through which small arms may be fired" and noting this definition as the "first known use" of the term, in 1591); *Loop-hole*, Oxford English Dictionary, https://www.oed.com/view/Entry/110180 (last visited June 29, 2020).

[4] The Straight Dope, *supra* note 3.

[5] *See id.*

Defendant-Appellant Carnival Corporation when she bought a ticket for a Carnival cruise. The forum-selection clause requires all litigation to proceed in federal court if federal jurisdiction lies for the claim. DeRoy, who injured her foot on a rug while onboard the Carnival *Valor*, simultaneously sued Carnival in both state and federal court. In her federal suit—this case—she attempted to plead her case to avoid invoking federal jurisdiction, even though federal jurisdiction could exist over a claim seeking damages for the injuries DeRoy allegedly suffered onboard the *Valor*. Then DeRoy sought for the district court to dismiss this federal case for lack of jurisdiction, so she could permissibly proceed with the state suit under the forum-selection clause.

It was a creative effort. But DeRoy's proposed loophole does not exist, so she cannot escape the forum-selection clause's ironclad consequences. Under the forum-selection clause's plain language, when jurisdiction for a claim could lie in federal district court, federal court is the *only* option for a plaintiff. Here, DeRoy's claim for negligence at sea falls well within the walls of the federal court's admiralty jurisdiction. Even without explicitly invoking admiralty jurisdiction—and in fact intentionally attempting to plead around it—DeRoy's complaint is subject to Federal Rule of Civil Procedure 9(h)'s provision rendering her claim an admiralty or maritime claim. Her claim is therefore subject to the forum-selection clause's federal-court-forum fortress.

For these reasons, the district court erred in dismissing the action for lack of subject-matter jurisdiction. We therefore reverse and remand for further proceedings.

I. FACTUAL BACKGROUND

For purposes of reviewing a district court's dismissal for lack of subject-matter jurisdiction, we take the facts as the plaintiff has alleged them, unless the district court has made a contrary finding. *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1568 n.1 (11th Cir. 1988).

Here, DeRoy asserted that in October 2016, she was a cruise passenger on the Carnival *Valor* ship. During her cruise, DeRoy tripped on a dip in the carpeting in one of the *Valor*'s inside hallways. As a result of her fall, DeRoy broke her right foot and suffered other damages.

On February 20, 2018, DeRoy simultaneously filed two complaints against Carnival Corporation: one in the United States District Court for the Southern District of Florida and one in the Eleventh Judicial Circuit Court in and for Miami-Dade County, Florida.[6] Each complaint contains a single negligence claim against Carnival.

DeRoy's ticket contract with Carnival contained a forum-selection clause that

[6] The record reflects that the state-court case is essentially on hold pending the outcome of this appeal.

required her to bring any claim in the United States District Court for the Southern District of Florida if it was jurisdictionally possible to do so:

> [I]t is agreed by and between the Guest and Carnival that all disputes and matters whatsoever arising under, in connection with or incident to this Contract or the Guest's cruise, including travel to and from the vessel, shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts of the United States lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida, U.S.A. to the exclusion of the Courts of any other county, state or country.

In accordance with this provision, as we have noted, DeRoy filed the suit pending here.

Yet DeRoy devoted the majority of her complaint to attempting to establish that the district court lacked subject-matter jurisdiction—whether diversity, federal-question, or admiralty jurisdiction—to adjudicate her claims. In furtherance of this tactic, DeRoy noted that both she and Carnival were citizens of Florida, so no diversity jurisdiction existed. She next pointed out that since she brought a negligence claim only, federal-question jurisdiction was lacking. And then she asserted that she had elected to bring her *in personam* negligence action *at law*—not in admiralty. So, DeRoy concluded, admiralty jurisdiction did not exist, since admiralty jurisdiction does not extend to *in personam* claims brought *at law*.

For these reasons, DeRoy contended, the federal district court lacked subject-matter jurisdiction and was required to dismiss her suit. Indeed, DeRoy invited the district court to "dismiss this case sua sponte because it lacks subject matter jurisdiction over the claims in this lawsuit." And the primary relief she sought in her negligence claim consisted of "[d]ismissal of this case for lack of subject matter jurisdiction," with damages as only an alternative request.[7]

Carnival responded with a motion to dismiss, or, in the alternative, for a more definite statement. In its motion, Carnival asserted that DeRoy undoubtedly could have invoked admiralty jurisdiction, since 28 U.S.C. § 1333 provides that "[t]he district courts have original jurisdiction, exclusive of the courts of the States," over "[a]ny civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are entitled."[8] And it noted that, to the extent the saving-to-suitors clause of § 1333 guaranteed DeRoy the right to a jury trial under the Florida constitution, Carnival would not object to a jury trial as DeRoy requested

[7] Certainly, pleading in the alternative is permissible in federal court. *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1273 (11th Cir. 2009) ("Rule 8(d) of the Federal Rules of Civil Procedure expressly permits the pleading of both alternative and inconsistent claims."). And "[t]he pleading of alternative jurisdictional bases is a common practice." *State Establishment for Agr. Prod. Trading v. M/V Wesermunde*, 770 F.2d 987, 991 n.3 (11th Cir. 1985). Pleading a lack of jurisdiction as an alternative to her affirmative claim for negligence, while contradictory, is not fatal to DeRoy's complaint.

[8] We have referred to this latter provision of 28 U.S.C. § 1333 interchangeably as the "saving to suitors" clause and the "savings to suitors" clause. *See, e.g.*, *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996) ("saving to suitors" clause); *Murphy v. Fla. Keys Elec. Co-op. Ass'n, Inc.*, 329 F.3d 1311, 1319 (11th Cir. 2003) ("savings to suitors" clause). The Supreme Court has shown a preference for utilizing the singular moniker. *See Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 443 (2001) ("saving to suitors" clause). For consistency, in this opinion, we refer to the provision as the "saving-to-suitors clause."

in her complaint.[9]

In her response to Carnival's motion, DeRoy clarified that she was not challenging the enforceability of the forum-selection clause, nor was she claiming that the saving-to-suitors clause in § 1333 gave her an inalienable right to litigate in state court, nor was she arguing that she would be deprived of her right to a jury trial under the Florida constitution. Rather, DeRoy claimed, she was simply exploiting a hole in Carnival's contract that no one had previously thought of: since, in DeRoy's view, the forum-selection clause allowed lawsuits where the federal courts had no jurisdiction to proceed in state court, DeRoy pleaded her case in a way intended to evade the federal district court's jurisdiction—specifically, by refusing to *invoke* admiralty jurisdiction.

The district court found DeRoy's position convincing and entered an order dismissing the complaint on May 22, 2018. In reaching this conclusion, the district court determined that the saving-to-suitors clause in § 1333 allowed DeRoy to evade the court's admiralty jurisdiction. In the district court's view, DeRoy, as the master of her own complaint, had deliberately avoided invoking admiralty jurisdiction. It did not matter, the district court said, that DeRoy *could* have brought her claim in admiralty because she affirmatively brought her claim at law. As a result, the district

[9] While admiralty cases do not guarantee the right to a jury trial, Federal Rule of Civil Procedure 39 permits trying such an action by jury with the parties' consent. Fed. R. Civ. P. 38, 39.

court determined, it lacked subject-matter jurisdiction over DeRoy's claim as she pleaded it. And the forum-selection clause did not remedy the jurisdictional problem, the district court reasoned, because subject-matter jurisdiction cannot be created through consent. Nevertheless, the district court recognized that *had* DeRoy brought her claim in admiralty, the court would have enjoyed subject-matter jurisdiction.

Carnival now appeals.

II. STANDARD OF REVIEW

We review *de novo* the grant of a motion to dismiss for lack of subject-matter jurisdiction. *Tundidor v. Miami-Dade Cty.*, 831 F.3d 1328, 1331 (11th Cir. 2016). In reviewing a facial challenge to a complaint, we consider only the allegations in the complaint, accepting them as true for this purpose. *McElmurray v. Consol. Gov't of Augusta-Richmond Cty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). Finally, we review *de novo* the interpretation of a contract. *Grange Mut. Cas. Co. v. Woodard*, 861 F.3d 1224, 1230 (11th Cir. 2017).

III. DISCUSSION

This case comes before us in a peculiar procedural posture, with DeRoy's tacit invocation of federal jurisdiction—by filing her complaint in the district court—coupled with DeRoy's explicit disavowal of federal jurisdiction in her allegations and claim for relief.[10] But regardless of what a complaint may say about a court's jurisdiction to entertain it, as we explain below, we look beyond the labels to the underlying facts of the complaint to evaluate jurisdiction.[11]

Here, the complaint alleges a simple personal-injury claim by a cruise-ship passenger who broke her foot while onboard Carnival's *Valor*. In dealing with claims like this, our precedent establishes four key principles that we must apply: (1) this type of claim falls comfortably within the admiralty jurisdiction of the district court; (2) a plaintiff need not expressly invoke admiralty jurisdiction for a

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[10] After the district court entered its order dismissing DeRoy's complaint, at least two other plaintiffs followed in her footsteps by filing their own complaints seeking immediate dismissal for want of jurisdiction. *See Diaz v. BPCL Mgmt.*, No. 18-cv-61379-BB (S.D. Fla. Jun. 19, 2018); *Siliakus v. Carnival Corp.*, No. 18-cv-25137-UU (Dec. 6, 2018).

[11] Carnival invites us to analyze the jurisdiction issue by analogizing to the artful-pleading doctrine. We decline to do so. That doctrine pertains to the right of a defendant to remove a cause of action over which federal subject-matter jurisdiction exists, despite the "artful pleading" or labels utilized by a plaintiff in the state court pleadings. *See Roe v. Michelin N. Am., Inc.*, 613 F.3d 1058, 1064 (11th Cir. 2010); *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 766 (11th Cir. 2010). According to the artful-pleading doctrine, a plaintiff who files suit in state court may not defeat removal simply by "omitting to plead necessary federal questions." *Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998) (quoting *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for S. Cal.*, 463 U.S. 1, 22 (1983)). "If a court concludes that a plaintiff has 'artfully pleaded' claims in this fashion, it may uphold removal even though no federal question appears on the face of the plaintiff's complaint." *Id.* While the artful-pleading doctrine shows that sometimes courts exercise jurisdiction over the protest of the plaintiff, the doctrine is not a perfect analogy. Indeed, some have argued that the doctrine is limited to cases where "federal law completely preempts a plaintiff's state-law claim." *Id.*; *Caterpillar Inc. v. Williams*, 482 U.S. 386, 397 n.11 (1987) (explaining that while removal courts have occasionally sought to determine whether the real nature of a claim is federal, regardless of a plaintiff's characterization, most courts "correctly confine this practice to areas of the law pre-empted by federal substantive law" (citation and quotation marks omitted)). Here, we need not (and do not) consider the artful-pleading doctrine since it is clear federal jurisdiction exists, regardless. *See* 14C Fed. Prac. & Proc. Juris. § 3722.1 (Rev. 4th ed.) ("Unfortunately, the artful-pleading doctrine lacks precise definition and has bred considerable confusion.").

district court to be able to exercise it where it exists; (3) in cases such as the one here, the saving-to-suitors clause does not operate as a get-out-of-federal-court escape; and (4) federal forum-selection clauses are enforceable. When we apply these principles here, what DeRoy presents as a Gordian jurisdictional knot[12] turns out to require just a straightforward application of our existing precedent to gently untangle its strings.

A. Subject-Matter Jurisdiction

Federal courts have an obligation to examine *sua sponte* their own jurisdiction over a case, notwithstanding the contentions of the parties. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999). That is so because subject-matter jurisdiction underlies a court's power to hear a case. *United States v. Cotton*, 535 U.S. 625, 630 (2002). And for that same reason, subject-matter jurisdiction can never be forfeited or waived. *Id.*

The plaintiff bears the burden of affirmatively asserting facts that show the

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[12] The term "Gordian knot," which refers to a very difficult or unsolvable problem, finds its origins in a legend about Alexander the Great. Evan Andrews, *What Was the Gordian Knot?*, HISTORY (last updated Aug. 29, 2018), https://www.history.com/news/what-was-the-gordian-knot. According to the story, in 333 B.C.E., Alexander the Great entered the Phrygian capital of Gordium in what is now Turkey. *Id.* When he arrived, he found an ancient wagon with its yoke tied with "several knots all so tightly entangled that it was impossible to see how they were fastened." *Id.* (internal quotation marks omitted). An oracle had announced that whoever could untangle the knots was destined to become the ruler of all of Asia. *Id.* After Alexander the Great tried to manually untie it for some time, according to one version of the legend, he cut the knot in half with a single stroke of his sword, announcing that it made no difference how the knot was untied. *Id.*

existence of jurisdiction and including "a short and plain statement of the grounds upon which the court's jurisdiction depends." *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994); Fed. R. Civ. P. 8(a). But even when the parties disclaim or fail to present requirements that go to the existence of subject-matter jurisdiction, courts must *sua sponte* consider such issues. *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012). And it is the facts and substance of the claims alleged, not the jurisdictional labels attached, that ultimately determine whether a court can hear a claim. *See Taylor*, 30 F.3d at 1367 (plaintiff must allege *facts* demonstrating jurisdiction); *see also In re Carter*, 618 F.2d 1093, 1101 (5th Cir. 1980)[13] (explaining that, in the context of examining a removed case, "[t]he reviewing court looks to the substance of the complaint, not the labels used in it").

Once the court establishes that jurisdiction exists, it has a duty to exercise that jurisdiction. *See Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996) ("[F]ederal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."); *Jackson-Platts v. Gen. Elec. Capital Corp.*, 727 F.3d 1127, 1143 (11th Cir. 2013).

[13] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) (holding that all decisions of the "old Fifth" Circuit handed down prior to the close of business on September 30, 1981, are binding precedent in the Eleventh Circuit).

1. Admiralty jurisdiction covers personal-injury claims like DeRoy's that occur onboard cruise ships at sea

The Constitution provides that the federal judicial power "shall extend . . . to all Cases of admiralty and maritime Jurisdiction." U. S. Const., Art. III, § 2, cl. 1. Under 28 U.S.C. § 1333, district courts enjoy "original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." Citing this provision, we have held that when cruise-ship passengers bring personal-injury claims for injuries that occurred at sea, those claims fall squarely within the admiralty jurisdiction of the district courts. *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018).

As we have explained, to fall within admiralty jurisdiction, a tort claim must satisfy two criteria: (1) the incident must have taken place on navigable water or the injury must have been caused by a vessel on navigable water; and (2) the incident must have been "connected with maritime activity." *Id.* An incident qualifies as "connected with maritime activity" if, when we evaluate "the general features of the type of incident involved," we determine that that variety of occurrence has "a potentially disruptive impact on maritime commerce" and that "the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* (quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (internal quotation marks omitted)).

DeRoy's negligence claim here meets both of these criteria. First, the incident precipitating DeRoy's claim occurred while the *Valor* was traveling at sea. Second, unchecked personal injuries allegedly resulting from a cruise-ship operator's negligence have the potential to disrupt maritime commerce, and DeRoy suffered her injury while participating as a passenger on a cruise, which is a traditional maritime activity. *See id.* ("Personal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts.").

2. DeRoy's failure to expressly allege admiralty jurisdiction here does not mean that admiralty jurisdiction ceases to exist

Sometimes, in addition to admiralty, a court enjoys another basis for subject-matter jurisdiction—say, diversity jurisdiction. In those cases, Rule 9(h) of the Federal Rules of Civil Procedure allows a party to elect to proceed at law via the other jurisdictional basis or to proceed through admiralty. Fed. R. Civ. P. 9(h)(1) ("If a claim for relief is within the admiralty or maritime jurisdiction and also within the court's subject-matter jurisdiction on some other ground, the pleading may designate the claim as an admiralty or maritime claim[.]"). And if a party has two or more viable bases for jurisdiction, one of which is admiralty, then the party's failure to designate her claim as arising in admiralty means that the case will instead proceed at law. *Murphy v. Fla. Keys Elec. Co-op. Ass'n, Inc.*, 329 F.3d 1311, 1319 (11th Cir. 2003) ("If a claim has multiple jurisdictional bases, one of which is admiralty, . . . [f]ailure to identify a claim as an admiralty or maritime claim in these circumstances means that it is not one.”).

Crucially, though, Rule 9(h) also provides that “[a] claim cognizable *only* in the admiralty or maritime jurisdiction is an admiralty or maritime claim for those purposes, *whether or not so designated*.” Fed. R. Civ. P. 9(h)(1) (emphasis added). Although Rule 9(h) allows a plaintiff in a maritime case to choose whether to proceed at law or in admiralty, that choice is available only if there is a choice to be made—that is, if the plaintiff has a separate basis for subject-matter jurisdiction other than admiralty. But when admiralty is the only basis for jurisdiction, then admiralty jurisdiction applies, regardless of how the plaintiff designates her case.

Caron presents an example of a case where a claim proceeded in admiralty despite the plaintiff’s failure to elect admiralty jurisdiction under Federal Rule of Civil Procedure 9(h) as his primary basis for jurisdiction. There, Caron, the plaintiff, impaired after drinking alcohol, fell down an escape hatch on a cruise ship. 910 F.3d at 1362. He sued the cruise line for serving him too much alcohol. *Id.* In his complaint, Caron asserted both diversity of citizenship and admiralty jurisdiction. *Id.* at 1363. On appeal, we addressed whether the district court had subject-matter jurisdiction of Caron’s claim. Caron argued that alienage-diversity jurisdiction existed; as a backup, though, he also asserted that he had sufficiently invoked admiralty jurisdiction, notwithstanding his failure to officially designate admiralty under Rule 9(h). *See id.* at 1364–65 & n.4.

We ruled that though alienage-diversity jurisdiction was lacking over Caron's case, we did have admiralty jurisdiction, as "[p]ersonal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts." *Id.* at 1365. We clarified that "[s]ince admiralty was the only proper source of jurisdiction, Caron was not required to elect it under Federal Rule of Civil Procedure 9(h)" to proceed on that basis. *Id.* at 1365 n.4. Rather, we explained, we enjoyed jurisdiction because "Caron alleged sufficient *facts* to support the District Court's exercise of admiralty jurisdiction." *Id.* at 1366 (emphasis added).

Like the claim at issue in *Caron*, DeRoy's negligence claim lies squarely within federal-court admiralty jurisdiction, since, as we have explained, the facts and tort claim she alleged satisfy admiralty jurisdiction. So despite DeRoy's attempt to avoid invoking admiralty jurisdiction, the district court enjoyed it nonetheless.

It makes no difference that in *Caron*, Caron affirmatively invoked admiralty jurisdiction in the alternative, and in DeRoy's case, DeRoy actively attempted to disclaim admiralty jurisdiction throughout her complaint. Admiralty jurisdiction turns on the *facts* and substance of the claims alleged in the complaint. And here, the complaint alleges sufficient facts demonstrating that the district court had admiralty subject-matter jurisdiction. *Cotton*, 535 U.S. at 630; *Taylor*, 30 F.3d at

1367; *Gonzalez,* 565 U.S. at 141. Since admiralty jurisdiction is the only basis for federal jurisdiction under the facts and substance of DeRoy's complaint, the district court enjoyed admiralty jurisdiction in this case, whether DeRoy invoked it or not. Fed. R. Civ. P. 9(h).

3. The saving-to-suitors clause does not nullify admiralty jurisdiction over this action

Although the district court was aware that admiralty jurisdiction could lie for a claim like DeRoy's, it nonetheless concluded that under § 1333's saving-to-suitors clause, DeRoy could and did choose to avoid admiralty jurisdiction. That was error.

As we have noted, § 1333 vests district courts with original jurisdiction over civil admiralty or maritime disputes, but the statute "saves to suitors"—meaning plaintiffs—"all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). While the Supreme Court has noted that the drafters' intention behind what is now § 1333 "is not entirely clear and has been the subject of some debate," it has nonetheless concluded that "the saving to suitors clause preserves remedies and the concurrent jurisdiction of state courts over some admiralty and maritime claims."[14] *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 444, 445 (2001).

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[14] The saving-to-suitors clause does not provide concurrent state and federal jurisdiction over all admiralty claims. *In rem* proceedings, "where a vessel or thing is itself treated as the offender and made the defendant by name or description in order to enforce a lien," fall exclusively within the federal domain. *Madruga v. Superior Court of State of Cal. in & for San Diego Cty.*, 346 U.S. 556, 560 (1954).

One remedy the saving-to-suitors clause safeguards is the right to a jury trial.[15] *Id.* at 454–55 ("Trial by jury is an obvious, but not exclusive, example of the remedies available to suitors."). Unlike with federal cases brought at law, no Seventh Amendment right to a jury trial applies in admiralty cases. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963). So we have said that the saving-to-suitors clause "embodies a presumption in favor of jury trial and common law remedies in the forum of the claimant's choice." *Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996).

For that reason, we have concluded that the saving-to-suitors clause generally provides a plaintiff in a maritime case alleging an *in personam* claim three options: "(1) the plaintiff may file suit in federal court under admiralty jurisdiction . . . ; (2) the plaintiff may file suit in federal court under diversity jurisdiction; or (3) the plaintiff may file suit in state court." *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181, 1187 n.13 (11th Cir. 2009); *Diesel "Repower", Inc. v. Islander Invs. Ltd.*, 271 F.3d 1318, 1322 (11th Cir. 2001) ("The saving to suitors clause allows an *in personam* action, whether the action is instituted in a state court or in a federal court under diversity jurisdiction or in a federal court under maritime jurisdiction.").

[15] In the district court, DeRoy disclaimed any reliance on an argument that the saving-to-suitors clause gave her an inalienable right to litigate in state court or that she otherwise would be deprived of her right to a jury trial under the Florida constitution by proceeding in federal court.

Nothing about the saving-to-suitors clause does anything to alter the fact that the district court enjoyed admiralty jurisdiction over DeRoy's claim, based on the facts she alleged in her complaint and given that DeRoy herself filed this action in federal court. Nor does the saving-to-suitors clause authorize a plaintiff who files in federal court to escape or sabotage existing admiralty jurisdiction by simply labeling her claims "at law," rather than "in admiralty." The saving-to-suitors clause of 28 U.S.C. § 1333 likewise does not relieve courts of their burden to examine their own jurisdiction. And when a plaintiff herself files a suit in federal court, the saving-to-suitors clause does not modify Rule 9(h) to permit a party to "elect" to proceed at law in federal court instead of in admiralty when admiralty provides the only basis for subject-matter jurisdiction—at least not when the defendant agrees to a jury trial.

Rather, the saving-to-suitors clause allowed DeRoy to choose to file her claim exclusively in state court. Because DeRoy did not, though, and because she voluntarily filed in federal court and alleged sufficient facts to satisfy admiralty jurisdiction, DeRoy's case could not be dismissed from federal district court for lack of subject-matter jurisdiction. And the saving-to-suitors clause is not even arguably relevant to the analysis, since DeRoy filed in federal court and Carnival has agreed to a jury trial.

We also reject the notion that the saving-to-suitors clause's impact on removal jurisdiction has any relevance here. True, if the plaintiff elects to file a maritime case in state court, that case may not be removed to federal court solely on the basis of admiralty jurisdiction. *Armstrong v. Ala. Power Co.*, 667 F.2d 1385, 1388 (11th Cir. 1982) ("[A] federal district court should not accept the removal of a saving clause case solely because of its general maritime nature: the maritime nature simply does not provide a ground for federal jurisdiction.").[16] But this is not a removal action. And neither the fact that the saving-to-suitors clause gives state and federal courts concurrent jurisdiction over admiralty *in personam* cases nor the fact that a defendant may not remove a saving-to-suitors claim solely on the basis of admiralty jurisdiction affects DeRoy's affirmative act of filing her own suit in federal court. Because DeRoy did so and the facts she alleged nonetheless established admiralty jurisdiction, the district court had admiralty jurisdiction over DeRoy's maritime negligence claim, regardless of the saving-to-suitors clause.

B. The forum-selection clause here required DeRoy to file in the U.S. District Court in Miami any claims over which federal jurisdiction could exist if properly pleaded

As we have discussed, the district court dismissed DeRoy's maritime negligence claim for lack of subject-matter jurisdiction, even though it recognized that admiralty jurisdiction could exist over DeRoy's claim. We have already

[16] We decided *Armstrong* under a version of the removal statute, 28 U.S.C. § 1441, that has since been amended. Section 1441(b) was amended as part of the Federal Courts Jurisdiction and Venue Clarification Act of 2011, § 102, Pub. L. No. 112–63, 125 Stat. 758. We have yet to consider whether *Amstrong*'s holding withstands these amendments, nor need we do so now, as DeRoy's action is not before us as a result of removal.

explained why that was error from a jurisdictional point of view. But it was also error for another reason: the forum-selection clause did not allow DeRoy to avoid federal jurisdiction for any claims she had against Carnival that could be brought in federal court.

While the saving-to-suitors clause gives state and federal courts concurrent jurisdiction over admiralty *in personam* cases such as this one, parties are free to contract for a federal forum for potential claims, provided, of course, that the federal forum has independent subject-matter jurisdiction. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11(1972); *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). DeRoy has expressly disclaimed challenging the enforceability of the clause, so we must apply the clause here.

In interpreting a forum-selection clause's language, we turn to general contract principles to apply the plain meaning of the contract's language. *Slater v. Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1330 (11th Cir. 2011). We consider the contract as a whole, the parties, and the agreement's purpose to best determine the intent of the parties. *Id.* Where contract principles do not reveal a particular meaning of a clause in question and more than one reasonable construction is plausible, we choose the construction that favors the non-drafting party. *Id.*

We begin our analysis of the forum-selection clause here by considering whether it is permissive or mandatory. As its name suggests, a permissive clause permits litigation in a jurisdiction other than the one designated. *Id.* But a mandatory clause requires the party to litigate exclusively within the designated forum. *Id.*

Here, as we have noted, the forum-selection clause provides, in relevant part, that "all disputes . . . shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami, or as to those lawsuits to which the Federal Courts . . . lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida." The plain meaning of the forum-selection clause at issue here reflects that the clause is a mandatory one that requires a litigant to sue in Miami federal district court when her claims are amenable to federal jurisdiction.

Three aspects of the first half of the clause—"all disputes . . . shall be litigated, if at all, before the United States District Court for the Southern District of Florida in Miami"—stand out. First, the clause specifies that it pertains to "all" disputes arising from the cruise. We have recognized that "all" means "every" or "any." *See United States v. Castro*, 837 F.2d 441, 445 (11th Cir. 1988) (concluding "any" means "every" or "all"). So the forum-selection clause applies to every dispute that arises from the cruise. Second, the clause employs the term "shall." We have recognized that "the use of the term 'shall' is one of requirement." *See Slater*, 634 F.3d at 1330. So this word requires any litigation to occur in the United States District Court for the Southern District of Florida. And third, the clause uses the phrase "if at all" in describing litigation. In the context of the forum-selection clause at issue, this language means that if a dispute can be litigated in the Southern District of Florida, that is the only place it can be litigated. If such a dispute is not litigated in the Southern District of Florida, it is not to be litigated "at all."

The second half of the forum-selection clause—"or as to those lawsuits to which the Federal Courts . . . lack subject matter jurisdiction, before a court located in Miami-Dade County, Florida"—does nothing to change the fact that all disputes arising from the cruise, that can be litigated in the Southern District of Florida, must be litigated there or not litigated at all. Rather, the second half of the clause permits a plaintiff to file in state court only when the federal court does not have subject-matter jurisdiction over the claim. It is a failsafe that guards against the possibility that a plaintiff with a potentially viable claim will not be able to have her claim heard because federal jurisdiction is lacking over the facts of the claim.

Contrary to DeRoy's argument, the "or" language is not an invitation for litigants to forum shop. Litigants who wish to be in state court cannot simply refuse to set forth the correct federal jurisdictional ground. DeRoy's construction would render the "shall" language meaningless and effectively nullify the forum-selection clause: a plaintiff could just "decline" to invoke diversity or admiralty jurisdiction to get into state court. We do not construe contracts that way. Rather, when, as here, we may reasonably construe a contract to give every provision meaning, we do so. *Fla. Polk Cty. v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 (11th Cir. 1999).

We further note that the Supreme Court has concluded that cruise lines have a special interest in clarifying where they can be sued, since their business involves transporting passengers through many jurisdictions. *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991). Clarity in the forum for litigation spares parties time and expense, and it allows the cruise line to pass the savings to passengers. *Id.* at 594. We will not effectively repudiate a valid forum-selection clause by allowing a plaintiff to circumvent it by refusing to acknowledge the correct basis for federal jurisdiction over her case.

Indeed, DeRoy has conceded that she concurrently filed her complaint in federal court because, in the absence of a binding federal holding that the district court did not enjoy jurisdiction over her claim, binding case law in state court would have required the state court to dismiss her claim in accordance with the forum-selection clause. Courts in the jurisdiction where DeRoy filed her state-court complaint, Florida's Third District Court of Appeal, have found enforceable the very forum-selection clause at issue here, requiring other lawsuits to proceed in federal court where jurisdiction exists. *M.Z. v. Carnival Corp.*, 239 So. 3d 756, 758 (Fla. 3d DCA 2018), *reh'g denied* (Mar. 27, 2018) (enforcing the same forum-selection clause at issue here, because there was no evidence of overreaching or bad faith, or that "plaintiffs w[ould] be mistreated or short-changed by the judges of the United States District Court for the Southern District of Florida, or that federal judges w[ould] routinely deny cruise ship passengers, such as these plaintiffs, jury trials if requested”); *Leslie v. Carnival Corp.*, 22 So. 3d 561, 562–63 (Fla. 3d DCA 2008), *upheld on reh’g en banc*, 22 So. 3d 567 (Fla. 3d DCA 2009) (enforcing the same forum-selection clause at issue here against the allegation that the clause deprives Florida citizens of their right to a jury trial under the saving-to-suitors clause); *Carnival Corp. v. Garcia*, 237 So. 3d 1110, 1114 (Fla. 3d DCA 2018) (“[O]nly in the absence of admiralty jurisdiction, will proper venue lie in a state court in Miami–Dade County.”).

Put simply, DeRoy did not discover a “loophole” in the forum-selection clause, so she cannot escape its consequences. Rather, because her claim is capable of being pleaded to satisfy federal jurisdiction (and was, in fact, pleaded that way), the claim must proceed, if at all, in federal court.

IV. CONCLUSION

In short, the forum-selection clause does not contain the loophole DeRoy urges. To the contrary, it serves as a moat around the federal-court forum, ensuring that claims where federal jurisdiction could lie, if litigated at all, stay in federal court.

For the reasons we have explained, the district court enjoyed admiralty subject-matter jurisdiction over DeRoy’s complaint. Therefore, we must reverse and vacate the order of dismissal for lack of subject-matter jurisdiction and remand for further proceedings consistent with this opinion.

REVERSED, VACATED, and REMANDED.

Supreme Court of Florida

No. SC18-357

CYNTHIA L. JACKSON, et al.,
Petitioners,

vs.

HOUSEHOLD FINANCE CORPORATION III, et al.,
Respondents.

July 2, 2020

LAWSON, J.

This case is before the Court for review of the decision of the Second District Court of Appeal in *Jackson v. Household Finance Corp. III*, 236 So. 3d 1170 (Fla. 2d DCA 2018). The district court certified that its decision directly conflicts with *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016), on the same question of law, giving us jurisdiction. *See* art. V, § 3(b)(4), Fla. Const. For the reasons explained below, we approve *Jackson*, disapprove *Maslak*, and hold that the proper predicate for admission of records into evidence under the business records exception to the hearsay rule can be laid by a qualified witness testifying to the foundational elements of the exception, as held by the Second District. *Jackson*, 236 So. 3d at 1175.

BACKGROUND

On April 25, 2006, Cynthia Jackson executed a loan agreement to obtain a residential loan in the amount of $146,841.79 from Household Finance Corp III (HFC).[1] Jackson and her husband (Petitioners) also executed a mortgage for the same amount with HFC. The Second District explained:

> Household Finance Corp III is the originating lender and the plaintiff below. In 2002, well before the Jacksons executed the mortgage, Household was purchased by HSBC Holdings and became a wholly-owned subsidiary of HSBC.

Id. at 1172.

On June 23, 2014, HFC filed a foreclosure complaint against Petitioners and other defendants, alleging that Petitioners defaulted under the terms of the note and the mortgage. Petitioners did not challenge the default.

At the bench trial, HFC called a twenty-five-year employee of HSBC, Assistant Vice President David Birsh, to establish the foundation for admission of records under the business records exception to the hearsay rule. Counsel for HFC asked Birsh if he has "access to the records maintained by HSBC with respect to

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1. The mortgagee's name is designated in some parts of the record as "Household Finance Corporation III" and in other parts as "Household Finance Corp III." Petitioners did not challenge HFC's standing to foreclose on any basis, including this discrepancy.

the mortgage loan account which is the subject of this instant action," to which he answered, "Yes, I do." Counsel then asked Birsh the following questions:

> Q. So are you familiar with the business practice of HSBC?
>
> A. Yes, I am.
>
> Q. And is it the regular business practice of HSBC to record acts, transactions, payments, communications, escrow account activity disbursements, events and analysis with respect to the mortgage loan account?
>
> A. Yes, it is.
>
> Q. And are these business records prepared by persons with knowledge of or from information transmitted by persons with knowledge of the acts, transactions, payments, communications, escrow account activity, disbursements and analyses?
>
> A. Yes.
>
> Q. And are all records made at or near the time the acts, transactions, payments, communications, escrow account activity, disbursements, events and analyses occur?
>
> A. Yes.
>
> . . . .
>
> Q. And are these records maintained by HSBC in the ordinary course of its regular business activity of the mortgage, lending, banking and service activity?
>
> A. Yes, they are[.]
>
> Q. Did HSBC prepare and maintain these records with respect to the subject loan?
>
> A. Yes.

Counsel then moved the documents, including the original note, mortgage, and loan payment history, into evidence. Counsel for Petitioners objected on grounds of "hearsay," explaining that Birsh had not "laid a foundation upon which to testify as to these as business records or to authenticate any of these documents based on personal knowledge." The trial judge overruled the objection and admitted the records into evidence.[2]

HFC rested its case, and counsel for Petitioners did not introduce any evidence. The trial court entered final judgment of mortgage foreclosure in favor

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2. In addition to challenging the foundation laid for the business records exception to the hearsay rule set forth in section 90.803(6)(a), Florida Statutes (2014), counsel for Petitioner also objected that Birsh did not properly "authenticate any of these documents," which we read as an objection based upon section 90.901, Florida Statutes (2014) ("Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). As is typically the case with any custodian of business records, Birsh was required to both authenticate the documents and lay a foundation for their admission as business records. *See* Charles W. Ehrhardt, *Florida Evidence*, § 901.1, at 1288-89 (2019 ed.) (explaining that authentication of an item of evidence does not make it "automatically admissible" and that "after a document has been authenticated," a witness must then "lay the foundation for the admission of a document under a hearsay exception"). However, all of Petitioner's arguments on appeal relate to the hearsay objection, thereby waiving any argument that the documents were not properly authenticated under section 90.901. *See Coolen v. State*, 696 So. 2d 738, 742 n.2 (Fla. 1997) (stating that the failure to fully brief and argue points on appeal "constitutes a waiver of these claims").

of HFC, and the Second District affirmed the judgment. *Jackson*, 236 So. 3d at 1171.

ANALYSIS

We review a trial court's decision to admit evidence for an abuse of discretion. *Tundidor v. State*, 221 So. 3d 587, 598 (Fla. 2017). "However, the question of whether a statement is hearsay is a matter of law and is subject to de novo review on appeal." *Id.* at 598-99 (quoting *Cannon v. State*, 180 So. 3d 1023, 1037 (Fla. 2015)).

Florida's Evidence Code sets forth the general rule that "hearsay" is not admissible except as provided by statute, § 90.802, Fla. Stat. (2014), and defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," § 90.801(1)(c), Fla. Stat. (2014). The Evidence Code defines some categories of evidence as non-hearsay, and therefore generally admissible, *see* § 90.801(2), Fla. Stat. (2014), and also lists a number of "exceptions," which constitute categories of admissible hearsay, *see* §§ 90.803(1)-(24), 90.804(1)-(2), Fla. Stat. (2014). The business records exception to the hearsay rule provides for the admission of "records of regularly conducted business activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business

> activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 90.803(6)(a). As explained by the Second District,

> A party can lay a foundation for the [admission of documents pursuant to the] business records exception in three ways: (1) offering testimony of a records custodian, (2) presenting a certification or declaration that each of the elements has been satisfied, or (3) obtaining a stipulation of admissibility. *Yisrael v. State*, 993 So. 2d 952, 956-57 (Fla. 2008).

Jackson, 236 So. 3d at 1172 (footnote omitted).

This case obviously involves the first method—testimony at trial of a records custodian. With respect to this method, the Second District explained,

> If the party offers the testimony of a records custodian to lay the foundation, it is not necessary that the testifying witness be the person who created the business records. *Channell* [*v. Deutsche Bank Nat'l Tr. Co.*], 173 So. 3d [1017,] 1019 [(Fla. 2d DCA 2015)]; *Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988). The witness may be any qualified person with knowledge of each of the elements. *Channell*, 173 So. 3d at 1019; *Specialty Linings*, 532 So. 2d at 1121.

Id.; *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 1109-10 (2019 ed.) (A witness must be able to "show that each of the foundation requirements is present," but "[i]t is not necessary to call the person who observed the matter recorded or actually made the entry."). A qualified witness, therefore, is anyone with personal knowledge of the organization's regular business practices relating to creating and retaining the record(s) at issue. *Id.* § 803.6, at 1111. This knowledge will necessarily come from the witness's training or experience, or, most likely, a combination of both.[3] The foundation requirements are:

> (1) that the record was made at or near the time of the event, (2) that it was made by or from information transmitted by a person with knowledge, (3) that it was kept in the ordinary course of a regularly conducted business activity, and (4) that it was a regular practice of that business to make such a record.

Jackson, 236 So. 3d at 1172 (quoting *Channell*, 173 So. 3d at 1019).

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3. The "level of training or amount of experience necessary . . . depends wholly on the subject of the testimony." *Bell v. State*, 179 So. 3d 349, 357 (Fla. 5th DCA 2015). Even with respect to expert testimony, oftentimes, the amount of training or experience required is minimal. *See id.* (explaining that, in the context of the typical probation officer field test testimony, "very little" training or experience is necessary "before a person can reliably interpret . . . preliminary drug tests" and that "any person with the minimal training, experience, or both, needed to understand these tests and how to read and explain their results would qualify to testify to the results under section 90.702, Florida Statutes"). Likewise, we generally observe that it should not take a new bank employee hired for an entry-level position much time or training to become familiar with how the bank records and keeps track of monetary transactions—a core function basic to the operation of any financial institution. Because making and keeping records of loan and deposit account transactions is the quintessential banking activity, it hardly seems possible that someone could work in and then manage multiple departments at a bank over a twenty-five-year period without learning how the bank makes a record of the loan payments that it receives.

Here, the proponent presented the testimony of a twenty-five-year employee and executive vice president who testified that he was “familiar with the business practices of the company” and that it was the company’s “regular business practice” to “record acts, transactions, payments, communications, escrow account activity, disbursements, events and analysis with respect to the mortgage loan account.” He further testified that the documents met each of the other foundational requirements set forth in section 90.803(6), using the language of the statute or a close approximation of it, as detailed above. No additional foundation is required by the statute or by any case from this Court, and we reject the notion that the witness must also detail the basis for his or her familiarity with the relevant business practices of the company or give additional details about those practices as part of the initial foundation because this would be inconsistent with the plain language of the statute. *See Greenfield v. Daniels*, 51 So. 3d 421, 425 (Fla. 2010) (“[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984))).

Rather, once the proponent lays the predicate for admission of documents set forth in the statute and reflected in our case law, “the burden shifts to the opposing party to prove that the records are untrustworthy,” *Jackson*, 236 So. 3d at 1172 (citing *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994)), or that they should not be admitted for some other reason. This would necessarily need to be done prior to admission of the documents into evidence—so that the opponent can timely raise a proper objection to admission of the documents—and could include questioning of the witness as to the basis for his or her knowledge of the company's business practices.

In this case, the opponent waited until after the documents were admitted to question the witness about the basis for his knowledge. Even then, although the witness's answer does not inspire confidence in his preparation for the opponent's question, neither does it reveal any disqualifying deficiency in his relevant knowledge. Birsh explained that during his twenty-five years with the company he had "been in the various departments" and "managed various departments" such that he had "basically become really familiar with a lot of the different questions." He also mentioned "cross-training and what have you." Additionally, on cross-examination, Birsh testified that he first became familiar with the Jackson file and documents "a couple of months ago." Birsh explained that "upon [his] review of the documents," he personally "went into [HSBC's] imaging system and reviewed those documents and compared them to the ones that were printed today." Birsh stated that "they have not been changed," and that "[t]hey are the same that have been imaged in our system from the beginning." These responses demonstrate a working knowledge of HSBC's relevant record-keeping practices and system. The opponent accepted Birsh's responses and did not press the witness for further details about the basis for his knowledge of his company's relevant business practices.

We also note that the opponent did not question Birsh's assertion that the documents were HSBC records. Although one might expect related companies to have independent business practices and separate record-keeping systems, Birsh's uncontradicted testimony was that the documents were maintained by HSBC as HSBC business records. And, the documents relating to the Jackson loan are consistent with this testimony. For example, a screenshot of the computerized account record relating to Jackson's loan has a prominent HSBC logo at the top and, under the HSBC logo, reads "HFC & Beneficial Members HSBC." Additionally, copies of correspondence to Jackson from HFC include a prominent "HFC" logo that includes "Member HSBC Group" as part of that logo.

Because Birsh testified to his familiarity with the business practices of his company and to each foundational requirement, we agree with the trial judge and the Second District that Birsh's testimony was "sufficient to satisfy [HFC's] initial burden to lay the predicate for the business records exception." *Jackson*, 236 So. 3d at 1175; *see also United States v. Langford*, 647 F. 3d 1309, 1327 (11th Cir. 2011) (finding a proper foundation laid for the admission of business records where the records custodian testified that "she had personal knowledge of the process involved in gathering the documents, that the documents had been gathered from ongoing businesses at the bank, that the documents were not made in response to a subpoena, and that the documents were part of, or appeared to be part of, documents routinely held in the normal course of business"); *United States v. Atchley*, 699 F. 2d 1055, 1058 (11th Cir. 1983) (finding a proper foundation laid for the admission of business records where the records custodian testified that the records "were kept in the ordinary course of business, that it was the ordinary course of her business to make and keep such records, [and] that the records were made on or about the time of the transactions reflected in the records").

By contrast, the Fourth District in *Maslak* held that despite a bank employee's testimony describing her job duties and familiarity with the bank's loan servicing practices, she "was not qualified to lay a foundation for [the] admission" of the loan servicing documents moved into evidence. 190 So. 3d at 658. *Maslak* does not elaborate on what deficiency it found with respect to the witness's qualification to lay the foundation for admission of the documents, and we find her testimony to be sufficient, as a matter of law, to demonstrate her qualification to testify as a records custodian, and to shift the burden to the opponent to establish otherwise. Additionally, the Fourth District held that despite the witness's testimony that the proffered documents met all prerequisites for admission under section 90.803(6), the foundation was lacking because the witness did not testify as to specific details of the bank's "procedures for inputting payment information into their systems and how the payment history was produced." *Id.* at 659. Again, we disagree and hold that a qualified witness who has "testified as to each element of the business records exception for the admission of" a business record, *id.*, has laid the proper predicate for admission of the document such that the document should be admitted unless the opponent establishes it to be untrustworthy, *Love*, 634 So. 2d at 160; *Jackson*, 236 So. 3d at 1172. This is why the Second District disagreed with *Maslak*, and why we disapprove it.

The dissent argues that we are "tak[ing] away the records proponent's burden to lay a proper foundation for admission" of business records. Dissenting op. at 38. Our ruling in this case does not subtract from that burden, which is set by the plain words of the statute. A contrary ruling would, indeed, add to the burden by requiring "factual specificity . . . [as to] how the records were compiled, maintained, or utilized." *Id*. at 28. The statute does not require this detail, and we see no reason why it should be required as part of the proponent's prima facie case. The dissent seems to be arguing that in the absence of testimony explaining details of a company's relevant record-keeping practices, a records custodian cannot "demonstrat[e] his personal knowledge" of the company's record-keeping policies and procedures. *Id*. This lack of detail seems to be the basis for the dissent's conclusion that Birsh's testimony did "not demonstrate that [he] had any personal knowledge or actual familiarity with the business practices regarding HFC III's mortgage loan accounts." *Id*. However, after Birsh testified to his years of experience with the bank, he then testified that he was familiar with the company's business practices. That testimony is direct evidence that Birsh was familiar with the relevant business practices, including how the bank records and tracks monetary transactions, and was sufficient to make a prima facie showing that Birsh was qualified to give the testimony that followed, authenticating the documents and laying the foundation for their admission as business records pursuant to the express requirements of section 90.803(6)(a).

The dissent also wrongly relies on Ehrhardt's *Florida Evidence* to support its argument that our opinion changes Florida law by creating "a special rule for foreclosure actions." Dissenting op. at 41 & n.8 (quoting Ehrhardt, *Florida Evidence* § 803.6, at 1113-14, for the proposition that "[s]ome District Courts of Appeal have expanded the records admissible under 90.803(6) in mortgage foreclosure cases" where "multiple companies [are] involved in servicing an individual loan as a result of a loan portfolio being sold or acquired by another entity").

Unlike the cases Ehrhardt references, however, this case does not involve records from a prior servicer. Although the dissent does argue that because Birsh worked for HSBC, and not HFC, he was not qualified to lay a foundation for the records admitted into evidence (claiming that there "certainly was no connection established between HFC III and HSBC"), dissenting op. at 30-31, this assertion is incorrect. Birsh testified that HSBC acquired HFC prior to origination of the loan at issue and that the records "with respect to the mortgage loan account which is the subject of this instant action" were "maintained by HSBC." This testimony was uncontradicted.

Finally, we address the Fourth District's articulated justification for concluding that a qualified witness must do more than testify to each foundational element set forth in section 90.803(6) to satisfy the proponent's initial burden of demonstrating admissibility under the business records exception. The Fourth District stated that the witness's "parroting" of the statutory elements of the business records exception was inadequate, *Maslak*, 190 So. 3d at 660, because holding otherwise would transform Florida's business records exception into a "magic words" test contrary to the Fourth District's case law. *Id.* at 659. The Fourth District does not explain why more should be required, and we will explain why a minimal testimonial foundation is both appropriate in this context and desirable in terms of fairness and the efficient administration of justice.

First, it is important to consider that what the Fourth District impugns as "magic words" is the clear-cut foundation that we have said a party must make to secure admission of a business record:

> To secure admissibility under [Florida's business-records] exception, the proponent must show that (1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record.

Yisrael v. State, 993 So. 2d 952, 956 (Fla. 2008). It would be odd if a party could not make this required showing with straightforward testimony that each of the criteria is met. Because the records custodian testimony is relevant only to the collateral issue of essentially authenticating relevant documents, there is no reason to prolong a trial and clutter a record with irrelevant details of those practices and procedures. To do so would add unnecessary inefficiency into the process.

Second, it is important to understand the objectives and policy issues surrounding evidentiary requirements for the authentication and admission of a document by its proponent. "Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is what its proponent claims." Ehrhardt, *Florida Evidence* § 901.1, at 1287. In this context, a party calls a records custodian to authenticate the documents needed to prove its allegations and to lay a foundation confirming that the proffered documents are in fact business records. The word "confirming" is appropriate because documents proffered at trial are what they purport to be "in 99 out of 100 cases." 2 *McCormick on Evidence* § 221 (7th ed. 2013).[4] As explained in *McCormick*, the "principal justification" for imposing authentication requirements in the rules of evidence is to create "a necessary check on the perpetration of fraud." *Id.* *McCormick* notes that "requiring proof of what may be correctly assumed in 99 out of 100 cases is at best time-consuming and expensive." *Id.* *McCormick* also notes that although "[t]raditional requirements of authentication admittedly furnish some guarantee against fraudulent or mistaken attribution of a writing. . . . it has frequently been questioned whether this benefit is not outweighed by the time, expense, and occasional untoward results entailed by the traditional skeptical attitude toward authenticity of writings." *Id.* § 221 (7th ed. Supp. 2016). Courts have historically attempted to ameliorate the time and expense required to prove this particular collateral matter (that is almost always self-evident and true) by making it simple to do. *See, e.g.*, *Lexington Ins. Co. v. W. Pennsylvania Hosp.*, 423 F.3d 318, 328

4. The dissent argues that our opinion makes "the mistake of conflating the evidentiary concepts of authentication and admissibility" and that "this fundamental legal error is at the root of the majority's erroneous decision in this case." Dissenting op. at 36. We are not confused. We understand that a party seeking to admit a document as a business record must both authenticate the document and lay a proper "foundation" for admission with evidence demonstrating that the document meets the criteria for admission as a business record. Our point here is that these tasks are both related and similar in purpose, and that the same policy considerations apply equally to both evidentiary requirements.

(3d Cir. 2005) ("We have repeatedly noted that '[t]he burden of proof for authentication is slight.' ") (quoting *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 928 (3d Cir. 1985)). Again, this is consistent with the efficient administration of justice. The company's record-keeping practices are not on trial or otherwise relevant to any issue framed by the pleadings. Adding complexity to the foundation requirement in this context, as the Fourth District did, is inconsistent with the appropriate objective of making litigation as simple and sensible as reasonably possible.

Examining the payment history in a mortgage foreclosure case, such as this one, is illustrative. We know that every commercial lender will necessarily have a "regular practice" of making a record of payments and will necessarily keep that record "in the ordinary course of business." That record of payments will also of necessity be "made at or near the time" that the payment is received by a "person with knowledge" of the payment amount and date of receipt. In other words, it is *extraordinarily* unlikely in any mortgage foreclosure case that records meeting the business records exception to the hearsay rule will not exist or that the proffered records are not exactly what they purport to be. In this case, as in most, the debtor does not even dispute the accuracy of the payment history as reflected in the records admitted. Rather, she simply argues for reversal on the theory that her lender should have been required to prove additional collateral facts before it could introduce records to establish material facts that she does not contest. We should not impose that additional burden on litigants. Of course, a litigant is free to contest the genuineness of the documents, as business records or otherwise, if he or she has a basis to do so. This would be true irrespective of the quantum of detail we require as part of the threshold showing to establish a document as a business record—meaning that requiring the showing detailed in the plain language of the statute, and not more, will in no way prejudice any party that has a legitimate basis to challenge admissibility of the document in question.

CONCLUSION

For the foregoing reasons, we resolve the certified conflict by holding that the testimony of a qualified witness confirming the presence of each foundation requirement of the business records exception constitutes a sufficient predicate for the admission of records under this exception to the hearsay rule. Accordingly, we approve the Second District's decision and disapprove the Fourth District's decision.

It is so ordered.

CANADY, C.J., and MUÑIZ and COURIEL, JJ., concur.
POLSTON, J., dissents with an opinion, in which LABARGA, J., concurs.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

POLSTON, J., dissenting.

I agree with the Jacksons' evidentiary objection that the records proponent's witness in this case failed to lay "a foundation upon which to testify as to these as business records." Only records identified as from HSBC[5] were admitted under the business records exception to the hearsay rule, and none from the plaintiff, Household Finance Corporation III. Moreover, the records proponent's witness, who was an employee of HSBC, made only general statements parroting the statutory elements of the business records exception without any identified basis of how the records were generated, what they were used for, or how they were maintained. And there was no connection established between the plaintiff and HSBC. As a result, the witness did not demonstrate personal knowledge of the records at issue or personal knowledge sufficient to affirm the statutory elements of the business records exception. Therefore, I respectfully dissent from the majority's decision, which transforms Florida's business records exception into a magic-words test only requiring the recitation of the statute.

I. BACKGROUND

At the bench trial in this mortgage foreclosure case, the originating lender and plaintiff, Household Finance Corporation III (HFC III), sought to admit several

5. "HSBC" was identified in the admitted records as HSBC Holdings, PLC.

documents related to the mortgage account pursuant to the business records exception, section 90.803(6), Florida Statutes. Specifically, the documents in HFC III's composite exhibit were identified as records maintained by HSBC, including the following: a merger announcement from 2002 indicating that HSBC Holdings, PLC, planned to acquire Household International, Inc., by the first quarter of 2003, which was printed from the Securities and Exchange Commission (SEC) Edgar website in 2015; the loan agreement listing HFC III as the lender and Cynthia Jackson as the borrower; the mortgage executed by Petitioners listing HFC III as the mortgagee; a printout of Petitioners' loan payment history with an "HFC Member HSBC Group" logo; snapshots from HSBC's computer database; breach letters sent to Petitioners from HFC III with an "HFC Member HSBC Group" logo in the right hand corner; and a screenshot reflecting when the breach letters were sent with no indication of what entity generated the screenshot.

HFC III offered the testimony of one witness, David Birsh,[6] an employee of HSBC, to lay the foundation for the admission of the documents as business records. Birsh stated that he was an Assistant Vice President at HSBC, was familiar with HSBC's business practices, and had access to the Jacksons' mortgage loan account. Then, in response to HFC III counsel's recitation of the elements of

6. The witness' name was spelled phonetically by the court reporter.

the business records exception, Birsh responded that "yes" each of the statutory requirements was met. Birsh testified that "yes" he was familiar with HSBC's business practices, "yes" these records are prepared by people with knowledge, "yes" the records are made near the time of the acts, "yes" the records are maintained by HSBC in the ordinary course of its business, and "yes" HSBC prepared and maintained these records.

Counsel for HFC III then moved to admit the records into evidence. The Jacksons' counsel objected that the records were hearsay and that Birsh "hasn't laid a foundation upon which to testify as to these as business records or to authenticate any of these documents based on personal knowledge."[7] The trial judge overruled the Jacksons' objection and admitted the documents.

7. The Jacksons were not required to raise multiple, repeated, or more explanatory objections to the admission of the documents under the business records exception to the hearsay rule based upon the failure to lay a proper foundation. *See, e.g.*, *Carter v. State*, 951 So. 2d 939, 943 (Fla. 4th DCA 2007) ("[W]hen the state moved the police report/affidavit into evidence under the business records hearsay exception, appellant objected on relevancy, hearsay, and foundation grounds. He makes the same argument on appeal that the document should not have come in as a business record; that it was hearsay. Thus, appellant's hearsay objection was sufficient to preserve for appellate review his arguments regarding admission of the police report/affidavit."); *Richardson v. State*, 875 So. 2d 673, 676 (Fla. 1st DCA 2004) ("Appellant correctly cites *Andrews v. State*, 261 So. 2d 497 (Fla. 1972), for the proposition that an objection to a question on hearsay grounds is sufficient to preserve for appellate review the failure of the proponent of the testimony to lay a proper predicate [for admission under the business records exception].").

On cross-examination, the Jacksons' counsel asked Birsh when he became familiar with the file, and he replied that the first time was "a couple of months ago." Birsh explained that he "went into our imaging system and reviewed those documents and compared them to the ones that were printed today, and they have not changed. They are the same that have been imaged in our system from the beginning." He then testified as follows:

> Q. And you testified that you're familiar and I forget the exact language, with the recordkeeping procedures of HSBC. How did you gain that familiarity?
> A. Well, I've been there for 25 years. So I've been in the various departments, managed various departments. So I've basically become really familiar with a lot of the different questions. Like cross-training and what have you.

II. ANALYSIS

The Florida Evidence Code provides that hearsay is inadmissible except as provided by statute. *See* § 90.802, Fla. Stat. (2014). Section 90.801, Florida Statutes (2014), defines hearsay as "a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." And the business records exception to the hearsay rule

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And to be clear, I address the validity of the Jacksons' hearsay objection in this dissent, not the validity of the Jacksons' authentication objection that was not pursued on appeal.

provides for the admission of "records of regularly conducted business activity" as follows:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make such memorandum, report, record, or data compilation, all *as shown by the testimony of the custodian or other qualified witness*, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness. The term "business" as used in this paragraph includes a business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 90.803(6)(a), Fla. Stat. (2014) (emphasis added). "The rationale behind the business records exception is that such documents have a high degree of reliability because businesses have incentives to keep accurate records." *Bank of New York v. Calloway*, 157 So. 3d 1064, 1070 (Fla. 4th DCA 2015) (quoting *Timberlake Constr. Co. v. U.S. Fid. & Guar. Co.*, 71 F.3d 335, 341 (10th Cir. 1995)).

To lay a proper foundation for the admission of business records, the proponent must show that "(1) the record was made at or near the time of the event; (2) was made by or from information transmitted by a person with knowledge; (3) was kept in the ordinary course of a regularly conducted business activity; and (4) that it was a regular practice of that business to make such a record." *Yisrael v. State*, 993 So. 2d 952, 956 (Fla. 2008). The records proponent can present that information in one of three ways: (1) provide a witness—either the records custodian or other qualified witness—to testify under oath at trial to the statutory requirements; (2) present a certification or declaration from the records custodian or other qualified person that complies with sections 90.803(6)(c) and 90.902(11), Florida Statutes; or (3) stipulate with the opposing party to the admissibility of the documents as business records. *Id.* at 956-57. This case involves the first method.

When using witness testimony to lay the foundation for the admission of business records,

> it is necessary to call a witness who can show that each of the foundational requirements set out in the statute is present. It is not necessary to call the person who actually prepared the document.

Twilegar v. State, 42 So. 3d 177, 199 (Fla. 2010) (quoting *Forester v. Norman Roger, Jewell & Brooks Int'l, Inc.*, 610 So. 2d 1369, 1373 (Fla. 1st DCA 1992)); *see also* Charles W. Ehrhardt, *Florida Evidence* § 803.6, at 1109-10 (2019 ed.) (A witness must be able to "show that each of the foundation requirements is present," but "[i]t is not necessary to call the person who observed the matter recorded or actually made the entry.").

Importantly, such a witness must have requisite knowledge of the business procedures used to make the record. *See Twilegar*, 42 So. 3d at 199 ("The records custodian or any qualified witness who has the necessary knowledge to testify as to how the record was made can lay the necessary foundation." (quoting *Forester*, 610 So. 2d at 1373); *Hunter v. Aurora Loan Servs., LLC*, 137 So. 3d 570, 573 (Fla. 1st DCA 2014) (finding testimony from witness insufficient to lay the proper foundation when the witness lacked "personal knowledge" of the record-keeping procedures).

Professor Charles Ehrhardt has explained that the witness must have "personal knowledge" of how a business record was made. Ehrhardt, *Florida Evidence* § 803.6, at 1111. Specifically, Professor Ehrhardt states that "[s]ection 90.803(6)(a) provides that a custodian or otherwise qualified witness who has *personal knowledge* of the method employed by the business establishes that each of the foundation requirements is present with respect to the record can lay the foundation for the admission of the record." *Id.* at 1110-11 (emphasis added).

Stated otherwise, "a qualified person to introduce business records, other than the records custodian, must be a person, who by the very nature of that person's job responsibilities and training, knows and understands the records sought to be introduced." *Lassonde v. State*, 112 So. 3d 660, 663 (Fla. 4th DCA 2013). When the business records sought to be admitted are "in the form of computer or electronic records, such as a computerized loan transaction history, the foundational witness ought to possess knowledge of the record-keeping system." *Channell v. Deutsche Bank Nat'l Tr. Co.*, 173 So. 3d 1017, 1019 (Fla. 2d DCA

2015); *see also Specialty Linings, Inc. v. B.F. Goodrich Co.*, 532 So. 2d 1121, 1121 (Fla. 2d DCA 1988). Further, "[i]n the context of a foreclosure action, a representative of a loan servicer testifying at trial . . . must be familiar with and have knowledge of how the 'company's data [is] produced,' " *Sanchez v. Suntrust Bank*, 179 So. 3d 538, 541 (Fla. 4th DCA 2015) (second alteration in original) (quoting *Glarum v. LaSalle Nat'l Ass'n*, 83 So. 3d 780, 783 (Fla. 4th DCA 2011)), and be "familiar with the bank's record-keeping system and [have] knowledge of how the data was uploaded into the system," *id.* (quoting *Weisenberg v. Deutsche Bank Nat'l Tr. Co.*, 89 So. 3d 1111, 1112-13 (Fla. 4th DCA 2012)).

If the records proponent does not lay the proper foundation, the records are not admissible under section 90.803(6). *Yisrael*, 993 So. 2d at 956 ("[T]he evidentiary proponent . . . ha[s] the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay."); *Caldwell v. State*, 137 So. 3d 590, 591-92 (Fla. 4th DCA 2014) (holding evidence inadmissible under section 90.803(6) when the State failed to lay the proper foundation); Ehrhardt, *Florida Evidence* § 803.6, at 1111-12 ("If a party does not lay the necessary foundation, the document is not admissible under section 90.803(6)."). However, if (and only if) the records proponent lays the necessary foundation for the admissibility of business records, the burden shifts to the opposing party to show their untrustworthiness. *Love v. Garcia*, 634 So. 2d 158, 160 (Fla. 1994) ("Once this predicate is laid, the burden is on the party opposing the introduction to prove the untrustworthiness of the records. If the opposing party is unable to carry this burden, then the record will be allowed into evidence as a business record."); *see also* Ehrhardt, *Florida Evidence* § 803.6, at 1109 ("If the trial court finds pursuant to 90.105 that each [of] the [foundational] requirements has been proven by a preponderance of the evidence, then the burden shifts to the opposing party to show the lack of trustworthiness of the record.").

Additionally, this Court has made clear that evidence admitted under an exception to the hearsay rule "must be offered in *strict* compliance with the requirements of the particular exception." *Yisrael,* 993 So. 2d at 957 (quoting *Johnson v. Dep't of Health & Rehab. Servs.*, 546 So. 2d 741, 743 (Fla. 1st DCA 1989)).

Here, Birsh testified that he was an Assistant Vice President of HSBC and that he had "access to the records maintained by HSBC with respect to the mortgage loan account which is the subject of this instant action." He then said "yes" as HFC III's counsel recited the statutory elements of the business records exception. On cross-examination, Birsh testified that he had "been there for 25 years" and "in the various departments, managed the various departments" and that he first became familiar with the file "a couple of months ago."

However, this testimony does not demonstrate that Birsh had any personal knowledge or actual familiarity with the business practices regarding HFC III's mortgage loan accounts or personal knowledge of the method employed to make the records at issue. He only testified that the printed documents were the same as what the HSBC computer system showed. This testimony, his job title, and length of employment do not provide any details regarding his training or experience that could possibly demonstrate that he knew how the records were prepared and maintained. In addition, Birsh's agreement with HFC III's counsel's recitation of the statutory elements of the business records exception lacked any factual specificity demonstrating his personal knowledge of how the records were compiled, maintained, or utilized.

In other words, "the witness simply 'regurgitated the magic words,' but was unfamiliar with, and had no knowledge of, how the records were created and kept." *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656, 659 (Fla. 4th DCA 2016). "What is missing here is testimony about [the] procedures for inputting payment information into their systems and how the payment history was produced." *Id.* "[Birsh] failed to testify about how payments were received and processed, [the] procedures for inputting payment information, or the computer system [utilized]." *Id.* at 660; *see also Miller v. Bank of America, N.A.*, 201 So. 3d 1286, 1288 (Fla. 5th DCA 2016) (holding that the witness had not laid the proper foundation, even though she gave "affirmative answers to the business record foundation questions," because her testimony "was not based on personal knowledge"); *Sanchez*, 179 So. 3d at 541 (holding that the witness did not have "sufficient knowledge to lay the foundation for the admission of the screenshot into evidence" because the witness "did not know anything about the process by which [the records] were created").

The majority belittles the complexity of banking records and assumes it would be easy for any "new bank employee hired for an entry-level position" to learn a banking system since keeping track of transactions is "the core function . . . of any financial institution"; therefore, a 25-year employee would obviously know the ins and outs of all of the banking records. Majority op. at 7 n.3. The majority is ill informed. Just because someone works at a bank for 25 years does not demonstrate that the employee knows the correct documentation that a particular entity uses for specific information or how a system works. Different banks use different types of records that are processed differently and are shown in different ways. That is a lot of difference. There is no dispute that Birsh could learn the system at least as quickly as a new banking employee, but there was no evidence to demonstrate he had yet done so.

Moreover, a parent relationship of HSBC to HFC III was not established. The majority quotes the Second District's decision when stating that the parent relationship exists, but nowhere in the record was such a relationship established.

The document improperly introduced into evidence under the business records exception does not do that as it is simply a merger announcement from 2002 indicating that HSBC Holdings, PLC, was planning to acquire Household International, Inc., by the first quarter of 2003. The merger announcement mentions that Household International, Inc., is the parent company of Household Financial Corporation, but Household Financial Corporation is a different legal entity and business than the plaintiff here, Household Financial Corporation III. When introducing the merger announcement, counsel for HFC III asked Birsh to identify it, and Birsh stated that "[t]his is the merger announcement which indicates that HSBC merged – purchased Household Finance Corporation III" and answered in the affirmative that the agreement is maintained as part of HSBC's business records. But, it bears repeating, the announcement actually discussed an anticipated merger between HSBC and Household International (the parent of Household Financial Corporation), not one that had already taken place between HSBC and the plaintiff in this case, Household Financial Corporation III (HFC III). In fact, the merger announcement, which appears to have been filed with and maintained by the SEC, does not mention HFC III at all. The majority, the Second District, and HFC III appear to be merely relying on the fact that HFC and HFC III have similar names; but they are different legal entities with no connection established between them in this record. There certainly was no connection established between HFC III and HSBC, the company that was at some point contemplating the purchase of the similarly named Household International. And no servicing agreement was mentioned or produced. Without an established connection between the two entities, Birsh's testimony that he personally "went into [HSBC's] imaging system" could not possibly demonstrate any personal knowledge regarding HFC III's loan documents or HFC III's record-keeping system. Further, a comparison of what is on a computer screen to a printout to see if there were any changes is certainly not a demonstration of working knowledge of business record practices and systems. Someone totally unfamiliar with any business records from anywhere could do that. That is not sufficient under the statute to admit hearsay documents.

To summarize, in this case, there were general statements that are a recitation of the statute without any identified basis of how the business records at issue were generated, what they were used for, or how they were maintained. These general statements were from an employee of HSBC, a different company than the plaintiff, who identified the records as records of HSBC even though some of the records only have the plaintiff's name on them, and no connection was established between HSBC and the plaintiff. These general statements do not demonstrate that the employee of HSBC had sufficient personal knowledge to affirm the statutory elements of the business records exception with respect to the records relating to HFC III's loan. Accordingly, HFC III failed to meet its burden of laying a proper foundation for the admission of the records relating to its loan. The burden never shifted to the Jacksons to prove the untrustworthiness of the records, and the trial court erred in admitting the documents without a proper foundation. *Cf. CitiMortgage, Inc. v. Hoskinson*, 200 So. 3d 191, 192 (Fla. 5th DCA 2016) (holding that a witness was qualified to lay the foundation for a letter as a business record because she testified as to when and how the letters were created and mailed and that she had "trained side-by-side with someone in that department and had observed the entire process"); *Wells Fargo Bank, N.A. v. Balkissoon*, 183 So. 3d 1272, 1276-77 (Fla. 4th DCA 2016) (holding that proper foundation was laid because the witness "demonstrated he had personal knowledge concerning the accuracy of Bank of America's records," and he testified that "[t]he AS400 system contains basic loan information, including the payment history, escrow information, and property address[, that] Bank of America applies payments it receives to the interest and principal on the loan and then to tax and insurance[, and that t]he payment center records the allocation of funds in the AS400 system"); *Lindsey v. Cadence Bank, N.A.*, 135 So. 3d 1164, 1168 (Fla. 1st DCA 2014) (holding that an assistant vice president had sufficient understanding to lay the foundation for the admission of computer printouts as business records because she explained that the computer loan processing system automatically creates account balances, that the bank's loan processing employees enter each received payment into the system, that loan payments are entered into the system when the transaction happens, and that loan records are updated within a day); *Cooper v. State*, 45 So. 3d 490, 492-93 (Fla. 4th DCA 2010) (holding that trial court did not err in admitting records as the witness had "training and experience" in records processing, customer support, billing, and data servicing and testified how the business maintained and prepared its records); *see also Noble v. Ala. Dep't of Envtl. Mgmt.*, 872 F.2d 361, 366-67 (11th Cir. 1989) (requiring a foundational witness to give testimony "that he had personal knowledge of the circumstances under which the [records] were prepared" rather than "simply testif[ying] that he had seen the letter before and that it was prepared in the 'ordinary course' of ADEM's business"); *U-Haul Int'l, Inc. v. Lumbermens Mut. Cas. Co.*, 576 F.3d 1040, 1042-45 (9th Cir. 2009) (holding that the claims manager laid the proper foundation because the witness explained the details of how employees input records of payments into the database, explained how the database was queried, testified about the computer used to compile and search records, and detailed how the summaries matched with the "backup documentation"); *United States v. Jenkins*, 345 F.3d 928, 934-36 (6th Cir. 2003) (determining that a U.S. Postal Inspector laid the proper foundation for admission of mailing labels because he "testified that he was familiar with these labels through his training and experience and that he commonly dealt with these records"); *Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534, 545-46 (D. Md. 2007) ("It is necessary, however, that the [foundational] witness provide factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so, as opposed to boilerplate, conclusory statements that simply parrot the elements of the business record exception to the hearsay rule . . . .").

The majority complains about the Fourth District's description of "magic words." When I refer to the majority only requiring a recitation of the statutory elements as a magic-words test, it is because the recitation serves as a mere illusion, meaning that simply saying the words is intended to make something appear to be present when it is not. It makes it appear that the records proponent has actually proven what the statute requires even though the witness has only repeated the words of the statute. Unfortunately, the majority's holding only involves saying the statutory elements without concern over what the response is, who is giving it, and whether the records custodian or person testifying actually has personal knowledge sufficient to demonstrate that the documents should be admitted into evidence. Business records are admissible as an exception to the hearsay rule because they are considered reliable since businesses have an incentive to keep accurate records. *See, e.g.*, *Bank of New York*, 157 So. 3d at 1070; *Timberlake Constr. Co.*, 71 F.3d at 341; *see also* Ehrhardt, *Florida Evidence* § 803.6, at 1097 (“The evidence is reliable because it is of a type that is relied upon by a business in the conduct of its daily affairs and the records are customarily checked for correctness during the course of the business activities.”); 2 *McCormick on Evidence* § 286 (7th ed. 2013) (“Reliability is furnished by the fact that regularly kept records typically have a high degree of accuracy. The regularity and continuity of the records are calculated to train the recordkeeper in habits of precision; if of a financial nature, the records are periodically checked by balance-striking and audits; and in actual experience, the entire business of the nation and many other activities function in reliance upon records of this kind.”). But documents should only be admitted as reliable business records if the proponent’s witness provides testimony actually demonstrating personal knowledge and establishing that these are the type of documents that fall into the category of reliable business records.

Moreover, I strongly disagree with the majority’s contention that, because the foundational witness’ testimony is “relevant only to the collateral issue of essentially authenticating relevant documents, there is no reason to prolong a trial and clutter a record with irrelevant details of those practices and procedures.” Majority op. at 15. This contention (as well as the majority’s out-of-place policy discussion regarding authentication and lender records) demonstrates that the majority, notwithstanding its protest to the contrary, is making the mistake of conflating the evidentiary concepts of authentication and admissibility. And this fundamental legal error is at the root of the majority's erroneous decision in this case.

Section 90.901, Florida Statutes (2014), of the Florida Evidence Code provides the following regarding authentication:

> Authentication or identification of evidence is required as a condition precedent to its admissibility. The requirements of this section are satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.

However, as Professor Ehrhardt explains, "[i]f an item of evidence has been authenticated, it is not automatically admissible." Ehrhardt, *Florida Evidence* § 901.1, at 1288. "When a document is authenticated, there has only been evidence introduced, or an agreement by counsel, that the document or writing is what it purports to be." *Id.* at 1288-89. But "[t]he hearsay rule, or other exclusionary rule may still exclude the evidence." *Id.* at 1289. Professor Ehrhardt continues, "In other words, after document is authenticated, a witness must lay the foundation for the admission of a document under a hearsay exception; for example, the business record or public record exception." *Id.*; *see also United States v. Browne*, 834 F.3d 403, 415 (3d Cir. 2016) ("Evidence that is properly authenticated may nonetheless be inadmissible hearsay if it contains out-of-court statements, written or oral, that are offered for the truth of the matter asserted and do not fall under any exception enumerated under Federal Rule of Evidence 802."); 2 *McCormick on Evidence* § 227, at 102-03 ("Again, it must be emphasized that authentication does not secure admissibility of electronic documents into evidence. As with more traditional forms of written evidence, if the electronic or computer-generated writing is used to prove the truth of its contents, the hearsay rule must be satisfied."). Professor Ehrhardt also explains that, "[a]lthough the term authenticate is sometimes used to refer to whether a proper foundation has been laid for a document, this usage is imprecise and can be misleading." Ehrhardt, *Florida Evidence* § 901.1, at 1289; *see also Arce v. Wackenhut Corp.*, 40 So. 3d 813, 816 (Fla. 3d DCA 2010) ("It appears that Arce believes either that a federal authentication of the [hearsay] document will *ipso facto* make the document admissible, or that Arce may be able to persuade the FBI to include something additional in the certification that will make the document admissible into evidence. Arce again errs, first by making the common legal error of conflating authenticity of a document with admissibility . . . ."); *Friedle v. Bank of New York Mellon*, 226 So. 3d 976, 978 (Fla. 4th DCA 2017) (explaining that "[w]hile it was certified by the Securities and Exchange Commission ("SEC") as being filed with that agency, and thus was self-authenticating, there is a difference between authentication and admissibility" and holding that "[t]he Bank did not present sufficient evidence through its witness to admit this unsigned document as its business record”).

Accordingly, while the majority’s conflating of authentication and admissibility is a common mistake, it has misled the majority into reducing the requirements for laying a proper foundation for the admission of documents under the business records exception into a mere formality, which is contrary to the Florida Evidence Code. Simply stated, the majority is increasing the likelihood that inadmissible documents will be admitted into evidence simply because they were authenticated.

The majority counters that a litigant would still be “free to contest the genuineness of the documents . . . irrespective of the quantum of detail we require as part of the threshold showing,” majority op. at 18, but this flips the burden of laying the foundation for admission of records from the records proponent to the party against whom they are to be admitted. Such a flip in the burden of proof is contrary to the Florida Evidence Code. *See* § 90.803(6)(a), Fla. Stat.; *Yisrael,* 993 So. 2d at 956 (“[T]he evidentiary proponent . . . ha[s] the burden of supplying a proper predicate to admit this evidence under an exception to the rule against hearsay.”). Of course, the majority’s willingness to take away the records proponent’s burden to lay a proper foundation for admission most likely arises from the majority’s legal error of confusing admissibility with authentication.

Compare Ehrhardt, *Florida Evidence* § 901.1, at 1287-88 ("Evidence is authenticated when prima facie evidence is introduced to prove that the proffered evidence is what its proponent claims. The finding of authenticity does not mean that the trial judge makes a finding that the proffered evidence is genuine. The judge only determines whether prima facie evidence of its genuineness exists. Once the matter has been admitted the opposing party may challenge its genuineness. The jury then determines as a matter of fact whether the evidence is genuine.") (footnotes omitted) *with* Ehrhardt, *Florida Evidence* § 803.6, at 1103-04 ("While the trial judge has the duty under section 90.105(1) to make a factual determination that the proponent of the document has demonstrated the necessary foundation for the admission of a business record, the opponent has the burden of showing sufficient lack of trustworthiness. The record is inadmissible if the trial court makes the section 90.105(1) determination that the opponent has shown that the record is not trustworthy. Even if the court rules that the record is admissible under section 90.803(6), opposing counsel can offer the same evidence of lack of trustworthiness to the weight and credibility that should be given the record.") (footnote omitted). In other words, the majority conflates the question of whether a document is genuine with the question of whether a document is an admissible business record, which leads it to confuse the burdens of proof specific to each question.

Finally, I disagree with the majority's characterization of requiring the records proponents to satisfy the foundational requirements for the admission of business records as requiring "irrelevant details" of a business' "practices and procedures." To belabor the point, these details that "clutter the record" are needed to demonstrate that records at issue are in fact business records that should be admitted into evidence. Like the majority, I have no doubt that most commercial lenders can produce witnesses who can lay the proper foundation for the admission of their records under the business records exception. But the particular lender in this particular case did not, and this Court should not change the rules that help ensure the reliability of evidence that is admitted as an exception to the general bar against hearsay simply because the details may seem tedious to some and most lenders can meet the requirements anyway. Mistakes with records that are used to establish large judgments happen. We should not eliminate foundational requirements that safeguard the reliability and accuracy of evidence.

III. CONCLUSION

To lay the proper foundation for the admission of records under the business records exception to the hearsay rule, the records proponent's witness must do more than merely echo the statutory elements of the exception and identify employment and familiarity with a different company. The witness must demonstrate that he personally has the sufficient knowledge to affirm the statutory elements of the business records exception by demonstrating personal knowledge of the methods utilized by the business regarding the records at issue, such as how the records were created, what they were used for, and how they were maintained. Otherwise, the business records exception to the hearsay rule becomes a magic-words test rather than a requirement that the records proponent demonstrate the reliability of the business records.

At worst, with general application, the majority's opinion seriously undermines the propriety of the business records exception to hearsay. At best, it creates a special rule for foreclosure actions.[8] Accordingly, I would quash the

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8. *Cf.* Ehrhardt, *Florida Evidence* § 803.6, at 1113-14 ("Some District Courts of Appeal have expanded the records admissible under 90.803(6) in mortgage foreclosure cases. In many cases, there are multiple companies involved in servicing an individual loan as a result of a loan portfolio being sold or acquired by another entity. In order to establish the loan payment history, an employee of the current servicer frequently has no knowledge of the record-keeping system or process used by prior servicers and therefore cannot lay the foundation under 90.803(6) for the records maintained by the prior servicer. These decisions have determined that the testimony of an employee of a current servicer can lay the foundation for the records of a former servicer if the testimony establishes that the current servicer independently verified the accuracy of the former servicer's records regarding the payment history and details the procedure used to verify the accuracy of the payment histories. Presumably, this verification goes beyond confirming that the amount due on the former servicer's records is the same as the amount entered in the current servicer's records. While the decisions seem to focus on records in the mortgage servicing industry, which are plagued by inaccuracies, its rationale extends to all records offered under 90.803(6) which are records of a prior business and are presently located in the records of the current business. While records acquired from another business and incorporated into the record of the acquiring business can fairly be treated as being made by the acquiring business, the acquired records should be admissible only if the other

Second District's decision in *Jackson v. Household Finance Corp. III*, 236 So. 3d 1170 (Fla. 2d DCA 2018), and approve the Fourth District's decision in *Maslak v. Wells Fargo Bank, N.A.*, 190 So. 3d 656 (Fla. 4th DCA 2016). I respectfully dissent.

LABARGA, J., concurs.

Application for Review of the Decision of the District Court of Appeal – Certified Direct Conflict of Decisions

Second District - Case No. 2D15-2038

(Manatee County)

Nicole M. Ziegler of Emerson Straw, PL, St. Petersburg, Florida,

for Petitioner

Matthew A. Ciccio and Spencer Gollahon of Aldridge Pite, LLP, Delray Beach, Florida,

for Respondent

Robert R. Edwards of Choice Legal Group, P.A., Fort Lauderdale, Florida; David Rosenberg of Robertson, Anschutz & Schneid, P.L., Boca Raton, Florida; Marissa M. Yaker of Padgett Law Group, Tallahassee, Florida; and Andrea R. Tromberg of Tromberg Law Group, P.A., Boca Raton, Florida,

for Amicus Curiae American Legal and Financial Network

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requirements of section 90.803(6) are satisfied. The decisions are a significant change in Florida law and inconsistent with many other Florida decisions.") (footnotes omitted).

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

NEON INVESTMENTS, LLC,
Petitioner,

v.

AFINA PALLADA, INC., ILYA TORCHINSKY, and
KSENIA KONDRATYUK,
Respondents.

No. 4D20-281

[July 1, 2020]

Petition for writ of certiorari to the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Carol-Lisa Phillips, Judge; L.T. Case No. CACE19006129 (25).

Joseph J. Huss, Cary A. Lubetsky and Benny A. Ortiz of Krinzman Huss Lubetsky Feldman & Hotte, Fort Lauderdale, for petitioner.

Aresh Alex Dehghani of Dehghani Law, P.A., Miami Lakes, for respondents.

WARNER, J.

After a final judgment of foreclosure was entered against Afina Pallada, Inc., the trial court granted a motion to intervene on behalf of the corporation's president. The judgment creditor petitions for writ of certiorari. We grant the petition and conclude that the court departed from the essential requirements of law in allowing post-judgment intervention.

Petitioner, Neon Investments Inc., filed a complaint to foreclose a mortgage on property owned by Afina, together with a notice of *lis pendens* on the property. The complaint also named Ilya Torchinsky, the vice president of Afina. It alleged a default under a promissory note and mortgage, signed by Torchinsky as vice president. The complaint was served on Afina's registered agent. Afina defaulted, and a final default judgment of foreclosure was entered. After final judgment, Afina and Torchinsky moved to set aside the default on the ground that Torchinsky was not properly served. The motion did not claim improper service on Afina. The trial court denied the motion.

The property was sold at a judicial sale. Later, respondent Ksenia Kondratyuk filed a motion to intervene and vacate the final judgment, alleging that she was the president of Afina. Under the bylaws of the corporation she had the general power of management of the corporation, and the vice president Torchinsky did not. Kondratyuk also alleged that she was the president, chairman of the board of directors, and managing member of Vladsale LLC, an entity which owns all controlling shares of Afina. She sought intervention pursuant to Florida Rule of Civil Procedure 1.230, which provides:

> Anyone claiming an interest in pending litigation may at any time be permitted to assert a right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding, unless otherwise ordered by the court in its discretion.

She claimed that she was an "indispensable party with an interest in the above styled action." The trial court granted the motion, although it did not rule on that portion of the motion which sought to vacate the final judgment.[1]

Neon filed its petition for writ of certiorari, contending that this post-judgment intervention was a departure from the essential requirements of law. This order is subject to certiorari review. *See Fed. Nat'l Mortgage Ass'n v. Gallant*, 211 So. 3d 1055, 1057-58 (Fla. 4th DCA 2017). In *Gallant*, we also held that a post-judgment intervention in a foreclosure proceeding, which stayed the sale of the property pending the outcome of another lawsuit between the parties, was sufficient to show material harm not remediable on appeal. Similarly, we conclude that Neon suffers from irreparable harm, because the intervention seeks to vacate the final judgment and prevent any sale of the property while addressing other claims between the parties.

The trial court departed from the essential requirements of law by allowing this post-judgment intervention, where the purpose of the intervention was to attack the final judgment. Post-judgment intervention

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[1] After this petition was filed, the trial court entered an order of clarification that its order of intervention did not vacate the final judgment. It did allow the filing of a counterclaim by Kondratyuk in which she sought invalidation of the mortgage as well as damages based upon various theories of recovery.

generally is not allowed, *see Dickinson v. Segal*, 219 So. 2d 435, 436 (Fla. 1969), and "this Court has strictly adhered to the general rule against intervention after final judgment." *See Regency Highland Assocs. v. Regency Highland Condo. Ass'n, Inc.*, 405 So. 2d 788, 789 (Fla. 4th DCA 1981) (citation omitted). Indeed, rule 1.230 allows intervention in *pending* litigation, not litigation which has already been concluded by final judgment. The cases which have allowed post-judgment intervention are those in which the merits of the underlying judgment are not being challenged. *See e.g., Lefkowitz v. Quality Labor Mgmt., LLC*, 159 So. 3d 147 (Fla. 5th DCA 2014); *Tech. Chem. & Prods., Inc. v. Porchester Holdings, Inc.*, 748 So. 2d 1090, 1091 (Fla. 4th DCA 2000).

Kondratyuk claims that she should be allowed to intervene as an interested party, being the president, chairman of the board and controlling shareholder of Afina. She alleges that Torchinsky, as vice president and as general counsel executed the note and mortgage, even though Torchinsky had no authority to do so on behalf of Afina. In Kondratyuk's pleadings, she claims that Neon engaged in fraud with Torchinsky in the execution of the note and mortgage. Kondratyuk also mentions that she did not learn of the foreclosure until after the final judgment was entered. These facts, she claims, should allow her to intervene. If, however, Neon has committed fraud, or if there was "mistake, inadvertence, surprise, or excusable neglect" in the entry of a default against Afina, then Afina can seek relief pursuant to Florida Rule of Civil Procedure 1.540(b). Therefore, the corporation is not without a remedy.

For these reasons, we grant the petition and quash the order of intervention in these proceedings. Our ruling is without prejudice to the corporate defendant to seek any authorized post-judgment relief pursuant to rule 1.540(b).

LEVINE, C.J., and CIKLIN, J., concur.

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Not final until disposition of timely filed motion for rehearing.