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 OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute
Center for Constitutional Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866
(877) 855-3330
jeastman@chapman.edu

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence

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. Whether *Humprey's Executor v. United States*, 295 U.s. 602 (1935), should be overruled as incompatible with the Constitution's separation of powers and with recent decisions of this Court?

3. Whether, if the "for-cause" removal provision for the CFPB Director is deemed unconstitutional, the entire Title X of the Dodd-Frank Act must be invalidated rather than rewritten by this Court to allow at-will removal by the President, lest the relatively unique self-funding provisions for the CFPB result in an agency un-envisioned by the Congress, accountable to the President but not to Congress's appropriation authority, quite likely in violation of Article I, Section 9's mandate that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that "The executive Power shall be vested in a President of the United States." U.S. Const. Art. II, § 1. The Center has previously participated on behalf of a party or as *amicus curiae* in a number of cases before this Court addressing similar separation of powers issues, including *Berninger v. Federal Communications Commission*, 139 S.Ct. 453 (2018) (Mem); *Gundy v. United States*, 139 S.Ct. 2116 (2019); *U.S. Dep't of Trans. v. Ass'n of American Railroads*; 575 U.S. 43 (2015); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Chamber of Commerce v. EPA*, 573 U.S. 302 (2014); *Peri & Sons Farms v. Rivera*, 573 U.S. 916 (2014); and *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142 (2012).

SUMMARY OF ARGUMENT

The Consumer Financial Protection Bureau ("CFPB") is an "independent" executive agency headed by a single agency head who exercises significant executive power yet is removable by the President only for cause. Although a for-cause removal provision is particularly problematic in the context of a

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[1] Pursuant to this Court's Rule 37.3(a), this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

single-headed agency, for-cause removal provisions in multi-member agencies exercising executive powers are also constitutionally problematic. In both cases, the agencies exercise executive power without being directly answerable to the President, in violation of the Constitution's mandate that "*the* executive Power shall be vested in a President of the United States." U.S. Const. Art. II, § 1 (emphasis added).

Humphrey's Executor, decided at the height of an era in which this Court's solicitude for separation of powers and other structural provisions of the Constitution was at its nadir, can be distinguished because the decision rested in part on the quasi-legislative and quasi-judicial functions of the agency. But the case is wrongly decided, as recent decisions of this Court suggest, and should be overruled. An agency exercising legislative authority runs afoul of the non-delegation. And an agency exercising judicial authority runs afoul of separation of powers.

Finally, should this Court agree that the "for-cause" removal provisions for the CFPB director, found in Title X of the Dodd-Frank Act, are unconstitutional, the entirety of Title X should be deemed invalid. Because of the relatively unique self-funding mechanism granted to the CFPB, any attempt to excise only the "for-cause" removal provision would lead to the creation of an agency unimagined by the authorizing act of Congress, leaving the President alone as a check on the agency without the check by Congress that normally exists by way of Congress's appropriation power.

ARGUMENT

I. The Constitution's Separation of Powers Prohibits the Current Structure of the CFPB.

Article II grants the President of the United States "the Executive power." U.S. Const. Art. II, § 1. As Justice Scalia noted in his persuasive (and historically vindicated) dissent in *Morrison v. Olson*, "this does not mean some of the executive power, but all of the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Article II also imposes on the President the duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

Because a President obviously cannot carry out the entire business of the executive branch himself, he must be able "select those who [are] to act for him under his direction in the execution of the laws" if he is to be able to exercise his constitutional authority and fulfill his constitutional duty. *Myers v United States*, 272 U.S. 52, 117 (1926). As James Madison noted in the First Congress, "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 of Cong. 463 (1789). Just as important as the appointment of officers who will aid in his execution of the law, therefore, is the ability of the President to remove agents who are no longer acting in accord with his views.

Although the President's removal power is not *expressly* stated in the Constitution, it is clearly implied, as a President cannot "faithfully execute the laws" if his appointees or, as will often be the case with the statute at issue here, the appointees of a previous

President, become defiant and insubordinate. The Framers therefore intended the President to have removal power because that power is necessary to "to keep officers accountable." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). This removal authority allows the President to hold his subordinates accountable. Denying the President this oversight authority would create the potential that a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Congress structured the CFPB in a way that is contrary to this basic constitutional command, undermining the President's ability to "take care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. The CFPB Director is insulated from presidential control in a couple of significant ways. First, the CFPB Director has a five-year term, and he may even continue to serve beyond that "until a successor has been appointed and qualified," allowing his tenure to extend beyond the four-year term of the President who appointed him. 12 U.S.C. §§ 5491(c)(1), (2).[2] Second, the Director may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." § 5491(c)(3). These limitations on the President's ability remove the director of CFPB produce an agency that exercises a significant amount of the President's executive power without the accountability

[2] Statutory references are to Title 12 of the U.S. Code unless otherwise noted.

that the vesting of "*the* executive Power" in the nationally elected President was intended to create.

That circumvention of presidential authority is exacerbated by the fact that the CFPB Director can issue his own regulations that have the force of law for any person under its very broad jurisdiction, § 5512; investigate potential violations of those regulations, § 5562; prosecute actions in his agency's own administrative tribunals as well as in the courts, §§ 5563, 5564; establish as many regional offices anywhere in the country as he thinks useful, § 5491(e); propose and comment on legislation without clearance from anyone else in the executive branch up to and including the President, § 5492(c)(4); and even appropriate Federal Reserve money to his own agency without further action or even review by Congress, §§ 5497(a)(1), (a)(2)(c).

This would be constitutionally troubling if the CFPB were headed by a multi-member commission, but the fact that all this unaccountable power is vested in a single Director makes it even more constitutionally infirm, as there are not even the sort of internal checks that exist with a multi-member body. That, and the fact that the Director cannot be removed by the President himself except in the narrow circumstances of "inefficiency, neglect of duty, or malfeasance in office," § 5491(c)(3), makes him "the single most powerful official in the entire U.S. Government, other than the President" himself. *PHH Corp. v. Consumer Fin. Prot. Bureau,* 839 F.3d 1, 17, *rev'd on reh'g en banc*, 881 F.3d 75 (D.C. Cir. 2018).

Indeed, in the expansive areas under his jurisdiction, the Director is arguably even more powerful than the President. As a result, the President simply cannot "be held fully accountable for discharging his own responsibilities," and such "diffusion of authority … greatly diminish[es] the intended and necessary responsibility of the chief magistrate himself," as this Court has already recognized when it found the for-cause removal provision applicable to the Public Company Accounting Oversight Board to be unconstitutional. *Free Enterprise Fund,* 561 U.S. at 514 (quoting The Federalist No. 70, p. 478 (J. Cooke ed. 1961) (A. Hamilton)).

II. *Humphrey's Executor* Is Distinguishable, But Also Wrongly Decided And Should Be Overruled.

This Court previously upheld a for-cause removal restriction on the President's authority in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), of course—the decision that is widely recognized as paving the way for the administrative state. *See*, *e.g.*, Daniel A. Crane, "Debunking Humphrey's Executor," 83 Geo. Wash. L. Rev. 1835, 1835 (2016). Distinguishing the holding in *Myers*, which had less than a decade earlier upheld the President's authority to remove executive officers, this Court found significant the fact that the Federal Trade Commission exercised "quasi-legislative" and "quasi-judicial" powers rather than purely executive powers. *Humphrey's Executor*, 295 U.S. at 624, 628. It was therefore permissible, the Court held, for Congress to create an agency whose independence from the President (via fixed terms and a for-cause removal provision) would allow it to utilize its expertise in a "nonpartisan" manner. *Id.* at 624, 632. "[T]he *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers," the Court held, because "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office." *Id.* at 631-32.

Humphrey was a member of the Federal Trade Commission, the five-member body that conducted and oversaw the work of that agency; the CFPB Director, in contrast, is alone atop his agency. Moreover, the CFPB Director exercises significant executive powers. He investigates potential violations of the law and of the regulations he adopts, § 5562, and he prosecutes violations in his agency's own administrative tribunals as well as in the courts, §§ 5563, 5564. *Humphrey's Executor* is therefore distinguishable on its own terms.[3]

More significantly, though, *Humphrey's Executor*, decided at a time with this Court was perhaps less solicitous of the Constitution's structural constraints such as separation of powers than was warranted, has been undermined by recent decisions of this Court. Its

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[3] To be sure, *Morrison v. Olson*, 487 U.S. 654 (1988), eviscerated the line drawn by the *Humphrey's Executor* court between quasi-legislative and quasi-judicial functions, on the one hand, and executive functions, on the other. But that case ostensibly involved, as the Court held, an "inferior" officer, not a principle officer such is at issue here. Moreover, the majority opinion in the case has not withstood the test of time. As one prominent scholar has recently noted, "In anything but the most nominal sense, *Morrison* is probably no longer good law. Indeed, the best understanding is that it has long since become anticanonical." Adrian Vermeule, "Morrison v. Olson Is Bad Law," Lawfare (June 9, 2017), available at https://www.lawfareblog.com/morrison-v-olson-bad-law.

reliance on the "quasi-legislative" functions assigned to the Federal Trade Commission is incompatible with a majority of this Court's renewed focus on the non-delegation doctrine, which requires that the core decisions of legislating be made by the Congress, not by unaccountable agencies to which Congress purports to delegate its lawmaking authority. *See Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) ("Congress may not 'delegate ... powers which are strictly and exclusively legislative'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))); *Gundy*, 139 S. Ct. at 2130-31 (Alito, J., conc. in judgment) (noting that "[t]he Constitution confers on Congress certain 'legislative [p]owers, Art. I, § 1, and does not permit Congress to delegate them to another branch of government," and adding that he would "support" an effort to revive the non-delegation "[i]f a majority of this Court were willing to do so); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (noting that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases").

The *Humphrey's Executor* Court's reliance on the "quasi-judicial" functions of the FTC is likewise incompatible with this Court's renewed focus on the Constitution's separation of powers. As Justice Gorsuch noted in his *Gundy* dissent:

> In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power

> to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

Gundy, 139 S. Ct. at 2133. It is therefore as problematic for an executive agency to exercise judicial power as it is for it to exercise legislative power.

Indeed, several members of this Court have recently called into question judicial doctrines that give deference to executive branch interpretations of statutes or its own regulations because they "effect[] a transfer of the judicial power [to say what the law is] to an executive agency." *Perez*, 575 U.S. at 112 (Thomas, J., concurring in judgment); *see also id.* at 119 ("[T]he judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws"; *Chevron*[4] deference "wrests from the Courts the ultimate authority to 'say what the law is'" (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))); *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (noting that the reflexive deference given by some lower courts to agency interpretations of statutes "suggests an abdication of the Judiciary's proper role"); *id.* at 2121 (Alito, J., dissenting) (describing *Chevron* as an "increasingly maligned precedent" "that the Court, for whatever reason, is simply ignoring"); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) ("the fact is *Chevron* and *Brand X*[5] permit executive bureaucracies to swallow huge

[4] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[5] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967 (2005).

amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design. Maybe the time has come to face the behemoth."); *cf. Perez*, 575 U.S. at 109 (Scalia, J., concurring) (noting that under the Administrative Procedures Act, "the reviewing court shall ... interpret constitutional and statutory provisions"). If an executive agency exercising the judiciary's interpretative authority is constitutionally problematic, then it is necessarily problematic for it to exercise the full judicial power to adjudicate cases or controversies.

Humphrey's Executor did not address either of these problems when basing its decision on the fact that the agency exercised quasi-legislative and quasi-judicial powers. Neither did it address the Founders grave concern about the consolidation of such powers in a single body. The Constitution's core doctrine of separation of powers should not have been dispensed with so cavalierly, *sub silentio*. But the case here is even worse, for the CFPB Director has authority to exercise all three powers of government—legislative, judicial, and executive. Our Constitution provides for separation of powers precisely to prevent that consolidation of power, for as James Madison noted in Federalist 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (J. Madison).

III. The Remedial Cure Adopted By This Court in *Free Enterprise Fund* Would Be Inappropriate Here.

Once the for-cause restriction on the President's ability to remove a CFPB Director is recognized as unconstitutional, the question of remedy arises. In *Free Enterprise Fund*, this Court merely excised the for-cause restriction on removal of members of the Public Company Accounting Oversight Board, thereby subjecting Board members to "at will" removal.[6]

A similar remedy would be inappropriate here, because the relatively unique self-funding provisions of the CFPB would result in an agency un-envisioned by Congress, with a sole Director accountable to the President but not subject to the normal accountability to Congress that follows from Congress's power of the purse. Funds for the operating expenses of the CFPB are transferred every year by the Federal Reserve Board of Governors "from the combined earnings of the Federal Reserve System" in an "amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law." § 5497(a)(1).[7] Astoundingly,

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[6] Board members could be removed by the Security and Exchange Commission, which appointed them. SEC Commissioners were, in turn, only subject to for-cause removal by the President, but the Court did not address that problem, only the double for-cause removal problem.

[7] To be sure, the Public Company Accounting Oversight Board is also self-funding, *see* 15 U.S.C. § 7219, but as Chief Justice Roberts noted in Free Enterprise Fund, "[i]t was modeled on private self-regulatory organizations in the securities industry—such as the New York Stock Exchange—that investigate and discipline their own members …." 561 U.S. at 484. It

the Act also provides that "the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." § 5497(c).[8] Congress may well have been willing to forego its appropriations oversight authority over the CFPB because the CFPB Director was likewise immunized from all but "for-cause" removal authority of the President, but allowing the latter while retaining the former would significantly alter the balance of political accountability (or lack thereof) that Congress envisioned.

CONCLUSION

For the above reasons, this Court should find that the for-cause restriction on the President's ability to remove a CFPB Director is unconstitutional. Further, because merely excising the for-cause removal restriction from Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act would significantly alter the balance of political accountability envisioned by Congress, the entirety of Title X should be invalidated, leaving it to Congress to craft a new structure for the CFPB to the extent it thinks warranted.

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therefore served first as a certification agency, with enforcement authority that followed. CFBP is an enforcement agency, simply. In any event, the self-funding aspect of the PCAOB was nowhere discussed in the Court's opinion.

[8] Although not at issue in the current challenge, this self-funding mechanism has constitutional problems of its own. After all, the Appropriations Clause of Article I, Section 9, provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. Art. I, § 9, cl. 7.

DATED: December 2019

Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ANTHONY T. CASO
The Claremont Institute
Center for Const'l Jurisprudence
c/o Chapman University
Fowler School of Law
One University Drive
Orange, CA 92866

Counsel for Amicus Curiae
Center for Constitutional Jurisprudence