No. 19-7

In the

# Supreme Court of the United States

SEILA LAW LLC,

*Petitioner;*

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

*Respondent.*

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

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER


STEVE SIMPSON
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, Virginia 22201

OLIVER J. DUNFORD
*Counsel of Record*
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, Florida 33410
(916) 419-7111
ODunford@pacificlegal.org

GLENN E. ROPER
Pacific Legal Foundation
1745 Shea Center Dr., Ste. 400
Highlands Ranch, Colorado 80129

*Counsel for Amicus Curiae Pacific Legal Foundation*

## QUESTIONS PRESENTED

1. Does the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violate the separation of powers?

2. If the CFPB is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?

## TABLE OF CONTENTS

QUESTIONS PRESENTED .................................................i

TABLE OF CONTENTS .....................................................ii

TABLE OF AUTHORITIES ...............................................iv

IDENTITY AND
INTEREST OF AMICUS CURIAE .....................................1

INTRODUCTION AND
SUMMARY OF ARGUMENT .............................................2

I. UNDER THIS COURT'S PRECEDENTS, THE CFPB VIOLATES THE SEPARATION OF POWERS ..................................................................8

A. The Constitution's Structure Demands that the President have the Power to Control Executive Officers.....................................8

1. Separation of Powers and Political Accountability are Fundamental to our Constitutional Structure .........................................................8

2. The President's Power to Remove Executive Officers is an Essential Link Between the Government and the People and a Key Separation of Powers Principle .....................10

B. "Independent" Agencies such as the CFPB are Structured to Evade the Separation of Powers and Accountability....................................14

C. Under This Court's Removal Precedents, the CFPB is Unconstitutionally Structured .......19

1. *Myers* and *Free Enterprise* Control.............20

2. *Humphrey's Executor* and its progeny do not save the CFPB.....................................21

II. IF THE COURT CONCLUDES THAT ITS PRECEDENTS DO NOT INVALIDATE THE CFPB'S STRUCTURE, THE COURT SHOULD RETURN TO FIRST PRINCIPLES ............................23

A. *Humphrey's Executor* and its progeny have allowed Congress to experiment with various forms of "independent" agencies..........................23

B. If the CFPB survives the Court's precedents, then *stare decisis* cannot save *Humphrey's Executor*..................................................................25

III. 12 U.S.C. § 5491(C)(3) CANNOT BE SEVERED FROM THE DODD-FRANK ACT ....................................26

A. Application of the severability doctrine depends on Congress' intent.................................27

B. Congress intended independence from Presidential oversight and control to be an indispensable feature of the CFPB.................28

CONCLUSION .........................................................................30

## TABLE OF AUTHORITIES

### CASES

*Alaska Airlines, Inc. v. Brock,*
480 U.S. 678 (1987) ............................................28, 29

*Ayotte v. Planned Parenthood of N. New Eng.,*
546 U.S. 320 (2006) ............................................ 27, 28

*Bowsher v. Synar,*
478 U.S. 714 (1986) ..................................................... 9

*Buckley v. Valeo,*
424 U.S. 1 (1976) ...................................................... 13

*City of Arlington v. FCC,*
569 U.S. 290 (2013) ...................................... 2, 3, 5, 14

*Collins v. Mnuchin,*
938 F.3d 553 (5th Cir. 2019) .............................. 25, 27

*Commodity Futures Trading Comm'n v. Schor,*
478 U.S. 833 (1986) ................................................... 26

*Dep't of Transp. v. Ass'n of Am. R.R.,*
575 U.S. 43 (2015) ................................................. 5, 10

*Ex parte Hennen,* 38 U.S. 230 (1839) ........................... 14

*Free Enter. Fund v. PCAOB,*
561 U.S. 477 (2010) ........................................... *passim*

*FTC v. Ruberoid Co.,*
343 U.S. 470 (1952) ..................................................... 3

*Gundy v. United States,*
139 S. Ct. 2116 (2019) ................................................. 1

*Humphrey's Executor v. United States,*
295 U.S. 602 (1935) ........................................... *passim*

*Kisor v. Wilkie,*
139 S. Ct. 2400 (2019) ....................................... *passim*

*Lucia v. SEC,*
138 S. Ct. 2044 (2018) ............................................... 27

*Morrison v. Olson*,
487 U.S. 654 (1988) ........................................... *passim*

*Murphy v. NCAA*,
138 S. Ct. 1461 (2018) ................................................ 28

*Myers v. United States*,
272 U.S. 52 (1926) .............................................. *passim*

*NBC v. United States*,
319 U.S. 190 (1943) .................................................... 24

*Office of Pers. Mgmt. v. Richmond*,
496 U.S. 414 (1990) .................................................... 18

*PHH Corp. v. CFPB*,
881 F.3d 75 (D.C. Cir. 2018) ............................ *passim*

*Rapanos v. United States*,
547 U.S. 715 (2006) ...................................................... 1

*Sackett v. EPA*,
566 U.S. 120 (2012) ...................................................... 1

*SEC v. Chenery*,
332 U.S. 194 (1947) .................................................... 24

*Stern v. Marshall*,
564 U.S. 462 (2011) .................................................... 26

*Truax v. Corrigan*,
257 U.S. 312 (1921) .................................................... 16

*U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*,
136 S. Ct. 1807 (2016) .................................................. 1

*Wiener v. United States*,
357 U.S. 349 (1958) ............................................. 22, 23

*Withrow v. Larkin*,
421 U.S. 35 (1975) ...................................................... 24

*Yakus v. United States*,
321 U.S. 414 (1944) .................................................... 24

*Youngstown Sheet & Tube Co. v. Sawyer*,
343 U.S. 579 (1952) ...................................................... 9

**Federal Constitution**

U.S. Const. art I, § 1 .... 10
U.S. Const. art I, § 2 .... 10
U.S. Const. art I, § 3 .... 10
U.S. Const. art. I, § 9, cl. 7.... 18
U.S. Const. art. II, § 1.... 11, 12
U.S. Const. art. II, § 3.... 11

**Federal Statutes**

5 U.S.C. § 706(2)(A).... 6
5 U.S.C. § 706(2)(E) .... 6
12 U.S.C. § 5491(a) .... 17
12 U.S.C. § 5491(b)(1) .... 18
12 U.S.C. § 5491(b)(2) .... 18
12 U.S.C. § 5491(c)(1).... 18
12 U.S.C. § 5491(c)(3) .... *passim*
12 U.S.C. § 5492(c)(3).... 18
12 U.S.C. § 5497(a)(1).... 6, 18
12 U.S.C. § 5497(a)(2)(C) .... 6, 18
12 U.S.C. § 5497(a)(4)(E).... 18
12 U.S.C. § 5512(b)(1) .... 7, 17, 19
12 U.S.C. § 5512(b)(4)(B).... 6
12 U.S.C. § 5531(a) .... 6, 17
12 U.S.C. § 5531(b).... 6
12 U.S.C. § 5536(a)(1)(B) .... 6
12 U.S.C. § 5563.... 6
12 U.S.C. § 5565(a)(2).... 6

Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ........................................ *passim*

**Miscellaneous**

156 Cong. Rec. at 7481, 7485, 8931, 12434 .................... 29

Amar, *Akhil Reed, Some Opinions on the Opinion Clause, 82 Va.* L. Rev. 647 (1996) ............. 11

Bar-Gill, Oren & Warren, *Elizabeth, Making Credit Safer*, 157 U. Pa. L. Rev. 1 (2008)................ 16

Barkow, Rachel E., *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15 (2010) ............................ 16

Calabresi, Steven G. & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541 (1994) .................... 11, 12, 13

Frankfurter, Felix, THE PUBLIC AND ITS GOVERNMENT, 78 (Yale Univ. Press 1930)......... 4, 15

Haara, Charles M., and Wolf, Michael Allan, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158 (2002) .......................................................... 15

Hamburger, Philip, Is Administrative Law Unlawful? (Chicago 2016)....................................... 3, 4

Harrison, John, *Addition by Subtraction*, 92 Va. L. Rev. 1853 (2006) .................................. 11, 12

Kagan, Elena, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001) ............................ 10, 14

Lawson, Gary, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994) ..................................... 3

Madison, James (June 16, 1789), 1 *Annals of Cong*. 462................................................ 14

Metzger, Gillian E., *Forward, 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1 (2017) ............................................ 15

Pearson, Eric, *A Brief Essay on the Constitutionality of the Consumer Financial Protection Bureau*, 47 Creighton L. Rev. 99, 103 (2013) ...................... 16

Sunstein, Cass R., *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, (1987) ......................... *passim*

*The Federalist No. 47* (Madison) ............................... 3, 9

*The Federalist No. 48* (Madison).............................. 9, 11

*The Federalist No. 51* (Madison) ......................... *passim*

*The Federalist No. 70* (Hamilton) ............................... 10

*The Federalist No. 72* (Hamilton) ......................... 12, 13

Tushnet, Mark, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 Duke L.J. 1565 (2011)........................... 15

Wilson, Woodrow, THE NEW FREEDOM (Doubleday, Page & Co. 1918)............................. 4, 16

Zywicki, Todd, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856 (2013) ........................ 7, 24

## 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 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); *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").

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 that should illuminate the Court's review.

---

[1] Pursuant to this Court's Rule 37.2(a), each party filed a blanket consent to the filing of amicus briefs. 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.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Framers sought to create a government that was strong enough to protect liberty but not so strong that government itself would become a threat to liberty. As James Madison put the point: "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." *The Federalist No. 51*, at 349 (J. Cooke ed. 1961).

Essential to their solution was the separation of powers and political accountability. Both principles combined to ensure that liberty was protected, in the first instance, not by mere "parchment barriers," but by so constructing the government that each branch would jealously guard its power against encroachment by the others and that power would remain accountable to the people. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) (stating that the under the structure the Framers created the government's "dependence on the people" would be maintained, not just by "parchment barriers," but by separation of powers and checks and balances). In that way, the people would not have to resort to the courts, alone, or to any particular branch of government to ensure that government remained within its constitutional bounds. The government would, to the maximum extent possible, govern itself.

Our modern administrative state presents a serious threat to this structure. It combines all three powers of government into one "branch" that, today, reaches into every aspect of our lives. *See City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting). The administrative state is often referred to as a fourth branch of government. *See id.* (Roberts, C.J., dissenting) ("The

collection of agencies housed outside the traditional executive departments . . . is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence." (citation omitted)); *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (observing that administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories"). This is an accurate description in that the administrative state does not fit within any of the other three branches. But it is a significant understatement from the perspective of the power and structure of the administrative state, for no other branch of government exercises *all three* powers of government—a circumstance that James Madison described as "the very definition of tyranny." *The Federalist No. 47*, at 324. While it is too soon to describe the administrative state as tyrannical, it is also too mild to describe it as a mere "fourth branch." The modern administrative state is more a government within a government—and one that threatens to overwhelm the government the constitution created.

As a result, the modern administrative state bears little connection to the government the Framers actually created. *See* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (Chicago 2015). Indeed, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities." *City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (citation omitted). If it is to be justified, it must be justified on some constitutional or political theory other than the one the Framers followed. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 497–98

(1987) ("Despite some continuity with Madisonian theory, the independent agency is in considerable tension with principles traceable to the original constitutional framework.").

And, indeed, the architects of the modern administrative state recognized as much. They openly rejected the Framers' political views and called for a new approach to government. *See, e.g.*, FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 78 (Yale Univ. Press 1930) ("Enforcement of a rigid conception of separation of powers would make modern government impossible."); WOODROW WILSON, THE NEW FREEDOM 47 (Doubleday, Page & Co. 1918) (comparing government to a living thing, which cannot "live" if "its organs offset against each other, as checks"). They saw separation of powers and consent of the governed as outmoded impediments to "efficient" government and sought to create a government composed of expert administrators armed with the power to solve societal problems and uninhibited by the messy day-to-day operations of politics. *See* HAMBURGER, *supra*, at 370–71.

Whether the modern administrative state is a good development or a bad one is often debated, although amicus sides with the Framers and their Constitution. The Framers wanted a government capable of protecting our rights and preserving order; their ultimate goal was *not* efficiency of administration. As Justice Brandeis observed,

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental

> powers among three departments, to save the people from autocracy.

*Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

To paraphrase one member of this Court, the end result of the modern administrative state may be trains that run on time (although we doubt it), but the cost to our Constitution and the individual liberty it protects will be grave. *See Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 91 (2015) (Thomas, J., concurring). There are ways of addressing problems facing modern governments without turning all government power over to an unaccountable bureaucracy.

But it is not debatable—or at least it should not be—that the power of the administrative state has grown precipitously since its birth and that it will continue to grow unless checked. *See City of Arlington*, 569 U.S. at 313 (Roberts, C.J., dissenting) (observing that "the federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies...[ a]nd more are on the way") (citations omitted). Indeed, given the premises of the administrative state, constant growth and consolidation of unaccountable power are inevitable. If separation of powers is outmoded and inefficient, then consolidation of powers is the obvious solution. If political accountability and all of its constitutional hallmarks create friction and slow the wheels of progress, then handing power to supposedly expert "administrators" who are "independent of politics" is the cure. There is no logical limit to these principles. If it is desirable for the sake of efficient administration to transfer legislative and executive power from 535 members of Congress and one President to scores of commissioners, then it is better to transfer

that power to fewer and less politically accountable commissioners and, ultimately, to one person. If efficiency and "getting things done" are the main goals, it always makes sense to have fewer people exercising more power. This concentration of power is a grave threat to liberty.

The Consumer Financial Protection Bureau (CFPB) is the result of this inevitable march toward greater consolidation of power and less accountability. Created as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), the CFPB is charged with enforcing 18 different consumer financial-protection statutes previously administered by seven different federal agencies. It is authorized to issue regulations defining prohibited "unfair, deceptive, or abusive" acts or practices, 12 U.S.C. §§ 5531(a)-(b), 5536(a)(1)(B), and to enforce the consumer-protection laws and its own regulations through in-house administrative proceedings, *id.*, §§ 5563, 5565(a)(2). To ensure its independence, Congress gave the agency a single Director who serves a five-year term and who may be removed by the President only for "inefficiency, neglect of duty, or malfeasance in office." *Id.* § 5491(c)(3). It also placed the CFPB beyond Congress's appropriations power by making the agency's funding mandatory. *Id.* §§ 5497(a)(1), 5497(a)(2)(C). Finally, to ensure only minimal judicial oversight, Congress requires deferential review, even when the CFPB chooses to enforce consumer-protection laws in court. *Id.* § 5512(b)(4)(B); 5 U.S.C. § 706(2)(A), (E).

In short, the CFPB—under and through its Director, and insulated from the constitutional branches—may exercise all three powers of government, as it *alone* deems "necessary or appropriate to enable the [Bureau] to administer and carry out the purposes and objectives of the

Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).

Accordingly, the CFPB is "one of the most powerful and publicly unaccountable agencies in American history." Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 Geo. Wash. L. Rev. 856, 875 (2013). This is no accident. The CFPB's "extreme independence was originally touted as one of the Bureau's great virtues, as the purported lack of independence of prior financial regulators had been thought to be a source of the allegedly lax oversight that produced the financial crisis." *Id.* (footnote omitted).

The question presented in this case is relatively narrow: Does the CFPB's structure violate the separation of powers by preventing the President from removing the Director without cause? But the broader issue is how much more unaccountable power will this Court allow to be concentrated in our administrative state?

This Court has expressed concern about the concentration of unaccountable power in the administrative state before:

> Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people.

*Free Enter. Fund*, 561 U.S. at 499.

With the creation of the CFPB, this concern is now a reality. Indeed, other than 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. v. CFPB (PHH-2)*, 881 F.3d 75, 166 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

On the narrow question, this Court should hold that the structure of the CFPB, with a Director protected from removal except for cause and thereby insulated from political accountability, violates the Constitution. This modest ruling would be consistent with the Court's presidential-removal jurisprudence, which makes clear that the CFPB's structure runs afoul even of the Court's most limited interpretations of the President's removal power. *See Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935) (distinguishing *Myers* because, "[t]o 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.") (footnote omitted).

If, however, the Court concludes that the CFPB can survive this Court's precedents, then the Court should reconsider and reverse *Humphrey's Executor* and return to the Constitution's first principles.

## ARGUMENT

## I.

## UNDER THIS COURT'S PRECEDENTS, THE CFPB VIOLATES THE SEPARATION OF POWERS

### A. The Constitution's Structure Demands that the President have the Power to Control Executive Officers

#### 1. Separation of Powers and Political Accountability are Fundamental to our Constitutional Structure

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than this: "The accumulation of

all powers, legislative, executive, and judiciary, in the same hands … may justly be pronounced the very definition of tyranny." *The Federalist No. 47*, at 324 (Madison). Although the Framers believed that "[a] dependence on the people is, no doubt, the primary control on the government," they also recognized that "experience has taught mankind the necessity of auxiliary precautions." *The Federalist No. 51*, at 349 (Madison). Those auxiliary precautions were to be found in separation of powers.

Accordingly, the Constitution divides the federal government's powers into three, distinct branches. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 349. *See also Free Enter. Fund*, 561 U.S. at 501 ("The Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'") (quoting *The Federalist No. 51*, at 349 (Madison)). That dependence is maintained, not just by "parchment barriers," *The Federalist No. 48*, at 333 (Madison), but by letting "[a]mbition ... counteract ambition[,]" giving each branch "the necessary constitutional means, and personal motives, to resist encroachments of the others," *id.*, *No. 51*, at 349 (Madison).

The primary purpose of this arrangement was, of course, to protect liberty. *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (The "declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)). But the separation of powers also promotes accountability to the people—and these two principles mutually reinforce one another.

A government that is accountable to the people will be less likely to exceed its powers and violate the people's liberties. *See, e.g.*, *Ass'n of Am. R.R.*, 575 U.S. at 57 (Alito, J., concurring) ("Liberty requires accountability."). And a government composed of separate branches with distinct powers will be more accountable because the people will know whom to blame when something goes wrong. *See Free Enter. Fund*, 561 U.S. at 498 ("Without a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'") (quoting *The Federalist No. 70*, at 476 (Hamilton)). *See also* 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.'") (citation omitted).

### 2. The President's Power to Remove Executive Officers is an Essential Link Between the Government and the People and a Key Separation of Powers Principle

The Constitution ensures separation of powers and accountability in many and varied ways, but one absolutely essential means is the vesting of all executive power in a President who is both responsible to take care that the laws are faithfully executed and able to do so by controlling those under his supervision.

The Framers recognized that, among the three branches, the legislature was by far the most powerful and most likely to usurp the powers of the other branches. *See The Federalist No. 51* (Madison). Their solution was to divide the legislature into two houses, each with different "modes of election[] and different principles of action[.]" *Id.* at 350; *see also* U.S. Const. art. I, §§ 1–3.

But just "[a]s the weight of the legislative authority requires that it should be thus divided, the weakness of the executive may require, on the other hand, that it should be fortified." *The Federalist No. 51*, at 350. The primary "fortification" was the veto power. *Id.* But the Founders also refused to weaken the executive by dividing its power among different functionaries.[2] Instead, they vested "[t]he" executive power solely in "a" single "President of the United States of America." U.S. Const. art. II, § 1. 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[.]").

The Constitution further provides that the President "shall take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. He 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). *See also* Sunstein, *supra*, at 476 ("The 'take Care' clause is a duty, not a license.").

The President, however, cannot personally execute all of the laws and, therefore, "must execute them by the assistance of subordinates." *Myers*, 272 U.S. at 117. These subordinates—officers of the United States—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.

---

[2] As Justice Scalia observed, "the Founders conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power." *Morrison v. Olson*, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting).

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[.]").

If these officers "were agents of someone [other than the President], [then] 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.

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).

Further, 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—control traditionally effected through the power to remove executive officers at will. *Free Enter. Fund*, 561 U.S. at 483 (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[.]"); *Free Enter. Fund*, 561 U.S. at 513–14 (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.")

Thus, although Congress may establish administrative agencies, *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976), it may not invade 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 also id.* at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices. Only presidential oversight can counter its influence."); 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.'").

The removal power is critical to ensuring accountability, as without it the President "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enterprise Fund*, 561 U.S. at 514. *See also Myers*, 272 U.S. at 131 ("'Vest this [removal] power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the executive department, which was intended for the security of liberty and the public good.'") (quoting Madison, 1 Annals of Congress, 499).

The people do not vote for administrators—they "instead look to the President to guide the 'assistants or deputies ... subject to his superintendence.'" *Free Enter. Fund*, 561 U.S. at 497–98 (quoting *The Federalist No. 72*, at 487 (Hamilton)). Therefore, 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) (citations omitted). 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 Enter. Fund*, 561 U.S. at 484. Therefore, under the long-'"settled and well understood construction of the Constitution[,]'" the President must have the power to remove principal executive officers at will. *Id.* at 492 (quoting *Ex parte Hennen,* 38 U.S. 230 (1839)).

### B. "Independent" Agencies such as the CFPB are Structured to Evade the Separation of Powers and Accountability

There is little dispute that "modern administrative agencies," "as a practical matter [] exercise" all three powers of government. *City of Arlington*, 569 U.S. at 312 (Roberts, C.J., dissenting); *see also* Sunstein, *supra*, at 446 ("[T]he New Deal agency combines executive, judicial, and legislative functions."); Kagan, *supra*, at 2255 ("From the beginning of the twentieth century onward, many statutes authorizing agency action included open-ended grants of power, leaving to the relevant agency's discretion major questions of public policy.") (footnote omitted).

This streamlined concentration of powers—with broad policymaking authority and insulation from "politics"—is, after all, the whole point of the modern[3] administrative state, a supposedly pragmatic and streamlined administration, free from "politics" and attuned to the complexities of modern life. *See, e.g.*, FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 78 (Yale Univ. Press 1930) ("Enforcement of a rigid conception of separation of powers would make modern government impossible."); *see id.* at 152 ("[T]he staples of contemporary politics—the organization of industry, the control of public utilities, the well-being of agriculture, the mastery of crime and disease—are deeply enmeshed in intricate and technical facts, and must be extricated from presupposition and partisanship.").

Because of the supposed need for technical expertise, the inefficient legislative process, on the one hand, and judicial oversight, on the other hand, had to be jettisoned. Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 Duke L.J. 1565, 1568 (2011). Thus, courts were to apply only "deferential oversight of their co-equal branches … so that the nation's regulatory experiment could continue." Charles M. Haara and Michael Allan

---

[3] The modern Administrative State originated in the Progressive era. *See* Gillian E. Metzger, *Forward, 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 52 (2017) ("It was in the Progressive Era at the end of the nineteenth century and the early decades of the twentieth that national administrative government truly blossomed."); Sunstein, *supra*, at 424 n.9 ("Although administrative agencies have been a part of government since the founding of the republic, the modern regulatory agency is a recent phenomenon[,] … [and] it was not until the New Deal that the modern agency became a pervasive feature of American government.").

Wolf, Euclid *Lives: The Survival of Progressive Jurisprudence*, 115 Harv. L. Rev. 2158, 2161 (2002) (footnote omitted).

In short, the Constitution's separation of powers had to go. *See* WOODROW WILSON, THE NEW FREEDOM 47 (Doubleday, Page & Co. 1918) (comparing government to a living thing, which cannot "live" if "its organs offset against each other, as checks").

This rationale openly (and necessarily) called for the curtailment of individual liberty. *See, e.g.*, *Truax v. Corrigan*, 257 U.S. 312, 376 (1921) (Brandeis, J., dissenting) ("In the interest of the public and in order to preserve the liberty and the property of the great majority of the citizens of a state, rights of property and the liberty of the individual must be remolded, from time to time, to meet the changing needs of society.").

What's striking here is that the same arguments are offered today in defense of the CFPB.

The CFPB's promoters advocated for a single, consumer-protection regulator since previous regulation relied "excessively" on legislation, which purportedly "c[ould ]not effectively respond to market innovation." Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. Pa. L. Rev. 1, 79 (2008). Bar-Gill & Warren thus proposed a single agency empowered to regulate with a "broad mandate, rather than by specifically targeted piecemeal legislation[.]" *Id.* at 98. They called for "ex ante regulations [to] be promulgated and enforced by an administrative agency with broad rulemaking and enforcement authority over consumer credit products." *Id.* at 99.

And, like their forebears, the CFPB's promoters insisted upon political insulation. *See* Bar-Gill & Warren, *supra*, at 99 n.325 (calling for an agency that could evade "political capture"); Eric Pearson, *A Brief Essay on the*

*Constitutionality of the Consumer Financial Protection Bureau*, 47 Creighton L. Rev. 99, 103 (2013) (In addition to capture by private "special interests, "Congress was concerned as well about undue influence *from the federal government itself*.") (emphasis added); *but cf.* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 19 (2010) (recognizing that "one person's political pressure is another person's democratic accountability").

As a result, the CFPB was structured precisely to prevent Presidential (and Congressional) oversight and control.

According to Dodd-Frank, the CFPB is "considered an Executive agency…." 12 U.S.C. § 5491(a). It is placed within the Federal Reserve—another independent agency—but "[n]o rule or order of the Bureau shall be subject to approval or review by the [Federal Reserve's] Board of Governors." *Id.* § 5492(c)(3). Therefore, the CFPB is an independent agency *within*—but independent of—*another* independent agency.

To be sure, the CFPB is authorized to exercise the traditional executive function of enforcing the law—challenging "unfair, deceptive, or abusive act[s] or practice[s]." 12 U.S.C. § 5531(a). *See also Morrison*, 487 U.S. at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.") (citations omitted).

But this power comes with wide-ranging discretion, as the CFPB may proceed as it *alone* deems "necessary or appropriate to enable the [Bureau] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).

And this broad discretion is virtually immune from Presidential control. 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). 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. This removal protection improperly "reduce[s]" the President to "appointer-in-chief." *PHH-2*, 831 F.3d at 156 (Henderson, J., dissenting) (citation omitted).

The CFPB is also immune from OMB and OIRA review. *see PHH-2*, 881 F.3d at 146–47 (Henderson, J., dissenting). And, in stark disregard of the Constitution's command that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const. art. I, § 9, cl. 7, the CFPB is exempted from the normal appropriations process and therefore insulated from Congressional oversight. *See Office of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990) ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

Under Dodd-Frank, the CFPB Director—alone—sets the agency's budget; and the Bureau's funds come from the Federal Reserve, which "*shall* transfer" funds in "the amount [up to a certain percentage of the Federal Reserve's operating budget] *determined by the [CFPB] Director* to be reasonably necessary" to administer the consumer-protection laws. 12 U.S.C. § 5497(a)(1) (emphasis added). Neither OMB review, *Id.* § 5497(a)(4)(E), nor Congressional appropriations, *id.* § 5497(a)(2)(C), are available to ensure that CFPB's budget is subject to the relative priorities of the President and Congress. These funding

decisions are unreviewable. *See id.* The CFPB's funding mechanism thus ties the hands of all future Presidents and Congresses.

### C. Under This Court's Removal Precedents, the CFPB is Unconstitutionally Structured

There is no dispute that the CFPB Director is a principal officer of an executive agency; nor is there a dispute that this Director wields vast, discretionary powers. The only question is whether the President's power to remove such an officer may be restricted. This Court's precedents confirm that Dodd-Frank's for-cause removal restriction violates Article II.

While this Court has upheld presidential-removal restrictions for principal officers "under certain circumstances," *Free Enter. Fund*, 561 U.S. at 483 (citations omitted), it has never countenanced a removal protection for a lone principal officer given virtually unreviewable authority over a powerful agency, funded outside the Congressional appropriations process and vested with a sweeping mandate to do all that is "necessary or appropriate to enable the [CFPB] to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." 12 U.S.C. § 5512(b)(1).

As Judge Henderson observed in *PHH-2*,

> The CFPB is not the first agency exempt from appropriations.... It is not the first agency headed by a single official or lacking a partisan balance requirement.... It is not the first agency with sweeping rulemaking and enforcement powers over an entire sector of the economy.... But the CFPB is the only agency that combines each and every one of these elements with for-cause removal protection and a mission to

> "side" with one segment of the population against others. Neither the Supreme Court nor our Court has upheld anything like it before.

*PHH-2*, 881 F.3d at 155 (Henderson, J., dissenting) (citations omitted).

The Court's precedents require the invalidation of Dodd-Frank's removal-protection provision.

**1. *Myers* and *Free Enterprise* control**

In *Myers*, this Court considered whether the President had the authority to remove a postmaster from office at will. In a detailed, scholarly opinion—written by Chief Justice (and former President) Taft—the Court analyzed at length the purpose of the separation of powers, the President's role in that structure, and the view of the Framers. *Id.*, 272 U.S. at 108–35. According to the Court, the President must be able to remove the heads of the key executive departments in which "the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the government." *Id.* at 134.

But, the Court continued, that obvious conclusion "is not to say that there are not strong reasons why the President should have a like power to remove his appointees charged with other duties." *Id.* at 135. Indeed, the "ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power," and the President "may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.* Any other conclusion would make it "impossi-

ble for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 164.

*Free Enterprise Fund* confirmed this long-'"settled and well understood construction of the Constitution'"; namely, that the President must have the power to remove officers at will so that he can fulfill his duty to take care that the laws are faithfully executed and so that administrative agencies—through the President—remain accountable to the people. *Id.*, 561 U.S. at 492–93; 497–98; 501–02 (citation omitted).

Here, the CFPB Director is a superior executive officer charged with executing the law. Under well-settled precedent, the President must have the power to remove the Director at will.

**2. *Humphrey's Executor* and its progeny do not save the CFPB**

In *Humphrey's Executor*, this Court recognized a narrow exception to *Myers* and upheld a statute that allowed the President to remove Commissioners of the Federal Trade Commission only 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." 295 U.S. at 624. According to the Court, the FTC could not "in any proper sense be characterized as an arm or an eye of the executive;" instead, it was "wholly disconnected from the executive department," and was "created by Congress as a means of carrying into operation legislative and judicial powers, and *as an agency of* the legislative and judicial departments." *Id.* at 628, 630 (emphasis added). Therefore, the Court concluded, the FTC did not exercise executive power "in the constitutional sense." *Id.* at 628.

The Court applied that reasoning in *Wiener v. United States*, which concluded that President Roosevelt had improperly removed a member of the War Crimes Commission. 357 U.S. 349 (1958). The "most reliable factor" to determine a president's removal power is "the nature of the function" vested in an agency. *Id.* at 353. Because the War Crimes Commission was established as "an adjudicating body" that was to be "'entirely free from the control or coercive influence, direct or indirect,'" of either the President or Congress, the for-cause removal protection for Commission members was valid. *Id.* at 354, 355 (quoting *Humphrey's Executor*, 295 U.S. at 629).

The Court retreated from this rationale in *Morrison*. There, the Court stated that while *Humphrey's Executor* "undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial,'" the question whether a removal restriction is permissible no longer turns on an agency official's "purely executive" status. *Morrison*, 487 U.S. at 689. The "real question" now is whether "removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty, and the functions of the officials in question must be analyzed in that light." *Id.* at 691.

*Morrison* upheld a for-cause removal protection for an *inferior* executive officer—an independent counsel—who remained subject to removal (for good cause) by the Attorney General, who himself could be removed at will by the President. 487 U.S. at 671, 691–96. *Morrison* also found it relevant that the independent counsel could be appointed, for a limited time, only upon a specific request by the Attorney General, which gave the executive branch "a degree of control" over the independent counsel's investigative power, and that the independent counsel's jurisdiction was defined by facts submitted by the Attorney General. *Id.* at 696. This arrangement gave the executive

branch "sufficient" control over the independent counsel and "ensure[d]" that the President could perform his constitutionally assigned duties. *Id.*

None of this saves the CFPB. First, under their express terms, *Humphrey's Executor* and *Wiener* turn exclusively on whether the agency's function is something other than executive. Here, the CFPB is unquestionably an executive agency exercising executive functions. Under both *Humphrey's Executor* and *Wiener*, the for-cause removal provision in Dodd-Frank is invalid.

Especially under *Morrison's* "clarification," the CFPB's structure must be invalidated. Unlike the independent-counsel office in *Morrison*, the CFPB Director is a principle officer of an executive agency of unlimited duration; the Director has vast, discretionary powers that may be implemented at the Director's sole impetus; and the Director's actions are virtually unreviewable.

* * *

As this Court's precedents instruct, the President cannot ensure that the laws are faithfully executed and cannot ensure administrative accountability unless he has the power to remove superior executive officers vested with vast, discretionary, and virtually unreviewable powers.

## II.

## IF THE COURT CONCLUDES THAT ITS PRECEDENTS DO NOT INVALIDATE THE CFPB'S STRUCTURE, THE COURT SHOULD RETURN TO FIRST PRINCIPLES

### A. *Humphrey's Executor* and its progeny have allowed Congress to experiment with various forms of "independent" agencies

While the holding in *Humphrey's Executor* turned on the "character" of the office at issue, 295 U.S. at 624, the opinion defended the removal protection on other

grounds. According to the Court, the FTC needed independence because it was to be a non-partisan "body of experts" that would act "with entire impartiality." *Id.* at 624, 625. Its only "policy" was the "policy of the law." *Id.* at 624. Thus, Congress had established the FTC to be "'independent of any department of the government.'" *Id.* at 625 (citation omitted).

This pragmatic justification—and not the character of a particular office or an office's location within one of the three branches—ultimately became dispositive and set the stage for the modern, "independent" administrative agency. Not surprisingly, after *Humphrey's Executor*, the Court has upheld the validity of all manner of "independent" agencies that are delegated vast, discretionary powers but left consciously unaccountable to "any department of the government." *Id.*, 295 U.S. at 625. *See NBC v. United States*, 319 U.S. 190, (1943) (approving delegation of legislative power FCC to act "as the public convenience, interest, or necessity requires"); *Yakus v. United States*, 321 U.S. 414, 433–44 (1944) (upholding Emergency Price Control Act, which granted the Office of Price Administration authority to establish price controls and to enforce criminal violations, while limiting judicial review); *SEC v. Chenery*, 332 U.S. 194, 202 (1947) (approving administrative policymaking through enforcement actions because "problems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule."); *Withrow v. Larkin*, 421 U.S. 35 (1975) (finding no due process violation in agency vested with both investigatory and adjudicatory powers).

The CFPB represents a return to the—pragmatically speaking—failed ideas of the New Deal's conception of administrative agencies. *See, e.g.*, Zywicki, *supra*, at 870 ("Much of the blame came to rest on the philosophy that

had animated the New Deal support for administrative agencies: the naïve view that unelected bureaucrats insulated from political oversight and other feedback mechanisms would produce ideal policies.") (footnote omitted); Sunstein, *supra*, at 483 ("The idea of autonomous administration is outdated.") (footnote omitted).

### B. If the CFPB survives the Court's precedents, then *stare decisis* cannot save *Humphrey's Executor*

Overturning precedent is not, of course, a "'small matter.'" *Kisor*, 139 S. Ct. at 2422 (citation omitted). But *stare decisis* is "not an inexorable command, and this Court should not always remain bound to decisions whose rationale no longer withstands careful analysis." *Id.* at 2445 (Gorsuch, J., dissenting) (quotation marks and citations omitted). The Court thus "consider factors such as the quality of [the precedent's] reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* (quotation marks and citations omitted) (bracketed information supplied by Gorsuch, J.)). If the Court concludes that its precedents support the CFPB's viability, then the Court's *stare decisis* factors all but require that *Humphrey's Executor* be reversed.

First, the Court itself has altered—if not outright rejected—the reasoning for *Humphrey's Executor's* ruling. *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.); *Collins v. Mnuchin*, 938 F.3d 553, 619–20 (5th Cir. 2019) (Higginson, J., dissenting in part) ("*Morrison* downgraded

*Wiener*'s and *Humphrey's Executor*'s inquiries from a determination to a subsidiary level.") (citation omitted).

Second (and third), the "pragmatic" test—applied as needed depending on the unique nature of the agency power presented—"works" only in the sense that it gives the Court room to approve the "gradual concentration of the several powers in the same department." *The Federalist No. 51*, at 321 (Madison). *See, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851 (1986) (approving "the concerns that drove Congress *to depart from* the requirements of Article III") (emphasis added). Through this "workable" standard, the Administrative State's "slight encroachments create new boundaries from which [its] legions of power [] seek new territory to capture[,]" *Stern v. Marshall,* 564 U.S. 462, 503 (2011) (internal quotation marks and citation omitted).

Finally, no reliance interest justifies the continued concentration of powers in unaccountable, fourth branches of government. Indeed, the only reliance interests that will be harmed are those of the independent agencies themselves. But this Court "has never suggested that the convenience of government officials should count in the balance of *stare decisis*, especially when weighed against the interests of citizens in a fair hearing before an independent judge and a stable and knowable set of laws." *Kisor*, 139 S. Ct. at 2447 (Gorsuch, J., dissenting). And when compared against the interests of the people to be free from arbitrary government, any reliance interests here counsel against upholding *Humphrey's Executor*.

## III.

## 12 U.S.C. § 5491(C)(3) CANNOT BE SEVERED FROM THE DODD-FRANK ACT

Remedies for Appointments Clause violations must assure that the Clause's "structural purposes" are

protected. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). Equally important, remedies should deter Congress from enacting, and the President from signing, laws that violate those structural purposes in the future—and should hold Congress and the Executive accountable for their failure to protect the separation of powers.

Here, Petitioner has cogently explained why this Court need not even reach the question of severability, as it can simply reverse the judgment below. Pet. Br. 35–41. But if it does reach the question, the CFPB's constitutional infirmity must be resolved through means other than simply severing §5491(c)(3). *Id.* at 41–47. Invalidating that section would subject the Director and the CFPB to Presidential oversight and control, even though exempting the Director from Presidential control was an inseparable part of Congress's purpose, without which Title X of Dodd-Frank would not have been enacted. Therefore, if it reaches the severability question, this Court must invalidate all of Title X so that Congress can consider anew whether and how to create an executive agency charged with consumer financial protection.

### A. Application of the severability doctrine depends on Congress' intent

The severability doctrine implicates three competing principles. First, out of respect for the political branches, the default rule is that of "partial, rather than facial, invalidation." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) (citation omitted); *see also id.* (a court should not "nullify more of [the] legislature's work than is necessary"). Second, because federal courts' "constitutional mandate and institutional competence are limited," *id.*, unlawful portions of a statute can be judicially severed only if the statute—with the offending provision(s) excised—"is legislation that Congress would ...

have enacted." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987); *see also Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (asking whether Congress would have enacted "those provisions which are within its power, independently of those which are not") (citation and alterations omitted).

The tension between these two principles is resolved by analyzing legislative intent, "the touchstone for any decision about remedy." *Ayotte*, 546 U.S. at 330. In reviewing legislative intent, the question is not whether the statute (absent the offending provisions) would still accomplish some of Congress' purposes, but whether the unconstitutional provisions were insignificant enough that without them, the statutory scheme would still "function in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685. And this analysis involves a familiar inquiry into the statute's "language," "structure" and "legislative history." *Alaska Airlines*, 480 U.S. at 697.

**B. Congress intended independence from Presidential oversight and control to be an indispensable feature of the CFPB**

Here, the language, structure, and history of the Dodd-Frank Act compel the conclusion that severing the for-cause removal provision is not an available remedy. Congress specifically designed the CFPB to be free of political control—especially Presidential control—and considered that to be an indispensable part of the statutory design.

As for language and structure, the above discussion highlights how the CFPB was designed to be independent of both the President and Congressional oversight. *See supra*, Part I.C. Thus, excising for-cause removal protection for the CFPB's Director would not only undermine Congress' intention to create an "independent" bureau,

but "would by judicial decree transfer to the executive branch far-reaching new powers that, before Title X, resided with several non-executive agencies." *PHH-2*, 881 F.3d at 162 (Henderson, J., dissenting). The Congress that enacted Dodd-Frank would not have countenanced that outcome.

That conclusion is confirmed by the history of the Act. *See, e.g.*, 156 Cong. Rec. at 7481, 7485, 8931 ("We took steps to ensure that the [CFPB's] funding will be independent and reliable so that its mission cannot be compromised by political maneuvering.") (Sen. Dodd); *id.* at 12434 ("It will be completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority.") (Rep. Maloney).

Given this text and history, it is clear that putting the CFPB under direct executive control would have been unacceptable. Independence was indispensable, and without it, the statute would cease to "function in a manner consistent with the intent of Congress" and, therefore, "Congress would not have enacted" the statute absent §5491(c)(3). *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted).

The CFPB is thus markedly different from the PCAOB, since "nothing in the statute's text or historical context" showed that Congress "would have preferred no Board at all to a Board whose members are removable at will." *Free Enter. Fund*, 561 U.S. at 509. Severing a for-cause removal restriction was therefore deemed an acceptable remedy. In contrast, the evidence shows that subjecting the CFPB to Presidential control would have been too "controversial" to garner congressional approval, at east "without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Severing §5491(c)(3)

would not provide this oversight mechanism, since it would not affect the CFPB's exemption from appropriations and all other legislative review. Severance is therefore not an appropriate remedy.

---

## CONCLUSION

The CFPB should be declared unconstitutional.

DATED: December 2019.

Respectfully submitted,

STEVE SIMPSON
Pacific Legal Foundation
3100 Clarendon Blvd.,
Suite 610
Arlington, VA 22201

OLIVER J. DUNFORD
*Counsel of Record*
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
(916) 419-7111
ODunford@pacificlegal.org

GLENN E. ROPER
Pacific Legal Foundation
1745 Shea Center Dr., Ste. 400
Highlands Ranch, Colorado 80129

*Counsel for Amicus Curiae Pacific Legal Foundation*