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 THE CATO INSTITUTE, CENTER FOR INDIVIDUAL RIGHTS, AND AMERICANS FOR PROSPERITY FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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QUESTIONS PRESENTED

1. Whether the limitation of the president's ability to remove the head of the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.

2. Whether *Humphrey's Executor v. United States* should be narrowed to apply only to purely non-executive officers, to bring removal doctrine in line with the separation of powers principles embodied in *Myers v. United States* and *Free Enterprise Fund v. PCAOB*.

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and publishes the annual *Cato Supreme Court Review*.

Cato has devoted significant attention to the Consumer Financial Protection Bureau's structure and operations. *See*, *e.g.*, Dan Quan, "CFPB Can Do Better by Fintechs Than a 'Policy Tool,'" *Am. Banker*, Nov. 4, 2019, https://bit.ly/348enr4; Brian Johnson, "Consumer Protection and Financial Inclusion," 39 Cato J. 489 (Fall 2019), https://bit.ly/2t1BkiW; Todd Zywicki & Diego Zuluaga, Public Comment Regarding CFPB's Proposed Rulemaking on Payday, Vehicle Title, and Certain High-Cost Installment Loans, May 15, 2019, https://bit.ly/2YEHFN2; Thaya Brook Knight, *Behind the Latest Washington War: An Agency That Neither Side Should Control*, N.Y. Post, Nov. 27, 2017, https://bit.ly/38lp6Sn.

The Center for Individual Rights is a public interest law firm based in Washington. It has litigated constitutional issues and has a special interest in the Constitution's structural protections for liberty. CIR represented respondent Antonio Morrison in *United States v. Morrison*, 529 U.S. 598 (2000) (holding that

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[1] Rule 37 statement: Both parties issued blanket consents to the filing of *amicus* briefs. None of this brief was authored by any party's counsel; nobody other than *amicus* funded its production.

42 U.S.C. § 1398 exceeded Congress's enumerated powers to the extent it authorized a tort lawsuit against a private individual) and filed an *amicus* brief supporting petitioner in *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010) (holding that PCAOB's insulated structure violated the separation of powers).

Americans for Prosperity Foundation is a 501(c)(3) nonprofit organization that educates and trains Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. AFPF believes that *Humphrey's Executor* was wrongly decided.

This case interests *amici* because the CFPB's structure raises significant separation-of-powers concerns. The separation of powers is critical to the rule of law, while an agency exercising enforcement powers without political accountability is a major threat to liberty.

INTRODUCTION AND SUMMARY OF ARGUMENT

Our three branches of government protect liberty through a system of checks and balances that prevent any single individual or entity from growing too powerful. During the 20th century, however, Congress began creating "independent" agencies, typically headed by multiple commissioners appointed by the president. Those independent agencies skirt the usual system of checks and balances by exercising elements of all three branches, frequently without any oversight or control by anyone, let alone the branch to which the power was originally entrusted. Transferring government power to unaccountable and unelected officials has resulted in unconstitutional agencies that lack the structural protections of liberty designed by the Framers.

One of the most concerning hallmarks of independent agencies is the limits Congress frequently puts on the president's ability to remove the officers leading these agencies. More than 80 years ago, this Court, flying in the face of history and precedent, declared in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that such limitations were constitutional with respect to the recently created Federal Trade Commission. Since *Humphrey's Executor*, the Court has continued to uphold limitations on the president's ability to remove chief officers of multi-member independent commissions. But the rationale behind *Humphrey's Executor* and subsequent cases has become muddled, and the Court's removal doctrine is now so convoluted that it is impossible for Congress, the lower courts, or private actors to anticipate whether a given agency structure is constitutional. The Court's recent constitutional-structure rulings, while not revisiting *Humphrey's Executor* directly, have illuminated serious flaws in the case and declined to extend it further.

Into this constitutional confusion, Congress inserted the Consumer Financial Protection Bureau, an independent agency with a novel and constitutionally dubious structure. The CFPB is the most independent of independent agencies, essentially accountable to no one. A single director heads the CFPB, serving a five-year term, removable only for cause. The CFPB does not even need Congress to provide its funding because its budget requests are rubber-stamped by another independent agency: the Federal Reserve. The CFPB has authority over 19 federal consumer-protection laws, through which it writes regulations, investigates potential violations, and brings enforcement actions in its own administrative proceedings. The CFPB thus exercises significant legislative and executive power

over consumer finance regulation. That creates serious constitutional problems for an agency that is unaccountable to the political branches—and, thus, to the people. The Constitution simply does not permit unaccountable actors to exert such significant and varied power over an important aspect of American life.

Supporters of the CFPB's constitutionality—which, notably, does not include the agency itself—seek refuge in *Humphrey's Executor*, arguing that the CFPB is nothing but a logical extension of that and later cases upholding removal restrictions of officers heading independent agencies. Petitioner and other *amici* point out several key differences between the CFPB and other, multi-member independent agencies. Lower courts have struggled to reach agreement on how to adjudicate this dispute in large part because of the uncertain status of *Humphrey's Executor* and lack of clear direction on removal doctrine. While the reasoning of *Humphrey's* has long since ceased to play a role in this Court's jurisprudence, the case remains on life support because the Court has lacked an opening to revisit it. Here is that opening. Unless the inconsistencies among *Humphrey's Executor*, *Morrison v. Olson*, 487 U.S. 654 (1988), and other removal cases are resolved, similar disputes will continue to divide lower courts, leaving independent agencies in constitutional limbo.

Some aspects of *Humphrey's Executor* are well taken: those addressing the separation-of-powers issues that would arise if the president could unilaterally remove judicial or legislative officers. But in the 84 years since the case was decided, its overall reasoning has been gutted, leaving it brain dead but still breathing. It's time to pull the plug, salvaging the useful parts into a new, more coherent removal doctrine.

ARGUMENT

I. THE STANDARDS SET IN *HUMPHREY'S EXECUTOR* AND SUBSEQUENT REMOVAL CASES ARE INCONSISTENT

Humphrey's Executor v. United States, 295 U.S. 602 (1935), "paved the way for the modern administrative state by holding that Congress could constitutionally limit the President's power to remove the heads of administrative agencies for political reasons." David A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1836 (2015). Its "six quick pages" of reasoning are based, ostensibly, on concern for the separation of powers, *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting), but the case created more separation-of-powers problems than it solved.

Humphrey's concerned the Federal Trade Commission, which was created by the 1914 Federal Trade Commission Act, replacing the Bureau of Corporations. *Our History*, FTC, https://www.ftc.gov/about-ftc/our-history (last visited Dec. 14, 2019). At the time of *Humphrey's Executor*, the FTC's "sole capacity" was administering federal antitrust law. Crane, *supra*, at 1836. Unlike traditional executive branch agencies, the FTC was headed by a multi-member commission, with each commissioner nominated by the president, confirmed by the Senate, and serving staggered terms in office. *Humphrey's Executor*, 295 U.S. at 623.

The Court took note of the powers held by the FTC at the time. In enforcing federal antitrust law, the FTC could "issue a complaint stating its charges" against the person or entity, who then received a hearing to "show cause why an order to cease and desist" the al-

legedly anti-competitive practice "should not be issued." *Humphrey's Executor*, 295 U.S. at 620. Further, the FTC had "wide powers of investigation in respect of certain corporations subject to the act," with the aim of reporting its findings to Congress for consideration of future legislation. *Id.* at 621. Finally, in antitrust suits brought by the attorney general, the presiding court could refer the suit to the FTC to act as a "master in chancery" to determine appropriate relief, which "the court may adopt or reject." *Id.* (quoting § 7 of the FTC Act, 15 U.S.C. § 47).

The *Humphrey's Executor* Court described these statutory duties as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative," emphasizing the "non-partisan" and "expert" aspects of the commission. *Humphrey's Executor*, 295 U.S. at 624. Only four pages later, the Court again stressed that the FTC, "[i]n administering the provisions of the statute in respect of 'unfair methods of competition,'" acted "in part quasi-legislatively and in part quasi-judicially." *Id.* at 628. When conducting investigations and reporting its findings to Congress, the FTC "acts as a legislative agency." *Id.* When acting "as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." *Id.* By contrast, the Court viewed FTC commissioners as "occup[ying] no place in the executive department" and "exercis[ing] no part of the executive power vested by the Constitution in the President." *Id.* Any exercise of "executive function," which the Court describes as distinguishable from "executive power in the constitutional sense," is in the service "of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial branches of government." *Id.*

Humphrey's Executor's test for limits on the president's ability to remove agency heads is based on which power of government the agency exercises. While the Court concluded that the FTC is quasi-legislative, quasi-judicial, and non-executive, the core of *Humphrey's* is a respect for the separation of powers. If an agency is "wholly disconnected from the executive department" and created as a means of "carrying into operation legislative and judicial powers," then it follows that the president would not have the inherent, unlimitable authority to reach into the other branches to "impos[e] his control in the house of another who is master there." *Humphrey's Executor*, 295 U.S. at 630. If the agency exercises "quasi-legislative" or "quasi-judicial" powers, rather than "purely executive" ones, then Congress may restrict the president's removal power in order to protect the non-executive agency from the executive branch's control. *Id.* at 628, 631.

Twenty-three years later, the Court stuck with *Humphrey's Executor*'s reasoning in deciding *Wiener v. United States*, 357 U.S. 349 (1958), concluding that the agency in question was not executive in character. In *Wiener*, the Court considered limits on the president's ability to remove members of the War Claims Commission, a body created by Congress to adjudicate "claims for compensating internees, prisoners of war, and religious organizations . . . who suffered personal injury or property damage at the hands of the enemy in connection with World War II." *Id.* at 350. Like *Humphrey's Executor*, the Court found that the War Claims Commission was not an executive agency. Instead, it "was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof," with its decisions unreviewable by other federal officials or courts. *Id.* at 354–55. While it was a

commission rather than a court of law, that "did not alter the intrinsic judicial character of the task with which the Commission was charged." *Id.* at 355. *Humphrey's Executor* meant that Congress was constitutionally permitted to limit the president's power to remove a member of this judicial or quasi-judicial agency. *Id.* at 356. *Wiener* was decided on the same separation-of-powers grounds as *Humphrey's*.

Thirty years later, and over half a century after *Humphrey's Executor*, the Court made a dramatic shift in *Morrison v. Olson*, 487 U.S. 654 (1988). *Morrison* addressed a limitation on the president's ability to remove an independent counsel, which was an office created by Title VI of the Ethics in Government Act. *Id.* at 660. Again, the Court found the limitation constitutional, though not for the same reasons as in *Humphrey's Executor* or *Wiener*. The Court acknowledged that it had "rel[ied] on the terms 'quasi-legislative' and 'quasi-judicial' to distinguish the officials involved in *Humphrey's Executor* and *Wiener* from those in *Myers* [*v. United States*, 272 U.S. 52 (1926)]," where the Court had struck down a limitation on the removal power as unconstitutional. *Id.* at 689; *see* Part II *infra*. But the Court went on to write that its "present considered view [was] that the determination of whether the Constitution allows Congress to impose a 'good cause'-type restriction" on the removal power "cannot be made to turn on whether or not that official is classified as 'purely executive.'" *Id.* Instead, the Court framed its "characterization of the agencies in *Humphrey's Executor* and *Wiener* as 'quasi-legislative' or 'quasi-judicial'" as reflecting its judgment that "it was not essential to the President's proper execution of his Article II powers that these agencies be headed up by individuals who were removable at will." *Id.* at 690–91.

Rather than expressly overrule *Humphrey's* and risk undermining the "fundamental constitutional charter of the independent regulatory commissions," the *Morrison* Court attempted to retroactively render its past decisions consistent with the old case. Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 94 (1986)). Unlike the "rigid categories" employed in *Humphrey's* and *Wiener* that classified officers as executive, (quasi-)legislative, or (quasi-)judicial, the *Morrison* Court stated that the "real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison*, 487 U.S. at 691. By the *Morrison* Court's own admission, that test is not the one on which the *Humphrey's* Court relied.

Morrison "cast serious doubt on the continuing relevance" of *Humphrey's Executor*. Crane, *supra*, at 1847. The independent counsel at issue in *Morrison* had the power to prosecute, and "[p]rosecution is manifestly a core executive function." *Id.* Accordingly, "the central thrust of *Humphrey's Executor*—recasting the FTC as something other than a law-enforcement agency—had to be abandoned" to uphold the removal limitation in *Morrison*. *Id. Humphrey's Executor* was thus "swept into the dustbin of repudiated constitutional principles" but not overruled. *Morrison*, 487 U.S. at 725 (Scalia, J., dissenting). Predictably, this maneuver has caused no shortage of confused and conflicting opinions in the lower courts over three decades, as judges struggled to apply two manifestly incompatible Supreme Court precedents in removal cases.

Two recent cases illustrate the issue. In *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), the D.C. Circuit confronted the very question at issue

here. In its *en banc* opinion, the court retraced the history of *Humphrey's Executor* and *Morrison*, including the uncertain status of the reasoning in *Humphrey's*. *See PHH*, 881 F.3d at 87 ("Though the Court in *Humphrey's Executor* and *Wiener* thus emphasized the 'quasi-legislative' and 'quasi-judicial' character of the relevant offices, more recently the Court in *Morrison v. Olson* downplayed those particular characterizations of independent agencies."). In the end, instead of applying either test in full, the D.C. Circuit merely compared the CFPB's structure and removal limits to the agency structures and removal limits in the Supreme Court's precedents and concluded that both were sufficiently analogous to past independent agencies to be constitutional. In the analytical core of the court's opinion, "*Humphrey's Executor*" appears nearly twice as often as "*Morrison*." *See PHH*, 881 F.3d at 92–101. While hardly determinative of the status of either case, it highlights the unusual status of both. Despite the *Morrison* Court's acknowledgement of the change in reasoning, *Humphrey's* ostensibly remains good law, requiring courts to reconcile the irreconcilable.

The other case, *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc), concerned the constitutionality of the structure of the Federal Housing Finance Agency. The Fifth Circuit found the FHFA unconstitutional but dealt with the incompatibility of *Humphrey's Executor* and *Morrison* in a similar manner to the D.C. Circuit in *PHH*. In the portion of the panel decision reinstated by the *en banc* Fifth Circuit, the court compared the FHFA structure to both the FTC in *Humphrey's* and the independent counsel in *Morrison*, finding neither apposite. *Collins v. Mnuchin*, 896 F.3d 640, 670–72 (5th Cir. 2018) (partially reinstated by *Collins*, 938 F.3d 553). Like *PHH*, the *Collins* court did

not try to reconcile the *Humphrey's* and *Morrison* tests. Instead of applying the *Morrison* test to distinguish the FHFA from the FTC, the court returned to *Humphrey's*-style analysis: "The FHFA—unlike the FTC—exercises executive functions." *Collins*, 896 F.3d, at 670–72. Similarly, the court applied the *Morrison* test to distinguish the FHFA from the independent counsel. *Id.* at 672. Like the *PHH* court, the *Collins* court avoided a near-impossible reconciliation of the *Humphrey's* and *Morrison* tests by limiting each to its own facts and treating each case as good law. But this tactic only works so long as both comparisons achieve the same result. The lower courts have received no guidance on which test to apply if a removal limitation passed the *Humphrey's* test but failed the *Morrison* test, or vice versa. The Court should resolve this issue and clarify the test to be applied in removal cases.

II. THE COURT SHOULD CLEAR UP ITS REMOVAL DOCTRINE BY NARROWING *HUMPHREY'S EXECUTOR* TO APPLY TO NON-EXECUTIVE OFFICERS ONLY

A. The Court's Current Removal Doctrine Seriously Endangers the Separation of Powers, as Recognized by Chief Justice Taft in *Myers v. United States*

"The structural principles secured by the separation of powers protect" not only the branches of government from each other, but the individual as well. *Stern v. Marshall*, 564 U.S. 462, 483 (2011). While strict adherence to this framework may sometimes cause the government to be less efficient, that is a feature and not a bug: "The Framers recognized that, in the long term, structural protections against abuse of

power were critical to preserving liberty." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 501 (2010) (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)).[2] Accordingly, each branch was given the "necessary constitutional means . . . to resist encroachments" of the other branches. Federalist No. 51 (Madison).

Because the Founders feared that the legislative branch would dominate the other branches, they sought to "provide fortification" to the executive in the form of the veto. *Morrison*, 487 U.S. at 698–99 (Scalia, J., dissenting). They also "conspicuously and very consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected." *Id.* (citing 1 M. Farrand, Records of the Federal Convention of 1787, pp. 66, 71–74, 88, 91–92 (rev. ed. 1966). *See also* Federalist No. 70 (Hamilton) (discussing the need for "unity" in the executive). Each branch's strength is essential to the separation of powers—and that includes the president's control over executive-branch officers. *Morrison*, 487 U.S. at 704 (Scalia, J., dissenting) (arguing that "separation and equilibration of powers" is "the fountainhead" of "appointments and removal jurisprudence").

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[2] The definitive analysis of the need for the separation of powers for the Framers was Montesquieu's *The Spirit of the Laws* (1748). Montesquieu wrote that "there is no liberty, if the judiciary power be not separated from the legislative and executive," just as "there can be no liberty" "[w]hen the legislative and executive powers are united in the same person" or group. Baron de Montesquieu, *The Spirit of the Laws*, 151-52 (photo. reprint 2002) (Colonial Press 1900) (1748)). And, "were the same man or the same body . . . to exercise those three powers" together, Montesquieu cautions, "[t]here would be an end of everything." *Id.* at 152.

Humphrey's Executor deviated from the foundational removal case, *Myers v. United States*, where the Court addressed the question of "whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." 272 U.S. 52, 106 (1926). Chief Justice Taft's lengthy decision in *Myers* concluded that constitutional structure and separation of powers principles made the president's removal power "illimitable" regarding officers exercising executive power. "From [the] division" of powers into three branches, Taft wrote, "the reasonable construction of the Constitution must be that the branches should be kept separate in all cases in which they were not expressly blended, and the Constitution should be expounded to blend them no more than it affirmatively requires." *Id.* at 116 (citing Madison, 1 Annals of Congress, 497).

Removal, Taft argued, was an executive power and rested with the president, as it was "incident to the power of appointment." *Id.* at 122. The involvement of the Senate in the appointment process "was to be strictly construed" to the power of advice and consent expressly granted in the Constitution and did not imply any further ability of Congress to infringe on the executive power. *Id.* at 118. When the First Congress debated the issue of presidential removal power, Abraham Baldwin of Georgia noted that vesting in the Senate even part of the appointment power had been highly controversial for mixing of powers in a single branch. *Id.* at 120 (citing 1 Annals of Congress, 557). Accordingly, Baldwin remarked: "Ought we not, therefore, to be careful not to extend this unchaste connection any further?" 1 Annals of Congress, 557. James Madison, Taft notes, made the same point:

> Mr. Madison insisted that Article II by vesting the executive power in the President was intended to grant to him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article. He pointed out that one of the chief purposes of the Convention was to separate the legislative from the executive functions. He said: "If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with great caution, it is that which relates to officers and offices."

Myers, 272 U.S. at 115–16 (quoting 1 Annals of Congress 581).

The president's unlimited power of removal of officers exercising his executive power is further emphasized by the Take Care Clause. Chief Justice Taft, who knew a little bit about the nature of effective executive power, understood that "when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal." *Id.* at 122. When an agency—independent or otherwise—exercises executive power, such as by suing to enforce federal law, its officers are exercising the power vested by the Constitution in the president alone. For that exercise of executive power to be constitutionally valid, the president must retain ultimate control over its use.

Although "[t]he removal power may not provide the President with every form of control . . . it satisfies a constitutional minimum for the exercise of executive power." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1227 (2014). If a CEO of a company were limited in her ability to remove a lesser officer, that would severely curtail her executive prerogative. Similarly, the president's ability to remove agency heads at will means that he can remove them if he disapproves of the officer's use of the executive power. That leaves ultimate responsibility for the exercise of executive power with the president. The public can hold the president accountable for his decisions to remove, or not remove, agency heads, and the president can control the actions of agencies by removing, or threatening to remove, agency heads who misuse the executive power delegated to them. If the president is limited in his ability to remove agency heads, then executive power exists at least partly outside his control. Instead, it rests with the agencies and their chief officers—individuals unaccountable to the people. Such a system has no place in our constitutional structure, which rigidly defines where each power of government vests.

It is for those reasons that the *Myers* Court concluded that "Article II grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed." *Myers*, 272 U.S. at 163. An independent agency that is misapplying the law—in the president's constitutionally vested, discretionary judgment—is undermining the president's constitutional obligations that he took

an oath to uphold. Maintaining a system of separated powers vested in co-equal branches of government requires that boundaries set by the Constitution remain in place, and that they be enforced by the judiciary.

B. *Humphrey's Executor*'s Limiting of *Myers* to "Purely Executive Officers" Misreads Chief Justice Taft's Landmark Opinion

Humphrey's Executor is correct with regards to officers who do not exercise executive power. This understanding allows the president to control, through removal, all exercises of executive power vested in him and to fulfill his constitutional obligation to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. *Humphrey's* would still cover those cases where an officer truly exercises only (quasi-)judicial or (quasi-)legislative power, allowing Congress to protect the separation of powers by preventing the president from reaching into the judicial or legislative branches. [3]

The *Humphrey's* Court determined that FTC commissioners did not exercise executive power. While the Court likely reached the wrong conclusion on the nature of the FTC, it was asking the correct question: what power of government does the officer in question exercise? The Court described the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." *Humphrey's Executor*, 295 U.S. at 628. But if the executive power encompasses anything, it is the power to "carry into effect" the policies set into law by Congress.

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[3] For example, the commissioners in *Wiener* had entirely adjudicatory powers and a task "intrinsic[ally] judicial [in] character." 357 U.S. at 355. Accordingly, narrowing *Humphrey's Executor* as we suggest would not require disturbing *Wiener*.

Under *Morrison*, by contrast, there are "no lines." *Morrison*, 487 U.S. at 726-27 (Scalia, J., dissenting). Bringing the Court's removal doctrine in line with *Myers* and the Constitution's separation-of-powers principles would cure both problems by providing a clear test: Does the officer exercise executive power?

Myers was a "landmark case" that "reaffirmed the principle that Article II confers on the President 'the general administrative control of those executing the laws.'" *Free Enter. Fund*, 561 U.S. at 492. Yet, less than a decade after it was decided, *Humphrey's Executor* "gutt[ed], in six quick pages devoid of textual or historical precedent for the novel principle it set forth, [*Myers'*s] carefully researched and reasoned 70-page opinion." *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting). The *Humphrey's* Court attempted to limit *Myers* to its facts, opining that Chief Justice Taft's detailed opinion decided "only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress," adding that "[t]he office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* case cannot be accepted as controlling our decision here." *Humphrey's Executor*, 295 U.S. at 626–27. The Court distinguished the two cases by noting that "[a] postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power." *Id.* at 627. The "necessary reach of the [*Myers*] decision" thus goes only "far enough to include all purely executive officers. It 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.

In other words, *Humphrey's Executor* holds that the president's removal power is only limitless if the officer in question exercises "purely executive" power. To the Constitution's detriment, that interpretation inverts the *Myers* test. As recognized in *Myers*, and by the First Congress, the test should instead be whether the officer exercises executive power. Because executive power is vested by the Constitution exclusively in the president, any officer that exercises executive power is removable by the president at his discretion.

Instead of finding the FTC's structure unconstitutional because it mixes at least judicial and legislative powers, *Humphrey's* uses that mix to justify the infringement on executive prerogative. The *Humphrey's* formulation thus encourages both the neutering of the executive and the direct violation of the separation of powers. One drop of "quasi-legislative" or "quasi-judicial" authority is somehow enough to justify Congress's cutting the president off from the officer who exercises his executive power. But that allows one separation-of-powers issue to open the door to another. By granting quasi-judicial or quasi-legislative powers to an officer who also exercises executive power, Congress can impermissibly alter the constitutionally mandated separation and distribution of powers.

Then-Judge Kavanaugh described how *Humphrey's Executor* led to a situation where the president "lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch" due to independent agencies with "huge policymaking and enforcement authority" that can "greatly affect the lives and liberties of the American people." *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). Under *Humphrey's Executor,*

these agencies are "democratically unaccountable—neither elected by the people nor supervised in their day-to-day activities by the elected President." *Id.*

As Justice Scalia noted in his dissent in *Morrison*, determining which species of government power an officer exercises is not always easy, and there will be close cases. Dealing with the close cases of quasi-powers under a clear and definite test is, however, better than the status quo, where lower courts are faced with the daunting task of simultaneously following *Humphrey's Executor*, *Morrison*, and the Constitution. By clarifying the extent to which *Humphrey's Executor* remains good law and announcing a clear test for removal doctrine cases, the Court will relieve the lower courts of the task of navigating a jumbled set of precedents and allow them to return to the "fountainhead" of the removal doctrine: the separation of powers.

C. Bringing *Humphrey's Executor* in Line with *Myers* Follows from the Court's Decision in *Free Enterprise Fund v. PCAOB*

Narrowing *Humphrey's Executor* to better follow separation-of-powers principles would be in keeping with the Court's most recent removal doctrine case, *Free Enterprise Fund v. PCAOB*. The Court there did not "reexamine" the correctness of *Humphrey's Executor* or later removal doctrine cases, because the parties "d[id] not ask" it to. *Free Enter. Fund*, 561 U.S. at 483. Here, they are asking.

Although the *Free Enterprise* Court did not directly address the constitutionality of its existing precedents, "there can be little doubt that [its] wording and reasoning are in tension with *Humphrey's Executor* and are more in line with Chief Justice Taft's majority

opinion in *Myers*." *Aiken County*, 645 F.3d at 446 (Kavanaugh, J., concurring). The *Free Enterprise* Court refused to extend *Humphrey's* and *Morrison* any further than their holdings required, applying *Myers*'s separation of powers-based reasoning to address the "novel structure" of multiple tiers of for-cause removal limitations. *Free Enter. Fund*, 561 U.S. at 496. In a line that could have come from *Myers* itself, the Court held that "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484.

The *Free Enterprise* Court hits the same notes as *Myers* and builds on them, focusing in particular on the link between the removal power, the Take Care Clause, and the need for "ultimate responsibility" for executive power to rest with the president to ensure popular accountability. *Id.* at 496–97. "The Constitution requires," the Court wrote, "that a President chosen by the entire Nation oversee the execution of the laws." *Id.* at 499. Although the structure of independent agencies like the PCAOB may be more "efficient, convenient, [or] useful in facilitating the functions of government," those "are not the primary objectives—or the hallmarks—of democratic government." *Id.* Such virtues "will not save [a law] if it is contrary to the Constitution." *Id.* Indeed, the same logic could be applied to *Humphrey's Executor* itself. Although it may be more efficient, more convenient, or more useful to leave it in jurisprudential limbo, none of those features ought to save a decision "contrary to the Constitution."

In *Aiken County*, then-Judge Kavanaugh noted that *Free Enterprise Fund* allowed the Court to recognize "the constitutional and practical issues that con-

tinue to result from the *Humphrey's Executor* structure." 645 F.3d at 444 (internal citations omitted). Although it "drew an important constitutional line by refusing to extend *Humphrey's Executor* so far as to allow two levels of for-cause removal," this likely left the lower courts in an even greater state of confusion over the removal doctrine than before. *Id.* In *PHH*, *Collins*, and *Aiken County*, the judges on both sides of each decision wrestled with what *Free Enterprise* stood for. Perhaps a return to *Myers*? A "this far but no farther" approach to *Humphrey's Executor*? A new approach entirely? *Free Enterprise* did not provide the Court with the opportunity to resolve these issues. The Court should take advantage of the opportunity the Petitioner has provided and complete that project.

III. THE COURT SHOULD HOLD THE CFPB'S STRUCTURE TO BE UNCONSTITUTIONAL

If the Court follows *Free Enterprise Fund* in returning to the separation of powers principles of *Myers*, it should hold the CFPB's current structure unconstitutional because the director of the CFPB exercises the executive power and yet the president's ability to remove the director is limited by statute.

In evaluating the constitutionality of the removal limitation for the CFPB director, the relevant inquiry is a simple one: does he or she exercise the executive power? Thankfully, this is not a close call. A clear violation allows the Court to set a ground rule that will guide lower courts in how to expound on the doctrine within the proper constitutional framework.

The CFPB has the authority to enforce 19 consumer protection laws, including "all but exclusive power 'to prescribe rules or issue orders or guidelines

pursuant to'" those laws. *PHH*, 881 F.3d at 145 (Henderson, J., dissenting). These include "expansive *new* powers under Title X [of Dodd-Frank] to investigate, charge, adjudicate, and penalize—through (*inter alia*) subpoena, rescission, restitution, disgorgement and monetary penalties" acts and practices covered by the statute. *Id.* In other words, it has the power to enforce the law. CFPB is like other independent agencies, "exercis[ing] executive power by bringing enforcement actions against private citizens." *Id.* at 164–65 (Kavanaugh, J., dissenting). That the CFPB is in a "headless fourth branch of the U.S. Government" rather than solidly in the executive branch compounds the constitutional problem rather than saves it. *Id.* at 165.

This fourth branch may in some ways be more efficient than a unitary executive system where all executive power is under the president's purview. But "[t]he purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). Because Congress has insulated the CFPB director from the three branches of government, "the Director enjoys more unilateral authority than any other official [other than the President] in any of the three branches of the U.S. Government," and "[i]ndeed, within his jurisdiction, the Director of the CFPB is even more powerful than the President. The Director's view of consumer protection law and policy prevails over all others. In essence, the Director of the CFPB is the President of Consumer Finance." *PHH*, 881 F.3d at 165–66, 172 (Kavanaugh, J., dissenting).

Thankfully, the Framers also devised a solution to statutes that deviate from the Constitution's prescriptions: the "courts of justice," which have the "duty . . . to declare all acts contrary to the manifest tenor of the constitution void." Federalist No. 78 (Hamilton).

CONCLUSION

To bring removal doctrine back in line with *Myers,* the separation of powers, and ultimately the Constitution, the Court should keep only the part of *Humphrey's Executor* that permits limitations on the president's removal power in cases of non-executive officers—officers who do not exercise the president's unified executive power. Because the director of the CFPB unquestionably exercises executive power through her unilateral control over the enforcement of the nation's consumer protection laws, the Court should declare the CFPB's structure unconstitutional and void.

For the above reasons, and those stated by the Petitioner, the Court should reverse the Ninth Circuit.

Respectfully submitted,

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