No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF OF *AMICI CURIAE* RACHEL E. BARKOW, KIRTI DATLA, RICHARD L. REVESZ, AND ROBERT B. THOMPSON IN SUPPORT OF THE COURT-APPOINTED *AMICUS*

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STATEMENT OF INTEREST

Amici have extensively studied how Congress has structured the administrative state.[1] Through their scholarship, amici have explained that, when it comes to agency design, Congress picks and chooses from a broad menu of structural features that bear on the agency's relationship to Congress, to the President, to the regulated community, and to the public at large. Amici have demonstrated that, as a result, federal agencies cannot be sorted along neat lines, into, for example and as most relevant here, those that a President can control and those that a President cannot. As a result of the myriad permutations of design choices available to Congress, each agency is controlled—in some ways—by the President, and is independent—in other ways—from the President.

Amici's scholarship has been cited in this litigation and other cases raising similar questions, both by the parties and in the lower court opinions. Amici have an interest in ensuring that this Court decides this case based on an accurate picture of the agency design features at issue in this case and of the effect of those features on presidential control. Amici are: Rachel E. Barkow, Vice Dean, Segal Professor of Regulatory Law and Policy, and Faculty Director, Center on the Administration of Criminal Law, New York University School of Law; Kirti Datla, Affiliated

[1] No party or counsel for a party authored this brief in whole or in part. No party, counsel for party, or person other than Amici or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed with the Clerk a notice of blanket consent.

Scholar, Institute for Policy Integrity, New York University School of Law; Richard L. Revesz, Lawrence King Professor of Law, Dean Emeritus, and Director, Institute for Policy Integrity, New York University School of Law; and Robert B. Thompson, Peter P. Weidenbruch, Jr. Professor of Business Law, Georgetown University Law Center.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner and the government both offer this Court a neat dividing line: A single-member agency whose head enjoys for-cause removal protection is categorically different than a multi-member agency whose heads similarly enjoy for-cause removal protection. See Pet. Br. 15, 21; Gov't Br. 8. This categorical separation allows them to argue that the Consumer Financial Protection Bureau (CFPB) falls on the unconstitutional side of the line—as straying too far from some constitutionally required minimum amount of presidential control—while multi-member agencies with identical removal provisions do not.

The reason for this tactic is clear, given the agency that petitioner and the government go out of their way to avoid discussing at all. Calling into question the constitutionality of all multi-member agencies calls into question the constitutionality of the Federal Reserve Board. For obvious reasons, neither petitioner nor the government wants to state this

[2] No part of this brief purports to present the views, if any, of the New York University School of Law or the Georgetown University Law Center. Amici do not take a position on any action the Consumer Financial Protection Bureau has taken.

consequence out loud. See Tr. of Oral Arg., *Bowsher* v. *Synar*, 478 U.S. 714 (1986) (Solicitor General Fried: "[T]his * * * does not * * * in any way cast any doubt on the validity of agencies such as the Federal Reserve Board" and "the notion that" it "endangers those agencies * * * is simply a scare which we don't intend to throw into the Court * * * ."); see also *PHH Corp.* v. *CFPB*, 881 F.3d 75, 192 n.17 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (suggesting that the Federal Reserve Board might be thought of "as an historical anomaly").

But the neat categorical distinction between single-member agencies and multi-member agencies offered by petitioner and the government rests on inaccurate descriptions of how multi-member agencies are structured, and how they function. In reality, multi-member agencies exhibit a diversity of form that belies that distinction. As a result, if the features of multi-member agencies that petitioner and the government discuss are deemed dispositive of these agencies' constitutionality, the inevitable round of constitutional challenges that will follow from this one will force courts to wade into the minutiae of agency design to draw lines between permissible and impermissible *multi-member* agencies.

This Court should have an accurate picture of the administrative landscape when deciding this case. That picture shows that multi-member agencies and single-headed agencies do not fall into distinct categories based on the functional criteria to which petitioner and the government attach constitutional significance. Petitioner and the government cannot deem the CFPB unconstitutional based on differences that do not exist.

ARGUMENT

Petitioner and the government claim that, where a President may remove an agency head only for cause, a multi-member agency is categorically distinct from a single-headed agency. They offer three functional explanations for this claim. First, a President exerts significant influence over a multi-member agency through its chair. See Pet. Br. 28; Gov't Br. 36. Second, the group dynamics of a multi-member agency make it less likely to diverge from a President's preferences. See Pet. Br. 26; Gov't Br. 35–36. And third, a President will gain control over a multi-member agency during a single presidential term through the appointment process. See Pet. Br. 28; Gov't Br. 36. Each of these explanations is inaccurate.

I. Petitioner And The Government Overstate The Influence A President Can Exert Through A Multi-Member Agency's Chair.

Petitioner and the government argue that a multi-member agency is different in kind from a single-headed agency because multi-member agencies have a chair through whom the President can exert influence. As they tell it, the "special powers and prerogatives of agency chairmen" allow a President to exercise " 'total control' " over these agencies. Pet. Br. 29 (quoting Glen O. Robinson, *Independent Agencies: Form and Substance in Executive Prerogative*, 1988 Duke L.J. 238, 245 n.24 (reporting on "personal experience" with the FCC's "basic agenda")); accord Gov't Br. 36 ("Many multimember commissions, moreover, afford the President the unfettered ability to appoint and remove their chairs, which is a significant means of influence."). This

categorical claim is wrong because the method of appointment of agency chairs, the scope of a chair's responsibilities, and the ability to remove a chair all vary across agencies.[3]

A. The method of appointing the chair varies across multi-member agencies.

Petitioner and the government assert that the President has "the unfettered ability to appoint" an agency chair. Gov't Br. 36; accord Pet. Br. 28 ("[T]he President can ordinarily exercise some influence over an independent agency by * * * designating the chair."). But the organic statutes of multi-member agencies set out three different methods for appointing a chair. For many multi-member agencies, the President alone appoints the chair. This is the design choice on which petitioner and the government exclusively rely. The President, for example, "shall designate one member" of the Equal Employment Opportunity Commission "to serve as Chairman." 42 U.S.C. 2000e-4(a); accord 47 U.S.C. 154(a) (Federal Communications Commission).[4] But for

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[3] This section discusses the multi-member agencies analyzed in Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 Cornell L. Rev. 769, 784 n.90, 793 (2013) (Datla & Revesz).

[4] For other examples, see 22 U.S.C. 290h-5(a)(1) (African Development Foundation); 42 U.S.C. 2286(c)(1) (Defense Nuclear Facilities Safety Board); 12 U.S.C. 2242(a) (Farm Credit Administration); 42 U.S.C. 7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. 7104(b) (Federal Labor Relations Authority); 46 U.S.C. 301(c)(1) (Federal Maritime Commission); 30 U.S.C. 823(a) (Federal Mine Safety and Health Review Commission); 5 U.S.C. 8472(b)(1) (Federal Retirement Thrift Investment Board); 15 U.S.C. 41 (Federal Trade Com-

other agencies, the Senate's advice-and-consent role constrains the President's appointment power. For example, one of the seven members of the Federal Reserve Board is "designated by the President, *by and with the advice and consent of the Senate*, to serve as Chairman of the Board for a term of 4 years." 12 U.S.C. 242 (emphasis added); accord 7 U.S.C. 2(a)(2)(B) (Commodity Futures Trading Commission, or CFTC).[5]

In the remaining multi-member agencies, the President has *no* role in appointing the chair; the mem-

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mission); 19 U.S.C. 1331(c)(1) (International Trade Commission); 40 U.S.C. 8711(c) (National Capital Planning Commission); 29 U.S.C. 780(c) (National Council on Disability); 12 U.S.C. 1752a(b)(1) (National Credit Union Administration); 29 U.S.C. 153(a) (National Labor Relations Board); 42 U.S.C. 5841(a)(1) (Nuclear Regulatory Commission); 29 U.S.C. 661(a) (Occupational Safety and Health Review Commission); 22 U.S.C. 2193(b) (Overseas Private Investment Corporation); 39 U.S.C. 502(d) (Postal Regulatory Commission); Reorganization Plan No. 10 of 1950, § 3, 5 U.S.C. App. at 568 (Securities and Exchange Commission); 49 U.S.C. 1301(c)(1) (Surface Transportation Board).

[5] For other examples, see 5 U.S.C. 593(b)(1) (Administrative Conference of the United States); 54 U.S.C. 304101(e)(1)(a) (Advisory Council on Historic Preservation); 42 U.S.C. 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 15 U.S.C. 2053(a) (Consumer Product Safety Commission); 12 U.S.C. 635a(b) (Export-Import Bank); 12 U.S.C. 1812(b)(1) (Federal Deposit Insurance Corporation); 5 U.S.C. 1203(a) (Merit Systems Protections Board); 22 U.S.C. 7703(c)(5) (Millennium Challenge Corporation) (Secretary of State serves as chairperson); 49 U.S.C. 1111(d) (National Transportation Safety Board); 45 U.S.C. 231f(a) (Railroad Retirement Board); see also 42 U.S.C. 1975(d)(2) (Commission on Civil Rights) (President designates with the concurrence of a majority of the Commission).

bers select the chair themselves. For example, the Federal Election Commission "elect[s] a chairman * * * from among its members." 52 U.S.C. 30106(a)(5); accord 52 U.S.C. 20923(c)(1) (Election Assistance Commission).[6]

Petitioner and the government are thus incorrect to state that the existence of agency chairs guarantees that the President will be able to assert control over multi-member agencies, setting these agencies apart from the CFPB. The President's ability to influence a chair depends on how the chair is appointed. If the President appoints the chair alone, his influence will be greater than if he must negotiate that appointment with the Senate, which may prefer a different candidate or prefer not to confirm an appointment at all. And the President will have more influence in both of these situations than when he has no formal role in appointing the chair at all.

B. The authority of the chair varies across multi-member agencies.

Petitioner and the government next argue that agency chairs possess "special powers and prerogatives" that can be used to control an agency. Pet. Br. 29 (citation omitted); accord Gov't Br. 36. But even if a President does appoint an agency chair, that appointment does not translate to control over the

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[6] For other examples, see 45 U.S.C. 154 (National Mediation Board); 16 U.S.C. 831a(a)(2) (Tennessee Valley Authority); 39 U.S.C. 202(a)(1) (United States Postal Service); see also 42 U.S.C. 12651 (Corporation for National and Community Service; initial chair appointed by the President, subsequent chairs elected by members).

agency. That is because petitioner and the government greatly overstate the role of the chair.[7]

The current system, under which the chair of a multi-member agency generally exercises administrative responsibilities, is a recent development. As enacted, the organic statutes of multi-member agencies generally did not set out the powers of the chair. See Marshall Breger & Gary Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1165–66 (2000). Eventually, however, "both the President and Congress came to recognize that the day-to-day administration of an agency [could not] be exercised collectively." *Id.* at 1166. The administrative powers of agencies were then, over time, assigned to the chairs. See Henry B. Hogue, Cong. Research Serv., R42852, *Presidential Reorganization Authority: History, Recent Initiatives, and Options for Congress* 21 (2012) ("[A] number of reorganization plans pertained to the centralization of administrative authority over collegial boards and commissions in their chairs."); see, *e.g.*, Reorganization Plan No. 10 of 1950, 5 U.S.C. App. at 568. Thus, many agency governing statutes define the powers of the chair and frequently refer to the chair as the "chief executive officer," 47 U.S.C. 155(a) (FCC), "chief administrative

[7] For this point, petitioner quotes Datla & Revesz out of context. Compare Pet. Br. 28 ("The 'ability of the President to retain policy influence through the selection of the chair' is particularly important because the chair is generally a multimember commission's 'most dominant figure.' " (quoting Datla & Revesz 819)), with Datla & Revesz 819 ("[T]he ability to appoint the head of an independent agency allows the President to retain *some* control over that agency's activities." (emphasis added)).

officer," 7 U.S.C. 2(a)(2)(B) (CFTC), or some combination of both, 5 U.S.C. 7104(b) (Federal Labor Relations Authority) ("The Chairman is the chief executive and administrative officer of the Authority.").

Many organic statutes expressly grant the chair an administrative, rather than substantive, leadership role. These statutes refer, as a general matter, to appointing and supervising staff, distributing work across personnel, and approving expenditures. See Breger & Edles, 52 Admin. L. Rev. at 1165; see also, *e.g.*, 15 U.S.C. 2053(f)(1) (Consumer Product Safety Commission, or CPSC); 42 U.S.C. 2286(c)(2)(A)–(C) (Defense Nuclear Facilities Safety Board).[8] These statutes make the chair's role "chiefly procedural[,]" with only some ability to affect policymaking. Harold H. Bruff, *Presidential Power and Administrative Rulemaking*, 88 Yale L.J. 451, 491 (1979).

Other statutes do not define the powers of the chair in any detail. For example, the governing statute of the Federal Reserve Board states only that "[t]he Chairman of the Board * * * shall be its active executive officer." 12 U.S.C. 242. In the Federal Reserve Board, "key decisions * * * are made collegially." Breger & Edles, 52 Admin. L. Rev. at 1172. In agencies of this sort, "substantive policymaking and

[8] For other examples, see 42 U.S.C. 2000e-4(a) (EEOC); 5 U.S.C. 8473(a) (Employee Advisory Thrift Council); 47 U.S.C. 155(a), (e) (FCC); 42 U.S.C. 7171(c) (FERC); 46 U.S.C. 301(c)(3) (FMC); Reorganization Plan No. 8 of 1950, § 1, 5 U.S.C. App. at 567 (FTC); 19 U.S.C. 1331(a) (ITC); 12 U.S.C. 1752a(e) (National Credit Union Administration); 42 U.S.C. 5841(a)(2) (NRC); 49 U.S.C. 1111(e) (NTSB); 29 U.S.C. 661(e) (OSHRC); 39 U.S.C. 504(a) (PRC); Reorganization Plan No. 10 of 1950, § 1, 5 U.S.C. App. at 568 (SEC); 49 U.S.C. 1301(c)(2) (STB).

regulatory authority is vested in the Board as a whole," rather than the agency chair. *Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, 24 Op. O.L.C. 102, 102 (2000); see also Daniel M. Welborn, *Governance of Federal Regulatory Agencies* 5 (1977). This kind of collectively exercised substantive authority includes "the determination of policies, the formulation and issuance of rules, and the adjudication of cases." Decision of Comptroller General to the Equal Employment Opportunity Commission, No. B-167015, 1974 U.S. Comp. Gen. Lexis 1627, at *16.[9]

And even when a chair has statutorily designated authority, it is not absolute. Most agency governing statutes also allow other members of the commission to constrain the chair, even with respect to administrative actions. See Breger & Edles, 52 Admin. L. Rev. at 1173. For example, the full agency, rather than the chair alone, may be responsible for appointing major department heads, see 7 U.S.C. 2(a)(6)(C) (CFTC); 15 U.S.C. 2053(g)(1)(A) (CPSC),[10] for remov-

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[9] Where disputes arise over the respective authorities of the chair and the full body, the full body decides the issue. See *Division of Powers and Responsibilities Between the Chairperson of the Chemical Safety and Hazard Investigation Board and the Board as a Whole*, 24 Op. O.L.C. 102, 105 (2000) ("[T]he Board * * * has the final authority to resolve disputes over whether a specific matter is within its oversight authority or is an administrative or executive concern of the chairperson or a legitimate concern of the Board as a whole.").

[10] For other examples, see 46 U.S.C. 301(c)(3)(A)(ii) (FMC); Reorganization Plan No. 8 of 1950, § 1(b)(2), 5 U.S.C. App. at 567 (FTC); 39 U.S.C. 504(a) (PRC); Reorganization Plan No. 10

ing major department heads, see 15 U.S.C. 2053(g)(1)(B)(ii) (CPSC); 42 U.S.C. 2286(c)(7)(B) (DNFSB),[11] or for submitting an agency's budget, see 7 U.S.C. 2(a)(6)(E) (CFTC); 15 U.S.C. 2053(f)(3) (CPSC).[12]

Petitioner and the government are thus incorrect to argue that a President's ability to influence an agency chair guarantees the President will be able to control the full multi-member agency, setting these agencies apart from the CFPB. That assertion assumes that the chair of a multi-member agency wields significant, substantive authority over the full agency. In reality, they do not.

C. The method of removing the chair varies across multi-member agencies.

Petitioner and the government point to a President's "unfettered ability to * * * remove [multi-member agency] chairs" as "a significant means of influence." Gov't Br. 36; accord Pet. Br. 29 ("The President can exercise nearly total control over [a multimember commission's] policy agenda simply by installing a more sympathetic chair." (internal quotation marks and citation omitted)). But the President's ability to remove an agency chair also

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of 1950, § 1(b)(2), 5 U.S.C. App. at 568 (SEC); 49 U.S.C. 1301(c)(2)(B) (STB).

[11] For other examples, see 19 U.S.C. 1331(a)(2)(A) (ITC); Reorganization Plan No. 1 of 1980, § 1(b)(1), 5 U.S.C. App. at 682 (NRC).

[12] For other examples, see Reorganization Plan No. 8 of 1950, § 1(b)(4), 5 U.S.C. App. at 567 (FTC); 19 U.S.C. 1331(a)(2)(B) (ITC); Reorganization Plan No. 10 of 1950, § 1(b)(4), 5 U.S.C. App. at 568 (SEC); 49 U.S.C. 1301(c)(2)(D) (STB).

varies across multi-member agencies. Here too, then, the presence of a chair does not guarantee the level of presidential control that petitioner and the government suggest.[13]

Some chair removal provisions specify, as petitioner and the government maintain, that the chair serves at the pleasure of the President. See 7 U.S.C. 2(a)(2)(B) (creating the CFTC with a position of a "Chairman, who shall serve as Chairman at the pleasure of the President"); 42 U.S.C. 5841(a)(1) (Nuclear Regulatory Commission).[14] The President's ability to remove the chair of these agencies is plenary. Thus, the possibility of removal does allow for presidential influence—*limited* influence, as discussed in Part I.B, supra—over these agencies. Gov't Br. 36.

But, for other agencies, the President does not have express removal power. Many agency governing statutes do not specify whether, or for what reasons, the President may remove the chair. See, *e.g.*, 15 U.S.C. 2053(f) (CPSC), 12 U.S.C. 242 (Federal Re-

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[13] Here, the government relies on a significant overreading of Datla & Revesz. Compare Gov't Br. 36 ("Many multimember commissions * * * afford the President the unfettered ability to appoint and remove their chairs, which is a significant means of influence."), with Datla & Revesz 796–97 (noting that "most chairs control the day-to-day administration of the agency[,]" and that if the President "retain[s] influence over the decisions of multimember agencies" it is because "members of the same partisan affiliation as the chair tend to vote with the chair").

[14] For other examples, see 54 U.S.C. 304101(e)(1)(B) (Advisory Council on Historic Preservation); 22 U.S.C. 7703(c)(5) (MCC) (Chairman is Secretary of State, who serves at the pleasure of the President); 39 U.S.C. 502(d) (PRC).

serve). Courts have not settled the question of what effect this statutory silence has on a President's ability to remove the chair. Compare *The President's Ability to Remove the Chairman of the Consumer Product Safety Commission*, 25 Op. O.L.C. 171, 171 (2001) (concluding, in the case of the CPSC, that silence has been interpreted to give the President "authority to remove [the chair] for any reason"), with Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 Yale J. Reg. 257, 295 (2015) (discussing the three possible interpretations of the statutory silence in 12 U.S.C. 242, governing the Federal Reserve Board).

And, at least once, Congress has expressly restricted the President's ability to remove an agency chair. The governing statute of the Chemical Safety and Hazard Investigation Board provides that "[a]ny member of the Board, *including the Chairperson*, may be removed for inefficiency, neglect of duty, or malfeasance in office." 42 U.S.C. 7412(r)(6)(B) (emphasis added).

Thus, the President does not always have "the unfettered ability to * * * remove" the chair of a multi-member agency. Gov't Br. 36. And, as discussed in Part I.B, supra, the chair—even if subject to removal by the President at will—often can assert only limited authority over administrative issues. For this reason, it is wrong to claim, as petitioner and the government do, that multi-member agencies are necessarily different from the CFPB as a result of a President's ability to influence an agency's chair.

* * *

The diversity of appointment and removal methods for agency chairs, as well as the varying amount of

statutory authority granted to them, belie the argument that that the mere presence of an agency chair ensures a certain level of presidential control that sets multi-member agencies apart from the CFPB. Thus, relying on the presence of an agency chair to deem an agency constitutional raises questions about which combinations of features—appointment method, authority, and removal method—suffice to grant the President some minimum constitutionally required level of control over a multi-member agency. Neither petitioner nor the government provides answers to these questions, or even a theory from which this Court could answer these questions in this case or future cases. The dividing line that petitioner and the government urge is, simply, an untenable one.

II. Petitioner And The Government Lack An Empirical Basis For The Claim That A Multi-Member Agency Is Less Likely To Diverge From A President's Preferences.

Petitioner and the government claim that removal protections are appropriate only for multi-member agencies because the multi-member structure leads to "less extreme outcomes and fewer aberrant actions." Pet. Br. 26; accord Gov't Br. 29.[15] This argument relies on an assumption: that deliberation will lead to moderate decisions, and that moderate deci-

[15] Petitioner wrongly attributes this claim to Datla & Revesz 794. See Pet. Br. 26. That discussion does not address whether the multi-member structure leads to more or less extreme outcomes; instead it explains that a multi-member structure can foster "more deliberative decision making, a higher level of expertise, and continuity of policy." Datla & Revesz 794.

sions are less likely to diverge from the President's preferences.[16] As an empirical matter, the jury is out on this assumption about the moderating effects of deliberation.

To begin, petitioner and the government implicitly assume that the multi-member structure will produce deliberation and that such deliberation will change the members' views. But whether, and to what extent, a multi-member leadership structure leads to meaningful deliberation turns on a number of factors that are difficult to predict in advance. For example, when members of a group enter a discussion with strong opinions based in their values, opportunities for persuasion tend to be slim. See Blair T. Johnson & Alice H. Eagly, *Effects of Persuasion: A Meta-Analysis*, 106 Psychol. Bull. 290, 290 (1989). In particular, longstanding group members often have deeply ingrained beliefs that make them less likely to change their minds because of deliberation. See Andreas Warntjen, *Between Bargaining and Deliberation: Decision-Making in the Council of the European Union*, 17 J. Euro. Pub. Pol'y 665, 671 (2010). If deliberation or opportunities for persuasion are limited, then the benefits of group decision-making are also limited.

And when meaningful deliberation takes place, research suggests that group decisions sometimes

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[16] This argument also appears to be limited to a situation in which the President has not yet appointed a sufficient number of members whose policy preferences align with his. After that point in time, any tendency of group deliberation dynamics to produce moderate outcomes would diverge *more* from the President's policy preferences than the more extreme outcome.

are more extreme than the decisions favored by members of the group before deliberation, not less. This is known as "group polarization." See David G. Myers & Helmut Lamm, *The Group Polarization Phenomenon*, 83 Psychol. Bull. 602, 603–04 (1976); see also Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 Yale L.J. 71, 85–96 (2000). For example, mock juries deliver larger damages awards after deliberations than the aggregation of the individual pre-deliberation judgements would suggest. David Schkade, Cass R. Sunstein & Daniel Kahneman, *Deliberating About Dollars: The Severity Shift*, 100 Colum. L. Rev. 1139, 1140–41 (2000). Similar results have been observed across many empirical studies, in many contexts. See Myers & Lamm, 83 Psychol. Bull. at 604–10 (surveying relevant research).

There are two commonly offered explanations for this phenomenon. First, people wish to see and present themselves in a socially acceptable light, so they recalibrate and reconsider their views in a way that results in an average shift toward the outcome perceived as more socially acceptable, which can be toward one extreme. See Daniel J. Isenberg, *Group Polarization: A Critical Review and Meta-Analysis*, 50 J. Personality & Soc. Psychol. 1141, 1142 (1986). And second, people make judgments based on the number and persuasiveness of arguments that they can recall from memory. If a group discussion centers on arguments on one end of the decision-making spectrum, the outcome shifts toward that extreme. *Id*. at 1145.

These studies suggest that multi-member agencies may produce polarized outcomes, and the degree of

polarization may turn on a number of factors. See, *e.g.*, Norbert L. Kerr & R. Scott Tindale, *Group Performance and Decision Making*, 55 Ann. Rev. Psychol. 623, 634 (2004). For instance, the type of issue being decided affects whether and how much the group members shift from their initial preferences. Martin F. Kaplan & Charles E. Miller, *Group Decision Making and Normative Versus Informational Influence: Effects of Type of Issue and Assigned Decision Rule*, 53 J. Personality & Soc. Psychol. 306, 306 (1987). A group might also function under different leadership models—ranging from a more dominant leader, to democratic decision-making, to a more fluid structure without a clear leader. These different structures have a significant influence on the polarization of an agency's decision. See, *e.g.*, Jorge Correia Jesuino, *Influence of Leadership Processes on Group Polarization*, 16 Eur. J. Soc. Psychol. 413, 413 (1986). Another key factor is whether any agency members holds outlying views, as the extremity-influence hypothesis posits that those with a more extreme response will exert a disproportionate influence on the group, bringing more moderate group members along with them. See David G. Myers & Peter J. Murdoch, *Is Risky Shift Due to Disproportionate Influence of Extreme Group Members?*, 11 Brit. J. Soc. & Clinical Psychol. 109, 109 (1972); Markus Brauer et al., *The Effects of Repeated Expressions on Attitude Polarization During Group Discussions*, 68 J. Personality & Soc. Psychol. 1014, 1027–28 (1995). Group members with extreme beliefs are often more confident in their positions and talk more during group deliberations. See Lyn M. Van Swol et al., *The Language of Extremity: The Language of Extreme Members and How the*

Presence of Extremity Affects Group Discussions, 35 J. Language & Soc. Psychol. 603, 618 (2016).

Petitioner and the government rely on the proposition—which they offer as uncontested truth—that a multi-member agency will reach consensus positions that are less likely to stray from a President's preferences than a single-headed agency like the CFPB. But as the discussion in this Part shows, just how group dynamics affect group decision-making is a fact-dependent, and contested, issue. The studies point in different directions. Compare Daniel J. Isenberg & James G. Ennis, *Perceiving Group Members: A Comparison of Derived and Imposed Dimensions*, 41 J. Personality & Soc. Psychol. 293, 303 (1981) (finding that views of extreme group members are particularly salient in the minds of other group members), with Lyn M. Van Swol, *Extreme Members and Group Polarization*, 4 Soc. Influence 185, 185 (2009) (finding that groups containing a more extreme group member did not polarize more than other groups). The research has not yet produced a consensus view. Petitioner and the government thus ask this Court to pick one side, possibly the weaker side, of an ongoing academic debate, attach decisive constitutional significance to it, and open up significant portions of the administrative state to challenge on this basis.

III. Petitioner And The Government Overstate The Influence A President Can Exert Through Appointments To A Multi-Member Agency.

The ability of a President to gain sufficient control over multi-member agencies "over the course of his term" through the appointment process plays a

significant role in petitioner's and the government's distinction between the unconstitutional status of the CFPB and the constitutional status of multi-member agencies. See Pet. Br. 29; accord Gov't Br. 36. But a President will not be able to gain such control in important instances because of how some governing statutes set the number of members and length of their terms, whether they impose a partisan-balance requirement, and how they specify the agency's quorum requirement.

A. The rate of vacancies varies across agencies.

As petitioner and the government implicitly admit, see Pet. Br. 28; Gov't Br. 36, a President is not guaranteed the ability to control an agency through appointments merely because it has multiple members, rather than one. That is because Congress has structured multi-member agencies differently—creating some with longer term lengths than others, and some with more members than others.

For agencies with longer term lengths, a President will be unable to appoint a majority of their membership by the end of his first term. Take the Federal Reserve Board. Seven Governors serve fourteen-year terms, staggered by two years. 12 U.S.C. 241, 242. Thus, a one-term President would appoint only two governors out of seven. The Federal Trade Commission (FTC) provides another example. Five members serve seven-year terms, staggered by one year, with a two-year gap between two of the appointments. 15 U.S.C. 41. When this gap overlaps with a President's sole term, he would not be able to appoint a majority of the Commission. For these agencies, there is no guarantee that a one-term President will be able to

appoint a majority of the agency, just as there is no guarantee a President would be able to appoint a CFPB Director.

This is also true of the agencies that Congress chose not to structure with staggered terms. See Datla & Revesz 790 n.112. The Merit Systems Protection Board (MSPB), for example, has three Board members serving seven-year terms, but does not stagger those terms. See 5 U.S.C. 1201, 1202. The CPSC is similar, with five Commissioners serving seven-year terms, 15 U.S.C. 2053(b), and the U.S. Postal Service Board of Governors is as well, with nine appointees serving seven-year terms, 39 U.S.C. 202. For these agencies, the ability of a President to appoint a majority of the agency's members turns on the happenstance of resignations and term expirations. The governing statute does not guarantee that a President will appoint any members, much less a majority.

These are not hypothetical scenarios. President George H.W. Bush appointed only two of the five CPSC Commissioners over his presidency. See *Commissioner Biographies*, Consumer Prod. Safety Comm'n, http://bit.ly/CPSCCommr (last visited Jan. 20, 2020). By the end of their first terms, Presidents Reagan and Clinton had, respectively, appointed only two of the seven Federal Reserve Governors and only two of the five FTC Commissioners. See *Board of Governors Members, 1914-Present*, Bd. of Governors of the Fed. Reserve Sys., http://bit.ly/FRBMembers (last visited Jan. 20, 2020); *Former Commissioners*, Fed. Trade Comm'n, http://bit.ly/FTCCommr (last visited Jan. 20, 2020). And but for an unscheduled vacancy, President

George W. Bush would have appointed only one member to the MSPB in his first term, while President Obama had a mere one MSPB vacancy arise during his second term. See *Board Members' Service*, Merit Sys. Prot. Bd., http://bit.ly/MSPBMem (last visited Jan. 20, 2020).

The realities of the Senate confirmation process impose additional limits on a President's ability to control a multi-member agency's agenda through the appointment process. Indeed, the Senate often refuses to confirm a President's nominees. From 1981 to 2014, for example, 30.5% of nominations to independent regulatory commissions or boards failed. See Anne Joseph O'Connell, *Shortening Agency and Judicial Vacancies Through Filibuster Reform? An Examination of Confirmation Rates and Delays from 1981 to 2014*, 64 Duke L. J. 1645, 1661 tbl. 1 (2015). And even when the Senate does confirm a nominee, it takes longer on average to do so for multi-member agencies than for Cabinet posts, White House positions, and other agencies. See *id.* at 1670 tbl. 5. Thus, even for agencies with shorter term lengths, or staggered terms, the President may not be able to appoint a majority of members within a single term.

The wide variance in term length and membership numbers at multi-member agencies undercuts the categorical distinction that petitioner and the government offer between multi-member agencies and the CFPB. See Pet. Br. 29; Gov't Br. 36. For some multi-member agencies, there is no guarantee that a President will appoint a majority of the members during a single term, just as there is no guarantee

that a President will appoint the CFPB Director in a single term.

B. Partisan balance requirements limit the President's ability to control a multi-member agency through appointments.

The government suggests that the partisan-balance requirements that Congress has enacted for many multi-member agencies bolster a President's ability to gain control through appointments. See, *e.g.*, Gov't Br. 36 ("[T]he partisan-balance requirement * * * further increases the likelihood that at least some of the holdover members share the President's views."). In its telling, even if a President has a limited number of appointments, existing members of his partisan affiliation will share his views. Once again, this blunt claim cannot be squared with the more nuanced reality of how partisan-balance requirements actually function.

To start, partisan balance requirements dull a President's ability to influence a multi-member agency through appointments. These requirements limit the pool of appointees available to a President. Consider the FCC, which is directed by five commissioners serving five-year terms, no more than three of whom may be members of the same political party. See 47 U.S.C. 154(a), (c). Because of the partisan balance requirements, Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush each appointed at least one member of the opposite party. See Daniel E. Ho, *Congressional Agency Control: The Impact of Statutory Partisan Requirements on Regulation* 13 (Am. Law & Econ. Ass'n Paper 73, 2007). These appointees were not partisans in name only.

An empirical study of FCC voting patterns found that the three Republican-appointed Democratic commissioners were among the most liberal commissioners surveyed and that the Democratic-appointed Republican was the most conservative commissioner surveyed. *Id*. at 21; see also Daniel E. Ho, *Measuring Agency Preferences: Experts, Voting, and the Power of Chairs*, 59 DePaul L. Rev. 333, 348 (2010) (comparing ideological preferences of Democratic and Republican FCC commissioners between 1965 and 2006). This finding aligns with other surveys, which find that partisan-balance requirements do have an effect on who is appointed. See Brian D. Feinstein & Daniel J. Hemel, *Partisan Balance with Bite*, 118 Colum. L. Rev. 9, 72 (2018) (explaining that partisan-balance requirements "do indeed lead Presidents to choose cross-party appointees with divergent ideological preferences"). Thus, even if a President gets to appoint a majority of an agency's members, that majority may not share the President's views.

Nor is the government correct to lean on the possibility that existing appointees who share the same partisan affiliation as the current President will be aligned with that President's preferences. See Gov't Br. 36. That is because the current President may have views on policy matters within the agency's jurisdiction that diverge from those of the current members. Political parties are not monoliths, and even a President's current appointees might not reflect his views on a particular issue, much less the appointees of a prior President of the same party. Consider climate change policy. President Obama appointed Cheryl LaFleur to serve as a FERC Commissioner, and later as the chair. During most of her tenure, Commissioner LaFleur consistently took the

position that FERC did not need to measure climate change impacts when evaluating pipeline projects. See Transcontinental Gas Pipe Line Company, LLC, Order Issuing Certificate, 156 FERC ¶ 61,092 at ¶¶ 90–91 (2016) (2016 WL 4198689) (explaining that the Commissioners, including Commissioner LaFleur, unanimously did "not believe the potential increase of emissions associated with the production and combustion of natural gas [was] causally related to [the] action in approving" the pipeline project at issue). The Obama Administration took the opposite position. See *id.* (noting that "[t]he EPA recommend[ed] that the commission provide an estimate of both production emissions, including production-related fugitive emissions, and end-user GHG emissions"). And even if an agency member's views initially align with a President's, those views may change over time, because the member will acquire expertise while serving on the agency. See Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 29 (2010). A shared partisan affiliation thus does not ensure that the members of an agency with that affiliation will carry out the President's views in lockstep.

As this discussion shows, that many multi-member agencies have partisan-balance requirements further undercuts the categorical distinction that petitioner and the government offer between multi-member agencies and the CFPB. In these agencies, even if a vacancy occurs, the eventual appointee may not share the President's partisan affiliation, and thus may not share his views on the agency's agenda. The resulting appointment will leave the President no

better off than he would be when facing a holdover Director of the CFPB whom he did not appoint.

C. Agency quorum requirements affect the President's ability to gain control over multi-member agencies.

Finally, petitioner and the government insist there is something historically unusual about a single officer with removal protection exercising the power of an agency. Pet. Br. 26; Gov't Br. 33. But this ignores that, in practice, multi-member agencies sometimes function as single-member agencies. That is because for some agencies, the governing statute allows a single member to constitute a quorum.

Many multi-member agencies lack statutory quorum requirements, which govern when an agency without a full set of members can execute its functions. See Jennifer L. Selin & David E. Lewis, Admin. Conference of the United States, Sourcebook of United States Executive Agencies 45–48 (2d ed. 2018) (listing thirty-one such agencies). And by internal rules or regulation, some agencies may function with only one member. For example, the Federal Deposit Insurance Corporation Board has five members, but its bylaws allow that, "[i]n the event there is only one member in office, that member shall constitute a quorum." Fed. Deposit Ins. Corp., Bylaws 6 (2019), http://bit.ly/FDICBylaws. Similarly, Securities and Exchange Commission regulations provide that "if the number of Commissioners in office is less than three, a quorum shall consist of the number of members in office." 17 C.F.R. 200.41. Thus, a single member of a multi-member agency may sometimes exercise the full authority of that agency.

This possibility is not merely hypothetical. The Surface Transportation Board, a multi-member agency regulating railroads, operated with a single member from April 2003 to May 2004. See *Past Board Members*, Surface Transp. Bd., http://bit.ly/STBMem (last visited Jan. 20, 2020); Don Phillips, *Railroad Regulator Linda Morgan Resigns*, Wash. Post (Feb. 27, 2003), http://bit.ly/LMResigns. During that time, the Board performed all of its usual functions, approving collective ratemaking agreements, adjudicating disputes, and monitoring approved mergers. See*, e.g.*, Rate Bureau Agreements–EC-MAC Motor Carrier Assoc., et al., 7 S.T.B. 65 (2003); *Carolina Power & Light Co. v. Norfolk S. Ry. Co.*, 7 S.T.B. 235 (2003); Surface Transp. Bd., FY 2002 – 2004 Report 9–12 (2005). The FTC had only two Commissioners from February 2017 until May 2018. See *Former Commissioners*, Fed. Trade Comm'n, http://bit.ly/FTCCommr (last visited Jan. 20, 2020). In this period, when one Commissioner was recused, the other issued the decision for the agency. See, *e.g.*, Press Release, Fed. Trade Comm'n, FTC Adds Requirements to 2014 Order to Remedy CoreLogic Inc.'s Compliance Deficiencies (Mar. 15, 2018), http://bit.ly/FTCCoreLogic ("The Commission vote to accept the Agreement * * * was 1-0-1, with Commissioner McSweeny not participating by reason of recusal.").

As this discussion shows, the idea of a single officer exercising the kind of authority multi-member agencies exercise is not some "historical anomaly." Pet. Br. 47. Instead, it is a possibility baked into the governing statutes of important multi-member agencies themselves. Multi-member agencies cannot

be put in a separate constitutional category from the CFPB on this basis.

* * *

There is a reason neither petitioner nor the government acknowledges any of the nuances in how Congress has chosen to structure the administrative state. Their object is to invalidate the CFPB; their arguments, however, have far broader reach, threatening to invalidate "roughly a third of the modern federal government." Br. of Ct. Appointed Amicus 20. And the way out they offer this Court—relying on a categorical distinction between multi-member agencies and a single-headed agency like the CFPB—has little to or no basis in the actual statutes that govern these agencies.

The Federal Reserve Board most clearly exposes the limitations of—and danger inherent in—their categorical approach. A President may not get to gain control over the CFPB by appointing its Director within a single term, they say. See, *e.g.*, Pet. Br. 29. But the same is true of the Federal Reserve Board. A President will not be able to appoint a majority of its members within a single term, and the existence of the Chair does not counteract this feature because the power to render substantive decisions rests with the full Board. See Part I, supra; Peter Conti-Brown, *Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve*, 24 Geo. Mason L. Rev. 617, 627 (2017) (explaining that the "common assumption * * * that the Fed Chair equals the Federal Reserve * * * is false"). The CFPB receives funding outside of the normal appropriations process. See Pet. Br. 7. So does the Federal Reserve

Board. See 12 U.S.C. 243. The CFPB " 'wields enormous power over American businesses, American consumers, and the overall U.S. economy.' " Pet. Br. 27 (quoting *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting)). So, of course, does the Federal Reserve Board. See Ernest A. Young, *The Constitution Outside the Constitution*, 117 Yale L.J. 408, 418 (2007) ("[T]he Federal Reserve * * * sets U.S. monetary policy and consequently affects the lives of every American."); see also Colleen Baker, *The Federal Reserve as Last Resort*, 46 U. Mich. J.L. Reform 69, 71 (2012) ("The Federal Reserve, the central bank of the United States, is one of the most important and powerful institutions in the world.").

The diversity of form within multi-member agencies does not just undercut the categorical distinction petitioner and the government make, and the constitutional conclusion they ask this Court to draw from it. It guarantees that, if this Court relies on that distinction, a thicket of constitutional challenges will follow. How much authority must a chair have to be a sufficient channel of presidential control? How much divergence from presidential preferences is permissible? What percentage of an agency's members must a President be able to appoint within a single term for that agency to be constitutional? What quorum rules are constitutionally permissible? There is no end to the minutiae of agency design that this Court will have to confront to draw lines between permissible, and impermissible, agencies.[17]

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[17] Perhaps the unspoken responses from petitioner and the government would be: The chair must have total control; no divergence from presidential preferences is permissible; com-

The President's control over the CFPB is, in the end, not so different from his control over the multi-member agencies that this Court has approved of, and that are enmeshed in the historical tradition of the administrative state. Petitioner and the government are wrong to suggest otherwise. And this Court should not accept their overly simplified portrait of the administrative state as gospel.

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plete control over agency membership on day one of a President's term is required. The proposition that the President's control over executive agencies must be so unfettered is a radical one. It would call into question *every* structural feature of federal agencies that was designed, in some way, to limit a President's discretion, not just features of agencies with for-cause removal provisions. See Datla & Revesz 825–27. And it is flatly inconsistent with many existing constraints on a President's authority. See, *e.g.*, 33 U.S.C. 1342(c)(3) (prohibiting the revocation of EPA's delegation of permitting authority to states without a finding, after a public hearing, that the state is not administering the program in accordance with the statutory requirements, akin to a for-cause determination); *FCC* v. *Fox Television Stations*, *Inc.*, 556 U.S. 502, 515–16 (2009) (holding that, under the Administrative Procedure Act, repeal of an agency action requires an agency to provide a "reasoned explanation" for "disregarding the facts and circumstances that underlay or were engendered by" the original rule).

CONCLUSION

This Court should affirm the judgment of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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