No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC,
PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU,
RESPONDENT

ON PETITION FOR A 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 CERTIORARI

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QUESTION 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.

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[*]

Amici separation of powers scholars seek to alert this Court to important points of constitutional text, structure, and history that support review of the decision below. The Consumer Financial Protection Bureau (CFPB) is an independent agency headed by a single director insulated from presidential control and removal yet wielding "the executive power" of the United States. This agency structure is both unprecedented and unconstitutional because Article II, Section 1 of the Constitution vests "the executive power" in the President of the United States. Whatever else the "executive power" includes, at a minimum it includes the power to direct and remove principal executive officers.

In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Supreme Court created an exception to this vesting of the executive power grounded in the structure of the Federal Trade Commission (FTC). As the Court explained, the FTC was "nonpartisan," composed of a multimember, bipartisan commission that was to deploy administrative expertise in a particular field. To consider a principal officer who alone directs an entire department of government as "nonpartisan" would be to defy all human political experience. Extending the exception of *Humphrey's Execu-*

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[*] 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.

tor—itself constitutionally dubious—to this case would create an unprecedented concentration of unsupervised executive power, threatening the separation of powers and democratic accountability.

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STATEMENT

1. In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank"). Title X created the CFPB and granted it authority, among other things, to implement and enforce numerous consumer protection laws. 12 U.S.C. §§ 5481(12), 5581(b)(5)(B). The CFPB, denominated an "Executive agency," is headed by a single "Director" appointed to a five-year term who may be removed only "for inefficiency, neglect of duty, or malfeasance in office" and whose term may be extended indefinitely until a new director is appointed and confirmed. *Id.* §§ 5491(a), (b)(1), (c).

2. The CFPB issued civil investigative demands to petitioner, Seila Law, who objected on the ground that the CFPB was unconstitutionally structured. The district court below granted CFPB's petition for enforcement, and the Ninth Circuit affirmed, relying on the majority opinion in *PHH Corp.* v. *Consumer Financial Protection Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc) to uphold the constitutionality of the CFPB.

REASONS FOR GRANTING THE PETITION

The for-cause removal provision respecting the director of the CFPB creates an unprecedented concentration of unsupervised executive power, threatens the separation of powers and democratic accountabil-

ity, and is unconstitutional. The Constitution vests the executive power in the President of the United States. U.S. Const. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America."). Whatever else this power includes, at a minimum it includes the power to appoint, control, and remove principal executive officers. To be sure, the Constitution assigns some of this executive power away from the President: Article II, Section 2 gives the Senate a share in the appointment power. But other than the Constitution's specific assignments away from the President, the executive power of the laws rests with the President. The Take Care Clause supports this structural inference, implying that the President has that species of power—the ability to direct and remove officers—to ensure the faithful execution of the laws. *Id.* § 3 ("he shall take Care that the Laws be faithfully executed").

Two important sources confirm that the power to remove executive officers was part of the "executive power." William Blackstone, whose *Commentaries on the Laws of England* guided the Framers' drafting of the Constitution, included within his conception of "the executive power of the laws" the power to conduct prosecutions, to issue proclamations binding on subjects (and, therefore, subordinate officers) as to how the laws are to be executed, and to appoint assistants—strongly suggesting the power to direct and remove subordinate executive officers engaged in the kind of enforcement function at issue in this case. Further, the First Congress concluded that, although not expressly mentioned in the Constitution, this removal power was constitutionally vested in the President because it was part of the executive power—an inference supported by the Take Care Clause.

In 1935, the Supreme Court recognized an exception to the President's removal authority. *Humphrey's Ex'r*, 295 U.S. 602. Rebuffing President Roosevelt's attempt to remove a commissioner of the Federal Trade Commission (FTC), *id.* at 618–19, a Supreme Court hostile to Roosevelt's New Deal observed that the FTC "is charged with the enforcement of no policy except the policy of the law," that "[i]ts duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative," *id.* at 624. Crucially, the Court noted that the FTC consisted of a five-member commission, not more than three of whose commissioners "shall be members of the same political party." *Id.* at 619–20 (quoting Federal Trade Commission Act, Pub. L. No. 63-203, ch. 311, § 1, 38 Stat. 717, 718 (1914)). Thus "[t]he commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality." *Id.* at 624. Further, "its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id.* (citation omitted).

The exception to presidential removal authority upheld in *Humphrey's Executor*—itself constitutionally dubious—should apply only if all of its many factors are present. That is not the case here, where a single director, belonging to a single political party, can have no pretensions to being "nonpartisan" and acting "with entire impartiality." A single person cannot supply "the trained judgment of a body of experts." This case warrants this Court's review because the CFPB's structure is an unprecedented extension of the exception created by *Humphrey's Executor*, concentrating unsupervised executive power outside the executive itself and threatening both the

separation of powers and democratic accountability. The Court should reject that extension and reaffirm the original meaning of Article II's Vesting Clause.

I. Text, structure, and history show that the 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 implies that *all* executive power, absent other express limitations, is vested in the President of the United States.

The key question is what constitutes this "executive power." Two sources critical to interpreting Article II of the Constitution both suggest that, whatever else is included within "the executive power," it at a minimum includes the power to remove principal executive officers engaged in prosecutorial or enforcement functions. *First*, William Blackstone's *Commentaries* guided the Framers' drafting of the Constitution, and those commentaries suggest that the power to appoint, control, and remove assistants was part of "the executive power" to carry laws into execution, particularly in the conduct of prosecutions and enforcement actions. *Second*, history confirms this understanding. The First Congress, after several days of debate, also concluded that the power to remove principal executive officers was part of "the executive power" and thus vested in the President.

Blackstone. Blackstone's *Commentaries on the Laws of England* guided the Framers' drafting of the Constitution. The U.S. Constitution specifically mentions and assigns almost all of the powers in Blackstone's chapter on the King's "authorities and powers" to a department of the national government, or denies that power altogether.

The powers that Blackstone described deal either with "th[e] nation's intercourse with foreign nations, or it's own domestic government and civil polity." 1 William Blackstone, Commentaries on the Laws of England *245 (1st ed. 1765–69). The former category of powers includes the powers to send and receive ambassadors; to make treaties, leagues, and alliances; to make war and peace; to issue letters of marque and reprisal; and to grant safe-conduct (passports) and admit strangers (foreigners) into the country. *Id.* at *245–53.

The latter, domestic powers include the power to veto legislation; be commander-in-chief ("generalissimo"); raise and regulate fleets and armies; and erect forts and similar buildings. *Id.* at *253–57. The King is also the "fountain of honour, of office, and of privilege," by which he may, for example, grant titles of nobility. *Id.* at 261–62. This includes the power to naturalize aliens and to erect corporations. *Id.* at *263. The King is the arbiter of commerce, regulates weights and measures, and may coin money. *Id.* at 263–68. He is also the head of the Church of England. *Id.* at *269.

Blackstone also wrote that the King is the "fountain of justice and general conservator of the peace of the kingdom." *Id.* at *257. This means the King is the "proper person to prosecute for all public offenses

and breaches of the peace," may grant pardons, and may nominate judges. *Id.* at *259. The King has the power to make proclamations as to the "manner, time, and circumstances of putting [the] laws in execution." *Id.* at *261. And the King may create judicial tribunals, "for, though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power." *Id.* at *257.

Almost every single power Blackstone discussed is specifically assigned somewhere in the U.S. Constitution: to send ambassadors (President and Senate);[1] to receive ambassadors (President);[2] to make treaties, leagues, and alliances (President and Senate);[3] to make war and peace (Congress has the power to declare war, the President to wage it);[4] to issue letters

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[1] U.S. Const. art. II, § 2, para. 2 ("[A]nd he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls . . . .").

[2] *Id.* art. II, § 3 ("he shall receive Ambassadors and other public Ministers").

[3] *Id.* art. II, § 2, para. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur . . . .").

[4] *Id.* art. I, § 8, cl. 11 ("The Congress shall have Power . . . To declare War . . . ."); *id.* art. II, § 2, para. 1 ("The President shall be Commander in Chief of the Army

of marque and reprisal (Congress);[5] to veto legislation (President subject to override);[6] to be commander-in-chief (President);[7] to raise and regulate fleets and armies (Congress);[8] to erect forts and similar buildings (Congress);[9] to grant titles of nobility (specifical-

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and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

[5] *Id.* art. I, § 8, cl. 11 ("The Congress shall have Power . . . To . . . grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

[6] *Id.* art. I, § 7, para. 3 ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.").

[7] *Id.* art. II, § 2, para. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

[8] *Id.* art. I, § 8, cls. 12–14 ("The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces.").

[9] *Id.* art. I, § 8, cl. 17 ("The Congress shall have Power . . . to exercise [exclusive] Authority over all Places

ly forbidden);[10] to naturalize aliens (Congress);[11] to regulate commerce and weights and measures, and to coin money (Congress);[12] to institute judicial tribunals (Congress);[13] and to nominate and appoint judges (President and Senate).[14]

There are a few exceptions. For example, the Constitution does not make the President the head of any church. There was no established church at the national level of the American constitutional regime, and so such a power would have been unnecessary (not to mention improper). The Constitution also does not expressly grant any power over immigration, but if commerce includes the transportation of people as

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purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.").

[10] *Id.* art. I, § 9, cl. 8 ("No Title of Nobility shall be granted by the United States.").

[11] *Id.* art. I, § 8, cl. 4 ("Congress shall have Power . . . To establish an uniform Rule of Naturalization.").

[12] *Id.* art. I, § 8, cls. 3, 5 ("Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . . To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.").

[13] *Id.* art. I, § 8, cl. 9 ("Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court.").

[14] *Id.* art. II, § 2, para. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States.").

the Court held in *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824), then Congress might have some power over immigration pursuant to this clause.

Despite these few exceptions, it seems undeniable that Blackstone's set of royal powers and authorities guided the structure of the Constitution, which assigns those powers and authorities to specific departments of the national government. What is more, Blackstone's discussion lends support to the proposition that the power to appoint, control, and remove officers was part of "the executive power."

Blackstone wrote that the king has "the right of erecting courts of judicature" because "though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust"; therefore, it is necessary "that courts should be erected, to assist him in executing this power." Blackstone, *supra*, at *257. In the Constitutional Convention, Madison also 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).

Blackstone also described the power of prosecution as an "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, *supra*, 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 (emphasis added). Thus, Blackstone specifically included the power to prosecute as a power "with regard to the execution of the laws." *See generally*, Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701 (2003) (arguing that the essential meaning of the executive power in Article II is the power to enforce federal law).

Additionally, Blackstone described a power to issue proclamations as to "the manner, time, and circumstances of putting [Parliament's] laws in execution." Blackstone, *supra*, 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.* (emphasis added). And if they were binding on subjects, these executive directives would have been binding on executive officers, too.

In sum, Blackstone's list of powers and authorities guided the Framers' drafting of the Constitution. Although Blackstone did not mention the removal power specifically, his discussion strongly suggests 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." And if

the executive power includes the power to appoint and direct assistants, it would seem to include the power to remove them, too, when they cease to have the qualifications that led to their appointment or when they refuse the direction of the chief executive. Thus, Blackstone's work strongly suggests that the removal power is part of "the executive power" that Article II vests in the President.

The Decision of 1789. History confirms this understanding. 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"); *see also id.* at 385. 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.*, *id.* at 381 (Representative Livermore arguing that the "same power which appointed an officer, had the right of removal also").

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 an executive power. "The Constitution places all Executive power in the hands of the President," exhorted 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." *Id.* at 474. Because the President cannot possibly handle all the minutiae of administration, he "must therefore have assistants." *Id.* 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." *Id.* The executive power thus includes a "choice in selecting . . . assistants, a control over them, with power to remove them." *Id.*

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." *Id.* at 463. "[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." *Id.* at 500.

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.

Id. at 463; *see also id.* 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.").

To be sure, some have argued 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 carrying 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."). This position begs the very question at hand, however; it assumes that the removal power is not part of "the executive power." After all, if the power to remove officers is part of "the executive power," then seeking to limit that power would be improper attempt to undermine the separation of powers. Nor would it be in furtherance of Congress's own enumerated powers—Congress has no enumerated power to carry into execution the laws—and it would be in *hindrance*, not furtherance, of the President's own executive power. *See* Prakash, *supra*, at 737–40.

More still, the Take Care Clause creates an inference in favor of the President's removal power and against Congress's ability to structure removal through the Necessary and Proper Clause. As Madi-

son argued, the Take Care Clause suggests the removal power is constitutionally vested in the President because otherwise the President would not have sufficient power to ensure the faithful execution of the laws:

> [T]here is another part of the Constitution, which inclines, in my judgment, to favor the construction I put upon it; the President is required to take care that the laws be faithfully executed. 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. Thus the Take Care Clause supports the structural inference about the Vesting Clause: the President may remove executive officers in part to ensure the faithful execution of the laws.

With these and contrary arguments on the table, the House of Representatives debated for over five full days on 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," *id.* at 371, 383, and further rejected a proposal to include the modifying phrase "by and with the advice and consent of the senate," *id.* at 382.

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. *Id.* at 578. As explained by the sponsor of this amendment, Representative Benson:

> If we declare in the bill that the officer shall be removable by the President, it has the appearance of conferring the power upon him. . . . For this reason, I shall take the liberty of submitting an alteration, or change in the manner of expression, 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.

Id. at 505. This amendment passed by a vote of 30 to 18. *Id.* 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 .

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*, 295 U.S. at 630, would become the "permanent exposition of the Constitution," 1 Annals at 495. And with a few minor 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* v. *United States*, "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. 52, 163 (1926). 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).[15]

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[15] 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 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 vocal 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; *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 best interpretation in light

II. The structure of the CFPB creates an unprecedented concentration of unsupervised executive power, threatening the separation of powers and democratic accountability.

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.*

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 na-

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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).

ture 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* v. *United States* 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—itself constitutionally dubious—cannot be divorced from the kind of body then before it. What made the FTC a "judicial" and "legislative" aid that, according to the Court, did not exercise any of the executive power vested in the President of the United States? It 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 can only apply when all the factors supplied by the Court in *Humphrey's Executor* are present. That includes a multimember body of "experts" from different political parties who are to be "nonpartisan" and act "impartially," which the CFPB does not resemble in any way. 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 Executor*, concentrating unsupervised executive power 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).

In sum, the Court should refuse to extend *Humphrey's Executor*, or should reconsider that precedent altogether. After all, nothing exempts independent agencies, even if staffed by multimember commissions, from the constitutional provision vesting the President with the executive power of the laws.

CONCLUSION

The CFPB's removal structure violates the Constitution's provisions for executive power. The removal power is part of "the executive power," which is vested in the President because it is not specifically qualified by another provision of the Constitution—an interpretation supported by the President's duty to take care that the laws be faithfully executed. If Congress can insulate principal administrative officers from presidential removal at all, it can do so only on the grounds supplied by *Humphrey's Executor*, in which the officers were to be nonpartisan, impartial, and members of bipartisan boards with expertise in a particular administrative area. The CFPB's director does not fit these criteria.

Respectfully submitted,

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