IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LTD., *et al*. *Plaintiffs,* v. CONSUMER FINANCIAL PROTECTION BUREAU, *et al*., *Defendants.*	Civil Action No. 1:18-cv-00295

NOTICE OF SUPPLEMENTAL AUTHORITY

Defendant Consumer Financial Protection Bureau submits this Notice to inform the Court of additional recent authority relevant to the Court's adjudication of the parties' pending cross-motions for summary judgment—specifically, Plaintiffs' argument that the Payment Provisions of the 2017 Payday Rule are "void *ab initio*" and therefore incapable of ratification. *E.g.*, ECF No. 80 at 13, 18. The Supreme Court rejected similar arguments in two recent separation-of-powers decisions.

First, *Collins v. Yellen*, No. 19-422 (U.S. June 23, 2021) (attached as Exhibit A), considered a challenge to an exercise of executive authority by the Federal Housing Finance Agency while its single director was unconstitutionally insulated from removal. The Supreme Court rejected as "neither logical nor supported by precedent" the very view that Plaintiffs advance here—that actions by an official subject to an unconstitutional removal provision "are void *ab initio* and must be undone." Slip op. at 33-35 & n.24. The Court explained that the officials leading the FHFA were (just like the Bureau Director) properly appointed and that their

purported insulation from removal created "no reason to regard any of the actions taken by the FHFA in relation to the [action] as void." *Id.* at 33-34 & n.23. Likewise, here, the (prior) purported restriction on the President's ability to remove the Bureau Director supplies "no reason to hold that the [Payment Provisions] must be completely undone." *Id.* at 35.

The Court held that it was "possible" that the challengers could obtain some other relief, but only if they could show that the unconstitutional removal restriction itself caused them "compensable harm." *Id.* at 35-36. The Court remanded for the lower courts to decide whether the removal restriction had caused any harm and, if so, what the appropriate remedy would be. Here, Plaintiffs can show no harm that would entitle them to the relief they seek: invalidation of the Payments Provisions. As the Bureau has explained, a Bureau Director appointed by and indisputably removable at will by the President considered and ratified the Payments Provisions. That confirms that the invalid removal restriction made no difference for Plaintiffs or for their members' future obligation to comply with the Payments Provisions when they take effect.

Second, in *United States v. Arthrex, Inc.*, No. 19-1434 (U.S. June 21, 2021) (attached as Exhibit B), the Court rejected similar arguments that "the appropriate remedy" for an action by agency officials—administrative patent judges—who exercised authority without constitutionally adequate oversight was "to order outright dismissal of the proceeding below." Slip op. at 20 (plurality op.); *see also id.* at 7 (Breyer, J., concurring on remedy). Instead, it held the statutory provisions purporting to insulate the officials' decisions from review by the head of the relevant agency were invalid but severable, and remanded to provide an opportunity for review by the agency head. *Id.* at 22-23 (plurality op.). The equivalent remedy here, which Plaintiffs have received, was review by a properly removable official of the Bureau's decision to issue the Payments Provisions.

Dated: June 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 28, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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Exhibit A

Collins v. Yellen, No. 19-422 (U.S. June 23, 2021)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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COLLINS ET AL. *v.* YELLEN, SECRETARY OF THE TREASURY, ET AL.

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

No. 19–422. Argued December 9, 2020—Decided June 23, 2021*

When the national housing bubble burst in 2008, the Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac), two of the Nation's leading sources of mortgage financing, suffered significant losses that many feared would imperil the national economy. To address that concern, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), which, among other things, created the Federal Housing Finance Agency (FHFA)—an independent agency tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver. See 12 U. S. C. §4501 *et seq.* At the head of the Agency, Congress installed a single Director, removable by the President only "for cause." §§4512(a), (b)(2).

Soon after the FHFA's creation, the Director placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury. Under those agreements, Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends. In the years that followed, the agencies agreed to a number of amendments, the third of which replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve.

A group of the companies' shareholders challenged the third amend-

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*Together with No. 19–563, *Yellen, Secretary of the Treasury, et al.* v. *Collins et al.*, also on certiorari to the same court.

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ment on both statutory grounds—that the FHFA exceeded its authority as a conservator under the Recovery Act by agreeing to the new variable dividend formula—and constitutional grounds—that the FHFA's structure violates the separation of powers because the Agency is led by a single Director, removable by the President only for cause. The District Court dismissed the statutory claim and granted summary judgment in the FHFA's favor on the constitutional claim. The Fifth Circuit reversed the District Court's dismissal of the statutory claim, held that the FHFA's structure violates the separation of powers, and concluded that the appropriate remedy for the constitutional violation was to sever the removal restriction from the rest of the Recovery Act, but not to vacate and set aside the third amendment.

Held:

1. The shareholders' statutory claim must be dismissed. The "anti-injunction clause" of the Recovery Act provides that unless review is specifically authorized by one of its provisions or is requested by the Director, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." §4617(f). Where, as here, the FHFA's challenged actions did not exceed its "powers or functions" "as a conservator," relief is prohibited. Pp. 12–17.

(a) The Recovery Act grants the FHFA expansive authority in its role as a conservator and permits the Agency to act in what it determines is "in the best interests of the regulated entity *or the Agency*." §4617(b)(2)(J)(ii) (emphasis added). So when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial to the Agency and, by extension, the public it serves. This feature of an FHFA conservatorship is fatal to the shareholders' statutory claim. The third amendment was adopted at a time when the companies had repeatedly been unable to make their fixed quarterly dividend payments without drawing on Treasury's capital commitment. If things had proceeded as they had in the past, there was a possibility that the companies would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations. The third amendment's variable dividend formula eliminated that risk, and in turn ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters. Although the third amendment required the companies to relinquish nearly all of their net worth, the FHFA could have reasonably concluded that this course of action was in the best interests of members of the public who rely on a stable secondary mortgage market. Pp. 13–15.

(b) The shareholders argue that the third amendment did not actually serve the best interests of the FHFA or the public because it did

not further the asserted objective of protecting Treasury's capital commitment. First, they claim that the FHFA agreed to the amendment at a time when the companies were on the precipice of a financial uptick which would have allowed them to pay their cash dividends and build up capital buffers to absorb future losses. Thus, the shareholders assert, sweeping all the companies' earnings to Treasury increased rather than decreased the risk that the companies would make further draws and eventually deplete Treasury's commitment. But the success of the strategy that the shareholders tout was dependent on speculative projections about future earnings, and recent experience had given the FHFA reasons for caution. The nature of the conservatorship authorized by the Recovery Act permitted the Agency to reject the shareholders' suggested strategy in favor of one that the Agency reasonably viewed as more certain to ensure market stability. Second, the shareholders claim that the FHFA could have protected Treasury's capital commitment by ordering the companies to pay the dividends in kind rather than in cash. This argument rests on a misunderstanding of the agreement between the companies and Treasury. Paying Treasury in kind would not have satisfied the cash dividend obligation; it would only have delayed that obligation, as well as the risk that the companies' cash dividend obligations would consume Treasury's capital commitment. Choosing to forgo this option in favor of one that eliminated the risk entirely was not in excess of the FHFA's authority as a conservator. Finally, the shareholders argue that because the third amendment left the companies unable to build capital reserves and exit conservatorship, it is best viewed as a step toward liquidation, which the FHFA lacked the authority to take without first placing the companies in receivership. This characterization is inaccurate. Nothing about the third amendment precluded the companies from operating at full steam in the marketplace, and all available evidence suggests that they did. The companies were not in the process of winding down their affairs. Pp. 15–17.

2. The Recovery Act's restriction on the President's power to remove the FHFA Director, 12 U. S. C. §4512(b)(2), is unconstitutional. Pp. 17–36.

(a) The threshold issues raised in the lower court or by the federal parties and appointed *amicus* do not bar a decision on the merits of the shareholders' constitutional claim. Pp. 17–26.

(i) The shareholders have standing to bring their constitutional claim. See *Lujan* v. *Defenders of Wildlife,* 504 U. S. 555, 560–561. First, the shareholders assert that the FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury, and that sort of pocketbook injury is a prototypical form of injury in fact. See *Czyzewski* v. *Jevic Holding Corp.*, 580 U. S. ___, ___. Second, the

shareholders' injury is traceable to the FHFA's adoption and implementation of the third amendment, which is responsible for the variable dividend formula. For purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to "allegedly unlawful conduct" of the defendant, not to the provision of law that is challenged. *Allen* v. *Wright*, 468 U. S. 737, 751. Finally, a decision in the shareholders' favor could easily lead to the award of at least some of the relief that the shareholders seek. Pp. 17–19.

(ii) The shareholders' constitutional claim is not moot. After oral argument was held in this case, the FHFA and Treasury agreed to amend the stock purchasing agreements for a fourth time. That amendment eliminated the variable dividend formula that caused the shareholders' injury. As a result, the shareholders no longer have any ground for prospective relief, but they retain an interest in the retrospective relief they have requested. That interest saves their constitutional claim from mootness. P. 19.

(iii) The shareholders' constitutional claim is not barred by the Recovery Act's "succession clause." §4617(b)(2)(A)(i). That clause effects only a limited transfer of stockholders' rights, namely, the rights they hold "with respect to the regulated entity" and its assets. *Ibid.* Here, by contrast, the shareholders assert a right that they hold in common with all other citizens who have standing to challenge the removal restriction. The succession clause therefore does not transfer to the FHFA the constitutional right at issue. Pp. 20–21.

(iv) The shareholders' constitutional challenge can proceed even though the FHFA was led by an Acting Director, as opposed to a Senate-confirmed Director, at the time the third amendment was adopted. The harm allegedly caused by the third amendment did not come to an end during the tenure of the Acting Director who was in office when the amendment was adopted. Rather, that harm is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with Treasury. Because confirmed Directors chose to continue implementing the third amendment while insulated from plenary Presidential control, the survival of the shareholders' constitutional claim does not depend on the answer to the question whether the Recovery Act restricted the removal of an Acting Director. The answer to that question could, however, have a bearing on the *scope* of relief that may be awarded to the shareholders. If the statute does not restrict the removal of an Acting Director, any harm resulting from actions taken under an Acting Director would not be attributable to a constitutional violation. Only harm caused by a confirmed Director's implementation of the third amendment could then provide a basis for relief. In the Recovery Act,

Congress expressly restricted the President's power to remove a confirmed Director but said nothing of the kind with respect to an Acting Director. When a statute does not limit the President's power to remove an agency head, the Court generally presumes that the officer serves at the President's pleasure. See *Shurtleff* v. *United States*, 189 U. S. 311, 316. Seeing no grounds for departing from that presumption here, the Court holds that the Recovery Act's removal restriction does not extend to an Acting Director and proceeds to the merits of the shareholders' constitutional argument. Pp. 21–26.

(b) The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, the Court held that Congress could not limit the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) to instances of "inefficiency, neglect, or malfeasance." *Id.*, at ___. In so holding, the Court observed that the CFPB, an independent agency led by a single Director, "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.,* at ___–___. A straightforward application of *Seila Law*'s reasoning dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power. The distinctions Court-appointed *amicus* draws between the FHFA and the CFPB are insufficient to justify a different result. First, *amicus* argues that Congress should have greater leeway to restrict the President's power to remove the FHFA Director because the FHFA's authority is more limited than that of the CFPB. But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. Moreover, the test that *amicus* proposes would lead to severe practical problems. Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies. Second, *amicus* contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it does, the Agency must implement a federal statute and may exercise powers that differ critically from those of most conservators and receivers. Third, *amicus* asserts that the FHFA's structure does not violate the separation of powers because the entities it regulates are Government-sponsored enterprises that have federal charters, serve public objectives, and receive special privileges. This argument fails because the President's removal power

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serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives. Finally, *amicus* contends that there is no constitutional problem in this case because the Recovery Act offers only "modest" tenure protection. But the Constitution prohibits even "modest restrictions" on the President's power to remove the head of an agency with a single top officer. *Id.*, at ___. Pp. 26–32.

(c) The shareholders seek an order setting aside the third amendment and requiring that all dividend payments made pursuant to that amendment be returned to Fannie Mae and Freddie Mac. In support of this request, they contend that the third amendment was adopted and implemented by officers who lacked constitutional authority and that their actions were therefore void *ab initio*. This argument is neither logical nor supported by precedent. All the officers who headed the FHFA during the time in question were properly *appointed*. There is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office or that actions taken by the FHFA in relation to the third amendment are void. That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief. Although an unconstitutional provision is never really part of the body of governing law, it is still possible for an unconstitutional provision to inflict compensable harm. The possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out. The parties' arguments on this point should be resolved in the first instance by the lower courts. Pp. 32–36.

938 F. 3d 553, affirmed in part, reversed in part, vacated in part, and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C. J., and THOMAS, KAVANAUGH, and BARRETT, JJ., joined in full; in which KAGAN and BREYER, JJ., joined as to all but Part III–B; in which GORSUCH, J., joined as to all but Part III–C; and in which SOTOMAYOR, J., joined as to Parts I, II, and III–C. THOMAS, J., filed a concurring opinion. KAGAN, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER and SOTOMAYOR, JJ., joined as to Part II. GORSUCH, J., filed an opinion concurring in part. SOTOMAYOR, J., filed an opinion concurring in part and dissenting in part, in which BREYER, J., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 19–422 and 19–563

PATRICK J. COLLINS, ET AL., PETITIONERS
19–422 *v.*
JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS
19–563 *v.*
PATRICK J. COLLINS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2021]

JUSTICE ALITO delivered the opinion of the Court.

Fannie Mae and Freddie Mac are two of the Nation's leading sources of mortgage financing. When the housing crisis hit in 2008, the companies suffered significant losses, and many feared that their troubling financial condition would imperil the national economy. To address that concern, Congress enacted the Housing and Economic Recovery Act of 2008 (Recovery Act), 122 Stat. 2654, 12 U. S. C. §4501 *et seq*. Among other things, that law created the Federal Housing Finance Agency (FHFA), "an independent agency" tasked with regulating the companies and, if necessary, stepping in as their conservator or receiver. §§4511, 4617. At its head, Congress installed a single Director, whom the President could remove only "for cause."

§§4512(a), (b)(2).

Shortly after the FHFA came into existence, it placed Fannie Mae and Freddie Mac into conservatorship and negotiated agreements for the companies with the Department of Treasury. Under those agreements, Treasury committed to providing each company with up to $100 billion in capital, and in exchange received, among other things, senior preferred shares and quarterly fixed-rate dividends. Four years later, the FHFA and Treasury amended the agreements and replaced the fixed-rate dividend formula with a variable one that required the companies to make quarterly payments consisting of their entire net worth minus a small specified capital reserve. This deal, which the parties refer to as the "third amendment" or "net worth sweep," caused the companies to transfer enormous amounts of wealth to Treasury. It also resulted in a slew of lawsuits, including the one before us today.

A group of Fannie Mae's and Freddie Mac's shareholders challenged the third amendment on statutory and constitutional grounds. With respect to their statutory claim, the shareholders contended that the Agency exceeded its authority as a conservator under the Recovery Act when it agreed to a variable dividend formula that would transfer nearly all of the companies' net worth to the Federal Government. And with respect to their constitutional claim, the shareholders argued that the FHFA's structure violates the separation of powers because the Agency is led by a single Director who may be removed by the President only "for cause." §4512(b)(2). They sought declaratory and injunctive relief, including an order requiring Treasury either to return the variable dividend payments or to re-characterize those payments as a pay down on Treasury's investment.

We hold that the shareholders' statutory claim is barred by the Recovery Act, which prohibits courts from taking "any action to restrain or affect the exercise of [the] powers or functions of the Agency as a conservator." §4617(f). But

we conclude that the FHFA's structure violates the separation of powers, and we remand for further proceedings to determine what remedy, if any, the shareholders are entitled to receive on their constitutional claim.

I

A

Congress created the Federal National Mortgage Association (Fannie Mae) in 1938 and the Federal Home Loan Mortgage Corporation (Freddie Mac) in 1970 to support the Nation's home mortgage system. See National Housing Act Amendments of 1938, 52 Stat. 23; Federal Home Loan Mortgage Corporation Act, 84 Stat. 451. The companies operate under congressional charters as for-profit corporations owned by private shareholders. See Housing and Urban Development Act of 1968, §801, 82 Stat. 536, 12 U. S. C. §1716b; Financial Institutions Reform, Recovery, and Enforcement Act of 1989, §731, 103 Stat. 429–436, note following 12 U. S. C. §1452. Their primary business is purchasing mortgages, pooling them into mortgage-backed securities, and selling them to investors. By doing so, the companies "relieve mortgage lenders of the risk of default and free up their capital to make more loans," *Jacobs* v. *Federal Housing Finance Agcy*. (*FHFA*), 908 F. 3d 884, 887 (CA3 2018), and this, in turn, increases the liquidity and stability of America's home lending market and promotes access to mortgage credit.

By 2007, the companies' mortgage portfolios had a combined value of approximately $5 trillion and accounted for almost half of the Nation's mortgage market. So, when the housing bubble burst in 2008, the companies took a sizeable hit. In fact, they lost more that year than they had earned in the previous 37 years combined. See FHFA Office of Inspector General, Analysis of the 2012 Amendments to the Senior Preferred Stock Purchase Agreements 5 (Mar. 20, 2013), https://www.fhfaoig.gov/Content/Files/WPR–2013–

002_2.pdf. Though they remained solvent, many feared the companies would eventually default and throw the housing market into a tailspin.

To address that concern, Congress enacted the Recovery Act. Two aspects of that statute are relevant here.

First, the Recovery Act authorized Treasury to purchase Fannie Mae's and Freddie Mac's stock if it determined that infusing the companies with capital would protect taxpayers and be beneficial to the financial and mortgage markets. 12 U. S. C. §§1455(*l*)(1), 1719(g)(1). The statute further provided that Treasury's purchasing authority would automatically expire at the end of the 2009 calendar year. §§1455(*l*)(4), 1719(g)(4).

Second, the Recovery Act created the FHFA to regulate the companies and, in certain specified circumstances, step in as their conservator or receiver. §§4502(20), 4511(b), 4617.[1] A few features of the Agency deserve mention.

The FHFA is led by a single Director who is appointed by the President with the advice and consent of the Senate. §§4512(a), (b)(1). The Director serves a 5-year term but may be removed by the President "for cause." §4512(b)(2). The Director is permitted to choose three deputies to assist in running the Agency's various divisions, and the Director sits as Chairman of the Federal Housing Finance Oversight Board, which advises the Agency about matters of strategy and policy. §§4512(c)–(e), 4513a(a), (c)(4). Since its inception, the FHFA has had three Senate-confirmed Directors, and in times of their absence, various Acting Directors have been selected to lead the Agency on an interim basis. See *Rop* v. *FHFA*, 485 F. Supp. 3d 900, 915 (WD Mich. 2020).

The Agency is tasked with supervising nearly every as-

[1] Before the Recovery Act was enacted, Fannie Mae and Freddie Mac were regulated by the Office of Federal Housing Enterprise Oversight. See Federal Housing Enterprises Financial Safety and Soundness Act of 1992, §§1311–1313, 106 Stat. 3944–3946.

pect of the companies' management and operations. For example, the Agency must approve any new products that the companies would like to offer. §4541(a). It may reject acquisitions and certain transfers of interests the companies seek to execute. §4513(a)(2)(A). It establishes criteria governing the companies' portfolio holdings. §4624(a). It may order the companies to dispose of or acquire any asset. §4624(c). It may impose caps on how much the companies compensate their executives and prohibit or limit golden parachute and indemnification payments. §4518. It may require the companies to submit regular reports on their condition or "any other relevant topics." §4514(a)(2). And it must conduct one on-site examination of the companies each year and may, on any terms the Director deems appropriate, hire outside firms to perform additional reviews. §§4517(a)–(b), 4519.

The statute empowers the Agency with broad investigative and enforcement authority to ensure compliance with these standards. Among other things, the Agency may hold hearings, §§4582, 4633; issue subpoenas, §§4588(a)(3), 4641(a)(3); remove or suspend corporate officers, §4636a; issue cease-and-desist orders, §§4581, 4632; bring civil actions in federal court, §§4584, 4635; and impose penalties ranging from $2,000 to $2 million per day, §§4514(c)(2), 4585, 4636(b).

In addition to vesting the FHFA with these supervisory and enforcement powers, the Recovery Act authorizes the Agency to act as the companies' conservator or receiver for the purposes of reorganizing the companies, rehabilitating them, or winding down their affairs. §§4617(a)(1)–(2). The Director may appoint the Agency in either capacity if the companies meet certain specified benchmarks of financial risk or satisfy other criteria, §4617(a)(3), and once the Director makes that appointment, the Agency succeeds to all of the rights, titles, powers, and privileges of the companies,

§4617(b)(2)(A)(i).[2] From there, the Agency has the authority to take control of the companies' assets and operations, conduct business on their behalf, and transfer or sell any of their assets or liabilities. §§4617(b)(2)(B)–(C), (G). In performing these functions, the Agency may exercise whatever incidental powers it deems necessary, and it may take any authorized action that is in the best interests of the companies or the Agency itself. §4617(b)(2)(J).

Finally, the FHFA is not funded through the ordinary appropriations process. Rather, the Agency's budget comes from the assessments it imposes on the entities it regulates, which include Fannie Mae, Freddie Mac, and the Nation's federal home loan banks. §§4502(20), 4516(a). Those assessments are unlimited so long as they do not exceed the "reasonable costs . . . and expenses of the Agency." §4516(a). In fiscal year 2020, the FHFA collected more than $311 million. See FHFA, Performance & Accountability Report 24 (2020), https://www.fhfa.gov/AboutUs/Reports/ReportDocuments/FHFA-2020-PAR.pdf.

B

In September 2008, less than two months after Congress enacted the Recovery Act, the Director appointed the FHFA as conservator of Fannie Mae and Freddie Mac. The following day, Treasury exercised its temporary authority to buy their stock and the FHFA, acting as the companies' conservator, entered into purchasing agreements with Treasury.[3] Under these agreements, Treasury committed to providing

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[2] Receivership is mandatory in certain circumstances not relevant here. See 12 U. S. C. §4617(a)(4).

[3] See Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and the Federal National Mortgage Association (Sept. 26, 2008); Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and the Federal Home Loan Mortgage Corporation (Sept. 26, 2008) (online sources archived at www.supremecourt.gov).

each company with up to $100 billion in capital, upon which it could draw in any quarter in which its liabilities exceeded its assets. In return for this funding commitment, Treasury received 1 million shares of specially created senior preferred stock in each company.

Those shares provided Treasury with four key entitlements. First, Treasury received a senior liquidation preference equal to $1 billion in each company, with a dollar-for-dollar increase every time the company drew on the capital commitment. In other words, in the event the FHFA liquidated Fannie Mae or Freddie Mac, Treasury would have the right to be paid back $1 billion, as well as whatever amount the company had already drawn from the capital commitment, before any other investors or shareholders could seek repayment. Second, Treasury was given warrants, or long-term options, to purchase up to 79.9% of the companies' common stock at a nominal price. Third, Treasury became entitled to a quarterly periodic commitment fee, which the companies would pay to compensate Treasury for the support provided by the ongoing access to capital.[4] And finally, the companies became obligated to pay Treasury quarterly cash dividends at an annualized rate equal to 10% of Treasury's outstanding liquidation preference.

Within a year, Fannie Mae's and Freddie Mac's net worth decreased substantially, and it became clear that Treasury's initial capital commitment would prove inadequate. To address that problem, the FHFA and Treasury twice amended the agreements to increase the available capital. The first amendment came in May 2009, when Treasury doubled its combined commitment from $200 billion to $400 billion.[5] And the second amendment was adopted in December 2009, when Treasury agreed to provide as much

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[4] Treasury has the authority to waive this fee. At the time this lawsuit was filed, Treasury had always exercised this option and had never received a periodic commitment fee from the companies. See App. 61.

[5] See Amendment to Amended and Restated Senior Preferred Stock

funding as the companies needed through 2012, after which the cap would be reinstated.[6]

The companies drew sizeable amounts from Treasury's capital commitment in the years that followed. And because of the fixed-rate dividend formula, the more money they drew, the larger their dividend obligations became. The companies consistently lacked the cash necessary to pay them, and they began the circular practice of drawing funds from Treasury's capital commitment just to hand those funds back as a quarterly dividend. By the middle of 2012, the companies had drawn over $187 billion, and $26 billion of that was used to satisfy their dividend obligations.

In August 2012, the FHFA and Treasury decided to amend the agreements for a third time.[7] This amendment replaced the fixed-rate dividend formula (which was tied to the size of Treasury's investment) with a variable dividend formula (which was tied to the companies' net worth). Under the new formula, the companies were required to pay a dividend equal to the amount, if any, by which their net

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Purchase Agreement Between the United States Department of the Treasury and Federal National Mortgage Association (May 6, 2009); Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and Federal Home Loan Mortgage Corporation (May 6, 2009) (online sources archived at www.supremecourt.gov).

[6] See Second Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and Federal National Mortgage Association (Dec. 24, 2009); Second Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and Federal Home Loan Mortgage Corporation (Dec. 24, 2009) (online sources archived at www.supremecourt.gov).

[7] See Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement Between the United State Department of the Treasury and Federal National Mortgage Association (Aug. 17, 2012); Third Amendment to Amended and Restated Senior Preferred Stock Purchase Agreement Between the United States Department of the Treasury and Federal Home Loan Mortgage Corporation (Aug. 17, 2012) (online sources archived at www.supremecourt.gov).

worth exceeded a pre-determined capital reserve.[8] In addition, the amendment suspended the companies' obligations to pay periodic commitment fees.

Shifting from a fixed-rate dividend formula to a variable one materially changed the nature of the agreements. If the net worth of Fannie Mae or Freddie Mac at the end of a quarter exceeded the capital reserve, the amendment required the company to pay *all of the surplus* to Treasury. But if a company's net worth at the end of a quarter did not exceed the reserve or if it lost money during a quarter, the amendment did not require the company to pay anything. This ensured that Fannie Mae and Freddie Mac would never again draw money from Treasury just to make their quarterly dividend payments, but it also meant that the companies would not be able to accrue capital in good quarters.

After the third amendment took effect, the companies' financial condition improved, and they ended up transferring immense amounts of wealth to Treasury. In 2013, the companies paid a total of $130 billion in dividends. In 2014, they paid over $40 billion. In 2015, they paid almost $16 billion. And in 2016, they paid almost $15 billion.[9] These payments totaled approximately $200 billion, which is at

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[8]The capital reserve for each company began at $3 billion and was scheduled to decrease to zero by January 2018. In December 2017, however, Treasury agreed to restore the reserve to $3 billion per company in return for a liquidation-preference increase of the same amount. See Letters from S. Mnuchin, Secretary of Treasury, to M. Watt, Director of the FHFA (Dec. 21, 2017). And in September 2019, Treasury agreed to raise the reserve to $25 billion for Fannie Mae and $20 billion for Freddie Mac, again in return for corresponding increases in the liquidation preference. See Letters from S. Mnuchin, Secretary of Treasury, to M. Calabria, Director of the FHFA (Sept. 27, 2019) (online sources archived at www.supremecourt.gov).

[9]See Fannie Mae, Form 10–K for Fiscal Year Ended Dec. 31, 2016, p. 120, https://www.fanniemae.com/media/26811/display; Freddie Mac, Form 10–K for Fiscal Year Ended Dec. 31, 2016, p. 283, https://www.freddiemac.com/investors/financials/pdf/10k_021617.pdf.

least $124 billion more than the companies would have had to pay during those four years under the fixed-rate dividend formula that previously applied.

The third amendment stayed in place for another four years. In January 2021, the FHFA and Treasury amended the stock purchasing agreements for a fourth time.[10] This amendment, which is currently in place, suspends the companies' quarterly dividend payments until they build up enough capital to meet certain specified thresholds, a process that we are told is expected to take years. See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (Mar. 18, 2021). During that time, each company is required to pay Treasury through increases in the liquidation preference that are equal to the increase, if any, in its net worth during the previous fiscal year. Once that threshold is met, the company will resume quarterly dividend payments, and those dividends will be equal to the lesser of 10% of Treasury's liquidation preference or the incremental increase in the company's net worth in the previous quarter. In addition, the company will be required to pay periodic commitment fees.

C

In 2016, three of Fannie Mae's and Freddie Mac's shareholders brought suit against the FHFA and its Director, and they asserted two claims that are relevant for present purposes. First, they claimed that the FHFA exceeded its statutory authority as the companies' conservator by adopting the third amendment. Second, they asserted that because the FHFA is led by a single Director who may be removed by the President only "for cause," its structure is unconstitutional. They asked for various forms of equitable

[10] See Letters from S. Mnuchin, Secretary of Treasury, to M. Calabria, Director of the FHFA (Jan. 14, 2021) (online source archived at www.supremecourt.gov).

relief, including a declaration that the third amendment violated the Recovery Act and that the FHFA's structure is unconstitutional; an injunction ordering Treasury to return to Fannie Mae and Freddie Mac all the dividend payments that were made under the third amendment or alternatively, a re-characterization of those payments as a paydown of the liquidation preference and a corresponding redemption of Treasury's stock; an order vacating and setting aside the third amendment; and an order enjoining the FHFA and Treasury from taking any further action to implement the third amendment.[11]

The District Court dismissed the statutory claim and granted summary judgment in favor of the FHFA on the constitutional claim, *Collins* v. *FHFA*, 254 F. Supp. 3d 841 (SD Tex. 2017), and a three-judge panel of the Fifth Circuit affirmed in part and reversed in part, *Collins* v. *Mnuchin*, 896 F. 3d 640 (2018) (*per curiam*). At the request of both parties, the Fifth Circuit reheard the case en banc. *Collins* v. *Mnuchin*, 908 F. 3d 151 (2018). In a deeply fractured opinion, the en banc court reversed the District Court's dismissal of the statutory claim; held that the FHFA's structure violates the separation of powers; and concluded that the appropriate remedy for the constitutional violation was to sever the removal restriction from the rest of the Recovery Act, but not to vacate and set aside the third amendment. *Collins* v. *Mnuchin*, 938 F. 3d 553 (2019).

Both the shareholders and the federal parties sought this Court's review, and we granted certiorari. 591 U. S. ___ (2020). Because the federal parties did not contest the Fifth Circuit's conclusion that the Recovery Act's removal re-

[11] The shareholders also sued Treasury and its Secretary, contending that the Agency exceeded its statutory authority and acted arbitrarily and capriciously in adopting the third amendment. The District Court dismissed these claims, the Fifth Circuit affirmed, and the shareholders did not seek review of those holdings in this Court.

striction improperly insulates the Director from Presidential control, we appointed Aaron Nielson to brief and argue, as *amicus curiae*, in support of the position that the FHFA's structure is constitutional. He has ably discharged his responsibilities.

II

We begin with the shareholders' statutory claim and conclude that the Recovery Act requires its dismissal.

In the Recovery Act, Congress sharply circumscribed judicial review of any action that the FHFA takes as a conservator or receiver. The Act states that unless review is specifically authorized by one of its provisions or is requested by the Director, "no court may take any action to restrain or affect the exercise of powers or functions of the Agency as a conservator or a receiver." 12 U. S. C. §4617(f). The parties refer to this as the Act's "anti-injunction clause."

Every Court of Appeals that has confronted this language has held that it prohibits relief where the FHFA action at issue fell within the scope of the Agency's authority as a conservator, but that relief is allowed if the FHFA exceeded that authority. See *Jacobs*, 908 F. 3d, at 889; *Saxton* v. *FHFA*, 901 F. 3d 954, 957–958 (CA8 2018); *Roberts* v. *FHFA*, 889 F. 3d 397, 402 (CA7 2018); *Robinson* v. *FHFA*, 876 F. 3d 220, 228 (CA6 2017); *Perry Capital LLC* v. *Mnuchin*, 864 F. 3d 591, 605–606 (CADC 2017); *County of Sonoma* v. *FHFA*, 710 F. 3d 987, 992 (CA9 2013); *Leon Cty.* v. *FHFA*, 700 F. 3d 1273, 1278 (CA11 2012).

We agree with that consensus. The anti-injunction clause applies only where the FHFA exercised its "powers or functions" "as a conservator or a receiver." Where the FHFA does not exercise but instead exceeds those powers or functions, the anti-injunction clause imposes no restrictions.

With that understanding in mind, we must decide

whether the FHFA was exercising its powers or functions as a conservator when it agreed to the third amendment. If it was, then the anti-injunction clause bars the shareholders' statutory claim.

A

The Recovery Act grants the FHFA expansive authority in its role as a conservator. As we have explained, the Agency is authorized to take control of a regulated entity's assets and operations, conduct business on its behalf, and transfer or sell any of its assets or liabilities. See §§4617(b)(2)(B)–(C), (G). When the FHFA exercises these powers, its actions must be "necessary to put the regulated entity in a sound and solvent condition" and must be "appropriate to carry on the business of the regulated entity and preserve and conserve [its] assets and property." §4617(b)(2)(D). Thus, when the FHFA acts as a conservator, its mission is rehabilitation, and to that extent, an FHFA conservatorship is like any other. See, *e.g., Resolution Trust Corporation* v. *CedarMinn Bldg. Ltd. Partnership*, 956 F. 2d 1446, 1454 (CA8 1992).[12]

An FHFA conservatorship, however, differs from a typical conservatorship in a key respect. Instead of mandating that the FHFA always act in the best interests of the regulated entity, the Recovery Act authorizes the Agency to act in what it determines is "in the best interests of the regulated entity *or the Agency*." §4617(b)(2)(J)(ii) (emphasis added). Thus, when the FHFA acts as a conservator, it may aim to rehabilitate the regulated entity in a way that, while not in the best interests of the regulated entity, is beneficial

[12] By contrast, when the FHFA acts as a receiver, it is required to "place the regulated entity in liquidation and proceed to realize upon the assets of the regulated entity." §4617(b)(2)(E). The roles of conservator and receiver are very different. See §4617(a)(4)(D) ("The appointment of the Agency as receiver of a regulated entity under this section shall immediately terminate any conservatorship established for the regulated entity under this chapter").

to the Agency and, by extension, the public it serves. This distinctive feature of an FHFA conservatorship is fatal to the shareholders' statutory claim.

The facts alleged in the complaint demonstrate that the FHFA chose a path of rehabilitation that was designed to serve public interests by ensuring Fannie Mae's and Freddie Mac's continued support of the secondary mortgage market. Recall that the third amendment was adopted at a time when the companies' liabilities had consistently exceeded their assets over at least the prior three years. See *supra,* at 8. It is undisputed that the companies had repeatedly been unable to make their fixed quarterly dividend payments without drawing on Treasury's capital commitment. And there is also no dispute that the cap on Treasury's capital commitment was scheduled to be reinstated at the end of the year and that Treasury's temporary stock-purchasing authority had expired in 2009. See §§1455(*l*)(4), 1719(g)(4). If things had proceeded as they had in the past, there was a realistic possibility that the companies would have consumed some or all of the remaining capital commitment in order to pay their dividend obligations, which were themselves increasing in size every time the companies made a draw.

The third amendment eliminated this risk by replacing the fixed-rate dividend formula with a variable one. Under the new formula, the companies would never again have to use capital from Treasury's commitment to pay their dividends. And that, in turn, ensured that all of Treasury's capital was available to backstop the companies' operations during difficult quarters. In exchange, the companies had to relinquish nearly all their net worth, and this made certain that they would never be able to build up their own capital buffers, pay back Treasury's investment, and exit conservatorship. Whether or not this new arrangement was in the best interests of the companies or their shareholders, the FHFA could have reasonably concluded that it

was in the best interests of members of the public who rely on a stable secondary mortgage market. The Recovery Act therefore authorized the Agency to choose this option.

B

The shareholders contend that the third amendment did not actually serve the best interests of the FHFA or the public because it did not further the asserted objective of protecting Treasury's capital commitment. This is so, the shareholders argue, for two reasons.

First, they claim that the FHFA adopted the third amendment at a time when the companies were on the precipice of a financial uptick and that they would soon have been in a position not only to pay cash dividends, but also to build up capital buffers to absorb future losses. Thus, the shareholders assert, sweeping all the companies' earnings to Treasury increased rather than decreased the risk that the companies would make further draws and eventually deplete Treasury's commitment.

The nature of the conservatorship authorized by the Recovery Act permitted the Agency to reject the shareholders' suggested strategy in favor of one that the Agency reasonably viewed as more certain to ensure market stability. The success of the strategy that the shareholders tout was dependent on speculative projections about future earnings, and recent experience had given the FHFA reasons for caution. The companies had been repeatedly unable to pay their dividends from 2009 to 2011. With the aim of more securely ensuring market stability, the FHFA did not exceed the scope of its conservatorship authority by deciding on what it viewed as a less risky approach.

Second, the shareholders contend that the FHFA could have protected Treasury's capital commitment by ordering the companies to pay the dividends in kind rather than in cash. This argument rests on a misunderstanding of the

agreement between the companies and Treasury. The companies' stock certificates required Fannie Mae and Freddie Mac to pay their dividends "in cash in a timely manner." App. 180, 198. If the companies had failed to do so, they would have incurred a penalty: Treasury's liquidation preference would have immediately increased by the dividend amount, and the dividend rate would have increased from 10% to 12% until the companies paid their outstanding dividends in cash.[13] Thus, paying Treasury in kind would not have satisfied the cash dividend obligation, and the risk that the companies' cash dividend obligations would consume Treasury's capital commitment in the future would have remained. Choosing to forgo this option in favor of one that eliminated the risk entirely was not in excess of the FHFA's statutory authority as conservator.

Finally, the shareholders argue that because the third amendment left the companies unable to build capital reserves and exit conservatorship, it is best viewed as a step toward ultimate liquidation and, according to the shareholders, the FHFA lacked the authority to take this decisive step without first placing the companies in receivership.

The shareholders' characterization of the third amendment as a step toward liquidation is inaccurate. Nothing about the amendment precluded the companies from operating at full steam in the marketplace, and all the available evidence suggests that they did so. Between 2012 and 2016 alone, the companies "collectively purchased at least 11 million mortgages on single-family owner-occupied properties,

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[13] The senior preferred stock certificates provide: "[I]f at any time the Company shall have for any reason failed to pay dividends in cash in a timely manner as required by this Certificate, then immediately following such failure and for all Dividend Periods thereafter until the Dividend Period following the date on which the Company shall have paid in cash full cumulative dividends (including any unpaid dividends added to the Liquidation Preference . . .), the 'Dividend Rate' shall mean 12.0%"). App. 180, 198.

and Fannie issued over $1.5 trillion in single-family mortgage-backed securities." *Perry Capital*, 864 F. 3d, at 602. During that time, the companies amassed over $200 billion in net worth and, as of November 2020, Fannie Mae's mortgage portfolio had grown to $163 billion and Freddie Mac's to $193 billion.[14] This evidence does not suggest that the companies were in the process of winding down their affairs.

It is not necessary for us to decide—and we do not decide—whether the FHFA made the best, or even a particularly good, business decision when it adopted the third amendment. Instead, we conclude only that under the terms of the Recovery Act, the FHFA did not exceed its authority as a conservator, and therefore the anti-injunction clause bars the shareholders' statutory claim.

III

We now consider the shareholders' claim that the statutory restriction on the President's power to remove the FHFA Director, 12 U. S. C. §4512(b)(2), is unconstitutional.

A

Before turning to the merits of this question, however, we must address threshold issues raised in the lower court or by the federal parties and appointed *amicus*.

1

In the proceedings below, some judges concluded that the shareholders lack standing to bring their constitutional claim. See 938 F. 3d, at 620 (Costa, J., dissenting in part). Because we have an obligation to make sure that we have jurisdiction to decide this claim, see *DaimlerChrysler Corp.* v. *Cuno*, 547 U. S. 332, 340 (2006), we begin by explaining

[14] See Dept. of Treasury Press Release, Treasury Department and FHFA Amend Terms of Preferred Stock Purchase Agreements for Fannie Mae and Freddie Mac (Jan. 14, 2021), https://home.treasury.gov/news/press-releases/sm1236.

why the shareholders have standing.

To establish Article III standing, a plaintiff must show that it has suffered an "injury in fact" that is "fairly traceable" to the defendant's conduct and would likely be "redressed by a favorable decision." *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992) (alterations and internal quotation marks omitted). The shareholders meet these requirements.

First, the shareholders claim that the FHFA transferred the value of their property rights in Fannie Mae and Freddie Mac to Treasury, and that sort of pocketbook injury is a prototypical form of injury in fact. See *Czyzewski* v. *Jevic Holding Corp.*, 580 U. S. ___, ___ (2017) (slip op., at 11). Second, the shareholders' injury is traceable to the FHFA's adoption and implementation of the third amendment, which is responsible for the variable dividend formula that swept the companies' net worth to Treasury and left nothing for their private shareholders. Finally, a decision in the shareholders' favor could easily lead to the award of at least some of the relief that the shareholders seek. We found standing under similar circumstances in *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___ (2020). See *id.*, at ___ (slip op., at 10) ("In the specific context of the President's removal power, we have found it sufficient that the challenger sustains injury from an executive act that allegedly exceeds the official's authority" (brackets and internal quotation marks omitted)); see also *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010) (considering challenge to removal restriction where plaintiffs claimed injury from allegedly unlawful agency oversight).

The judges who thought that the shareholders lacked standing reached that conclusion on the ground that the shareholders could not trace their injury to the Recovery Act's removal restriction. See 938 F. 3d, at 620–621 (opin-

ion of Costa, J.). But for purposes of traceability, the relevant inquiry is whether the plaintiffs' injury can be traced to "allegedly unlawful conduct" of the defendant, not to the provision of law that is challenged. *Allen* v. *Wright*, 468 U. S. 737, 751 (1984); see also *Lujan*, *supra*, at 560 (explaining that the plaintiff must show "a causal connection between the injury and the conduct complained of," and that "the injury has to be fairly traceable to the challenged action of the defendant" (quoting *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 41 (1976); brackets, ellipsis, and internal quotation marks omitted)). Because the relevant action in this case is the third amendment, and because the shareholders' concrete injury flows directly from that amendment, the traceability requirement is satisfied.

2

After oral argument was held in this case, the federal parties notified the Court that the FHFA and Treasury had agreed to amend the stock purchasing agreements for a fourth time.[15] And because that amendment eliminated the variable dividend formula that had caused the shareholders' injury, it is necessary to consider whether the fourth amendment moots the shareholders' constitutional claim.

It does so only with respect to some of the relief requested. In their complaint, the shareholders sought various forms of prospective relief, but because that amendment is no longer in place, the shareholders no longer have any ground for such relief. By contrast, they retain an interest in the retrospective relief they have requested, and that interest saves their constitutional claim from mootness.

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[15] See Letter from E. Prelogar, Acting Solicitor General, to S. Harris, Clerk of Court (Mar. 18, 2021).

3

The federal parties contend that the "succession clause" in the Recovery Act bars the shareholders' constitutional claim. Under this clause, when the FHFA appoints itself as conservator, it immediately succeeds to "all rights, titles, powers, and privileges of the regulated entity, and of any stockholder, officer, or director of such regulated entity with respect to the regulated entity and the assets of the regulated entity." 12 U. S. C. §4617(b)(2)(A)(i). According to the federal parties, this clause transferred to the FHFA the shareholders' right to bring their constitutional claim, and it therefore bars the shareholders from asserting that claim on their own behalf. In other words, the federal parties read the succession clause to mean that the only party with the authority to challenge the restriction on the President's power to remove the Director of the FHFA is the FHFA itself.

The federal parties read the succession clause too broadly. The clause effects only a limited transfer of stockholders' rights, namely, the rights they hold *as stockholders "with respect to the regulated entity" and its assets*. The right the shareholders assert in this case is one that they hold in common with all other citizens who have standing to challenge the removal restriction. As we have explained on many prior occasions, the separation of powers is designed to preserve the liberty of all the people. See, *e.g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 730 (1986); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring) (noting that the Constitution "diffuses power the better to secure liberty"). So whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge. See, *e.g.*, *Seila Law*, *supra*, at ___ (slip op., at 10); *Bond* v. *United States*, 564 U. S. 211, 223 (2011); *INS* v. *Chadha*, 462 U. S. 919, 935–936 (1983). Nearly half our hallmark removal cases have been brought by aggrieved private parties. See *Seila*

Law, 591 U. S., at ___–___ (slip op., at 6–7) (law firm to which the agency issued a civil investigative demand); *Free Enterprise Fund*, *supra*, at 487 (accounting firm placed under agency investigation); *Morrison* v. *Olson*, 487 U. S. 654, 668 (1988) (federal officials subject to subpoenas issued at the request of an independent counsel); *Bowsher*, *supra*, at 719 (union representing employee-members whose benefit increases were suspended due to an action of the Comptroller General).

Here, the right asserted is not one that is distinctive to shareholders of Fannie Mae and Freddie Mac; it is a right shared by everyone in this country. Because the succession clause transfers the rights of "stockholder[s] . . . with respect to the regulated entity," it does not transfer to the FHFA the constitutional right at issue.[16]

4

The federal parties and appointed *amicus* next contend that the shareholders' constitutional challenge was dead on arrival because the third amendment was adopted when the FHFA was led by an *Acting* Director[17] who was removable by the President at will. This argument would have merit if (a) the Acting Director was indeed removable at will (a matter we address below, see *infra*, at 22–26) and (b) all the harm allegedly incurred by the shareholders had been completed at the time of the third amendment's adoption. Under those circumstances, any constitutional defect in the provision restricting the removal of a confirmed Director would not have harmed the shareholders, and they would not be entitled to any relief. But the harm allegedly caused by the third amendment did not come to an end during the

[16] The federal parties also argue that the Recovery Act's succession clause bars the shareholders' statutory claim. Because we have concluded that the statutory claim is already barred by the anti-injunction clause, we do not address this argument.

[17] See *Rop* v. *FHFA*, 485 F. Supp. 3d 900, 915 (WD Mich. 2020).

tenure of the Acting Director who was in office when the amendment was adopted. That harm is alleged to have continued after the Acting Director was replaced by a succession of confirmed Directors, and it appears that any one of those officers could have renegotiated the companies' dividend formula with Treasury. From what we can tell from the record, the FHFA and Treasury consistently reevaluated the stock purchasing agreements and adopted amendments as they thought necessary. Nothing in the third amendment suggested that it was permanent or that the FHFA lacked the ability to bring Treasury back to the bargaining table. After all, the agencies adopted a fourth amendment just this year. The federal parties and *amicus* do not dispute this. Accordingly, continuing to implement the third amendment was a decision that each confirmed Director has made since 2012, and because confirmed Directors chose to continue implementing the third amendment while insulated from plenary Presidential control, the survival of the shareholders' constitutional claim does not depend on the answer to the question whether the Recovery Act restricted the removal of an Acting Director.

On the other hand, the answer to that question could have a bearing on the *scope* of relief that may be awarded to the shareholders. If the statute unconstitutionally restricts the authority of the President to remove an Acting Director, the shareholders could seek relief rectifying injury inflicted by actions taken while an Acting Director headed the Agency. But if the statute does not restrict the removal of an Acting Director, any harm resulting from actions taken under an Acting Director would not be attributable to a constitutional violation. Only harm caused by a confirmed Director's implementation of the third amendment could then provide a basis for relief. We therefore consider what the Recovery Act says about the removal of an Acting Director.

The Recovery Act's removal restriction provides that

"[t]he Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President." 12 U. S. C. §4512(b)(2). That provision refers only to "the Director," and it is surrounded by other provisions that apply only to the Director. See §4512(a) (establishing the position of the Director); §4512(b)(1) (setting out the procedure for appointing the Director); §4512(b)(3) (discussing the manner for selecting a new Director to fill a vacancy).

The Act's mention of an "acting Director" does not appear until four subsections later, and that subsection does not include any removal restriction. See §4512(f). Nor does it cross-reference the earlier restriction on the removal of a confirmed Director. *Ibid.* Instead, it merely states that "[i]n the event of the death, resignation, sickness, or absence of the Director, the President shall designate" one of three Deputy Directors to serve as an Acting Director until the Senate-confirmed Director returns or his successor is appointed. *Ibid.*

That omission is telling. When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure. See *Shurtleff* v. *United States*, 189 U. S. 311, 316 (1903). Moreover, "when Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Barnhart* v. *Sigmon Coal Co.,* 534 U. S. 438, 452 (2002) (internal quotation marks omitted). In the Recovery Act, Congress expressly restricted the President's power to remove a confirmed Director but said nothing of the kind with respect to an Acting Director. And Congress might well have wanted to provide greater protection for a Director who had been confirmed by the Senate than for an Acting Director in whose appointment Congress had played no role. In any event, the disparate treatment weighs

against the shareholders' interpretation.

In support of that interpretation, the shareholders first contend that the Recovery Act should be read to restrict the removal of an Acting Director because the Act refers to the FHFA as an "*independent* agency of the Federal Government." 12 U. S. C. §4511(a) (emphasis added). The reference to the FHFA's independence, they claim, means that any person heading the Agency was intended to enjoy a degree of independence from Presidential control.

That interpretation reads far too much into the term "independent." The term does not necessarily mean that the Agency is "independent" of the President. It may mean instead that the Agency is not part of and is therefore independent of any other unit of the Federal Government. And describing an agency as independent would be an odd way to signify that its head is removable only for cause because even an agency head who is shielded in that way would hardly be fully "independent" of Presidential control.

A review of other enabling statutes that describe agencies as "independent" undermines the shareholders' interpretation of the term. Congress has described many agencies as "independent" without imposing any restriction on the President's power to remove the agency's leadership. This is true, for example, of the Peace Corps, 22 U. S. C. §§2501–1, 2503, the Defense Nuclear Facilities Safety Board, 42 U. S. C. §2286, the Commodity Futures Trading Commission, 7 U. S. C. §2(a)(2), the Farm Credit Administration, 12 U. S. C. §§2241–2242, the National Credit Union Administration, 12 U. S. C. §1752a, and the Railroad Retirement Board, 45 U. S. C. §231f(a).

In other statutes, Congress has restricted the President's removal power without referring to the agency as "independent." This is the case for the Commission on Civil Rights, 42 U. S. C. §§1975(a), (e), the Federal Trade Commission, 15 U. S. C. §41, and the National Labor Relations

Board, 29 U. S. C. §153. And in yet another group of statutes, Congress has referred to an agency as "independent" but has not expressly provided that the removal of the agency head is subject to any restrictions. See 44 U. S. C. §§2102, 2103 (National Archives and Records Administration); 42 U. S. C. §§1861, 1864 (National Science Foundation). That combination of provisions shows that the term "independent" does not necessarily connote independence from Presidential control, and we refuse to read that connotation into the Recovery Act.

Taking a different tack, the shareholders claim that their interpretation is supported by the absence of any reference to removal in the Recovery Act's provision on Acting Directors. Again, that provision states that if the Director is absent, "the President shall designate [one of the FHFA's three Deputy Directors] to serve as acting Director until the return of the Director, or the appointment of a successor." 12 U. S. C. §4512(f). According to the shareholders, this text makes clear that an Acting Director differs from a confirmed Director in three respects (manner of appointment, qualifications, and length of tenure). They assume that these are the only respects in which confirmed and Acting Directors differ, and they therefore conclude that the permissible grounds for removing an Acting Director are the same as those for a confirmed Director.

This argument draws an unwarranted inference from the Recovery Act's silence on this matter. As noted, we generally presume that the President holds the power to remove at will executive officers and that a statute must contain "plain language to take [that power] away." *Shurtleff*, *supra*, at 316. The shareholders argue that this is not a hard and fast rule, but we certainly see no grounds for an exception in this case.[18]

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[18] In *Wiener* v. *United States*, 357 U. S. 349 (1958), the Court read a removal restriction into the War Claims Act of 1948. But it did so on the

For all these reasons, we hold that the Recovery Act's removal restriction does not extend to an Acting Director, and we now proceed to the merits of the shareholders' constitutional argument.

B

The Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers. Indeed, our decision last Term in *Seila Law* is all but dispositive. There, we held that Congress could not limit the President's power to remove the Director of the Consumer Financial Protection Bureau (CFPB) to instances of "inefficiency, neglect, or malfeasance." 591 U. S., at ___ (slip op., at 11). We did "not revisit our prior decisions allowing certain limitations on the President's removal power," but we found "compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director." *Id.,* at ___ (slip op., at 2). "Such an agency," we observed, "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.*, at ___–___ (slip op., at 2–3).

A straightforward application of our reasoning in *Seila Law* dictates the result here. The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power. Fulfilling his obligation to defend the constitutionality of the Recovery Act's removal restriction, *amicus* attempts to distinguish the FHFA from the CFPB. We do not find any of these distinctions sufficient to justify a different result.

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rationale that the War Claims Commission was an adjudicatory body, and as such, it had a unique need for "absolute freedom from Executive interference." *Id.,* at 353, 355–356. The FHFA is not an adjudicatory body, so *Shurtleff*, not *Weiner,* is the more applicable precedent.

1

Amicus first argues that Congress should have greater leeway to restrict the President's power to remove the FHFA Director because the FHFA's authority is more limited than that of the CFPB. *Amicus* points out that the CFPB administers 19 statutes while the FHFA administers only 1; the CFPB regulates millions of individuals and businesses whereas the FHFA regulates a small number of Government-sponsored enterprises; the CFPB has broad rulemaking and enforcement authority and the FHFA has little; and the CFPB receives a large budget from the Federal Reserve while the FHFA collects roughly half the amount from regulated entities.

We have noted differences between these two agencies. See *Seila Law*, 591 U. S., at ___ (slip op., at 20) (noting that the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors"). But the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head. The President's removal power serves vital purposes even when the officer subject to removal is not the head of one of the largest and most powerful agencies. The removal power helps the President maintain a degree of control over the subordinates he needs to carry out his duties as the head of the Executive Branch, and it works to ensure that these subordinates serve the people effectively and in accordance with the policies that the people presumably elected the President to promote. See, *e.g.*, *id.,* at ___–___ (slip op., at 11–12); *Free Enterprise Fund*, 561 U. S., at 501–502; *Myers* v. *United States*, 272 U. S. 52, 131 (1926). In addition, because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability. See *Free Enterprise Fund*, 561 U. S., at 497–498. At-will removal ensures that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the

President, and the President on the community." *Id.*, at 498 (quoting 1 Annals of Cong. 499 (1789) (J. Madison)). These purposes are implicated whenever an agency does important work, and nothing about the size or role of the FHFA convinces us that its Director should be treated differently from the Director of the CFPB. The test that *amicus* proposes would also lead to severe practical problems. *Amicus* does not propose any clear standard to distinguish agencies whose leaders must be removable at will from those whose leaders may be protected from at-will removal. This case is illustrative. As *amicus* points out, the CFPB might be thought to wield more power than the FHFA in some respects. But the FHFA might in other respects be considered more powerful than the CFPB.

For example, the CFPB's rulemaking authority is more constricted. Under the Dodd-Frank Act, the CFPB's final rules can be set aside by a super majority of the Financial Stability and Oversight Council whenever it concludes that the rule would "'put the safety and soundness'" of the Nation's banking or financial systems at risk. See *Seila Law*, *supra*, at ___, n. 9 (slip op., at 25, n. 9) (quoting 12 U. S. C. §§5513(a), (c)(3)). No board or commission can set aside the FHFA's rules.

In addition, while the CFPB has direct regulatory and enforcement authority over purely private individuals and businesses, the FHFA has regulatory and enforcement authority over two companies that dominate the secondary mortgage market and have the power to reshape the housing sector. See App. 116. FHFA actions with respect to those companies could have an immediate impact on millions of private individuals and the economy at large. See *Seila Law*, *supra*, at ___ (slip op., at 31) (KAGAN, J., concurring in judgment with respect to severability and dissenting in part) (noting that "the FHFA plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely").

Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.[19]

2

Amicus next contends that Congress may restrict the removal of the FHFA Director because when the Agency steps into the shoes of a regulated entity as its conservator or receiver, it takes on the status of a private party and thus does not wield executive power. But the Agency does not always act in such a capacity, and even when it acts as conservator or receiver, its authority stems from a special statute, not the laws that generally govern conservators and receivers. In deciding what it must do, what it cannot do, and the standards that govern its work, the FHFA must interpret the Recovery Act, and "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher*, 478 U. S., at 733; see also *id.,* at 765 (White, J., dissenting) ("[T]he powers exercised by the Comptroller under the Act may be characterized as 'executive' in that they involve the interpretation and carrying out of the Act's mandate").

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[19] *Amicus* argues that there is historical support for the removal restriction at issue here because the Comptroller of Currency and the members of the Sinking Fund Commission were subject to similar protection, but those agencies are materially different because neither of them operated beyond the President's control, and one of them was led by a multi-member Commission. As we explained in *Seila Law*, with the exception of a 1-year aberration during the Civil War, the Comptroller was removable at will by the President, who needed only to communicate the reasons for his decision to Congress. 591 U. S., at ___, n. 5 (slip op., at 19, n. 5). And the Sinking Fund Commission, which Congress created to purchase U. S. securities following the Revolutionary War, was run by a 5-member Commission, and three of those Commissioners were part of the President's Cabinet and therefore removable at will. See An Act Making Provision for the Reduction of the Public Debt, ch. 47, 1 Stat. 186 (1790).

Moreover, as we have already mentioned, see *supra*, at 5–6, the FHFA's powers under the Recovery Act differ critically from those of most conservators and receivers. It can subordinate the best interests of the company to its own best interests and those of the public. See 12 U. S. C. §4617(b)(2)(J)(ii). Its business decisions are protected from judicial review. §4617(f). It is empowered to issue a "regulation or order" requiring stockholders, directors, and officers to exercise certain functions. §4617(b)(2)(C). It is authorized to issue subpoenas. §4617(b)(2)(I). And of course, it has the power to put the company into conservatorship and simultaneously appoint itself as conservator. §4617(a)(1). For these reasons, the FHFA clearly exercises executive power.[20]

3

Amicus asserts that the FHFA's structure does not violate the separation of powers because the entities it regulates are Government-sponsored enterprises that have federal charters, serve public objectives, and receive "'special privileges'" like tax exemptions and certain borrowing rights. Brief for Court-Appointed *Amicus Curiae* 27–28. In *amicus*'s view, the individual-liberty concerns that the removal power exists to preserve "ring hollow where the only entities an agency regulates are themselves not purely private actors." *Id.,* at 29 (internal quotation marks omitted).

This argument fails because the President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound

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[20] *Amicus* claims that *O'Melveny & Myers* v. *FDIC*, 512 U. S. 79 (1994), supports his argument, but that decision is far afield. It held that state law, not federal common law, governed an attribute of the FDIC's status as receiver for an insolvent savings bank. *Id.,* at 81–82. The nature of the FDIC's authority in that capacity sheds no light on the nature of the FHFA's distinctive authority as conservator under the Recovery Act.

but indirect effect on their lives. And there can be no question that the FHFA's control over Fannie Mae and Freddie Mac can deeply impact the lives of millions of Americans by affecting their ability to buy and keep their homes.

4

Finally, *amicus* contends that there is no constitutional problem in this case because the Recovery Act offers only "modest [tenure] protection." *Id.,* at 37. That is so, *amicus* claims, because the for-cause standard would be satisfied whenever a Director "disobey[ed] a lawful [Presidential] order," including one about the Agency's policy discretion. *Id.,* at 41.

We acknowledge that the Recovery Act's "for cause" restriction appears to give the President more removal authority than other removal provisions reviewed by this Court. See, *e.g., Seila Law*, 591 U. S., at ___ (slip op., at 5) ("for 'inefficiency, neglect of duty, or malfeasance in office'"); *Morrison*, 487 U. S., at 663 ("'for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of [his or her] duties'"); *Bowsher*, *supra*, at 728 ("by joint resolution of Congress" due to "'permanent disability,'" "'inefficiency,'" "'neglect of duty,'" "'malfeasance,'" "'a felony[,] or conduct involving moral turpitude'"); *Humphrey's Executor* v. *United States*, 295 U. S. 602, 619 (1935) ("'"for inefficiency, neglect of duty, or malfeasance in office"'"); *Myers*, 272 U. S., at 107 ("'by and with the advice and consent of the Senate'"). And it is certainly true that disobeying an order is generally regarded as "cause" for removal. See *NLRB* v. *Electrical Workers*, 346 U. S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough").

But as we explained last Term, the Constitution prohibits even "modest restrictions" on the President's power to remove the head of an agency with a single top officer. *Seila*

Law, *supra*, at ___ (slip op., at 26) (internal quotation marks omitted). The President must be able to remove not just officers who disobey his commands but also those he finds "negligent and inefficient," *Myers*, 272 U. S., at 135, those who exercise their discretion in a way that is not "intelligen[t] or wis[e]," *ibid.*, those who have "different views of policy," *id.*, at 131, those who come "from a competing political party who is dead set against [the President's] agenda," *Seila Law*, *supra*, at ___ (slip op., at 24) (emphasis deleted), and those in whom he has simply lost confidence, *Myers*, *supra*, at 124. *Amicus* recognizes that "'for cause' . . . does not mean the same thing as 'at will,'" Brief for Court-Appointed *Amicus Curiae* 44–45, and therefore the removal restriction in the Recovery Act violates the separation of powers.[21]

C

Having found that the removal restriction violates the Constitution, we turn to the shareholders' request for relief. And because the shareholders no longer have a live claim for prospective relief, see *supra*, at 19, the only remaining remedial question concerns retrospective relief.

On this issue, the shareholders' lead argument is that the third amendment must be completely undone. They seek an order setting aside the amendment and requiring the "return to Fannie and Freddie [of] all dividend payments

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[21] *Amicus* warns that if the Court holds that the Recovery Act's removal restriction violates the Constitution, the decision will "call into question many other aspects of the Federal Government." Brief for Court-Appointed *Amicus Curiae* 47. *Amicus* points to the Social Security Administration, the Office of Special Counsel, the Comptroller, "multi-member agencies for which the chair is nominated by the President and confirmed by the Senate to a fixed term," and the Civil Service. *Id.*, at 48 (emphasis deleted). None of these agencies is before us, and we do not comment on the constitutionality of any removal restriction that applies to their officers.

made pursuant to [it]."[22] App. 117–118. In support of this request, they contend that the third amendment was adopted and implemented by officers who lacked constitutional authority and that their actions were therefore void *ab initio*.

We have already explained that the Acting Director who *adopted* the third amendment was removable at will. See *supra,* at 22–26. That conclusion defeats the shareholders' argument for setting aside the third amendment in its entirety. We therefore consider the shareholders' contention about remedy with respect to only the actions that confirmed Directors have taken to *implement* the third amendment during their tenures. But even as applied to that subset of actions, the shareholders' argument is neither logical nor supported by precedent. All the officers who headed the FHFA during the time in question were properly *appointed*. Although the statute unconstitutionally limited the President's authority to *remove* the confirmed Directors, there was no constitutional defect in the statutorily prescribed method of appointment to that office. As a result, there is no reason to regard any of the actions taken by the FHFA in relation to the third amendment as void.

The shareholders argue that our decisions in prior separation-of-powers cases support their position, but most of the cases they cite involved a Government actor's exercise of power that the actor did not lawfully possess. See *Lucia* v. *SEC*, 585 U. S. ___, ___ (2018) (slip op., at 12) (administrative law judge appointed in violation of Appointments Clause); *Stern* v. *Marshall*, 564 U. S. 462, 503 (2011) (bankruptcy judge's exercise of exclusive power of Article III judge); *Clinton* v. *City of New York*, 524 U. S. 417, 425, and

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[22] In the alternative, they request that the dividend payments be "recharacteriz[ed] . . . as a pay down of the liquidation preference and a corresponding redemption of Treasury's Government Stock." App. 118.

n. 9, 438 (1998) (President's cancellation of individual portions of bills under the Line Item Veto Act); *Chadha*, 462 U. S., at 952–956 (one-house veto of Attorney General's determination to suspend an alien's deportation); *Youngstown*, 343 U. S., at 585, 587–589 (Presidential seizure and operation of steel mills). As we have explained, there is no basis for concluding that any head of the FHFA lacked the authority to carry out the functions of the office.[23]

The shareholders claim to find implicit support for their argument in *Seila Law* and *Bowsher*, but they read far too much into those decisions. In *Seila Law*,[24] after holding that the restriction on the removal of the CFPB Director was unconstitutional and severing that provision from the rest of the Dodd-Frank Act, we remanded the case so that the lower courts could decide whether, as the Government claimed, the Board's issuance of an investigative demand had been ratified by an Acting Director who was removable at will by the President. See 591 U. S., at ___ (slip op., at 36). The shareholders argue that this disposition implicitly meant that the Director's action would be void unless lawfully ratified, but we said no such thing. The remand did not resolve any issue concerning ratification, including whether ratification was necessary. And in *Bowsher*, after

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[23] Settled precedent also confirms that the unlawfulness of the removal provision does not strip the Director of the power to undertake the other responsibilities of his office, including implementing the third amendment. See, *e.g., Seila Law*, 591 U. S., at ___–___ (slip op., at 30–36).

[24] What we said about standing in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction. We held that a plaintiff that challenges a statutory restriction on the President's power to remove an executive officer can establish standing by showing that it was harmed by an action that was taken by such an officer and that the plaintiff alleges was void. See 591 U. S., at ___–___ (slip op., at 9–10). But that holding on standing does not mean that actions taken by such an officer are void *ab initio* and must be undone. Compare *post*, at 2 (GORSUCH, J., concurring in part).

holding that the Gramm-Rudman-Hollings Act unconstitutionally authorized the Comptroller General to exercise executive power, the Court simply turned to the remedy specifically prescribed by Congress. See 478 U. S., at 735.[25] We therefore see no reason to hold that the third amendment must be completely undone.

That does not necessarily mean, however, that the shareholders have no entitlement to retrospective relief. Although an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment), it is still possible for an unconstitutional provision to inflict compensable harm. And the possibility that the unconstitutional restriction on the President's power to remove a Director of the FHFA could have such an effect cannot be ruled out. Suppose, for example, that the President had attempted to remove a Director but was prevented from doing so by a lower court decision holding that he did not have "cause" for removal. Or suppose that the President had made a public statement expressing displeasure with actions taken by a Director and had asserted that he would remove the Director if the statute did not stand in the way. In those situations, the statutory provision would clearly cause harm.

In the present case, the situation is less clear-cut, but the shareholders nevertheless claim that the unconstitutional removal provision inflicted harm. Were it not for that provision, they suggest, the President might have replaced one of the confirmed Directors who supervised the implementation of the third amendment, or a confirmed Director might

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[25] In addition, the constitutional defect in *Bowsher* was different from the defect here. In *Bowsher*, the Comptroller General, whom Congress had long viewed as "an officer of the Legislative Branch," 478 U. S., at 731, was vested with executive power. Here, the FHFA Director is clearly an executive officer. See *post,* at 5–6 (THOMAS, J., concurring).

have altered his behavior in a way that would have benefited the shareholders.

The federal parties dispute the possibility that the unconstitutional removal restriction caused any such harm. They argue that, irrespective of the President's power to remove the FHFA Director, he "retained the power to supervise the [Third] Amendment's adoption . . . because FHFA's counterparty to the Amendment was Treasury—an executive department led by a Secretary subject to removal at will by the President." Reply Brief for Federal Parties 43. The parties' arguments should be resolved in the first instance by the lower courts.[26]

* * *

The judgment of the Court of Appeals is affirmed in part, reversed in part, and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

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[26] The lower courts may also consider all issues related to the federal parties' argument that the doctrine of laches precludes any relief. The federal parties argue that Treasury was prejudiced by the shareholders' delay in filing suit because, for some time after the third amendment was adopted, there was a chance that it would benefit the shareholders. According to the federal parties, the shareholders waited to file suit until it became apparent that the third amendment would not have that effect.

The shareholders respond that laches is inapplicable because they filed their complaint within the time allowed by the statute of limitations, and they argue that their delay did not cause prejudice because it was "mathematically impossible" for Treasury to make less money under the Third Amendment than under the prior regime. Reply Brief for Collins et al. 4–5 (emphasis deleted). We decline to decide this fact-bound question in the first instance.

SUPREME COURT OF THE UNITED STATES

Nos. 19–422 and 19–563

PATRICK J. COLLINS, ET AL., PETITIONERS
19–422 *v.*
JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS
19–563 *v.*
PATRICK J. COLLINS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2021]

JUSTICE THOMAS, concurring.

I join the Court's opinion in full. I agree that the Directors were properly appointed and could lawfully exercise executive power. And I agree that, to the extent a Government action violates the Constitution, the remedy should fit the injury. But I write separately because I worry that the Court and the parties have glossed over a fundamental problem with removal-restriction cases such as these: The Government does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract.

I

As discussed in more detail by the Court, Congress created the Federal Housing Finance Agency (FHFA) in 2008. Housing and Economic Recovery Act of 2008, 12 U. S. C. §4501 *et seq*. The FHFA is "an independent agency." 12 U. S. C. §4511(a). Among other things, it supervises and

regulates Fannie Mae and Freddie Mac, two companies created by Congress to provide liquidity and stability to the mortgage market. See §4511(b). In the midst of the 2008 financial crisis, the FHFA's Director exercised his statutory authority under §4617(a)(1) to appoint the Agency as conservator of Fannie Mae and Freddie Mac. As conservator, the Agency in effect had full control over the companies.

The FHFA used this control to have the companies enter into several agreements with the Treasury Department to secure financing to keep both companies afloat. Relevant here, the FHFA and Treasury signed two agreements, known as the Third Amendments, requiring the companies to pay a quarterly dividend to Treasury of nearly all their net worth minus a predetermined capital reserve.

Shareholders of the companies sued the FHFA, the Director, Treasury, and the Secretary of the Treasury. They advanced four theories about why the adoption and enforcement of the Third Amendments violated the law: (1) The FHFA's conduct exceeded its statutory authority; (2) Treasury's conduct exceeded its statutory authority; (3) Treasury's conduct was arbitrary and capricious; and (4) the FHFA's structure violated the "Separation of Powers" because the President could fire the FHFA Director only "for cause." App. 116–117; §4512(b)(2).

The District Court rejected their claims. The Fifth Circuit affirmed the dismissal of claims two and three, and the shareholders did not seek review of that decision. The Fifth Circuit reinstated the statutory claim, but today we correctly reverse that decision. *Ante*, at 12–17. The Fifth Circuit also held that the shareholders are entitled to judgment on the separation-of-powers claim. *Collins* v. *Mnuchin*, 938 F. 3d 553, 587 (2019)

II

For the shareholders to prevail, identifying some conflict between the Constitution and a statute is not enough. They

must show that the challenged Government action at issue—the adoption and implementation of the Third Amendment—was, in fact, unlawful. See *California* v. *Texas*, 593 U. S. ___, ___–___ (2021) (slip op., at 4–9). Modern standing doctrine reflects this principle: To have standing, a plaintiff must allege an injury traceable to an "allegedly unlawful" action (or threatened action) and seek a remedy to redress that action. *Allen* v. *Wright*, 468 U. S. 737, 751 (1984); accord, *Virginia* v. *American Booksellers Assn., Inc.*, 484 U. S. 383, 392 (1988); contra, 938 F. 3d, at 586 (tracing injury to the removal restriction). Here, before a court can provide relief, it must conclude that either the adoption or implementation of the Third Amendment was unlawful.[1]

The parties simply assume that the lawfulness of agency

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[1] Another limit on the judicial power is relevant: A party seeking relief must have a legal right to redress. See *Cohens* v. *Virginia*, 6 Wheat. 264, 405 (1821) (explaining that Article III "does not extend the judicial power to every violation of the constitution which may possibly take place"). The judicial power extends only "to 'a case in law or equity,' in which a right, under such law, is asserted." *Ibid.* We have indicated that individuals may have an implied private right of action under the Constitution to seek equitable relief to "'preven[t] entities from acting unconstitutionally.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 491, n. 2 (2010). This includes "Appointments Clause or separation-of-powers claim[s]." *Ibid.* I assume the shareholders have brought such a cause of action here and have a legal right to obtain equitable relief if they can show they suffered an injury traceable to a Government action that violates the Constitution. The shareholders did not raise the Administrative Procedure Act (APA) in count four of their complaint, but now contend their "constitutional claim is cognizable under the APA," which permits a "'reviewing court [to] *hold unlawful and set aside* agency action found to be contrary to constitutional right, power, privilege, or immunity.'" Brief for Collins et al. 74 (quoting 5 U. S. C. §706; ellipses omitted; emphasis in original). Even assuming they raised their constitutional claim under the APA, it would not change the analysis; the shareholders would need to show they suffered an injury traceable to a Government *action* that violates the Constitution.

action turns on the lawfulness of the removal restriction. Our recent precedents have not clearly questioned this premise, and on this premise, the Court correctly resolves the remaining legal issues. But in the future, parties and courts should ensure not only that a provision is unlawful but also that unlawful *action* was taken.

This suit provides a good example. The shareholders largely neglect the issue of lawfulness to focus on remedy, but their briefing appears premised on several theories of unlawfulness.[2] First, that the removal restriction renders all Agency actions void because the Directors serve in violation of the Constitution's structural provisions, similar to Appointments Clause cases, see *Lucia* v. *SEC*, 585 U. S. ___, ___ (2018) (slip op., at 12) (holding that an Administrative Law Judge was unlawfully appointed), and other separation-of-powers cases, *e.g., Bowsher* v. *Synar*, 478 U. S. 714, 727–736 (1986) (holding that the Comptroller General was not an executive officer and could not exercise executive power granted to him by statute). Second, that even if the Director is in the Executive Branch and the removal restriction is just unenforceable, the mere existence of the law somehow taints all of the Director's actions. Third, that "when FHFA's single Director exercises Executive Power without meaningful oversight from the President, he exercises authority that was never properly his." Brief for Collins et al. 64. Fourth, that the statutory provision that gave the Director the power to adopt and implement the Third Amendments must fall if the statutory removal restriction is unlawful. §4617(b)(2)(J)(ii).

As the Court's reasoning makes clear, however, all these theories appear to fail on the merits.

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[2] Because the shareholders allege the Government acted unlawfully, because their alleged injury can be traced to those allegedly unlawful actions, and because this Court might be able to redress that injury, I agree with the Court that they have standing. See *Steel Co.* v. *Citizens for Better Environment*, 523 U. S. 83, 89 (1998).

A

I begin with whether the FHFA Director may lawfully exercise executive authority. The shareholders suggest that the removal restriction inherently renders the Agency's actions void. In support, they point to our Appointments Clause cases and our other separation-of-powers cases. But the cases on which they rely prove quite the opposite.

Consider our separation-of-powers cases, which set out a two-part analysis to determine whether an official can lawfully exercise a statutory power *at all*. First, we ask in what branch (if any) an official is located. Second, we determine whether the statutory power possessed by the official belongs to that branch. In *Bowsher*, the Court determined that the Comptroller General of the United States was "an officer of the Legislative Branch" based on other statutes dating back to 1945 declaring him as such, the expressed views of other Comptrollers General, the fact that only Congress could remove the Comptroller General, and the structure of the office. 478 U. S., at 727–732. In light of this legislative identity, the Court held the Comptroller General could not lawfully exercise executive powers assigned to him by statute. *Id.,* at 732–735.[3]

Assuming the shareholders raise a *Bowsher*-type argument, I agree with the Court that the FHFA Director is an

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[3] See also *Stern* v. *Marshall*, 564 U. S. 462, 503 (2011) (bankruptcy judges, as Article I officers, cannot exercise exclusive Article III power); *Clinton* v. *City of New York*, 524 U. S. 417, 438–441, 448–449 (1998) (the President, an Article II officer, cannot exercise Article I line-item-veto power); *Morrison* v. *Olson*, 487 U. S. 654, 677–679 (1988) (a law cannot give a court powers that violated Article III); *Glidden Co.* v. *Zdanok*, 370 U. S. 530, 584 (1962) (plurality opinion) (concluding after exhaustive analysis that two courts were Article III courts); *id.,* at 585–588 (Clark, J., concurring in result) (agreeing "in light of the congressional power exercised and the jurisdiction enjoyed, together with the characteristics of its judges"); *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828) (a territorial court is an Article I court and admiralty jurisdiction

executive official who can lawfully "carry out the functions of the office." *Ante*, at 33–35, and n. 25 (discussing *Bowsher*). The statutory scheme creates a common type of executive officer—an individual nominated by the President and confirmed by the Senate, who heads an agency exercising executive powers and who reports to the President. The only statutory powers assigned to the Director are executive. No party contends the office of the FHFA Director is a nonexecutive office. No statute refers to him as a nonexecutive officer. And the statutory scheme recognizes that the President can remove the officer (but only "for cause"). §4512(b)(2). In fact, the Court concludes that the removal restriction is unconstitutional in part because the FHFA Director is an executive officer whom the President needs to be able to control. See *ante,* at 26–32.

Our cases demonstrate that the existence of a removal restriction, without more, usually does not take an otherwise executive officer outside the Executive Branch. True, statutory provisions governing who can remove an officer (and when) can provide evidence of the branch to which that officer belongs. *E.g., Bowsher*, 478 U. S., at 727–728, and n. 5; *American Ins. Co.* v. *356 Bales of Cotton*, 1 Pet. 511, 546 (1828). But they generally are not dispositive. In many cases, it is obvious that the officer is executive, and it is the removal restriction—not the officer's exercise of executive powers—that is the problem. *E.g., Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 492–508 (2010) (holding unconstitutional tenure provisions protecting executive officer, but concluding "the existence of the Board does not violate the separation of powers"); cf.

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can be exercised only by Article III courts, but Article IV removes this limitation with respect to the Territories).

Myers v. *United States*, 272 U. S. 52, 108, 176 (1926).[4]

The Appointments Clause cases do not help the shareholders either. These cases also ask whether an officer can lawfully exercise the statutory power of his office at all in light of the rule that an officer must be properly appointed before he can legally act as an officer. *Lucia*, 585 U. S., at ___ (slip op., at 12); *Ryder* v. *United States*, 515 U. S 177, 182–183 (1995). Otherwise, the official's authority to exercise the powers of the office generally is legally deficient. *Id.*, at 179, 182–183. Here, "[a]ll the officers who headed the FHFA during the time in question were properly *appointed*." *Ante*, at 33. There is thus no barrier to them exercising power in the first instance.

B

The mere existence of an unconstitutional removal provision, too, generally does not automatically taint Government action by an official unlawfully insulated. It is true the removal restriction here is unlawful. But while the shareholders are correct that the Constitution authorizes the President to dismiss the FHFA Director for any reason, no statute can take that Presidential power away. See *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, ___ (2020) (THOMAS, J., concurring in part and dissenting in part) (slip op., at 15) ("In the context of a constitutional challenge, . . . 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"

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[4] I agree with JUSTICE GORSUCH that a court must look at more than the label to determine in what branch an officer sits. *Post*, at 3, n. 1 (opinion concurring in part). To answer this question, courts have historically looked at various factors. See n.3, *supra*. Here, everything about the Director's position, except the removal restriction, indicates he is an executive officer. See also *ante,* at 35, n. 25 (opinion of the Court). As the Court correctly explains, "the removal restriction . . . violates the separation of powers" because the Director is an executive officer. *Ante*, at 32.

(internal quotation marks omitted)); *ante,* at 35.

That the Constitution automatically trumps an inconsistent statute creates a paradox for the shareholders. Had the removal restriction *not* conflicted with the Constitution, the law would never have unconstitutionally insulated any Director. And while the provision *does* conflict with the Constitution, the Constitution has always displaced it and the President has always had the power to fire the Director for any reason. So regardless of whether the removal restriction was lawful or not, the President always had the legal power to remove the Director in a manner consistent with the Constitution.[5] Brief for Harrison as *Amicus Curiae* 15–16.

Moreover, no Director has ever purported to occupy the office and exercise its powers despite a Presidential attempt at removal. No court, for example, has enjoined an attempt by the President to remove the Director.[6] So every Director

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[5] In *Seila Law*, the Court did not address whether an officer acts unlawfully if protected by an unlawful removal restriction. See *ante*, at 34, and nn. 23–24. That is because the Government in effect conceded the issue. *Seila Law*, 591 U. S., at ___ (plurality opinion) (slip op., at 30); *id.,* at ___ (opinion of THOMAS, J.) (slip op., at 17). Perhaps we should have addressed it then. *Post*, at 6–7, n. 2 (opinion of GORSUCH, J.).

I continue to adhere to the views that I expressed in *Seila Law*: A combination of statutes can produce a separation-of-powers violation that renders Government action unlawful. See 591 U. S., at ___ (opinion concurring in part and dissenting in part) (slip op., at 21). In remedying such a separation-of-powers violation, courts cannot purport to rewrite the statute to avoid the violation. *Ibid.*; *post,* at 6, n. 2 (opinion of GORSUCH, J.) ("[W]e cannot divine 'which of the provisions' Congress would have kept and which it would have scrapped . . . had it known its actual choice was unconstitutional," "absent statutory direction from Congress"). However, I respectfully part ways with JUSTICE GORSUCH, because, on the merits, I am uncertain whether the unlawful removal restriction here combines with any other statutory provision in a way that renders the Government action at issue unlawful.

[6] A removal restriction may unconstitutionally insulate an officer such that his actions are unlawful. If the President tries to remove an official

is a lawfully appointed executive officer whom the President may remove in a manner consistent with the Constitution but did not attempt to do so.

C

Another possible theory the shareholders seem to rely on is that a misunderstanding about the correct state of the law makes an otherwise constitutional action unconstitutional. Thus, if the President or Director *misunderstood* the circumstances under which the President could have removed the Director, then that creates a defect in authority. But nothing in the Constitution, history, or our case law supports this expansive view of unlawfulness. The Constitution does not transform unfamiliarity with the Vesting Clause into a legal violation when an executive officer acts with authority.[7]

Perhaps the better understanding of this argument is the Director *might* have acted differently if he knew that he served at the pleasure of the President. That may be true, but it is not enough for a party to show that an official acted differently because he or another official incorrectly interpreted the Vesting Clause—the party must show that the official acted unlawfully. If the President vetoed a bill on the ground that he believed it to be unconstitutional, this

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but a court blocks this action, then that official is not lawfully occupying his office and would likely be acting without authority. Cf. *ante*, at 35. But that circumstance has not arisen here.

[7]The APA might permit this type of lawsuit in allowing an individual to challenge an agency action as "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U. S. C. §706(2)(A). There is a colorable argument that a Government official's misunderstanding about the scope of the President's removal authority would render an agency action arbitrary or capricious in certain cases. However, the shareholders did not bring this constitutional challenge as an arbitrary and capricious claim against the FHFA. And if they had, we would need to consider the interaction between this statutory claim and the Act's anti-injunction provision. Cf. *ante,* at 12–13.

Court could not undo that lawful act simply because an injured plaintiff persuasively establishes that the President was mistaken.

Sure enough, we have not held that a misunderstanding about authority results in a constitutional defect where the action was otherwise lawful. Absent such authority in a "constitutional cas[e], our watchword [should be] caution." *Hernández* v. *Mesa*, 589 U. S. ___, ___ (2020) (slip op., at 6). We should be reluctant to create a new restriction on a coequal branch and enforce it through a new private right of action. *Id.*, at ___–___ (slip op., at 6–7). Doing so places great stress upon "the Constitution's separation of legislative and judicial power." *Id.*, at ___ (slip op., at 5).

Seila Law and *Free Enterprise* do not help the shareholders on the lawfulness of the Government actions question. *Ante*, at 18, 34–35. In *Seila Law*, the Government in effect "conceded that [its] actions were unconstitutional" if the removal restriction was unconstitutional. 591 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 17). So the Court assumed "that [petitioner] 'sustain[ed] injury' from an executive act that allegedly exceeds the official's authority." *Id.,* at ___ (slip op., at 10); *ante*, at 34–35. In *Free Enterprise*, we considered a similar challenge to a removal restriction without questioning the plaintiffs' standing "where plaintiffs claimed injury from allegedly unlawful agency oversight." *Ante*, at 18. And then we assumed that the agency lacked the authority to act lawfully if the removal restriction there were invalid.

D

The shareholders' briefing strongly implies one final argument: The statutory provision giving the FHFA the power to act as conservator, 12 U. S. C. §4617(b)(2)(J)(ii), cannot be severed from the removal restriction. Brief for Collins et al. 77–79. Thus, the argument goes, if the removal provision is unlawful, then §4617(b)(2)(j)(ii) is too

and the FHFA Directors acted without statutory authority.

Assuming that the unlawfulness of one provision can cause another to be unlawful, this inquiry is just a question of statutory interpretation. See *Seila Law*, 591 U. S., at ___ (opinion of THOMAS, J.) (slip op., at 20); Lea, Situational Severability, 103 Va. L. Rev. 735, 764–776 (2017). The Recovery Act contains no inseverability clause. Contra, 4 U. S. C. §125 (inseverability clause). Nor does it contain any fallback provision stating that §4617(b)(2)(j)(ii) should be altered if the removal clause is found unlawful. Without something in the statutory text or structure to show that §4617(b)(2)(j)(ii)'s lawfulness rises or falls based on the removal restriction, this argument is also unconvincing.

* * *

I do not understand the parties to have sought review of these issues in this Court. So the Court correctly resolves the legal issues presented. That being said, I seriously doubt that the shareholders can demonstrate that any relevant action by an FHFA Director violated the Constitution. And, absent an unlawful act, the shareholders are not entitled to a remedy. The Fifth Circuit can certainly consider this issue on remand.

SUPREME COURT OF THE UNITED STATES

Nos. 19–422 and 19–563

PATRICK J. COLLINS, ET AL., PETITIONERS
19–422 *v.*
JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS
19–563 *v.*
PATRICK J. COLLINS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2021]

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join as to Part II, concurring in part and concurring in the judgment in part.

Faced with a global financial crisis, Congress created the Federal Housing Finance Agency (FHFA) and gave it broad powers to rescue the Nation's mortgage market. I join the Court in deciding that the FHFA wielded its authority within statutory limits. On the main constitutional question, though, I concur only in the judgment. *Stare decisis* compels the conclusion that the FHFA's for-cause removal provision violates the Constitution. But the majority's opinion rests on faulty theoretical premises and goes further than it needs to. I also write to address the remedial question. The majority's analysis, which I join, well explains why backwards-looking relief is not always necessary to redress a removal violation. I add only two

thoughts. The broader is that the majority's remedial holding mitigates the harm of the removal doctrine applied here. The narrower is that, as I read the decision below, the Court of Appeals has already done what is needed to find that the plaintiffs are not entitled to their requested relief.

I

I agree with the majority that *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___ (2020), governs the constitutional question here. See *ante*, at 26. In *Seila Law*, the Court held that an "agency led by a single [d]irector and vested with significant executive power" comports with the Constitution only if the President can fire the director at will. 591 U. S., at ___ (slip op., at 18). I dissented from that decision—vehemently. See *id.*, at ___ (KAGAN, J., dissenting) (slip op., at 4) ("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"). But the "doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike"—even when that means adhering to a wrong decision. *June Medical Services L. L. C.* v. *Russo*, 591 U. S. ___, ___ (2020) (ROBERTS, C. J., concurring in judgment) (slip op., at 2). So the issue now is not whether *Seila Law* was correct. The question is whether that case is distinguishable from this one. And it is not. As I observed in *Seila Law*, the FHFA "plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely." 591 U. S., at ___ (slip op., at 31). It thus wields "significant executive power," much as the agency in *Seila Law* did. And I agree with the majority that there is no other legally relevant distinction between the two. See *ante*, at 29–32.

For two reasons, however, I do not join the majority's discussion of the constitutional issue. First is the majority's

political theory. Throughout the relevant part of its opinion, the majority offers a contestable—and, in my view, deeply flawed—account of how our government should work. At-will removal authority, the majority intones, "is essential to subject Executive Branch actions to a degree of electoral accountability"—and so courts should grant the President that power in cases like this one. *Ante*, at 27. I see the matter differently (as, I might add, did the Framers). *Seila Law*, 591 U. S., at ___–___ (KAGAN, J., dissenting) (slip op., at 9–13). The right way to ensure that government operates with "electoral accountability" is to lodge decisions about its structure with, well, "the branches accountable to the people." *Id.*, at ___ (slip op., at 38); see *id.*, at ___ (slip op., at 39) (the Constitution "instructs Congress, not this Court, to decide on agency design"). I will subscribe to decisions contrary to my view where precedent, fairly read, controls (and there is no special justification for reversal). But I will not join the majority's mistaken musings about how to create "a workable government." *Id.*, at ___ (slip op., at 38) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 635 (1952) (Jackson, J., concurring)).

My second objection is to the majority's extension of *Seila Law*'s holding. Again and again, *Seila Law* emphasized that its rule was limited to single-director agencies "wield[ing] significant executive power." 591 U. S., at ___ (plurality opinion) (slip op., at 2); see *id.*, at ___ (majority opinion) (slip op., at 18); *id.*, at ___ (plurality opinion) (slip op., at 36). To take *Seila Law* at its word is to acknowledge where it left off: If an agency did not exercise "significant executive power," the constitutionality of a removal restriction would remain an open question. Accord, *post*, at 11–12 (SOTOMAYOR, J., concurring in part and dissenting in part). But today's majority careens right past that boundary line. Without even mentioning *Seila Law*'s "significant executive power" framing, the majority announces that, actually, "the constitutionality of removal restrictions" does

not "hinge[]" on "the nature and breadth of an agency's authority." *Ante*, at 27, 29. Any "agency led by a single Director," no matter how much executive power it wields, now becomes subject to the requirement of at-will removal. *Ante*, at 26. And the majority's broadening is gratuitous—unnecessary to resolve the dispute here. As the opinion later explains, the FHFA exercises plenty of executive authority: Indeed, it might "be considered more powerful than the CFPB." *Ante*, at 28. So the majority could easily have stayed within, rather than reached out beyond, the rule *Seila Law* created.

In thus departing from *Seila Law*, the majority strays from its own obligation to respect precedent. To ensure that our decisions reflect the "evenhanded" and "consistent development of legal principles," not just shifts in the Court's personnel, s*tare decisis* demands something of Justices previously on the losing side. *Payne* v. *Tennessee*, 501 U. S. 808, 827 (1991). They (meaning here, I) must fairly apply decisions with which they disagree. But fidelity to precedent also places demands on the winners. They must apply the Court's precedents—limits and all—wherever they can, rather than widen them unnecessarily at the first opportunity. Because today's majority does not conform to that command, I concur in the judgment only.

II

I join in full the majority's discussion of the proper remedy for the constitutional violation it finds. I too believe that our Appointments Clause precedents have little to say about remedying a removal problem. See *ante*, at 33–34; cf. *Lucia* v. *SEC*, 585 U. S. ___, ___ (2018) (slip op., at 12) (requiring a new hearing before a properly appointed official). As the majority explains, the officers heading the FHFA, unlike those with invalid appointments, possessed the "authority to carry out the functions of the office." *Ante*, at 34. I also agree that plaintiffs alleging a removal violation are

entitled to injunctive relief—a rewinding of agency action—only when the President's inability to fire an agency head affected the complained-of decision. See *ante*, at 35–36. Only then is relief needed to restore the plaintiffs to the position they "would have occupied in the absence" of the removal problem. *Milliken* v. *Bradley*, 433 U. S. 267, 280 (1977); see D. Laycock & R. Hasen, Modern American Remedies 275 (5th ed. 2019). Granting relief in any other case would, contrary to usual remedial principles, put the plaintiffs "in a better position" than if no constitutional violation had occurred. *Mt. Healthy City Bd. of Ed.* v. *Doyle*, 429 U. S. 274, 285 (1977).

The majority's remedial holding limits the damage of the Court's removal jurisprudence. As the majority explains, its holding ensures that actions the President supports—which would have gone forward whatever his removal power—will remain in place. See *ante*, at 35. In refusing to rewind those presidentially favored decisions, the majority prevents theories of formal presidential control from stymying the President's real-world ability to carry out his agenda. Similarly, the majority's approach should help protect agency decisions that would never have risen to the President's notice. Consider the hundreds of thousands of decisions that the Social Security Administration (SSA) makes each year. The SSA has a single head with for-cause removal protection; so a betting person might wager that the agency's removal provision is next on the chopping block. Cf. *ante*, at 32, n. 21. But given the majority's remedial analysis, I doubt the mass of SSA decisions—which would not concern the President at all—would need to be undone. That makes sense. "[P]residential control [does] not show itself in all, or even all important, regulation." Kagan, Presidential Administration, 114 Harv. L. Rev. 2245, 2250 (2001). When an agency decision would not capture a President's attention, his removal authority could not make a difference—and so no injunction should issue.

My final point relates to the last sentence of the majority's remedial section. There, the Court holds that the decisive question—whether the removal provision mattered—"should be resolved in the first instance by the lower courts." *Ante*, at 36. That remand follows the Court's usual practice: We are, as we often say, not a "court of first view." *Alabama* v. *Shelton*, 535 U. S. 654, 673 (2002). But here the lower court proceedings may be brief indeed. As I read the opinion below, the Court of Appeals already considered and decided the issue remanded today. The court noted that all of the FHFA's policies were jointly "created [by] the FHFA and Treasury" and that the Secretary of the Treasury is "subject to at will removal by the President." *Collins* v. *Mnuchin*, 938 F. 3d 553, 594 (CA5 2019). For that reason, the court concluded, "we need not speculate about whether appropriate presidential oversight would have stopped" the FHFA's actions. *Ibid.* "We know that the President, acting through the Secretary of the Treasury, could have stopped [them] but did not." *Ibid*; see *ibid.*, n. 6 (noting that the plaintiffs' "allegations show that the President had oversight of the action"). That reasoning seems sufficient to answer the question the Court kicks back, and nothing prevents the Fifth Circuit from reiterating its analysis. So I join the Court's opinion on the understanding that this litigation could speedily come to a close.

SUPREME COURT OF THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2021]

JUSTICE GORSUCH, concurring in part.

I agree with the Court on the merits and am pleased to join nearly all of its opinion. I part ways only when it comes to the question of remedy addressed in Part III–C.

As the Court observes, the only question before us concerns retrospective relief. *Ante*, at 32. By the time we turn to that question, the plaintiffs have proven that the Director was without constitutional authority when he took the challenged actions implementing the Third Amendment. In response to such a showing, a court would normally set aside the Director's ultra vires actions as "contrary to constitutional right," 5 U. S. C. §706(2)(B), subject perhaps to consideration of traditional remedial principles such as laches. See *ante*, at 36, n. 26; *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 155 (1967). Because the Court of Appeals did not follow this course, this Court would normally vacate the judgment in this suit with instructions requiring

the Court of Appeals to conform its judgment to traditional practice. Today, the Court acknowledges it has taken exactly this course in cases involving unconstitutionally appointed executive officials. *Ante*, at 33–34.

Still, the Court submits, we should treat this suit differently because the Director was unconstitutionally insulated from removal rather than unconstitutionally appointed. *Ante,* at 33–34; see also *ante*, at 7 (THOMAS, J., concurring). It is unclear to me why this distinction should make a difference. Either way, governmental action is taken by someone erroneously claiming the mantle of executive power—and thus taken with no authority at all. The Court points to not a single precedent in 230 years of history for the distinction it would have us draw. Nor could it. The course it pursues today defies our precedents. In *Bowsher* v. *Synar*, 478 U. S. 714 (1986), this Court concluded that Congress had vested the Comptroller General with "the very essence" of executive power, *id.*, at 732–733, but that he was (impermissibly) removable only by Congress, *id.*, at 727–728. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___ (2020), we found Congress had assigned the CFPB Director sweeping authority over the financial sector, *id.*, at ___–___ (slip op., at 4–6), while insulating him "from removal by an accountable President," *id.*, at ___ (slip op., at 23). In both cases that meant the officers could "not be entrusted with executive powers" from day one, *Bowsher*, 478 U. S., at 732, and the challenged actions were "void," *Seila Law*, 591 U. S., at ___ (slip op., at 10).[1]

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[1]The Court's attempt to sidestep these cases leads nowhere. *Seila Law*, we are told, discussed standing—not remedies—when it said plaintiffs "'sustain[] injury'" from unlawfully insulated executive action and may "challeng[e] [such] action as void." See *ante,* at 34, n. 24. But standing and remedies are joined at the hip: Article III permits a court only to provide "a *remedy* that redresses the plaintiffs' *injury-in-fact*." *Collins* v. *Mnuchin*, 938 F. 3d 553, 609 (CA5 2019) (Oldham, J., concurring in

If anything, removal restrictions may be a greater constitutional evil than appointment defects. New Presidents *always* inherit thousands of Executive Branch officials whom they did not select. It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office. After all, from the moment "an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear." *Synar* v. *United States*, 626 F. Supp. 1374, 1401 (DC 1986) (*per curiam*). Chief Justice Taft, who knew a little about such things, put it this way: "[W]hen the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Myers* v. *United States*, 272 U. S. 52, 122 (1926). Because the power of supervising subordinates is essential to sound constitutional administration, as between presidential hiring and firing "the unfettered ability to remove is the more important." M. McConnell, The President Who Would Not Be King 167 (2020).

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part and dissenting in part) (emphasis added). That is why a plaintiff "must have standing [for] each form of relief" sought. *Town of Chester* v. *Laroe Estates, Inc.*, 581 U. S. ___, ___ (2017) (slip op., at 5). *Bowsher*, we are told, involved a legislative officer—not an executive one, which supposedly makes all the difference. *Ante*, at 35, n. 25. But there the Comptroller was legislative only in the sense that he headed an "independent" department and was accountable to Congress rather than the President. 478 U. S, at 730–732. If there is any difference here, it's that the FHFA Director—who likewise heads an "independent" agency, 12 U. S. C. §4511(a)—is accountable to *no one*. The idea that whether acts are void or not turns on a label rather than on the functions an officer is assigned and who he is accountable to should not be taken seriously. *E.g., Bowsher*, 478 U. S., at 727–728, 732–733; *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 484–486, 496–498 (2010); *Seila Law*, 591 U. S., at ___–___, ___ (slip op., at 4–6, 23); *ante*, at 27–29, 31–32.

Protecting this aspect of the separation of powers isn't just about protecting presidential authority. Ultimately, the separation of powers is designed to "secure[] the freedom of the individual." *Bond* v. *United States*, 564 U. S. 211, 221 (2011); *ante*, at 20–21. That's no less true here than anywhere else. As Hamilton explained, the point of ensuring presidential supervision of the Executive Branch is to ensure "a due dependence on the people" and "a due responsibility" to them; these are key "ingredients which constitute safety in the republican sense." The Federalist No. 70, p. 424 (C. Rossiter ed. 1961). In the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken. *United States* v. *Arthrex, Inc.*, *ante,* at 3 (GORSUCH, J., concurring in part and dissenting in part). Few things could be more perilous to liberty than some "fourth branch" that does not answer even to the one executive official who *is* accountable to the body politic. *FTC* v. *Ruberoid Co.*, 343 U. S. 470, 487 (1952) (Jackson, J., dissenting).

Instead of applying our traditional remedy for constitutional violations like these, the Court supplies a novel and feeble substitute. The Court says that, on remand in this suit, lower courts should inquire whether the President would have removed or overruled the unconstitutionally insulated official had he known he had the authority to do so. *Ante*, at 35. So, if lower courts find that the President would have removed or overruled the Director, *then* the for-cause removal provision "clearly cause[d] harm" and the Director's actions may be set aside. *Ibid.*

Not only is this "relief" unlike anything this Court has ever before authorized in cases like ours; it is materially identical to a remedial approach this Court previously rejected. In *Bowsher*, the Court directly addressed and ex-

pressly refused the dissent's insistence that it should undertake a "'consideration' of the 'practical result of the removal provision.'" 478 U. S., at 730. Instead of speculating about what would have happened in a different world where the officer's challenged actions were reviewable within the Executive Branch, the Court recognized that unconstitutionally insulating an officer from removal "inflicts a 'here-and-now' injury" on affected parties. *Seila Law*, 591 U. S., at ___ (slip op., at 10). In *this* world, real people are injured by actions taken without lawful authority. "The Framers did not rest our liberties on . . . minutiae" like some guessing game about what might have transpired in another timeline. *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 500 (2010).

Other problems attend the Court's remedial science fiction. It proceeds on an assumption that Congress would have adopted a version of the Housing and Economic Recovery Act (HERA) that allowed the President to remove the Director. But that is sheer speculation. It is equally possible that—had Congress known it could not have a Director independent from presidential supervision—it would have deployed different tools to rein in Fannie Mae and Freddie Mac. Surely, Congress possessed no shortage of options. By way of example, it could have conferred new regulatory functions on an existing (and accountable) agency like the Department of Housing and Urban Development, or it might have enacted detailed statutes to govern Fannie and Freddie's activities directly. For that matter, Congress might have opted for no additional oversight rather than subject the Federal Housing Finance Agency (FHFA) to supervision by the President.

This Court possesses no authority to substitute its own judgment about *which* legislative solution Congress might have adopted had it considered a problem never put to it. That is not statutory interpretation; it is statutory reinvention. Indeed, while never uttering the words "severance

doctrine," the Court today winds up implicitly resting its remedial enterprise upon it—severing, or removing, one part of Congress's work based on speculation about its wishes and usurping a legislative prerogative in the process. See, *e.g., Arthrex*, *ante,* at 6–7 (GORSUCH, J., concurring in part and dissenting in part); *Synar*, 626 F. Supp., at 1393. By once again purporting to do Congress's job, we discourage the people's representatives from taking up for themselves the task of consulting their oaths, grappling with constitutional problems, and specifying a solution in statutory text. "Congress can now simply rely on the courts to sort [it] out." *Tennessee* v. *Lane*, 541 U. S. 509, 552 (2004) (Rehnquist, C. J., dissenting).[2]

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[2]JUSTICE THOMAS stakes out more foreign terrain. After saying that he "join[s] the Court's opinion in full," he argues there was no constitutional violation at all because the President—despite statutes barring his way—was free to remove the Director all along. *Ante*, at 1, 4, 11. Accordingly, it seems JUSTICE THOMAS disagrees with all of Part III–B's merits analysis in addition to the Court's novel remedy in Part III–C. Like the Court, though, he seemingly takes as given that Congress would have chosen to adopt HERA even if it had known this course required subjecting the Director to removal by the President. *Ante*, at 5–6. In doing so, he parts ways with his opinion last year in *Seila Law*, where he recognized the following: First, in cases like ours, a constitutional violation arises because of "the combination" of statutory terms that (1) confer executive power on an official and (2) improperly insulate him from removal. 591 U. S., at ___ (THOMAS, J., concurring in part and dissenting in part) (slip op., at 21). Second, absent statutory direction from Congress, we cannot divine "which of the provisions" Congress would have kept and which it would have scrapped—or what else it might have done—had it known its actual choice was unconstitutional. *Id.,* at ___ (slip op., at 23). Third, this Court lacks the "'editorial freedom'" to pick and choose among options like these, for doing so would usurp Congress's legislative authority. *Ibid.* Today, JUSTICE THOMAS suggests *Seila Law* rested on one party's concession about the meaning of the law. *Ante*, at 8, n. 5; *ante*, at 10. But parties cannot stipulate to the law. *E.g., Zivotofsky* v. *Kerry*, 576 U. S. 1, 41, n. 2 (2015) (THOMAS, J., concurring in judgment in part and dissenting in part); *Young* v. *United States*, 315 U. S. 257, 258–259 (1942). More importantly, his observations were right then—and they remain so today.

The Court's conjecture does not stop there. After guessing what legislative scheme Congress would have adopted in some hypothetical but-for world, the Court tasks lower courts and the parties with reconstructing how executive agents would have reacted to it. On remand, we are told, the litigants and lower courts must ponder whether the President would have removed the Director had he known he was free to do so. *Ante*, at 35. But *how* are judges and lawyers supposed to construct the counterfactual history? It is no less a speculative enterprise than guessing what Congress would have done had it known its statutory scheme was unconstitutional. It's only that the Court prefers to reserve the big hypothetical (legislative) choice for itself and leave others for lower courts to sort out.

Consider the guidance the Court offers. It says lower courts should examine clues such as whether the President made a "public statement expressing displeasure" about something the Director did, or whether the President "attempted" to remove the Director but was stymied by lower courts. *Ibid.* But what if the President never considered the possibility of removing the Director because he was never advised of that possibility? What if his advisers themselves never contemplated the option given statutory law? And even putting all that aside, what evidence should courts and parties consult when inquiring into the President's "displeasure"? Are they restricted to publicly available materials, even though the most probative evidence may be the most sensitive? To ascertain with any degree of confidence the President's state of mind regarding the Director, don't we need testimony from him or his closest staff?

The Court declines to tangle with any of these questions. It's hard not to wonder whether that's because it intends for this speculative enterprise to go nowhere. Rather than intrude on often-privileged executive deliberations, the Court may calculate that the lower courts on remand in this suit will simply refuse retroactive relief. See, *e.g.*, *ante*, at 6

(KAGAN, J., concurring in part and concurring in judgment in part). But if this is what the Court intends, why not just admit it and put these parties out of their misery?

As strange as the Court's remand instructions are, the more important question lower courts face isn't how to resolve this suit but what to do with the next one. Today, the Court sounds the call to arms and declares a constitutional violation only to head for the hills as soon as it's faced with a request for meaningful relief. But as we have seen, the Court has in the past consistently vindicated Article II both in reasoning and in remedy. *E.g., Seila Law*, 591 U. S., at ___ (opinion of ROBERTS, C. J.) (slip op., at 36); *Lucia* v. *SEC*, 585 U. S. ___, ___–___, n. 5 (2018) (slip op., at 12–13, n. 5); *NLRB* v. *Noel Canning*, 573 U. S. 513, 557 (2014); *Ryder* v. *United States*, 515 U. S. 177, 182–183 (1995); *Bowsher*, 478 U. S., at 736. These cases—involving appointment and removal defects alike—remain good law. So what are lower courts faced with future removal defect cases to make of all this? The only lesson I can divine is that the Court's opinion today is a product of its unique context—a retreat prompted by the prospect that affording a more traditional remedy here could mean unwinding or disgorging hundreds of millions of dollars that have already changed hands. *Ante*, at 32–33. The Court may blanch at authorizing such relief today, but nothing it says undoes our prior guidance authorizing more meaningful relief in other situations.

For my part, rather than carve out some suit-specific, removal-only, money-in-the-bank exception to our normal rules for Article II violations, I would take a simpler and more familiar path. Whether unconstitutionally installed or improperly unsupervised, officials cannot wield executive power except as Article II provides. Attempts to do so are void; speculation about alternate universes is neither necessary nor appropriate. In the world we inhabit, where

individuals are burdened by unconstitutional executive action, they are "entitled to relief." *Lucia*, 585 U. S., at ___ (slip op., at 12).

SUPREME COURT OF THE UNITED STATES

Nos. 19–422 and 19–563

PATRICK J. COLLINS, ET AL., PETITIONERS
19–422 *v.*
JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL.

JANET L. YELLEN, SECRETARY OF THE TREASURY, ET AL., PETITIONERS
19–563 *v.*
PATRICK J. COLLINS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 23, 2021]

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, concurring in part and dissenting in part.

Prior to 2010, this Court had gone the greater part of a century since it last prevented Congress from protecting an Executive Branch officer from unfettered Presidential removal. Yet today, for the third time in just over a decade, the Court strikes down the tenure protections Congress provided an independent agency's leadership.

Last Term, the Court held in *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___ (2020), that for-cause removal protection for the Director of the Consumer Financial Protection Bureau (CFPB) violated the separation of powers. *Id.*, at ___ (slip op., at 3). As an "independent agency led by a single Director and vested with significant executive power," the Court reasoned, the CFPB had "no basis in history and no place in our constitutional struc-

ture." *Id.*, at ___ (slip op., at 18). *Seila Law* expressly distinguished the Federal Housing Finance Agency (FHFA), another independent Agency headed by a single Director, on the ground that the FHFA does not possess "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Id.*, at ___–___ (slip op., at 20–21). Moreover, the Court found it significant that, unlike the CFPB, the FHFA "regulates primarily Government-sponsored enterprises, not purely private actors." *Id.*, at ___ (slip op., at 20).

Nevertheless, the Court today holds that the FHFA and CFPB are comparable after all, and that any differences between the two are irrelevant to the constitutional separation of powers. That reasoning cannot be squared with this Court's precedents, least of all last Term's *Seila Law*. I respectfully dissent in part from the Court's opinion and from the corresponding portions of the judgment.[1]

I

Congress created the FHFA in the Housing and Economic Recovery Act of 2008 (Recovery Act), 12 U. S. C. §4501 *et seq*. The FHFA supervises the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the 11 Federal Home Loan Banks. These 13 Government-sponsored entities (GSEs) provide liquidity and stability to the national housing market by, among other things, purchasing mortgage

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[1] I join Parts I and II of the Court's opinion rejecting petitioners' argument that the FHFA actions under review violated the Housing and Economic Recovery Act of 2008, as well as Part III–C discussing what the appropriate remedial implications would be if the FHFA Director's for-cause removal protection were unconstitutional. I join also Part II of JUSTICE KAGAN's concurrence concerning the proper remedial analysis for the Fifth Circuit to conduct on remand. Finally, I note that JUSTICE THOMAS' arguments that an improper removal restriction does not necessarily render agency action unlawful warrant further consideration in an appropriate case.

loans from, and offering financing to, private lenders.

The FHFA "establish[es] standards" for the GSEs relating to risk management, internal auditing, and minimum capital requirements. §4513b(a). If the FHFA believes a GSE may be failing to meet its requirements under the Act, the Agency may initiate administrative proceedings, §4581, issue subpoenas, §4517(g), and, in some circumstances, impose monetary penalties, §4585. In the event a GSE falls into financial distress, the FHFA may appoint itself "conservator or receiver for the purpose of reorganizing, rehabilitating, or winding up" the GSE's affairs. §4617(a)(2).

In 2008, the FHFA put both Fannie Mae and Freddie Mac under conservatorship. In 2016, shareholders of Fannie Mae and Freddie Mac (petitioners) sued the FHFA, challenging the Agency's conservatorship decisions in part by arguing that the Agency's structure is unconstitutional. The FHFA is headed by a single Director, who serves a 5-year term and may be removed by the President "for cause." §4512(b)(2). According to petitioners, the separation of powers requires the FHFA Director to be removable by the President at will.

II

Where Congress is silent on the question, the general rule is that the President may remove Executive Branch officers at will. See *Myers* v. *United States*, 272 U. S. 52, 126 (1926). Throughout our Nation's history, however, Congress has identified particular officers who, because of the nature of their office, require a degree of independence from Presidential control. Those officers may be removed from their posts only for cause. Often, Congress has granted financial regulators such independence in order to bolster public confidence that financial policy is guided by long-term thinking, not short-term political expediency. See *Seila Law*, 591 U. S., at ___–___ (slip op., at 13–16) (KAGAN, J., concurring in judgment with respect to severability and dissenting in

part) (discussing examples). Other times, Congress has provided tenure protection to officers who investigate other Government actors and thus might face conflicts of interest if directly controlled by the President. See, *e.g.*, 28 U. S. C. §596(a)(1) (making an independent counsel removable "only by the personal action of the Attorney General and only for good cause" or disability).

In a line of decisions spanning more than half a century, this Court consistently approved of independent agencies and independent counsels within the Executive Branch. See *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935); *Wiener* v. *United States*, 357 U. S. 349 (1958); *Morrison* v. *Olson*, 487 U. S. 654 (1988). In recent years, however, the Court has taken an unprecedentedly active role in policing Congress' decisions about which officers should enjoy independence. See *Seila Law*, 591 U. S. ___; *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010). These decisions have focused almost exclusively on perceived threats to the separation of powers posed by limiting the President's removal power, while largely ignoring the Court's own encroachment on Congress' constitutional authority to structure the Executive Branch as it deems necessary.

Never before, however, has the Court forbidden simple for-cause tenure protection for an Executive Branch officer who neither exercises significant executive power nor regulates the affairs of private parties. Because the FHFA Director fits that description, this Court's precedent, separation-of-powers principles, and proper respect for Congress all support leaving in place Congress' limits on the grounds upon which the President may remove the Director.

A

In *Seila Law*, the Court held that the CFPB Director, an individual with "the authority to bring the coercive power

of the state to bear on millions of private citizens and businesses," 591 U. S., at ___ (slip op., at 18), must be removable by the President at will. In so holding, the Court declined to overrule *Humphrey's Executor* and *Morrison*, which respectively upheld the independence of the Federal Trade Commission's (FTC) five-member board and an independent counsel tasked with investigating Government malfeasance. See 591 U. S., at ___ (slip op., at 27) ("[W]e do not revisit *Humphrey's Executor* or any other precedent today"). Instead, *Seila Law* opted not to "extend those precedents" to the CFPB, "an independent agency led by a single Director and vested with significant executive power." 591 U. S., at ___ (slip op., at 18).[2]

The Court today concludes that the reasoning of *Seila Law* "dictates" that the FHFA is unconstitutionally structured because it, too, is led by a single Director. *Ante*, at 26. But *Seila Law* did not hold that an independent agency may never be run by a single individual with tenure protection. Rather, that decision stated, repeatedly, that its holding was limited to a single-director agency with "significant executive power." 591 U. S., at ___, ___, ___ (slip op., at 2, 18, 36). The question, therefore, is not whether the FHFA is headed by a single Director, but whether the FHFA wields "significant" executive power. It does not.

As a yardstick for measuring the constitutional significance of an agency's executive power, *Seila Law* looked to the FTC as it existed at the time of *Humphrey's Executor* (the 1935 FTC). 591 U. S., at ___–___ (slip op., at 16–17). That agency had a roving mandate to prevent private individuals and corporations alike from engaging in "'unfair

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[2] As JUSTICE KAGAN explained in dissent, *Seila Law* rested on implausible recharacterizations of this Court's separation-of-powers jurisprudence. I continue to believe that *Seila Law* was wrongly decided. Whatever the merits of that decision, however, it does not support invalidating the FHFA Director's independence.

methods of competition in commerce.'" *Humphrey's Executor*, 295 U. S., at 620 (citing 15 U. S. C. §45). To carry out its mandate, the 1935 FTC had broad authority to issue complaints and cease-and-desist orders. 295 U. S., at 620. The agency also had "wide powers of investigation," which it used to make recommendations to Congress, as well as the responsibility to assist courts in antitrust litigation by "'ascertain[ing] and report[ing] an appropriate form of decree.'" *Id.*, at 621.

These powers may seem "significant" in a colloquial sense. In *Seila Law*'s view, however, they did not rise to the level of constitutional significance. That was in contrast to the CFPB's powers, which far outstrip the 1935 FTC's. While the 1935 FTC's ambit was limited to preventing unfair competition and violations of antitrust law, the CFPB "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." *Seila Law*, 591 U. S., at ___ (slip op., at 17). While the 1935 FTC could issue cease-and-desist orders and recommended dispositions, the CFPB "may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications" and "seek daunting monetary penalties against private parties on behalf of the United States in federal court." *Ibid.* Far from a "mere legislative or judicial aid" like the 1935 FTC, *ibid.*, the CFPB is 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," *id.*, at ___, n. 8 (slip op., at 21, n. 8).

Measured against such standards, the FHFA comfortably fits within the same category of constitutional insignificance as the 1935 FTC. To some, the CFPB Director was "the single most powerful official in the entire U. S. Government, other than the President, at least when measured in

terms of unilateral power." *PHH Corp.* v. *Consumer Financial Protection Bur.*, 881 F. 3d 75, 171 (CADC 2018) (Kavanaugh, J., dissenting). The FHFA Director is not one of the most powerful officials in the U. S. Government. As the Court recognized in *Seila Law*, the FHFA does "not involve regulatory or enforcement authority remotely comparable to that exercised by the CFPB." 591 U. S., at ___ (slip op., at 20–21).

The FHFA's authority is much closer to (and, in some respects, far less than) that of the 1935 FTC. Like the 1935 FTC, the FHFA oversees regulated entities and gathers specified information from them on Congress' behalf. Unlike the 1935 FTC, however, which was tasked with implementing the Nation's antitrust laws and policing unfair competition, the FHFA is limited to specified duties under the Recovery Act. Furthermore, while the 1935 FTC had jurisdiction over countless individuals and corporations, the FHFA regulates just 13 GSEs.

Moreover, one of the FHFA's main powers is assuming the mantle of conservatorship or receivership over the GSEs, which hardly registers as executive at all. When acting as a conservator or receiver, an agency like the FHFA "'steps into the shoes'" of the party under distress, *O'Melveny & Myers* v. *FDIC*, 512 U. S. 79, 86 (1994), and largely "'shed[s] its government character,'" *Herron* v. *Fannie Mae*, 861 F. 3d 160, 169 (CADC 2017). Even granting that there are differences between the FHFA's powers as a conservator and those of a common-law conservator, "the FHFA's conservatorship function [is] a role one would be hard-pressed to characterize as near the heart of executive power." *Collins* v. *Mnuchin*, 938 F. 3d 553, 620 (CA5 2019) (Higginson, C. J., dissenting in part).

To be sure, the FHFA has at least one executive power that the 1935 FTC did not: the power to impose fines. But that fining authority is quite limited. The FHFA may impose fines on the 13 GSEs it regulates for failing to meet

their reporting requirements and housing goals under the Recovery Act and for violating the requirements of the Federal Housing Enterprises Financial Safety and Soundness Act of 1992, 106 Stat. 3941. See 12 U. S. C. §§4585, 4636. Petitioners point to no instance in the Agency's 13-year history in which it has ever fined a GSE.[3]

That is not to say that the FHFA possesses no executive authority whatsoever. It does. But the 1935 FTC, too, possessed executive authority, just not enough to be "significant." See *Seila Law*, 591 U. S., at ___, n. 2 (slip op., at 14, n. 2) ("'[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'" (quoting *Morrison*, 487 U. S., at 690, n. 28)). When measured against the benchmark of the 1935 FTC, the FHFA does not possess "significant executive power" within the meaning of *Seila Law*. It is in "an entirely different league" from the CFPB. 591 U. S., at ___, n. 8 (slip op., at 21, n. 8).

B

Because the FHFA does not possess significant executive power, the question under *Seila Law* is whether this Court's decisions upholding for-cause removal provisions in *Humphrey's Executor* and *Morrison* should be "extend[ed]" to the FHFA Director. 591 U. S., at ___ (slip op., at 18). The clear answer is yes.

Not only does the FHFA lack significant executive power, the authority it does possess is exercised over other governmental actors. In that respect, the FHFA Director mimics the independent counsel whose tenure protections were upheld in *Morrison*. The independent counsel, as *Seila Law* noted, could bring criminal prosecutions and thus "wielded core executive power." 591 U. S., at ___ (slip op., at 18).

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[3] By comparison, the CFPB has fined private actors billions of dollars. *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, ___ (2020) (slip op., at 5).

Separation-of-powers concerns were allayed, however, because "that power, while significant, was trained inward to high-ranking Governmental actors identified by others." *Ibid.* In explaining why "[t]he logic of *Morrison*" did "not apply" to the CFPB, *Seila Law* emphasized that the CFPB "has the authority to bring the coercive power of the state to bear on millions of private citizens and businesses." *Id.*, at ___–___ (slip op., at 17–18).

Morrison's logic may not have applied to the CFPB, but it certainly applies to the FHFA. The FHFA's executive power, too, is "trained inward," on the 13 GSEs "identified by" the Recovery Act. *Seila Law*, 591 U. S., at ___ (slip op., at 18). While the GSEs are now privately owned, they still operate under congressional charters, see 12 U. S. C. §4501(1), serve "important public missions," *ibid.*, and receive preferential treatment under law by dint of their Government affiliation, §1719.[4] *Seila Law* itself distinguished the CFPB from the FHFA precisely on the basis that the latter Agency "regulates primarily Government-sponsored enterprises, not purely private actors." 591 U. S., at ___ (slip op., at 20).

Historical considerations further confirm the constitutionality of the FHFA Director's independence. Single-director independent agencies with limited executive power, like the FHFA, boast a more storied pedigree than do single-director independent agencies with significant ex-

[4]The GSEs' ongoing ties with the Government long fueled public perception that the Government would intervene if the GSEs were in danger of collapse. See Congressional Research Serv., Fannie Mae and Freddie Mac in Conservatorship: Frequently Asked Questions 2 (updated May 31, 2019) (noting that it was "widely believed prior to 2008 that the federal government was an implicit backstop for the GSEs in light of their congressional charters"). This perception became reality during the 2008 financial crisis, when the Treasury Department extended hundreds of billions of dollars in credit to Fannie Mae and Freddie Mac, and the FHFA put those entities under conservatorship.

ecutive power, like the CFPB. Consider three such examples, each discussed in *Seila Law*. First, the Comptroller of the Currency, who was briefly independent from Presidential removal during the Civil War and thereafter retained a lesser form of tenure protection. *Id.*, at ___ (slip op., at 19). Second, the Office of Special Counsel, which has been "headed by a single officer since 1978." *Id.*, at ___–___ (slip op., at 19–20). Third, the Social Security Administration, which has been "run by a single Administrator since 1994." *Id.*, at ___ (slip op., at 20). Like the FHFA, these examples lack "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Id.*, at ___–___ (slip op., at 20–21). While these agencies thus offered "no foothold in history or tradition" for the CFPB, *id.*, at ___ (slip op., at 21), they provide historical support for an agency with the FHFA's limited purview.

The FHFA also draws on a long tradition of independence enjoyed by financial regulators, including the Comptroller of the Treasury, the Second Bank of the United States, the Federal Reserve Board, the Securities and Exchange Commission, the Commodity Futures Trading Commission, and the Federal Deposit Insurance Corporation. See *id.*, at ___–___ (slip op., at 12–16) (opinion of KAGAN, J.). The public has long accepted (indeed, expected) that financial regulators will best perform their duties if separated from the political exigencies and pressures of the present moment.

In *Seila Law*, this tradition of independence was of little help to the CFPB because, "even assuming financial institutions . . . can claim a special historical status," the CFPB's unique powers put it "in an entirely different league" from other financial regulators. *Id.*, at ___, n. 8 (majority opinion) (slip op., at 21, n. 8). In contrast, the FHFA's function as a monitor of regulated entities important to economic stability makes the FHFA far more similar to historically independent financial regulators

than to the CFPB. See FHFA, Performance and Accountability Report 18 (2020) ("The [Recovery Act] vests FHFA with the authorities, similar to those of other prudential financial regulators, to maintain the financial health of the regulated entities").

To recap, the FHFA does not wield significant executive power, the executive power it does wield is exercised over Government affiliates, and its independence is supported by historical tradition. All considerations weigh in favor of recognizing Congress' power to make the FHFA Director removable only for cause.

III

The Court disagrees. After *Seila Law*, the Court reasons, all that matters is that "[t]he FHFA (like the CFPB) is an agency led by a single Director." *Ante*, at 26. From that, the unconstitutionality of the FHFA Director's independence follows virtually *a fortiori*. The Court reaches that conclusion by disavowing the very distinctions it relied upon just last Term in *Seila Law* in striking down the CFPB Director's independence.

On three separate occasions, *Seila Law* stated that its holding applied to single-director independent agencies with "significant executive power." See 591 U. S., at ___, ___, ___ (slip op., at 2, 18, 36). Remarkably, those words appear nowhere in today's decision. Instead, the Court appears to take the position that exercising essentially any executive power whatsoever is enough. *Ante*, at 27–29. In terms of explanation, the Court says that it is "not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies" and that it "do[es] not think that the constitutionality of removal restrictions hinges on such an inquiry." *Ante*, at 29.

The Court's position unduly encroaches on Congress' judgments about which executive officers can and should enjoy a degree of independence from Presidential removal,

and it cannot be squared with *Seila Law*, which relied extensively on such agency comparisons. Not only did *Seila Law* contrast the CFPB's powers against those of the 1935 FTC in *Humphrey's Executor*, see 591 U. S., at ___–___ (slip op., at 16–17), as well as the independent counsel in *Morrison*, see 591 U. S., at ___–___ (slip op., at 17–18), it concluded that the FHFA (along with the Comptroller of the Currency, the Office of Special Counsel, and the Social Security Administration) does not possess "regulatory or enforcement authority remotely comparable to that exercised by the CFPB." *Id.*, at ___–___ (slip op., at 20–21). Those distinctions underpinned *Seila Law*'s proclamation that the CFPB had "no basis in history and no place in our constitutional structure." *Id.*, at ___ (slip op., at 18). In the Court's view today, however, all of those comparisons were irrelevant to the bottom-line question whether the CFPB Director's tenure protections comport with the Constitution.

The Court today also suggests that whether an agency regulates private individuals or Government actors does not meaningfully affect the separation-of-powers analysis. *Ante*, at 30–31 ("[T]he President's removal power serves important purposes regardless of whether the agency in question affects ordinary Americans by directly regulating them or by taking actions that have a profound but indirect effect on their lives"). That, too, is flatly inconsistent with *Seila Law*, which returned repeatedly to this consideration. Not only did *Seila Law* distinguish the CFPB from the independent counsel in *Morrison* on this basis, see 591 U. S., at ___ (slip op., at 18), it distinguished the CFPB from both the FHFA and the Office of Special Counsel for the same reason, see *id.*, at ___ (slip op., at 20). That the Court is unwilling to stick to the methodology it articulated just last Term in *Seila Law* is a telltale sign that the Court's separation-of-powers jurisprudence has only continued to lose its way.

IV

The Court has proved far too eager in recent years to insert itself into questions of agency structure best left to Congress. In striking down the independence of the FHFA Director, the Court reaches further than ever before, refusing tenure protections to an Agency head who neither wields significant executive power nor regulates private individuals. Troublingly, the Court justifies that result by ignoring the standards it set out just last Term in *Seila Law*. Because I would afford Congress the freedom it has long possessed to make officers like the FHFA Director independent from Presidential control, I respectfully dissent.

Exhibit B

United States v. Arthrex, Inc., No. 19-1434 (U.S. June 21, 2021)

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* ARTHREX, INC. ET AL.

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

No. 19–1434. Argued March 1, 2021—Decided June 21, 2021*

The question in these cases is whether the authority of Administrative Patent Judges (APJs) to issue decisions on behalf of the Executive Branch is consistent with the Appointments Clause of the Constitution. APJs conduct adversarial proceedings for challenging the validity of an existing patent before the Patent Trial and Appeal Board (PTAB). During such proceedings, the PTAB sits in panels of at least three of its members, who are predominantly APJs. 35 U. S. C. §§6(a), (c). The Secretary of Commerce appoints all members of the PTAB—including 200-plus APJs—except for the Director, who is nominated by the President and confirmed by the Senate. §§3(b)(1), (b)(2)(A), 6(a). After Smith & Nephew, Inc., and ArthroCare Corp. (collectively, Smith & Nephew) petitioned for inter partes review of a patent secured by Arthrex, Inc., three APJs concluded that the patent was invalid. On appeal to the Federal Circuit, Arthrex claimed that the structure of the PTAB violated the Appointments Clause, which specifies how the President may appoint officers to assist in carrying out his responsibilities. Art. II, §2, cl. 2. Arthrex argued that the APJs were principal officers who must be appointed by the President with the advice and consent of the Senate, and that their appointment by the Secretary of Commerce was therefore unconstitutional. The Federal Circuit held that the APJs were principal officers whose appointments were unconstitutional because neither the Secretary nor Director can review their decisions or remove them at will. To remedy this constitutional violation, the Federal Circuit invalidated the APJs' tenure protections,

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*Together with No. 19–1452, *Smith & Nephew, Inc., et al.* v. *Arthrex, Inc., et al.* and No. 19–1458, *Arthrex, Inc.* v. *Smith & Nephew, Inc., et al.*, also on certiorari to the same court.

Syllabus

making them removable at will by the Secretary.

Held: The judgment is vacated, and the case is remanded.

941 F. 3d 1320, vacated and remanded.

THE CHIEF JUSTICE delivered the opinion of the Court with respect to Parts I and II, concluding that the unreviewable authority wielded by APJs during inter partes review is incompatible with their appointment by the Secretary of Commerce to an inferior office. Pp. 6–19.

(a) The Appointments Clause provides that only the President, with the advice and consent of the Senate, can appoint principal officers. With respect to inferior officers, the Clause permits Congress to vest appointment power "in the President alone, in the Courts of Law, or in the Heads of Departments." Pp. 6–8.

(b) In *Edmond* v. *United States,* 520 U. S. 651, this Court explained that an inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.*, at 663. Applying that test to Coast Guard Court of Criminal Appeals judges appointed by the Secretary of Transportation, the Court held that the judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch. *Id.*, at 664–665. What the Court in *Edmond* found "significant" was that those judges had "no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.*, at 665.

Such review by a superior executive officer is absent here. While the Director has tools of administrative oversight, neither he nor any other superior executive officer can directly review decisions by APJs. Only the PTAB itself "may grant rehearings." §6(c). This restriction on review relieves the Director of responsibility for the final decisions rendered by APJs under his charge. Their decision—the final word within the Executive Branch—compels the Director to "issue and publish a certificate" canceling or confirming patent claims he had previously allowed. §318(b).

The Government and Smith & Nephew contend that the Director has various ways to indirectly influence the course of inter partes review. The Director, for example, could designate APJs predisposed to decide a case in his preferred manner. But such machinations blur the lines of accountability demanded by the Appointments Clause and leave the parties with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility.

Even if the Director can refuse to designate APJs on *future* PTAB panels, he has no means of countermanding the final decision already on the books. Nor can the Secretary meaningfully control APJs

through the threat of removal from federal service entirely because she can fire them only "for such cause as will promote the efficiency of the service." 5 U. S. C. §7513(a); see *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, ___. And the possibility of an appeal to the Federal Circuit does not provide the necessary supervision. APJs exercise executive power, and the President must be ultimately responsible for their actions. See *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4.

Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor "attribute the Board's failings to those whom he *can* oversee." *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.,* 561 U. S. 477, 496. APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Edmond*, 520 U. S., at 663. Pp. 8–14.

(c) History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers. Founding-era congressional statutes and early decisions from this Court indicate that adequate supervision entails review of decisions issued by inferior officers. See, *e.g.*, 1 Stat. 66–67; *Barnard* v. *Ashley*, 18 How. 43, 45. Congress carried that model of principal officer review into the modern administrative state. See, *e.g.*, 5 U. S. C. §557(b).

According to the Government and Smith & Nephew, heads of department appoint a handful of contemporary officers who purportedly exercise final decisionmaking authority. Several of their examples, however, involve inferior officers whose decisions a superior executive officer can review or implement a system for reviewing. See, *e.g.*, *Freytag* v. *Commissioner*, 501 U. S. 868. Nor does the structure of the PTAB draw support from the predecessor Board of Appeals, which determined the patentability of inventions in panels composed of examiners-in-chief without an appeal to the Commissioner. 44 Stat. 1335–1336. Those Board decisions could be reviewed by the Court of Customs and Patent Appeals—an executive tribunal—and may also have been subject to the unilateral control of the agency head. Pp. 14–18.

(d) The Court does not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond*, 520 U. S., at 661. Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and the Court does not address supervision outside the context of adjudication. Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal. *Buckley* v. *Valeo,* 424 U. S.

Syllabus

1, 126. Pp. 18–19.

THE CHIEF JUSTICE, joined by JUSTICE ALITO, JUSTICE KAVANAUGH, and JUSTICE BARRETT, concluded in Part III that §6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB. When reviewing such a decision by the Director, a court must decide the case "conformably to the constitution, disregarding the law" placing restrictions on his review authority in violation of Article II. *Marbury* v. *Madison*, 1 Cranch 137, 178.

The appropriate remedy is a remand to the Acting Director to decide whether to rehear the petition filed by Smith & Nephew. A limited remand provides an adequate opportunity for review by a principal officer. Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs. Pp. 19–23.

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

SUPREME COURT OF THE UNITED STATES

Nos. 19–1434, 19–1452 and 19–1458

UNITED STATES, PETITIONER
19–1434 *v.*
ARTHREX, INC., ET AL.

SMITH & NEPHEW, INC., ET AL., PETITIONERS
19–1452 *v.*
ARTHREX, INC., ET AL.

ARTHREX, INC., PETITIONER
19–1458 *v.*
SMITH & NEPHEW, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 21, 2021]

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

The validity of a patent previously issued by the Patent and Trademark Office can be challenged before the Patent Trial and Appeal Board, an executive tribunal within the PTO. The Board, composed largely of Administrative Patent Judges appointed by the Secretary of Commerce, has the final word within the Executive Branch on the validity of a challenged patent. Billions of dollars can turn on a Board decision.

Under the Constitution, "[t]he executive Power" is vested in the President, who has the responsibility to "take Care

that the Laws be faithfully executed." Art. II, §1, cl. 1; §3. The Appointments Clause provides that he may be assisted in carrying out that responsibility by officers nominated by him and confirmed by the Senate, as well as by other officers not appointed in that manner but whose work, we have held, must be directed and supervised by an officer who has been. §2, cl. 2. The question presented is whether the authority of the Board to issue decisions on behalf of the Executive Branch is consistent with these constitutional provisions.

I

A

The creation of a workable patent system was a congressional priority from the start. The First Congress established the Patent Board—consisting impressively of Secretary of State Thomas Jefferson, Secretary of War Henry Knox, and Attorney General Edmund Randolph—to issue patents for inventions they deemed "sufficiently useful and important." §1, 1 Stat. 109–110. Jefferson, a renowned inventor in his own right, "was charged with most of the responsibility" to administer the new patent system. Federico, Operation of the Patent Act of 1790, 18 J. Pat. Off. Soc. 237, 238–239 (1936). The Patent Board was a short-lived experiment because its members had much else to do. Jefferson candidly admitted that he had "been obliged to give undue & uninformed opinions on rights often valuable" without the "great deal of time" necessary to "understand & do justice by" patent applicants. Letter from T. Jefferson to H. Williamson (Apr. 1, 1792), in 6 Works of Thomas Jefferson 459 (P. Ford ed. 1904).

In 1793, Congress shifted to a registration system administered by the Secretary of State. See 1 Stat. 319–321. The Secretary no longer reviewed the substance of patent applications but instead issued patents through a routine process "as a ministerial officer." *Grant* v. *Raymond*, 6 Pet.

218, 241 (1832). The courts would make the initial determination of patent validity in a subsequent judicial proceeding, such as an infringement suit. See 1 Stat. 322. This scheme unsurprisingly resulted in the Executive Branch issuing many invalid patents and the Judicial Branch having to decide many infringement cases. See S. Doc. No. 338, 24th Cong., 1st Sess., 3 (1836). Judge William Van Ness—who before taking the bench had served as second to Aaron Burr in his duel with Alexander Hamilton—lamented that Congress had left the door "open and unguarded" for imposters to secure patents, with the consequences of "litigation and endless trouble, if not total ruin, to the true inventor." *Thompson* v. *Haight*, 23 F. Cas. 1040, 1041–1042 (No. 13,957) (CC SDNY 1826). Congress heeded such concerns by returning the initial determination of patentability to the Executive Branch, see 5 Stat. 117–118, where it remains today.

The present system is administered by the Patent and Trademark Office (PTO), an executive agency within the Department of Commerce "responsible for the granting and issuing of patents" in the name of the United States. 35 U. S. C. §§1(a), 2(a)(1). Congress has vested the "powers and duties" of the PTO in a sole Director appointed by the President with the advice and consent of the Senate. §3(a)(1). As agency head, the Director "provid[es] policy direction and management supervision" for PTO officers and employees. §3(a)(2)(A).

This suit centers on the Patent Trial and Appeal Board (PTAB), an executive adjudicatory body within the PTO established by the Leahy-Smith America Invents Act of 2011. 125 Stat. 313. The PTAB sits in panels of at least three members drawn from the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and more than 200 Administrative Patent Judges (APJs). 35 U. S. C. §§6(a), (c). The Secretary of Commerce appoints the members of the PTAB (except for the Director),

including the APJs at issue in this dispute. §§3(b)(1), (b)(2)(A), 6(a). Like the 1790 Patent Board, the modern Board decides whether an invention satisfies the standards for patentability on review of decisions by primary examiners. §§6(b)(1), 134(a).

Through a variety of procedures, the PTAB can also take a second look at patents previously issued by the PTO. §§6(b)(2)–(4). One such procedure is inter partes review. Established in 2011, inter partes review is an adversarial process by which members of the PTAB reconsider whether existing patents satisfy the novelty and nonobviousness requirements for inventions. See §6(a) of the America Invents Act, 125 Stat. 299. Any person—other than the patent owner himself—can file a petition to institute inter partes review of a patent. 35 U. S. C. §311(a). The Director can institute review only if, among other requirements, he determines that the petitioner is reasonably likely to prevail on at least one challenged patent claim. §314(a). Congress has committed the decision to institute inter partes review to the Director's unreviewable discretion. See *Thryv, Inc.* v. *Click-To-Call Technologies, LP*, 590 U. S. ___, ___ (2020) (slip op., at 6). By regulation, the Director has delegated this authority to the PTAB itself. 37 CFR §42.4(a) (2020).

The Director designates at least three members of the PTAB (typically three APJs) to conduct an inter partes proceeding. 35 U. S. C. §6(c). The PTAB then assumes control of the process, which resembles civil litigation in many respects. §316(c). The PTAB must issue a final written decision on all of the challenged patent claims within 12 to 18 months of institution. §316(a)(11); see *SAS Institute Inc.* v. *Iancu*, 584 U. S. ___, ___ (2018) (slip op., at 5). A party who disagrees with a decision may request rehearing by the PTAB. 35 U. S. C. §6(c); 37 CFR §42.71(d).

The PTAB is the last stop for review within the Executive Branch. A party dissatisfied with the final decision may seek judicial review in the Court of Appeals for the Federal

Circuit. 35 U. S. C. §319. At this stage, the Director can intervene before the court to defend or disavow the Board's decision. §143. The Federal Circuit reviews the PTAB's application of patentability standards *de novo* and its underlying factual determinations for substantial evidence. See *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___ (2018) (slip op., at 4). Upon expiration of the time to appeal or termination of any appeal, "the Director shall issue and publish a certificate canceling any claim of the patent finally determined to be unpatentable, confirming any claim of the patent determined to be patentable, and incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable." §318(b).

B

Arthrex, Inc. develops medical devices and procedures for orthopedic surgery. In 2015, it secured a patent on a surgical device for reattaching soft tissue to bone without tying a knot, U. S. Patent No. 9,179,907 ('907 patent). Arthrex soon claimed that Smith & Nephew, Inc. and ArthroCare Corp. (collectively, Smith & Nephew) had infringed the '907 patent, and the dispute eventually made its way to inter partes review in the PTO. Three APJs formed the PTAB panel that conducted the proceeding and ultimately concluded that a prior patent application "anticipated" the invention claimed by the '907 patent, so that Arthrex's patent was invalid. See App. to Pet. for Cert. in No. 19–1434, p. 128a.

On appeal to the Federal Circuit, Arthrex raised for the first time an argument premised on the Appointments Clause of the Constitution. That Clause specifies how the President may appoint officers who assist him in carrying out his responsibilities. *Principal* officers must be appointed by the President with the advice and consent of the Senate, while *inferior* officers may be appointed by the

President alone, the head of an executive department, or a court. Art. II, §2, cl. 2. Arthrex argued that the APJs were principal officers and therefore that their appointment by the Secretary of Commerce was unconstitutional. The Government intervened to defend the appointment procedure.

The Federal Circuit agreed with Arthrex that APJs were principal officers. 941 F. 3d 1320, 1335 (2019). Neither the Secretary nor Director had the authority to review their decisions or to remove them at will. The Federal Circuit held that these restrictions meant that APJs were themselves principal officers, not inferior officers under the direction of the Secretary or Director.

To fix this constitutional violation, the Federal Circuit invalidated the tenure protections for APJs. Making APJs removable at will by the Secretary, the panel held, prospectively "renders them inferior rather than principal officers." *Id.*, at 1338. The Federal Circuit vacated the PTAB's decision and remanded for a fresh hearing before a new panel of APJs, who would no longer enjoy protection against removal. *Id.*, at 1338–1340.

This satisfied no one. The Government, Smith & Nephew, and Arthrex each requested rehearing en banc, which the Court of Appeals denied. 953 F. 3d 760, 761 (2020) (*per curiam*). The parties then requested review of different aspects of the panel's decision in three petitions for certiorari.

We granted those petitions to consider whether the PTAB's structure is consistent with the Appointments Clause, and the appropriate remedy if it is not. 592 U. S. ___ (2020).

II

A

The President is "'responsible for the actions of the Executive Branch'" and "'cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes

with it.'" *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010) (quoting *Clinton* v. *Jones*, 520 U. S. 681, 712–713 (1997) (BREYER, J., concurring in judgment)). The Framers recognized, of course, that "no single person could fulfill that responsibility alone, [and] expected that the President would rely on subordinate officers for assistance." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, ___ (2020) (plurality opinion) (slip op., at 2).

Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through "a clear and effective chain of command" down from the President, on whom all the people vote. *Free Enterprise Fund*, 561 U. S., at 498. James Madison extolled this "great principle of unity and responsibility in the Executive department," which ensures that "the chain of dependence [will] be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 1 Annals of Cong. 499 (1789).

The Appointments Clause provides:

> "[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." Art. II, §2, cl. 2.

Assigning the nomination power to the President guarantees accountability for the appointees' actions because the "blame of a bad nomination would fall upon the president

singly and absolutely." The Federalist No. 77, p. 517 (J. Cooke ed. 1961) (A. Hamilton). As Hamilton wrote, the "sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation." *Id.*, No. 76, at 510–511. The Appointments Clause adds a degree of accountability in the Senate, which shares in the public blame "for both the making of a bad appointment and the rejection of a good one." *Edmond* v. *United States*, 520 U. S. 651, 660 (1997).

Only the President, with the advice and consent of the Senate, can appoint noninferior officers, called "principal" officers as shorthand in our cases. See *id.*, at 659. The "default manner of appointment" for inferior officers is also nomination by the President and confirmation by the Senate. *Id.*, at 660. But the Framers foresaw that "when offices became numerous, and sudden removals necessary, this mode might be inconvenient." *United States* v. *Germaine*, 99 U. S. 508, 510 (1879). Reflecting this concern for "administrative convenience," the Appointments Clause permits Congress to dispense with joint appointment, but only for inferior officers. *Edmond*, 520 U. S., at 660. Congress may vest the appointment of such officers "in the President alone, in the Courts of Law, or in the Heads of Departments."

B

Congress provided that APJs would be appointed as inferior officers, by the Secretary of Commerce as head of a department. The question presented is whether the nature of their responsibilities is consistent with their method of appointment. As an initial matter, no party disputes that APJs are officers—not "lesser functionaries" such as employees or contractors—because they "exercis[e] significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U. S. 1, 126, and n. 162 (1976) (*per curiam*); see *Lucia* v. *SEC*, 585 U. S. ___, ___–___ (2018) (slip op., at

8–9). APJs do so when reconsidering an issued patent, a power that (the Court has held) involves the adjudication of public rights that Congress may appropriately assign to executive officers rather than to the Judiciary. See *Oil States*, 584 U. S., at ___–___ (slip op., at 8–9).

The starting point for each party's analysis is our opinion in *Edmond*. There we explained that "[w]hether one is an 'inferior' officer depends on whether he has a superior" other than the President. 520 U. S., at 662. An inferior officer must be "directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Id.*, at 663.

In *Edmond*, we applied this test to adjudicative officials within the Executive Branch—specifically, Coast Guard Court of Criminal Appeals judges appointed by the Secretary of Transportation. See *id.*, at 658. We held that the judges were inferior officers because they were effectively supervised by a combination of Presidentially nominated and Senate confirmed officers in the Executive Branch: first, the Judge Advocate General, who "exercise[d] administrative oversight over the Court of Criminal Appeals" by prescribing rules of procedure and formulating policies for court-martial cases, and could also "remove a Court of Criminal Appeals judge from his judicial assignment without cause"; and second, the Court of Appeals for the Armed Forces, an executive tribunal that could review the judges' decisions under a *de novo* standard for legal issues and a deferential standard for factual issues. *Id.*, at 664–665. "What is significant," we concluded, "is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.*, at 665.

Congress structured the PTAB differently, providing only half of the "divided" supervision to which judges of the Court of Criminal Appeals were subject. *Id.*, at 664. Like the Judge Advocate General, the PTO Director possesses

powers of "administrative oversight." *Ibid.* The Director fixes the rate of pay for APJs, controls the decision whether to institute inter partes review, and selects the APJs to reconsider the validity of the patent. 35 U. S. C. §§3(b)(6), 6(c), 314(a). The Director also promulgates regulations governing inter partes review, issues prospective guidance on patentability issues, and designates past PTAB decisions as "precedential" for future panels. §§3(a)(2)(A), 316(a)(4); Brief for United States 6. He is the boss, except when it comes to the one thing that makes the APJs officers exercising "significant authority" in the first place—their power to issue decisions on patentability. *Buckley*, 424 U. S., at 126. In contrast to the scheme approved by *Edmond*, no principal officer at any level within the Executive Branch "direct[s] and supervise[s]" the work of APJs in that regard. 520 U. S., at 663.

Edmond goes a long way toward resolving this dispute. What was "significant" to the outcome there—review by a superior executive officer—is absent here: APJs have the "power to render a final decision on behalf of the United States" without any such review by their nominal superior or any other principal officer in the Executive Branch. *Id.*, at 665. The only possibility of review is a petition for rehearing, but Congress unambiguously specified that "[o]nly the Patent and Trial Appeal Board may grant rehearings." §6(c). Such review simply repeats the arrangement challenged as unconstitutional in this suit.

This "diffusion of power carries with it a diffusion of accountability." *Free Enterprise Fund*, 561 U. S., at 497. The restrictions on review relieve the Director of responsibility for the final decisions rendered by APJs purportedly under his charge. The principal dissent's observation that "the Director alone has the power to take final action to cancel a patent claim or confirm it," *post*, at 7 (opinion of THOMAS, J.), simply ignores the undisputed fact that the Director's

"power" in that regard is limited to carrying out the ministerial duty that he "shall issue and publish a certificate" canceling or confirming patent claims he had previously allowed, as dictated by the APJs' final decision. §318(b); see §§131, 153. The chain of command runs not from the Director to his subordinates, but from the APJs to the Director.

The Government and Smith & Nephew assemble a catalog of steps the Director might take to affect the decisionmaking process of the PTAB, despite his lack of any statutory authority to review its decisions. See Brief for United States 30–32; Brief for Smith & Nephew, Inc., et al. 25–27. The Government reminds us that it is the Director who decides whether to initiate inter partes review. §314(a). The Director can also designate the APJs who will decide a particular case and can pick ones predisposed to his views. §6(c). And the Director, the Government asserts, can even vacate his institution decision if he catches wind of an unfavorable ruling on the way. The "proceeding will have no legal consequences" so long as the Director jumps in before the Board issues its final decision. Brief for United States 31.

If all else fails, the Government says, the Director can intervene in the rehearing process to reverse Board decisions. The Government acknowledges that only the PTAB can grant rehearing under §6(c). But the Director, according to the Government, could manipulate the composition of the PTAB panel that acts on the rehearing petition. For one thing, he could "stack" the original panel to rehear the case with additional APJs assumed to be more amenable to his preferences. See *Oil States*, 584 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 3). For another, he could assemble an entirely new panel consisting of himself and two other officers appointed by the Secretary—in practice, the Commissioner for Patents and the APJ presently designated as Chief Judge—to decide whether to overturn a decision and reach a different outcome binding on future panels. See

Brief for United States 6–7, 31–32. The Government insists that the Director, by handpicking (and, if necessary, repicking) Board members, can indirectly influence the course of inter partes review.

That is not the solution. It is the problem. The Government proposes (and the dissents embrace) a roadmap for the Director to evade a statutory prohibition on review without having him take responsibility for the ultimate decision. See *post*, at 2–3 (BREYER, J., concurring in judgment in part and dissenting in part); *post*, at 8–10 (opinion of THOMAS, J.). Even if the Director succeeds in procuring his preferred outcome, such machinations blur the lines of accountability demanded by the Appointments Clause. The parties are left with neither an impartial decision by a panel of experts nor a transparent decision for which a politically accountable officer must take responsibility. And the public can only wonder "on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." The Federalist No. 70, at 476 (A. Hamilton).

The Government contends that the Director may respond after the fact by removing an APJ "from his judicial assignment without cause" and refusing to designate that APJ on *future* PTAB panels. *Edmond*, 520 U. S., at 664. Even assuming that is true, reassigning an APJ to a different task going forward gives the Director no means of countermanding the final decision already on the books. Nor are APJs "meaningfully controlled" by the threat of removal from federal service entirely, *Seila Law*, 591 U. S., at ___ (slip op., at 23), because the Secretary can fire them after a decision only "for such cause as will promote the efficiency of the service," 5 U. S. C. §7513(a). In all the ways that matter to the parties who appear before the PTAB, the buck stops with the APJs, not with the Secretary or Director.

Review outside Article II—here, an appeal to the Federal Circuit—cannot provide the necessary supervision. While

the duties of APJs "partake of a Judiciary quality as well as Executive," APJs are still exercising executive power and must remain "dependent upon the President." 1 Annals of Cong., at 611–612 (J. Madison); see *Oil States*, 584 U. S., at ___ (slip op., at 8). The activities of executive officers may "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power,'" for which the President is ultimately responsible. *Arlington* v. *FCC*, 569 U. S. 290, 305, n. 4 (2013) (quoting Art. II, §1, cl. 1).

Given the insulation of PTAB decisions from any executive review, the President can neither oversee the PTAB himself nor "attribute the Board's failings to those whom he *can* oversee." *Free Enterprise Fund*, 561 U. S., at 496. APJs accordingly exercise power that conflicts with the design of the Appointments Clause "to preserve political accountability." *Edmond*, 520 U. S., at 663.

The principal dissent dutifully undertakes to apply the governing test from *Edmond*, see *post*, at 5–10 (opinion of THOMAS, J.), but its heart is plainly not in it. For example, the dissent rejects any distinction between "inferior-officer power" and "principal-officer power," *post*, at 12, but *Edmond* calls for exactly that: an appraisal of how much power an officer exercises free from control by a superior. The dissent pigeonholes this consideration as the sole province of the Vesting Clause, *post*, at 14–15, but *Edmond* recognized the Appointments Clause as a "significant structural safeguard[ ]" that "preserve[s] political accountability" through direction and supervision of subordinates—in other words, through a chain of command. 520 U. S., at 659, 663. The dissent would have the Court focus on the location of an officer in the agency "organizational chart," *post*, at 1, but as we explained in *Edmond*, "[i]t is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude," 520 U. S., at 662–663. The dissent stresses that "at least

two levels of authority" separate the President from PTAB decisions, *post*, at 1, but the unchecked exercise of executive power by an officer buried many layers beneath the President poses more, not less, of a constitutional problem. Conspicuously absent from the dissent is any concern for the President's ability to "discharge his own constitutional duty of seeing that the laws be faithfully executed." *Myers* v. *United States*, 272 U. S. 52, 135 (1926).

The other dissent charges that the Court's opinion has "no foundation" in past decisions. *Post*, at 5 (opinion of BREYER, J.). Of course, we have a different view on the proper application of *Edmond* in this dispute. As for other past decisions, it is the dissent that expressly grounds its analysis in dissenting opinions from *Free Enterprise Fund* and *Seila Law*, while frankly acknowledging that the *Court's* opinions in those cases support the principles that guide us here. *Post*, at 5–7.

C

History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers. Since the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy. Hamilton articulated the principle of constitutional accountability underlying such supervision in a 1792 Treasury circular. Writing as Secretary of the Treasury to the customs officials under his charge, he warned that any deviations from his instructions "would be subversive of uniformity in the execution of the laws." 3 Works of Alexander Hamilton 557 (J. Hamilton ed. 1850). "The power to superintend," he explained, "must imply a right to judge and direct," thereby ensuring that "the responsibility for a wrong construction rests with the head of the department, when it proceeds from him." *Id.*, at 559.

Early congressional statutes expressly empowered department heads to supervise the work of their subordinates,

sometimes by providing for an appeal in adjudicatory proceedings to a Presidentially nominated and Senate confirmed officer. See, *e.g.*, 1 Stat. 66–67 (authorizing appeal of auditor decisions to Comptroller); §4, 1 Stat. 378 (permitting supervisors of the revenue to issue liquor licenses "subject to the superintendence, control and direction of the department of the treasury"). For the most part, Congress left the structure of administrative adjudication up to agency heads, who prescribed internal procedures (and thus exercised direction and control) as they saw fit. See J. Mashaw, Creating the Administrative Constitution 254 (2012).

This Court likewise indicated in early decisions that adequate supervision entails review of decisions issued by inferior officers. For example, we held that the Commissioner of the General Land Office—the erstwhile agency that adjudicated private claims to public lands and granted land patents—could review decisions of his subordinates despite congressional silence on the matter. Our explanation, almost "too manifest to require comment," was that the authority to review flowed from the "necessity of 'supervision and control,' vested in the commissioner, acting under the direction of the President." *Barnard* v. *Ashley*, 18 How. 43, 45 (1856). "Of necessity," we later elaborated, the Commissioner "must have power to adjudge the question of accuracy preliminary to the issue of a [land] patent." *Magwire* v. *Tyler*, 1 Black 195, 202 (1862).

Congress has carried the model of principal officer review into the modern administrative state. As the Government forthrightly acknowledged at oral argument, it "certainly is the norm" for principal officers to have the capacity to review decisions made by inferior adjudicative officers. Tr. of Oral Arg. 23. The Administrative Procedure Act, from its inception, authorized agency heads to review such decisions. 5 U. S. C. §557(b). And "higher-level agency reconsideration" by the agency head is the standard way to maintain political accountability and effective oversight for

adjudication that takes place outside the confines of §557(b). Walker & Wasserman, The New World of Agency Adjudication, 107 Cal. L. Rev. 141, 157 (2019). To take one example recently discussed by this Court in *Free Enterprise Fund*, the Public Company Accounting Oversight Board can issue sanctions in disciplinary proceedings, but such sanctions are reviewable by its superior, the Securities and Exchange Commission. 15 U. S. C. §§7215(c)(4), 7217(c).

The Government and Smith & Nephew point to a handful of contemporary officers who are appointed by heads of departments but who nevertheless purportedly exercise final decisionmaking authority. Several examples, however, involve inferior officers whose decisions a superior executive officer can review or implement a system for reviewing. For instance, the special trial judges in *Freytag* v. *Commissioner*, 501 U. S. 868 (1991), may enter a decision on behalf of the Tax Court—whose members are nominated by the President and confirmed by the Senate, 26 U. S. C. §7443(b)—but only "subject to such conditions and review as the court may provide." §7443A(c); see also 8 CFR §1003.0(a) (2020) (establishing Executive Office for Immigration Review under control of Attorney General). And while the Board of Veteran Affairs does make the final decision within the Department of Veteran Affairs, 38 U. S. C. §§7101, 7104(a), its decisions are reviewed by the Court of Appeals for Veterans Claims, an Executive Branch entity, §§7251, 7252(a). See *Henderson* v. *Shinseki*, 562 U. S. 428, 431–432 (2011). Other examples are potentially distinguishable, such as the Benefits Review Board members who appear to serve at the pleasure of the appointing department head. See 33 U. S. C. §921(c); *Kalaris* v. *Donovan*, 697 F. 2d 376, 396–397 (CADC 1983).

Perhaps the Civilian and Postal Boards of Contract Appeals are most similar to the PTAB. The Administrator of General Services and the Postmaster General appoint the

members of the respective Boards, whose decisions are appealable to the Federal Circuit. See 41 U. S. C. §§7105(b), (d), (e), 7107(a). Congress established both entities in 2006 and gave them jurisdiction over disputes involving public contractors. 119 Stat. 3391–3394. Whatever distinct issues that scheme might present, the Boards of Contract Appeals—both young entrants to the regulatory landscape—provide the PTAB no "foothold in history or tradition" across the Executive Branch. *Seila Law*, 591 U. S., at ___ (slip op., at 21).

When it comes to the patent system in particular, adjudication has followed the traditional rule that a principal officer, if not the President himself, makes the final decision on how to exercise executive power. Recall that officers in President Washington's Cabinet formed the first Patent Board in 1790. 1 Stat. 109–110. The initial determination of patentability was then relegated to the courts in 1793, but when the Executive Branch reassumed authority in 1836, it was the Commissioner of Patents—appointed by the President with the advice and consent of the Senate—who exercised control over the issuance of a patent. 5 Stat. 117, 119. The patent system, for nearly the next hundred years, remained accountable to the President through the Commissioner, who directed the work of his subordinates by, for example, hearing appeals from decisions by examiners-in-chief, the forebears of today's APJs. 12 Stat. 246–247.

The Government and Smith & Nephew find support for the structure of the PTAB in the predecessor Board of Appeals established in 1927. 44 Stat. 1335–1336. Simplified somewhat, the Board of Appeals decided the patentability of inventions in panels composed of examiners-in-chief without an appeal to the Commissioner. But decisions by examiners-in-chief could be reviewed by the Court of Customs and Patent Appeals (CCPA), an entity within the Ex-

ecutive Branch until 1958. 45 Stat. 1476; see *Ex parte Bakelite Corp.*, 279 U. S. 438, 460 (1929); see also 72 Stat. 848. The President appointed CCPA judges with the advice and consent of the Senate. 36 Stat. 105. Even after 1958, the Commissioner appears to have retained "the ultimate authority regarding the granting of patents" through the examination and interference processes, notwithstanding the lack of a formal appeal from the Board's decision. *In re Alappat*, 33 F. 3d 1526, 1535 (CA Fed. 1994) (en banc) (plurality opinion). The history of the Board of Appeals, though more winding and varied than recounted here, has little to say about the present provision expressly ordering the Director to undo his prior patentability determination when a PTAB panel of unaccountable APJs later disagrees with it. See 35 U. S. C. §318(b).

The Government and Smith & Nephew also note that early Patent Acts authorized the Secretary of State to appoint two types of officials who made final decisions on questions of patent law. See 1 Stat. 322–323 (panel of arbitrators in interference proceedings); 5 Stat. 120–121 (board of examiners to hear appeal from patentability or priority decision of Commissioner). Neither example, however, serves as historical precedent for modern APJs. Both the arbitrators and the examiners assembled to resolve a single issue—indeed, these ad hoc positions may not have even constituted offices. See *Auffmordt* v. *Hedden*, 137 U. S. 310, 327 (1890). If they were officers, they exercised their limited power under "special and temporary conditions." *United States* v. *Eaton*, 169 U. S. 331, 343 (1898) (holding that an inferior officer can perform functions of principal office on acting basis). APJs, by contrast, occupy a permanent office unless removed by the Secretary for cause.

* * *

We hold that the unreviewable authority wielded by APJs

during inter partes review is incompatible with their appointment by the Secretary to an inferior office. The principal dissent repeatedly charges that we never say whether APJs are principal officers who were not appointed in the manner required by the Appointments Clause, or instead inferior officers exceeding the permissible scope of their duties under that Clause. See *post*, at 3, 11, 16 (opinion of THOMAS, J.). But both formulations describe the same constitutional violation: Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in the proceeding before us.

In reaching this conclusion, we do not attempt to "set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Edmond*, 520 U. S., at 661. Many decisions by inferior officers do not bind the Executive Branch to exercise executive power in a particular manner, and we do not address supervision outside the context of adjudication. Cf. *post*, at 13–14 (opinion of THOMAS, J.). Here, however, Congress has assigned APJs "significant authority" in adjudicating the public rights of private parties, while also insulating their decisions from review and their offices from removal. *Buckley*, 424 U. S., at 126.

III

We turn now to the appropriate way to resolve this dispute given this violation of the Appointments Clause. In general, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by disregarding the "problematic portions while leaving the remainder intact." *Ayotte* v. *Planned Parenthood of Northern New Eng.*, 546 U. S. 320, 328–329 (2006). This approach derives from the Judiciary's "negative power to disregard an unconstitutional enactment" in resolving a legal dispute. *Massachusetts* v. *Mellon*, 262 U. S. 447, 488 (1923). In a case that presents a conflict between the Constitution and

a statute, we give "full effect" to the Constitution and to whatever portions of the statute are "not repugnant" to the Constitution, effectively severing the unconstitutional portion of the statute. *Bank of Hamilton* v. *Lessee of Dudley*, 2 Pet. 492, 526 (1829) (Marshall, C. J.). This principle explains our "normal rule that partial, rather than facial, invalidation is the required course." *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 504 (1985).

Arthrex asks us to hold the entire regime of inter partes review unconstitutional. In its view, any more tailored declaration of unconstitutionality would necessitate a policy decision best left to Congress in the first instance. Because the good cannot be separated from the bad, Arthrex continues, the appropriate remedy is to order outright dismissal of the proceeding below. The partial dissent, similarly forswearing the need to do anything beyond "identifying the constitutional violation," would grant full relief to Arthrex. *Post*, at 5–6 (GORSUCH, J., concurring in part and dissenting in part).

In our view, however, the structure of the PTO and the governing constitutional principles chart a clear course: Decisions by APJs must be subject to review by the Director. Congress vested the Director with the "powers and duties" of the PTO, 35 U. S. C. §3(a)(1), tasked him with supervising APJs, §3(a)(2)(A), and placed the PTAB "in" the PTO, §6(a). A single officer has superintended the activities of the PTO since the Commissioner of Patents assumed the role of "chief officer" of the Patent Office in 1836. §1, 5 Stat. 117–118. The Commissioner long oversaw examiners-in-chief, see 12 Stat. 246–247, just as the Director today has the responsibility to oversee APJs. While shielding the ultimate decisions of the 200-plus APJs from review, Congress also provided the Director means of control over the institution and conduct of inter partes review. 35 U. S. C. §§314(a), 316(a). In every respect save the insulation of their decisions from review within the Executive Branch,

APJs appear to be inferior officers—an understanding consistent with their appointment in a manner permissible for inferior but not principal officers.

The America Invents Act insulates APJs from supervision through two mechanisms. The statute provides that "each . . . inter partes review shall be heard by at least 3 members of the [PTAB]" and that "only the [PTAB] may grant rehearings." §6(c). The upshot is that the Director cannot rehear and reverse a final decision issued by APJs. If the Director were to have the "authority to take control" of a PTAB proceeding, APJs would properly function as inferior officers. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 354 (1931).

We conclude that a tailored approach is the appropriate one: Section 6(c) cannot constitutionally be enforced to the extent that its requirements prevent the Director from reviewing final decisions rendered by APJs. Because Congress has vested the Director with the "power and duties" of the PTO, §3(a)(1), the Director has the authority to provide for a means of reviewing PTAB decisions. See also §§3(a)(2)(A), 316(a)(4). The Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board. Section 6(c) otherwise remains operative as to the other members of the PTAB.

This does not result in an incomplete or unworkable statutory scheme. Cf. *United States* v. *Treasury Employees*, 513 U. S. 454, 479 (1995). To the contrary, review by the Director would follow the almost-universal model of adjudication in the Executive Branch, see *supra*, at 15–16, and aligns the PTAB with the *other* adjudicative body in the PTO, the Trademark Trial and Appeal Board, see §228 of the Trademark Modernization Act of 2020, 134 Stat. 2209.

The Government defends the different approach adopted by the Federal Circuit. The Court of Appeals held unenforceable APJs' protection against removal except "for such

cause as will promote the efficiency of the service," 5 U. S. C. §7513(a), which applies through 35 U. S. C. §3(c). See 941 F. 3d, at 1337, 1340. If the for-cause provision were unenforceable, the Secretary could remove APJs at will. See *Ex parte Hennen*, 13 Pet. 230, 259–260 (1839). The Government contends that APJs would then be inferior officers under *Free Enterprise Fund*. But regardless whether the Government is correct that at-will removal by the Secretary would cure the constitutional problem, review by the Director better reflects the structure of supervision within the PTO and the nature of APJs' duties, for the reasons we have explained. See *supra*, at 12, 20–21.

In sum, we hold that 35 U. S. C. §6(c) is unenforceable as applied to the Director insofar as it prevents the Director from reviewing the decisions of the PTAB on his own. The Director may engage in such review and reach his own decision. When reviewing such a decision by the Director, a court must decide the case "conformably to the constitution, disregarding the law" placing restrictions on his review authority in violation of Article II. *Marbury* v. *Madison*, 1 Cranch 137, 178 (1803). We add that this suit concerns only the Director's ability to supervise APJs in adjudicating petitions for inter partes review. We do not address the Director's supervision over other types of adjudications conducted by the PTAB, such as the examination process for which the Director has claimed unilateral authority to issue a patent. See Reply Brief for Arthrex, Inc. 6.

We also conclude that the appropriate remedy is a remand to the Acting Director for him to decide whether to rehear the petition filed by Smith & Nephew. Although the APJs' appointment by the Secretary allowed them to lawfully adjudicate the petition in the first instance, see *Freytag*, 501 U. S., at 881–882, they lacked the power under the Constitution to finally resolve the matter within the Executive Branch. Under these circumstances, a limited remand to the Director provides an adequate opportunity for

review by a principal officer. Because the source of the constitutional violation is the restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary, Arthrex is not entitled to a hearing before a new panel of APJs. Cf. *Lucia*, 585 U. S., at ___–___ (slip op., at 12–13).

* * *

Today, we reaffirm and apply the rule from *Edmond* that the exercise of executive power by inferior officers must at some level be subject to the direction and supervision of an officer nominated by the President and confirmed by the Senate. The Constitution therefore forbids the enforcement of statutory restrictions on the Director that insulate the decisions of APJs from his direction and supervision. To be clear, the Director need not review every decision of the PTAB. What matters is that the Director have the discretion to review decisions rendered by APJs. In this way, the President remains responsible for the exercise of executive power—and through him, the exercise of executive power remains accountable to the people.

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

It is so ordered.

SUPREME COURT OF THE UNITED STATES

Nos. 19–1434, 19–1452 and 19–1458

UNITED STATES, PETITIONER
19–1434 *v.*
ARTHREX, INC., ET AL.

SMITH & NEPHEW, INC., ET AL., PETITIONERS
19–1452 *v.*
ARTHREX, INC., ET AL.

ARTHREX, INC., PETITIONER
19–1458 *v.*
SMITH & NEPHEW, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 21, 2021]

JUSTICE GORSUCH, concurring in part and dissenting in part.

For most of this Nation's history, an issued patent was considered a vested property right that could be taken from an individual only through a lawful process before a court. *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___–___ (2018) (GORSUCH, J., dissenting) (slip op., at 8–10). I continue to think this Court's recent decision in *Oil States*—upsetting this traditional understanding and allowing officials in the Executive Branch to "cancel" already-issued patents—departed from the Constitution's separation of powers. But it would be an even greater departure to permit those officials to withdraw a vested property right while accountable to no one within the Executive Branch. Accordingly, I join Parts I and II of the

Court's opinion. Respectfully, however, I am unable join the Court's severability discussion in Part III.

*

On the merits, I agree with the Court that Article II vests the "executive Power" in the President alone. This admittedly formal rule serves a vital function. If the executive power is exercised poorly, the Constitution's design at least ensures "[t]he people know whom to blame"—and hold accountable. *Morrison* v. *Olson*, 487 U. S. 654, 729 (1988) (Scalia, J., dissenting). As Hamilton explained, the President's "due dependence on the people and . . . due responsibility" to them are key "ingredients which constitute safety in the republican sense." The Federalist No. 70, p. 424 (C. Rossiter ed. 1961). Or as Madison put it, "no principle is more clearly laid down in the Constitution than that of responsibility." 1 Annals of Cong. 462 (1789). Without presidential responsibility there can be no democratic accountability for executive action.

Of course, the framers recognized that no one alone can discharge all the executive duties of the federal government. They "expected that the President would rely on subordinate officers for assistance." *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___, ___ (2020) (ROBERTS, C. J.) (slip op., at 2). But the framers took pains to ensure those subordinates would always remain responsible to the President and thus, ultimately, to the people. Because it is the President's duty to take care that the laws be faithfully executed, Art. II, §3, the framers sought to ensure he possessed "the power of *appointing*, *overseeing*, *and controlling* those who execute the laws." 1 Annals of Cong. 463 (Madison) (emphasis added).

To this end, the Constitution provided for a chain of authority. Several constitutional provisions reflect this structure. See Calabresi & Prakash, The President's Power To

Execute the Laws, 104 Yale L. J. 541, 570–599 (1994); Lawson, Appointments and Illegal Adjudication: The American Invents Act Through a Constitutional Lens, 26 Geo. Mason L. Rev. 26, 57–58 (2018). The Appointments Clause, for example, vests the President with the power to appoint "Officers of the United States" with "the Advice and Consent of the Senate," and to appoint "inferior Officers . . . alone" when Congress authorizes him to do so. Art. II, §2, cl. 2.

By definition, an "'inferior officer' . . . has a superior." *Edmond* v. *United States*, 520 U. S. 651, 662 (1997). To be an "inferior" officer, then, one must be both "*subordinate* to a[n] officer in the Executive Branch" and "under the direct control of the President" through a "chain of command." *Morrison*, 487 U. S., at 720–721 (Scalia, J., dissenting). In this way, the "text and structure of the Appointments Clause" *require* a "reference to hierarchy." Calabresi & Lawson, The Unitary Executive, Jurisdiction Stripping, and the *Hamdan* Opinions: A Textualist Response to Justice Scalia, 107 Colum. L. Rev. 1002, 1018–1020 (2007). Only such an understanding preserves, as Madison described it, the "chain of dependence," where "the lowest officers, the middle grade, and the highest"—each and every one—"will depend, as they ought, on the President." 1 Annals of Cong. 499 (Madison). And where the President, in turn, depends "on the community," so that "[t]he chain of dependence" finally "terminates in the supreme body, namely, in the people." *Ibid.*

I agree with the Court, too, that the statutory regime before us breaks this chain of dependence. In the America Invents Act of 2011 (AIA), Congress authorized the inter partes review (IPR) process, which permits anyone to file a petition asking the Patent and Trademark Office to "cancel" someone else's patent. 35 U. S. C. §311. Congress assigned the power to decide an IPR proceeding to a specific group of officials—the Patent Trial and Appeal Board (PTAB). Under the AIA's terms, three members from the PTAB—often,

as here, administrative patent judges (APJs)—sit on a panel to decide whether to cancel a patent. §6(c). After the three-member panel issues its decision, a party may seek rehearing from another three-member panel. *Ibid.* But only a PTAB panel—and no other official within the Executive Branch—may grant rehearing. *Ibid.* If that fails, a losing party's only recourse is to seek judicial review in the Court of Appeals for the Federal Circuit, which reviews the PTAB's factual findings under the deferential substantial evidence standard of review. See §319; *Oil States*, 584 U. S., at ___ (slip op., at 4).

Under this statutory arrangement, APJs are executive officers accountable to no one else in the Executive Branch. A panel of bureaucrats wields unreviewable power to take vested property rights. This design may hold its advantages for some. Often enough, the Director of the Patent and Trademark Office and the President may be happy to wash their hands of these decisions. But by breaking the chain of dependence, the statutory scheme denies individuals the right to be subjected only to *lawful* exercises of executive power that can ultimately be controlled by a President accountable to "the supreme body, namely, . . . the people."

*

The real question here concerns what to do about it. In Part III of its opinion, the Court invokes severability doctrine. *Ante*, at 19–22. It "sever[s]" Congress's statutory direction that PTAB decisions may not be reviewed by the Director of the Patent Office—in that way reconnecting APJs to the chain of command and subjecting their decisions to a superior who is, in turn, ultimately accountable to the President. See *ibid.*

I don't question that we might proceed this way in some cases. Faced with an application of a statute that violates the Constitution, a court might look to the text of the law in

question to determine what Congress has said should happen in that event. Sometimes Congress includes "fallback" provisions of just this sort, and sometimes those provisions tell us to disregard this or that provision if its statutory scheme is later found to offend the Constitution. See, *e.g.*, *Bowsher* v. *Synar*, 478 U. S. 714, 718–719 (1986); see also Walsh, Partial Unconstitutionality, 85 N. Y. U. L. Rev. 738, 780–781 (2010).

The problem here is that Congress has said nothing of the sort. And here it is the combination of separate statutory provisions that conspire to create a constitutional violation. Through some provisions, Congress has authorized executive officers to cancel patents. §§6(b)(4), 318(a). Through others, it has made their exercise of that power unreviewable within the Executive Branch. See §§6(c), 318(b). It's the combination of these provisions—the exercise of executive power and unreviewability—that violates the Constitution's separation of powers.

Nor is there only one possible way out of the problem. First, one could choose as the Court does and make PTAB decisions subject to review by the Director, who is answerable to the President through a chain of dependence. See Duffy, Are Administrative Patent Judges Unconstitutional? 77 Geo. Wash. L. Rev. 904, 911 (2009). Separately, one could specify that PTAB panel members should be appointed by the President and confirmed by the Senate and render their decisions directly reviewable by the President. See Lawson, 26 Geo. Mason L. Rev., at 57. Separately still, one could reassign the power to cancel patents to the Judiciary where it resided for nearly two centuries. See *Oil States*, 584 U. S., at ___–___ (GORSUCH, J., dissenting) (slip op., at 8–10). Without some direction from Congress, this problem cannot be resolved as a matter of statutory interpretation. All that remains is a policy choice.

In circumstances like these, I believe traditional remedial principles should be our guide. Early American courts did

not presume a power to "sever" and excise portions of statutes in response to constitutional violations. Instead, when the application of a statute violated the Constitution, courts simply declined to enforce the statute in the case or controversy at hand. See *Seila Law*, 591 U. S., at ___ (THOMAS, J., dissenting in part) (slip op., at 15); see also Walsh, N. Y. U. L. Rev., at 769. I would follow that course today by identifying the constitutional violation, explaining our reasoning, and "setting aside" the PTAB decision in this case. See *Novartis AG* v. *Torrent Pharmaceuticals Ltd.*, 853 F. 3d 1316, 1323–1324 (CA Fed. 2017) (holding that the standard in 5 U. S. C. §706 governs judicial review of PTAB decisions).

The Court declines to follow this traditional path. Instead, it imagines that, if Congress had known its statutory scheme was unconstitutional, it would have preferred to make the policy choice the Court makes for it today. Faced with an unconstitutional combination of statutory instructions—providing for the exercise of executive power and its unreviewability—the Court *chooses* to act as if the provision limiting the Director's ability to review IPR decisions doesn't exist. Having done that, the Court gifts the Director a new power that he never before enjoyed, a power Congress expressly withheld from him and gave to someone else—the power to cancel patents through the IPR process. Effectively, the Court subtracts statutory powers from one set of executive officials and adds them to another.

While the Court has in relatively recent years proclaimed the power to proceed in this fashion, it has never paused to explain how this "severance doctrine" comports with traditional judicial remedial principles. See *Barr* v. *American Assn. of Political Consultants, Inc.*, 591 U. S. ___, ___ (2020) (GORSUCH, J., concurring in judgment in part and dissenting in part) (slip op., at 5). Or with the fact that the judicial power is limited to resolving discrete cases and controversies. *Murphy* v. *National Collegiate Athletic Assn.*, 584

U. S. ___, ___–___ (2018) (THOMAS, J., concurring) (slip op., at 2–3). Or with the framers' explicit rejection of allowing this Court to serve as a council of revision free to amend legislation. See Mitchell, The Writ-of-Erasure Fallacy, 104 Va. L. Rev. 933, 954–960 (2018). Let alone with our constant admonitions that policy choices belong to Congress, not this Court. *E.g.*, *Pereida* v. *Wilkinson*, 592 U. S. ___, ___ (2021) (slip op., at 16). And certainly none of the early cases the Court cites today proceeded as it does. See *ante*, at 19, 22.

Nor does the Court pause to consider whether venturing further down this remedial path today risks undermining the very separation of powers its merits decision purports to vindicate. While the Court's merits analysis ensures that executive power properly resides in the Executive Branch, its severability analysis seemingly confers legislative power to the Judiciary—endowing us with the authority to make a raw policy choice between competing lawful options. No doubt, if Congress is dissatisfied with the choice the Court makes on its behalf today, it can always reenter the field and revise our judgment. But doesn't that just underscore the legislative nature of the Court's judgment? And doesn't deciding for ourselves which policy course to pursue today allow Congress to disclaim responsibility for our legislative handiwork much as the President might the PTAB's executive decisions under the current statutory structure?

Instead of confronting these questions, the Court has justified modern "severance" doctrine on assumptions and presumptions about what Congress would have chosen to do, had it known that its statutory scheme was unconstitutional. See, *e.g.*, *Seila Law*, 591 U. S., at ___ (slip op., at 32) ("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" (internal quotation marks omitted)). But any claim about "congressional intent" divorced from enacted statutory text is an appeal to

mysticism. Short of summoning ghosts and spirits, how are we to know what those in a past Congress might think about a question they never expressed any view on—and may have never foreseen?

Let's be honest, too. These legislative séances usually wind up producing only the results intended by those conducting the performance: "When you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, . . . your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean." Scalia, Common Law Courts in a Civil-Law System, in A Matter of Interpretation: Federal Courts and the Law 18 (A. Gutmann ed. 1997); see also *United States* v. *Public Util. Comm'n of Cal.*, 345 U. S 295, 319 (1953) (Jackson, J., concurring) (describing that process as "not interpretation of a statute but creation of a statute"). The crystal ball ends up being more of a mirror.

Our case illustrates the problem. The Court apparently believes that Congress would have wanted us to render PTAB decisions reviewable by the Director. This regime is consistent with the "'standard federal model'" for agency adjudication. Walker & Wasserman, The New World of Agency Adjudication, 107 Cal. L. Rev. 141, 143–144 (2019). It's easy enough to see why a group of staid judges selecting among policy choices for itself might prefer a "standard" model. But if there is anything we know for certain about the AIA, it is that Congress *rejected* this familiar approach when it came to PTAB proceedings. Multiple *amici* contend that Congress did so specifically to ensure APJs enjoy "independence" from superior executive officers and thus possess more "impartiality." Brief for Fair Inventing Fund as *Amicus Curiae* 20–21 (quoting legislative history that Congress desired a "'fairer'" and "'more objective'" process); see also, *e.g.*, Brief for New Civil Liberties Alliance as *Amicus*

Curiae 6 (Congress sought "to preserve the independence of those conducting inter partes review"); Brief for US Inventor Inc. as *Amicus Curiae* 22 ("[I]t is plainly evident that Congress would not have enacted an APJ patentability trial system that was more political than the one they did enact"); Brief for Cato Institute et al. as *Amici Curiae* 20 (It was a "conscious congressional decision to provide individuals with the power to adjudicate (and often destroy) vested patent rights with some level of independence"). All of which suggests that the majority's severability analysis defies, rather than implements, legislative intent. At the least, it is surely plausible that, if faced with a choice between giving the power to cancel patents to political officials or returning it to courts where it historically resided, a Congress so concerned with independent decisionmaking might have chosen the latter option.

My point here isn't that I profess any certainty about what Congress would have chosen; it's that I confess none. Asking what a past Congress would have done if confronted with a contingency it never addressed calls for raw speculation. Speculation that, under traditional principles of judicial remedies, statutory interpretation, and the separation of powers, a court of law has no authority to undertake.

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If each new case this Court entertains about the AIA highlights more and more problems with the statute, for me the largest of them all is the wrong turn we took in *Oil States*. There, the Court upheld the power of the Executive Branch to strip vested property rights in patents despite a long history in this country allowing only courts that authority. See 584 U. S., at ___–___ (GORSUCH, J., dissenting) (slip op., at 8–10). In the course of rejecting a separation-of-powers challenge to this novel redistribution of historic authority, the Court acknowledged the possibility that permitting politically motivated executive officials to "cancel"

patents might yet raise due process concerns. *Id.*, at ___ (slip op., at 17). But the Court refused to consider those concerns in *Oil States* because, it said, no one had "raised a due process challenge." *Ibid.*

It was my view at the time that the separation of powers—and its guarantee that cases involving the revocation of vested property rights must be decided by Article III courts—is *itself* part of the process that is due under our Constitution. See Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1801–1804 (2012). Any suggestion that the neutrality and independence the framers guaranteed for courts could be replicated within the Executive Branch was never more than wishful thinking. The Court's decision in *Oil States* allowing executive officials to assume an historic judicial function was always destined to invite familiar due process problems—like decisions "favor[ing] those with political clout, the powerful and the popular." *Thryv*, *Inc.* v. *Click-To-Call Technologies*, *LP*, 590 U. S. ___, ___ (2020) (GORSUCH, J., dissenting) (slip op., at 20). After all, "[p]owerful interests are capable of amassing armies of lobbyists and lawyers to influence (and even capture) politically accountable bureaucracies." *Oil States*, 584 U. S., at ___ (same) (slip op., at 3).

Already in the AIA's short tenure these problems have started coming home to roost—even with supposedly "independent" APJs. The briefs before us highlight example after example. I leave the interested reader to explore others. See, *e.g.*, Brief for TiVo Corporation as *Amicus Curiae* 6–13; Brief for 39 Aggrieved Inventors as *Amici Curiae* 14–23; Brief for Joshua J. Malone as *Amicus Curiae* 9–11. Here just consider the tale of a patent attorney at one of the world's largest technology companies who left the company to become an APJ. See Brief for US Inventor Inc. as *Amicus Curiae* 12. This private advocate-turned-APJ presided over dozens of IPRs brought by his former company. *Ibid.* In

those proceedings, the company prevailed in its efforts to cancel patents damaging to its private economic interests 96% of the time. *Ibid.* After six years of work, the APJ decided he had done enough, resigned, and (yes) returned to the company. *Ibid.* Without a hint of irony, that company has filed an *amicus* brief in this case to inform us, as a self-described "frequent user of the IPR process," about "the benefits of the system." Brief for Apple Inc. as *Amicus Curiae* 3. Nor is that the only large technology company to have its attorneys rotate in and out of the PTO to similar effect. See Brief for B. E. Technology, LLC, as *Amicus Curiae* 17 (discussing a Google attorney). *Oil States* virtually assured results like these.

That's not the end of the constitutional problems flowing from *Oil States* either. The Director has asserted "plenary authority" to personally select which APJs will decide an IPR proceeding. Brief for United States 5–6. Thus, any APJs whose rulings displease the party currently in power could soon find themselves with little to do. The PTAB has even "claimed the power through inter partes review to overrule final judicial judgments affirming patent rights." *Thryv*, 590 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 20). And this menu of constitutional problems is surely just illustrative, not exhaustive.

Today's decision at least avoids the very worst of what *Oil States* could have become—investing the power to revoke individual's property rights in some unaccountable fourth branch controlled by powerful companies seeking a competitive advantage. Alignments between the moneyed and the permanent bureaucracy to advance the narrow interests of the elite are as old as bureaucracy itself. Our decision today represents a very small step back in the right direction by ensuring that the people at least know who's responsible for supervising this process—the elected President and his designees.

Still, I harbor no illusions that today's decision will resolve

all the problems. Even if our judgment demands some degree of democratic accountability in the IPR process, it does not begin to fix the revolving door or any of the other due process problems *Oil States* ignored. No doubt, challenges involving those aspects of the IPR process will come. When they do, I hope this Court will come to recognize what was evident for so much of our history—that the process due someone with a vested property right in a patent is a proceeding before a neutral and independent judge.

SUPREME COURT OF THE UNITED STATES

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 21, 2021]

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

I

I agree with JUSTICE THOMAS' discussion on the merits and I join Parts I and II of his dissent. Two related considerations also persuade me that his conclusion is correct.

First, in my view, the Court should interpret the Appointments Clause as granting Congress a degree of leeway to establish and empower federal offices. Neither that Clause nor anything else in the Constitution describes the degree of control that a superior officer must exercise over the decisions of an inferior officer. To the contrary, the Constitution says only that "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in

the Heads of Departments." Art. II, §2, cl. 2. The words "by Law . . . as they think proper" strongly suggest that Congress has considerable freedom to determine the nature of an inferior officer's job, and that courts ought to respect that judgment. See *Lucia* v. *SEC*, 585 U. S. ___, ___–___ (2018) (BREYER, J., concurring in judgment in part and dissenting in part) (slip op., at 9–10). In a word, the Constitution grants to Congress the "authority to create both categories of offices—those the President must fill with the Senate's concurrence and 'inferior' ones. . . . That constitutional assignment to Congress counsels judicial deference." *In re Sealed Case*, 838 F. 2d 476, 532 (CADC) (R. Ginsburg, J., dissenting), rev'd *sub nom. Morrison* v. *Olson*, 487 U. S. 654 (1988). Article I's grant to Congress of broad authority to enact laws of different kinds concerning different subjects—and to implement those laws in ways that Congress determines are "necessary and proper"—suggests the same. Art. I, §8, cl. 18.

Even a small degree of "judicial deference" should prove sufficient to validate the statutes here. For one, the provisions at issue fall well within Article I's grant to Congress of the patent power. Nothing in them represents an effort by the "Legislative Branch [to] aggrandize itself at the expense of the other two branches." *Buckley* v. *Valeo*, 424 U. S. 1, 129 (1976) (*per curiam*). There is accordingly no general separation-of-powers defect that has arisen in other cases. See, *e.g., Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252, 277 (1991).

For another, Congress' scheme is consistent with our Appointments Clause precedents. They require only that an inferior officer be "directed and supervised at some level," *Edmond* v. *United States*, 520 U. S. 651, 663 (1997), and the Administrative Patent Judges (APJs) are supervised by two separate Senate-confirmed officers, the Secretary of Commerce and the Director of the Patent and Trademark Office

(PTO). Even were I to assume, with the majority, that the Director must have power to "control" the APJs, the statutes grant the Director considerable control. As the Court recognizes, the Director "fixes" their "rate[s] of pay," decides "whether to institute inter partes review," "selects the APJ's" who will preside at each particular proceeding, "promulgates regulations governing inter partes review," "issues prospective guidance on patentability issues," and "designates past PTAB decisions as 'precedential' for future panels." *Ante,* at 10. All told, the Director maintains control of decisions insofar as they determine policy. The Director cannot rehear and decide an individual case on his own; but Congress had good reason for seeking independent Board determinations in those cases—cases that will apply, not create, Director-controlled policy.

Finally, Congress' judgment is unusually clear in this suit, as there is strong evidence that Congress designed the current structure specifically to address constitutional concerns. See *In re DBC*, 545 F. 3d 1373, 1377–1380 (CA Fed. 2008) (explaining amendment to address defects in prior appointment process).

Second, I believe the Court, when deciding cases such as these, should conduct a functional examination of the offices and duties in question rather than a formalist, judicial-rules-based approach. In advocating for a "functional approach," I mean an approach that would take account of, and place weight on, why Congress enacted a particular statutory limitation. It would also consider the practical consequences that are likely to follow from Congress' chosen scheme.

Wiener v. *United States*, 357 U. S. 349 (1958), provides a good example of the role that purposes and consequences can play. In that case, the Court considered whether, in the face of congressional silence on the matter, the President had the constitutional or statutory authority to remove without cause a member of the War Claims Commission.

Justice Frankfurter, writing for a unanimous Court, said that Congress sought to create a commission that was "'entirely free from the control or coercive influence, direct or indirect,' of either the Executive or the Congress." *Id.,* at 355–356 (quoting *Humphrey's Executor* v. *United States*, 295 U. S. 602, 629 (1935)). He then asked why Congress might want to deny the President the power to remove a commissioner. Because, he answered, the "intrinsic judicial character" of the Commission's duties required that it be able to adjudicate claims solely on the merits of each claim free of external executive pressure. 357 U. S., at 355. "Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing." *Id.,* at 356. The Court has subsequently used the functional approach reflected in *Wiener* to resolve all manner of separation-of-powers disputes, including disputes under the Appointments Clause. See, *e.g., Buckley*, 424 U. S., at 126 (distinguishing employees from officers by asking if the individual exercises "significant authority"); *Mistretta* v. *United States*, 488 U. S. 361, 409 (1989) (asking whether a statute "prevents the Judicial Branch from performing its constitutionally assigned functions").

In this suit, a functional approach, which considers purposes and consequences, undermines the Court's result. Most agencies (and courts for that matter) have the power to reconsider an earlier decision, changing the initial result if appropriate. Congress believed that the PTO should have that same power and accordingly created procedures for reconsidering issued patents. Congress also believed it important to strengthen the reconsideration power with procedural safeguards that would often help those whom the PTO's initial decision had favored, such as the requirement that review be available only when there is a "reasonable likelihood" that the patent will be invalid. 35 U. S. C.

§314(a). Given the technical nature of patents, the need for expertise, and the importance of avoiding political interference, Congress chose to grant the APJs a degree of independence. These considerations set forth a reasonable legislative objective sufficient to justify the restriction upon the Director's authority that Congress imposed. And, as JUSTICE THOMAS thoroughly explains, there is no reason to believe this scheme will prevent the Director from exercising policy control over the APJs or will break the chain of accountability that is needed to hold the President responsible for bad nominations. *Post*, at 7–10 (dissenting opinion).

The Court does not take these realities into account. Instead, for the first time, it examines the APJs' office function by function and finds, in *Edmond*, a judicially created rule: "Only an officer properly appointed to a principal office may issue a final decision binding the Executive Branch in [inter partes review] proceeding[s]." *Ante,* at 19. As an initial matter, I agree with JUSTICE THOMAS that this rule has no foundation in *Edmond* or our Appointments Clause precedents. *Post*, at 10–11.

More broadly, I see the Court's decision as one part of a larger shift in our separation-of-powers jurisprudence. The Court applied a similarly formal approach in *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477 (2010), where it considered the constitutional status of the members of an accounting board appointed by the Securities and Exchange Commission. It held that Congress could not limit the SEC's power to remove those members without cause. The Court also applied a formalist approach in *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U. S. ___ (2020), where it held that Congress could not protect from removal without cause the (single) head of the Consumer Financial Protection Bureau. My dissent in the first case and JUSTICE KAGAN's dissent in the second explain in greater detail why we believed that this

shift toward formalism was a mistake.

I continue to believe that a more functional approach to constitutional interpretation in this area is superior. As for this particular suit, the consequences of the majority's rule are clear. The nature of the PTAB calls for technically correct adjudicatory decisions. And, as in *Wiener*, that fact calls for greater, not less, independence from those potentially influenced by political factors. The Court's decision prevents Congress from establishing a patent scheme consistent with that idea.

But there are further reasons for a functional approach that extend beyond the bounds of patent adjudication. First, the Executive Branch has many different constituent bodies, many different bureaus, many different agencies, many different tasks, many different kinds of employees. Administration comes in many different shapes and sizes. Appreciating this variety is especially important in the context of administrative adjudication, which typically demands decisionmaking (at least where policy made by others is simply applied) that is free of political influence. Are the President and Congress, through judicial insistence upon certain mechanisms for removal or review, to be denied the ability to create independent adjudicators?

Second, the Constitution is not a detailed tax code, and for good reason. The Nation's desires and needs change, sometimes over long periods of time. In the 19th century the Judiciary may not have foreseen the changes that produced the New Deal, along with its accompanying changes in the nature of the tasks that Government was expected to perform. We may not now easily foresee just what kinds of tasks present or future technological changes will call for. The Founders wrote a Constitution that they believed was flexible enough to respond to new needs as those needs developed and changed over the course of decades or centuries. At the same time, they designed a Constitution that

would protect certain basic principles. A principle that prevents Congress from affording inferior level adjudicators some decisionmaking independence was not among them.

Finally, the Executive Branch and Congress are more likely than are judges to understand how to implement the tasks that Congress has written into legislation. That understanding encompasses the nature of different mechanisms of bureaucratic control that may apply to the many thousands of administrators who will carry out those tasks. And it includes an awareness of the reasonable limits that can be placed on supervisors to ensure that those working under them enjoy a degree of freedom sufficient to carry out their responsibilities. Considered as a group, unelected judges have little, if any, experience related to this kind of a problem.

This is not to say that the Constitution grants Congress free rein. But in this area of the law a functional approach, when compared with the highly detailed judicial-rules-based approach reflected in the Court's decision, is more likely to prevent inappropriate judicial interference. It embodies, at least to a degree, the philosopher's advice: "Whereof one cannot speak, thereof one must be silent."

II

For the reasons I have set forth above, I do not agree with the Court's basic constitutional determination. For purposes of determining a remedy, however, I recognize that a majority of the Court has reached a contrary conclusion. On this score, I believe that any remedy should be tailored to the constitutional violation. Under the Court's new test, the current statutory scheme is defective only because the APJ's decisions are not reviewable by the Director alone. The Court's remedy addresses that specific problem, and for that reason I agree with its remedial holding.

* * *

In my view, today's decision is both unprecedented and unnecessary, and risks pushing the Judiciary further into areas where we lack both the authority to act and the capacity to act wisely. I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

Nos. 19–1434, 19–1452 and 19–1458

UNITED STATES, PETITIONER
19–1434 *v.*
ARTHREX, INC., ET AL.

SMITH & NEPHEW, INC., ET AL., PETITIONERS
19–1452 *v.*
ARTHREX, INC., ET AL.

ARTHREX, INC., PETITIONER
19–1458 *v.*
SMITH & NEPHEW, INC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[June 21, 2021]

JUSTICE THOMAS, with whom JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join as to Parts I and II, dissenting.

For the very first time, this Court holds that Congress violated the Constitution by vesting the appointment of a federal officer in the head of a department. Just who are these "principal" officers that Congress unsuccessfully sought to smuggle into the Executive Branch without Senate confirmation? About 250 administrative patent judges who sit at the bottom of an organizational chart, nestled under at least two levels of authority. Neither our precedent nor the original understanding of the Appointments Clause requires Senate confirmation of officers inferior to not one, but *two* officers below the President.

I

The Executive Branch is large, and the hierarchical path from President to administrative patent judge is long. At the top sits the President, in whom the executive power is vested. U. S. Const., Art. II, §1. Below him is the Secretary of Commerce, who oversees the Department of Commerce and its work force of about 46,000. 15 U. S. C. §§1501, 1513. Within that Department is the United States Patent and Trademark Office led by a Director. 35 U. S. C. §§1, 2(a), 3(a) (also known as the Under Secretary of Commerce for Intellectual Property). In the Patent and Trademark Office is the Patent Trial and Appeal Board. §6(a). Serving on this Board are administrative patent judges. *Ibid.*

There are few statutory prerequisites to becoming an administrative patent judge. One must be a "perso[n] of competent legal knowledge and scientific ability" and be "appointed by the Secretary." *Ibid.* The job description too is relatively straightforward: sit on the Board along with the Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and other administrative patent judges. *Ibid.*

The Board adjudicates both appellate and trial disputes. See §6(b). It may directly review certain decisions made by patent examiners, and it may hold its own proceedings to determine the patentability of patent claims. As relevant here, it conducts inter partes review, which "offers a second look at an earlier administrative grant of a patent." *Cuozzo Speed Technologies, LLC* v. *Lee*, 579 U. S. 261, 279 (2016). Inter partes review—and all other types of Board hearings—must be "heard by at least 3 members" of the Board. §6(c).

In this suit, Smith & Nephew, Inc., and Arthrocare Corp. (collectively, Smith & Nephew) filed a petition challenging some of Arthrex, Inc.'s patent claims. After deciding that there was a reasonable likelihood that Smith & Nephew would prevail, the Director instituted review. §314(a). A

panel of three administrative judges ultimately agreed with Smith & Nephew that the disputed claims were unpatentable. The Director did not convene a panel to rehear that decision. Nor is there any suggestion that Arthrex sought rehearing from the Board or from the Director. Instead, Arthrex appealed the Board's decision to the United States Court of Appeals for the Federal Circuit.

On appeal, Arthrex argued that the Federal Circuit must vacate the Board's decision. According to Arthrex, administrative patent judges are constitutionally defective because they are principal officers who were neither appointed by the President nor confirmed by the Senate. The Federal Circuit agreed in part. The court held that administrative patent judges *are* principal officers. 941 F. 3d 1320, 1335 (2019). But the court professed to transform these principal officers into inferior ones by withdrawing statutory removal restrictions. *Id.,* at 1338.

The Court now partially agrees with the Federal Circuit. Although it cannot quite bring itself to say so expressly, it too appears to hold that administrative patent judges are principal officers under the current statutory scheme. See *ante*, at 10–14. But it concludes that the better way to judicially convert these principal officers to inferior ones is to allow the Director to review Board decisions unilaterally. *Ante*, at 21 (plurality opinion); *ante*, at 7 (BREYER, J., concurring in part and dissenting in part).

That both the Federal Circuit and this Court would take so much care to ensure that administrative patent judges, appointed as inferior officers, would remain inferior officers at the end of the day suggests that perhaps they were inferior officers to begin with. Instead of rewriting the Director's statutory powers, I would simply leave intact the patent scheme Congress has created.

II

The Constitution creates a default process to appoint all

officers: The President "by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." Art. II, §2. But Congress has discretion to change the default process for "inferior" officers: "Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." *Ibid.*

A

The Court has been careful not to create a rigid test to divide principal officers—those who must be Senate confirmed—from inferior ones. See, *e.g.*, *Edmond* v. *United States*, 520 U. S. 651, 661 (1997) (the Court has "not set forth an exclusive criterion"); *Morrison* v. *Olson,* 487 U. S. 654, 671 (1988) ("We need not attempt here to decide exactly where the line falls between the two types of officers"). Instead, the Court's opinions have traditionally used a case-by-case analysis. And those analyses invariably result in this Court deferring to Congress' choice of which constitutional appointment process works best.[1] No party (nor the

[1] This Court has found a vast range of positions to be inferior, including a district court clerk, *Ex parte Hennen*, 13 Pet. 230, 258 (1839) ("that a clerk is one of the inferior officers contemplated by . . . the Constitution cannot be questioned"); election supervisors tasked with registering names, inspecting and scrutinizing the register of voters, and counting the votes cast, *Ex parte Siebold*, 100 U. S. 371, 380, 398 (1880) ("Congress had the power to vest the appointment of the supervisors in question in the circuit courts"); a vice consul who temporarily carried out the duties of the consul, *United States* v. *Eaton*, 169 U. S. 331, 343 (1898) ("The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution"); a United States Commissioner, entrusted with "issu[ing] warrants," "caus[ing] the offenders to be arrested and imprisoned, or bailed, for trial," "sit[ting] as

majority) has identified any instance in which this Court has found unconstitutional an appointment that aligns with one of the two processes outlined in the Constitution.

Our most exhaustive treatment of the inferior-officer question is found in *Edmond*. There, we evaluated the status of civilian judges on the Coast Guard Court of Criminal Appeals who were appointed by the Secretary of Transportation. As in all previous decisions, the Court in *Edmond* held that the Secretary's appointment of the judges complied with the Appointments Clause.

Recognizing that no "definitive test" existed for distinguishing between inferior and principal officers, the Court set out two general guidelines. 520 U. S., at 661–662. First, there is a formal, definitional requirement. The officer must be lower in rank to "a superior." *Id.*, at 662. But according to the Court in *Edmond*, formal inferiority is "not enough." *Ibid.* So the Court imposed a functional requirement: The inferior officer's work must be "directed and supervised at some level by others who were appointed by

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judge or arbitrator in such differences as may arise between the captains and crews of any vessels belonging to the nations whose interests are committed to his charge"; "institut[ing] prosecutions" and who enjoys "to a certain extent, independen[ce] in their statutory and judicial action," *United States* v. *Allred*, 155 U. S. 591, 594–595 (1895); *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 352–354 (1931) ("United States commissioners are inferior officers"); an independent counsel, charged with "'full power and independent authority to exercise all investigative and prosecutorial functions,'" *Morrison*, 487 U. S., at 661, 661–662, 671–672; special trial judges within the United States Tax Court "who exercise independent authority" and may "hear certain specifically described proceedings" and may "render the decisions of the Tax Court in declaratory judgment proceedings and limited-amount tax cases," *Freytag* v. *Commissioner*, 501 U. S. 868, 870–871, 882 (1991); judges on the Coast Guard Court of Criminal Appeals, *Edmond*, 520 U. S., at 653; and members of the Public Company Accounting Oversight Board who "determin[e] the policy and enforc[e] the laws of the United States," *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 484, 511 (2010).

Presidential nomination with advice and consent of the Senate." *Id.*, at 663. Because neither side asks us to overrule our precedent, I would apply this two-part guide.

There can be no dispute that administrative patent judges are, in fact, inferior: They are lower in rank to at least two different officers. As part of the Board, they serve in the Patent and Trademark Office, run by a Director "responsible for providing policy direction and management supervision for the Office and for the issuance of patents and the registration of trademarks." 35 U. S. C. §3(a)(2)(A). That Office, in turn, is "[w]ithin the Department of Commerce" and "subject to the policy direction of the Secretary of Commerce." §1(a). The Secretary, in consultation with the Director, appoints administrative patent judges. §6(a).

As a comparison to the facts in *Edmond* illustrates, the Director and Secretary are also functionally superior because they supervise and direct the work administrative patent judges perform. In *Edmond*, the Court focused on the supervision exercised by two different entities: the Judge Advocate General and the Court of Appeals for the Armed Forces (CAAF). The Judge Advocate General exercised general administrative oversight over the court on which the military judges sat. *Edmond*, 520 U. S., at 664. He possessed the power to prescribe uniform rules of procedure for the court and to formulate policies and procedure with respect to the review of court-martial cases in general. *Ibid.* And he could remove a Court of Criminal Appeals judge from his judicial assignment without cause, a "powerful tool for control." *Ibid.*

The Court noted, however, that "[t]he Judge Advocate General's control over Court of Criminal Appeals judges is . . . not complete." *Ibid.* This was so for two reasons. He could "not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings." *Ibid.* And, he had "no power to reverse decisions of the court." *Ibid.*

But this lack of complete control did not render the military judges principal officers. That is because one of the two missing powers resided, to a limited degree, in a different entity: the CAAF. *Ibid.* CAAF could not "reevaluate the facts" where "there [was] some competent evidence in the record to establish each element of the offense beyond a reasonable doubt." *Id.*, at 665. Still, it was "significant . . . that the judges of the Court of Criminal Appeals ha[d] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Ibid.* Having recounted the various means of supervision, the Court held that the military judges were inferior officers. Consistent with the Constitution, Congress had the power to vest the judges' appointments in the Secretary of Transportation. *Id.*, at 665–666.

The Director here possesses even greater functional power over the Board than that possessed by the Judge Advocate General. Like the Judge Advocate General, the Director exercises administrative oversight over the Board. Because the Board is within the Patent and Trademark Office, all of its powers and duties are ultimately held by the Director. 35 U. S. C. §3(a)(1). He "direct[s]" and "supervis[es]" the Office and "the issuance of patents." §3(a)(2)(A). He may even "fix the rate of basic pay for the administrative patent judges." §3(b)(6). And ultimately, after the Board has reached a decision in a specific case, the Director alone has the power to take final action to cancel a patent claim or confirm it. §318(b).

Also like the Judge Advocate General in *Edmond*, the Director prescribes uniform procedural rules and formulates policies and procedures for Board proceedings. Among other things, he has issued detailed regulations that govern "Trial Practice and Procedure" before the Board. 37 CFR pt. 42 (2020); see also *ibid.* (prescribing regulations governing, *inter alia*, discovery, oral argument, termination of trial, notice, privilege, filing fees, etc.); see also 35 U. S. C.

§§2(b)(2), 316(a)(4), 326(a)(4). He has designed a process to designate and de-designate Board decisions as precedential. Patent Trial and Appeal Board, Standard Operating Procedure 2 (Revision 10), pp. 1–2 (Sept. 20, 2018) (SOP2). He may issue binding policy directives that govern the Board. §3(a)(2)(A). And he may release "instructions that include exemplary applications of patent laws to fact patterns, which the Board can refer to when presented with factually similar cases." 941 F. 3d, at 1331. His oversight is not just administrative; it is substantive as well. §3(a)(2)(A).

The Director has yet another "powerful tool for control." *Edmond*, 520 U. S., at 664. He may designate which of the 250-plus administrative patent judges hear certain cases and may remove administrative patent judges from their specific assignments without cause. See §6(c). So, if any administrative patent judges depart from the Director's direction, he has ample power to rein them in to avoid erroneous decisions. And, if an administrative patent judge consistently fails to follow instructions, the Secretary has the authority to fire him. 5 U. S. C. §7513(a); 35 U. S. C. §3(c); *Cobert* v. *Miller*, 800 F. 3d 1340, 1351 (CA Fed. 2015) (interpreting §7513(a) to allow removal for "'[f]ailure to follow instructions or abide by requirements [that] affec[t] the agency's ability to carry out its mission'").[2]

To be sure, the Director's power over administrative patent judges is not complete. He cannot singlehandedly reverse decisions. Still, he has two powerful checks on Board decisions not found in *Edmond*.

Unlike the Judge Advocate General and CAAF in *Edmond*, the Director *may* influence individual proceedings.

[2] Although not applicable to any who served on the Board in this suit, a small subset of administrative patent judges are subject to a slightly different removal standard. See 83 Fed. Reg. 29324 (2018); see also 5 U. S. C. §7543(a); 5 CFR pt. 359 (2020); Brief for United States 5, n. 1.

The Director decides in the first instance whether to institute, refuse to institute, or de-institute particular reviews, a decision that is "final and nonappealable." 35 U. S. C. §314(d); see also §314(a). If the Director institutes review, he then may select which administrative patent judges will hear the challenge. §6(c). Alternatively, he can avoid assigning *any* administrative patent judge to a specific dispute and instead designate himself, his Deputy Director, and the Commissioner of Patents. In addition, the Director decides which of the thousands of decisions issued each year bind other panels as precedent. SOP2, at 8. No statute bars the Director from taking an active role to ensure the Board's decisions conform to his policy direction.

But, that is not all. If the administrative patent judges "(somehow) reach a result he does not like, the Director can add more members to the panel—including himself—and order the case reheard." *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___ (2018) (GORSUCH, J., dissenting) (slip op., at 3). There is a formalized process for this type of review. The Director may unilaterally convene a special panel—the Precedential Opinion Panel—to review a decision in a case and determine whether to order rehearing *sua sponte*. SOP2, at 5. (Any party to a proceeding or any Board member can also recommend rehearing by the Precedential Opinion Panel. *Ibid.*) The default members of the panel are the Director, the Commissioner for Patents, and the Chief Administrative Patent Judge. *Id.*, at 4. So even if *all* administrative patent judges decide to defy the Director's authority and go their respective ways, the Director and the Commissioner for Patents can still put a stop to it. And, if the Commissioner for Patents is running amuck, the Director may expand the size of the panel or may replace the Commissioner with someone else, including his Deputy Director. *Ibid.* Further, this panel is not limited to reviewing whether there is "competent evidence" as the CAAF was. It can correct anything

that may "have been misapprehended or overlooked" in the previous opinion. 37 CFR §41.79(b)(1). This broad oversight ensures that administrative patent judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Edmond*, 520 U. S., at 665.

B

The Court today appears largely to agree with all of this. "In every respect" save one, the plurality says, "[administrative patent judges] appear to be inferior officers." *Ante*, at 20–21. But instead of finding it persuasive that administrative patent judges seem to be inferior officers—"an understanding consistent with their appointment"—the majority suggests most of *Edmond* is superfluous: All that matters is whether the Director has the statutory authority to individually reverse Board decisions. See *ante*, at 10; see also *ante*, at 20 (plurality opinion).

The problem with that theory is that there is no precedential basis (or historical support)[3] for boiling down "inferior-officer" status to the way Congress structured a particular agency's process for reviewing decisions. If anything, *Edmond* stands for the proposition that a "limitation upon review does not . . . render [officers] principal officers." 520 U. S., at 665. Recall that the CAAF could not reevaluate certain factual conclusions reached by the military judges on the Court of Criminal Appeals. *Ibid.* And recall that neither CAAF nor the Judge Advocate General could "attempt to influence" individual proceedings. *Id.*, at 664. Yet, those constraints on supervision and control did not matter because the Court in *Edmond* considered all the means of supervision and control exercised by the superior officers. Although CAAF could not reevaluate everything, "[w]hat is significant" is that CAAF could oversee the military judges

[3] See Part IV, *infra*.

in other ways: The military judges could not render "a final decision on behalf of the United States unless permitted to do so by other Executive officers." *Id.*, at 665. Here, the Director cannot singlehandedly reevaluate individual decisions, but he still directs and "supervises . . . the Board members responsible for deciding patent disputes." *Oil States Energy Services*, 584 U. S., at ___ (GORSUCH, J., dissenting) (slip op., at 3).

C

Perhaps the better way to understand the Court's opinion today is as creating a new form of intrabranch separation-of-powers law. Traditionally, the Court's task when resolving Appointments Clause challenges has been to discern whether the challenged official qualifies as a specific sort of officer and whether his appointment complies with the Constitution. See *Lucia* v. *SEC*, 585 U. S. ___, ___ (2018) (slip op., at 1) ("This case requires us to decide whether administrative law judges . . . qualify as [officers of the United States]"). If the official's appointment is inconsistent with the constitutional appointment process for the position he holds, then the Court provides a remedy. *Id.*, at ___ (slip op., at 12). Otherwise, the Court must conclude that the "appointments at issue in th[e] case are . . . valid." *Edmond*, 520 U. S., at 666.

Today's majority leaves that tried-and-true approach behind. It never expressly tells us whether administrative patent judges are inferior officers or principal. And the Court never tells us whether the appointment process complies with the Constitution. The closest the Court comes is to say that "the source of the constitutional violation" is *not* "the appointment of [administrative patent judges] by the Secretary." *Ante*, at 23 (plurality opinion). Under our precedent and the Constitution's text, that should resolve the suit. If the appointment process for administrative patent judges—appointment by the Secretary—does not violate

the Constitution, then administrative patent judges must be inferior officers. See Art. II, §2, cl. 2. And if administrative patent judges are inferior officers and have been properly appointed as such, then the Appointments Clause challenge fails. After all, the Constitution provides that "Congress may by Law vest the Appointment of . . . inferior Officers . . . in the Heads of Departments." *Ibid.*

The majority's new Appointments Clause doctrine, though, has nothing to do with the validity of an officer's appointment. Instead, it polices the dispersion of executive power among officers. Echoing our doctrine that Congress may not mix duties and powers from different branches into one actor, the Court finds that the constitutional problem here is that Congress has given a specific power—the authority to finally adjudicate inter partes review disputes—to one type of executive officer that the Constitution gives to another. See *ante*, at 21 (plurality opinion); see also, *e.g.*, *Stern* v. *Marshall*, 564 U. S. 462, 503 (2011) (assignment of Article III power to Bankruptcy Judge); *Bowsher* v. *Synar*, 478 U. S. 714, 728–735 (1986) (assignment of executive power to a legislative officer). That analysis is doubly flawed.

For one thing, our separation-of-powers analysis does not fit. The Constitution recognizes executive, legislative, and judicial power, and it vests those powers in specific branches. Nowhere does the Constitution acknowledge any such thing as "inferior-officer power" or "principal-officer power." And it certainly does not distinguish between these sorts of powers in the Appointments Clause.

And even if it did, early patent dispute schemes establish that the power exercised by the administrative patent judges here does not belong exclusively to principal officers. Nonprincipal officers could—and did—render final decisions in specific patent disputes, not subject to any appeal to a superior executive officer. In 1793, Congress provided that resolution of disputes, where two applicants sought a

patent for the same invention, "shall be submitted to the arbitration of three persons" chosen by the Secretary or by the parties, and that "the decision or award . . . , delivered to the Secretary of State . . . or any two of them, shall be final, as far as respects the granting of the patent." Act of Feb. 21, 1793, §9, 1 Stat. 322–333. In 1836, Congress allowed applicants to appeal the denial of a patent application to "a board of examiners, to be composed of three disinterested persons, who shall be appointed for that purpose by the Secretary of State." Act of July 4, 1836, §7, 5 Stat. 119–120. The Board had the power "to reverse the decision of the Commissioner, either in whole or in part," and the decision governed "further proceedings." *Ibid.* These two early examples show, at a minimum, that the final resolution of patent disputes is not the sole preserve of principal officers.

More broadly, interpreting the Appointments Clause to bar any nonprincipal officer from taking "final" action poses serious line-drawing problems. The majority assures that not every decision by an inferior officer must be reviewable by a superior officer. *Ante*, at 19. But this sparks more questions than it answers. Can a line prosecutor offer a plea deal without sign off from a principal officer?[4] If faced with a life-threatening scenario, can an FBI agent use deadly force to subdue a suspect? Or if an inferior officer temporarily fills a vacant office tasked with making final decisions, do those decisions violate the Appointments

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[4]And all this contemplates that it is easy to distinguish between a principal and inferior officer. But recall that the default appointment scheme for *all* officers—inferior and principal alike—is Presidential appointment and Senate confirmation. Senate confirmation says nothing about whether an officer is principal or inferior for constitutional purposes. Cf. 2 Opinion of Office of Legal Counsel 58, 59 (1978) (concluding that United States Attorneys "can be considered to be inferior officers," even though Congress has never "exercised its discretionary power to vest the appointment of U. S. Attorneys in the Attorney General").

Clause?[5] And are courts around the country supposed to sort through lists of each officer's (or employee's) duties, categorize each one as principal or inferior, and then excise any that look problematic?

Beyond those questions, the majority's nebulous approach also leaves open the question of how much "principal-officer power" someone must wield before he becomes a principal officer. What happens if an officer typically engages in normal inferior-officer work but also has several principal-officer duties? Is he a hybrid officer, properly appointed for four days a week and improperly appointed for the fifth? And whatever test the Court ultimately comes up with to sort through these difficult questions, are we sure it is encapsulated in the two words "inferior officer"?

D

The majority offers one last theory. Although the parties raise only an Appointments Clause challenge and the plurality concedes that there is no appointment defect, *ante,* at 23, the Court appears to suggest that the *real* issue is that this scheme violates the Vesting Clause. See Art. II, §1, cl.1; see also a*nte*, at 13–14 (citing *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496 (2010)); *Myers* v. *United States*, 272 U. S. 52, 135 (1926)). According to the majority, the PTAB's review process inverts the executive "chain of command," allowing administrative patent judges to wield "unchecked . . . executive power" and to "dictat[e]" what the Director must do. *Ante*, at 11, 14. This final offering falters for several reasons.

First no court below passed on this issue. See 941 F. 3d,

[5] See *Eaton*, 169 U. S., at 343 ("The claim that Congress was without power to vest in the President the appointment of a subordinate officer called a vice-consul, to be charged with the duty of temporarily performing the functions of the consular office, disregards both the letter and spirit of the Constitution").

at 1327 (addressing whether "the [administrative patent judges] who presided over this *inter partes* review were . . . constitutionally appointed"). Given that this Court is generally one "of review, not of first view," it is unclear why we would grant relief on this ground. *Cutter* v. *Wilkinson*, 544 U. S. 709, 718, n. 7 (2005).

Second, the idea that administrative patent judges are at the *top* of the chain of command is belied not only by the statutory scheme, see *supra,* at 7–10, but also by the majority's own refusal to ever name these judges principal officers. See *ante,* at 19.

Third, even if the chain of command were broken, Senate confirmation of an administrative patent judge would offer no fix. As Madison explained, the Senate's role in appointments is an *exception* to the vesting of executive power in the President; it gives another branch a say in the hiring of executive officials. 1 Annals of Cong. 463 (1789). An Article II Vesting Clause problem cannot be remedied by stripping away even more power from the Executive.

Fourth, and finally, historical practice establishes that the vesting of executive power in the President did not require that every patent decision be appealable to a principal officer. As the majority correctly explains, these sorts of final decisions were routinely made by inferior executive officers (or, perhaps, by mere executive employees). See *ante*, at 17–18. If no statutory path to appeal to an executive principal officer existed then, I see no constitutional reason why such a path must exist now.

Perhaps this Vesting Clause theory misunderstands the majority's argument. After all, the Court never directly says that any law or action violates the Vesting Clause. The Court simply criticizes as overly formalistic the notion that both Clauses do exactly what their names suggest: The Appointments Clause governs only appointments; the Vesting Clause deals just with the vesting of executive power in the President. *Ante*, at 13. I would not be so quick to stare

deeply into the penumbras of the Clauses to identify new structural limitations.

III

In the end, the Court's remedy underscores that it is ambivalent about the idea of administrative patent judges *actually* being principal officers. Instead of holding as much explicitly, the Court rewrites the statutory text to ensure that the Director can directly review Board decisions. *Ante*, at 21–22 (plurality opinion). Specifically, the Court declares unenforceable the statutory provision that "prevents the Director from reviewing the decisions of the [Board] on his own." *Ante*, at 22. And as a remedy, the Court "remand[s] to the Acting Director for him to decide whether to rehear the petition." *Ibid.* In that way, the Court makes extra clear what should already be obvious: Administrative patent judges are inferior officers.

But neither reading of the majority's opinion—(1) that administrative patent judges are principal officers that the Court has converted to inferior officers, or (2) that administrative patent judges are inferior officers whose decisions must constitutionally be reversible by the Director alone—supports its proposed remedy.

Take the principal officer view. If the Court truly believed administrative patent judges are principal officers, then the Court would need to vacate the Board's decision. As this Court has twice explained, "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a properly appointed' official." *Lucia*, 585 U. S., at ___ (slip op., at 12) (quoting *Ryder* v. *United States*, 515 U. S. 177, 183, 188 (1995)). If administrative patent judges are (or were) constitutionally deficient principal officers, then surely Arthrex is entitled to a new hearing before officers untainted by an appointments

violation. But, the Court does not vacate the Board's decision. In fact, it expressly disavows the existence of an appointments violation. *Ante*, at 23 (plurality opinion).

The quasi-separation-of-powers view fares no better. If we accept as true the Court's position that the Appointments Clause inherently grants the Director power to reverse Board decisions, then another problem arises: No constitutional violation has occurred in this suit. The Board had the power to decide and lawfully did decide the dispute before it. The Board did not misinterpret its statutory authority or try to prevent direct review by the Director. Nor did the Director wrongfully decline to rehear the Board's decision. Moreover, Arthrex has not argued that it sought review by the Director. So to the extent "the source of the constitutional violation is the restraint on the review authority of the Director," *ibid.*, his review was not constrained. Without any constitutional violation in this suit to correct, one wonders how the Court has the power to issue a remedy. See *Carney* v. *Adams*, 592 U. S. ___, ___ (2020) (slip op., at 4) (Article III prevents "the federal courts from issuing advisory opinions").

Perhaps the majority thinks Arthrex should receive some kind of bounty for raising an Appointments Clause challenge and *almost* identifying a constitutional violation. But the Constitution allows us to award judgments, not participation trophies.

IV

Although unnecessary to resolve this suit, at some point it may be worth taking a closer look at whether the functional element of our test in *Edmond*—the part that the Court relies on today—aligns with the text, history, and structure of the Constitution. The founding era history surrounding the Inferior Officer Clause points to at least three different definitions of an inferior officer, none of which requires a case-by-case functional examination of exactly how

much supervision and control another officer has. The rationales on which *Edmond* relies to graft a functional element into the inferior-officer inquiry do not withstand close scrutiny.

A

Early discussions of inferior officers reflect at least three understandings of who these officers were—and who they were not—under the Appointments Clause. Though I do not purport to decide today which is best, it is worth noting that administrative patent judges would be inferior under each.

1

The narrowest understanding divides all executive officers into three categories: heads of departments, superior officers, and inferior officers. During the Constitutional Convention, James Madison supported this view in a brief discussion about the addition of the Inferior Officer Clause. 2 Records of the Federal Convention of 1787, p. 627 (M. Farrand ed. 1911) (Farrand); see also Mascott, Who Are "Officers of the United States," 70 Stan. L. Rev. 443, 468, n. 131 (2018). Gouverneur Morris moved to add the clause. But Madison initially resisted. He argued that it did "not go far enough if it be necessary at all [because] Superior Officers below Heads of Departments ought in some cases to have the appointment of the lesser offices." 2 Farrand 627. The motion nonetheless passed. The crux of Madison's objection appears to rely on the idea that there are three types of officers: inferior officers, superior officers, and department heads. Congress could vest the appointment of inferior officers in the President, the courts, or a department head. But the others must be appointed by the President with Senate confirmation.

Some held a second understanding: Inferior officers encompass nearly *all* officers. As Justice Story put it,

"[w]hether the *heads of departments* are inferior officers in the sense of the constitution, was much discussed, in the debate on the organization of the department of foreign affairs, in 1789." 3 Commentaries on the Constitution of the United States 386, n. 1 (1833) (emphasis added). Proponents of this understanding argued that the Secretary of State should be an inferior officer because he was inferior to the President, "the Executive head of the department." 1 Annals of Cong. 509. In other words, inferior officers would encompass *all* executive officers inferior to the President, other than those specifically identified in the Constitution: "Ambassadors, other public Ministers and Consuls." Art. II, §2.

The constitutional text and history provide some support for this rationale. By using the adjective "such" before "inferior Officers," the Clause about inferior officers could be understood to refer back to "all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law." *Ibid.*; see also 2 S. Johnson, A Dictionary of the English Language (6th ed. 1785) (defining "such" to mean "[c]omprehended under the term premised, like what has been said"). And to be "inferiour" means simply to be "[l]ower in place"; "[l]ower in station or rank of life" and "[s]ubordinate" to another officer. 1 *ibid.* Department heads are officers, and they are lower in rank and subordinate to the President. See U. S. Const., Art. II, §1.

But others disagreed, contending this went "too far; because the Constitution" elsewhere specifies "'the principal officer in each of the Executive departments.'" 1 Annals of Cong. 459. These Framers endorsed a third understanding, which distinguished just between inferior and principal officers. See *id.*, at 518 ("We are to have a Secretary for Foreign Affairs, another for War, and another for the Treasury; now, are not these the principal officers in those departments"). A single officer could not simultaneously be both.

Ultimately, this group won out, "expressly designat[ing]" the Secretary of the Department of Foreign Affairs as a "principal officer," not an inferior one. *Edmond*, 520 U. S., at 663 (quoting Act of July 27, 1789, ch. 4, §§1–2, 1 Stat. 28–29).

This principal-inferior dichotomy also finds roots in the structure of the Constitution, which specifically identifies both principal officers (in the Opinions Clause and the Twenty-fifth Amendment) and inferior officers (in the Appointments Clause). And it comports with contemporaneous dictionary definitions. A "principal" officer is "[a] head" officer; "a chief; not a second." 2 Johnson, Dictionary of the English Language. Other executive officers would, by definition, be lower than or subordinate to these head officers.

The principal-inferior officer divide played out in other contexts as well. In the debate over removability of officers, Representative Smith indicated that he "had doubts whether [an] officer could be removed by the President" in light of the impeachment process. 1 Annals of Cong. 372. Madison disagreed, arguing that impeachment alone for all removals "would in effect establish every officer of the Government on the firm tenure of good behaviour; not the heads of Departments only, but all the inferior officers of those Departments, would hold their offices during good behaviour." *Ibid.*

State constitutions at the founding lend credence to this idea that inferior officers encompass all officers except for the heads of departments. For example, the 1789 Georgia State Constitution provided that "militia officers and the secretaries of the governor . . . shall be appointed by the governor." Art. IV, §2. But "[t]he general assembly may vest the appointment of inferior officers in the governor, the courts of justice, or in such other manner as they may by law establish." *Ibid.* The law thus distinguished between secretaries and inferior officers. Similarly, the Delaware Constitution directed that "[t]he State treasurer shall be

appointed annually by the house of representatives, with the concurrence of the Senate." Art. VIII, §3 (1792). But "all inferior officers in the treasury department" were to be "appointed in such manner as is or may be directed by law." §6.

Although not dipositive, this Court has adopted the nomenclature of the principal-inferior distinction. See, *e.g.*, *ante,* at 5–6; *Edmond*, 520 U. S., at 661 ("distinguishing between principal and inferior officers for Appointments Clause purposes"); *Buckley* v. *Valeo*, 424 U. S. 1, 132 (1976) (*per curiam*) ("Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary"); cf. *Lucia*, 585 U. S., at ___ (THOMAS, J., concurring) (slip op., at 2) ("While principal officers must be nominated by the President and confirmed by the Senate, Congress can authorize the appointment of 'inferior Officers' by 'the President alone,' 'the Courts of Law,' or 'the Heads of Departments'"); *United States* v. *Germaine*, 99 U. S. 508, 511 (1879) ("the principal officer in" the Opinions Clause "is the equivalent of the head of department in the other"). And in reasoning adopted unanimously by the Court, at least one opinion defined "principal officers" for purposes of the Appointments Clause to be "ambassadors, ministers, heads of departments, and judges." *Freytag* v. *Commissioner*, 501 U. S. 868, 884 (1991).

2

Regardless of which of the three interpretations is correct, all lead to the same result here. Administrative patent judges are inferior officers.

Start with the broadest understanding. A careful read of the Appointments Clause reveals that the office of "administrative patent judge" does not appear amidst the offices of ambassador, consul, public minister, and Supreme Court

judge the Constitution identifies. See Art. II, §2, cl. 2. So, if inferior officers are all executive officers other than those with special appointment processes laid out in the Constitution, then administrative patent judges squarely fit.

Administrative patent judges also fall on the inferior-officer side of the inferior-principal divide. It is agreed that administrative patent judges are not the heads of any department. See *ante*, at 8; Brief for Arthrex, Inc., 5–6 (noting that the Secretary of Commerce is the relevant "department head"). Thus, to the extent a "principal officer . . . is the equivalent of the head of department," administrative patent judges are not one. *Germaine*, 99 U. S., at 511.

And under the Madisonian tripartite system, administrative patent judges would still be inferior. These judges are not heads of departments. Nor are they "superior officers." An administrative patent judge is not "[h]igher" than or "greater in dignity or excellence" to other officers inferior to him. 2 Johnson, Dictionary of the English Language (defining "Superiour"). Tellingly, neither respondent nor the majority identify a *single* officer lower in rank or subordinate to administrative patent judges. Surely if "[w]hether one is an 'inferior' officer depends on whether he has a superior," then whether one is a superior officer depends on whether he has an inferior. *Edmond*, 520 U. S., at 662; see also *Morrison*, 487 U. S., at 720 (Scalia, J., dissenting) ("Of course one is not a 'superior officer' without some supervisory responsibility"). In contrast, an administrative patent judge *is* lower in rank and subordinate to both the Director and the Secretary.

* * *

To be clear, I do not purport to have exhausted all contemporaneous debates, sources, and writings. Perhaps there is some reason to believe that the inherent nature of an inferior officer requires that all of their decisions be directly appealable to a Senate-confirmed executive officer.

But the majority does not identify one. And, without any justification in the text, in the history, or in our precedent, I would not impose that requirement.

B

If anything, the Court's functional prong in *Edmond* may merit reconsideration. The *Edmond* opinion highlighted three justifications for its decision to require more than just a lower rank and a superior officer. But having reviewed the history, it is worth checking whether these reasons are sound. They may not be.

First, *Edmond* highlighted the Constitution's use of the term "inferior officer." 520 U. S., at 663. Were the Appointments Clause meant to identify only lower ranking officers, then the Constitution could have used the phrase "'lesser officer.'" *Ibid.* But Madison's objection to the Inferior Officer Clause pokes a hole in this distinction. After all, Madison used almost exactly this "lesser officer" phrasing: He urged a broader clause so that "superior officers" could "have the appointment of the *lesser offices*." 2 Farrand 627 (emphasis added). If Madison understood the two terms to be interchangeable, perhaps this Court should too.

Second, *Edmond* flagged that the Appointments Clause was designed "to preserve political accountability relative to important Government assignments." 520 U. S., at 663. But the accountability feature of the Appointments Clause was not about accountability for specific *decisions* made by inferior officers, but rather accountability for "'a bad nomination.'" *Id.*, at 660 (quoting The Federalist No. 77, p. 392 (M. Beloff ed. 1987)). The Appointments Clause "provides a direct line of accountability for any poorly performing *officers* back to the actor who selected them." Mascott, 70 Stan. L. Rev., at 447 (emphasis added).

And third, *Edmond* noted that legislation adopted by early Congresses revealed that inferior officers were subject to the discretion and direct oversight of the principal officer.

520 U. S., at 663. Take, for example, the Act establishing the Department of War: It referred "to the Secretary of that department as a 'principal officer,'" and provided that "the Chief Clerk, would be 'employed' within the Department as the Secretary 'shall deem proper,' as an 'inferior officer.'" *Edmond*, 520 U. S., at 664 (quoting ch. 7, 1 Stat. 49–50).

But not every officer was neatly categorized as a principal officer or an inferior one. For example, the Act of Congress Establishing the Treasury Department created "the following officers, namely: a Secretary of the Treasury, to be deemed head of the department; a Comptroller . . . , and an Assistant to the Secretary of the Treasury, which assistant shall be appointed by the said Secretary." Act of Sept. 2, 1789, ch. 12, §1, 1 Stat. 65. The statute does not label the Comptroller as a principal officer or a department head. Nor is he expressly designated as an inferior officer. Moreover, his duties extended beyond doing merely what the Secretary deemed proper. The Comptroller's statutory power and authority included "countersign[ing] all warrants drawn by the Secretary of Treasury," "provid[ing] for the regular and punctual payment of all monies which may be collected," and "direct[ing] prosecutions for all delinquencies of officers of the revenue, and for debts that are, or shall be due to the United States." §3, *id.,* at 66. This quasi-judicial figure's "principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens." 1 Annals of Cong. 611–612 (Madison); see also *ante*, at 14–15. Yet at least one early legislator (with no recorded objections) thought "the Comptroller was an inferior officer." 1 Annals of Cong. 613 (Stone).

Given the lack of historical support, it is curious that the Court has decided to expand *Edmond*'s "functional" prong to elevate administrative patent judges to principal-officer status (only to demote them back to inferior-officer status). Perhaps the Court fears that a more formal interpretation

might be too easy to subvert. A tricky Congress could allow the Executive to sneak a powerful, Cabinet-level-like officer past the Senate by merely giving him a low rank. Maybe. But this seems like an odd case to address that concern. And, even if this suit did raise the issue, the Court should be hesitant to enforce its view of the Constitution's spirit at the cost of its text.

* * *

The Court today draws a new line dividing inferior officers from principal ones. The fact that this line places administrative patent judges on the side of Ambassadors, Supreme Court Justices, and department heads suggests that something is not quite right. At some point, we should take stock of our precedent to see if it aligns with the Appointments Clause's original meaning. But, for now, we must apply the test we have. And, under that test, administrative patent judges are both formally and functionally inferior to the Director and to the Secretary. I respectfully dissent.