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 FOR SEPARATION OF POWERS SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

ILAN WURMAN*
Sandra Day O'Connor College of Law
Arizona State University
111 E. Taylor St.
Phoenix, AZ 85004
(480) 965-2245
ilan.wurman@asu.edu

**Counsel of Record*

Counsel for Amici Curiae

QUESTIONS PRESENTED

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

2. If the Consumer Financial Protection Bureau 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?

This brief addresses only the first question presented.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. Text, structure, and history show that Article II's Vesting Clause confers on the President the power to remove principal executive officers. 5

II. Contrary arguments from early historical practice are unpersuasive. 20

III. *Humphrey's Executor* should be revisited or, at a minimum, not extended. 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Cases

Bank of the United States v. *Planters' Bank of Georgia*,
22 U.S. (9 Wheat.) 904 (1824) 25

City of Arlington v. *FCC*,
569 U.S. 290 (2013) 29

Free Enterprise Fund v. *Public Company Accounting Oversight Board*,
561 U.S. 477 (2010) 5, 29

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

Lebron v. *National Railroad Passenger Corp.*,
513 U.S. 374 (1995) 25

Marbury v. *Madison*,
5 U.S. (1 Cranch) 137 (1803).......................... 17–18

McCulloch v. *Maryland*,
17 U.S. (4 Wheat.) 316 (1819) 15

Mistretta v. *United States*,
488 U.S. 361 (1989) 29

Morrison v. *Olson*,
487 U.S. 654 (1988) 6, 29

Myers v. *United States*,
272 U.S. 52 (1926) 3, 6, 19, 20

National Federation of Independent Business v. *Sebelius*,
567 U.S. 519 (2012) 15

PHH Corp. v. *Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) ....*passim*

Wiener v. *United States*, 357 U.S. 349 (1958) 29

Statutes and Constitutional Provisions

12 U.S.C. § 5581(b)(5)(B) 4

12 U.S.C. § 5491(b)(1) 4

12 U.S.C. § 5491(c)(3) 4

12 U.S.C. § 5492(a)(10) 4

Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65 23

Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67 22

Act of Settlement, 12 & 13 Wm. 3. c. 2 9

Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717 (1914) 28

U.S. Const. art. I, § 1 5

U.S. Const. art. I, § 8, cl. 18 .... 11, 14

U.S. Const. art. II, § 1 .... 2, 3, 5, 11

U.S. Const. art. II, § 2, para. 1 25

U.S. Const. art. II, § 2, para. 2 .... 2, 11, 26

U.S. Const. art. II, § 3 .... 2, 3, 5

Other Authorities

1 Annals of Cong. (Joseph Gales ed., 1790) ....*passim*

1 William Blackstone, *Commentaries on the Laws of England* (1st ed. 1765–69) ....*passim*

5 John Marshall, The Life of George Washington (1807) 19

15 Alexander Hamilton, *The Papers of Alexander Hamilton* 33 (Harold C. Syrett ed., 1969)... 19

Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111 (2019)............. 17

Brief of Separation of Powers Scholars as *Amici Curiae* in Support of CFPB, *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177) 21, 23–25

David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801 (1997) 20

Documentary History of the First Federal Congress, 1789–1791 (Bickford et al. eds., 1992) ....*passim*

Edwin S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353 (1927) 20

Frank J. Goodnow, Politics and Administration (1900) 30

Ilan Wurman, *In Search of Prerogative*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472108 12

James Wilson, On the Legislative Authority of the British Parliament, 2 Works of James Wilson 505 [1774] (J. Andrews, ed. 1896)... 7

Journal of William Maclay, 1789-1791, https://memory.loc.gov/ammem/amlaw/lwmj.html 18

Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019) 12

Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994) 21, 22, 25–26

Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* Correspondence, First Session: June-August 1789, 16 *Documentary History of the First Federal Congress, 1789-1791*, at 890 (Charlene Bangs Bickford et al. eds., 2004) 20

Matthew Hale, Prerogatives of the King (D.E.C. Yale ed., 1975) 7

Michael Duffy, The Younger Pitt (2013) 3, 9

Michael W. McConnell, The President Who Would Not Be King (Princeton University Press forthcoming) 6

Murray Scott Downs, *George III and the Royal Coup of 1783*, 27 The Historian 56 (1964) 3, 9

Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001) 11–12

Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701 22

Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006) 20

Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute The Laws*, 104 Yale L.J. 541 (1994) 26

The Federalist No. 70 (Alexander Hamilton) (Clinton Rossiter ed., 2003) 16

The Records of the Federal Convention of 1787 (Max Farrand ed., 1966) (1911) 10, 26

Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197 (1887) 30

INTEREST OF *AMICI CURIAE*[*]

Amici are law professors who teach and write about executive power, administrative law, constitutional law, and the separation of powers. They are interested in the sound development of these fields. Each of the *amici* is listed below. Institutional affiliations are included for identification purposes only.

Steven G. Calabresi
Clayton J. & Henry R. Barber Professor,
Northwestern University Pritzker School of Law

Michael W. McConnell
Richard and Frances Mallery Professor of Law
Director, Constitutional Law Center
Stanford Law School

Saikrishna Prakash
James Monroe Distinguished Professor of Law
Paul G. Mahoney Research Professor of Law
University of Virginia School of Law

Jeremy A. Rabkin
Professor of Law
Antonin Scalia Law School
George Mason University

---

[*] Pursuant to Rule 37.2(a), *amici* provided timely notice of their intention to file this brief. All parties consented. In accordance with Rule 37.6, no counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution intended to fund the brief's preparation or submission.

Michael D. Ramsey
Hugh & Hazel Darling Foundation Professor of Law,
University of San Diego School of Law

Michael Rappaport
Hugh & Hazel Darling Foundation Professor of Law
Director, Center for the Study of Constitutional Originalism
University of San Diego School of Law

Ilan Wurman
Visiting Assistant Professor
Sandra Day O'Connor College of Law
Arizona State University

SUMMARY OF THE ARGUMENT

1. The Consumer Financial Protection Bureau (CFPB) is a regulatory agency headed by a single director insulated from presidential control and removal, yet wielding executive power. This agency structure is unconstitutional because Article II of the Constitution vests "[t]he executive Power" in the President of the United States and charges the President with the duty to "take Care that the Laws be faithfully executed," a duty that cannot be discharged without authority to supervise, control, and remove subordinate executive officers. U.S. Const. art. II, §§ 1, 3. To be sure, the Constitution assigns some of the historical executive power away from the President: Article II, Section 2, for example, gives the Senate a share in the appointment power. *Id.* § 2. But except as specifically qualified, the executive power is vested

in the President. Therefore, if the power to remove principal executive officers is part of "[t]he executive Power" or essential to carrying out the duty to "take Care that the Laws be faithfully executed," it is vested in the President.

As this Court recognized in *Myers* v. *United States*, 272 U.S. 52 (1926), the power to remove is a necessary element of the executive power. Two important historical sources confirm that, whatever else might be contained within "[t]he executive Power," that power includes the ability to remove executive officers who assist the chief executive magistrate in carrying the laws into execution. First, in eighteenth-century English law and practice the executive magistrate had the power to remove principal executive officers as part of the executive power to carry law into execution. *See, e.g.*, 1 William Blackstone, Commentaries on the Laws of England *243, 261–62, 327 (1st ed. 1765–69); Michael Duffy, The Younger Pitt 18–27 (2013); Murray Scott Downs, *George III and the Royal Coup of 1783*, 27 The Historian 56, 72–73 (1964).

Second, in 1789 the First Congress concluded that, although not expressly mentioned in the Constitution, this removal power was constitutionally vested in the President on the basis of the two overlapping and complementary textual grounds discussed above: because the power of removal is part of "[t]he executive Power" vested in the President, and because such a removal power is necessary for the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3.

As a result, the structure of the CFPB is unconstitutional. The CFPB, among other duties, is charged

with law enforcement. 12 U.S.C. §§ 5492(a)(10), 5581(b)(5)(B)(ii). It is headed by a single director who may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." *Id.* §§ 5491 (b)(1), (c)(3). Thus the President does not fully control the CFPB's law execution.

2. In recent decades, revisionist scholars have argued that the President's authority over the Treasury Department, financial regulators, and "Article I" agencies is distinct from the President's authority over "Article II" agencies tasked with assisting the President in exercising inherent constitutional power. The Framers and Founding generation, however, recognized no such distinction. To the extent financial agencies enforce the law, they exercise executive power.

3. Not only is the CFPB's structure unconstitutional, it is unprecedented. In 1935, the Court in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), in addressing the structure of the Federal Trade Commission (FTC), created space for Congress to establish multi-member commissions charged with "quasi-legislative" and "quasi-judicial" responsibilities, led by commissioners with staggered terms.

The Court's efforts in *Humphrey's* to distinguish *Myers* and avoid the force of Article II, Sections 1 and 3, were and remain unpersuasive. The Constitution only recognizes legislative power that can be exercised by Congress, judicial power that can be exercised by the judiciary, and executive power—even if the exercise of this executive power sometimes takes regulatory or adjudicatory forms—that is vested in the President.

Humphrey's is thus inconsistent with the Constitution's text and original meaning and should be revisited—or, at minimum, should not be extended. *See Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (declining to extend *Humphrey's* to multiple levels of removal protection). Here, the CFPB's structure concentrates unsupervised executive power in a single person outside the executive itself. It represents an unprecedented extension of the exception created by *Humphrey's*. The Court should reject that extension and reaffirm the original meaning of Article II's Vesting Clause.

ARGUMENT

I. Text, structure, and history show that Article II's Vesting Clause confers on the President the power to remove principal executive officers.

The Constitution provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. Particularly when compared to the limited grant of legislative power to Congress—"all legislative Powers *herein* granted," *id.* at art. I, § 1 (emphasis added)—the Vesting Clause of Article II indicates that all of the executive power, absent express limitations, is vested in the President of the United States. Moreover, the President is charged with the duty to "take Care that the Laws be faithfully executed," *id.* at art. II, § 3, which, as Madison and other framers recognized (see below), could not be fulfilled without presidential authority to supervise and remove officers engaged in executing the law.

The key questions, then, are what constitutes this "executive power," and what power may be implied by the President's duty of faithful execution.

As this Court recognized in *Myers*, the power to remove is a necessary element of the executive power because the President cannot possibly hope to execute the law alone. 272 U.S. at 117. The President must therefore have assistants. Without power to control those officers, however, including the power to remove, the President does not fully control law execution and is not able to ensure that the laws are faithfully executed. *Id.*; *see also Morrison* v. Olson, 487 U.S. 654, 706–09 (1988) (Scalia, J., dissenting).

The two most valuable sources bearing on the meaning of Article II are the British Constitution, which defined the terms of the debate in the Constitutional Convention, and the First Congress's debates over the removal power. Both indicate that, whatever else is included within "[t]he executive Power," it at a minimum includes the power to remove principal executive officers engaged in prosecutorial or enforcement functions.

The British Constitutional Backdrop. The delegates to the Constitutional Convention were attentive to the powers of the monarch as set forth in William Blackstone's *Commentaries*, allocating almost every single power discussed in Blackstone to Congress, to the President, or to the President with a senatorial check, or eliminating some from the reach of federal power altogether. *See generally* Blackstone, *supra*, at *245–69; Michael W. McConnell, The President Who Would Not Be King (Princeton University Press forthcoming) (on file with author).

The power to remove principal executive officers was one of the few royal powers not explicitly discussed, but the overwhelming weight of the evidence is that removal was part of the executive power, necessary to the President's role of law execution, and not assigned to Congress.

In the eighteen-century British Constitution, like the U.S. Constitution, the "supreme executive power" of the nation was vested in a single person. Blackstone, at *183. The king was anything but a figurehead. As noted in Matthew Hale's *Prerogatives of the King*, at 11 (D.E.C. Yale ed., 1975), written in the seventeenth century, "[T]he supreme administration of this monarchy is lodged in the king, and that not only titularly, but really." The king was understood to be the "fountain of justice and general conservator of the peace of the kingdom." Blackstone, at *257. Accordingly, the king was the "proper person to prosecute for all public offenses and breaches of the peace," could grant pardons, and could nominate judges. *Id.* at *259. The king had the power to make proclamations as to the "manner, time, and circumstances of putting [the] laws in execution." *Id.* at *261. Writing in 1774, James Wilson described the king as "intrusted" with "the direction and management of the great machine of government." James Wilson, On the Legislative Authority of the British Parliament, 2 Works of James Wilson 505, 520 [1774] (J. Andrews, ed. 1896). This is the core of the executive power.

Of course, to discharge these responsibilities, the king required ministers and officers, who "act[ed] by commission from, and in due subordination to him." Blackstone, at *243. The king created offices, ap-

pointed and supervised officers, and—more relevant here—had the power to remove office-holders. The drafters of the U.S. Constitution divided these powers, giving Congress the power to create offices, the President power to nominate and appoint officers to fill them (with senatorial advice and consent as to principal officers), and the President the duty to ensure that those officers faithfully execute their responsibilities. The Constitution thus assigns Congress and the Senate roles only in the creation of, and appointment to, offices, and not in the removal of officers.

Additionally, the power to remove principal executive officers unquestionably belonged to the executive magistrate as a necessary component of the executive power to carry law into execution, which the Constitution assigns to the President. Blackstone wrote that the king is "the fountain of honour, of office, and of privilege." Blackstone, at *261. As to "officers," Blackstone wrote, this meant that "the law supposes, that no one can be so good a judge of their several merits and services, as the king himself who employs them," from which principle "arises the prerogative of erecting and disposing of offices." *Id.* at *262. In a section of his *Commentaries* entitled "Of Subordinate Magistrates," Blackstone described the principal officers—namely, "the lord treasurer, lord chamberlain, the principal secretaries, [and] the like"—as "his majesty's great officers of state" and explained that these offices are not "in any considerable degree the objects of our laws." *Id.* at *327. In other words, the principal officers of state were executive, not legislative, creatures.

In a famous incident just four years before the Constitutional Convention, King George III cashiered Prime Minister Fox, notwithstanding Fox's majority support in the House of Commons, and replaced him with William Pitt the Younger, who continued in office despite a no-confidence vote in the Commons. See Duffy, *supra*, at 18–27; *see also* Downs, *supra*, at 72–73 (noting that it was "manifestly [the king's] constitutional prerogative of dismissing his ministers and dissolving the parliament"). This would be the last time in English history that the king personally exercised the removal power at the highest reaches of government, but it dramatically illustrated the potency of the British executive's removal power on the eve of the Constitution.

Other officers involved in the execution of the laws, such as sheriffs and justices of the peace, also served at the pleasure of the Crown. Blackstone, at *331 (sheriffs); *id.* at *341 (justices of the peace). Removal restrictions existed only for officers exercising judicial or ministerial functions, Act of Settlement, 12 & 13 Wm. 3. c. 2 (judges in Britain); Blackstone at *336–37 (coroners), and for certain local or municipal officials who related to "mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchise." *Id.* at *328.

Other parts of Blackstone likewise indicate that the power to appoint, control, and remove officers was part of "the executive power." Blackstone wrote that the king had a right to erect a particular kind of office—courts—because it was "impossible" for the king to exercise "the whole executive power of the laws" on his own. Blackstone, at *257. In the Constitutional

Convention, Madison similarly argued that the executive authority would need assistants to help execute the laws, and he thus stated that the power to carry into execution the laws and to appoint officers not already provided for were in their nature "executive" powers. 1 The Records of the Federal Convention of 1787, at 66–67 (Max Farrand ed., 1966) (1911) (hereinafter "Farrand").

Blackstone also described the power of prosecution as part of "the executive power." Under the same roman numeral heading under which Blackstone described "the executive power of the laws" and the need for assistants, Blackstone also discussed "criminal proceedings." Blackstone, at *258. Because the public

> has delegated all it's power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law.

Id. at *258–59. Thus, Blackstone specifically included the power to prosecute as a power "with regard to the execution of the laws." Those officers engaged in enforcement functions are therefore exercising the executive power.

Finally, Blackstone described a power to issue proclamations as to "the manner, time, and circumstances of putting [Parliament's] laws in execution."

Blackstone, at *261. These proclamations were "binding upon the subject" when they "only enforce[d] the execution of such laws as are already in being." *Id.* And if they were binding on subjects, these executive directives would have been binding on executive officers, too.

In sum, Blackstone's discussion indicates that the power to appoint and direct assistants, particularly in the context of prosecutorial or enforcement functions, was part of "the executive power of the laws." The power to create offices, dispose of (appoint to and remove from) those offices, and direct those officers was part of the king's power to carry law into execution. To be sure, the Constitution assigns some of these royal powers to Congress. It assigns the power to create offices to Congress, U.S. Const. art. I, § 8, cl. 18, and the power to appoint to office to the President and Senate together (for principal officers), *id.* art II, § 2, para. 2. Yet it does not assign the removal power in this manner. It instead vests "[t]he executive Power" in the President alone. *Id.* art. II, § 1. Because the executive power to carry law into execution entailed the component powers of office creation, appointment, direction, and removal, those powers are a part of "[t]he executive Power" vested in the President except where the Constitution has assigned those powers to another department of the national government.[1]

---

[1] There is a debate among scholars over whether "the executive power" granted in Article II's Vesting Clause is a residual grant of powers exercised by the executive magistrate in England, or is merely a grant of law-execution power. *Compare* Saikrishna B. Prakash & Mi-

The Decision of 1789. The First Congress came to the same conclusion in 1789 when it created the first three executive departments. Congress first debated a draft bill creating the Department of Foreign Affairs, which provided that the Secretary of the department was only removable "from office by the President of the United States." 1 Annals of Cong. 455 (1789) (Joseph Gales ed., 1834) (hereinafter "1 Annals"); 11 Doc. Hist. of First Fed. Cong., 1789–1791, at 842 (Bickford et al. eds., 1992) (hereinafter "DHFFC"). Some representatives worried that a removal power would be dangerous if vested in the President alone, and argued that the President could only remove officers by and with the advice and consent of the Senate—the same process by which he could appoint them. *See, e.g.*, 1 Annals at 381; 10 DHFFC at 36. A few argued that impeachment was

---

chael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231 (2001) (arguing for a residual grant of foreign affairs powers), *with* Julian Davis Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169 (2019) (arguing that Article II's Vesting Clause is a grant of only law-execution power), *and with* Ilan Wurman, *In Search of Prerogative*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3472108 (arguing that the clause only grants the power to execute law, but that this power plausibly includes incidental and component powers like the removal power). This Court need not, and should not, resolve this debate in this case. Amici believe that under either account of "[t]he executive Power," it includes the power to remove principal executive officers assisting the President in carrying the laws into execution. Prakash & Ramsey, *supra*; Wurman, *supra*.

the only mechanism for removing officers, 1 Annals at 375; 10 DHFFC at 730, and others that Congress could decide the matter under its authority to create offices pursuant to the Necessary and Proper Clause, 1 Annals at 484; 11 DHFFC at 909.

Other representatives disagreed, arguing that the Constitution vested the removal power in the President alone. James Madison, Fisher Ames, and other representatives made two constitutional arguments in favor of a presidential removal power.

First, the removal power is part of the executive power. "The Constitution places all Executive power in the hands of the President," explained Fisher Ames, "and could he personally execute all the laws, there would be no occasion for establishing auxiliaries; but the circumscribed powers of human nature in one man, demand the aid of others." 1 Annals at 474; 11 DHFFC at 880. Because the President cannot possibly handle all the minutiae of law-execution, he "must therefore have assistants." 1 Annals at 474; 11 DHFFC at 880. But "in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist." 1 Annals at 474; 11 DHFFC at 880. The executive power thus includes a "choice in selecting . . . assistants, a control over them, with power to remove them." 1 Annals at 474; 11 DHFFC at 880.

For his part, Madison conceived "that if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals at 463; 11 DHFFC at 868. "[I]f any thing in its nature is executive," he later

added, "it must be that power which is employed in superintending and seeing that the laws are faithfully executed." 1 Annals at 500; 11 DHFFC at 926.

Because removal was part of "the executive power," Article II vested that power in the President unless that power was qualified by some other provision in the Constitution. Madison elaborated on this textual and structural argument:

> The Constitution affirms, that the Executive power shall be vested in the President. Are there exceptions to this proposition? Yes, there are. The Constitution says, that in appointing to office, the Senate shall be associated with the President, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception? I believe not.

1 Annals at 463; 11 DHFFC at 868; *see also* 1 Annals at 496 (Madison) ("[T]he Executive power shall be vested in a President of the United States. The association of the Senate with the President in exercising that particular function, is an exception to this general rule; and exceptions to general rules, I conceive, are ever to be taken strictly."); 11 DHFFC at 896.

To be sure, as noted, some Representatives argued in 1789, as some scholars do today, that the Necessary and Proper Clause is an assignment away from the President because Congress's power to establish (or abolish) offices might include the power to set conditions on the removal of officers. U.S. Const. art. I, § 8, cl. 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for car-

rying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."). The Necessary and Proper Clause, however, does not give Congress power to derogate from the President's executive power; it only gives power to help carry that power into execution.[2] A restriction on the power to remove would not be in furtherance of the President's power but rather a hindrance to it.

James Madison addressed this argument from the Necessary and Proper Clause in the 1789 debate, arguing as follows:

> [W]hen I consider, that, if the Legislature has a power, such as is contended for, they may subject and transfer at discretion powers from one department of our government to another; they may, on that principle, exclude the President altogether from exercising any authority in the removal of officers; they may give to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress, or they may reserve it

---

[2] *Cf. Nat'l Fed'n of Indep. Bus.* v. *Sebelius,* 567 U.S. 519, 559 (2012) ("[W]e have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws, which are not 'consist[ent] with the letter and spirit of the constitution,' are not 'proper [means] for carrying into Execution'" the Constitution's enumerated powers.) (quoting *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)).

> to be exercised by this House. When I consider the consequences of this doctrine, and compare them with the true principles of the Constitution, I own that I cannot subscribe to it.

1 Annals at 495–96; 11 DHFFC at 921–22. In other words, if the power to establish and abolish offices includes the power to restrict removal, then it is unclear what limits on the power to restrict there might be. And such a doctrine, Madison argued, would be entirely incompatible with the "true principles of the Constitution"—its separation of powers and its creation of a unitary, energetic, and accountable executive. The Federalist No. 70, at 422–28 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

The Take Care Clause supports this reading of the vesting and necessary and proper clauses. As Madison argued, the Take Care Clause suggests the removal power is constitutionally vested in the President because otherwise the President would have insufficient power to ensure the faithful execution of the laws: "If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." 1 Annals at 496; 11 DHFFC at 922. Similarly, Fisher Ames argued:

> In the Constitution the President is required to see the laws faithfully executed. He cannot do this [unless] he has a control over officers appointed to aid him in the performance of his duty. Take this power out of his hands, and you virtual-

> ly strip him of his authority; you virtually destroy his responsibility.

1 Annals at 539–40; 11 DHFFC at 979. Thus the Take Care Clause supports the prior reading of the Vesting Clause: the President may remove executive officers in part to ensure the faithful execution of the laws.

Some modern scholars have argued that the Take Care Clause supports limiting the President's ability to remove executive officers. *See, e.g.*, Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2112 (2019) ("Our history supports readings of Article II . . . that limit Presidents to exercise their power in good faith . . . . So understood, Article II may thus place some limits on the pardon and removal authority."). This argument fails, however, because it effectively transfers the duty to "take care" from the President, to whom the Constitution gives such duty explicitly, to Congress. The argument is simply a disagreement with the Constitution.

Additionally, if the executive power includes at its core the power to exercise discretion within the bounds of the law, then it is up to the President how to exercise such discretion. In other words, subordinate officers may be faithfully executing their trust, but nevertheless exercising discretion in a way that the President disfavors. The very core of executive power is exercising discretion within the bounds of statutory authority. Blackstone, at *261 (describing a proclamation power as to the "manner, time, and circumstances" of putting laws into execution). And the Take Care Clause requires that the President have the ability to oversee a subordinate's exercise of discretion to ensure that the subordinate is faithfully

executing the law according to *the President's* good-faith understanding. *Cf. Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165–67 (1803) (suggesting that "in cases in which the executive possesses a constitutional or legal discretion," the acts of officers are ultimately the President's acts).

In any event, with the various arguments on the table, the House of Representatives in 1789 devoted over five full days of debate to the question of the President's removal power. After the first day, a majority agreed to retain the clause "to be removable by the President," 1 Annals at 371, 383; 10 DHFFC at 718, 740, and further rejected a proposal to include the modifying phrase "by and with the advice and consent of the senate," 1 Annals at 382; 10 DHFFC at 738.

After the fifth day, the House made a significant change. It altered the bill to ensure that its language would not be construed as a *conferral* of the removal power. The amended provision stated that "whenever the said principal officer shall be removed from office by the President," the departmental papers would then be under the control of the department's clerk. 1 Annals at 578; 11 DHFFC at 1028. As explained by the sponsor of this amendment, Representative Benson, the alteration was intended "so that the law may be nothing more than a declaration of our sentiments upon the meaning of a Constitutional grant of power to the President." 1 Annals at 505; 11 DHFFC at 931–32. This amendment passed by a vote of 30 to 18. 1 Annals at 580. The Senate agreed by a vote of 10-10, with Vice President Adams breaking the tie. William Maclay, *Journal of William Maclay, United States Senator from Pennsylvania, 1789-1791*, at 116

(Edgar S. Maclay ed., 1890), https://memory.loc.gov/ammem/amlaw/lwmj.html.

Despite the close nature of the vote in the Senate, Madison thought that Congress's decision on this question, which has come to be known as the "Decision of 1789," *see, e.g.*, *Humphrey's Ex'r*, 295 U.S. at 630, would become the "permanent exposition of the Constitution," 1 Annals at 495; 11 DHFFC at 921. And with a few highly controversial exceptions—such as the Tenure of Office Act, enacted by radical Republicans to prevent Andrew Johnson from removing certain of Lincoln's cabinet members—so it remained. "Summing up . . . the facts as to acquiescence by all branches of the Government in the legislative decision of 1789, as to executive officers, whether superior or inferior," the Supreme Court explained in *Myers*, "we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no decision of this Court at variance with the declaration of the First Congress, but there was, as we have seen, clear, affirmative recognition of it by each branch of the Government." 272 U.S. at 163. Alexander Hamilton and Chief Justice Marshall had no doubt that Congress's decision reflected its constitutional interpretation that the removal power was constitutionally vested in the President. *See* 15 Alexander Hamilton, *The Papers of Alexander Hamilton* 33, 40 (Harold C. Syrett ed., 1969); 5 John Marshall, *The Life of George Washington* 200 (1807).[3]

---

[3] Some scholars have suggested that the Decision of 1789 was no decision at all because, they argue, the majority in favor of Benson's amendment was actually cobbled together by representatives who believed the removal

II. Contrary arguments from early historical practice are unpersuasive.

In recent decades, revisionist scholars have sought to cast doubt on these textual, structural, and historical arguments by claiming that financial and other

---

power was *constitutionally* vested in the President and those who believed Congress could *confer* such power. *Myers*, 272 U.S. at 285 n.75 (Brandeis, J., dissenting); Edward S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 362–63 (1927); David P. Currie, The Constitution in Congress: The Federalist Period, 1789-1801, at 40–41 (1997). Yet Madison and other advocates of the Benson amendment made clear their belief that the removal power is constitutionally vested in the President. As Madison reminded the representatives toward the end of the debate, "Gentlemen have all along proceeded on the idea that the Constitution vests the power in the President." 1 Annals at 578; 11 DHFFC at 1029; *see generally* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021 (2006).

In any event, the standard interpretation of the First Congress's decision is the better interpretation in light of the Constitution's text and structure. As Madison explained in a letter to Thomas Jefferson, the House's decisions about the removal power was "most consonant to the text of the Constitution, to the policy of mixing the Legislative and Executive Departments as little as possible, and to the requisite responsibility and harmony in the Executive Department." Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* Correspondence, First Session: June-August 1789, 16 *Documentary History of the First Federal Congress, 1789-1791*, at 890, 893 (Charlene Bangs Bickford et al. eds., 2004).

"Article I" agencies are distinct from "Article II" agencies tasked with assisting the President in exercising inherent constitutional power. *See, e.g.*, Brief of Separation of Powers Scholars as *Amici Curiae* in Support of CFPB, *PHH Corp.* v. *CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177), 2017 WL 1196118 ("SOP Brief"); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 35, 71 (1994). For example, in their brief to the D.C. Circuit in *PHH Corp.*, a number of scholars made the claim that the CFPB's

> independence is consistent with governmental structures dating back to the earliest days of the Republic. At that time, the first Congress distanced the Department of the Treasury from the President's direct control, in stark contrast to its choices for the Departments of State and War. Around the same time, Congress created the relatively independent Office of the Comptroller and the National Bank. Thus began a long national history of granting independence to financial institutions and regulators, which has continued through the present day.

SOP Brief at 2. The en banc D.C. Circuit adopted this view, focusing particularly on the structure of the Treasury Department. *PHH Corp.*, 881 F.3d at 91–92. The Ninth Circuit below relied on the D.C. Circuit's opinion. Pet. App. 2a.

More generally, Professors Lawrence Lessig and Cass Sunstein have argued for "another conception of the original understanding" inspired by the distinc-

tion made by nineteenth-century theorists between "politics" and "administration." Lessig & Sunstein, 94 Colum. L. Rev. at 35. Applying this distinction, Lessig and Sunstein argue that executive power "derive[s] from Article II," but administrative power "stem[s] from Article I." *Id.* at 71. "Applying the nineteenth century vision as mechanically as possible to some modern developments," they argue, "we think that Congress could not constitutionally make the Department of Defense into an independent agency; but it could allow at least a degree of independence for such modern institutions as the National Labor Relations Board and the Federal Communications Commission," *id.*—and, presumably, the CFPB.

The Founding generation, however, recognized no such distinction, which is an anachronistic imposition of late nineteenth-century views. Early Congresses never granted "independence" to any early agency; never imposed "for cause" restrictions; and never limited executive control over financial agencies. To the contrary, the Treasury Department was designated an executive department under the Articles of Confederation, in the Convention, during the ratifying debates, and during the First Congress's debates. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 804. Treasury officials were also designated "executive" officers in the First Congress's act providing salaries to executive branch officials. Act of Sept. 11, 1789, ch. 13, § 1, 1 Stat. 67, 67. And the President received written opinions from Alexander Hamilton—relying upon the Opinions Clause that speaks of "principal Officer[s] in each of the executive Departments."

The arguments made in favor of a distinction between financial and other "Article I" agencies and "Article II" agencies generally focus on the early structure of the Treasury Department, but none overcomes the positive evidence. First, the separation of powers scholars in the D.C. Circuit litigation argue that "Congress specified the offices and functions of the Department of the Treasury in detail and gave its Secretary specified responsibilities," which "gave Congress a degree of oversight over the Department." SOP Brief at 5–6; *see also PHH Corp.*, 881 F.3d at 91. This is a red herring. Congress creates offices and specifies their functions and it did so for all early departments (albeit in less detail than for Treasury). Congress's undoubted ability to create offices says nothing about whether the President can remove officers.

Second, these scholars argue that the Comptroller of the Treasury was given prosecutorial power along with a "measure of independence," noting that his "decisions to prosecute" were independent and that his "decisions against claimants" would be "final and conclusive." SOP Brief at 7–8; *PHH Corp.*, 881 F.3d at 91. To buttress this point, they assert (erroneously) that Congress specified that the Comptroller could only be removed for cause. For this claim, they rely on the statute creating the Comptroller, which provided that "if any person shall offend against any of the prohibitions of this act, he shall be deemed guilty of a high misdemeanor, . . . and shall upon conviction be removed from office." SOP Brief at 8 (quoting Act of Sept. 2, 1789, ch. 12, § 8, 1 Stat. 65, 67); *PHH Corp.*, 881 F.3d at 91. This provision, they argue, "protected [the Comptroller] from . . . removal in

much the way that Dodd-Frank protects the Bureau's Director." SOP Brief at 7.

These claims are mistaken. The cited provision says nothing at all about the President's removal power. Whether Congress can also effect a removal of executive officers by means of impeachment has no bearing on whether Congress can prevent the *President* from removing an officer absent cause. That statute in no way limited the President's ability to remove the Comptroller. Additionally, whether the Comptroller's decisions against claimants were final and conclusive had to do with the availability of judicial review, not presidential direction.

Third, these scholars cite James Madison's observation respecting the Comptroller, claiming he "went so far as to argue that 'there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.'" SOP Brief at 7 (quoting 1 Annals 612); *PHH Corp.*, 881 F.3d at 91. This is a misreading of Madison's position. He suggested that perhaps the properties of the Comptroller's office "are not purely of an Executive nature" and "partake of a Judiciary quality as well as Executive." 1 Annals at 611; 11 DHFFC at 1080. But he did not propose any restriction on the President's removal power; to the contrary, he proposed that the Comptroller be appointed for a relatively short term, "unless sooner removed by the President." 1 Annals at 612; 11 DHFFC at 1080. That gives the Senate the opportunity to review the Comptroller's performance, but it does not derogate the President's power of removal.

Fourth, these scholars point to the Bank of the United States as an example of a federal financial in-

stitution over which the United States government, let alone the President, did not have direct control because private shareholders selected most of the directors. SOP Brief at 8–10. But the Bank of the United States was not considered an arm of the federal government at all. It was a private, profit-making corporation, in which the United States was a minority shareholder.[4]

Finally,[5] Lessig and Sunstein assert that constitutional text supports their view that there is a distinction between "executive departments" headed by "principal officers," and Article I "administrative" departments headed by "heads of department" but not "principal officers." Lessig & Sunstein, 94 Colum. L. Rev. at 34–38. It is of course true that the Constitution uses various terms to denominate principal officers. The Opinions Clause refers to "principal of-

---

[4] *Bank of U.S.* v. *Planters' Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 908 (1824) (noting that the government is not a party in cases against the bank); *see also Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995) ("[A] corporation is an agency of the Government . . . when the State has specifically created that corporation for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees.").

[5] The separation of powers scholars also point to state constitutions, with very different separation of powers provisions, as informing the meaning of the Constitution's own provisions. SOP Brief at 10–13. If anything, however, the state constitutions suggest the opposite: they suggest that the Framers had good examples of how to create a plural executive if that had been their intent.

ficer[s]" of the "executive [d]epartments." U.S. Const. art. II, § 2, para. 1. The Appointments Clause distinguishes between "inferior officers" and "Heads of Departments." *Id.* § 2, para. 2. Moreover, Lessig and Sunstein point out, the First Congress denominated the secretaries of foreign affairs and war as "principal officers" but the secretary of Treasury as a "head of department." Lessig & Sunstein, at 35. They suggest that these textual differences make sense on the nineteenth-century understanding that there are certain departments that are inherently executive, derived from Article II, and the Opinions Clause ensures that the President has authority to control the principal officers of these departments, but not the heads of all the departments of government. *Id.* at 37–38.

The evidence does not bear out this view. The reference to "executive" departments in the Opinions Clause was probably in response to proposals that would have given the President power to demand opinions from the Chief Justice and officers of the House and Senate. 2 Farrand at 342, 367; Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute The Laws*, 104 Yale L.J. 541, 628–29 (1994). As for the distinction between "principal officers" and other "heads of departments," the Framers used these terms interchangeably—there is no evidence at all that the Framers ever thought of them differently. Calabresi & Prakash, at 629. Moreover, as noted, Treasury was referred to as an executive department under the Articles of Confederation, at the Constitutional Convention, in the ratification debates, and throughout the First Congress; the Secretary was denominated an "executive officer" in the act providing for his salary; and the President received

written opinions from Alexander Hamilton—relying upon the Opinions Clause that speaks of "principal Officer[s] in each of the executive Departments." Treasury was (and is) an executive department through and through—as are other departments with authority to carry financial laws into execution.

III. *Humphrey's Executor* should be revisited or, at a minimum, not extended.

When Congress created the Federal Trade Commission, it provided that "any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Humphrey's Ex'r*, 295 U.S. at 619. President Roosevelt nevertheless sought to remove a commissioner whom President Hoover had appointed because, as Roosevelt wrote the commissioner, "You will, I know, realize that I do not feel that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have a full confidence." *Id.*

In *Humphrey's*, the Supreme Court first held that the statute by its terms precluded the President from removing a commissioner for reasons other than those specified in the statute. The Court reasoned, "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* at 624. The Court concluded that the "general purposes of the legislation . . . demonstrate the Congressional intent to create a body of experts who shall gain experience by

length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625–26 (emphasis omitted). Indeed, the statute created a five-member commission on which "[n]ot more than three of the commissioners shall be members of the same political party." *Id.* at 620 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717, 718 (1914)).

The Court held this arrangement constitutional. The Court concluded that the reach of *Myers* affirming the Decision of 1789 "goes far enough to include all purely executive officers," but "goes no farther;—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 627–28. The presidential removal power was inapplicable to the FTC, which was "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." *Id.* at 628. Thus the FTC "acts in part quasi-legislatively and in part quasi-judicially." *Id.*

In sum, the Court concluded, an unfettered presidential removal power "threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, 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 630.

The Court's holding in *Humphrey's* cannot be reconciled with the Constitution's text or structure. The opinion relies on the fallacy that there is a category of legislative-like or judicial-like power that need not be exercised by Congress or the judiciary, but which is also not part of "[t]he executive Power." As the Court has said before, however, exercises of executive power often take legislative or judicial *form*, but they are still ultimately exercises of executive power. *See City of Arlington* v. *FCC*, 569 U.S. 290, 305, n.4 (2013) ("Agencies make rules . . . and conduct adjudications . . . and have done so since the beginning of the Republic. These activities take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'") (citation omitted); *cf. Mistretta* v. *United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (noting that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action").

But if the Court is not inclined to reconsider *Humphrey's*, then at a minimum that case should not be extended.[6] *See Free Enter. Fund*, 561 U.S. at 484 (declining to extend *Humphrey's* to multiple levels of removal protection). And the present case entails a

---

[6] The Court has applied the rule of *Humphrey's* to members of the quasi-judicial War Claims Commission. *Wiener* v. *United States*, 357 U.S. 349 (1958). And in *Morrison* v. *Olson*, the Court upheld for-cause removal restrictions even for a "purely executive" officer such as the "independent counsel" in that case, but there the Court found the counsel to be an inferior officer. 487 U.S. at 672, 689–90.

substantial extension. In *Humphrey's*, what made the FTC a "judicial" and "legislative" aid was the nature of the commission as much as its duties. The commission was to be "nonpartisan" and "act with entire impartiality." *Id.* at 624. It was "a body of experts who shall gain experience by length of service." *Id.* at 625.

The Court perhaps was embracing the distinction of early nineteenth-century theorists between "politics" and "administration." But a key component of this distinction was that administrative officials worthy of insulation from politics must be impartial. As Woodrow Wilson wrote, "The field of administration is a field of business. . . . [A]dministration lies outside the proper sphere of *politics*." Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 209–10 (1887). Frank Goodnow wrote that "there is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies," because it embraces "semi-scientific" fields. Frank J. Goodnow, Politics and Administration: A Study in Government 85 (1900). Administrative officials "should be free from the influence of politics because . . . their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information," "efficient" organization, and "the maintenance of a strictly impartial attitude toward the individuals with whom they have dealings." *Id.*

Simply put, if the exception to the presidential removal power is to apply, it should only apply when the prerequisites identified by the Court in *Humphrey's* are present. A single principal officer, who is a partisan of a particular political party and who enjoys

a sweeping portfolio over all the nation's consumer protection laws, is far removed from the FTC. The CFPB Director, who has no need to convince, reason, or debate fellow commissioners, can hardly be counted on to be nonpartisan, impartial, or to act as an "expert."

The CFPB, in other words, creates an unprecedented extension of the exception of *Humphrey's*, concentrating unsupervised executive power in a single person outside the executive and threatening both the separation of powers and democratic accountability. Or put another way, "[T]he heads of independent agencies, although not accountable to or checked by the President, are at least accountable to and checked by their fellow commissioners or board members. No independent agency exercising substantial executive authority has ever been headed by a single person. Until now." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

Assuming the Court is not inclined in this case to reconsider *Humphrey's*, it should at least refuse to extend the reach of that poorly reasoned decision beyond its bounds. Nothing exempts financial regulatory agencies, any more than Treasury, State, or War, from the constitutional provisions vesting the President with "[t]he executive Power" and the duty to "take Care that the Laws be faithfully executed."

CONCLUSION

The decision of the Court of Appeals should be reversed.

Respectfully submitted,

ILAN WURMAN*
Sandra Day O'Connor College of Law
Arizona State University
111 E. Taylor Street
Phoenix, AZ 85006
(480) 965-2245
ilan.wurman@asu.edu

**Counsel of Record*

DECEMBER 16, 2019