No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

PHILIP HAMBURGER
MARK CHENOWETH
HARRIET M. HAGEMAN
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates the separation of powers.
2. Whether, if the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, 12 U.S.C. § 5491(c)(3) can be severed from the remainder of the Dodd–Frank Wall Street Reform and Consumer Protection Act.

TABLE OF CONTENTS

Questions presented i

Table of contents ii

Table of authorities iii

Interest of amicus 1

Constitutional and statutory provisions involved 3

Summary of argument 3

Argument 7

I. Article II's vesting clause requires presidential control of officers who exercise executive powers 8

II. *Humphrey's Executor* and *Morrison* should be overruled 11

Conclusion 14

TABLE OF AUTHORITIES

Cases

Franchise Tax Board of California v. Hyatt, 139 S. Ct. 1485 (2019) 13
Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010) 4
Graves v. New York, 306 U.S. 466 (1939) 8
Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595 (1949) 13
Humphrey's Executor v. United States, 295 U.S. 602 (1935) ..... passim
Knick v. Township of Scott, 139 S. Ct. 2162 (2019) 13
Marbury v. Madison, 5 U.S. 137 (1803) 5
Morrison v. Olson, 487 U.S. 654 (1988) ..... passim
Myers v. United States, 272 U.S. 52 (1926) 4
PHH Corp. v. Consumer Financial Protection Bureau, 881 F.3d 75 (D.C. Cir. 2018) (en banc) 3, 4
PHH Corp. v. CFPB, 839 F.3d 1 (D.C. Cir. 2016) 7

Other Authorities

Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015) 12
Philip Hamburger, *Law and Judicial Duty* (2008) 13
Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41 6
St. George Tucker, Law Lectures 9

Constitutional Provisions

U.S. Const. art. II, § 1 ..... 3, 7, 8
U.S. Const. art. II, § 3 3
U.S. Const. art. III, § 1 3

In the Supreme Court of the United States

No. 19-7

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

The New Civil Liberties Alliance (NCLA) is a nonprofit, public-interest law firm founded to challenge multiple constitutional defects in the modern administrative state through original litigation, amicus curiae briefs, and other means. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be

1. All parties consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the amicus curiae, its members, or its counsel financed the preparation or submission of this brief.

tried in front of an impartial and independent judge, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels rather than by an executive-branch official who is acting outside those channels and whose removal by the President has been unconstitutionally obstructed. Yet these selfsame civil rights are also very contemporary — and in dire need of renewed vindication — precisely because Congress and federal administrative agencies like the Consumer Financial Protection Bureau (CFPB) have trampled them for so long.

NCLA aims to defend civil liberties — primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government — a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed at the manner in which Congress established the Consumer Financial Protection Bureau — an agency that was clearly designed to flout the Constitution's separation of powers and its representative form of government. Americans enjoy a constitutional freedom to elect the person in whom the Constitution vests the executive power, and the Constitution thereby makes the exercise of executive power accountable to the people.

Nonetheless, Congress has now sought to protect the Director of the Consumer Financial Protection Bureau

from removal, thus depriving Americans of their constitutional freedom to live under a government in which executive power is accountable to them through the President. This freedom is among those that are threatened by independent agencies, and it is one that NCLA seeks to protect by participating in cases such as the present one.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. II, § 1: "The executive Power shall be vested in a President of the United States of America."

U.S. Const. art. II, § 3: "[The President] shall take Care that the Laws be faithfully executed."

U.S. Const. art. III, § 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

SUMMARY OF ARGUMENT

The precedent of this Court does not compel an outcome for either side. Although decisions such as *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988), approved statutes that insulate administrative officers from presidential removal, each of those rulings is readily distinguishable from the situation presented in this case. *See PHH Corp. v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164–98 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (distinguishing *Humphrey's Executor* and *Morrison*).

At the same time, *Myers v. United States*, 272 U.S. 52 (1926), and *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), which disapproved statutes that limited the President's removal power, can likewise be distinguished if the Court wishes to do so. *See PHH Corp.*, 881 F.3d at 78 (distinguishing *Myers* and *Free Enterprise Fund* and observing that "[t]he Supreme Court has never struck down a statute conferring the standard for-cause protection at issue here."); *see also* Pet. App. 5a.

No one can pretend that judicial precedent resolves this case. Rather, the Court must choose whether it will extend the holdings of *Humphrey's Executor* and *Morrison* to uphold the unique structure of the Consumer Financial Protection Bureau.

Furthermore, the Court must justify the choice that it makes by reference to the Constitution's text and original understanding. If the Constitution, properly construed, prohibits Congress from limiting the President's authority to remove officers who wield executive power, then *Humphrey's Executor* and *Morrison* should be confined to their facts—if not overruled. And the President may then remove the CFPB Director for any reason. If, on the other hand, the Constitution, properly construed, gives Congress freer rein to limit the President's removal powers, then the Court should say so rather than acting as though *Humphrey's Executor* or *Morrison* resolves the situation presented in this case.

In order to decide this case, the Court must "say what the law is" on the question of removal of a department head. As laid out in *Marbury v. Madison*, this is "the duty

of the Judicial Department," for even if only to decide a case, the Court must "of necessity, expound and interpret the rule." 5 U.S. 137, 177 (1803). The Court therefore should not shy away from "expounding" the rule here—notwithstanding that the rule will inevitably have implications for future cases regarding other agencies.

Put another way, although the constitutionality of multi-headed "independent" agencies is not at issue in this case, the Constitution does not distinguish between multi- and single-headed agencies, and the Court must be careful in this case to ground its decision on the Constitution's principles, even if they apply to multi-member commissions.

Any Supreme Court precedent in derogation of the Constitution must be narrowly construed. Nowhere is this maxim more appropriate than with a decision such as *Humphrey's Executor,* which allowed Congress to limit the President's power to remove or control members of the Federal Trade Commission. The Court justified its conclusion by denying that the FTC exercised *any* executive power—a preposterous (and since rejected) claim given that the FTC even then was authorized to enforce the law by prosecuting alleged statutory violators in administrative proceedings. *Compare Humphrey's Executor*, 295 U.S. at 628 (claiming that the FTC "exercises no part of the executive power vested by the Constitution in the President."); *with Morrison*, 487 U.S. at 689 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree."); Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev.

41, 94 ("It was nonsense to assert that the FTC did not act in an executive role."). The FTC's exercise of executive power is today manifest and not subject to dispute. The FTC and Department of Justice, for example, exert indistinguishable executive power over mergers under the Clayton Act, differing only by an agreed-upon split of jurisdiction by industry area.

Worse still, *Humphrey's Executor* declared that "quasi-legislative" powers (whatever that means) could be exercised by administrative agencies rather than by Congress, and that "quasi-judicial" powers (another undefined term) could be vested in agencies rather than Article III courts. *See id.* at 628. The Constitution, however, makes no provision for "quasi-legislative" or "quasi-judicial" powers, and it makes no allowance for independent agencies to wield those powers at the expense of Congress or the federal judiciary. Finally, *Humphrey's Executor* described the FTC as "an agency of the legislative or judicial departments of the government." *Id.* at 628. But the Constitution does not allow the legislative department to exercise executive power, even if through an agent. Nor does the Constitution permit non-Article III entities to act as agents of the judicial department. "The judicial power of the United States"—that is, *all* of it—must be vested in Article III tribunals.

The *Humphrey's Executor* opinion is a constitutional debacle, and if the Court is unwilling to overrule the decision, it should at the very least limit it to its facts. But the case for overruling *Humphrey's Executor*, as well as the decision in *Morrison,* is compelling, and the Court should at least use this case to narrow their scope while planting

the seed for a future repudiation of those poorly reasoned decisions.

ARGUMENT

The Ninth Circuit *admits* that the Consumer Financial Protection Bureau wields executive power—and it recognizes that the Bureau "possesses substantially more executive power than the FTC did back in 1935." Pet. App. 5a (emphasis added); *see also* Pet. App. 3a (acknowledging that "[t]he Director exercises substantial executive power similar to the power exercised by heads of Executive Branch departments"); and *PHH Corp. v. CFPB*, 839 F.3d 1, 16 (D.C. Cir. 2016), *rev'd and remanded en banc*, 881 F.3d 75 (D.C. Cir. 2018) ("Indeed, other than the President the Director of the CFPB is the single most powerful official in the entire United States Government, at least when measured in terms of unilateral power.").

So the Ninth Circuit must explain how a statutory regime that shields the Bureau's director from presidential removal (and thus control) can possibly be squared with the Constitution's command that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. The Ninth Circuit has made no effort in that regard, failing to cite or even acknowledge Article II's vesting clause—or any other provision of constitutional text for that matter. It instead relied entirely on judicial precedent, claiming that *Humphrey's Executor* and *Morrison* "lead us to conclude that the CFPB's structure is constitutionally permissible." Pet. App. 3a.

The proper approach, however, is to begin not with judicial precedent but with constitutional text. *See Graves v.*

New York, 306 U.S. 466, 491–92 (1939) (Frankfurter, J., concurring) ("[T]he ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it."). Article II requires *the* executive power to be "vested in a President of the United States of America," and that means Congress violates the vesting clause if it attempts to vest *any* portion of executive power in an officer outside the President's direction and control. Upon recognizing that the Director of the Consumer Financial Protection Bureau wields executive power, it became impossible for the Ninth Circuit to escape the conclusion that the statute that insulates the Director from presidential removal and control violates Article II's vesting clause.

To the extent that *Humphrey's Executor* and *Morrison* are inconsistent with the constitutional command of Article II, the Ninth Circuit was constitutionally obligated to confine those decisions to their facts (as then-Judge Kavanaugh did in his *PHH Corp.* dissent) and refuse to expand their rationale to a newly created agency, especially one vested with the enormous degree of executive power exercised by the Consumer Financial Protection Bureau.

I. Article II's Vesting Clause Requires Presidential Control of Officers Who Exercise Executive Powers

> The executive Power shall be vested in a President of the United States of America.

U.S. Const. art. II, § 1.

When the Constitution decrees that "the" executive power "*shall*" be vested in the President of the United

States, it means that the executive power *shall not* be vested in anyone or anything other than the President.

When Virginia Judge St. George Tucker lectured on constitutional law at William and Mary beginning in 1791, he recognized that the Constitution's vesting of "*all*" legislative powers in Congress, was exclusive of other departments. On this foundation, he explained:

> The word The, used in defining powers of the Executive, & of the judiciary, is, with their Exceptions, co-extensive in its signification, with all: for all the powers granted by the Constitution are either legislative, executive, or judicial; and to keep them forever separate & and distinct, except in the Cases positively enumerated, has been uniformly the policy, and constitutes one of the fundamental principles of the American Government.[2]

Not even *Humphrey's Executor* dared to suggest that Congress could allow an independent agency to wield executive powers; that is why *Humphrey's Executor* hinges on the indefensible claim that none of the FTC's powers were "executive." *See, e.g.*, *Humphrey's Executor*, 295 U.S. at 624 ("[I]ts duties are neither political nor executive"); *id.* 628 (claiming that the FTC "cannot in any

2. St. George Tucker, Law Lectures, p. 4 of four loose pages inserted in volume 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary. Later printed in St. George Tucker, View of the Constitution of the United States with Selected Writings, 149 (1803; Liberty Fund, 1999).

proper sense be characterized as an arm or an eye of the executive.").

Upon conceding that the CFPB Director exercises at least *some* executive powers, the Ninth Circuit itself removed this case from the ambit of *Humphrey's Executor*. To the extent that the Director of the CFPB wields executive powers—and it is undisputed that she does—those executive powers must be subject to presidential control under the vesting and take care clauses of Article II. The Ninth Circuit tried to avoid this conclusion by invoking *Morrison*, which allowed Congress to curtail the President's removal authority over an independent counsel, which the Ninth Circuit described as "an official exercising one of the most significant forms of executive authority: the power to investigate and prosecute criminal wrongdoing." Pet. App. 5a.

But the Ninth Circuit ignored *Morrison*'s rationale for upholding the Independent Counsel Act. *Morrison* allowed Congress to limit the President's removal authority over the independent counsel because "the independent counsel is an *inferior* officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Morrison*, 487 U.S. at 691 (emphasis added). For those reasons, *Morrison* concluded that the removal restriction did not "impede the President's ability to perform his constitutional duty." *Morrison* did not hold that Congress could limit the President's removal authority over *principal* officers who hold executive powers, and one would expect this Court —even after *Morrison*—to disapprove

statutes that restrict the President's prerogative to remove the Attorney General or U.S. Attorneys.

The Director of the CFPB—unlike the independent counsel in *Morrison*—is a principal officer rather than an inferior officer, and one who unquestionably holds executive power through her prerogative to bring enforcement actions against alleged wrongdoers. *Morrison*'s holding does nothing to shield a statute that limits a President's authority to remove a principal officer who holds executive power, especially a principal officer who enjoys both policymaking and significant administrative authority. If *Morrison*'s holding is to survive this case, it should extend no further than to statutes that limit the President's authority to remove *inferior* officers—and then only if the inferior officer lacks both policymaking and significant administrative authority. *See Morrison*, 487 U.S. at 691.

II. *HUMPHREY'S EXECUTOR* AND *MORRISON* SHOULD BE OVERRULED

The *Humphrey's Executor* and *Morrison* decisions had to rely on tortured mischaracterizations of the challenged statutes in order to escape the constitutional command of Article II. The *Humphrey's Executor* decision was only made possible by pretending that the FTC had no executive powers, even though the FTC had been empowered to bring enforcement actions against alleged wrongdoers. *See Humphrey's Executor*, 295 U.S. at 628 (claiming that the FTC "exercises no part of the executive power vested by the Constitution in the President."). The *Morrison* decision required a finding that the independent counsel was an "inferior officer" to avoid implying that Congress could immunize the Attorney General or U.S.

Attorneys from presidential removal. *See Morrison*, 487 U.S. at 691. In reality, however, *Morrison*'s attempt to paint the independent counsel as an inferior officer was unconvincing. The Office of Independent Counsel exercised the full powers of the Attorney General, and it could investigate even the President of the United States for criminal wrongdoing. An officer who wields such powers should have been deemed, without question, a "principal officer."

Rulings and opinions of this sort not only subvert the Constitution but also bring the Court into disrepute. No one seriously believes that the FTC lacks executive power, especially today, and a precedent that allows Congress to limit the President's removal prerogatives on the ground that the FTC has nothing to do with executive power is not credible. *See* Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835, 1847 (2015). The notion that the various independent counsel of the 1980s and 1990s were "inferior officers" is similarly quaint, especially after the high-profile impeachment drama triggered by the independent counsel's investigation of President Clinton.

In sum, both *Humphrey's Executor* and *Morrison* rest on indefensible premises, and the Court should overrule both decisions by simply acknowledging that the FTC wields executive powers and that 1980s- and 1990s-era independent counsel were principal rather than inferior officers.

Some members of this Court have recently protested the issuance of decisions that overrule prior precedent, in-

sisting that there must be a "special justification" to overrule an earlier decision that goes beyond a mere belief that the decision is wrong. *See Franchise Tax Board of California v. Hyatt*, 139 S. Ct. 1485, 1506 (2019) (Breyer, J., dissenting); *Knick v. Township of Scott*, 139 S. Ct. 2162, 2189–90 (2019) (Kagan, J., dissenting). But it is unfathomable how either the Constitution or the judicial oath would allow a Justice to subordinate the proper interpretation of the Constitution to a judicial precedent that was wrongly decided. *See* Philip Hamburger, *Law and Judicial Duty* (2008). *Stare decisis* considerations may come into play if the legal question is genuinely unclear. But the idea that a judge should interpret the Constitution in a manner that the judge *knows* to be wrong simply because prior jurists erred in interpreting the document bespeaks a staggering dereliction of judicial duty. *See Henslee v. Union Planters Nat'l Bank & Trust Co.*, 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting) ("Wisdom too often never comes, and so one ought not to reject it merely because it comes late.").

The Supreme Court is the highest court in the land, and there is no appeal from its errors, other than to the same court at another time. Accordingly, if the Court is not to become a source of accumulating incurable errors, it must openly recognize its mistakes. This is the only regular mechanism for correcting its wayward decisions.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

PHILIP HAMBURGER
MARK CHENOWETH
HARRIET M. HAGEMAN
New Civil Liberties Alliance
1225 19th Street NW
Suite 450
Washington, DC 20036
(202) 869-5210

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

December 16, 2019