No. 19-422, Vide 19-563

In The
Supreme Court of the United States

PATRICK J. COLLINS, et al.,
Petitioners,

v.

STEVEN T. MNUCHIN, Secretary,
U.S. Department of Treasury, et al.,
Respondents.

STEVEN T. MNUCHIN,
Secretary of the Treasury, et al.,
Petitioners,

v.

PATRICK J. COLLINS, et al.,
Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF COLLINS, ET AL.

ELIZABETH H. SLATTERY
ALISON E. SOMIN
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
ESlattery@pacificlegal.org
ASomin@pacificlegal.org

JEFFREY W. MCCOY
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JMcCoy@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

In 2008, Congress created the Federal Housing Finance Agency (FHFA)—an "independent" agency with sweeping authority over the housing finance system. 12 U.S.C. § 4511(a). Unlike every other independent agency except the Consumer Financial Protection Bureau, FHFA is headed by a single Director who can only be removed for cause by the President and is exempt from the congressional appropriations process. 12 U.S.C. §§ 4512(b)(2), 4516(f)(2). The questions presented are:

1. Whether FHFA's structure violates the separation of powers; and

2. Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Rules

Other Authorities

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, **PACIFIC LEGAL FOUNDATION** is a nonprofit, tax-exempt, California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited Constitutional government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the proper role of administrative agencies within the Constitution's structure. *See, e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States"); *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361 (2018) (agency interpretation of Endangered Species Act).

Many of PLF's clients bring their cases under the Administrative Procedure Act and ask courts to hold

---

[1] Pursuant to this Court's Rule 37.3(a), each party and court-appointed amicus has consented to the filing of this brief. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

unlawful and set aside agency action. *See Weyerhaeuser*, 139 S. Ct. 361. But because courts often sidestep the APA's command to vacate unlawful agency action, many of PLF's clients risk being unable to obtain relief even when they succeed on the merits of their claims. *See New Mexico Farm & Livestock Bureau v. U.S. Dep't of Interior*, 952 F.3d 1216 (10th Cir. 2020) (Holding that designation of critical habitat was arbitrary and capricious and remanding to determine proper remedy.).

This case raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its vested powers. PLF offers a discussion of first principles of the Constitution and how courts should remedy violations of the Constitution's structure.

INTRODUCTION AND SUMMARY OF ARGUMENT

The "principle of separation of powers" is "the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). The Constitution "protect[s] the liberty and security of the governed[,]" by dividing federal power among three branches of government. *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991).

The separation of powers also protects liberty by ensuring political accountability. Executive power is vested with the President, who must "take Care that the Laws be faithfully executed …." U.S. Const. art. II. Executive agencies thus "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) (opinion of Kagan, J.).

The Federal Housing Finance Agency (FHFA) upends this constitutional structure. Not only does the agency exercise great regulatory power, but as an "independent" agency the Director is not accountable to the President. Just last term, this Court struck down a for-cause removal restriction that insulated the Director of the Consumer Finance Protection Bureau from presidential control. *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2211 (2020). *Seila Law*'s holding applies with equal force to the FHFA. But this Court should take an additional step that it did not take in *Seila Law*, and overturn *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), so Congress may never again insulate independent agencies from presidential control.

This Court should also vacate the FHFA's decision imposing the Net Worth Sweep. Vacatur is mandated by section 706 of the Administrative Procedure Act, which requires that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity …." 5 U.S.C. § 706(2)(A), (2)(B). Treasury argues that this command is limited by two other provisions in the APA, namely the "prejudicial error" rule in Section 706 and statutory language in Section 702. *See Collins v. Mnuchin*, No. 19-422, Brief for the Respondents in Opposition to Petition for Writ of Certiorari at 20, 22 (U.S. Oct. 30, 2019). The prejudicial error rule, however, does not apply to violations of structural constitutional provisions.

Section 702 is similarly irrelevant. The alleged relevant language of 702 was adopted in 1976 and did not alter the meaning of Section 706. Therefore, under the APA, this Court must vacate the Net Worth Sweep.

Additionally, vacating the Net Worth Sweep is the only remedy that conforms to the judiciary's power under Article III. To have a case or controversy, the plaintiffs must show that they have an injury that the court can redress. But the Fifth Circuit left the shareholders in the peculiar position of winning their case, but not securing any relief.

ARGUMENT

I.

THE STRUCTURE OF THE FEDERAL HOUSING FINANCE AGENCY VIOLATES CONSTITUTIONAL SEPARATION OF POWERS

Last term, this Court held that an almost identical agency to the FHFA violated the Constitution's structure because the President could only remove the head of that agency for cause. *Seila Law*, 140 S. Ct. at 2211. In reaching that decision, this Court limited its precedent in *Humphrey's Executor* to its facts as the Court described them in 1935—that a bipartisan, multi-member commission that does not exercise substantial executive power may enjoy some tenure protection. 140 S. Ct. at 2199. *Seila Law* was just the latest in this Court's rulings that have, over the court of three decades, eroded the foundation of *Humphrey's Executor*.

Seila Law not only answers the constitutional question here, it strongly counsels in favor of overturning *Humphrey's*. The Court made clear in *Seila Law* that *Humphrey's* is inconsistent with the original meaning of the Constitution, out of step with this Court's other cases, and based on false premises. *See* 140 S. Ct. at 2206; *id*. at 2217 (Thomas, J., concurring in part and dissenting in part). Yet in *Seila Law*, the Court declined to overturn *Humphrey's* because, unlike in this case, no party asked it to. *Id.* at 2206. This case presents the Court with an opportunity to correct a mistake that has been on the books for over eight decades. The Court should take that opportunity.

A. "Independent Agencies" That Exercise Executive Power May Not Be Insulated from Presidential Control.

Congress may designate agencies as "independent" for various statutory purposes that are convenient to Congress, but such a designation does not change the constitutional rules for agencies exercising executive power. *See Mistretta v. United States*, 488 U.S. 361, 422–23 (1989) (Scalia, J., dissenting) ("Congress can divide up the Government any way it wishes, and employ whatever terminology it desires, for *non* constitutional purposes …. [T]he Court must therefore decide for itself where [an agency] is located for purposes of separation-of-powers analysis."). Independent agencies that exercise executive power are part of the Executive Branch even if they also exercise some powers that are thought to be quasi-legislative and quasi-judicial. *See City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (While

"[a]gencies make rules … and conduct adjudications … [and] [t]hese activities take 'legislative' and 'judicial' forms … under our constitutional structure they *must* be exercises of … the 'executive Power.'"). The FHFA is no exception, as its director wields far-reaching executive enforcement authority over our Nation's housing finance system. *See, e.g.*, 12 U.S.C. § 4617(a) (authorizing FHFA to appoint itself conservator of Fannie Mae and Freddie Mac); § 4631(a)(1) and § 4636 (granting authority to bring charges against regulated entities for unsound practices or violating the law; and impose penalties). Yet Congress wrongly insulated the FHFA from presidential control by giving its sole director a five-year term and allowing only "for cause" removal by the President. § 4512(b)(2). *See Seila Law*, 140 S. Ct. at 2207 ("[V]arious 'bureaucratic minutiae' a President might use to corral agency personnel is no substitute for at will removal.").

Article II of the Constitution vests "[t]he executive Power[,]" § 1, cl. 1, in the President along with the duty to "take Care that the Laws be faithfully executed," § 3. The President may enlist the assistance of others in carrying out this duty and "remov[e] those for whom he cannot continue to be responsible." *Myers v. United States*, 272 U.S. 52, 117 (1926) (citing Fisher Ames, 1 Annals of Congress, 474). While not explicitly mentioned in the Constitution, the Court has repeatedly held that this removal power is central to the President's ability to "control[ ] those who execute the laws," *Seila Law*, 140 S. Ct. at 2197 (citation omitted), because ultimately "[t]he buck stops with the President." *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*,

561 U.S. 477, 493 (2010); *see also Loving v. United States*, 517 U.S. 748, 757–58 (1996) ("The clear assignment of power to a branch … allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance."). It is also "incident" to the President's power to appoint executive officers under Article II, section 2. *Myers*, 272 U.S. at 119.

The President's removal power was understood as nearly illimitable from 1789 when the First Congress debated and recognized it until 1935 when the Court decided *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Since the ruling in *Humphrey's Executor*, however, it has become less clear where the buck stops. Congress has shifted legislative, executive, and judicial power to "independent" agencies and attempted to insulate agency officials from presidential control with tenure protections and other means. The resulting concentration of power—"the very definition of tyranny," according to James Madison, *The Federalist No. 47*, at 324 (J. Cooke ed. 1961)—without accountability to the President or the people, blurs the lines of responsibility and "pos[es] a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). The Court's ruling in *Humphrey's Executor* partially blessed this approach, leading to a "more pragmatic" and "flexible" view of the separation of powers when it is "convenient to permit the powers to be mixed." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 115–16 (2015) (Thomas, J., concurring in judgment). The resulting "headless fourth branch of government" leaves the

people with no meaningful way to hold government responsible for its actions. *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting).

Thus, the "constitutional strategy is straightforward …." *Seila Law*, 140 S. Ct. at 2203. It divides power "everywhere except for the Presidency, and render[s] the President directly accountable to the people through regular elections." *Id.* And while some executive officials "will still wield significant authority" that authority is overseen by the elected President. *Id.* But the FHFA upends the constitutional strategy. This Court should hold, like *Seila Law* just last term, that the FHFA director may not be insulated from presidential control with tenure protections.

B. The Court Should Overturn *Humphrey's Executor* to Ensure Agencies Are Not Insulated from Presidential Control.

Between the Court's rulings in *Myers* in 1926 and *Humphrey's Executor* in 1935, Congress did not create any agencies insulated from presidential control. Although Congress set up several commissions that bear the hallmark of an "independent" agency (*e.g.*, multi-headed, staggered-term, bipartisan commissions such as the Federal Radio Commission, the Federal Power Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Bituminous Coal Commission), all were subject to removal by the President. This Court's ruling in *Humphrey's Executor* in 1935 paved the way for Congress to create scores of agencies within the Executive Branch unshackled from presidential control.

Humphrey's Executor rested on a flawed premise, and the time has come for this Court to repudiate it. In considering a challenge to the president's ability to remove members of the Federal Trade Commission (FTC), the Court in *Humphrey's Executor* distinguished the purportedly "quasi-legislative" and "quasi-judicial" FTC from "purely executive officers" in order to depart from its earlier ruling in *Myers* recognizing the President's illimitable power to remove executive officers. The Court's reasoning in 1935 was flawed for at least two reasons.

First, though the three branches of government are not "'hermetically' sealed from one another," the Constitution "sought to divide the delegated powers of the new federal government into three defined categories" to ensure that "each Branch of government would confine itself to its assigned responsibility." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (citation omitted); *see also The Federalist No. 51*, at 349 (James Madison) ("[T]he members of each department should be as little dependent as possible on those of the others …. Ambition must be made to counteract ambition."). In other words, the Framers' "solution to governmental power and its perils was simple: divide it." *Seila Law*, 140 S. Ct. at 2202. While the Constitution identifies few exceptions to the general grants of power to each branch (*e.g.*, art. I, § 7 gives the President a role in the legislative process and art. II, § 2, cl. 2 gives the Senate a role in presidential appointments), the branches do not share powers given to the others. *See Stern v. Marshall*, 564 U.S. 462, 483 (2011) (The "'"judicial Power of the United States" … can no more be shared' with another branch than 'the Chief Executive, for example, can share with

the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential vote.'" (quoting *United States v. Nixon*, 418 U.S. 683, 704 (1974)). When an agency promulgates rules and adjudicates claims—activities that may "take 'legislative' and 'judicial' forms"—they are, nevertheless, exercising executive power. *City of Arlington*, 569 U.S. at 304 n.4. Thus, there are not "quasi-legislative" and "quasi-judicial" powers or agencies. *See Seila Law*, 140 S. Ct. at 2202 (citing *Chadha*, 462 U.S. at 951).

Second, the Court has repeatedly recognized that the *Humphrey* Court mischaracterized the power exercised by the FTC as "quasi-legislative" and "quasi-judicial" when, in fact, it exercised core executive power by administering the federal trade laws. *Seila Law*, 140 S. Ct. at 2198 n.2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); *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."); *Bowsher v. Synar*, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting) ("[I]t is clear that the FTC's power to enforce and give content to the [FTC] Act's proscription of 'unfair' acts and practices … is in fact 'executive[.]'"). The *Humphrey's* Court recast the FTC as "wholly disconnected from the executive department" to justify protecting its independence from "the control or coercive influence" of the President. *Humphrey's Executor*, 295 U.S. at 629–30. Congress cannot insulate agencies that exercise executive power from presidential control, and the

Court should not call such agencies "quasi-legislative" or "quasi-judicial" to "validate their functions within the separation-of-powers scheme[,]" *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting). After all, the "mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed." *Id.*

Through a series of rulings, the Court has eroded the foundation of *Humphrey's Executor* to the point that little remains. *See Seila Law*, 140 S. Ct. at 2199; *id.* at 2218 (Thomas, J., concurring and dissenting). The Court in *Morrison v. Olson* rejected its earlier reliance on "rigid categories of those officials who may or may not be removed at will by the President[,]" instead focusing on whether Congress has "interfere[d] with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed[.]'" 487 U.S. at 689–90. Then in *Free Enterprise Fund v. PCAOB*, the Court confirmed the "settled and well understood construction of the Constitution" that the President has the power to remove executive officers. 561 U.S. at 492 (citation omitted). The Court found that insulating from presidential removal officers who "determine[ ] the policy and enforce[ ] the laws of the United States" is "contrary to Article II's vesting of the executive power in the President." *Id.* at 484.

Most recently, in *Seila Law*, the Court limited *Humphrey's Executor* to its facts as the Court

described them in 1935—that a bipartisan, multi-member commission that does not exercise substantial executive power may enjoy some tenure protection. 140 S. Ct. at 2199. These rulings over the course of three decades show the "foundation for *Humphrey's Executor* is not just shaky. It is nonexistent." *Id.* at 2217 (Thomas, J., concurring in part and dissenting in part). The Court should repudiate the ruling that laid the groundwork for the modern administrative state that skirts the carefully delineated separation of powers.

C. *Stare Decisis* Does Not Justify Maintaining *Humphrey's Executor*.

Adhering to precedent is "a foundation stone of the rule of law," *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 798 (2014), but it is "not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). Indeed, *stare decisis* is "at its weakest" when the Court is called upon to interpret the Constitution because, unless the Court acts, its decisions may be "altered only by constitutional amendment." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). The Court has identified several factors to guide its decision to uphold or overturn a past decision, such as "the quality of [its] reasoning, … its consistency with other related decisions, [and] developments since the decision was handed down[.]" *Janus v. American Fed'n of State, County, and Mun. Emps., Council 31*, 138 S. Ct. 2448, 2478–79 (2018). Several factors support overturning *Humphrey's Executor*.

First, the reasoning of *Humphrey's Executor* was "exceptionally ill founded," *Knick v. Township of Scott*,

139 S. Ct. 2162, 2178 (2019), and inconsistent with Founding Era debates about the Constitution's text and original meaning, as well as earlier controlling precedent. *See* 140 S. Ct. at 2206; *id*. at 2217 (Thomas, J., concurring in part and dissenting in part). As discussed in Section I-B, the Court ground *Humphrey's Executor* on the flawed premise that the Constitution permits the creation of independent agencies that exercise legislative, executive, and judicial powers and enjoy insulation from presidential control. The Framers of the Constitution debated the structure of government, settling on one with enumerated and divided powers and accountability to the people. A key component of accountability was vesting the executive power in a single President who is accountable the people. *See The Federalist No. 70*, at 474 (Alexander Hamilton) (arguing that plurality "tends to conceal faults and destroy responsibility").

The Constitution contemplated the need for presidential assistants. *See Myers*, 272 U.S. at 117 ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."). When the first Congress created the first executive departments, it recognized that the President's ability to control his subordinates necessarily includes the ability to remove them. James Madison explained that this conclusion (known as the Decision of 1789) was "most consonant to the text of the Constitution" and that since the removal power was not "expressly taken away, it remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004). The Decision of 1789 "provides contemporaneous and

weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher*, 478 U.S. at 723–24 (citation and quotation marks omitted).

The Court reaffirmed this principle in *Myers*. Examining the congressional debates leading up to the Decision of 1789, historical practice, earlier rulings, and the views of the Framers, the Court concluded that Article II's grant of "the executive power" to the President includes "the general administrative control of those executing the laws, including the power of appointment and removal of executive officers." *Myers*, 272 U.S. at 163–64.

Second, through a series of rulings, the Court has eroded the foundation of *Humphrey's Executor* in favor of the rule in *Myers*. In *Seila Law*, this Court stated that "[r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" 140 S. Ct. at 2198 (quoting *Humphrey's Executor*, 295 U.S. at 628). But the *Humphrey* Court's view was wrong. As explained in section I-B, this Court has been steadily retreating from the reasoning of *Humphrey's* for decades. Thus, in *Morrison* the Court disavowed its reliance on a purported "quasi-legislative" and "quasi-judicial" power when it upheld the constitutionality of the independent counsel statute. 487 U.S. at 689. Then the Court reaffirmed the principle that the Constitution empowers the President to remove officers as a means of accountability in *Free Enterprise Fund*. 561 U.S. at 492. And just last term, the Court limited *Humphrey's Executor* to its facts (as characterized in 1935)—that some tenure protection

is permissible for a bipartisan, multi-member commission that does not exercise core executive power. *Seila Law*, 140 S. Ct. at 2199. But the FTC of 1935 flunked even this standard. Thus, so little remains of *Humphrey's Executor* that it cannot "justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure." *Id*. at 2218 (Thomas, J., concurring in part and dissenting in part).

Third, developments since the Court decided *Humphrey's Executor* support repudiating it. The decision in *Humphrey's Executor* reflected an early 20th century philosophy that is at odds with the Constitution—that apolitical, "educated, trained, expert administrators could fashion scientific solutions to any public policy problem." Paul J. Larkin, Jr. & Elizabeth H. Slattery, *The World After* Seminole Rock *and* Auer, 42 Harv. J.L. & Pub. Pol'y 625, 636 (2019). In reality, the ever-expanding regulatory state "aggrandize[s]" power and "diminish[es] presidential authority." Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 115 (1994). While the Court abandoned the notion of a "quasi-legislative" and "quasi-judicial" power after *Morrison*, Congress has created a Leviathan "which now wields vast power and touches almost every aspect of daily life, heighten[ing] the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund*, 561 U.S. at 499. More than 450 federal agencies churn out "'reams of regulations'" that "dwarf the statutes enacted by Congress" while enjoying limited oversight from

Congress, the President, and the courts. *Kisor v. Wilkie*, 139 S. Ct. at 2446–47 (Gorsuch, J., concurring in judgment).

This combination of "expert knowledge and consolidated power … hark[s] back to the medieval monarchical vision of a wise ruler, who knows what is best for his people, and who therefore must have the full range of unspecialized power to impose justice." Philip Hamburger, *Is Administrative Law Unlawful?* 344 (2014). While "[o]ne can have a government … that benefits from expertise without being ruled by experts[,]" *Free Enterprise Fund*, 561 U.S. at 499, continuing to rely on *Humphrey's Executor* to bolster the very existence of independent agencies "creates a serious, ongoing threat to our Government's design" that "subverts political accountability and threatens individual liberty." *Seila Law*, 140 U.S. at 2219 (Thomas, J., concurring in part and dissenting in part).

II.

THIS COURT SHOULD SET ASIDE THE NET WORTH SWEEP

The only proper remedy for the constitutional violations in this case is to vacate the Net Worth Sweep. The Fifth Circuit's remedy—effectively blue-penciling the statute to make the FHFA's director removable at will by the President—is inconsistent with the text of the Administrative Procedure Act and with the nature of judicial power under the Constitution. The Fifth Circuit left the shareholders in the peculiar position of winning their case, but not securing any relief. By contrast, vacating the net

worth sweep would vindicate constitutional separation of powers principles and incentivize Congress and agencies to act consistently with the Constitution.

A. The Administrative Procedure Act Directs Courts to Vacate Unconstitutional Agency Action.

1. Under Section 706 of the APA, a court "shall … hold unlawful and set aside" unconstitutional and illegal agency action.

Below, The Fifth Circuit did not set aside the Net Worth Sweep, and instead only severed the Housing and Economic Recovery Act's for cause removal provision. *Collins v. Mnuchin*, 938 F.3d 553, 592–95 (5th Cir. 2019) (en banc). In doing so, the court ignored section 706 of the APA, which requires courts to set aside agency action that are contrary to the Constitution. 5 U.S.C. § 706(2)(A), (2)(B). As the Fifth Circuit properly concluded, the FHFA's structure is unconstitutional. Under the APA, when an agency violates the constitution, a court must set aside its unlawful actions.

Section 706 of the APA states that a "reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be ... not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity …." 5 U.S.C. § 706(2)(A), (2)(B). "Shall" is a command. *Murphy v. Smith*, 138 S. Ct. 784, 787 (2018). "Set aside" means vacate. *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) ("To 'vacate,' … means

'to annul; to cancel …; to set aside."); *Nunez v. United States*, 554 U.S. 911 (2008) (Scalia, J., dissenting from GVR order) ("In my view we have no power to set aside (vacate) another court's judgment unless we find it to be in error."). Therefore, the APA clearly directs how courts should remedy unconstitutional agency action.

The legislative history confirms the meaning of Section 706. Prior to the adoption of the APA in 1946, Congress passed several statutes authorizing lawsuits to set aside orders adopted by certain agencies. *See* Urgent Deficiencies Act of 1913, 32 Stat. 208, 219 (1913); Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064, 1093 (1934). This Court interpreted those statutes to authorize courts to set aside regulations in addition to orders from those agencies. *See Columbia Broad. Sys. v. United States*, 316 U.S. 407, 421–22 (1942). Thus, when Congress passed the APA, the practice of courts vacating unlawful agency action was well established. *See id.*; *see also United States v. Baltimore & O. R. Co.*, 293 U.S. 454, 458 (1935); *Am. Tel. & Tel. Co. v. United States*, 299 U.S. 232, 235 (1936).

With the passage of the APA, Congress intended to codify and unify administrative procedure and judicial review of that procedure. Pub. L. No. 79-404, 60 Stat. 237, 237 (1946) ("AN ACT To improve the administration of justice by prescribing fair administrative procedure."). In the words of Representative Francis Walter, the leading sponsor of the APA in the House, the APA contains "a comprehensive statement of the right, mechanics, and scope of judicial review" of agency actions. 92 Cong. Rec. 5654 (1946). This included mandating when a

court must vacate agency action. 5 U.S.C. § 706; *see* Evan D. Bernick, *Envisioning Administrative Procedure Act Originalism*, 70 Admin. L. Rev. 807, 855 (2018).

Section 706 explicitly states how a court should conduct its review of agency action. It lays out the scope of review for judges and how courts should act when an agency violates the law. In short, "[t]he Administrative Procedure Act states this in the clearest possible terms" that a court "'shall'—**not may**—'hold unlawful and set aside'" illegal agency action. *Checkosky v. S.E.C.*, 23 F.3d 452, 491 (D.C. Cir. 1994) (Randolph, J., concurring) (quoting 5 U.S.C. § 706(2)(A)). "Setting aside means vacating; no other meaning is apparent." *Id.*

2. Section 706 limits a courts' equitable discretion in granting relief.

By not vacating the Net Worth Sweep, the Fifth Circuit implicitly accepted Treasury's argument that when a court holds unlawful agency action, vacatur is not mandatory but subject to equitable remedial authority. *See Collins*, 938 F.3d at 592–93 (en banc); *id.* at 628 (Willett, J., dissenting) (stating and disagreeing with Treasury's argument). But by directing courts to set aside unlawful agency action, the text of Section 706 limits a court's equitable discretion in granting relief. Under the Constitution, principles of equity "take a court only so far" because Congress can override those principles through legislation. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). Section 706 is a clear statement on how courts should conduct their judicial review of

agency action. *See Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).[2]

To the extent that Section 706 preserves a court's equitable discretion in granting relief, the extent of that discretion is determined by the nature of the relief. In *Columbia Broadcasting System*, this Court stated that a proceeding to set aside agency action was a "plenary suit in equity." 316 U.S. at 415. But there is a distinction between a plenary suit in equity to vacate and a suit to enjoin an action. *See* Comment, *The Value of the Distinction Between Direct and Collateral Attacks on Judgments*, 66 Yale L.J. 526, 531 (1957).

Vacating agency action is a "less drastic remedy" than the "extraordinary relief of an injunction …." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165–66 (2010). A plaintiff does not need to prove the elements of an injunction before a court can vacate an unlawful agency action. *Id.*[3] Therefore, a court has less discretion for granting relief in actions seeking to vacate an unlawful agency action than in actions

---

[2] As the Fifth Circuit correctly held, HERA's anti-injunction provision does not apply in this case. *Collins*, 938 F.3d at 569–572. Therefore, HERA's judicial review provisions do not supplant the APA's judicial review provisions.

[3] Despite this Court's decision in *Monsanto*, some lower courts still treat vacatur as a form of injunctive relief. S*ee WildEarth Guardians v. U.S. Bureau of Land Mgmt.*, 870 F.3d 1222, 1239 (10th Cir. 2017) ("Vacatur of agency action is a common, and often appropriate form of injunctive relief granted by district courts.").

seeking to enjoin an agency from taking some action. *See id.*

In his partial dissent below, Judge Willett recognized that setting aside agency action is not enjoining the agency, and instead compared the remedy to revoking a contract. *Collins*, 938 F.3d at 629 (Willett, J., dissenting). Although Judge Willett is correct that vacating agency action is not an injunction, his characterization of the remedy does not fully encompass the nature of an APA action and the relief mandated by Section 706.

Setting aside agency action is most like an appellate court vacating a district court judgment. Under the APA, courts often treat review of agency action as an appeal from the agency's decision. *Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994). Indeed, in cases challenging final agency action, agencies often request that the court "affirm" their decisions, like they would on appeal. *See Alexander v. Merit Sys. Prot. Bd.*, 165 F.3d 474, 480 (6th Cir. 1999) (district court granted agency's "motion to affirm"); *Williams Int'l Corp. v. Lehman*, No. 84-1122, 1984 WL 3227, at *3 (D.D.C. Nov. 6, 1984) ("The defendant has filed a cross motion for summary judgment (styled Motion to Affirm Agency Decision).").[4]

[4] While it may be appropriate for courts deciding questions of law to treat review of agency action as an appeal, an appellate approach to review of an agency's factual determinations raises significant due process concerns. Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 Geo. J. L. & Pub. Pol'y 27, 28 (2018).

An appellate court has limited discretion to not vacate or reverse an unlawful district court judgment. *See Kotteakos v. United States*, 328 U.S. 750, 757 n.9 (1946) (explaining harmless error rule). Likewise, a court has limited discretion to not vacate an unlawful agency action. 5 U.S.C. § 706 ("[D]ue account shall be taken of the rule of prejudicial error."). The harmless error rule and the APA's prejudicial error are not the same. *See* Section II-A-3, *infra*. Under both, however, a court may refuse to vacate an unlawful order only in rare cases. *See Gerber v. Norton*, 294 F.3d 173, 184 (D.C. Cir. 2002). This is not one of those rare cases.

3. Section 706's prejudicial error rule does not apply to violations of structural constitutional protections.

In its response to the Petition for Writ of Certiorari, Treasury argues that Section 706's prejudicial error rule means that a court is not required to vacate unconstitutional agency action. *See Collins v. Mnuchin*, No. 19-422, Brief for the Respondents in Opposition to Petition for Writ of Certiorari at 20. Treasury reads too much into the APA's prejudicial error rule. The rule applies only in rare cases, and does not apply to violations of the Constitution's structure.

Section 706 provides that, in reviewing final agency action, "due account shall be taken of the rule of prejudicial error." 5 U.S.C. § 706. By the time the APA was adopted, courts had articulated the harmless error standard. *Meeker v. Lehigh Valley R.R. Co.*, 236 U.S. 434, 439 (1915). Congress chose not to use the term "harmless error" in the APA, however, indicating that the APA's standard is distinct from the

traditional harmless error standard. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) ("[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning.").

In his floor statement on the APA, Representative Walter described the prejudicial error standard as: "where error has been fully cured prior to the effective date of agency action, the courts may apply the rule respecting nonprejudicial error." 92 Cong. Rec. 5654 (1946). The Senate Report reflects the same meaning, stating that prejudicial error is "a procedural omission which has been cured by affording the party the procedure to which he was originally entitled …." S. Rep. No. 79-752 (1945), *reprinted at* S. Doc. 79-248, at 214.

Unlike the requirement that a court "shall ... hold unlawful and set aside" unlawful agency action, Congress only stated that a court should take "due account" of prejudicial error. 5 U.S.C. § 706. "Due account" is not a requirement. *See* Raoul Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 161–62 (1967). Therefore, the text and history of the APA indicate that the APA's prejudicial error rule is different than the harmless error standard, and that the prejudicial error rule rarely applies.

Despite the language of the APA, this Court has stated that the APA's prejudicial error rule codifies the harmless error doctrine. *See Shinseki v. Sanders*,

556 U.S. 396, 406–07 (2009).[5] Even if the APA's prejudicial error rule is the same as the harmless error standard, however, the constitutional violation in this case is not harmless.

The executive vesting, Take Care, and Appointments Clauses are structural constitutional protections. *See Freytag*, 501 U.S. at 878–79 (discussing Appointments Clause). As such, their violation belongs to a "limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards.'" *Neder v. United States*, 527 U.S. 1, 7 (1999) (citation omitted). As this Court recently explained, many constitutional violations are "not amenable to that kind of [harmless error] analysis" because "the precise 'effect of the violation cannot be ascertained.'" *Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (citation omitted); *accord Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (Appointments Clause violations should be subject to automatic reversal because "it will often be difficult or impossible" to show the violation "played a causal role."). Accordingly, violations of structural constitutional protections "are so intrinsically harmful as to require automatic reversal ... without regard to their effect on the outcome." *Neder*, 527 U.S. at 7; *accord Landry*, 204 F.3d at 1131.

---

[5] In *Shinseki*, this Court cited the 1947 Attorney General's Manual on the APA to conclude that the APA's prejudicial error rule codifies the harmless error standard. 556 U.S. at 406. The House and Senate Reports, however, directly contradict the Attorney General's interpretation of the APA's prejudicial error rule. *See* Berger, *supra*, at 162.

Finally, because violations of structural constitutional protections are so harmful, they cannot be later remedied by ratification by an official removable at will. "[I]f an unconstitutional removal protection breaks the 'chain of dependence' between the officer and the President, the delegation breaks down too." *Collins*, 938 F.3d at 628 (Willett, J., dissenting) (quoting *Free Enter. Fund*, 561 U.S. at 498). Therefore, an unconstitutionally-insulated officer lacks authority to act. *Id.*

After-the-fact ratification does not provide the same process to regulated parties as adoption of a regulation by an official who has always been politically accountable. Status quo bias—especially within large government bureaucracies—is strong. *See* William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. Risk & Uncertainty 7 (1988). The succeeding official has a strong incentive to ratify the earlier decision, even if that same decision would never have been made by an official facing removal. This bias affects the ratification process, guaranteeing a different process than if the constitutionally-insulated officer was present from the beginning. Under Section 706 of the APA, this Court must vacate the Net Worth Sweep.

4. Section 702 of the APA speaks to justiciability and does not alter the meaning of Section 706.

Treasury also argues that Section 702 of the APA limits the meaning of Section 706. *See Collins v. Mnuchin*, No. 19-422, Brief for the Respondents in Opposition to Petition for Writ of Certiorari at 22. Specifically, Treasury relies on language added in

1976 to argue that courts retain broad equitable discretion in crafting relief under the APA. *Id.* The 1976 Amendment, however, did not alter Section 706 command that a court shall hold unlawful and set aside unconstitutional agency action.

In 1976, Congress amended Section 702 the APA to add an express waiver of sovereign immunity to the Act. Pub. L. No. 94-574, 90 Stat. 2721 (1976), *codified at* 5 U.S.C. § 702. That waiver provides: "An action in a court of the United States seeking relief other than money damages … shall not be dismissed nor relief therein be denied on the ground that it is against the United States …." *Id.*[6] The amendment also included a saving clause that states in part: "Nothing herein" "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground …." *Id.*

The saving clause of 702 does not alter Section 706's command that a court set aside unconstitutional agency action. The meaning of the saving clause, like all statutory text, "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). All three demonstrate that the 1976 amendment did not alter the meaning of Section 706.

Section 702 is titled "Right of review" and creates a cause of action under the APA. Specifically, the

---

[6] In 1966, Congress codified the APA at title 5 of the U.S. Code, but made no substantive changes to the text. Pub. L. No. 89-554, 80 Stat. 378 (1966).

section states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Prior to 1976, that was the entirety of the section.

Unfortunately, prior to the 1976 amendment, "three technical barriers" prevented many plaintiffs from bringing lawsuits under the APA. H.R. Rep. No. 94-1656, at 3, *reprinted* at 1976 U.S.C.C.A.N. 6121, 6123; *see also* S. Rep. No. 94-996, at 2 (1976). Specifically, sovereign immunity, a minimum $10,000 amount in controversy requirement, and requirements about who to name as the defendant made it difficult for those looking to challenge illegal agency action. H.R. Rep. No. 94-1656, at 2, 1976 U.S.C.C.A.N. at 6123. The 1976 Amendment removed these barriers. *Id.* at 3.

The saving clause was included to preserve "other limitations on judicial review—such as that plaintiff lacks standing to challenge the agency action, that the action is not ripe for review, or that the action is committed to unreviewable agency discretion." H.R. Rep. No. 94-1656, at 3, 1976 U.S.C.C.A.N. at 6123; S. Rep. No. 94-996, at 2. Similarly, the saving clause makes clear that the 1976 Amendment does not "confer authority to grant relief where another statute provides a form of relief which is expressly or impliedly exclusive." *Id.* Thus, the saving clause preserves a court's equitable discretion concerning the justiciability of a case.

The 1976 Amendment, however, did not amend Section 706. To accept that the Amendment altered

Section 706's command to set aside agency action would violate the "cardinal rule ... that repeals by implication are not favored." *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936). Indeed, the requirement that a court set aside unlawful agency action remains codified at Section 706. Senator Kennedy, the chief sponsor of the 1976 amendment, repeatedly made statements that the 1976 Amendment would not change the meaning of Section 706. *See Sovereign Immunity: Hearing Before the Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary*, 91st Cong. 2 (June 3, 1970); 122 Cong. Rec. 22011 (July 1, 1976).

With Section 706, Congress limited a court's equitable discretion in granting relief for unlawful agency action. It commands courts to set aside unconstitutional agency action. The 1976 Amendment did not change the meaning of Section 706, and Section 702 is irrelevant to the question of whether to vacate the Net Worth Sweep.

B. The Fifth Circuit's Remedy Is Inconsistent with the Nature of the Judicial Power Under the Constitution.

In addition to the statutory reasons for vacating the Net Worth Sweep, vacatur is the only remedy that conforms to the judiciary's power under Article III. Article III of the Constitution vests federal courts with the power to adjudicate particularized disputes between identifiable parties. U.S. Const. art. III, §§ 1, 2. This power does not normally extend to resolving broad policy disputes or disagreements. Under the constitutional system "'courts are not roving commissions assigned to pass judgment on the

validity of the Nation's laws.'" *Collins*, 938 F.3d at 609 (Oldham and Ho, JJ., concurring and dissenting) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 610–11 (1973)). Rather, "[c]onstitutional judgments, as Mr. Chief Justice Marshall recognized, are justified only out of the necessity of adjudicating rights in particular cases between the litigants brought before the Court …." *Broadrick*, 413 U.S. at 611 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803)). Within this longstanding tradition, remedies "operate with respect to specific parties" and "not ... on legal rules in the abstract." John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 85 (2014).

To that end, Article III grants judicial power only over cases and controversies. U.S. Const. art. III, § 1. For there to be a case or controversy, plaintiffs must establish that they have an injury that can be redressed by the court. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). But the Fifth Circuit's remedy failed to redress the shareholders' injuries because "[i]n a case seeking redress for past harms such as this one, prospective relief is no relief at all." *Collins*, 938 F.3d at 609–10 (Oldham and Ho, JJ., concurring and dissenting) (citing *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018)).

The power of the Judiciary is the power to enter judgments in cases. And in reaching those judgments, it is a court's duty "to declare all acts contrary to the manifest tenor of the Constitution void." *The Federalist No. 78*, at 524 (Alexander Hamilton). This authority derives from the Constitution's status as fundamental law and from judges' obligation "to

regulate their decisions by the fundamental laws, rather than by those which are not fundamental." *Id.*; *see also* Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 755–56 (2010).

Hamilton described the practice of refusing to enforce an unconstitutional action as an "exercise of judicial discretion in determining between two contradictory laws." Courts ought to determine the meaning of each, and "[i]f there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred." *The Federalist No. 78*, at 525 (Alexander Hamilton). Courts should attempt to reconcile seemingly contradictory laws. But when that is not possible, they should "give effect to one, in exclusion of the other." *Id.*

As demonstrated above, the FHFA's for-cause removal provision conflicts with the Constitution's executive vesting, Take Care, and Appointments Clauses. In turn, the regulations adopted by the FHFA, including the Net Worth Sweep, conflict with the executive vesting, Take Care, and Appointments Clauses. In this conflict, the higher law—the Constitution—controls. The proper remedy is thus vacatur of the Net Worth Sweep.

Furthermore, the Fifth Circuit's remedy of only severing the for-cause removal provision from HERA, and not granting any other relief, undermines the constitutional structure. "[T]he doctrine of separation of powers" is a "prophylactic device" meant to "establish[] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Plaut v.*

Spendthrift Farm, Inc., 514 U.S. 211, 239 (1995). To protect that purpose, remedies for violations of the Constitution's structure must create incentives to raise those types of claims. *See Lucia*, 138 S. Ct. at 2054 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

If plaintiffs have no incentive to challenge unconstitutionally structured agencies in court, Congress has no incentive to ensure that newly created agencies are consistent with the constitutional design. *See, e.g.*, David H. Gans, *Severability as Judicial Lawmaking*, 76 Geo. Wash. L. Rev. 639, 644 (2008). "If courts are willing to save a statute by severing on the legislature's say-so, even when that entails substantial rewriting, the legislature has much less of a reason or incentive to respect constitutional norms at the outset." *Id.*

In this case, vacating the Net Worth Sweep would create incentives to respect the constitutional structure for separation of powers. If courts purport to remedy injuries in cases involving appointment and removal by blue-pencilling the statute to make officials removable at will, but do not order any other kind of relief for the plaintiffs, future plaintiffs have significantly diminished incentives to bring such challenges. *Collins*, 938 F.3d at 610 (Oldham and Ho, JJ., concurring and dissenting). In order to properly exercise the judicial power, vindicate constitutional separation of powers, and incentivize Congress to act consistent with the Constitution, this Court should vacate the Net Worth Sweep.

CONCLUSION

This Court should hold that the FHFA is unconstitutionally structured. As a result, the agency's decision implementing the Net Worth Sweep must be vacated.

DATED: September 2020.

Respectfully submitted,

ELIZABETH H. SLATTERY
ALISON E. SOMIN
Pacific Legal Foundation
3100 Clarendon Blvd., Suite 610
Arlington, Virginia 22201
Telephone: (202) 888-6881
ESlattery@pacificlegal.org
ASomin@pacificlegal.org

JEFFREY W. MCCOY
Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
JMcCoy@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation