
No. 18-60302

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CONSUMER FINANCIAL PROTECTION BUREAU,
Plaintiff-Appellee,

v.

ALL AMERICAN CHECK CASHING, INCORPORATED; MID-STATE FINANCE,
INCORPORATED; MICHAEL E. GRAY, Individually,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Mississippi, Jackson
Honorable William H. Barbour, Jr., District Judge

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT OF
DEFENDANTS-APPELLANTS AND REVERSAL**

OLIVER J. DUNFORD
WENCONG FA
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Counsel for Amicus Curiae Pacific Legal Foundation

DISCLOSURE STATEMENT

No. 18-60302

Consumer Financial Protection Bureau

v.

All American Check Cashing, et al.

Pacific Legal Foundation (PLF) is a non-profit corporation, exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It has no parent corporation, and no publicly held company has a 10% or greater ownership interest in PLF.

s/ Oliver J. Dunford

OLIVER J. DUNFORD

*Attorney of Record for Amicus
Curiae Pacific Legal Foundation*

TABLE OF CONTENTS

DISCLOSURE STATEMENT	i
TABLE OF CONTENTS.....	ii
TABLE OF AUTHORITIES	iv
SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES	vii
INTEREST OF AMICUS	1
INTRODUCTION AND SUMMARY OF THE ARGUMENT.....	3
ARGUMENT	10
I. THE CONSTITUTION ESTABLISHED A GOVERNMENT OF SEPARATED POWERS TO PROTECT LIBERTY	10
II. “THE” EXECUTIVE POWER IS VESTED IN “A” PRESIDENT WHO “SHALL TAKE CARE THAT THE LAWS BE FAITHFULLY EXECUTED”	14
A. The President—and Only the President —Is Authorized and Obligated To “take Care that the laws be faithfully executed”	14
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.....	15
1. The Constitution Contemplates Presidential Assistants.....	15
2. Executive Officers Work in the Executive Branch and Are Subordinate to the President.....	17
3. Summing Up	19
C. To <i>Faithfully</i> Execute the Laws, the President Must Have Control Over <i>His</i> Officers—By Removal, If Necessary.....	20

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	23
III. THE STRUCTURE OF THE CFPB VIOLATES ARTICLE II OF THE CONSTITUTION AND THE CONSTITUTION’S SEPARATION OF POWERS	26
CONCLUSION.....	30
CERTIFICATE OF SERVICE.....	32
CERTIFICATE OF COMPLIANCE	33

TABLE OF AUTHORITIES

Cases

Bowsher v. Synar, 478 U.S. 714 (1986)11

Buckley v. Valeo, 424 U.S. 1 (1976)16

CFPB v. RD Legal Funding, LLC, No. 17-cv-890 (LAP),
2018 WL 3094916 (S.D.N.Y. June 21, 2018).....27

Decker v. Nw. Env'tl. Def. Ctr., 568 U.S. 597 (2013).....2

Dep't of Transp. v. Ass'n of Am. R.R.s,
135 S. Ct. 1225 (2015)4

Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.,
561 U.S. 477 (2010) passim

Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm,
136 S. Ct. 2442 (2016)2

Humphrey's Executor v. United States,
295 U.S. 602 (1935)28

INS v. Chadha, 462 U.S. 919 (1983).....11

Lucia v. SEC, 585 U.S. --- (2018).....2

*Metro. Wash. Airports Auth. v. Citizens for the Abatement
of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).....3, 9, 13

Morrison v. Olson, 487 U.S. 654 (1988).....25

Myers v. United States, 272 U.S. 52 (1926)7-8, 16, 20

Nat'l Ass'n of Mfrs. v. Dep't of Def., 138 S. Ct. 617 (2018)2

PHH Corp. v. CFPB, 839 F.3d 1, 10-11 (D.C. Cir. 2016),
reinstated in relevant part,
881 F.3d 75 (D.C. Cir. 2018).....8, 26-29

Rapanos v. United States, 547 U.S. 715 (2006).....2

Sackett v. EPA, 566 U.S. 120 (2012)2

U.S. Army Corps of Eng'rs v. Hawkes Co., Inc.,
136 S. Ct. 1807 (2016)2

Wellness Int'l Network, Ltd. v. Sharif,
135 S. Ct. 1932 (2015)31

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952)11

Federal Statutes

12 U.S.C. § 2607(a).....28

12 U.S.C. § 5481(12).....6

12 U.S.C. § 5491(b)(1)7

12 U.S.C. § 5491(b)(2)7

12 U.S.C. § 5491(c)(1).....7

12 U.S.C. § 5491(c)(3).....7

12 U.S.C. § 5531(a).....7

12 U.S.C. § 5531(b).....7

12 U.S.C. § 5565(a)(2)7

12 U.S.C. § 5581(a)(1)(A)6

12 U.S.C. § 5581(b).....6

Federal Constitution

U.S. Const. art. I, § 1.....11, 14

U.S. Const. art. II, § 15, 11, 14-15, 18

U.S. Const. art. II, § 219

U.S. Const. art. II, § 2, cl. 2.....5

U.S. Const. art. II, § 35, 9, 15

U.S. Const. art. III, § 1.....11, 14

Miscellaneous

Amar, Akhil Reed, *Some Opinions on the Opinion Clause*,
82 Va. L. Rev. 647 (1996).....15, 23

1 *Annals of Cong.* (Joseph Gales ed., 1834)..... passim

Calabresi, Steven G. & Prakash, Saikrishna B.,
The President’s Power to Execute the Laws,
104 Yale L.J. 541 (1994).....14-15, 17, 19, 22

Currie, David P., *The Distribution of Powers after Bowsher*,
1986 Sup. Ct. Rev. 1914

16 *Documentary History of the
First Federal Congress* (2004)21

2 Farrand, *Records of the Federal Convention of 1787*18

The Federalist (J. Cooke ed., 1961)..... passim

Harrison, John, *Addition by Subtraction*,
92 Va. L. Rev. 1853 (2006)..... 17-18

Kagan, Elena, *Presidential Administration*,
114 Harv. L. Rev. 2245 (2001).....4

Rao, Neomi, *A Modest Proposal: Abolishing Agency
Independence in Free Enterprise Fund v. PCAOB*,
79 Fordham L. Rev. 2541 (2011) 24-25

Rao, Neomi, *Removal: Necessary and Sufficient for
Presidential Control*, 65 Ala. L. Rev. 1205 (2014)18

30 *Writings of George Washington*
(John C. Fitzpatrick ed., 1939).....16

SUPPLEMENTAL STATEMENT OF INTERESTED PARTIES

No. 18-60302

Consumer Financial Protection Bureau

v.

All American Check Cashing, et al.

Pursuant to Fifth Circuit Rule 29.2, the undersigned counsel certifies that no persons or entities other than those in the parties' briefs have an interest in the outcome of this case.

s/ Oliver J. Dunford

OLIVER J. DUNFORD

*Attorney of Record for Amicus
Curiae Pacific Legal Foundation*

INTEREST OF AMICUS¹

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

¹ Defendants-Appellants consented to the filing of this brief. The Consumer Financial Protection Bureau took no position, however, and accordingly, PLF filed an accompanying Motion for Leave to file this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than amicus curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

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); *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”).

This case raises core Separation of Powers issues related to each co-equal branch’s accountability for the exercise of its powers. PLF offers a discussion of first principles concerning executive power that should illuminate the Court’s review of this case.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Supreme Court has consistently reaffirmed the central judgment of the Framers that the “ultimate purpose of th[e] separation of powers 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). Indeed, “[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty.” *The Federalist No. 47*, at 324 (James Madison) (J. Cooke ed., 1961). *See also* James Madison (June 22, 1789), 1 *Annals of Cong.* 581 (Joseph Gales ed., 1834) (“[I]f 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.”).

When the carefully balanced scheme of the Framers is not enforced—when the powers of government are concentrated in a single branch, or as here in a sole agency, virtually immune

from oversight—the liberty and security of the governed lack protection.

The question here—whether the structure of the Consumer Financial Protection Bureau (CFPB or Bureau) violates Article II of the Constitution and the Constitution’s separation of powers²—implicates 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 Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1234 (2015) (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).

² Two questions were accepted for interlocutory appeal. *CFPB v. All American Check Cashing, Inc.*, No. 3:16-cv-356 (S.D. Miss. Mar. 27, 2018) (Order) (Dkt. No. 240). We address only the first.

The lines of responsibility become blurred, and accountability for the exercise of power becomes less comprehensible, when Congress establishes “independent” executive-branch agencies armed with vast powers but placed beyond presidential control. The growth of the Administrative State—with its ever-increasing oversight by individuals wielding significant power—demands accountability. The decision below, if allowed to stand, would reduce that accountability.

The Constitution vests power in three—and only three—branches. “The” executive power is vested in “a” single president, who “shall take Care that the laws be faithfully executed[.]” U.S. Const. art. II, §§ 1, 3. As explained below, several principles follow:

- The president—and only the president—is authorized and obligated to execute the laws.
- To execute the laws, a president needs agents—*i.e.*, executive “officers of the United States” (U.S. Const. art. II, § 2, cl. 2), whose offices are lodged in the Executive Branch.

- To *faithfully* execute the laws, the president must have control over these officers—by removal, if necessary.
- And to ensure that the president carries out these duties, the president must be accountable to the people, which in turn, requires that the president’s agents be accountable to him. *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

The CFPB’s structure—headed by a lone Director, appointed for a five-year term, and immune from presidential removal except for cause—violates these principles.

Created through the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB was given vast powers: It 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, which were previously administered by seven separate agencies. 12 U.S.C. §§ 5481(12), 5581(a)(1)(A), 5581(b). The Bureau may initiate 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). And it has broad powers to order legal and equitable relief. *Id.* § 5565(a)(2).

Congress also provided the CFPB with 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.

The CFPB is therefore an “independent” administrative agency, an aberration in the tripartite government established by the Constitution, which vests power in only three branches and which empowers the president to remove Executive-Branch officers at will. As the Supreme Court explained, “[s]ince 1789, the Constitution has been understood to empower the President to keep [] officers accountable—by removing them from office, if

necessary.” *Free Enterprise Fund*, 561 U.S. at 483 (citing *Myers v. United States*, 272 U.S. 52 (1926)). The Court has held, though, that “Congress can, *under certain circumstances*, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.” *Id.* (emphasis added).

But the Supreme Court has never approved of a for-cause removal protection in these circumstances. Indeed, the CFPB’s structure is unprecedented: “No independent agency exercising substantial executive authority has ever been headed by *a single person*.” *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). Previously, “[t]o mitigate the risk to individual liberty, [] independent agencies have been headed by *multiple* commissioners or board members.” *Id.*

Because of the scope of CFPB’s powers and the for-cause removal protection, its Director “enjoys more unilateral authority than any other official in any of the three branches of

the U.S. Government[,]” except for the president. *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting).

The CFPB’s unprecedented concentration of power and independence from the Executive Branch present a unique and dangerous threat to the “liberty and security of the governed.” *Metro. Wash. Airports Auth.*, 501 U.S. at 272. As the Supreme Court 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*, 561 U.S. at 499.

While the Constitution was adopted to ensure liberty through accountability, the CFPB was designed precisely 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 CFPB will no doubt offer various policy reasons for its unprecedented independence. But policy cannot override constitutional principles. And “[w]e ought always to consider the Constitution with an eye to the principles upon which it was founded.” James Madison (June 19, 1789), 1 *Annals of Cong.* 582. This Court should reverse the district court’s opinion and hold that the structure of the CFPB violates Article II of the Constitution and the Constitution’s Separation of Powers.

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 (James Madison) (J. Cooke ed. 1961).

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. v. Sawyer*, 343 U.S. 579, 635 (1952) (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 (James Madison) (J. Cooke ed. 1961). 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 (James Madison) (J. Cooke ed. 1961).

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 (James Madison) (J. Cooke ed. 1961). *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 *The Federalist No. 51*, at 349 (James Madison) (J. Cooke ed. 1961); 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”

A. The President—and Only the President—Is Authorized and Obligated To “take Care that the laws be faithfully executed”

The Constitution vests power 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.”).

“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*, 272 U.S. at 117 ("[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 president 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 (Alexander Hamilton) (J. Cooke ed., 1961) (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 (Alexander Hamilton) (J. Cooke ed., 1961) (The “persons . . . 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 else, that someone else would have the executive power, or some share of it.” Harrison, *supra*, at 1862. But the Constitution did not vest anyone else 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).

3. Summing Up

(1) 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 assistance, and (3) the individuals who assist the president in the execution (administration) of the laws—*i.e.*, the executive³ “officers of the United States”—are part of the Executive Branch and subordinate to the president.

³ 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 (Alexander Hamilton) (J. Cooke ed., 1961) (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).

Again, Congress may have the power to establish administrative agencies but, according to the Supreme Court, 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 Article 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 (Alexander Hamilton) (J. Cooke ed., 1961)).

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 (Alexander Hamilton) (J. Cooke ed., 1961))).

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 (Alexander 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.”).

In short, 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 STRUCTURE OF THE CFPB
VIOLATES ARTICLE II OF THE CONSTITUTION
AND THE CONSTITUTION’S SEPARATION OF POWERS**

The structure of the CFPB brings these concerns into focus. As described above, Congress established a uniquely powerful and independent administrative agency. *See PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting) (Before the CFPB, “[n]o independent agency exercising substantial executive authority has ever been headed by a *single person*.”).

And just as the Supreme Court has never approved a multi-level for-cause removal protection, *see Free Enterprise Fund*, 561 U.S. at 495 (“The [unconstitutional] result is a Board that is not accountable to the President, and a President who is not responsible for the Board.”), the Supreme Court has never approved a for-cause removal protection for a *single* head of an

“independent” agency. *See PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

In his dissent, Judge Kavanaugh exhaustively discussed the points above, focusing on historical practice (which the Supreme Court has “repeatedly emphasized” in this context); the importance of liberty in the Separation of Powers analysis; and the dangers of congressional interference in the president’s authority over the Executive Branch. *See PHH Corp.*, 881 F.3d at 164–98 (Kavanaugh, J., dissenting). *See also CFPB v. RD Legal Funding, LLC*, No. 17-cv-890 (LAP), 2018 WL 3094916, at *35 (S.D.N.Y. June 21, 2018) (adopting Sections I-IV of Judge Kavanaugh’s dissent in *PHH Corp.*, “where, based on considerations of history, liberty, and presidential authority, [he] concluded that the CFPB ‘is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director.’”) (quoting *PHH Corp.*, 881 F.3d at 198) (Kavanaugh, J., dissenting)).

Accordingly, the Supreme Court’s decisions in *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), and its progeny do *not* support the structure of the CFPB. Those cases hold that the president’s removal power may be restricted when an agency is headed by multiple commissioners or board members. See *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). The multi-member agencies do not present the same threat to individual liberty as the CFPB does because they “do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members.” *Id.* The “multi-member structure thereby reduces the risk of arbitrary decisionmaking and abuse of power, and helps protect individual liberty.” *Id.*⁴

⁴ CFPB’s actions in the *PHH* case provide a textbook example of the threat of arbitrary rulings—novel interpretations of statutory language (contrary to longstanding interpretation), unprecedented penalties, and unilateral action.

In that case, the CFPB initiated an administrative-enforcement action in January 2014, accusing PHH of violating the Real Estate Settlement Practices Act (RESPA), which bans kickbacks that are used to refer business involving a “real estate settlement service.” 12 U.S.C. § 2607(a). PHH provided mortgage loans and referred borrowers to mortgage lenders who purchased reinsurance from a company that PHH owned. As a result,

Accordingly, the unique and unprecedented structure of the CFPB violates Article II and the Separation of Powers.

PHH received part of the reinsurance premiums. This type of arrangement (referring business to a “captive” reinsurer), however, had long been approved by the Department of Housing and Urban Development (HUD), so long as reinsurance premiums did not exceed market rates. *PHH Corp. v. CFPB*, 839 F.3d 1, 10–11 (D.C. Cir. 2016), *reinstated in relevant part*, 881 F.3d 75 (D.C. Cir. 2018) (en banc). In a Recommended Decision, an administrative-law judge (ALJ) concluded that PHH had violated RESPA because, he said, the reinsurance premiums exceeded market rates. *PHH Corp.*, 881 F.3d at 82. The ALJ recommended an order of disgorgement in the amount of \$6.4 million. *Id.*

The CFPB Director reviewed the ALJ’s recommendation. *PHH Corp.*, 881 F.3d at 82. The Director ignored HUD’s long-standing interpretation of RESPA and also declared that RESPA’s three-year statute of limitations applied only in court, not in administrative-enforcement actions. Based on these novel interpretations, the Director found additional RESPA violations and increased the disgorgement amount to *\$109 million*. *PHH Corp.*, 839 F.3d at 11–12.

Three years after the CFPB initiated its action against PHH, a panel of the D.C. Circuit vacated the Director’s order. *PHH Corp.*, 839 F.3d 1. According to the panel, the CFPB’s “newly minted” reading of RESPA (1) “discarded HUD’s longstanding interpretation[,]” and misinterpreted RESPA and (2) violated “bedrock due process principles by *retroactively* applying its new interpretation” against PHH. *Id.* at 11–12, 41–49. The panel further held that the three-year statute of limitations applied to administrative proceedings as well as court actions. *Id.* at 50–55.

The case was then heard by the *en banc* D.C. Circuit, which affirmed the panel’s interpretation of RESPA and its application to PHH. *PHH Corp.*, 881 F.3d at 83.

In sum, the Director—unilaterally and outside of the traditional APA requirements for rule-making—adopted new interpretations of RESPA and its statute of limitation. His interpretations upended well-settled law and would have resulted in an increased disgorgement order of \$109 million (far above the ALJ’s \$6.4 million order). The Director’s errors were corrected only after four years of litigation and appeals—by a party that had the resources to fight.

Because of the for-cause removal protection for the CFPB director, the “President is stripped of the power [the Supreme Court’s] precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.” *Free Enterprise Fund*, 561 U.S. at 496. “By granting the [CFPB] executive power without the Executive’s oversight, [the Dodd-Frank] Act subverts the President’s ability to ensure that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts. The Act’s restrictions are incompatible with the Constitution’s separation of powers.” *Id.* at 498.

CONCLUSION

The CFPB’s structure presents an unprecedented violation of the Constitution’s Separation of Powers. It is the Judiciary’s responsibility to ensure that the branches stay

within their constitutionally prescribed roles.⁵ This Court should therefore affirm the vested power of the president to “appoint[], oversee[], and *control*[] those who execute the laws.” James Madison (June 8, 1789), 1 *Annals of Cong.* 463 (emphasis added). The district court’s decision should be reversed.

DATED: July 13, 2018.

Respectfully submitted,

OLIVER J. DUNFORD
WENCONG FA
Pacific Legal Foundation

s/ Oliver J. Dunford
OLIVER J. DUNFORD

*Attorney of Record for Amicus
Curiae Pacific Legal Foundation*

⁵ As Chief Justice Roberts has noted, “[p]reserving the separation of powers is one of this Court’s most weighty responsibilities.” *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting). *See id.* at 1955 (identifying cases in which the Supreme Court had “invalidated executive actions that encroach upon the power of the Legislature, . . . legislative actions that invade the province of the Executive, . . . and actions by either branch that trench upon the territory of the Judiciary.”) (citations omitted).

CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Oliver J. Dunford

OLIVER J. DUNFORD

*Attorney of Record for Amicus
Curiae Pacific Legal Foundation*

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type Style Requirements

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f),

✓ this document contains 5,329 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because

✓ this document has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Century Schoolbook.

DATED: July 13, 2018.

s/ Oliver J. Dunford

OLIVER J. DUNFORD

*Attorney of Record for Amicus
Curiae Pacific Legal Foundation*