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,

Respondent.

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

Applicants.

v.

CATHY A. HARRIS,

Respondent.

AMICUS BRIEF OF THE COMPETITIVE ENTERPRISE INSTITUTE IN SUPPORT OF A STAY

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INTEREST OF AMICUS CURIAE[1]

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SUMMARY OF ARGUMENT

This Court should stay the lower court injunctions requiring the reinstatement of Officers of the United States removed by the President as such removals are not contrary to *Humphrey's Executor*, as claimed by the lower court decisions.

"Under the traditional default rule, removal is incident to the power of appointment." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010). This default rule was perhaps most clearly expressed in *Myers v. United States*: "The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power." 272 U.S. 52, 161 (1926). The rule rests on a central constitutional principle: "The executive Power

[1] No counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that no person other than *amicus*, its members, or its counsel made such a monetary contribution.

shall be vested in a President of the United States of America." U.S. Const. Art. II § 1, cl. 1.

Humphrey's Executor, 295 U.S. 602 (1935), provides a very limited exception to *Myers*'s default rule. The exception applies, by its own terms, only to the officer who "exercises no part of the executive power vested by the Constitution in the President." *Id.* at 628. It therefore operates only for officers who "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.*

The lower court failed to follow this Court's recognition of the limitations placed on *Humphrey's Executor* by *Seila Law LLC v. CFPB*. 591 U.S. 197, 219 n.4 (2020). In footnote 4 of *Seila Law*, this Court made clear that *Humphrey's Executor* is limited to "the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court." *Id.* Those specific powers are "making investigations and reports to Congress" and "making recommendations to courts as a master in chancery." *Id.* at 215 (internal quotation marks removed).

The board members of the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB) exercise substantial executive powers unlike merely issuing reports to Congress or making recommendations to a court.

The NLRB board members directly execute the law by appointing and overseeing the officials conducting union elections. Furthermore, under the National Labor Relations

Act, 29 U.S.C. § 156, the NLRB directly issues substantive rules implementing federal law. This Court has upheld such rules as binding upon the public. *American Hosp. Ass'n.* v. *NLRB,* 499 U.S. 606 (1991). The power to bind the federal government in how federal law is to be executed must be a core executive power under the President's constitutional duty to "take [c]are that the [l]aws be faithfully executed." U.S. Cost. art. II, § 3, cl. 1.

The MSPB board members have the power to reinstate executive officers who can exercise executive power. If the MSPB is protected from removal, federal officers could be exercising executive power after the President fires them, because they are re-instated by the MSPB. That would destroy the President's ability to ensure that execution of the "laws be faithfully executed." U.S. Const. art. II, § 3, cl. 1. No longer would all executive power be vested in the President, but he would lose complete control over that part of the executive branch taken over by the MSPB.

Additionally, 5 U.S.C. § 1204(a)(2) allows the MSPB to "order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order." Such orders can directly control the behavior of executive branch officers in how they exercise the law and must be controlled by the President.

For these reasons, the NLRB and the MSPB can exercise executive power and, therefore, do not fall within the *Humphrey's Executor* exception to *Myers* relied upon by

the lower courts to issue these injunctions. For that reason, this Court should stay these injunctions pending appeal.

ARGUMENT

I. ONLY MINISTERIAL, LEGISLATIVE, AND JUDICIAL OFFICES CAN BE PROTECTED FROM REMOVAL BY THE PRESIDENT, BECAUSE THEY LACK ANY EXECUTIVE POWER

Under the *Humphrey's Executor* exception, Congress can limit the President's removal powers only for offices that lack any Executive Power—namely, legislative, judicial, or ministerial officers. But before considering *Humphrey's* precedents, we should examine the historical evidence of original meaning that leads to *Humphrey's* rule.

A. THE ORIGINAL UNDERSTANDING DEMONSTRATES THAT ONLY EXECUTIVE BRANCH OFFICES THAT ARE MINISTERIAL OFFICES CAN BE PROTECTED FROM PRESIDENTIAL REMOVAL

During the Constitutional Convention, Edmund Randolph proposed that the executive be given "all the executive powers of the Congress under the Confederation." 1 Farrand, Records of the Federal Convention, 21 (1911). Under the Articles of Confederation, Congress exercised the executive power to remove executive officials, so Randolph's proposal empowered the President with this authority. The Constitutional Convention later transformed the provision into the Presidential Vesting Clause, which grants the President this executive power. U.S. Const. art. II § 1, cl. 1.

During the debates that established the first federal agencies, Congress discussed the proper removal of the Secretary of the Department of Foreign Affairs. Rep. Egbert Benson's "objection to the clause 'to be removable by the President' arose from an idea that the power of removal by the President hereafter might appear to be exercised by virtue of a legislative grant only, and consequently be subjected to legislative instability, when he was well satisfied in his own mind that it was fixed by a fair legislative construction of the Constitution." 1 Annals of Congress 579. James Madison agreed that the language "construed to imply a legislative grant of the power. He wished everything like ambiguity expunged, and the sense of the House explicitly declared, and therefore seconded the motion." *Id.* at 578-79. As reported by the Annals of Congress, there was, by "a considerable majority, in favor of declaring the power of removal to be in the President." 1 Annals of Congress 383.

This congressional decision demonstrates an unmistakable understanding by the First Congress that the Constitution had already vested the President with the power to remove officers exercising executive authority—and that the Congress lacked the ability to remove that power from the President. However, Congress's affirmation of the President's removal powers did not extend to the Comptroller of the Treasury. In the course of discussion of the possible removal of the Comptroller, Madison proposed that,

rather than removal at the pleasure of the President, the Comptroller would have a term of office and be removable only for cause. *Id.* at 636. According to Madison:

> It will be necessary . . . to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover that they are not purely of an executive nature. . . . The principal duty [of this office] seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government. I am inclined to think that we ought to consider him something in the light of an arbitrator between the public and individuals and that he ought to hold his office by such a tenure as will make him responsible to the public generally.

Id. at 635-36.

Although some Members claimed "that the Executive Magistrate had constitutionally a right to remove subordinate officers at pleasure" and "that these officers were merely to assist him in the performance of his duties, which, from the nature of man, he could not execute without them, although he had an unquestionable right to do them if he were able," *id.* at 638, Madison responded:

> I question very much whether [the President] can or ought to have any interference in the settling and adjusting of the legal claims of individuals against the United States. . . .I do not say that the office is either executive or judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place.

Id. 635-36.

Madison explained the operation of his distinction between these categories of officers in the Federalist Papers No. 39: "The tenure of the ministerial offices generally, will be a subject of legal regulation." His statement illuminates why the Secretary of Foreign Affairs, and not the Comptroller of the Treasury, is subject to Presidential removal.

A ministerial office involves no policymaking and no real executive discretion. The Comptroller of the Treasury's job was the "settling and adjusting of the legal claims of individuals against the United States." *Id.* at 638. Neither policymaking nor genuine discretion were thought to be involved in the execution of the duties of that office.

This Court, in *Marbury v. Madison* (1803), described the delivery of the commission to an officer as "a ministerial act":

> This is not a proceeding which may be varied if the judgment of the Executive shall suggest one more eligible, but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a *ministerial act* which the law enjoins on a particular officer for a particular purpose.

5 U.S. 137 (1803) (emphasis added). Likewise, this Court described "ministerial officers [as] discharging a duty without the least latitude of judgment or discretion." *Kerr v. Watts*, 19 U.S. 550 (1821). When a ministerial officer acts in a way that harms others, a Court can

command that officer via mandamus to follow the law without the exercise of any discretion and without any deference to the officer's policy judgment. Thus, an officer with only authority to perform ministerial acts lacks the Executive Power, including any policymaking authority. It follows that Congress can limit such an officer's tenure to something other than termination at the will of the President.

In short, the best understanding of the original meaning of the law is that only ministerial offices in the executive branch which are without substantial executive power or policymaking authority are subject to congressional limitation of the President's removal power.

B. THE CASELAW SHOWS THAT CONGRESS CAN CONSTRAIN THE PRESIDENT'S POWER OF REMOVAL ONLY WITH RESPECT TO OFFICES THAT DO NOT EXERCISE SUBSTANTIAL EXECUTIVE POWER

The caselaw demonstrates that the President can control all officers who exercise executive power as "[u]nder our Constitution, the 'executive Power'—*all of it*—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.' " *Seila L. LLC v. CFPB*, 591 U.S. 197, 203 (2020) (emphasis added) (citing U.S. Const. art. II, § 1, cl. 1).

As this Court held in *Myers v. United States*,

> [The President] is charged specifically to take care that [the laws] be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation

> respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible.

272 U.S. 52, 117 (1926).

Myers seems clear, but its holding must be harmonized with the decision in *Humphrey's Executor v. United States*. *Humphrey's Executor* did not overrule *Myers;* it distinguished it. 295 U.S. 602, 627 (1935) ("The office of a postmaster is so essentially unlike the office now involved that the decision in the *Myers* Case cannot be accepted as controlling our decision here."). According to *Humphrey's Executor*, the postmaster of *Myers* was a "subordinate and aid" of the President and thus "inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Id. Myers* does not "include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Id.* at 628. This clarification of *Myers* implies that *Humphrey's Executor* identified the FTC as an agency that "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *See id.*

Humphrey's Executor described the postmaster in *Myers* as an executive branch official exercising executive power. In contrast, the Court said that the Federal Trade Commission ("FTC") had "specified duties as a legislative or as a judicial aid." *Id.* It further described the FTC as "a body [that] cannot in any proper sense be characterized as an arm

or an eye of the executive." *Id.* In particular, *Humphrey's Executor* described two powers of the FTC, contained in two separate sections of the FTC Act, as follows: "In making investigations and reports thereon for the information of Congress under section 6, in aid of the legislative power, it acts as a legislative agency." *Id.* "Under section 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." *Id.* This Court therefore rejected the notion that the FTC exercises any "executive power in the constitutional sense." *Id.*

Humphrey's Executor correctly identified these powers of the FTC of 1935 as operating similarly to either (1) a congressional body like the Congressional Budget Office or the Government Accountability Office which has the authority to issue reports to Congress (as in Section 6 of the Federal Trade Commission Act) or (2) a federal magistrate presenting recommendations to a court of law on proper remedies (as in Section 7 Federal Trade Commission Act). These powers held by the FTC of 1935 fell entirely outside of the realm of the powers of the Executive. If they were the FTC's only powers, it would in effect be entirely outside the executive branch and it would not need to be controlled by the President.

Importantly, a Section 7 case must begin in an Article III court, and only upon a judicial finding that a violation of the antitrust laws has occurred can the case be brought to the FTC to provide a recommended remedy to the harms, "but the court may adopt or

reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require." Federal Trade Commission Act of 1935, Sec. 7, Pub. L. 63-203.

Humphrey's Executor, as limited to offices without any executive authority, follows from the nation's first case discussing presidential removal of officers, *Marbury v. Madison*. There, this Court recognized that "[Marbury's] appointment was not revocable" because "when the officer is not removable at the will of the Executive, the appointment is not revocable, and cannot be annulled." 5 U.S. (1 Cranch) 137, 162 (1803). Of course, Marbury's office was not that of an Article III judge, but nonetheless his office did not exercise executive power, which allowed it to fit within the *Humphrey's Executor* exception.

This Court recently confirmed in *Seila Law v. CFPB* that *Humphrey's Executor* is limited "to officers of the kind here under consideration," and thus the exception was limited to officers "exercising 'no part of the executive power.' " 591 U.S. 197, 215 (2020) (citing *Humphrey's Executor*, 295 U.S. at 632).

Seila Law noted that the claim that the FTC didn't exercise executive power "has not withstood the test of time." *Id.* at 216 n.2. This is true: under Section 5 of the FTC Act, the FTC's powers appear to be unambiguously executive. Section 5 gives the FTC an array of tools: it can initiate new enforcement actions, issue equitable orders, and seek their enforcement in federal court. *Seila Law* described this array as "a quintessentially executive power not considered in *Humphrey's Executor*." *Id.* at 199. However, *Seila Law*

recognized that "what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court." *Id.* at 219 n.4.

Indeed, even the FTC of 1935 wouldn't meet the limited exception in *Humphrey's Executor* after the arrival of *Seila Law*. This is because it is now clear that the FTC of 1935 was actually exercising executive power, as *Humphrey's Executor* was limited to those agencies "that cannot in any proper sense be characterized as an arm or an eye of the executive."

Whether or not the FTC of 1935 fell within the *Humphrey's Executor* exception, many agencies today use rulemaking that cannot be characterized as legislative, judicial, or ministerial. Congress would be prohibited by the Presentment Clause from enacting such rules itself. *INS v. Chadha*, 462 U.S. 919 (1983). Congress cannot give itself a legislative veto over the FTC's authority. Therefore, the enactment of such rules must be exercises of substantial executive power that Congress itself cannot possess.

The Comptroller General—who James Madison asserted could be protected from removal by the President—occupied the kind of office that would properly fall within the rule of *Humphrey's Executor*, because the office exercised no part of the Executive Power. In general, offices that are ministerial—and therefore are subject to the compulsion of mandamus should their occupants fail to do their duty under law—can be protected from

removal as described in the Federalist Papers No. 39: "The tenure of the ministerial offices generally, will be a subject of legal regulation."

Furthermore, other offices that exercise power that is wholly inside the legislative or judicial realm could properly be protected from removal by the President. That includes offices that exercise Congress's subpoena power, submit reports to Congress, or act as a judicial aid making recommendations to a court at that court's request.

The Congressional Budget Office and the U.S. Government Accountability Office are examples of agencies with officers who act as legislative aids. Even if the President were given a role in selecting the leadership of these offices, Congress could prevent him or her from removing them. Similarly, the officers of the Administrative Office of the U.S. Courts and the United States Sentencing Commission act as judicial aids.

Consider the United States Sentencing Commission: The President appoints, with the advice and consent of the Senate, members of the United States Sentencing Commission; they have six-year terms; and they can properly be prevented from removal by the President. *Mistretta v. United States* (1989) recognized that "[i]n order to safeguard the independence of the Commission from executive control, Congress specified in the Act that the President may remove the Commission members only for good cause." 488 U.S. 361, 410 (1989). *Mistretta* noted that "This removal provision is precisely the kind that was at issue in *Humphrey's Executor v. United States*." 488 U.S. at 410 n.33.

This Court's precedents make clear that the President's power of removal can only be limited with respect to offices that do not exercise substantial executive power—such as ministerial, judicial, or legislative offices.

II. THIS COURT SHOULD STAY THE LOWER COURT INJUNCTION DUE TO THE LOWER COURT'S MISUNDERSTANDING OF *SEILA LAW*

Because the lower court seriously misapplied *Seila Law,* this Court should grant the request for a stay. Specifically, the part of *Seila Law* that described the *Humphrey's Executor* exception as applying to "multimember expert agencies that *do not wield substantial executive power,*" *Seila Law*, 591 U.S. at 218 (emphasis added), was erroneously applied by the lower court.

Rather than apply the holding of *Seila Law*, the lower court interpreted *Humphrey's Executor* as allowing the protection of all multimember adjudicatory boards. App. 21 (describing the Humphrey's Executor exception as protecting "removal restrictions for government officials on multimember adjudicatory boards"). It failed to examine the powers specifically vested in the NLRB and the MSPB which were not considered in *Humphrey's Executor*.

The lower court failed to recognize that *Seila Law* limited *Humphrey's Executor* only to "the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court." *Id.* at 219 n.4. If the lower

court had fully appreciated *Seila Law*'s framework, that would have resolved any confusion about the modern operation of *Humphrey's Executor*. The lower court overlooked this important clarification in footnote 4 of *Seila Law* that harmonizes *Seila Law* with *Humphrey's Executor* without allowing executive power to be exercised outside of the President's control.

Although *Seila Law* clearly rejected the theory that the CFPB was not a "traditional independent agency headed by a multimember board or commission," the lower court failed to apply the second part of *Seila Law's* test—which requires that agencies "do not wield substantial executive power." *Seila L. LLC v. CFPB*, 591 U.S. 197, 218 (2020). And because this Court has had no occasion to apply the reasoning of *Humphrey's Executor* and *Seila Law* to multi-member agencies that exercise executive power, the lower court rejected any challenge to multi-member boards without considering the clear holding of *Seila Law*.

Of course, lower courts do not have the power to overturn *Humphrey's Executor*. But that is no barrier to applying the logic of *Humphrey's Executor* and *Seila Law* to other agencies that this Court has not yet examined. The lower court's failure to apply *Humphrey's Executor* and *Seila Law* correctly has, in effect, overruled the decisions of this Court.

Had the lower court properly applied *Humphrey's Executor* and *Seila Law* it would have found the board members of the NLRB and MSPB to exercise executive power and, therefore, were ineligible for the *Humphrey's Executor* exception to *Myers*.

The NLRB board members directly exercise the law by appointing and overseeing the officials who directly execute the law by conducting union elections. 29 U.S.C. § 154 ("The Board shall appoint . . regional directors . . . as it may from time to time"); 29 U.S. Code § 153(b) ("The Board is also authorized to delegate to its regional directors . . . take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof").

Furthermore, under the National Labor Relations Act, 29 U.S.C. § 156, the NLRB directly issues substantive rules implementing federal law. This Court has upheld such rules as binding upon the public and government. *American Hosp. Ass'n.* v. *NLRB,* 499 U.S. 606 (1991). The power to bind the federal government in how federal law is to be executed is a core executive power under the President's constitutional due to "take [c]are that the [l]aws be faithfully executed." U.S. Const. art. II, § 3, cl. 1. This is a power that even Congress would be prohibited from possessing. *INS v. Chadha*, 462 U.S. 919 (1983). Therefore, the enactment of such rules must be exercises of substantial executive power.

The MSPB board members have the power to order reinstatement of executive officers who can exercise substantial executive power. 5 U.S.C. § 1214(g)(1) ("If the Board

orders corrective action under this section, such corrective action may include that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred."). The President would no longer be able to ensure that the "laws be faithfully executed," U.S. Const. Art. II § 3, cl. 1, if he cannot fire those who are unfaithful in executing the law. No longer would all executive power be vested only in the President (as the Vesting Clause in U.S. Const. Art. II § 1, cl. 1 requires), but the president would lose control over that part of the executive branch usurped by the MSPB. However small a part of the executive power that is, it is intolerable for the executive power to be taken from the president for any length of time.

Additionally, 5 U.S.C. § 1204(a)(2) allows the MSPB to "order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order." Such orders can directly control the behavior of executive branch officers in how they execute the law.

In short, *Seila Law* noted that, for the *Humphrey's Executor* exception to apply, the officer must "not wield substantial executive power." *Seila Law*, 591 U.S. at 218. Properly applying that limitation to the executive power exercised by the MSPB and the NLRB would lead to the unmistakable conclusion that the these bodies cannot constitutionally be protected from Presidential removal.

As a result, this Court should grant the stay of the lower court decision and allow the Plaintiffs to argue that *Humphrey's Executor* should be extended, overturned or reinterpreted in a way contrary to *Seila Law* in the lower courts in the first instance.

III. THE FAILURE OF LOWER COURTS TO PROPERLY APPLY *SEILA LAW* AND *HUMPHREY'S EXECUTOR* IMPAIRS SELF-GOVERNMENT AND DEMOCRATIC ACCOUNTABILITY

Lower court opinions like the one at issue here impair the public accountability of administrative agencies. That impairment magnifies the possibility of abusive agency behavior.

For example, in *Collins v. Yellen* (2021), this Court ruled that the restrictions on removing the FHFA Director in 12 U. S. C. §4512(b)(2) were unconstitutional. 594 U.S. 220 (2021). The day this Court decided *Collins*, the President removed the director of the FHFA. Katy O'Donnell, *Biden removes FHFA director after Supreme Court ruling* (June 23, 2021), https://www.politico.com/news/2021/06/23/supreme-court-biden-fannie-mae-freddie-mac-housing-495673. It's reasonable to believe that the President had not previously removed the Director due to the statutory prohibition of removal without cause. Even if that removal provision were unconstitutional, a President may reasonably be guided by statute when the law is uncertain.

An unconstitutional removal provision prevents a President from firing a misbehaving agency official who is abusing executive power. When that occurs it hobbles

the ability of the people to exercise their powers of self-government through the mechanisms of democratic accountability. Abusive legislative officials can be controlled by Congress in much the same way that lower courts can be controlled by higher ones, similarly to the courts controlling judicial officials, and any abuse by ministerial officials can be corrected through mandamus. But when executive power is exercised beyond presidential control, there is no effective means for the public (or, indeed, those who represent the public) to stop such abuse.

This case is like *Collins v. Yellen*—but amplified. The correct resolution of this case is critically important to the appropriate exercise of authority in the nation's governance. The Court should stay the lower court injunction because of the extraordinary effects that a flawed theory of federal powers will have on agencies throughout the government as well as the public's ability to exercise control over such agencies through the President.

CONCLUSION

For the foregoing reasons, this Court should stay the lower court injunction.

Respectfully submitted,

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