No. 24A966

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL., APPLICANTS

v.

GWYNNE A. WILCOX

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL., APPLICANTS

v.

CATHY A. HARRIS,

AMICUS BRIEF OF THE STATE OF TENNESSEE IN SUPPORT OF APPLICANTS

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INTERESTS OF AMICUS CURIAE

The Constitution's balance of powers both "preserves the integrity, dignity, and residual sovereignty of the States" and protects "individual liberty." *Bond v. United States*, 564 U.S. 211, 221, 223 (2011). The State of Tennessee and its citizens thus maintain a weighty interest in proper application of separation-of-powers limits on federal agencies' authority.

By operating outside our Framers' three-branch structure, so-called "independent" agencies present an especially grave danger to the States and their citizens. This is by design. Such bodies emerged out of a desire to "ditch the Founders' tripartite system and their checks and balances for a 'more efficient separation of politics and administration.'" *Cochran v. SEC*, 20 F.4th 194, 218 (5th Cir. 2021) (Oldham, J., concurring) (quoting Ronald J. Pestritto, *Woodrow Wilson and the Roots of Modern Liberalism* 227 (2005)). The goal was to vest policy decisions in "a body of experts … which shall be independent of executive authority[.]" *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625 (1935). Left out in the cold? States—which lack power to affect many independent agencies' actions through the bicameral lawmaking process. *Cf. Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-51 (1985).

The threat to States from independent agencies is not hypothetical. Employment policy rests within States' traditional police-power oversight. Tennessee has chosen to exercise this power by enacting pro-growth business policies. Yet the National Labor Relations Board claims authority to target Tennessee employers for enforcement via in-house agency proceedings that override core state prerogatives. *See* Br. of Tennessee et al. as Amici Curiae in Supp. of Pet'r, *Starbucks Corp. v. McKinney*,

No. 23-367 (U.S. Feb. 28, 2024). The Equal Employment Opportunity Commission, as another example, recently ignored a direct presidential instruction to rescind a Title VII enforcement document that harms the States as employers.

In these and other ways, a "headless fourth branch of government" has for too long subjected States to regulations blessed by no democratically elected actor. *City of Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) (citation omitted). Ensuring proper presidential supervision will protect States' sovereign prerogatives from independent agencies' anti-democratic policies.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution's enduring genius lies in its structural choice to separate the legislative, executive, and judicial powers and place each in its own branch. Article II, for its part, vests the "executive Power" in a single, nationally elected president able to act with "energy" and "dispatch." *The Federalist* No. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Part and parcel of the President's law-execution duty is the power to supervise those within Article II's chain-of-command.

The Framers' careful form had vital functions. They "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 223-24 (2020) (quoting *The Federalist* No. 70, at 471 (Alexander Hamilton)). So too, the broader "structure of the Federal Government," which "gave the States a role" in selecting both the Executive and Legislative branches, "was designed in large part to protect the States from overreaching by Congress." *Garcia*, 469 U.S. at 550-51. Limits on congressional overstepping were thus a feature of a new republic that "viewed the legislative power as a special threat to individual liberty"—not a bug Congress could beat via backdoor encroachment by a bureaucratic Fourth Branch. *Seila Law*, 591 U.S. at 223.

Restricting the President's ability to dismiss agency heads violates Article II's vesting of the "executive Power" solely in the President. Yet since 1935, *Humphrey's Executor* has carved out an aberrant exception from the default rule of presidential supervision. Whatever *Humphrey's* reasoning used to be worth, this Court's subsequent cases have repudiated it. Instead, the requirement of at-will removal applies

"*whenever* an agency does important work" of the Executive Branch, regardless of its "size or role." *Collins v. Yellen*, 594 U.S. 220, 252 (2021) (emphasis added). That describes the NLRB to a T: It claims power to promulgate rules regulating employment and prosecute private parties through its own in-house adjudicative system and in courts. The same goes for the Merit Systems Protection Board, which polices the inner workings of executive personnel policy while wielding the power to represent itself in judicial proceedings. So whether because *Humphrey*'s is wrong or just inapplicable, both agencies' for-cause removal restrictions violate Article II.

States have a large stake in the independent-agency debate. The Supremacy Clause contemplated that laws would move through bicameralism and presentment, thereby ensuring that States have a voice in the federal lawmaking process. Yet in the world of independent agencies, neither bicameral lawmaking nor elections can check the mass of federal rules that whipsaw States each year. Tennessee, for its part, is experiencing here-and-now harm from this disconnect. More harm will follow if important Executive Branch policies must reside—as Wilcox and Harris insist—outside the President's purview.

ARGUMENT

I. Article II requires plenary presidential supervision of subordinate executive officials.

A. Our system of government contemplates three powers held by federal officials. The legislative power "prescribes the rules" of the community. *The Federalist* No. 78, at 465 (Alexander Hamilton). The executive power is the "sword of the community." *Id.* And the judicial power, "declare[s] the sense of the law." *Id.* at 469. The Framers "viewed the principle of separation of" those powers as "the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

Article II, at issue here, directs that "[t]he executive Power shall be vested in a President of the United States." U.S. Const. art. II, § 1. Yet the Framers understood that, as a practical matter, "the President alone and unaided could not execute the laws." *Myers v. United States*, 272 U.S. 52, 117 (1926). So the Constitution contemplates that the President will enjoy "the assistance of subordinates" selected through required appointment processes. *Id.* Such subordinate officials include the heads of administrative agencies, who, having no superior other than the President, are principal officers. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 12-13 (2021). And given "our constitutional structure," the activities of officials like Wilcox and Harris "*must be* exercises" of "the 'executive Power.'" *City of Arlington*, 569 U.S. at 304 n.4 (quoting U.S. Const. art. II, § 1).

As Tennessee explained below, centuries of Anglo-American legal history support that the "executive power" includes plenary authority to remove subordinate

executive officials. *See VHS Acquisition Subsidiary No. 7 v. NLRB*, No. 1:24-cv-02577, 2024 WL 5056358, at *3-4 (D.D.C. Dec. 10, 2024) (collecting historical examples); Michael W. McConnell, *The President Who Would Not Be King* 162 (2020) ("The king had the prerogative power to remove" executive officers "at will."). To be sure, scholarship of "Disunitarians" has sought to dispute this history. Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1761 (2023); *cf.* App. 141a n.1 (collecting sources). But best read, "early endorsements, declarations, and exercises"—from "James Madison, George Washington, Thomas Jefferson, Alexander Hamilton, and … many others"—evince that "the Constitution grant[s] Presidents the power to remove executive officers at pleasure." Bamzai & Prakash, *supra*, at 1761.

B. The district court in *Wilcox* trained fire on *amicus* Tennessee and its historical arguments about the removal power. At the preliminary-injunction hearing, the district court reportedly questioned why Tennessee "went way back to the monarch," continuing, "it just made me wonder: Is the tradition of the British king, with unfettered removal power … Is that the model? … Maybe Tennessee is recommending it for us Americans. But is that the model?" Avalon Zoppo, *'Unfettered Removal Power'? Judge Presses Lawyers on Trump's Firing of NLRB Member*, Nat'l L.J. (Mar. 5, 2023 5:30 pm), https://perma.cc/4GSL-XRU7. Again in its opinion, the district court dismissed Tennessee's discussion of the executive power in Britain as having "little purchase" in a system that repudiated the "British monarchy." *See* App. 144a n.5.

But sidelining the import of history badly misses the interpretive takeaway: The political concept of "executive power" preexisted the Constitution and was familiar to the Framers. Those in the Founding Era thus would have shared some understanding about the contours of the "executive power" when they vested that power in the President via Article II. And as with other constitutional terms,[1] that pre-existing understanding of "executive power" in turn reflected drafters and ratifiers' experience with the British system. *See, e.g.*, *Myers*, 272 U.S. at 118 ("In the British system, the crown, which was the executive, had the power of appointment and removal of executive officers, and it was natural, therefore, for those who framed our Constitution to regard the words 'executive power' as including both."). Tennessee's taking stock of that shared, pre-Founding understanding of "executive power" reflects mainstream interpretive methods—not "autocracy" apologism. App. 176a.

It proves nothing that "[a]s a textual matter, the Constitution is silent as to removals." App. 151a. Article II's Vesting Clause, by referencing the "executive Power," entails a correspondent grant of removal authority. Silence on removal, then, if anything indicates the Constitution does not limit that authority. *See Trump v. United States*, 603 U.S. 593, 608 (2024) (describing the removal power as "the

[1] *Cf., e.g.*, *Ex parte Grossman*, 267 U.S. 87, 110 (1925) (interpreting pardon power in light of how it "had been exercised by the king, as chief executive," at "the time of our separation from Great Britain"); *Schick v. United States*, 195 U.S. 65, 69-70 (1904) (using Blackstone's definition of "crimes" to inform analysis of the Sixth Amendment and concluding that misdemeanors are not "crimes"); *Boyd v. United States*, 116 U.S. 616, 628 (1886) (quoting English common law for the proposition that visual surveillance is not a "search" under the Fourth Amendment because "the eye cannot by the laws of England be guilty of trespass").

President's … constitutional power[]"); *cf.* U.S. Const. art. II, § 2 (limiting appointment power "by and with the Advice and Consent of the Senate"). And Congress "lacks the generic power to modify the Constitution's separation of powers." Bamzai & Prakash, *supra*, at 1791.

Those favoring independent-agency structures fear a default removal rule vests too much power in the President. App. 175a-176a; *see Seila Law*, 591 U.S. at 267 (Kagan, J., concurring in part and dissenting part) ("the President, needless to say, wasn't supposed to be a king"). Either that, or they claim "stability, competence, experience, [and] efficiency" follows from removal-shielded federal functionaries. App. 122a (Millett, J., dissenting); *accord id.* at 191a-192a (asserting that MSPB's "mission and purpose require independence"). That might surprise any target ever trapped in independent agencies' "tilted" game of "in-house proceedings." *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 215-16 (2023) (Gorsuch, J., concurring).

In all events, a different take on Article II emerges from this Court's majority opinions: "The Framers did not rest our liberties on such bureaucratic minutiae" as "whether particular *unelected* officials support or 'resist' the President's policies." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499-500 (2010) (quoting *id.* at 526 (Breyer, J., dissenting)). Nor will "the fact that a given law or procedure is efficient … save it if it is contrary to the Constitution," *id.*, since the "Framers often made trade-offs against efficiency in the interest of enhancing liberty," *PHH Corp. v. CFPB*, 881 F.3d 75, 186 n.14 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting), *abrogated by Seila Law*, 591 U.S. 197. Just so here.

II. For-cause removal protections for agency heads violate Article II.

Surveying the Constitution's text, structure, and history, the *Myers* Court held that Article II "grants to the President" the power of "removal of executive officers." 272 U.S. at 163-64. *Myers*'s detailed analysis of the President's power to remove executive officials soon met motivated opposition in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). But that case was wrongly decided. And its reasoning does not extend to the NLRB or MSPB regardless.

Humphrey's examined the Federal Trade Commission Act, which limited the President's removal of FTC commissioners to cases of "inefficiency, neglect of duty, or malfeasance in office." *Id.* at 619. In a short opinion, the Court upheld the FTC's removal restrictions against a constitutional challenge.

The core plank of *Humphrey's* is its assessment that "the duties" of the commission at issue were "neither political nor executive, but predominantly quasi judicial and quasi legislative." *Id.* at 624. The Court described the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute and in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." *Id.* at 628.

Humphrey's branch-busting reasoning was wrong the day it was rendered. To "carry into effect legislative policies" and "perform other specified duties" is, by definition, to *execute* a law. *See supra* Section I.A. Executive agency officials wield the executive power, even when doing things that look like legislating and adjudicating. *See City of Arlington*, 569 U.S. at 304 n.4. *Humphrey's*, then, thwarts our constitutional structure.

Given its flaws, it is no surprise that subsequent cases have narrowed *Humphrey's* nearly out of existence:

- *Free Enterprise Fund* exhaustively detailed Article II's design to permit agencies to be "fully accountable" to the President for their conduct. Applying that rule, the Court held that the Public Company Accounting Oversight Board's "dual for-cause limitations on the removal of Board members contravene the Constitution's separation of powers." 561 U.S. at 492.

- *City of Arlington* acknowledged that *all* agency activities are exercises of the executive power—contra *Humphrey's* quasi-legislative, quasi-judicial conception of the 1935-FTC. 569 U.S. at 304 n.4.

- *Seila Law* cabined *Humphrey's* to allowing "for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and [are] said not to exercise any executive power." 591 U.S. at 216. *Seila Law* noted that, even under *Humphrey's*, a multimember agency that "wield[s] substantial executive power" violates Article II if for-cause protected. 591 U.S. at 218.

- In *Collins v. Yellen*, this Court held that the "Recovery Act's for-cause restriction on the President's removal authority violates the separation of powers." 594 U.S. at 250. The Recovery Act created the Federal Housing Finance Agency, "led by a single Director" removable "by the President 'for cause.'" *Id.* at 229 (citation omitted). The "FHFA clearly exercises executive power," so even "'modest restrictions' on the President's power to remove the head of an agency with a single top officer" violates the Constitution. *Id.* at 254, 256 (citation omitted). And that rule of at-will removal applies "whenever an agency does important work." *Id.* at 252.

Most recently, in last term's *Trump v. United States* decision, this Court noted that the "removal" of certain federal officers "implicates 'conclusive and preclusive' Presidential authority." 603 U.S. at 620-21. A President's exclusive power that "stem[s] … from the Constitution itself" is "conclusive and preclusive." *See id.* at 607 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952); *id.* at 638 (Jackson, J., concurring)). That includes "the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has

appointed.'" *Id.* at 609 (quoting *Myers*, 272 U.S. at 106). The Court stated that "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id.* at 609.

Those instructions leave at most a 1930s-FTC-specific exception to the general rule of at-will presidential removal. Put simply, this "Court's recent decisions have been unequivocal: *Humphrey's* has few, if any, applications today." App. 39a (Walker, J., concurring). For those modern-day agencies exercising executive power, Article II prohibits statutes that purport to limit the President's ability to dismiss agency heads. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 446, 464 n.19 (5th Cir. 2022) (discussing the interaction between *City of Arlington* and *Seila Law*), *aff'd on other grounds*, 603 U.S. 109 (2024).

The en banc stay majority still opted to rest on *Humphrey's* thin reed. *See* App. 3a. But under governing precedent, if an agency "does important work," *Collins*, 594 U.S. at 252, its heads must be removable by the President at will. That rule governs no matter an agency's "size or role," *id.*—meaning the NLRB and MSPB's "multimember" composition is not dispositive. App. 3a. Applicants have demonstrated that both agencies exercise significant executive authority as this Court's precedents have outlined that concept. Stay Appl. 15-18. The NLRB's and MSPB's members thus must be removable at will, with no need to "weigh the relative importance of the regulatory and enforcement authority" of those bodies versus that of "disparate agencies." Order & Op. 3, *Dellinger v. Bessent*, No. 25-5052 (D.C. Cir. Mar. 10, 2025) (quoting *Collins*, 594 U.S. at 253).

III. Shielding executive agencies from presidential supervision harms the States.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty" that divides power "between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). That careful vertical separation of powers was the product of hard-fought compromise among those seeking to protect States' prerogatives. Independent agencies harm States' role in our federal system in ways Tennessee's experience highlights.

A. Vesting executive officials with runaway power to pursue unsupervised law enforcement upsets the Framers' fundamental federal-state balance. Originally, James Madison at the Constitutional Convention proposed an expansive congressional negative that would have "empowered Congress to set aside any state law that it judged to be 'improper.'" Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1339-46 (2001). Several States objected; ultimately, States voted down the congressional negative by a vote of 7 to 3. *Id.* at 1353. Later, the Convention approved what would become the Supremacy Clause.

As ratified, the Supremacy Clause sets out three categories of federal laws—the Constitution, "the Laws of the United States," and treaties—that preempt contrary state enactments or constitutions. U.S. Const. art. VI, cl. 2. This scheme aimed to protect States by requiring all State-trumping laws to pass through finely wrought procedures necessitating the States' participation (the Senate's equal-State representation for laws and treaties, and direct votes by States for constitutional amendments). It is by design that "[n]o law or resolution can now be passed without … a

majority of the States"; States thereby may foreclose "improper acts of legislation." *The Federalist* No. 62, at 378 (James Madison).

But nowadays, "those in the Executive Branch" increasingly seek "to use pen-and-phone regulations as substitutes for laws passed by the people's representatives." *West Virginia v. EPA*, 597 U.S. 697, 752-53 (2022) (Gorsuch, J., concurring). The result reduces States' power to protect their interests through the Constitution's bi-cameral process of lawmaking. Instead, States must engage with Executive Branch officials through indirect legal or political channels. Though poor substitutes for the rigors of lawmaking, States can at least hope that the President and others directly accountable to the President will be sensitive to the prospect of political "blame or [] punishment" by the States and their voters. *Free Enter. Fund*, 561 U.S. at 498.

B. By contrast, independent-agency heads exercise powers in a vacuum lacking direct political accountability. "But consent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches." App. 25a (Walker, J., concurring) (quoting *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting)). Recent events reveal that danger.

The NLRB is case in point. "States possess broad authority under their police powers to regulate the employment relationship" within their borders. *DeCanas v. Bica*, 424 U.S. 351, 356 (1976). And States have historically exercised that authority by enacting reticulated structures governing the employment relationship—within which "[f]ederal labor law … is [merely] interstitial." *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985). The National Labor Relations Act, which the

NLRB implements, imposes certain restrictions on employers related to the unionization of employees and the collective-bargaining process. But the Act did not "completely extinguish[] state power" over employment regulation. *Retail Clerks Int'l Ass'n, Loc. 1625 v. Schermerhorn*, 373 U.S. 746, 751 (1963). Just the opposite, it expressly preserved the States' ability to prohibit union-membership requirements, for example. *See* 29 U.S.C. § 164(b).

Over the past several years, though, the NLRB has routinely advanced legal theories that go well beyond the text of the Act. Take its recent final rule providing that businesses will be treated as "joint employers" when they have control, even if indirect and unexercised, over a single essential term of employment. *See* 29 C.F.R. § 103.40 (2024). That broad-sweep approach infringed the States' "authority under their police powers to regulate the employment relationship" within their borders. *DeCanas*, 424 U.S. at 356. And a court vacated the rule because of its illegality. *Chamber of Com. of U.S. v. NLRB*, 723 F. Supp. 3d 498, 519 (E.D. Tex. 2024).

The NLRB also unduly expanded its remedial rights by claiming power to recover "for all direct or foreseeable pecuniary harms" to employees, including everything from credit-card debt to out-of-pocket medical expenses. *Thryv, Inc.*, 372 NLRB No. 22, 2022 WL 17974951, at *9, *15 (Dec. 13, 2022). Again, that was unlawful. *See NLRB v. Starbucks Corp.*, 125 F.4th 78, 94 (3d Cir. 2024) (NLRB's remedial order "exceeds the Board's authority under the NLRA"). And while the Act expressly sets certain volume-of-business limits to cabin the NLRB's jurisdiction, the NLRB has read these thresholds as "discretionary" only and disregards them at will. *See, e.g.*,

Br. of NLRB at 10, *NLRB v. Valentine Painting & Wallcovering, Inc.*, 8 F. App'x 116 (2d Cir. Mar. 12, 2001) (Nos. 00-4226L, 00-4236C), 2001 WL 34094388, at *10.

The NLRB's continued power creep inflicts particularized harm on business-friendly States like Tennessee. By adopting "right to work" and other pro-growth policies,[2] Tennessee has seen an explosion in new-business growth as well as favorable outcomes on manufacturing, construction, personal-income, and business-development metrics. *See* Tenn. Sec'y of State, *Tennessee Marks 10 Years of New Business Growth* (Feb. 16, 2022), https://bit.ly/3SYL0El; Michael D. LaFaive & Todd Nesbit, *The Impact of Right-to-Work Laws; A Spatial Analysis of Border Counties* 9-10 (2022). Unaccountable NLRB regulation risks thwarting these gains by saddling States with policies that largely favor labor unions and related interest groups. And indeed, in terminating Wilcox, President Trump cited the NLRB's repeated choice to "vastly exceed[] the bounds" of its statutory authority. Stay Appl. 34 (citation omitted).

Other assertedly independent agencies have harmed Tennessee, too. Consider the Equal Employment Opportunity Commission, which has long considered itself independent from the President despite lacking statutory removal protections. Recently, all three members of the Commission's (then) 3-1 Democratic majority bucked the President's day-one executive order to rescind a controversial series of gender-identity enforcement mandates. *Compare* Executive Order 14168, 90 Fed. Reg. 8615, 8618, § 7(c)(iv) (Jan. 20, 2025), *with* Jocelyn Samuels (@JSamuelsEEOC), X (Jan. 21, 2025, 3:33 PM), https://perma.cc/E7WT-HUCD. That left the enforcement document

[2] *See* Tenn. Code Ann. § 50-1-201; Tenn. Const. art. 11, § 19 (approved Nov. 8, 2022).

with continued effect on employers nationwide, EEOC, *Removing Gender Ideology and Restoring the EEOC's Role of Protecting Women in the Workplace* (Jan 28, 2025), https://perma.cc/QXL7-V4RU, and Tennessee's legal challenge to the Commission's mandates ongoing. The upshot of the Commission's claimed independence is stark. A controversial Executive Branch enforcement document continues to govern the rights of Tennessee and many others. Yet the President himself, as Chief Executive, has disavowed that document as illegal and "wrong," 90 Fed. Reg. at 8615, consistent with a position that aided his election.

Tennessee's recent troubles raise a recurring question: "But where, in all this, is the role for oversight by an elected President?" *Free Enter. Fund*, 561 U.S. at 499. The common answer, when it comes to independent-agency heads and their policies, is nowhere. And therein lies the problem.

CONCLUSION

This Court should grant Applicants' request to stay the judgments below.

Respectfully submitted,

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