No. 19-7

In the
Supreme Court of the United States

SEILA LAW LLC,
Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
Respondent.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the vesting of legislative, executive, and judicial powers in the Consumer Financial Protection Bureau, an independent agency led by a single director who cannot be removed except for cause, violates the separation of powers.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, **PACIFIC LEGAL FOUNDATION** is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited 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 role of the Judiciary as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (*Auer* deference); *Gundy v. United States*, 139 S. Ct. 2116 (2019) (non-delegation doctrine); *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*,

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file 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.

136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act); *Sackett v. EPA*, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

This case raises core Separation of Powers issues related to each co-equal branch's accountability for the exercise of its powers. PLF offers a discussion of first principles concerning executive power that should illuminate the Court's review.

INTRODUCTION AND SUMMARY OF ARGUMENT

"The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 324 (Madison) (J. Cooke ed., 1961). To prevent tyranny—that is, "to protect the liberty and security of the governed[,]" *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991)—the Constitution divides all of the government's powers into three, distinct branches. U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

This case presents the Court with a unique and dangerous concentration of the federal government's legislative, executive, and judicial powers in a single, "independent" agency; an agency headed by a lone "Director" empowered with vast executive discretion but protected from removal except for cause; an agency whose actions enjoy an unprecedented free-

dom from oversight by the government's constitutionally vested powers. The combination of authority, discretion, and impunity in this independent power all but guarantees arbitrary governance. This is, therefore, "a case about executive power and individual liberty." *PHH Corp. v. CFPB*, 881 F.3d 75, 164 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). The Court should grant the petition to determine whether this independent power can be squared with the Constitution's Separation of Powers.

1. A description of the CFPB's powers and independence demonstrates the importance of the question presented.

Created as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), the Consumer Financial Protection Bureau (CFPB or Bureau) and its lone Director were given vast powers—legislative, executive, and judicial—along with substantial protections against interference by the three constitutional powers of government. As then-Judge Kavanaugh noted, with the exception of the President, the CFPB Director "enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting).

a. Legislative Power. The CFPB is authorized to make laws, *i.e.*, generally applicable rules for the government of society. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810). The CFPB may "prescribe rules or issue orders or guidelines pursuant to" 19 different consumer-protection laws, including the Fair Debt Collection Practices Act and the Truth in Lending Act, all previously administered by seven separate

agencies. 12 U.S.C. §§ 5481(12), 5581(a)(1)(A), 5581(b). *See also id.* § 5481(14) (The term "Federal consumer financial law" includes "any rule or order prescribed by the Bureau under [U.S. Code, Title 12], an enumerated consumer law [*see* § 5481(12)], or pursuant to the authorities transferred under subtitles F and H."); and § 5531(b) (authorizing the CFPB to prescribe rules "identifying" unlawful, unfair, deceptive, or abusive consumer transactions, products, or services).

The Bureau was given vast discretion to determine how it may enact these generally applicable rules, and it is not limited to the formal rulemaking process. *See* 12 U.S.C. § 5492(a)(10) (The CFPB is authorized to "establish the general policies of the [CFPB] with respect to all executive and administrative functions," including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions."). Perhaps most troubling, this power allows the CFPB to use administrative-enforcement actions (which, as noted below, are subject to deferential judicial review), not only to enforce existing rules, but also to establish new policies—that is, to punish conduct that was, before an enforcement action, perfectly legal. *See id.* (The CFPB may "implement[] the Federal consumer financial laws through . . . *enforcement actions*.") (emphasis added).

b. Executive Power. The CFPB is authorized to exercise the traditional executive function of enforcing the law, namely, challenging "unfair, deceptive, or abusive act[s] or practice[s]." 12 U.S.C. § 5531(a). *See* U.S. Const. art. II, § 3 (obliging the President to "take Care" that the laws are faithfully executed, through

subordinates when necessary); *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.") (citations omitted). But the CFPB's executive authority includes complete discretion to initiate enforcement actions in either federal court or administrative forums (along with, as noted above, the power to adopt the rules to be enforced, and, as noted below, the power to adjudicate administrative actions). 12 U.S.C. §§ 5563, 5564.

c. Judicial Power. Under the Constitution, the judicial power is the power to resolve cases and controversies involving those "matter[s] which, from [their] nature[s], [are] the subject[s] of [] suit[s] at the common law, or in equity, or admiralty[.]" *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856). Therefore, when the CFPB chooses to enforce consumer-financial laws *administratively*, the CFPB exercises (in addition to the executive and legislative powers) the judicial power. An administrative-enforcement action is prosecuted by the CFPB, under rules adopted by the CFPB (12 C.F.R. Subpart D (Decisions and Appeals)), and before the CFPB itself, rather than before a neutral, Article III judge and jury. 12 U.S.C. § 5563.

At the end of an initial administrative adjudication, a CFPB-appointed hearing officer issues a recommended decision, which includes findings of fact and conclusions of law. 12 C.F.R. § 1081.402. Review of a recommended decision goes to the CFPB Director for a final decision. *Id.* §§ 1081.402, 1081.405. And the Bureau has broad powers to order legal and equitable relief. 12 U.S.C. § 5565(a)(2).

d. An Independent Branch of Government. In addition to the nature and scope of the CFPB's powers, Dodd-Frank insulates the Bureau and its actions to an unmatched degree from Legislative, Executive, and Judicial Branch review.

i. Congress purported to grant the CFPB with unprecedented independence from the President, *i.e.*, from the head of the Executive Branch. The CFPB is led by a single "Director," 12 U.S.C. § 5491(b)(1), who is appointed by the President, with the advice and consent of the Senate, to a five-year term, *id.* §§ 5491(b)(2), (c)(1). But the Director may not be removed by the President, except "for inefficiency, neglect of duty, or malfeasance in office[]" (*id.* § 5491(c)(3))—that is, except for cause. And "[n]o independent agency exercising substantial executive authority has ever been headed by *a single person*." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

ii. The CFPB is also largely free of congressional oversight. Most significantly, the CFPB's budget does not go through Office of Management and Budget review, 12 U.S.C. § 5497(a)(4)(E), and it is not submitted to Congress for annual appropriations subject to the relative priorities of the President and Congress, *id.* § 5497(a)(2)(C). Instead, the CFPB Director—alone—sets the agency's budget; and its funds come not from Congress (pursuant to an appropriations bill signed into law by the President), but from the Federal Reserve, which "*shall* transfer" to the CFPB funds in "the amount [up to 12 percent of the Federal Reserve's operating budget] *determined by the [CFPB] Director* to be reasonably necessary" to administer the consumer-protection laws. *Id.* § 5497(a)(1) (emphasis

added). These funding decisions are effectively unreviewable. *See id.* § 5497(a)(2)(C) ("[T]he funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.").

iii. Finally, judicial review of a CFPB administrative-enforcement action[2] is allowed only after the protracted administrative processes discussed above (12 U.S.C. § 5563(b)(4); 12 C.F.R. § 1081.402(c)), and the judiciary's independence is burdened by a deferential standard of review. Courts are limited to determining whether the CFPB proceedings were—aside from the lack of a neutral, Article III judge—"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or, *inter alia*, "unsupported by substantial evidence . . . ." 5 U.S.C. § 706(2)(A), (E).

2. Thus, while "modern administrative agencies" like the CFPB perhaps "fit most comfortably within the Executive Branch, as a practical matter they exercise" all three powers of government. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting). Nor is the "accumulation of these powers in the same hands . . . an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.* at 1879.

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[2] As noted above, the CFPB may, at its sole discretion, initiate charges in federal court rather than in an administrative-enforcement proceeding. 12 U.S.C. §§ 5563, 5564. But *Chevron* and *Auer* deference would still apply; and, precisely because agencies control the administrative process and enjoy judicial deference, agencies are incentivized to proceed in administrative forums.

No government agency enjoys the combination of CFPB's powers, discretion, and freedom from oversight, all of which reveal the CFPB to be an especially egregious example of an "independent" federal power—an aberration in the tripartite government established by the Constitution, which vests all of the government's power in only three branches. *See The Federalist No. 47*, at 324 (Madison) (identifying the three "legislative, executive, and judiciary" powers as "all" of the government's powers).

3. It is this Court's duty to police the Constitution's separation of powers. *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 473 (2001). *See also N.L.R.B. v. Noel Canning*, 134 S. Ct. 2550, 2593 (2014) (Scalia, J., concurring in the judgment) ("[P]olicing the 'enduring structure' of constitutional government when the political branches fail to do so is 'one of the most vital functions of this Court.'") (quoting *Public Citizen v. Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring in judgment)).

The Court should grant the petition to determine whether the concentration of executive, legislative, and judicial powers in a single agency violates the Constitution's Separation of Powers. Three points in particular support review.

First, the Constitution established a government of only three branches, each given certain exclusive powers (with, to be sure, some overlap). But nothing in the Constitution authorizes the concentration of all three powers in any one of the three branches, to say nothing of an independent, "fourth" branch.

Second, while perhaps fitting "most comfortably" within the Executive Branch, the CFPB enjoys virtually unfettered discretion within that branch, and its powerful Director is safe from removal by the President except for cause. This arrangement dangerously reduces the President's accountability and incentivizes arbitrary government. This case therefore implicates core constitutional principles related to the liberty and security of the people and the people's ability to hold government responsible for its actions. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring) ("Liberty requires accountability."); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001) ("The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.") (internal quotation marks and citation omitted).

Third, the combination of CFPB's exercise of all three powers of government and its protection from review by those constitutional powers, was perhaps inevitable. In *Humphrey's Executor v. United States*, this Court upheld a for-cause removal restriction because the agency in question exercised "predominantly" "quasi legislative" and "quasi judicial" powers. 295 U.S. 602, 624 (1935). While the Court retreated from that rationale,[3] Congress has, since 1935, created numerous independent agencies that exercise

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[3] *See Morrison*, 487 U.S. at 689 (The Court "undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial'" in *Humphrey's Executor*, but now the question whether a removal restriction is permissible does *not* turn on an agency official's "purely executive" status.). *See also CFPB v. Seila Law LLC*, 923 F.3d 680, 683–84 (9th Cir. 2019) [Pet. App. 3a–6a] (discussing *Humphrey's Executor* and *Morrison*).

legislative and judicial (and, of course, executive) powers and has protected agency heads from presidential removal. To fully address the serious constitutional problems raised by the CFPB's structure and powers, the Court should reconsider its holding in *Humphrey's Executor*.

ARGUMENT

I.

THE CFPB JUSTIFIES CONCERNS ABOUT CREEPING ENCROACHMENTS

The Constitution established a government of divided powers to protect liberty. The **Legislature** is vested with the power to establish law—that is, to establish "generally applicable rules" adopted "only through the constitutionally prescribed process." *Ass'n of Am. R.R.*, 135 S. Ct. at 1246 (Thomas, J., concurring in the judgment). The **Executive Branch** is obligated to administer and enforce duly enacted law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). And the power to resolve cases or controversies concerning the meaning and application of the law is vested exclusively in the **Judicial Branch**. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

The Constitution identifies only a few exceptions to these general grants of power—*e.g.*, the President is vested with a defined power in the legislative process (U.S. Const. art. I, § 7); and the Senate is vested with a role in the appointment process (*id.* art. II, § 2,

cl. 2). Thus, while the branches may not be "'hermetically' sealed from one another," the Constitution "sought to divide the delegated powers" into "three defined categories," and those powers "are functionally identifiable." *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (citation omitted). Indeed, the grants of power to the three branches are "exclusive." *Ass'n of Am. R.R.*, 135 S. Ct. at 1241 (Thomas, J., concurring in the judgment). Accordingly, "[w]hen the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it." *Id.* (Thomas, J., concurring in the judgment).

Nowhere, of course, does the Constitution authorize the concentration of the three powers in any one of the three branches—much less, into an independent, "fourth" branch. *See FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (noting that administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories").

One byproduct of the proliferation of independent agencies is this Court's "pragmatic" review of the separation of powers. For example, in *Morrison*, the Court addressed "whether the [Ethics in Government] Act, *taken as a whole*, violate[d] the principle of separation of powers by *unduly* interfering with the role of the Executive Branch." 487 U.S. at 693 (emphasis added). *See also Mistretta v. United States*, 488 U.S. 361, 380 (1989) (describing a "pragmatic, flexible view of differentiated governmental power"); *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (declining to adopt "formalistic and unbending rules" to determine whether congressional decision to

allow Article III adjudication in non-Article III tribunal "*impermissibly* threaten[ed] the institutional integrity of the Judicial Branch") (emphasis added) (citation omitted).

While it may be difficult to delineate the precise boundaries between the branches in every circumstance, *see The Federalist No. 37* (Madison), the Court need not *begin* its separation-of-powers analysis at the margins. When, as here, an executive agency exercises core legislative and judicial powers—largely free of oversight by all three constitutional powers—there is no cause to consider whether the agency "unduly" interferes with or "impermissibly" threatens the "integrity" of the legislative or judicial branch. Instead, the "question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it." *Ass'n of Am. R.R.*, 135 S. Ct. at 1242 (Thomas, J., concurring in the judgment). Adopting general rules for the government of society requires the exercise of legislative power; enforcing those rules against persons requires the exercise of executive power; and adjudicating enforcement actions by the government against persons requires the exercise of judicial power. Only the legislative, executive, and judicial branches, respectively, can perform those powers.

The Constitution sought to prevent "a gradual concentration of the several powers in the same department." *The Federalist No. 51*, at 321 (Madison). Therefore, this Court should grant the petition and reconsider the "flexible" separation-of-powers analysis that accepts "incremental" encroachments. *Cf. Schor*, 478 U.S. at 861 (Brennan, J., dissenting) (The "important

functions of Article III are too central to our constitutional scheme to risk their incremental erosion.").

II.

"THE" EXECUTIVE POWER IS VESTED IN "A" PRESIDENT WHO "SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED"

It is generally assumed that the CFPB, like all "independent" agencies, is part of the Executive Branch. *Cf. City of Arlington*, 133 S. Ct. at 1878 (Roberts, C.J., dissenting). If so, another problem presents itself: the CFPB Director's for-cause removal protection, which deranges Article II's structure—a problem that is ripe for this Court's review.

The Framers gave serious thought to the structure of the Executive Branch, even appointing a committee to study the matter. This committee resolved that an able President would be hampered by a plural executive (to include either a privy council or a council of revision) and that a weak executive would hide behind it to avoid accountability for bad decisions. *See* Todd F. Gaziano, *The Opinions Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (noting Charles Pinckney's comment, "Give [the President] an able Council and it will thwart him; a weak one and he will shelter himself under their sanction.").[4]

Thus, after extensive debate and consideration, the Framers definitively concluded that the liberty of the people was best secured by a single President, charged with all of the responsibility and accountability to manage the Executive Branch. As Alexander

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[4] *See* https://www.heritage.org/constitution/#!/articles/2/essays/88/opinion-clause.

Hamilton explained, the Framers rejected a "plural" executive because, in part, a plural executive could escape public accountability more easily than a single President—precisely the problem raised by the CFPB here. *See The Federalist No. 70*, at 474 (Hamilton).

Not surprisingly, then, the Constitution's text and structure demonstrate that the Executive Branch is to be headed by a "unitary" executive, who can be held accountable for all of the branch's actions.

A. The President—and Only the President—Is Authorized and Obligated To "Take Care That the Laws Be Faithfully Executed"

"The" executive power is vested in "a" single "President of the United States of America." U.S. Const. art. II, § 1.[5] Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 568–69 (1994) ("Article II's vesting of the President with all of the 'executive Power' give[s] him control over all federal governmental powers that are neither legislative nor judicial[.]"). This President "shall take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. The President is thus "both empowered and obliged" to do so. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 658 (1996).

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[5] *Compare* U.S. Const. art. I, § 1 (vesting the legislative powers "in a Congress of the United States," but dividing that power in "a Senate *and* House of Representatives") (emphasis added).

B. To "Take Care" That the Laws Be Faithfully Executed, the President Must Have Agents—Executive-Branch "Officers of the United States"—Whose Offices Are Lodged in the Executive Branch

1. The Constitution Contemplates Presidential Assistants

The President is not required to *personally* execute all of the laws; rather, the President must "take Care" that the laws be (faithfully) executed. U.S. Const. art. II, § 3. As George Washington explained, because it is "'impossib[le] that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" 30 *Writings of George Washington* 334 (John C. Fitzpatrick ed., 1939), quoted in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 483 (2010). *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").

Thus, while Congress writes the laws and creates offices for their administration, *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976), the actual administration of the laws is left to the Executive Branch alone: "Legislative power, as distinguished from executive power, is the authority to make laws, [] not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Id.* at 139 (internal quotation marks and citation omitted). As Hamilton noted, the "administration of government . . . is limited to *executive* details, and falls *pecu-*

liarly within the province of the *executive* department." *The Federalist No. 72*, at 486 (Hamilton) (emphasis added).

2. Executive Officers Work in the Executive Branch and Are Subordinate to the President

These executive officers, who carry out some portion of the President's executive power, are and must be agents of the President—and "*of no one else*." John Harrison, *Addition by Subtraction*, 92 Va. L. Rev. 1853, 1862 (2006) (emphasis added). *See also The Federalist No. 72*, at 487 (Hamilton) (The "persons . . . to whose immediate management these different [executive] matters are committed ought to be considered as assistants or deputies to the chief magistrate."); Gouverneur Morris (July 19, 1787), 2 Farrand, *Records of the Federal Convention of 1787* at 53–54 ("There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions *in subordination* to the Executive . . . . Without these ministers the Executive can do nothing of consequence.") (emphasis added).

If these officers "were agents of someone [other than the President], that someone else would have the executive power, or some share of it." Harrison, *supra*, at 1862. The Constitution, however, does not vest anyone but the President with "[t]he" executive power. U.S. Const. art. II, § 1. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1213 (2014) (The Executive Vesting Clause "implies that all administrative powers that are not exercises of the legislative and judicial powers

are within the executive branch and therefore must be within the control of the President[.]").

Accordingly, the administrative power "must be a subset of the President's 'executive Power' and not of one of the other two traditional powers of government." Calabresi & Prakash, *supra*, at 569 (footnote omitted).

The Opinions Clause supports this reading. According to the Opinions Clause, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2, cl. 1. Even the heads of the "core" executive departments—*e.g.*, State and Defense—although appointed to office with the advice and consent of the Senate, report directly to the President, in writing if the President so requires. This clause confirms that the President is the head of the executive branch and that the officers in the executive departments are the President's subordinates. Further, as Professor Amar explains, this Clause also shows that the Framers "rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over Cabinet officers." Amar, *supra*, at 647 (footnote omitted).

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In sum, the President—and *only* the President—is authorized and obligated to "take Care" that the laws be faithfully executed, (2) the President cannot personally execute all of the laws and must therefore have assistance, and (3) the individuals who assist the President in the execution (administration) of the laws—*i.e.*, the executive "officers of the United

States"—are part of the Executive Branch and subordinate to the President.

C. To *Faithfully* Execute the Laws, the President Must Have Control Over *His* Officers—By Removal, If Necessary

The President's exclusive authority and obligation to "take Care that the laws be faithfully executed" require that the President have sufficient control over his agents. Traditionally, the President's control was effected through his power to remove executive officers at will. *See Free Enterprise Fund*, 561 U.S. at 483 ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.") (citing *Myers, supra*).

Although not expressly provided for in the Constitution, the President's removal power has long been considered a necessary incident of *the* executive power vested *exclusively* in the President. *See Myers*, 272 U.S. at 163–64 ("[A]rticle 2 grants to the President the executive power of the government—*i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed[.]").

As noted above, "the executive authority, *with few exceptions*, is to be vested in a single magistrate." *The Federalist No. 69*, at 462 (Hamilton) (emphasis added). The exceptions are explicitly identified in the Constitution. *See id.* (identifying exceptions, including the President's power, *with the advice and consent*

of the Senate, to make treaties). Therefore, when "traditional executive power was not '*expressly* taken away, it remained with the President.'" *Free Enterprise Fund*, 561 U.S. at 492 (emphasis added) (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 *Documentary History of the First Federal Congress* 893 (2004)). "Under the traditional default rule, [the] removal [power] is incident to the power of appointment." *Free Enterprise Fund*, 561 U.S. at 509 (citations omitted).

Congress may have the power to establish administrative agencies, but Congress cannot restrict the President's executive power of removal and thereby "reduce the Chief Magistrate to a cajoler-in-chief." *Free Enterprise Fund*, 561 U.S. at 502. *See id.* at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices. Only presidential oversight can counter its influence."); *id.* at 499 (Congress has the "power to create a vast and varied federal bureaucracy[]," but the "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."). *See also id.* at 516 (Breyer, J., dissenting) (The separation-of-powers "principle, along with the instruction in Article II, § 3 that the President 'shall take Care that the Laws be faithfully executed,' limits Congress' power to structure the Federal Government.") (citations omitted); Calabresi & Prakash, *supra*, at 581 ("Once created, these agencies and officers executing federal law must retain the President's approval and be subject to presidential superintendence if they are to continue to exercise 'the executive Power.'").

In short, the President is "both empowered and obliged" to take care that the laws be faithfully executed, Amar, *supra*, at 658; and to exercise this power *and meet this obligation*, the President must have sufficient control over his administration—through the at-will removal power, if necessary.

D. The President's Control Over His Administration Makes the President Accountable for the Faithful Execution of the Laws—and Thereby Helps To Secure Individual Liberty

The President's (necessary) delegation of executive power to his agents involves a risk, since the "diffusion of power carries with it a diffusion of accountability." *Free Enterprise Fund*, 561 U.S. at 497. This risk, though, is tempered by the President's constitutionally derived control over his administrative agents.

The Constitution "that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513–14. Without the removal power, the President "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else[,]" and this "diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id*. at 514 (quoting *The Federalist No. 70*, at 478 (Hamilton)).

The Constitution was designed to ensure that "those who are employed in the execution of the law

will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." James Madison (June 17, 1789), 1 *Annals of Cong*. 499.

The President is "the only democratically elected official [within the Executive Branch]," and "the political accountability of his subordinates depends on their accountability to the President." Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 Fordham L. Rev. 2541, 2552 (2011) (citing *Free Enterprise Fund*, 561 U.S. at 497–98 (quoting *The Federalist No. 72*, at 487 (Hamilton))).

The people do not vote for administrators—they "instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enterprise Fund*, 561 U.S. at 497–98 (quoting *The Federalist No. 72*, at 487 (Hamilton)). As Justice Scalia explained, the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . . ." *Morrison*, 487 U.S. at 729 (Scalia, J., dissenting). *See also* James Madison (June 16, 1789), 1 *Annals of Cong*. 462 (The "first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.").

In short, the President "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enterprise Fund*, 561 U.S at 484.

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While the Constitution was framed to ensure liberty through accountability, the CFPB was designed specifically to escape the control of the President who is thus *unconstitutionally* hampered in his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President and, therefore, We the People are prevented from holding the CFPB accountable for its administration of the laws. This Court's review is necessary to determine whether the CFPB Director's for-cause removal protection violates Article II of the Constitution.

III.
THE COURT SHOULD RECONSIDER *HUMPHREY'S EXECUTOR*

In 1926, this Court issued a detailed, scholarly opinion, discussing at length the points raised in Section II above, and concluded that the President had the power to remove principal officers at will. *Myers v. United States*, 272 U.S. 52 (1926). Of course, the Court adopted a narrow exception less than a decade later in *Humphrey's Executor*. But time and experience have shown that the Court got it right in *Myers*. The Court should revisit this issue.

In *Humphrey's Executor*, the Court upheld a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission for cause. This Court upheld the restriction because the FTC's "duties [we]re neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.*, 295 U.S. at 624. *See also id.* at 628, 630 (explaining that the FTC could not "in any proper sense be characterized as an arm or an eye of the executive;"

indeed, it was "wholly disconnected from the executive department").

Thus, a significant question remains concerning the extent to which Congress may validly establish "quasi-legislative" and "quasi-judicial" offices within the Executive Branch. That is, may Congress constitutionally vest officials in the Executive Branch with Article I and Article III powers? The CFPB puts this issue into clear relief: while the Bureau exercises legislative and judicial powers, its exercise of executive power requires that it be accountable to the (unitary) head of the Executive Branch.

This Court's attempts to limit *Humphrey's Executor* has not proved successful—as the D.C. Circuit's opinion in *PHH Corp.* demonstrates. There, the court concluded that *Humphrey's Executor* "required only that the President be able to remove *purely executive officers* without congressional involvement." *PHH Corp.*, 881 F.3d at 85 (emphasis added) (*en banc*) (citing *Humphrey's Executor*, 295 U.S. at 628). But, the *en banc* court continued, "where administrators of 'quasi legislative or quasi judicial agencies' are concerned, the Constitution does not require that the President have 'illimitable power' of removal." *Id.* (quoting *Humphrey's Executor*, 295 U.S. at 629).

The Court needs to resolve whether executive-branch agencies may be protected from full presidential accountability—including on the ground that they exercise *non-executive-branch* powers—or whether executive-branch agencies are limited to exercising only executive functions, subject to the President's constitutionally vested oversight.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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