Nos. 19-422, 19-563

IN THE

Supreme Court of the United States

PATRICK J. COLLINS, *ET AL.*,
Petitioners,

v.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, *ET AL.*,
Respondents.

STEVEN T. MNUCHIN, SECRETARY OF THE TREASURY, *ET AL.*,
Petitioners,

v.

PATRICK J. COLLINS, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PATRICK J. COLLINS ET AL.

Cynthia Fleming Crawford
Counsel of Record
Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
ccrawford@afphq.org
571-329-2227
Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PATRICK J. COLLINS *ET AL.*

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Plaintiffs.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas are the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF has a particular interest in this case because it believes businesses and individuals, like Plaintiffs, are entitled to a meaningful remedy for the government's separation-of-powers violations that would afford them complete redress under the facts and circumstances of their specific case, as required by Article III of the U.S. Constitution.

SUMMARY OF ARGUMENT

One might think, as a matter of basic fairness and common sense, that when the federal government unconstitutionally transfers money from private

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amicus* made any monetary contributions intended to fund the preparation or submission of this brief.

citizens to itself, those injured citizens should be able to sue in federal court and get their money back. As Chief Justice Marshall famously wrote in *Marbury v. Madison*, quoting Blackstone's Commentaries, "'it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.'" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (quoting 3 Blackstone, Commentaries 23). "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Id.* True enough, except when it's not.

So too here if the decision below is allowed to stand. A majority of the *en banc* Fifth Circuit correctly found that, under this Court's precedent, the Federal Housing Finance Agency's ("FHFA") structure violates the separation of powers. Nevertheless, and over powerful dissents, a majority of the *en banc* Fifth Circuit declined to vacate the Third Net Worth Sweep to redress Plaintiffs' substantial injury, choosing instead to blue-pencil the statute to bring it in line with constitutional requirements without meaningfully resolving the dispute before it. In so doing, the Fifth Circuit usurped Congress's prerogatives under Article I, going beyond the proper judicial role under Article III to decide concrete cases and controversies.

There is nothing this Court should try to do to salvage the Fifth Circuit's statutory revisions or the FHFA's unconstitutional actions. Only Congress may cure the FHFA's constitutional problems, if it chooses to do so. Instead, this Court should focus on the case

and controversy before it and provide complete relief to Plaintiffs. The only meaningful way to redress the harms Plaintiffs have suffered from the FHFA's constitutional violations is to vacate the Third Net Worth Sweep, as Article III and the Administrative Procedure Act ("APA") require. The concrete monetary harms to Plaintiffs flowing from the government's unconstitutional actions should not be swept under the rug through doctrinal subterfuge: the rule of law and the U.S. Constitution should always prevail over putative issues of practical expediency.

More broadly, this Court should take this opportunity to confront the behemoth lurking in the background: *Humphrey's Executor*. Unlike a fine wine, *Humphrey's Executor* has not gotten better with age. Over the past eighty-plus years, *Humphrey's Executor* has wrongly enabled a host of separation-of-powers violations, which have had all too real practical consequences for all too many businesses and individuals who have found themselves in the crosshairs of these "independent" agencies' draconian law enforcement activities. The targets of these extraconstitutional free-floating administrative entities often have no meaningful recourse to any elected officials, as none of them has the power to rein in these "independent" administrative bodies. Nor can they remove unelected officials whose public policy and law enforcement priorities conflict with those of the political branches—and, by extension, conflict with the will of the People, which, after all, is the source of *all* government power in this country.

Neither *Humphrey's Executor's* stale vintage nor any putative "reliance" interests federal officials may claim to have in unconstitutional insulation from any

political accountability justify maintaining the "quasi-legislative, quasi-judicial" charade upon which that poorly reasoned decision rests. Our Constitution, and our Republic, flourished long before the invention of free floating so-called "independent" administrative bodies unmoored to the Constitution and without accountability to the People.

The time has come to cut off one of the many constitutionally gangrenous appendages of the Administrative State—*Humphrey's Executor*. This Court must also restore a proper remedial approach to separation-of-powers violations focusing on redressing the harm to the victim of unconstitutional government action, as opposed to revising Congress's flawed handiwork to prevent future constitutional violations to hypothetical nonparties. As painful for some as this may be, our Constitution, and our Republic, will be healthier for it.

Under our system of checks and balances, those who wield federal government power must be, in some way, accountable to the source of that power: the People, through the duly elected political branches. After all, our very system of government is premised on the consent of the governed. *Humphrey's Executor* materially breaches that societal contract. And the People deserve the benefit of our bargain, as set forth in the U.S. Constitution.

Furthermore, this Court should roundly reject the government's breathtakingly broad, and flatly unconstitutional, interpretation of the Housing and Economic Recovery Act ("HERA"). If upheld, the government's construction would not only insulate the FHFA from *all* accountability to Congress, the

President—and indeed the Judiciary—but also would run afoul of the nondelegation doctrine. This Court should interpret HERA narrowly, consistent with the Congress's intent and in line with the Constitution. Under such an interpretation, the FHFA exceeded its statutory authority here, and its *ultra vires* actions should be set aside for that independent reason.

ARGUMENT

I. THIS COURT SHOULD VACATE THE THIRD NET WORTH SWEEP.

As Plaintiffs ably explain, *see* Collins Br. 62–79, the Fifth Circuit should have set aside the Third Net Worth Sweep, as it was required to do under the APA and Article III of the U.S. Constitution.

A. The Blue-Pencil Remedy Exceeds the Judicial Power Under Article III.

The Fifth Circuit's remedial approach ignores the separation-of-powers-based limitations on Article III courts' ability to "revise" federal statutes—a task Article I vests in Congress alone. "[C]ourts cannot take a blue pencil to statutes[.]" *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). "Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). "[T]he power of judicial review does not allow courts to revise statutes[.]" *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2220 (2020) (Thomas, J., concurring in part and dissenting in part); *see also Barr v. Am.*

Ass'n of Political Consultants, 140 S. Ct. 2335, 2365–66 (2020) (Gorsuch, J., dissenting in part) ("I am doubtful of our authority to rewrite the law in this way. . . . To start, it's hard to see how today's use of severability doctrine qualifies as a remedy at all[.]"). And courts may "'not rewrite a . . . law to conform it to constitutional requirements.'" *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted).

Instead, federal courts are tasked with adjudicating discrete "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006). "[T]he judiciary has no power to alter, erase, or delay the effective date of a statute[.]" Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 942 (2018). Instead, the "province of the court is, solely, to decide on the rights of individuals[.]" *Marbury*, 5 U.S. (1 Cranch) at 170. When courts rule for a complaining party, they must focus on providing complete relief to that party, not on rewriting statutes.

But that is exactly what the Fifth Circuit *en banc* majority did below. According to the majority, "the Shareholders' ongoing injury, if indeed there is one, is remedied by a declaration that the 'for cause' restriction is declared removed. . . . [T]he appropriate remedy for that finding is to declare the 'for cause' provision severed." Pet. App. 80a. The majority "decline[d] to invalidate the Net Worth Sweep or PSPAs." Pet. App. 81a. That was error of constitutional dimensions for at least two reasons.

First, the majority's "blue pencil" remedy to simply delete the unconstitutional portion of the statute does nothing to address Plaintiffs' injury, which is the source of their Article III standing to maintain the suit in the first place. As Judge Oldham, joined by Judge Ho, explained: "In this case, Plaintiffs are injured by the Net Worth Sweep—an exercise of executive power unconstitutionally granted by HERA. Plaintiffs lost the value of their investments because FHFA used the Net Worth Sweep to transfer their money to the Treasury." Pet. App. 112a–113a (concurring in part and dissenting in part). The majority's decision to "blue-pencil the statute by deleting the unconstitutional statutory provision . . . affords Plaintiffs no relief whatsoever. On these facts, editing the statute would not resolve any case or controversy." Pet. App. 113a. This is because Plaintiffs' injury is backwards-looking, directly traceable to an agency's past decision; Plaintiffs did not allege an injury based on the possibility of future regulatory action. *See* Pet. App. 113a. Thus, the *prospective* remedy of judicially revising the statute did not redress Plaintiffs' injury.

This simple fact puts in stark relief the fundamental constitutional problem with the majority's blue-pencil remedy here. "Although the Constitution does not fully explain what is meant by the judicial Power of the United States, it does specify that this power extends only to "Cases" and "Controversies."" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (cleaned up). "[T]he constitutional limitation of federal-court jurisdiction to actual cases or controversies" is fundamental to maintaining the proper judicial role and preventing Article III courts

from impinging upon the prerogatives of the political branches. *See id.* at 1546–47.

It is hornbook law that "the irreducible constitutional minimum of standing consists of three elements. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 1547 (cleaned up). The Constitution's "concrete injury requirement has . . . [a] separation-of-powers significance[.]" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992). And Article III courts lack jurisdiction in the absence of the ability to redress a plaintiffs' injuries. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 109–10 (1998).

But as Judge Oldham observed:

> Strangely, our colleagues who argue that Plaintiffs lack standing to bring their constitutional claim also join a majority . . . in endorsing a blue-penciling remedy. Nowhere in their opinion do they explain how our Court could purport to delete a statutory provision when there is no active case or controversy within the meaning of Article III. We think Plaintiffs do have standing, yet we cannot identify how deleting the FHFA Director's removal protection would redress any harm Plaintiffs have alleged. On what basis could our colleagues possibly believe that a blue-penciling remedy is constitutionally permissible? We can see none.

Pet. App. 114a–115a.

B. The Separation of Powers Requires Relief that Remedies Plaintiffs' Injury.

As Judge Willett, joined by Judges Jones, Smith, Elrod, Ho, Englehardt, and Oldham, explained in dissent below: "When a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside." Pet. App. 152a (dissenting in part). *Cf. Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part and dissenting in part) ("To resolve this case, I would simply deny the . . . CFPB petition to enforce the civil investigative demand."); *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 139 (D.C. Cir. 2018) (*en banc*) (Henderson, J., dissenting) ("I would set aside the Director's decision as *ultra vires* and forbid the agency from resuming proceedings.").

This is because as then-Judge Scalia explained, remedies for constitutional violations must redress the harms to the injured party. When resolving "cases specifically involving incompatible authorization and tenure (or appointment) statutes," courts must focus on providing relief to "the injury-in-fact that confers standing upon the plaintiff." *Synar v. United States,* 626 F. Supp. 1374, 1393 (D.D.C. 1986) (per curiam) (collecting cases), *aff'd sub nom. Bowsher v. Synar,* 478 U.S. 714 (1986); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 52 (1982) (setting aside exercise of adjudicatory authority *over plaintiff* by bankruptcy judge who lacked Article III life tenure); *Buckley v. Valeo*, 424 U.S. 1 (1976) (setting aside Federal Election Campaign Act

provisions granting authority *over plaintiffs* to officials appointed in an improper manner).

Here, Plaintiffs' injury is backward-looking: they were harmed because of the FHFA's Third Net Worth Sweep, which was an "exercise of executive power unconstitutionally granted by HERA" pursuant to which "Plaintiffs lost the value of their investments because FHFA . . . transfer[ed] their money to the Treasury." Pet. App. 112a–113a (Oldham, J., concurring in part and dissenting in part). As the majority below observed: "The net worth sweep transferred a fortune from Fannie and Freddie to Treasury. When this suit was filed, the GSEs had paid $195 billion in dividends under the net worth sweep. Under the Agreements more broadly, Treasury had disbursed $187 billion and recouped $250 billion, thanks largely to the net worth sweep." Pet. App. 17a. That is a classic, straightforward injury in fact: monetary harm caused by defendant's actions.

Blue-penciling the statute therefore "affords Plaintiffs no relief whatsoever. On these facts, editing the statute would not resolve any case or controversy. [Because] Plaintiffs do not complain about the possibility of future regulatory activity." Pet. App. 113a (Oldham, J., concurring in part and dissenting in part).[2] And "in a case seeking redress for past harms such as this one, prospective relief is no relief

[2] By contrast, in *Free Enterprise Fund* "the plaintiffs sought an injunction against future audits and investigations by the unconstitutionally insulated agency. To remedy the plaintiffs' prospective injury-in-fact, the Court refused to apply the statute insulating the officers from removal." Pet. App. 114a (Oldham, J., concurring in part and dissenting in part).

at all." Pet. App. 113a (Oldham, J., concurring in part and dissenting in part).

Plaintiffs' injury is caused by an unconstitutional administrative action suffering from a fatal defect in authority, which this Court should not try to retroactively fix. As Judge Willett explained below:

> Unconstitutional protection from removal, like unconstitutional appointment, is a defect in authority. Appointments Clause decisions routinely set aside agency action. . . . These cases are apt because there, as here, a defect in authority made agency action unlawful. . . . An unconstitutionally-insulated officer lacks authority to act.

Pet. App. 155a–156a (Willett, J., dissenting in part).

Plaintiffs here seek relief from actions the agency has already taken. Failing to vacate the Third Net Worth Sweep will leave them without a remedy. That result would conflict with the fundamental and longstanding principle that for every right there must be a remedy.[3] "It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 147. As applied here, this venerable principle demands that where, as here, an agency official lacks statutory or constitutional authority to take a specific

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[3] Severance is not "literally" a remedy, because "[r]emedies operate with respect to specific parties, not on legal rules in the abstract." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

action, that action should be vacated. *See Noel Canning v. NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013).

Underscoring this point, the APA itself makes plain that "[t]he reviewing court *shall*— . . . hold unlawful and set aside *agency action*, findings, and conclusions found to be . . . contrary to constitutional right, power, privilege, or immunity [or] . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]" 5 U.S.C. § 706(2) (emphasis added). "The first sign that the statute imposed an obligation is its mandatory language: 'shall.'" *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (cleaned up). Section 706 of the APA's "instruction comes in terms of the mandatory 'shall,' which normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Because the Third New Worth Sweep was an unconstitutional action, it must be set aside.

Furthermore, Plaintiffs should not be punished for asserting their constitutional right to challenge an *ultra vires* agency action performed by an unconstitutionally constituted agency, which was void *ab initio*. *Cf. Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902) ("The acts of all . . . [government] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief."). As this Court has made clear, Appointments Clause remedies should "create incentives to raise Appointments Clause challenges." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018) (cleaned up and citation omitted). The remedy for a violation of the Appointments Clause or separation of

powers should advance the structural purpose of Article II by creating incentives for parties to raise such challenges. *See Ryder v. United States*, 515 U.S. 177, 182–83 (1995). Use of the blue-pencil remedy here would have the opposite effect, perversely *disincentivizing* parties from exercising their constitutional rights. *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 518–46 (2014).

This result would be particularly unfair here because the Third Net Worth Sweep was void *ab initio*, suffering from a fatal, constitutionally incurable defect in authority.

II. THE GOVERNMENT'S CONSTRUCTION OF HERA WOULD VIOLATE THE NONDELEGATION DOCTRINE.

As Plaintiffs ably explain, *see* Collins Br. 43, the FHFA's lawless pursuit of the Third Net Worth Sweep was not only *ultra vires* but unconstitutional to boot. It is black-letter law that agencies only possess powers Congress *affirmatively chooses to delegate to them*. *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("agency literally has no power to act . . . unless and until Congress confers power upon it."). Congress did not grant the FHFA a blank check to do whatever it wants untethered from oversight by and accountability to each of the three branches of government established by Articles I, II, and III of the Constitution—and, by extension, unaccountable to the People. That should end the matter. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). If it were otherwise, HERA would violate the

nondelegation doctrine. *But cf. Gundy v. United States*, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting) (If the statute is broadly construed, "it would present 'a nondelegation question.' So the only remaining available tactic is to try to . . . recast[] the statute in a way that might satisfy any plausible separation-of-powers test.").

"Congress, when creating agencies, is itself constrained—at all times—by the separation of powers." Pet. App. 4a. The nondelegation doctrine requires Congress to articulate an "intelligible principle" when it confers decision making authority upon a federal agency. *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 472 (2001). In order to operate pursuant to a lawful delegation, an agency must adhere to that "intelligible principle." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring).[4]

Here, however, there is a compelling case to be made that "the FHFA, created to stem the tide of a massive financial crisis, has grown into a monster." *Saxton v. Federal Housing Finance Agency*, 901 F.3d 954, 959 (8th Cir. 2018) (Stras, J., concurring). "Congress, intentionally or otherwise, may have created a monster by handing an agency breathtakingly broad powers and insulating the exercise of those powers from judicial review." *Id.* at

[4] *Amicus* takes no position here on whether the "intelligible principle" test is proper or badly in need of reform, only that it is currently the operative test.

963.[5] "[E]ven in a time of exigency, a nation governed by the rule of law cannot transfer broad and unreviewable power to a government entity to do whatsoever it wishes with the assets of these Companies. Moreover, to remain within constitutional parameters, even a less-sweeping delegation of authority would require an explicit and comprehensive framework." *Perry Capital LLC ex rel. Inv. Funds v. Mnuchin*, 864 F.3d 591, 635 (D.C. Cir. 2017) (Brown, J., dissenting).

These concerns are not speculative, as underscored by the government's proposed construction of HERA. *See generally* Br. of the Federal Parties 17–50. As the FHFA would have it, Congress empowered the agency to appoint itself conservator while concurrently—unlike every other conservator—silently releasing the FHFA from any duty to conserve the assets and property. *Cf.* Br. of the Federal Parties 45 ("The common-law restrictions on conservatorships do not preclude the Third Amendment"). That makes absolutely no sense and is patently unconstitutional. "Without the statutory command to 'preserve and conserve' the GSEs' assets and property, the FHFA is left without any intelligible principle to guide its discretion as conservator." Pet. App. 271b (Willett, J., dissenting), *vacated by* 908 F.3d 151 (5th Cir. 2018). That unconstrained reading of the statute would "erase[] any outer limit to FHFA's statutory powers[.]"

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[5] The restrictions on judicial review under HERA, *see, e.g.,* 12 U.S.C. § 4617(f), underscore why the government's construction violates the nondelegation doctrine. *Cf. United States v. Garfinkel,* 29 F.3d 451, 459 (8th Cir. 1994) ("Judicial review is a factor weighing in favor of upholding a statute against a nondelegation challenge.").

Perry Capital, 864 F.3d at 642 (Brown, J., dissenting). The boundless authority the FHFA seeks here to pursue whatever ends it wants—without meaningful judicial review—violates the nondelegation doctrine.

This Court should not "endorse[] FHFA's stunningly broad view of its own power. Plaintiffs—not all innocent and ill-informed investors, to be sure—are betting the rule of law will prevail. In this country, everyone is entitled to win that bet." *Id.* at 635 (Brown, J., dissenting).[6] "[T]he existence of a predictable rule of law has made America's enviable economic progress possible. . . . What might serve in a banana republic will not do in a constitutional one." *Id.* at 647–48.

Accordingly, this Court should reject the FHFA's unconstitutional proposal. "[W]hat Congress has written . . . must be construed with an eye to possible constitutional limitations so as to avoid doubts as to its validity."[7] *United States v. Rumely*, 345 U.S. 41, 45 (1953) (cleaned up). The government's construction of HERA "raise[s] serious constitutional problems," and this Court should "construe the statute to avoid such

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[6] The government itself characterizes HERA as granting the FHFA "unusually sweeping authorities." *See* Br. for the Federal Parties 33.

[7] "Traditionally, the avoidance canon was not a doctrine under which courts read statutes to avoid mere constitutional doubts. Instead, it commanded courts, when faced with two plausible constructions of a statute—one constitutional and the other unconstitutional—to choose the constitutional reading." *Clark v. Suarez Martinez*, 543 U.S. 371, 395 (2005) (Thomas, J., dissenting).

problems" because "an alternative interpretation of the statute" is both reasonable and feasible. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001) (citations omitted). Courts are obligated to construe statutes to avoid constitutional problems if it is fairly possible to do so. *See Boumediene v. Bush*, 553 U.S. 723, 787 (2008); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2600 (2012).

This Court has previously construed statutes to avoid nondelegation problems. *See, e.g., Nat'l Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336, 340–41 (1974) (construing FCC assessment as a "fee" rather than a "tax" to avoid question of whether Congress unconstitutionally delegated taxing power to agency); *Kent v. Dulles*, 357 U.S. 116, 129–30 (1958); *Reynolds v. United States*, 565 U.S. 432, 448–51 (2012) (Scalia, J., dissenting) (applying doctrine of constitutional avoidance to avoid nondelegation problem); *see also* Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 316 (2000) ("Administrative agencies are not permitted to construe federal statutes in such a way as to raise serious constitutional questions; if the constitutional question is substantial, Congress must clearly assert its desire to venture in the disputed terrain."). This Court should follow that approach here and "decline to follow FHFA through the looking glass to a world where conservators need not conserve." Pet. App. 271b (Willett, J., dissenting).

III. THIS COURT SHOULD ADDRESS THE ROOT OF THE SEPARATION-OF-POWERS PROBLEM: *HUMPHREY'S EXECUTOR*.

A. *Stare Decisis* Provides No Cover for *Humphrey's Executor*.

As Plaintiffs explain, *see* Collins Br. 60–61, the FHFA's structure violates the separation of powers. Just last Term, this Court held in *Seila Law* "that the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S. Ct. at 2197. The FHFA's structure is indistinguishable.

But this case, like *Seila Law*, brings the real issue to the surface. "There's an elephant in the room with us today." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). And the elephant is *Humphrey's Executor*. This ornery pachyderm has been lurking in the background too long. And its unwelcome presence should no longer be ignored or otherwise swept under the rug.

The reality is that the mansion of the modern Administrative State is built upon nothing more than constitutional quicksand and wrongly decided precedent. *Humphrey's Executor*, a cornerstone of the Administrative State's shaky and cracked foundation, should not be given *stare decisis* effect merely due to its vintage. "*Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law*, 140 S. Ct. at 2211 (Thomas, J., concurring in part and dissenting in part). "Continued reliance on *Humphrey's Executor* to justify the existence of

independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place . . . political accountability and threatens individual liberty." *Id.* at 2218–19 (Thomas, J., concurring in part and dissenting in part).

After all, as Justice Kagan observed, "agencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019). *Cf. PHH Corp*, 881 F.3d at 164 (Kavanagh, J., dissenting) ("To . . . safeguard liberty, the Framers insisted upon accountability for the exercise of executive power."). But under *Humphrey's*, so-called "independent" agencies are not subject to meaningful supervision by the President and thus lack political accountability for their actions, no matter how right or wrong those actions may be.

This Court should "repudiate what is left of this erroneous precedent."[8] *Seila Law*, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part). Any presumption in favor of *stare decisis* here should be deemed rebutted.[9] *See generally Payne v.*

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[8] As Justice Gorsuch powerfully observed just last Term: "Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1408 (2020).

[9] *See also* Pepson & Sharifi, Lego v. Twomey: *The Improbable Relationship Between an Obscure Supreme Court Decision and Wrongful Convictions*, 47 Am. Crim. L. Rev. 1185, 1245–49 (2010) (discussing *stare decisis* factors). *But cf. Gamble v. United*

Tennessee, 501 U.S. 808, 827–28 (1991). All *stare decisis* factors counsel in favor of overruling *Humphrey's Executor*, and the time has come to relegate that misguided decision to the dustbin of history where it belongs.

As this Court explained last Term, "*stare decisis* isn't supposed to be the art of methodically ignoring what everyone knows to be true. . . . [T]he doctrine is at its weakest when we interpret the Constitution[.]" *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020). As in *Ramos*, history has shown that *Humphrey's Executor* was a "mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time." *Id.* at 1408. When this Court "revisits a precedent this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Id.* at 1405. Each of these factors weigh in favor of jettisoning *Humphrey's in toto* here and now.

"[W]hen governing decisions . . . are badly reasoned, this Court has never felt constrained to follow precedent." *Payne*, 501 U.S. at 827. And "[i]f a prior ruling rests on faulty factual assumptions, . . . a court may jettison that decision." Pepson & Sharifi, 47 Am. Crim. L. Rev. at 1246. *See, e.g., Brown v. Bd. of Educ.*, 347 U.S. 483, 492–93 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), in part, because that

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States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) ("[T]he Court's typical formulation of the stare decisis standard does not comport with our judicial duty under Article III because it elevates demonstrably erroneous decisions . . . over the text of the Constitution[.]").

decision rested on patently false factual assumptions when decided). "A case may be egregiously wrong when decided or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, or both." *Ramos*, 140 S. Ct. at 1415 (Kavanaugh, J., concurring in part) (cleaned up). Such is the case here.

B. *Humphrey's Executor* Was Wrongly Decided on both the Law and the Facts and Should be Overruled.

To begin with, *Humphrey's* was poorly reasoned, and its constitutional holding has only become lonelier with time. *See generally Seila Law*, 140 S. Ct. at 2211–19 (Thomas, J., concurring in part and dissenting in part) (explaining why). "*Humphrey's Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Id.* at 2216 (Thomas, J., concurring in part and dissenting in part). "*Humphrey's Executor* relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of "the executive power vested by the Constitution in the President." *Id.* (Thomas, J., concurring in part and dissenting in part). "The problem is that the [*Humphrey's*] Court's premise was entirely wrong." *Id.* (Thomas, J., concurring in part and dissenting in part). Under our Constitution, Congress does not have the power to create these unconstitutional (and unaccountable) "[f]ree-floating agencies[.]" *Id.* (Thomas, J., concurring in part and dissenting in part). That alone should end the matter.

In addition, *Humphrey's* rested on plainly erroneous factual assumptions as to the nature of FTC. *Humphrey's* "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 140 S. Ct. at 2198 n.2.

The *Humphrey's* Court placed great weight on its view that the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935). In the *Humphrey's* Court's view: "To the extent that . . . [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* at 628. "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body . . . that performed legislative and judicial functions *and was said not to exercise any executive power*." *Seila Law*, 140 S. Ct. at 2199 (emphasis added). *Cf. id.* at 2234 n.7 (Kagan, J., dissenting) ("The majority is quite right that today we view all the activities of administrative agencies as exercises of the executive Power.") (cleaned up). This supposition, as we now know, was mistaken.

Regardless whether such was the case in 1935—at a time when the FTC did not yet have consumer protection authority, let alone independent litigating authority in federal courts—it certainly does not hold true today. "A new empirical study . . . shows that the FTC's predominant mode of law enforcement is through consent decrees, which involve no adjudication, and that the FTC is more prone to sue

in federal district court as a plaintiff than to adjudicate matters administratively in the event there is adjudication. The upshot is that the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was." Daniel Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1839 (2015).

The FTC almost never engages in rulemakings, rarely uses its administrative process to prospectively "develop" the law, and routinely prosecutes companies in federal court seeking money damages—the antithesis of a "quasi-judicial" or "quasi-legislative" function. The FTC agrees, routinely describing itself as "law enforcement" and even the "top cop." For example, a former FTC official described FTC's activities thus: "You often hear the FTC described as America's top cop on the privacy beat. . . . As law enforcers, we walk the walk. . . . FTC law enforcement actions send a message[.]" Thomas Pahl, Acting Director, Bureau of Consumer Protection, FTC, *Your Cop On the Privacy Beat* (Apr. 20, 2017), https://bit.ly/31yok2R. That about sums it up. That is exactly what the FTC does, prosecuting a host of entities and individuals on a regular basis. *See Stats & Data 2017 – Annual Highlights 2017*, Fed. Trade Comm'n, http://bit.ly/2mwz7sj (last visited Nov. 6, 2019). This is an Executive Branch function.

The FTC even has a "*Criminal Liaison Unit* [that] helps prosecutors bring more criminal consumer fraud cases."[10] The FTC *itself*—as opposed to the U.S. Department of Justice (DOJ), which shares some

[10] FTC, Criminal Liaison Unit (emphasis added), https://www.ftc.gov/enforcement/criminal-liaison-unit

enforcement authority with the FTC[11]—has even brought court actions resulting in incarceration. *E.g.*, *FTC v. Cardiff*, No. 18-2104, 2020 U.S. Dist. LEXIS 137800, at *22–24 (C.D. Cal. July 24, 2020) (granting FTC's incarceration request). And, in fact, the FTC *itself* has been appointed as a "special prosecutor" to prosecute a *criminal* contempt action. *FTC v. Am. Nat'l Cellular*, 868 F.2d 315, 322–23 (9th Cir. 1989). This, again, is an Executive Branch function and the antithesis of what Congress and Article III Courts are tasked with doing under the Constitution. It cannot seriously be contended that these activities are in any way, shape, or form "quasi-legislative" or "quasi-judicial." That would blink reality. Instead, such "law enforcement" activities are purely the province of the Executive under Article II.

Indeed, the FTC itself recently highlighted to Congress its "law enforcement work" asking for even more powers:

- "The SAFE WEB Act is an indispensable part of the *FTC's enforcement arsenal*. It provides the Commission with critical *law enforcement* tools[.]"

- "The *FTC's law enforcement* orders prohibit defendants from engaging in further illegal activity, impose other compliance obligations,

[11] The FTC and DOJ share authority to enforce federal antitrust laws. But unlike DOJ, the President cannot rein in the FTC. The FTC's prosecution of Qualcomm is a perfect example, putting the agency at odds with the Executive-controlled agencies. *See FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019). Defendants should not bear the brunt of these agency policy disputes.

and in some cases, ban defendants from engaging in certain businesses altogether."

- "Fighting fraud is a major focus of the *FTC's law enforcement efforts*."

- "Many of the Commission's *law enforcement actions* address scams that target those already struggling with debt and credit issues."

- "The *FTC's most recent law enforcement crackdown*, 'Operation Call It Quits,' included 94 total actions by the FTC and 25 federal, state, and local agencies."

- "Despite the *FTC's vigorous law enforcement program*, however, technological advances continue to permit bad actors to place millions or even billions of calls[.]"

Prepared Statement of the Federal Trade Commission, Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation pp. 5–6, 14–15, 24–25 (Aug. 5, 2020) (emphasis added throughout), https://bit.ly/2G51acn. In fact, this Court is *currently* addressing FTC's claimed law enforcement power to extract money damages in federal court under the guise of equity. *See FTC v. Credit Bureau Ctr., LLC*, No. 19-825 & *AMG Cap. Mgmt., LLC v. FTC*, No. 19-508 (petitions granted).

By its own admission, the FTC identifies why *Humphrey's* should be revisited to protect the separation of powers. "Law enforcement" by the "top cop" prosecuting companies in federal court seeking

money damages for alleged past conduct is not "quasi-judicial" or "quasi-legislative"—it is a core Executive function. *Cf. Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988) ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."); *id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

How can it be that an administrative body that solely has "quasi-legislative, quasi-judicial" authority can blithely claim these law enforcement powers? This state of affairs does not pass the laugh test.

Congress does not bring actions for civil penalties or otherwise shutter or raid businesses, as the FTC routinely does. Nor are Article III Courts in the business of investigating and prosecuting companies. On the other hand, "executive" agencies like DOJ do investigate and prosecute alleged violations of law. The FTC, in practice, is no different.

In short, as Professor Crane has explained:

> At a minimum, the historical record needs to be set straight. The FTC bears little resemblance to the Progressive-technocratic vision enunciated in *Humphrey's Executor*. . . . A century of experience has shown that the FTC's actual practice conforms very little to this vision. It is independent from the President but inclined to the will of Congress, not uniquely expert, and not predominantly legislative or

> adjudicatory. *Rather, its predominant character is that of a law enforcement agency.*

Crane, 83 Geo. Wash. L. Rev. at 1870–71 (emphasis added).

The FTC is not alone. Many other so-called independent agencies (including the CFPB, SEC, CFTC, and others), also revel in their role as "law enforcement" prosecuting companies in federal court seeking civil penalties for allegedly past conduct. This is a far cry from the world in which *Humphrey's* was decided, where the FTC was only empowered to issue purely prospective forward-looking cease-and-desist orders to develop the antitrust law and to use compulsory process in aid of its investigations.

This Court should not allow this profoundly unconstitutional state of affairs to continue any longer and, instead, should repudiate the errors of *Humphrey's Executor* before Congress crafts any other new and unusual "independent agencies." The unconstitutional CFPB and FHFA were bad enough.

Whatever "reliance" interests so-called "independent" agencies purportedly have in the unconstitutional status quo insulating them from all accountability to the political branches and, by extension, the People, pale in comparison with "the reliance the American people place in their constitutionally protected liberties[.]" *Ramos*, 140 S. Ct. at 1408. Judge Henderson of the D.C. Circuit hit the nail on the head: "Effective 1789, we Americans set up government by consent of the governed. Under

the United States Constitution, all of the federal government's power derives from the people. Much of that power has been further delegated to a warren of administrative agencies, making accountability more elusive and more important than ever. . . . But consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches."[12] *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting) (cleaned up). Such is the case here. The People deserve better.

As Justice Thomas noted last Term, in light of this Court's post-*Humphrey's* precedent, including *Seila Law*, "it is not clear what is left of Humphrey's Executor's rationale. But if any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure." *Seila Law*, 140 S. Ct. at 2218 (Thomas, J., concurring in part and dissenting in part). Indeed, in *Seila Law*, this "Court . . . repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 2212 (Thomas, J.,

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[12] As Judge Willet put it:

> No mere tinkerers, the Framers upended things. Three rival branches deriving power from three unrivaled words — "We the People" — inscribed on the parchment in supersize script. In an era of kings and sultans, nothing was more audacious than the Preamble's first three words, a script-flipping declaration that ultimate sovereignty resides not in the government but in the governed.

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concurring in part and dissenting in part). This Court should no longer "giv[e] the veneer of respectability," *Gamble*, 139 S. Ct. at 1981 (Thomas, J., concurring), to *Humphrey's Executor* under the banner of *stare decisis*. Its day has come. There is no good reason to keep up the "quasi-legislative, quasi-judicial" charade any longer. "Nor would enforcing the Constitution's demands spell doom for what some call the 'administrative state.' The separation of powers does not prohibit any particular policy outcome . . . . Instead, it is a procedural guarantee that requires Congress to assemble a social consensus before choosing our nation's course on policy questions[.]" *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

If the People wish to be governed by unelected and unaccountable bureaucrats housed within free-floating extraconstitutional administrative bodies known as "independent" agencies, the U.S. Constitution prescribes the process for revising the Constitution itself. *See* U.S. Const. Art. V. But unless and until that happens, and the People affirmatively consent, the current state of affairs is patently unconstitutional.

CONCLUSION

For these reasons, and those described by the Mr. Collins *et al.*, this Court should set aside and vacate the Third Net Worth Sweep, declare FHFA an unconstitutional administrative body and enjoin any further agency actions, and squarely overrule *Humphrey's Executor*.

Respectfully submitted,

Cynthia Fleming Crawford
Counsel of Record
Michael Pepson
AMERICANS FOR PROSPERITY FOUNDATION
1310 N. Courthouse Road, Ste. 700
Arlington, VA 22201
ccrawford@afphq.org
571-329-2227

Counsel for Amicus Curiae

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