No. 25-332

IN THE

Supreme Court of the United States

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

Petitioners,

v.

REBECCA KELLY SLAUGHTER, ET AL.,

Respondents.

On Writ of Certiorari to the United States District Court for the District of Columbia

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers and, if so, whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation is a public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as an amicus curiae to defend the Constitution's careful separation of powers. *See, e.g., Lucia v. SEC*, 585 U.S. 237 (2018); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). And WLF filed an early version of this brief in *Seila Law LLC v. CFPB,* 591 U.S. 207 (2020).

Safeguarding the separation of powers is "the sacred maxim of free government." The Federalist, No. 47 (Madison). The rise of administrative agencies, those sprawling departments tasked by Congress with faithfully helping to execute its laws, has long threatened to combine the legislative and executive powers in defiance of the Constitution.

WLF believes that unconstitutional restrictions on the President's removal power have unleashed an unaccountable regulatory apparatus on the American citizenry. Restoring the President's power to remove principal officers is thus crucial for democratic accountability. "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enter. Fund*, 561 U.S. at 514.

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* No party's counsel authored any part of this brief. No person or entity, other than WLF and its counsel, helped pay for the brief's preparation or submission.

SUMMARY OF ARGUMENT

The Constitution vests "[t]he executive Power" in the President alone—a grant that, from the Founding, has encompassed the unqualified authority to remove those who exercise it on his behalf. Yet for 90 years, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has defied this textual command, carving out a bizarre exception for "independent" agencies like the Federal Trade Commission, whose commissioners wield vast enforcement, rulemaking, and investigative powers but may defy the Chief Executive with impunity.

Our nation's English common-law traditions and Constitution categorically condemn that anemic view of executive power. A product of Depression-era expediency rather than principled interpretation, the decision has eroded accountability, invited bureaucratic entrenchment, and mocked the separation of powers. The time has come to jettison it, lest the President's duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, becomes a hollow promise subject to congressional whim.

The President's broad removal power has deep roots in the English historical practice of a "mixed regime," where the Crown, the House of Lords, and the House of Commons enjoyed distinct roles, each balancing and checking one another. Both before and after the American Revolution, the English (later British) monarch enjoyed an absolute right to remove high officials at will. Save a narrow exception for judges, the power to appoint conferred the power to remove. Although they rejected many other royal prerogatives, the Framers of our Constitution—

chastened by their experience with the feeble Articles of Confederation—retained a broad removal power for the Chief Executive.

That choice is evident in Article II's clauses vesting "the executive Power" in a single "President" who must "take Care that the Laws be faithfully executed." It can also be seen in the overall structure of the Constitution; in the practices of Presidents Washington, Adams, and Jefferson; and in key decisions taken by the First Congress. Drawing on many of these sources, this Court confirmed—in *Shurtleff v. United States*, 189 U.S. 311 (1903) and *Myers v. United States*, 272 U.S. 52 (1926)—the then-ubiquitous understanding that the President may remove principal officers at will.

Everything abruptly changed when this Court decided *Humphrey's Executor*. In a six-page opinion that all but ignored the pertinent constitutional text, structure, and history, the Court declared that Congress may grant for-cause removal protection to a principal officer on a panel of purportedly neutral "experts" who exercise "quasi legislative" and "quasi judicial" powers. This effectively granted Congress carte blanche to create a separate branch of government, one of independent boards and commissions, whose principal officers are removable only for "inefficiency, neglect of duty, or malfeasance in office." And this distortion of the separation of powers begat others, culminating in "an Executive Branch that cannibalizes itself," *Trump v. United* States, 603 U.S. 593, 640 (2024)—a vast, unaccountable administrative state capable of binding the citizenry with agency rules that carry the force and effect of law.

As Congress's attempts to cut into the President's removal power have become more brazen, this Court has begun righting the ship in some recent decisions, insisting that "a single President" is "responsible for the actions of the Executive Branch." *Free Enter. Fund*, 561 U.S. at 496–97; *Seila Law*, 591 U.S. at 213. As this case illustrates, however, at least some officers of the United States do not take that constitutional structure seriously. And why should they? *Humphrey's Executor* insulates them from accountability.

Unified control, in contrast, fosters true accountability. "Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence." *Free Enter. Fund*, 561 U.S. at 500. This Court should abandon the unconstitutional limit on the President's removal power that *Humphrey's Executor* created out of thin air.

ARGUMENT

I. The President's Broad Removal Power Is Confirmed by English History, the Text and Structure of the Constitution, and More Than 145 Years of Unbroken Practice After the Founding.

A. English History

"Will *no one* rid me of this turbulent priest?" Four knights immortalized this howl of protest by taking King Henry II's feverish rant seriously. They took their leave, rode to the Norman coast, and crossed the Channel. They found the Archbishop of Canter-

bury, Thomas Becket, in his cathedral, and they hacked him to pieces. 1 Winston S. Churchill, *A History of the English-Speaking Peoples: The Birth of Britain* 210–11 (1956).

Becket had once been the King's friend and counselor. After Henry had him appointed archbishop in 1162, however, he promptly went rogue. The Church of that day was a power apart—a body with its own lands and privileges, its own laws and courts—and Becket became its champion. He denied the Crown's authority, undermined royal policy at every turn, and excommunicated clerics loyal to the King. Henry could do very little about any of it except shout and sputter. When at last, in 1170, his knights mistook one of Henry's many tirades as a command and removed Becket by cutting him down, the scandal shook the kingdom to its core. History would hail Becket as a martyr and a saint, and Henry would spend years atoning for the bloody sacrilege he had brought about. Peter Ackroyd, *Foundation: The History of England from its Earliest Beginnings to the Tudors* 132–34 (2011); 1 Churchill, *supra*, at 210–11.

But this colorful episode is a historical aberration, the rare exception that proves the rule. For centuries, England's high officials—its chancellors, councilors, ministers, and (once Henry VIII had his way) even its bishops—all served at the king's pleasure. Their powers were the king's powers. F.W. Maitland, *The Constitutional History of England* 389 (1919). They were, as Maitland explained, "royal prerogatives" that "the king might lawfully exercise himself were he capable of discharging personally the vast business of government." *Id.* An untram-

meled power of appointment and removal was itself one such prerogative. *Id.*

Some of these prerogatives were stripped away just as the American colonies were getting underway. After the Glorious Revolution of 1688, the Crown lost, for all time, the power to suspend a law. *Id.* at 388. No sovereign has vetoed a bill from the throne since Queen Anne did so in 1708. *Id.* at 398. And when Anne died in 1714, the Crown's power to remove a judge "during good behaviour" died with her. *Id.* at 312–13; see Act of Settlement, 1701, 12 & 13 William III c. 2, § 3. Royal authority withered further under George I and George II, Hanoverians who cared little about England or its affairs. Maitland, *supra*, at 395; Peter Ackroyd, *Revolution: The History of England from the Battle of the Boyne to the Battle of Waterloo* 80–81, 93–94, 123–24 (2016). Although George III took some interest in governing, by his day the king no longer attended cabinet meetings. Maitland, *supra*, at 395.

Yet the king remained formidable. He retained his say in foreign affairs. He could still create new offices, albeit only with what money Parliament might supply. 1 William Blackstone, *Commentaries on the Laws of England* 262 (1765). Above all, his power to appoint and remove officers stood unscathed. Maitland, *supra*, at 388–89. The king, Blackstone wrote in 1765, was still "the fountain of honour, of office, and of privilege." Blackstone, *supra*, at 261. It was for the king alone, then, to decide "in what capacities, with what privileges, and under what distinctions his people [we]re best qualified to serve and to act under him." *Id.* at 263.

The power to appoint came with the power to remove. Writing in the early twentieth century, Maitland vividly described the abiding scope of—and justification for—the Crown's appointment and removal power:

> I think it well to notice separately that almost all those who have any governmental or judicial powers of any high order are appointed by the queen; if their powers are of a judicial kind, they generally hold office during good behaviour; if their powers are not judicial, they generally hold office merely during the queen's good pleasure and no reason need be assigned for dismissing them. I think it well to notice this separately, for it is these powers of appointment and dismissal which give to our scheme of government the requisite unity. The privy councillors hold their places during good pleasure, [and] so do those high officers of state who form the ministry. It is not usual to remove [such officers] . . . . But the legal power is absolute; and it is just because the legal power is absolute that our system of party government is possible.
>
> I mention this power of appointing and dismissing the high officers of state by itself because it is so very important, but of course the king has a very general power of appointing not only those whom we speak of as collectively forming the ministry, but all or almost all of those who hold public offices of first-rate importance.

Maitland, *supra*, at 428–29. The British monarch enjoyed the unquestioned power to appoint and dismiss high officials and ministers at pleasure and without cause. This sweeping authority extended over the holder of nearly every key public office—save judges who served for life during good behavior. *Id.*

B. The Constitution.

The Declaration of Independence accuses George III of committing "every act which may define a Tyrant." Declaration of Independence ¶ 30. At times the document seems to rail against a despot whose writ ran no further than Thomas Jefferson's imagination. *See id.* ¶¶ 3–29. No matter how overwrought Jefferson's accusations may be, his view of the King's despotism played on the minds of the men who assembled for the Constitutional Convention in 1787. The charter they crafted wrests many royal prerogatives from the grasp of our chief executive. In line with the British practice by that time, he may not remove judges. U.S. Const. art. III, § 1, cl. 2. Nor may he declare war or create offices; those powers belong to Congress. U.S. Const. art. I, § 8, cls. 11, 18. And he may not make treaties or appoint senior officers by himself; he needs the Senate's approval. U.S. Const. art. II, § 2, cl. 2.

Yet while the American concept of the separation of powers has its roots in seventeenth- and eighteenth-century English constitutionalism, the British monarchy was not the Framers' only reference point. The Articles of Confederation, which created a meager executive power and assigned it to Congress, had been tried and found wanting. The lack of a strong, unitary executive was, Jefferson exclaimed, "the

source of more evil than we have ever experienced from any other cause." Letter from Thomas Jefferson to Edward Carrington (Aug. 4, 1787), https://perma.cc/53HP-7VPL. "Nothing is so embarrassing nor so mischievous in a great assembly as the details of execution," he cried. *Id.* Hamilton agreed. The lack of a "proper executive" led, he wrote, to a "want of method and energy." Letter from Alexander Hamilton to James Duane (Sep. 3, 1780), https://perma.cc/YRS8-4SAP. "Responsibility" was too "diffused." *Id.*

Resolved to remedy this structural defect, the Framers only incrementally trimmed the executive bough. *First*, they roundly vested "the executive Power" in a single "President." U.S. Const. art. II, § 1, cl. 1. *Then*, when they wanted to revoke some prerogative or other, they did so openly and in plain words. The President may not "provide and maintain a Navy"; he may not grant anyone a "Title of Nobility"; and so on. U.S. Const. art. I, § 8, cl. 13; art. I, § 9, cl. 8. The Framers wanted to reduce the President's authority to a point, *but no further*. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 Yale L.J. 541, 596 n.212 (1994). "All the powers properly belonging to the executive department of the government are given," as Fisher Ames put it to the First Congress, "and such only taken away as are expressly excepted." 11 *Documentary History of the First Federal Congress*, 1789-1790, at 979 (statement of Fisher Ames) (Charlene Bangs Bickford et al. eds., 1992) [hereafter *DHFFC*].

"Our Constitution was adopted to enable the people to govern themselves" which requires that "a President chosen by the entire Nation oversee the

execution of the laws." *Free Enter. Fund*, 561 U.S. at 499. True, the Constitution requires the President to rely on Congress to erect and fund offices, *see Myers*, 272 U.S. at 128–30, and on the Senate to approve principal officers, U.S. Const. art. II, § 2, cl. 2. But it also commands the President, and the President alone, to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3, cl. 3. And although it says that judges "shall hold their offices during good behavior," U.S. Const. art. III, § 1, cl. 2., it extends no like protection to executive officials. A careful balance has obviously been struck. The President answers to Congress, but the government answers to the President. And so an officer must, in Washington's words, "assist the supreme Magistrate in discharging the duties of his trust." 30 Writings of George Washington 334 (John C. Fitzpatrick ed., 1939).

C. Early American Practice.

When Jefferson became President, he circulated among his heads of departments a letter setting Washington's administration as his standard. Washington had required his officers to keep him "always in accurate possession of all facts and proceedings." Circular Letter from Thomas Jefferson (Nov. 6, 1801), https://perma.cc/GJ9T-JPN3. He had "formed a central point for the different [executive] branches, preserved a unity of object and action among them," and "met himself the due responsibility for whatever was done." *Id.*

Jefferson contrasted this approach with "Mr. Adams's administration," in which the President, during "his long and habitual absences," let the Ex-

ecutive Branch be "parceled out" among "four independent heads, drawing sometimes in opposite directions." *Id.* "That the former is preferable to the latter course," declared Jefferson, "cannot be doubted." *Id.* Washington—and Jefferson—clearly believed that the President may guide, command, and, when necessary, remove government officials. Indeed, although no law granted the President a removal power, Washington, Adams, and Jefferson each dismissed many officers. *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1066 (2006). Jefferson alone fired 124 of them. *Id.*

The conduct of these early Presidents was not challenged by the other branches. On the contrary, the First Congress had endorsed the notion that the President enjoys an unfettered removal power. When Madison moved the House to establish a Department of Foreign Affairs, "the head of which" was to be an officer "removable by the President," a debate erupted about the removal power.

A few representatives argued that removal required an impeachment trial in the Senate. Calabresi & Prakash, *supra*, 104 Yale L.J. at 642–43; Prakash, *supra*, 91 Cornell L. Rev. at 1035. Others argued that at least the Senate's approval was necessary. Calabresi & Prakash, *supra*, 104 Yale L.J. at 643; Prakash, *supra*, 91 Cornell L. Rev. at 1036–37. Still others believed that, although the President should be allowed to remove officials at will, his power to do so came not from the Constitution but from Congress. Prakash, *supra*, 91 Cornell L. Rev. at 1038–39. Madison, for his part, contended that "the lowest officers, the middle grade, and the highest" all

"depend, as they ought, on the President." 11 *DHFFC*, *supra*, at 925 (statement of James Madison). And because he in turn depends on the "community," the "chain of dependence" terminates in "the people." *Id*. In other words, an unqualified removal power ensures that voters may hold the President to account for his officers' actions.

Madison's view won out. After a month-long discussion, majorities in both the House and Senate ultimately affirmed that the President held an inherent removal power under the vesting clause. During this pivotal debate and legislative action known as the Decision of 1789, Congress passed several bills that, while containing no removal clauses, nonetheless addressed who would manage the papers of a removed officer. *See* Prakash, *supra*, 91 Cornell L. Rev. at 1023 & nn. 7–9. Legislators on both sides of the debate memorialized their understanding in their private letters. The votes, one senator wrote, turned on "whether the President had a constitutional right to remove; not on the expediency of it." *Id*. at 1065–66. Madison told Jefferson that his colleagues had adopted the position "most consonant" to "the text of the Constitution" and "the requisite responsibility and harmony in the Executive Department." Letter from James Madison to Thomas Jefferson (June 30, 1789), https://perma.cc/LB3RBDKH.

D. *Shurtleff* and *Myers*.

Not until the twentieth century did this Court squarely consider the President's removal power. When at last it did so, it too sided with Madison.

The Court first considered the question of statutory restrictions on the President's removal power in *Shurtleff v. United States* (1903). Congress had created an "office of general appraiser of merchandise," whose occupant could be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." 189 U.S. at 313 (quoting the Customs Administrative Act, ch. 407, § 12, 26 Stat. 131, 136 (1890)). When President McKinley removed Ferdinand Shurtleff from this office in 1899, Shurtleff sued, contending that the statute's text precluded McKinley's removing him for reasons not explicitly set out by Congress. *Id.* at 315–16.

Writing for a unanimous Court, Justice Peckham disagreed. President McKinley could remove Shurtleff for reasons not specified by statute, the Court held, though Shurtleff was "entitled to notice and a hearing" if the President sought to remove him for one of the statutory causes. *Id.* at 314. Because Congress never specified a term of office for the General Appraiser, Justice Peckham explained, construing the statute to preclude Shurtleff's removal for reasons beyond those named in the statute would effectively be to grant him life tenure on good behavior. *Id.* at 316. And while the statute's for-cause removal clause might give an executive officer the right to defend himself against allegations of "inefficiency, neglect of duty, or malfeasance in office," in no way could it cabin the President's power to remove an executive officer at will. *Id.* at 317.

Twenty-three years later, in *Myers v. United States* (1926), this Court again considered the limits, if any, of the President's removal power. President Wilson had tapped Frank Myers as postmaster in

Portland, securing Senate consent as required. 272 U.S. at 106. But when Wilson later demanded Myers's resignation without consulting the senators, he flouted a Reconstruction-era statute that insisted on Senate approval for such ousters. *Id*. at 107–08. Myers sued for back pay, contending that his removal was invalid under federal law. Once again, this Court disagreed.

While the President holds all "executive power," *Myers* explained, he "alone and unaided could not execute the laws." *Id*. at 117. He must "execute them by the assistance of subordinates," and, to do so effectively, he must be able to remove "those for whom he cannot continue to be responsible." *Id.* The Framers could not have

> intended, without express provision, to give to Congress or the Senate, in case of political or other differences, the means of thwarting the executive in the exercise of his great powers and in the bearing of his great responsibility by fastening upon him, as subordinate executive officers, men who by their inefficient service under him, by their lack of loyalty to the service, or by their different views of policy might make his taking care that the laws be faithfully executed most difficult or impossible.

Id. at 131 (summarizing arguments Madison put to the First Congress). The President must, in other words, have the power "to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone." *Id.* at

135. He must, in short, "have the power to remove." *Id.*

Following *Myers*, Congress didn't even bother to include removal restrictions when creating the Federal Power Commission, the Securities and Exchange Commission, and the Federal Communications Commission. *See* Stephen G. Calbresi & Christopher S. Yoo, *The Unitary Executive in Historical Perspective*, 31 Admin. & Reg. L. News 5, 6 (2005). That no one regarded these commissions as being "independent" of the Executive Branch is "underscored by the fact that Presidents Cleveland, Wilson, Hoover, and Franklin Roosevelt did not hesitate to direct commission policies and to intervene in commission matters." *Id.*

Shurtleff and *Myers* got it right. The President enjoys inherent authority to remove executive officers at will, consistent with the Framers' view of a unitary executive revealed in the Constitution they adopted. Any attempt to cut back on this power risks undermining the Executive Branch's ability to faithfully execute the laws—along with the peoples' ability to hold a singular President accountable for his administration's actions.

II. The Court Erred, in Modern Times, by Eroding the President's Removal Power.

A. *Humphrey's Executor.*

The story so far has been about the federal government as it was designed by the Framers—the government described in grade-school textbooks. In that tripartite system, one branch makes the law,

another administers it, and a third applies it to cases and controversies. The plan never worked perfectly, of course. The lines between the powers are at times too obscure, and the humans tasked with finding them often too fallible or corrupt.

It is impossible to pinpoint exactly when this venerable model began to drift off course, but the New Deal saw a "rapid expansion of the administrative process," *United States v. Morton Salt Co.*, 338 U.S. 632, 644 (1950), including the creation of the FTC itself. As Hamilton observed, "there is in the nature of sovereign power, an impatience of control, that disposes those who are invested with the exercise of it, to look with an evil eye upon all external attempts to restrain or direct its operations." The Federalist, No. 15.

A pivotal moment came when FTC Commissioner William Humphrey ignored a letter from FDR removing him from his post. Humphrey just kept showing up for work every day. Before long, however, eternity's power of removal achieved what FDR's had not, so Humphrey's estate sued the government for unpaid wages.

According to the FTC Act, the President may remove a commissioner for only "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. FDR's only qualm with Humphrey had been his want of enthusiasm for the New Deal. "I do not feel," he told Humphrey, "that your mind and my mind go along together on either the policies or the administering of the Federal Trade Commission, and, frankly, I think it is best for the people of this country that I should have your full confidence." Letter from

Franklin D. Roosevelt to William E. Humphrey (Aug. 31, 1933) (quoted in *Humphrey's Executor*, 295 U.S. at 619). This Court disagreed.

Even judged by the standards of its own time, *Humphrey's Executor* was strangely inattentive to constitutional first principles. To justify its new limit on the President's removal power, the Court transformed the FTC's defects into virtues. The FTC's duties, the Court declared, "are neither political nor executive, but predominantly quasi judicial and quasi legislative." 295 U.S. at 624. Congress just wanted to create a "nonpartisan" "body of experts" and, thanks to these good intentions, the FTC was valid precisely *because* Congress made it "independent of executive authority." *Id.* at 624–25.

Ultimately, *Humphrey's Executor* ushered in the founding of a new branch of government. In that fourth branch—in the FTC, the SEC, the FCC, the CFTC, the NLRB, and on and on—unelected regulators wield the executive power (among others). They apply the law in accord with their own policies, their own maxims, and their own prerogatives. *See Arlington v. FCC*, 569 U.S. 290, 314 (2013) (Roberts, C.J., dissenting) ("The collection of agencies housed outside the traditional executive departments . . . is routinely described as the 'headless fourth branch of government,' reflecting not only the scope of their authority but their practical independence.") And when their aims conflict with the Executive Branch's aims, they need not yield. They are, like Becket's Church, a power apart.

B. Later Developments.

1. *Morrison*

Since *Humphrey's Executor*, this Court has considered the President's removal power several times. In *Morrison v. Olson*, 487 U.S. 654 (1988), the Court held that the Ethics in Government Act, which placed good-cause restrictions on the Attorney General's power to remove an independent counsel, did not impermissibly infringe the President's removal power, *id*. at 685–93, 695–96.

Whereas FTC Commissioners are principal officers, the independent counsel was an inferior officer, *id*. at 691. Still, note the sharp incongruity between *Humphrey's Executor* and *Morrison*. *Humphrey's Executor* stood its curtailment of executive power largely on the fact that an FTC commissioner has only quasi-judicial and quasi-legislative powers. *Humphrey's Executor* distinguished *Myers* on the ground that it involved "an executive officer restricted to the performance of executive functions." 295 U.S. at 627. Officers who wield purely executive power, *Humphrey's Executor* said, would remain "subject to the exclusive and illimitable power of removal by the Chief Executive." *Id.* Yet *Morrison* involved a prosecutor wielding purely executive power. How, then, could she enjoy good-cause protection?

The answer is that *Morrison* simply swept the rationale of *Humphrey's Executor* "into the dustbin." 487 U.S. at 725 (Scalia, J., dissenting). "Our present considered view," the Court said in *Morrison*, is that "rigid categories" do not matter, and that the removal power simply "ensure[s] that Congress does not

interfere with the President's exercise of the 'executive power' and his constitutionally appointed ['take-care'] duty." *Id.* at 689–90.

In other words, *Morrison* would come out wrong under the rule in *Humphrey's Executor*. And, one could argue, *Humphrey's Executor*, which involved powerful principal officers, would come out wrong under the rule in *Morrison*. That can't be right—and it exposes the Court's failure to police the sharp division between the Legislative and Executive Branches mandated by the text, structure, and history of Article II.

2. *Free Enterprise Fund*

This Court at last began to restore the President's removal power (and with it, the separation of powers) in *Free Enterprise Fund* (2010), which held that Congress may not create multi-level good-cause protections. If a principal officer enjoys good-cause protection, then the inferior officers answerable to her must be removable at will. Although it does not reexamine *Humphrey's Executor* or *Morrison*, 561 U.S. at 483, *Free Enterprise Fund* often breaks sharply with those decisions.

"The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484. That is, the "President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." *Id.* at 496-97 (quoting *Clinton v. Jones*, 520

U.S. 681, 712-13 (1997) (Breyer, J., concurring in judgment)).

Indeed, "[t]he diffusion of power carries with it a diffusion of accountability." *Id.* at 497. "Without a clear and effective chain of command, the public cannot determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures, ought really to fall." *Id.* at 498 (quoting The Federalist No. 70 (Hamilton)). The Constitution, *Free Enterprise Fund* reminds us, "requires that a President chosen by the entire Nation oversee the execution of the laws." *Id.* at 499. "In its pursuit of a 'workable government,' Congress cannot reduce the Chief Magistrate to a cajoler-in-chief." *Id.* at 502.

Each of these passages is in serious tension with *Humphrey's Executor*. Several of them flatly contradict it. And *Free Enterprise Fund* offers no reason why its logic reaches double-layer for-cause removal but *not* single-layer for-cause removal. Although this Court "drew the line at two levels of for-cause removal restrictions, this constitutional problem persists with only one level of restrictions." Stephen G. Calabresi et al., *The Rise & Fall of the Separation of Powers*, 106 Nw. L. Rev. 527, 541 n.57 (2012).

3. *Seila Law*

More recently, in *Seila Law* (2020), the Court held that the Consumer Financial Protection Bureau's leadership by a single director—removable only for inefficiency, neglect, or malfeasance—violates the separation of powers. *Seila Law* doubled down on the lessons of *Free Enterprise Fund*, quoting from it

liberally at times, while echoing the same unmistakable tune throughout.

"The entire 'executive Power' belongs to the President alone." *Seila Law*, 591 U.S. at 213. "The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the first Congress, and was confirmed in the landmark decision *Myers v. United States*." *Id.* at 204 (citation omitted).

The President's removal power, *Seila Law* insists, "has long been confirmed by history and precedent. It 'was discussed extensively in Congress when the first executive departments were created' in 1789." *Id.* at 214 (quoting *Free Enterprise Fund*, 561 U.S. at 492). At bottom, *Seila Law* embraces the general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties.'" *Id.* at 215 (quoting *Free Enterprise Fund*, 561 U.S. at 513–14).

That rule resolves this case. "New Presidents always inherit thousands of Executive Branch officials whom they did not select. It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Collins v. Yellen*, 594 U.S. 220, 277–78 (2021) (Gorsuch, J., concurring in part). Otherwise, there would be "wholly unaccountable government agent[s]" who "assert[] the power to make decisions affecting individual lives, liberty, and property," yet are not accountable to "those who govern." *Id.* at 278.

C. The FTC.

Humphrey's Executor blessed the creation of independent agencies governed by panels of experts. Spreading control among several board members or commissioners, the Court reasoned, made these novel agencies' autonomy not only tolerable, but desirable. 295 U.S. at 624 (the FTC's "members are called upon to exercise the trained judgment of a body of experts . . . informed by experience"). Justice Sutherland's opinion suggested that by eliminating the President's influence over these "quasi judicial" and "quasi legislative" agencies, they would be politically independent. *Id.*

Leaving aside the tremendous influence Congress exerts over federal agencies, Sutherland's reasoning hinges on an FTC that exercises real expertise—but no real executive power—and is insulated from partisan pressures to ensure impartial enforcement of the law. How does that rationale hold up nearly a century later?

Let's start with expertise. "Historically, FTC Commissioners have not been leading experts in their fields when appointed and have not stayed at the Commission long enough to acquire expertise." Daniel A. Crane, *FTC Independence after* Seila Law, Ctr. for the Study of the Admin. State, CSAS Working Paper 22-02, at 19, https://perma.cc/W3UU-DC7Q. In fact, the FTC has very little substantive expertise in the countless industries it regulates. No matter how credentialed they may be, the Commissioners' backgrounds rarely impart "special knowledge concerning the problems and operation of care labeling, funerals, food marketing, or any other

activity or particular industry." Timothy J. Muris, *Rules Without Reason—The Case of the FTC*, 6 Regul. 20, 22 (Sept./Oct. 1982).

FTC bureaucrats lack "the regular contact and communication with entities in a specific industry that facilitates deep understanding of what practices, or remedies, are appropriate." J. Howard Beales III, et al., *Back to the Future: How Not to Write a Regulation*, Am. Enter. Inst., at 4 (June 2022), http://bit.ly/46ZhUKK. In other words, when the FTC relies on its own expertise, it relies "on the experiences with a particular industry that the commissioners and the staff are likely to share with any ordinary citizen." Muris, *supra*, at 22. Above all, the agency lacks any special expertise that would justify setting it loose on the American economy without scrupulous accountability.

Nor is that all. Today's FTC "is neither primarily legislative nor adjudicatory but instead acts primarily as an executive law enforcement agency." Crane, *FTC Independence*, *supra*, at 18. Three years after *Humphrey's Executor* was decided, Congress extended the FTC's regulatory reach to all "unfair or deceptive acts or practices," backed by civil penalties and enforceable by the Department of Justice. *See* William Yeatman & Keelyn Gallagher, *The Rise of Monetary Sanctions in Federal Agency Adjudication*, 76 Admin. L. Rev. 857, 867 (2024). No longer merely advisory and subject to de novo review in federal court, the FTC's in-house adjudications are now "self-executing." *Id.*

Next, in the Finality Act of 1959, Congress made FTC orders final upon expiration of the 60-day peri-

od for seeking review. 73 Stat. 243 (1959), 15 U.S.C. § 21. The penalties Congress imposed for violating an FTC final order were so severe that this Court later invited the agency to reform its procedures for entering orders. *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 367–68 (1962). Backed by monetary sanctions, the FTC can now unilaterally issue final decisions awarding legal and equitable relief in its own administrative adjudications.

There's more. Although nothing in the FTC Act grants the FTC substantive rulemaking authority over trade practices (the agency did not promulgate such a rule until 1965), the D.C. Circuit decided in 1973 that the agency enjoyed that broad authority anyway. *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 678 (D.C. Cir. 1973); *see also* Daniel A. Crane, *Debunking* Humprey's Executor, 83 Geo. Wash. L. Rev. 1835, 1860–62 (2015). Today's FTC thus promulgates binding rules, with the force and effect of law, touching virtually every sector of the economy.

In 1973 and 1975, Congress gave the FTC added authority to seek monetary penalties from violators directly in federal court, but only after an administrative proceeding. *See AMG Cap. Mgmt., LLC v. FTC*, 593 U.S. 67, 72–73 (2021). Before long, the Commission "fell into the habit of obtaining effective monetary relief without administrative action by suing in federal district court seeking asset freezes and mandatory injunctions." Crane, 83 Geo. Wash. L. Rev. at 1865. It took this Court's intervention for the FTC to end that ultra vires practice. *AMG Cap. Mgmt.,* 593 U.S. at 75–78. Perhaps the FTC enjoys "broader rulemaking, enforcement, and adjudicatory

powers than the *Humphrey*'s Court appreciated." *Seila Law*, 591 U.S. at 219 n. 4. In fact, it's not even a close call.

Is the FTC strictly nonpartisan? "The FTC has been anything but a non-partisan and independent agency." Crane, *FTC Independence*, at 18. This reality is now an accepted truism throughout the administrative state where, in most multi-member agencies, an equal number of commissioners are appointed from each political party and the tie-breaking chair is named by the President.

The Respondent here, Rebecca Slaughter, is hardly immune from political grandstanding: "President Trump has," she wrote recently, "at every turn, thrown workers under the bus to ingratiate himself with corporations and their billionaire CEOs." Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Dismissal of Appeals in Noncompete Rule Litigation (Sep. 5, 2025), https://perma.cc/344X-9WE8 ("[T]he Trump-Vance FTC decides to throw in the towel on years of work by the agency to protect workers from draconian noncompete agreements."). Although Slaughter was engaging in rank partisan blame-shifting, she wasn't breaking any new ground in doing so.

Indeed, a 2024 report on Lina Khan's recent tenure as FTC Chair reveals an agency so entwined with White House directives that it functioned less as a separate agency than as an extension of the Oval Office. Senior FTC officials, including Khan's chief of staff (a Biden campaign fundraiser) and policy director (borrowed from the White House Counsel's office) routinely consulted with White House

aides on FTC enforcement priorities, from merger reviews to antitrust probes. H. Comm. on Oversight & Accountability, *The Federal Trade Commission Under Chair Lina Khan: Undue Biden-Harris White House Influence and Sweeping Destruction of Agency Norms*, at 12–14 (Majority Staff Report Oct. 31, 2024). This frenzy of West Wing coordination with the FTC peaked in the investigation of Amazon, when FTC career staff were pressed to expand the inquiry to match the administration's political goals, despite career analysts' reluctance to proceed on shaky legal and evidentiary grounds. *Id.* at 18–20.

The FTC's 2023 noncompete ban, adopted over bipartisan economic criticism warning of severe market distortions, proceeded on a sharply divided partisan vote that brushed aside hard data as mere "corporate influence." *Id.* at 25–28. Meanwhile, merger challenges like Microsoft-Activision racked up seven losses in eight cases by mid-2024, including several appellate reversals for agency overreach. *Id.* at 30–33. Internal memos by career staff pleading for restraint went unheeded. *Id.* All this just happened to seamlessly align with Biden-era priorities and well-documented White House direction and input.

Such partisan political entanglements reveal not the detached salon of expert collaboration *Humphrey*'s *Executor* promised, but a highly politicized apparatus advancing transient agendas—precisely the kind of mischief at-will removal is meant to check. Yet the FTC Act and this Court's precedent in *Humphrey's Executor* insist that Commissioners can be removed for only "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41.

In sum, the "last nine decades have brought significant changes to the FTC from the time of *Humphrey's Executor*, in terms of both its formal powers and its increasingly energetic—even ideological or partisan—approach to wielding them." Adam White, *Is* Humphrey's Executor *headed for Slaughter?*, SCOTUSBlog (Oct. 2, 2025), https://perma.cc/ZBS3-EGEC. The shifting sand on which *Humphrey's Executor* stands no longer can sustain it.

III. Unified Control Fosters Accountability.

Some commentators insist that the White House's present occupant is too volatile and politically charged to be allowed to decide who runs the agencies of the government he oversees. *See, e.g.*, Hayley Durudogen & Michael Sozan, *What Is* Humphrey's Executor *and Why Should You Care About It?*, Ctr. for Am. Progress (Feb. 27, 2025), https://shorturl.at/vjMrQ. But current personalities cannot alter the meaning of the Constitution, which is "fixed at the time of its ratification" and perpetual unless and until amended. *United States v. Rahimi*, 602 U.S. 680, 737 (2024) (Barrett, J., concurring). If the Constitution's meaning were to change from President-to-President (or Congress-to-Congress), we'd have something governing us, but it wouldn't be the stability the President's critics crave (nor what the Constitution demands).

Above all, the Founders were not naive about human nature. "[T]here is a degree of depravity in mankind," Madison insisted, "which requires a certain degree of circumspection and distrust." The Federalist No. 55. The Framers did not believe in fantasies about politically neutral Presidents any

more than they believed in fantasies about politically neutral panels of government experts. "Ambition," they steadfastly maintained, "must be made to counteract ambition." The Federalist No. 51 (Madison).

No surprise, then, that the Constitution never blesses arming an agency with an amorphous blend of "quasi" powers, much less an array of plenary executive powers. As Justice Jackson quipped, "the mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting). The separation of powers is no academic shibboleth. No President should be able to avoid responsibility before the voters by pointing to subterfuge from an unaccountable bureaucracy.

Nor would restoring the proper meaning of Article II render Congress a feckless branch. Congress holds the power of the purse and can withhold appropriations in response to perceived Executive slights—as it is doing at the time of this brief's filing. *See* Mia McCathy, *Capitol Agenda: No deal as the shutdown marches toward Week Three*, Politico (Oct. 10, 2025), https://politi.co/42yqBua. Congress also controls which appointments must be subject to Senate confirmation, U.S. Const. art. II, § 2, and the President cannot bulldoze the advice-and-consent appointment process through gamesmanship, *NLRB v. Noel Canning*, 573 U.S. 513 (2014). And unlike FDR, modern Presidents cannot hold office beyond two terms. U.S. Const. amend. XXII.

As it did with *Auer* deference, this Court could always grant *Humphrey's Executor* a "stay of execu-

tion," piling on so many caveats, distinctions, and qualifiers that it leaves the Court's precedent "zombified." *Kisor v. Wilkie*, 588 U.S. 558, 592 (2019) (Gorsuch, J., concurring). But no one should discount the ways that accountability to the Executive may help to ensure vigorous, robust, and *lawful* execution.

As shown above, those appointed to independent agencies aren't exactly models of self-restraint or rule adherence themselves. President Biden was committed to aggressive FTC enforcement, and to that end he placed Lina Khan as Chair. But Khan was uninterested in the niceties—due process, fair notice, faithful application—of implementing the President's agenda. This resulted in a series of setbacks for the Biden administration. *E.g.*, *FTC v. Microsoft*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023), *aff'd*, 136 F.4th 954 (9th Cir. 2025); *Custom Commc'ns v. FTC*, 142 F.4th 1060 (8th Cir. 2025). The President might have benefited from removing Khan as Chair and replacing her. Perhaps a more pragmatic FTC Chair could have advanced his policy goals more effectively. But President Biden was hamstrung from even considering that option, out of fidelity to the wrongly decided *Humphrey's Executor*.

* * *

None of the Founders would recognize the anemic view of executive power that Respondent urges here. It unavoidably collides with the executive power of the Vesting Clause and the Take Care Clause. Washington, Jefferson, and Madison would all reject it as unconstitutional. So would the First Congress and the *Shurtleff* and *Myers* Courts. In sum, there

can be no doubt what the constitutional history, text, and structure all tell us: the removal protections built around the FTC's commissioners gravely distort our founding charter. These sources confirm—along with *Free Enterprise Fund* and *Seila Law*—that the President may remove a principal officer at will, which means that *Humphrey's Executor* is intolerably wrong. This Court should say so at long last.

CONCLUSION

The judgment should be reversed.

Respectfully submitted,

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