No. 18-307

In the
Supreme Court of the United States

STATE NATIONAL
BANK OF BIG SPRING, et al.,

Petitioners,

v.

STEVEN T. MNUCHIN,
Secretary of the Treasury, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act violates the Constitution's separation of powers by creating the Bureau of Consumer Financial Protection (CFPB or Bureau) as an independent agency that exercises expansive legislative, executive, and judicial authority over private citizens but is led by a single Director whom the President cannot remove from office for policy reasons, and is exempted from Congress's power of the purse and accompanying congressional oversight.

2. Whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overturned.

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1973, **PACIFIC LEGAL FOUNDATION** is a nonprofit, tax-exempt corporation organized under the laws of the state of California for the purpose of engaging in litigation in matters affecting the public interest. PLF provides a voice in the courts for Americans who believe in limited government, private property rights, and individual freedom.

PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law. PLF's attorneys have participated as lead counsel or counsel for amici in several cases involving the role of the Judiciary as an independent check on the Executive and Legislative Branches under the Constitution's Separation of Powers. *See, e.g.*, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617 (2018); *Lucia v. SEC*, 585 U.S. --- (2018) (SEC administrative-law judge is "officer of the United States" under the Appointments Clause); *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 136 S. Ct. 2442 (2016) (*Auer* deference to agency guidance letter); *U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.*, 136 S. Ct. 1807 (2016) (judicial review of agency interpretation of Clean Water Act);

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Correspondence evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Sackett v. EPA, 566 U.S. 120 (2012) (same); *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597 (2013) (*Auer* deference to Clean Water Act regulations); *Rapanos v. United States*, 547 U.S. 715 (2006) (agency regulations defining "waters of the United States").

PLF supports the Petitioners in this case because it raises core Separation of Powers issues related to each branch's accountability for the exercise of its powers. PLF's policy perspectives and litigation experience offer an additional viewpoint that will assist the Court in reviewing this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

1. "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*, at 324 (J. Madison) (J. Cooke ed. 1961). To prevent tyranny—that is, "to protect the liberty and security of the governed[,]" *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991)—the Constitution divides all of the federal government's powers into three, distinct branches. U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. It follows that the "vesting" and concentration of powers in an agency "independent" of the three branches violate the Constitution's Separation of Powers.

With these principles in mind, the Framers established a government of divided powers. The Legislature is vested with the power to establish law—that is, "generally applicable rules" adopted "only through the constitutionally prescribed process." *Dep't of Transp. v. Ass'n of Am. R.R.*, 135 S. Ct. 1225, 1246

(2015) (Thomas, J., concurring in the judgment). The Executive Branch is obligated solely to administer and enforce duly enacted law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) ("In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."). Disputes concerning the meaning and application of the law are vested exclusively in the Judicial Branch. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But as Justice Jackson lamented, administrative agencies "have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

This case presents the Court with the opportunity to review a particularly egregious example of an unaccountable, "independent" federal power, and further, the chance to reestablish the stark inter-branch lines drawn by Constitution—restoring the Framers' divided government and putting an end to the concentration of the three branches' separate powers in an "an undifferentiated 'governmental power.'" *Ass'n of Am. R.R.*, 135 S. Ct. at 1240 (Thomas, J., concurring in judgment).

2. Created as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010), the CFPB was given vast powers and designed precisely to avoid the Constitution's tripartite design.

a. The CFPB is authorized to "prescribe rules or issue orders or guidelines pursuant to" nineteen different consumer-protection laws, including the Fair Debt Collection Practices Act and the Truth in Lending Act, all previously administered by seven separate agencies. 12 U.S.C. §§ 5481(12), 5581(a)(1)(A), 5581(b). At its discretion, the Bureau may initiate enforcement actions in federal court or through administrative actions, to challenge "unfair, deceptive, or abusive act[s] or practice[s]"—according to definitions adopted by the CFPB itself. *Id.* §§ 5531(a), (b); 5563; 5564. *See also id.* § 5492(a)(10) (The CFPB is authorized to "establish the general policies of the [CFPB] with respect to all executive and administrative functions," including "implementing the Federal consumer financial laws through rules, orders, guidance, interpretations, statements of policy, examinations, and enforcement actions."). And the Bureau has broad powers to order legal and equitable relief. *Id.* § 5565(a)(2). With the exception of the President, the CFPB Director "enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *PHH Corp. v. CFPB*, 881 F.3d 75, 166 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

b. Congress purported to grant the CFPB unprecedented independence from the President, *i.e.*, from the head of the Executive Branch. The CFPB is led by a single "Director," 12 U.S.C. § 5491(b)(1), who is appointed by the President, with the advice and consent of the senate, to a five-year term, *id.* §§ 5491(b)(2), (c)(1). The Director may not be removed by the President, except "for inefficiency, neglect of duty, or malfeasance in office[]" (*id.* § 5491(c)(3))—that is, except for cause.

c. The CFPB is also largely free of congressional oversight. Most significantly, the CFPB's budget does not go through OMB review, 12 U.S.C. § 5497(a)(4)(E), and is not submitted to Congress for annual appropriations consistent with the relative priorities of the President and Congress, *id.* § 5497(a)(2)(C). Instead, the CFPB Director—alone—sets the CFPB's budget, and the funds come not from Congress (pursuant to an appropriations bill signed into law by the President), but from the Federal Reserve, which "*shall* transfer" funds to the CFPB in "the amount [up to 12 percent of the Federal Reserve's operating budget] *determined by the Director* to be reasonably necessary" to administer the consumer-protection laws. *Id.* § 5497(a)(1) (emphasis added). These funding decisions are effectively immune from congressional control. *See id.* § 5497(a)(2)(C) ("[T]he 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.").

d. Finally, judicial review of CFPB actions is allowed only after protracted administrative processes in which traditional due-process protections are sidestepped. First, while an administrative-enforcement action mimics federal trial procedure—pleadings, voluminous discovery, motions *in limine*, etc.[2] (*see* 5 U.S.C. § 556(c) (listing powers of administrative adjudicators))—the action is prosecuted by the CFPB be-

[2] *See, e.g.*, Docket, *In re: PHH Corp., et al.*, CFPB Administrative Proceeding, File No. 2014-CFPB-0002, https://www.consumerfinance.gov/administrative-adjudication-proceedings/administrative-adjudication-docket/phh-corporation/.

fore the CFPB itself, rather than before a neutral, Article III judge. 12 U.S.C. § 5563. At the end of this proceeding, a CFPB-appointed hearing officer issues a recommended decision, which includes findings of fact and conclusions of law. 12 C.F.R. § 1081.402. Review of the recommended decision is available only before the CFPB Director. *Id*. §§ 1081.402, 1081.405. And only after the Director has issued a final decision may a party file for judicial relief. *Id*. § 1081.402(c).

The agency's independence, however, remains protected even then. On appeal, courts are limited to determining whether the agency proceedings were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *PSEG Energy Resources & Trade LLC v. FERC,* 665 F.3d 203, 208 (D.C. Cir. 2011) (internal quotation marks omitted). The CFPB's findings of fact are all but unreviewable. Philip Hamburger, *Is Administrative Law Unlawful?* 317–19 (Chicago 2015); *see id.* 318 ("The overall effect is to put courts in a position in which they defer to the facts as developed on the administrative record and even as determined by the agency."). And its conclusions of law are given presumptive weight. *See* 12 U.S.C. § 5512(b)(4)(B); *Auer v. Robbins*, 519 U.S. 452 (1997); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).[3]

[3] As noted above, the CFPB may, at its sole discretion, initiate charges in federal court rather than in an administrative-enforcement proceeding. 12 U.S.C. §§ 5563; 5564. But *Chevron* and *Auer* deference would still apply. And, precisely because of agency control over the administrative process and the deference courts must apply to agency fact-finding, agencies have incentives to prefer actions in administrative proceedings over federal trials.

Perhaps most worryingly, the CFPB may use administrative-enforcement actions, and enjoy the judicial deference accorded its factual and legal determinations, not only to enforce existing rules, but also to establish new policies—that is, to challenge conduct that was, before an enforcement action, perfectly legal. *See id.* § 5492(a)(10) (The CFPB may "implement[] the Federal consumer financial laws through . . . enforcement actions.").

3. Thus, while "modern administrative agencies" like the CFPB "fit most comfortably within the Executive Branch, as a practical matter they exercise" legislative, executive, and adjudicative power. *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (2013) (Roberts, C.J., dissenting). Nor is the "accumulation of these powers in the same hands . . . an occasional or isolated exception to the constitutional plan; it is a central feature of modern American government." *Id.* at 1879.

The combination of CFPB's powers, structure, and freedom from oversight, reveals the CFPB to be an especially egregious example of an "independent" federal power—an aberration in the tripartite government established by the Constitution, which vests *all* of the government's power in only three branches. *See The Federalist No. 47*, at 324 (J. Madison) (identifying the three "legislative, executive, and judiciary" powers as "all" of the government's powers).

The questions presented here—addressing whether the structure of the CFPB violates Article II of the Constitution and the Constitution's separation of powers—implicate core constitutional principles related to the liberty and security of the people and the people's ability to hold government responsible for its actions. *See Ass'n of Am. R.R.s*, 135 S. Ct. at 1234

(Alito, J., concurring) ("Liberty requires accountability."); Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2332 (2001) ("The lines of responsibility should be stark and clear, so that the exercise of power can be comprehensible, transparent to the gaze of the citizen subject to it.") (internal quotation marks and citation omitted).

The lines of responsibility become blurred, and accountability for the exercise of power becomes less comprehensible, when Congress establishes "independent" powers armed with vast authority but placed beyond control of the government's branches. As this Court has explained, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010).

While the Constitution was framed to ensure liberty through accountability, the CFPB was designed specifically to escape the control of the President who is thus *unconstitutionally* hampered in his obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President—and therefore, We the People—are prevented from holding the CFPB accountable for its administration of the laws.

The concentration of the government's three powers in a single agency raises additional separation-of-powers concerns. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this Court approved of a

for-cause removal restriction because the agency exercised (only) "quasi legislative" and "quasi judicial" powers. But aside from expressly provided exceptions[4]—none of which applied in *Humphrey's Executor* or applies here—the Executive Branch is not vested with either legislative or judicial powers. *Humphrey's Executor*'s approval of removal restrictions—on the ground that the agency exercises non-executive power—is based on an invalid presumption, namely, that the Constitution allows an executive agency to exercise non-executive power. To fully address the serious constitutional problems raised by the CFPB's structure and powers, the Court should reconsider its holding in *Humphrey's Executor*.

The CFPB will no doubt offer various policy reasons for its unprecedented independence and the powers it exercises. But policy cannot override constitutional principles, since "[w]e ought always to consider the Constitution with an eye to the principles upon which it was founded." James Madison, 1 *Annals of Cong.* 582 (June 19, 1789). This Court should grant the Petition and determine whether the structure of the CFPB violates Article II of the Constitution and the Constitution's Separation of Powers.

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[4] For example, the President is vested with some measure of legislative power. Article I vests the President with the authority to sign (or not) legislatively approved bills into law. U.S. Const. art. I, § 7.

ARGUMENT

I.

THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT LIBERTY

"No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," than this: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, 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*, at 324 (J. Madison).

To prevent tyranny and protect liberty, the Constitution divides the "powers of the . . . Federal Government into three defined categories, Legislative, Executive, and Judicial." *INS v. Chadha*, 462 U.S. 919, 951 (1983). Article I vests "[a]ll legislative Powers herein granted . . . in a Congress of the United States[;]" Article II vests "the" executive power "in a President of the United States of America[;]" and Article III vests "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

"The declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co.*, 343 U.S. at 635 (Jackson, J., concurring)).

The Framers recognized that these mere "parchment barriers" between the branches were not a sufficient guarantor of liberty. *The Federalist No. 48*, at 333 (J. Madison). Therefore, the Constitution also "give[s] to each [branch] a constitutional control of the others," without which "the degree of separation which the maxim requires, as essential to a free government, [could] never in practice be duly maintained." *Id.* at 332. The "constant aim," Madison explained, was "to divide and arrange the several [branches] in such a manner as that each may be a check on the other." *The Federalist No. 51*, at 349.

In sum, so that individual liberty may be secured, the Constitution divides power into three branches but also gives to each branch certain powers to check the others:

> [P]ower is of an encroaching nature, and . . . it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others.

The Federalist No. 48, at 332 (J. Madison). *See also Metro. Wash. Airports Auth.*, 501 U.S. at 272 ("The structure of our Government as conceived by the Framers of our Constitution disperses the federal power among the three branches—the Legislative, the Executive, and the Judicial—placing both substantive and procedural limitations on each.").

A "key 'constitutional means' vested in the President—perhaps *the* key means"—to "'resist encroachments'" by the other branches, is the President's "'power of appointing, overseeing, and *controlling* those who execute the laws.'" *Free Enterprise Fund*, 561 U.S. at 501 (emphasis of *controlling* added) (quoting James Madison (June 8, 1789), 1 *Annals of Cong*. 463).

Congress's for-cause removal protection for the CFPB Director unconstitutionally encroaches on the President's constitutional authority—and obligation—to control those who execute the laws.

II.

"THE" EXECUTIVE POWER IS VESTED IN "A" PRESIDENT WHO "SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED"

The Framers gave serious thought to the structure of the Executive Branch before adopting the unitary-executive model. In fact, they *considered but expressly rejected* a "plural" executive.

The Framers' deliberations included the submission of the matter to a committee for further study. This committee concluded that an able President would be hampered by a plural executive (to include either a privy council or a council of revision) and that a weak executive would hide behind it and avoid accountability for bad decisions. *See* Todd F. Gaziano, *The Opinions Clause*, in THE HERITAGE GUIDE TO THE CONSTITUTION (noting Charles Pinckey's comment, "Give [the President] an able Council and it will thwart him; a weak one and he will shelter himself

under their sanction.").[5] As Alexander Hamilton explained, the Framers rejected a "plural" executive because, in part, a plural executive could escape public accountability more easily than a single President—precisely the problem raised by the CFPB here. *See The Federalist No. 70*, at 474 (A. Hamilton). The Framers thus definitively concluded that the liberty of the people was best secured by a single President, charged with all of the responsibility and accountability to manage the Executive Branch.

Not surprisingly, then, the Constitution's text and structure demonstrate that the Executive Branch is to be headed by a "unitary" executive, who can be held accountable for all of the branch's actions.

A. The President—and Only the President—Is Authorized and Obligated To "take Care that the Laws be faithfully executed"

The Constitution vests legislative, executive, and judicial powers in three branches—and in three branches *only*. U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 566 (1994) ("Only the three specifically named branches are allowed. Indeed, each of the first three articles ordains and establishes one branch or institution and then very carefully describes how its officers are to be selected and what powers they are to have."); David P. Currie, *The Distribution of Powers after* Bowsher, 1986 Sup. Ct. Rev. 19, 35 ("The Constitution recognizes only three kinds of federal powers: legislative, executive, and judicial.").

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[5] *See* https://www.heritage.org/constitution/#!/articles/2/essays/ 88/opinion-clause.

"The" executive power is vested in "a" single "President of the United States of America." U.S. Const. art. II, § 1. *See* Calabresi & Prakash, *supra*, at 568–69 ("Article II's vesting of the President with all of the 'executive Power' give[s] him control over all federal governmental powers that are neither legislative nor judicial[.]"). And this President "shall take Care that the Laws be faithfully executed[.]" U.S. Const. art. II, § 3. The President is thus "both empowered and obliged" to do so. Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 Va. L. Rev. 647, 658 (1996).

B. To "Take Care" That the Laws Be Faithfully Executed, the President Must Have Agents—Executive-Branch "Officers of the United States"—Whose Offices Are Lodged in the Executive Branch

1. The Constitution Contemplates Presidential Assistants

The President is not required to *personally* execute all of the laws; rather, the President must "take Care" that the laws be (faithfully) executed. U.S. Const. art. II, § 3. As George Washington explained, because it is "'impossib[le] that one man should be able to perform all the great business of the State,' the Constitution provides for executive officers to 'assist the supreme Magistrate in discharging the duties of his trust.'" 30 *Writings of George Washington* 334 (John C. Fitzpatrick ed., 1939) (quoted in *Free Enterprise Fund*, 561 U.S. at 483). *See Myers v. United States*, 272 U.S. 52, 117 (1926) ("[T]he President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates.").

Thus while Congress writes the laws and creates offices for their administration, *Buckley v. Valeo*, 424 U.S. 1, 138–39 (1976), the actual administration of the laws is left to the Executive Branch alone: "Legislative power, as distinguished from executive power, is the authority to make laws, [] not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Id.* at 139 (internal quotation marks and citation omitted). As Hamilton noted, the "administration of government . . . is limited to *executive* details, and falls *peculiarly* within the province of the *executive* department." *The Federalist No. 72*, at 486 (emphasis added).

2. Executive Officers Work in the Executive Branch and Are Subordinate to the President

To repeat briefly, the Constitution vests the executive power exclusively in the President; and so that the President can exercise his power and duty to see that the laws are faithfully executed, he must have officers to assist him. *See* Calabresi & Prakash, *supra*, at 593 (Without "inferior executive officers and departments[,]" the "vast majority of federal laws would go unexecuted and the President would be without advice and help as he sought to carry out his constitutional powers and duties.").

Therefore, these executive officers, who carry out some portion of the President's executive power, are and must be agents of the President—and "*of no one else*." John Harrison, *Addition by Subtraction*, 92 Va. L. Rev. 1853, 1862 (2006) (emphasis added). *See also The Federalist No. 72*, at 487 (A. Hamilton) (The "per-

sons . . . to whose immediate management these different [executive] matters are committed ought to be considered as assistants or deputies to the chief magistrate."); Gouverneur Morris (July 19, 1787), 2 Farrand, *Records of the Federal Convention of 1787* at 53–54 ("There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions *in subordination* to the Executive . . . Without these ministers the Executive can do nothing of consequence.") (emphasis added).

If these officers "were agents of someone [other than the President], that someone else would have the executive power, or some share of it." Harrison, *supra*, at 1862. But the Constitution does not vest anyone but the President with "[t]he" executive power. U.S. Const. art. II, § 1. *See* Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1213 (2014) (The Executive Vesting Clause "implies that all administrative powers that are not exercises of the legislative and judicial powers are within the executive branch and therefore must be within the control of the President[.]").

Accordingly, the administrative power "must be a subset of the President's 'executive Power' and not of one of the other two traditional powers of government." Calabresi & Prakash, *supra*, at 569 (footnote omitted).

The Opinions Clause supports this reading. According to the Opinions Clause, the President "may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices." U.S. Const. art. II, § 2, cl. 1. Even the heads of

the "core" executive departments—*e.g.*, State and Defense—although appointed to office with the advice and consent of the Senate, report directly to the President, in writing if the President so requires. This Clause confirms that the President is the head of the Executive Branch and that the officers in the executive departments are the President's subordinates. Further, as Professor Akhil Reed Amar explains, this Clause also shows that the Framers "rejected a committee-style Executive Branch in favor of a unitary and accountable President, standing under law, yet over Cabinet officers." Amar, *supra*, at 647 (footnote omitted).

3. Summing Up

The President—and *only* the President—is authorized and obligated to "take Care" that the laws be faithfully executed, (2) the President cannot personally execute all of the laws and must therefore have assistants, and (3) the individuals who assist the President in the execution (administration) of the laws—*i.e.*, the executive[6] "officers of the United States"—are part of the Executive Branch and subordinate to the President.

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[6] The Constitution also provides for legislative and judicial officers. U.S. Const. art. II, § 2. But those officers are employed in the Legislative and Judicial Branches, respectively. That is, legislative and judicial officers, like Executive-Branch officers, are housed within their respective branches—and only in their respective branches. And outside of the appointment power, the President is not vested with any power to control the agents of the other two branches.

C. To *Faithfully* Execute the Laws, the President Must Have Control Over *His* Officers—By Removal, If Necessary

The President's exclusive authority and obligation to "take Care that the laws be faithfully executed" require that the President have sufficient control over his agents. Traditionally, the President's control was effected through his power to remove executive officers at-will. *See Free Enterprise Fund*, 561 U.S. at 483 ("Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary.") (citing *Myers*, 272 U.S. 52).

Although not expressly provided for in the Constitution, the President's removal power has long been considered a necessary incident of *the* executive power vested *exclusively* in the President. *See Myers*, 272 U.S. at 163–64 ("[A]rticle 2 grants to the President the executive power of the government—*i.e.*, the general administrative control of those executing the laws, including the power of appointment and removal of executive officers—a conclusion confirmed by his obligation to take care that the laws be faithfully executed[.]").

As noted above, "the executive authority, *with few exceptions*, is to be vested in a single magistrate." *The Federalist No. 69*, at 462 (A. Hamilton) (emphasis added). The exceptions are explicitly identified in the Constitution. *See id.* (identifying exceptions, including the President's power, *with the advice and consent of the senate*, to make treaties). Therefore, when "traditional executive power was not '*expressly* taken away, it remained with the President.'" *Free Enterprise Fund*, 561 U.S. at 492 (emphasis added) (quoting

Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)).

"Under the traditional default rule, [the] removal [power] is incident to the power of appointment." *Free Enterprise Fund*, 561 U.S. at 509 (citations omitted). Control of the executive branch requires that power.

Congress may have the power to establish administrative agencies, but Congress cannot restrict the President's executive power of removal and thereby "reduce the Chief Magistrate to a cajoler-in-chief." *Free Enterprise Fund*, 561 U.S. at 502. *See id.* at 500 ("Congress has plenary control over the salary, duties, and even existence of executive offices. Only presidential oversight can counter its influence."); *id.* at 499 (Congress has the "power to create a vast and varied federal bureaucracy[]," but the "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."). *See also id.* at 516 (Breyer, J., dissenting) (The separation-of-powers "principle, along with the instruction in art. II, § 3 that the President 'shall take Care that the Laws be faithfully executed,' limits Congress' power to structure the Federal Government.") (citations omitted); Calabresi & Prakash, *supra*, at 581 ("Once created, these agencies and officers executing federal law must retain the President's approval and be subject to presidential superintendence if they are to continue to exercise 'the executive Power.'").

In short, the President is "both empowered and obliged" to take care that the laws be faithfully executed, Amar, *supra*, at 658; to exercise this power *and*

meet this obligation, the President must have sufficient control over his administration—through the at-will removal power, if necessary.

D. The President's Control Over His Administration Makes the President Accountable for the Faithful Execution of the Laws—and Thereby Helps To Secure Individual Liberty

The President's (necessary) delegation of executive power to his agents involves a risk, since the "diffusion of power carries with it a diffusion of accountability." *Free Enterprise Fund*, 561 U.S. at 497. This risk, though, is tempered by the President's constitutionally derived control over his administrative agents.

The Constitution "that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513–14. Without the removal power, the President "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else[,]" and this "diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'" *Id*. at 514 (quoting *The Federalist No. 70*, at 478 (A. Hamilton)).

The Constitution was designed to ensure that "those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."

James Madison (June 17, 1789), 1 *Annals of Cong*. 499.

The President is "the only democratically elected official [within the Executive Branch]," and "the political accountability of his subordinates depends on their accountability to the President." Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 Fordham L. Rev. 2541, 2552 (2011) (citing *Free Enterprise Fund*, 561 U.S. at 497–98 (quoting *The Federalist No. 72*, at 487 (A. Hamilton)).

The people do not vote for administrators—they "instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'" *Free Enterprise Fund*, 561 U.S. at 497–98 (quoting *The Federalist No. 72*, at 487 (A. Hamilton) (J. Cooke ed., 1961)). As Justice Scalia explained, the President is "directly dependent on the people, and since there is only *one* President, *he* is responsible. The people know whom to blame . . ." *Morrison v. Olson*, 487 U.S. 654, 729 (1988) (Scalia, J., dissenting). *See also* James Madison (June 16, 1789), 1 *Annals of Cong*. 462 (The "first Magistrate should be responsible for the executive department; so far therefore as we do not make the officers who are to aid him in the duties of that department responsible to him, he is not responsible to his country.").

The President "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enterprise Fund*, 561 U.S at 484.

III.
THE COURT SHOULD RECONSIDER *HUMPHREY'S EXECUTOR*

In 1926, this Court confirmed the rationales discussed above, and concluded that the President had the power to remove principal officers at will. *Myers v. United States*, 272 U.S. 52. The Court reversed itself less than a decade later, *Humphrey's Executor*, *supra*, but time and experience have shown that the Court got it right in *Myers*. The Court should revisit this issue.

In *Humphrey's Executor*, the Court upheld a statute restricting the President's power to remove the Commissioners of the Federal Trade Commission for cause. This statute was constitutional, according to the Court, because the FTC's "duties [we]re neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Humphrey's Executor*, 295 U.S. at 624. *See also id.* at 628, 630 (explaining that the FTC could not "in any proper sense be characterized as an arm or an eye of the executive;" indeed, it was "wholly disconnected from the executive department.").

The Court has retreated from this rationale. *See Morrison*, 487 U.S. at 689 (The Court "undoubtedly did rely on the terms 'quasi-legislative' and 'quasi-judicial'" in *Humphrey's Executor*, but now the question whether a removal restriction is permissible does *not* turn on whether an agency official is classified as purely executive.). But Courts continue to rely on *Humphrey's Executor* and approve "independent" agencies that exercise non-executive power.

The CFPB brings this issue into clear relief. The CFPB's exercise of legislative and judicial powers suggest that the for-cause removal protection survives under the plain holding of *Humphrey's Executor*. But its exercise of executive power suggests that it must be accountable to the (unitary) head of the Executive Branch. The Court's attempts to limit *Humphrey's Executor* has not proved successful—as the *PHH Corp.* opinion below demonstrates. There, the court concluded that *Humphrey's Executor* "required only that the President be able to remove *purely executive officers* without congressional involvement." *PHH Corp.*, 881 F.3d 85 (emphasis added) (*en banc*) (citing *Humphrey's Executor*, 295 U.S. at 628). But, the *en banc* court continued, "where administrators of 'quasi legislative or quasi judicial agencies' are concerned, the Constitution does not require that the President have 'illimitable power' of removal." *Id.* (quoting *Humphrey's Executor* at 629).

The Court needs to resolve whether Executive-Branch agencies may be protected from full presidential accountability—on the ground they exercise *non-executive* powers—or whether Executive-Branch agencies are limited to exercising only executive functions.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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