No. 24-156

IN THE
Supreme Court of the United States

LEACHCO, INC.,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.,*

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICI CURIAE ADVANCING AMERICAN FREEDOM; AFA ACTION; AMAC ACTION; AMERICAN ASSOCIATION OF SENIOR CITIZENS; AMERICAN ENCORE; AMERICAN ENERGY INSTITUTE; AMERICAN LANDS COUNCIL; ANGLICANS FOR LIFE; CALIFORNIA POLICY CENTER; CENTER FOR POLITICAL RENEWAL; COMMITTEE FOR A CONSTRUCTIVE TOMORROW (CFACT); FAITH AND FREEDOM COALITION; FAMILY INSTITUTE OF CONNECTICUT ACTION; FRONTLINE POLICY COUNCIL; CHARLIE GEROW; JAY D. HOMNICK, SENIOR FELLOW, PROJECT SENTINEL; INTERNATIONAL CONFERENCE OF EVANGELICAL CHAPLAIN ENDORSERS; JCCWATCH.ORG; JOB CREATORS NETWORK FOUNDATION LEGAL ACTION FUND; TIM JONES, FMR. SPEAKER, MISSOURI HOUSE; CHAIRMAN, MISSOURI CENTER-RIGHT COALITION;

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In Support of Petitioner

QUESTIONS PRESENTED

1. Does the for-cause restriction on the President's authority to remove the CPSC's Commissioners violate the separation of powers? See *Consumers' Research v. CPSC*, No. 23-1323, cert petition at i (June 14, 2024) (presenting substantively identical question).

2. Should *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), be overruled?

3. For purposes of preliminary-injunctive relief, can a separation-of-powers violation cause irreparable harm—as this Court and several circuits hold—or can separation-of-powers violations never cause irreparable harm—as the Tenth Circuit alone holds?

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STATEMENT OF INTEREST OF AMICI CURIAE

Advancing American Freedom (AAF) is a nonprofit organization that promotes and defends policies that elevate traditional American values, including equal treatment before the law.[1] AAF "will continue to serve as a beacon for conservative ideas, a reminder to all branches of government of their responsibilities to the nation,"[2] and believes that Constitution's structure is essential to the preservation of liberty and thus is binding on those who exercise power under its three branches. AAF files this brief on behalf of its 1,942 members in Oklahoma and its 8,400 members in the Tenth Circuit.

Amici AFA Action; AMAC Action; American Association of Senior Citizens; American Encore; American Energy Institute; American Lands Council; Anglicans for Life; California Policy Center; Center for Political Renewal; Committee For A Constructive Tomorrow (CFACT); Faith and Freedom Coalition; Family Institute of Connecticut Action; Frontline Policy Council; Charlie Gerow; Jay D. Homnick, Senior Fellow, Project Sentinel; International Conference of Evangelical Chaplain Endorsers; JCCWatch.org; Job Creators Network Foundation Legal Action Fund; Tim Jones, Fmr.

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1. All parties received timely notice of the filing of this brief. No counsel for a party authored this brief in whole or in part. No person other than Amicus Curiae and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

2. Edwin J. Feulner, Jr., *Conservatives Stalk the House: The Story of the Republican Study Committee*, 212 (Green Hill Publishers, Inc. 1983).

Speaker, Missouri House; Chairman, Missouri Center-Right Coalition; Gerard Kassar, State Chairman, NYS Conservative Party; Louisiana Family Forum; Men and Women for a Representative Democracy in America, Inc.; Michael C. Munger, Director, Philosophy, Politics, and Economics Program, Duke University; National Center for Public Policy Research; North Carolina Values Coalition; Melissa Ortiz, Principal & Founder, Capability Consulting; Pennsylvania Eagle Forum; Project 21 Black Leadership Network; Restore Minnesota Action; Rio Grande Foundation; Roughrider Institute; Setting Things Right; 60 Plus Association; Stand for Georgia Values Action; Tea Party Patriots Action, Inc.; Tradition, Family, Property, Inc. ; Upper Midwest Law Center; WallBuilders; Women for Democracy in America, Inc.; Yankee Institute; Young America's Foundation; Young Conservatives of Texas believe that returning authority over the executive branch to the President, and by extension to the people, is an essential step towards returning the federal government to its constitutional constraints.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns the authority of Congress to insulate the heads of certain administrative agencies within the Executive Branch from presidential removal, and thus from meaningful presidential control. The most relevant constitutional requirement at issue in this case is the Constitution's allocation of "the 'executive Power' –all of it," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203 (2020), to "a President of the United States." U.S. Const. art. II, § 1. The President's power is not shared. Thus, any power exercised in the name of the Executive Branch that is not subject to the President's control is a usurpation of his power.

Today, the agencies that comprise the administrative state act with significant unchecked power. According to then-Securities and Exchange Commissioner Edward Fleischman, "the true life force of a fourth branch agency is expressed in a commandment that failed, presumably only through secretarial haste, to survive the cut for the original decalogue: Thou shalt expand thy jurisdiction with all thy heart, with all thy soul and with all thy might."[3]

The constitutional apportioning of powers was not an accident. It was designed by the Framers of the Constitution to ensure that the federal government, which exists to protect the rights of the people, would not become

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3. Edward H. Fleischman, Commissioner, SEC, Address to the Women in Housing and Finance, *The Fourth Branch at Work*, (November 29, 1990) https://www.sec.gov/news/speech/1990/112990fleischman.pdf.

a source of those rights' violation. The Constitution's structures are not suggestions or guidelines. They are limitations on government power.

One of those structures is the vesting of the whole executive power of the federal government in the President. The plain language of the Constitution, the early discussion of that language, and this Court's precedent all support the conclusion that final control of the executive power belongs to the President alone. Given the anti-constitutional intent of the progenitors of the administrative state, it is unsurprising that administrative agencies like the Consumer Products Safety Commission (CPSC) undermine constitutional structures like the unity of the executive. If America is to be a nation governed by the rule of law and not by the arbitrary will of those in power, the Constitution must rule.

ARGUMENT

The Constitution vests "[t]he executive Power . . . in a President of the United States." U.S. Const. art. II, § 1. The President is vested not just with some of the executive power, but "all of it." *Seila Law*, 591 U.S. at 203. Nonetheless, the President cannot carry out on his own his constitutional responsibility to "take care that the laws be faithfully executed," U.S. Const. art. II, § 3. The CPSC, like numerous other administrative agencies, is tasked with helping the President carry out that constitutional duty. The government conceded in oral arguments at the district court in *Consumers' Research v. CPSC* that the agency exercises executive power. Appendix of Petitioners at 81a-82a, *Consumers' Research v. CPSC*, No. 23-1323 (petition for cert. filed June 14, 2024).

Yet the President cannot truly exercise his own power when carried out by the CPSC or any of the other similarly arranged administrative agencies so long as heads of agencies like the CPSC "may [only] be removed by the President for neglect of duty or malfeasance in office." 15 U.S.C. § 2053(a). Thus, the CPSC exercises executive power without meaningful presidential control. This arrangement is constitutionally untenable. This Court's precedents make that clear. It should grant certiorari in this case and clarify that the President's constitutional power is not subject to congressional redistribution.

I. The Insulation of Administrative Agency Heads from Presidential Removal Defies the Plain Meaning of the Constitution's Text.

That the Framers and ratifiers of the Constitution understood themselves to be creating a unified, or unitary, executive as opposed to a multimember executive council, is undeniable. "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. Pub. Co.*, 561 U.S. 477, 483 (2010).

In the constitutional convention, different forms of executive structure were considered, with the convention ultimately settling on a single President. As Justice Scalia explained, the Framers "consciously declined to sap the Executive's strength in the same way they had weakened the Legislature: by dividing the executive power. Proposals to have multiple executives, or a council of advisers with separate authority were rejected." *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J.,

dissenting) (citing 1 M. Farrand, Records of the Federal Convention of 1787, pp. 66, 71-74, 88, 91-92 (rev. ed. 1966); 2 *id.*, at 335-337, 533, 537, 542).

When Alexander Hamilton defended the Constitution's design for the Executive Branch, his efforts were directed at showing the benefits of, and dispelling concerns about, the unity of the Executive, not at defending the claim that the executive power was unified, a fact that was obvious from the plain meaning of Article II. Hamilton's description of unity in Federalist 70 is unsurprisingly short. He notes, basically in passing, that unity of the executive means that the executive will be "one man," and that "in proportion as the number [of those with authority over the executive power] is increased," the qualities of the energetic executive will be decreased.[4] The question for those considering the proposed Constitution was not whether the executive it created would be unitary. The question was whether a unified executive was a good idea.

Hamilton took "it for granted . . . that all men of sense will agree in the necessity of an energetic executive."[5] According to Hamilton, "[t]he ingredients which constitute energy in the executive, are, unity; duration; an adequate provision for its support; competent powers."[6] The unity of the executive, in turn, can be destroyed, "either by vesting the power in two or more magistrates, of equal dignity and

4. The Federalist No. 70, at 363 (Alexander Hamilton) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

5. *Id.*

6. *Id.*

authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him."[7] Multimember agencies with removal protections do both.

First, the agencies themselves act as councils composed of "two or more magistrates, of . . . equal authority."[8] The CPSC is a five-member commission with the commissioners sharing equal power in decisions for the administration. Thus, the CPSC operates as a council over the relevant areas of law. Even if agency heads could legitimately hold executive power independent of presidential control, this multi-headed structure would violate the basic principle of executive unity as established in the Constitution.

Second, Hamilton explains that the unity of the executive may be destroyed "by vesting [the executive power] ostensibly in one man, subject, in whole or in part, to the control and cooperation of others, in the capacity of counsellors to him."[9] Multimember-headed agencies with removal protection destroy the unity of the executive in this way as well. The President's agenda in areas of the law executed by multimember-headed executive agencies with removal protection is always subject to the approval or disapproval of the council, or as they are called today, the commission.

While the Framers elsewhere divided government

7. *Id.*

8. *Id.*

9. *Id.*

power among different bodies for the protection of the liberty of the people, they believed that that same liberty demanded an energetic executive. *Seila Law*, 591 U.S. at 223-24. To offset this need for unity and energy, the Framers consciously made the President the most "politically accountable official in Government," subjecting that office to election "by the entire Nation." *Id.* at 224.

The Constitution vests the unitary President with certain specified powers and imposes on him the responsibility to "take care that the laws be faithfully executed." U.S. Const. art. II, § 3. As this Court has explained, "[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484. When Congress invests the executive power in an administrative agency with heads insulated from presidential control, it undermines the fundamental structure the Constitution establishes. The Court should grant certiorari in this case and rule for Petitioners and thus correct this serious deviation from the Constitution's design.

II. This Court Has Long Recognized the President's Authority Over the Executive Branch.

As this Court explained almost a century ago, "Article II 'grants to the President' the '*general administrative control* of those executing the laws, including the power of appointment and removal of executive officers.'" *Seila Law*, 591 U.S. at 214 (emphasis in original) (quoting *Myers v. United States*, 272 U.S. 52, 163-164 (1926)).

The Court has "recognized only two exceptions to the President's *unrestricted* removal power." *Seila Law*,

591 U.S. at 204 (emphasis added). First, the Court held in *Morrison v. Olson*, 487 U.S. 654 (1988) "that Congress [can] provide tenure protections to certain *inferior* officers with narrowly defined duties." *Seila Law*, 591 U.S. at 204 (emphasis in original). As Judge Oldham noted in his dissent to the Fifth Circuit's denial of rehearing en banc, "[t]he *Morrison* exception is plainly irrelevant because the Commissioners [of the CPSC] report to none but the President," and thus are "principle, not inferior, officers." *Consumers' Research v. CPSC*, 98 F.4th 646, 652 (5th Cir. 2024) (denial of rehearing en banc) (Oldham, J., dissenting) (citing *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021)).

The second exception to the President's general and absolute removal power was established in the Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).[10] *Seila Law*, 591 U.S. at 204. In *Humphrey's Executor*, the Court upheld removal protections for the Federal Trade Commission (FTC) because, at the time, the Court found that the agency performed only quasi-legislative and quasi-judicial functions. 295 U.S. at 628; *see Seila Law*, 591 U.S. at 215-16 (explaining the centrality of the non-executive nature of the agency at issue in *Humphrey's Executor* to the Court's analysis in that case). The agency was "wholly disconnected from the executive department," and "was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Humphrey's Executor*, 295 U.S. at 630. The Court explained that, unlike in *Myers*, in *Humphrey's*

10. For further discussion of *Humphrey's Executor*, *see* Neil Gorsuch and Janie Nitze, *Over Ruled: The Human Toll of Too Much Law*, 80-84 (2024).

Executor, the agency in question "occupie[d] no place in the executive department" and "exercise[d] no part of the executive power vested by the Constitution in the President." *Id*. at 627-28.

The essential fact in *Humphrey's Executor*, discussed above, is that the FTC, at the time of the Court's decision, did not exercise any executive power and merely performed auxiliary functions for the legislative and judicial branches. Because the government has acknowledged that the CPSC does, in fact, exercise executive power, the insulation of its commissioners from presidential removal cannot be justified under the *Humphrey's Executor* exception. Because the President has general removal power, subject, at most, to the two exceptions noted by the Court in *Seila Law*, and because neither of those exceptions apply here, the CPSC's removal protections unconstitutionally infringe on the President's authority over the executive branch and his responsibility under the Take Care Clause. The Court should grant certiorari and rule for Petitioners, thereby reestablishing the constitutional design of the executive.

III. Governments Must be Subject to the Rule of Law if they Are to Fulfill Their Reason for Being: The Protection of the Rights of the People.

The founding generation understood the purpose of government to be the protection of the rights of the people. Because government can violate those rights, the Framers understood that government itself had to be restrained. The constitutional separation of powers was implemented as just such a protection.

The rights of the people preexist government and come from man's Creator. The Declaration describes the higher law upon which government is based, and the truths explicated in Declaration, including the reality that "inalienable rights" are "embedded in our constitutional structure." *McDonald v. Chicago*, 561 U.S. 742, 807 (2010) (Thomas, J., concurring in part and concurring in the judgment). "Governments are instituted among Men," to secure "certain unalienable rights," which come from man's Creator and among which "are Life, Liberty, and the pursuit of Happiness." The Declaration of Independence para. 2 (U.S. 1776). These provisions of the Declaration of Independence "refer[ ] to a vision of mankind in which all humans are created in the image of God and therefore of inherent worth." *Obergefell v. Hodges*, 576 U.S. 644, 735 (2015) (Thomas, J., dissenting).

The Constitution, "like the Declaration of Independence before it—was predicated on a simple truth: One's liberty, not to mention one's dignity, was something to be shielded from—not provided by—the State." *Obergefell*, 576 U.S. at 736 (Thomas, J., dissenting). According to the Ninth Amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX. In other words, the people were to retain their *preexisting* rights, both enumerated and unenumerated, under the new government.

The Founders' view of government "was rooted in a general skepticism regarding the fallibility of human nature." *See INS v. Chadha*, 462 U.S. 919, 949 (1983). In a state of anarchy, the rights of the people are real but are subject to violation by the strong. Under a government, the rights of the people are real but are subject to the whims

of those exercising government power. The Founders were familiar with the abuse of government power. Government, after all, is "the greatest of all reflections on human nature[.]"[11] As Madison explained:

> If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.[12]

Who, then, will rule? John Adams suggested the answer in the Massachusetts Constitution. Proper government does not impose the rule of one man, nor of the few or the many. Under proper government, the *law* must rule. *See* Mass. Const. pt. 1 art. XXX. That is the only means of securing the rights of the people. Citing this provision of the Massachusetts Constitution, the Court in *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886), wrote that the idea of a person's rights held "at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."

The law that must rule is the Constitution, "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. It is also "the law that governs those who govern [the people]," and "is put in writing so that it can be enforced against

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11. The Federalist No. 51 at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

12. *Id.*

the servants of the people."[13] Those who administer American government swear an oath to uphold and defend it.[14] Thus, those who govern the people are bound by the Constitution. If America is to be a nation ruled by law and not by the whims of its elected or unelected officials, the Constitution must rule. The founders of the administrative state thought differently.

IV. Those Who Created the Administrative State Knew That What They Were Proposing was Unconstitutional and Inconsistent with the Fundamental Purpose of the Constitution.

The administrative state became a major player in the federal government during the Franklin Delano Roosevelt (FDR) presidency, largely as a result of his New Deal policies.[15] However, the ideas did not start with him. According to FDR himself, many of the principles for the New Deal came from President Woodrow Wilson.[16] Wilson, in turn, was influenced by Frank Goodnow, a professor at Columbia and later Johns Hopkins.[17] Finally, one of the most important early architects of the administrative state

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13. Randy E. Barnett, *Our Republican Constitution* 23 (1st ed. 2016).

14. U.S. Const. art. II, § 1, cl. 7; U.S. Const. art. VI, cl. 3.

15. *See* Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, Social Philosophy and Policy, January 2007, 16, 16 n.1.

16. *Id*. at 28.

17. *See id*. at 25, 43.

was James Landis.[18] "Through Landis' work on securities legislation, and his subsequent service on the FTC and SEC," he "became the animating force behind the growth of modern administration as we know it today."[19]

A. These early architects of the administrative state believed that the Framers had gotten the purpose of government wrong.

In the minds of these innovators of the administrative state, the government cannot merely protect the rights of the people because the complexity of the modern world demands government intervention. To Wilson:

> The object of constitutional government is to bring the active, planning will of each part of the government into accord with the prevailing popular thought and need . . . whatever institutions, whatever practices serve these ends, are necessary to such a system: those which do not, or which serve it imperfectly should be dispensed with or bettered.[20]

Goodnow also believed that America had moved past the Founders' vision of government. He wrote, "while insistence on individual rights may have been of great advantage at a time when the social organization was

18. *Id*. at 25.

19. *Id*. at 16.

20. Woodrow Wilson, *Constitutional Government in the United States* 14 (1914) https://www.loc.gov/resource/gdcmassbookdig.constitutionalgo00wils_0/?sp=28&r=-0.831,-0.033,2.661,1.184,0.

not highly developed, it may become a menace when social rather than individual efficiency is the necessary prerequisite of progress."[21] Apparently, then, it was a good thing that "the sphere of governmental action is continually widening and the actual content of individual private rights is being increasingly narrowed."[22]

Similarly, the increasing "complexities of our modern society" according to Landis "call for greater surveillance by government."[23] Nonetheless, "modern government had to move beyond the separation of powers, since the end of government had changed from rights protection to what Landis called the 'promotion of the welfare of the governed' or, more generally, 'well-being.'"[24]

Somewhat more subtly, though no less dangerously, FDR said, "[t]he task of statesmanship has always been the re-definition of [the] rights [people enter into the social contract to protect] in terms of a changing and growing social order. New conditions impose new requirements upon Government and those who conduct Government."[25] Thus, contrary to the understanding that informed

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21. Frank J. Goodnow, *The American Conception of Liberty* 21 (1916) https://archive.org/details/americanconcepti00goodrich/page/n5/mode/2up.

22. *Id.*

23. Pestritto, *supra* note 14 at 35.

24. *Id.* at 27.

25. Franklin Delano Roosevelt, President of the United States, Address to the Commonwealth Club (September 23, 19332) https://teachingamericanhistory.org/document/commonwealth-club-address/.

the drafting of the Constitution, these founders of the administrative state saw government's purpose not as rights protection but as the restructuring of society for social and economic efficiency with less and less regard paid to the rights of the people.

B. These founders of the administrative state believed that the structure of good government demands the separation of administration and politics.

Because those who created the administrative state believed the purpose of government was different from that which animated the creation of the Constitution, they also thought the structures created by that Constitution had to go.

For Goodnow, "the sphere of administration," was "outside the sphere of constitutional law,"[26] and "[the] principle of separation of powers and authorities [had] been proven . . . to be unworkable as a legal principle."[27] In place of separation of powers, Goodnow and Wilson advocated for the separation of politics and administration.[28] According to Wilson the government is a living organism, not a machine, as the Founders thought. As he concludes, "No living thing can have its

26. Pestritto, *supra* note 14 at 47.

27. Frank Goodnow, *Politics and Administration*, 14 (The Macmillan Co. 1900).

28. *See* Pestritto, *supra* note 14, at 25, 46-47.

organs offset against each other, as checks, and live."[29] Wilson further believed that the "field of administration is a field of business" and thus "removed from the hurry and strife of politics; it at most points stands apart even from the debatable ground of constitutional study."[30] Landis, "fully conceded" that "[t]he growth of modern administration . . . does not fit within the form of American constitutionalism," specifically the separation of powers.[31]

As one particularly relevant example of this philosophy in practice, the SEC was designed based on the belief that complexity demands not only government intervention but government free of normal constraints, with sufficient flexibility to address the apparently ever-arising issues.[32] Landis "pointed to the Securities and Exchange Act of 1934, which he had helped to draft, as an example of how to create an agency with powers flexible enough to meet unforeseen exigencies."[33] Landis thought "[t]he discretionary language with which the act empowered the SEC was a vast improvement" over the earlier Securities Act which gave the agency more limited powers.[34]

Landis complained that a "legalistic approach that reads a governing statute with the hope of finding

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29. *Id.* at 39.

30. Woodrow Wilson, *The Study of Administration*, Political Science Quarterly 197, 209 (June 1887).

31. *Id.* at 27.

32. *See id.*

33. *Id.*

34. *Id.*

limitations upon authority rather than grants of power with which to act decisively" was common because doing otherwise was a political gamble.[35] On the other hand, Landis held up as an example:

> One of the ablest administrators that it was my good fortune to know . . . [who] never read, at least more than casually, the statutes that he translated into reality. He assumed that they gave him power to deal with the broad problems of an industry and, upon that understanding, he sought his own solutions.[36]

This Court has at times imbibed the progressive view of government. *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring) (quoting *Perez v. Mortgage Bankers Assn.*, 575 U.S. 92, 115-16 (Thomas, J., concurring) ("Unfortunately, this Court 'ha[s] not always been vigilant about protecting the structure of our Constitution,' at times endorsing a 'more pragmatic, flexible approach' to our Government's design.") (alteration in original)). For example, the Court wrote in *Mistretta v. United States*, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives." 488 U.S. 361, 372 (1989). If that is the case, the Constitution may be amended. Until it is, however, those who govern the people are bound by that document as it is, not as they wish it were. Because the founders of the administrative state had little respect for the Constitution

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35. James M. Landis, *The Administrative Process*, 75 (1st ed. 1938).

36. *Id.*

and its limitations on power, it should be unsurprising that the system they created circumvents those limitations.

C. These founders of the administrative state were widely successful at undermining the basic structure of American federal government.

The administrative state is insulated from both methods of restraint of government foreseen by the Founders. According to Madison, "a dependence on the people" is the "primary control" of government, but "auxiliary precautions" are also necessary.[37] As Justice Thomas has noted, when "independent agencies wield substantial power with no accountability to the President or the people they 'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring) (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

The design of administrative agencies intentionally avoids both popular and structural constraints. First, many agency officials, despite being a part of the executive branch and thus exercising the President's power, are nonetheless protected from removal by, and otherwise from the control of, the President.

Further, the very structures that were designed to protect the liberty of the people function to insulate the administrative state from congressional review.

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37. The Federalist No. 51 at 269 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

Enacting federal legislation is not easy, nor is it supposed to be. *Gundy v. United States*, 588 U.S. 128, 154 (2019) (Gorsuch, J., dissenting) (explaining that the rigors of bicameralism and presentment, "Article I's detailed and arduous processes for new legislation," were, "to the framers . . . bulwarks of liberty."). This slow, deliberative process protects liberty against populist whims in the federal government. Yet that same process now makes it practically impossible for the legislature to oversee the exercise of the legislative and judicial power it has delegated to agencies. Because neither the President nor Congress can exercise meaningful oversight of much of what happens in the administrative state, the "primary control" envisioned by Madison and the Framers is rendered largely ineffectual.

Second, the "auxiliary precautions," established by the Constitution are undermined. The general structural protection that comes from a system of checks and balances operating among branches exercising distinct powers is absent in the administrative state which consists of agencies exercising legislative, executive, and judicial powers, all directed towards a shared goal. Thus, neither the primary nor the auxiliary limits on government power are reliably operable in the administrative state. Madison was clear about the danger of this sort of centralization: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many . . . may justly be pronounced the very definition of tyranny."[38]

38. The Federalist No. 47 at 249 (James Madison) (George W. Carey and James McClellan, eds., The Liberty Fund 2001).

D. The ideas of these so-called progressives were, in fact, regressive and inconsistent with the Constitution.

Those who designed and established the administrative state thought of themselves as progressive, but they were, in fact, advocating for regression. As President Calvin Coolidge explained on the Declaration's 150th anniversary:

> It is often asserted that the world has made a great deal of progress since 1776, that we have had new thoughts and new experiences which have given us a great advance over the people of that day, and that we may therefore very well discard their conclusions for something more modern. But that reasoning can not be applied to this great charter. If all men are created equal, that is final. If they are endowed with inalienable rights, that is final. If governments derive their just powers from the consent of the governed, that is final. No advance, no progress can be made beyond these propositions. If anyone wishes to deny their truth or their soundness, the only direction in which he can proceed historically is not forward, but backward toward the time when there was no equality, no rights of the individual, no rule of the people. Those who wish to proceed in that direction can not lay claim to progress. They are reactionary. Their ideas are not more modern, but more ancient, than those of the Revolutionary fathers.[39]

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39. Calvin Coolidge, President of the United States, Speech on the 150th Anniversary of the Declaration of Independence

The Founders knew they were doing something unique in world history: building a government from the ground up that was designed to preserve justice through the rule of law. The founders of the administrative state equally knew that they were seeking to undermine that system and institute the rule of men like them, not the rule of law. That rule of law demands a return to the careful balance the Constitution strikes between the three branches of government it creates.

CONCLUSION

For the forgoing reasons, the Court should grant certiorari and rule for Petitioners.

Respectfully submitted,

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(July 5, 1926) https://millercenter.org/the-presidency/presidential-speeches/july-5-1926-declaration-independence-anniversary-commemoration.