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 Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae October 16, 2025

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the broader separation-of-powers and practical implications of this case.

AFPF believes the scope of federal power has been expanded well beyond what the Constitution's grant of limited, enumerated powers allows. It likewise believes that Congress may not unconstitutionally transfer Article I legislative power or Article III judicial power to the executive. AFPF opposes executive overreach and supports a proper understanding of the scope of federal power. But AFPF's interest here is not in expanding executive power beyond constitutional bounds. To the contrary,

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[1] *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

it is instead ensuring that it is unified in an elected President, as the Constitution requires, and not diffused in an extraconstitutional Fourth Branch. The Constitution establishes numerous structural safeguards against Executive Branch (and federal) overreach that also must be vigorously enforced; a headless Administrative State is not one of them.

SUMMARY OF ARGUMENT

This case is about whether the Constitution authorizes a de facto Fourth Branch of government comprised of unelected bureaucrats insulated from accountability to the political branches—and thus to the American People—and permitted to make policy choices and enforcement decisions impacting the entire private economy. The answer is easily no.

In this country, all governmental power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. In that document, the People agreed that three branches of government—legislative, executive, and judicial—would exercise different forms of power that must be kept separate. Not four. And under the Constitution, agencies that wield executive power must be located in the Executive Branch and subject to presidential control.

Under Article II, "[t]he entire 'executive Power' belongs to the President alone," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020); U.S. Const. art. II, § 1, cl. 1, who "shall take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3. This means that "[t]he President is the only person who alone composes a branch of government." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). Article II contemplates that the President will be assisted by subordinate officers in carrying out his broad constitutionally charged responsibilities, U.S. Const. art. II, § 2, cl. 2, including enforcing federal law. But to protect liberty and ensure accountability, the Constitution necessarily also grants the President power to remove these Officers at will. U.S. Const. art. II, § 1, cl. 1; *id.* art. II § 3. That power is indefeasible. Congress may not limit that core Article II power.

The rise of "independent" agencies with vast law enforcement powers under the banner of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has undermined the Constitution's separation of powers, allowed wide swaths of the Executive Branch to escape accountability, and threatened individual liberty. These extraconstitutional administrative bodies have become a de facto headless Fourth Branch of government outside the control of the political branches and thus the American people. This arrangement makes a mockery of consent of the governed. And it is antithetical to our Republic's system of constitutionally limited self-government.

Unlike a fine wine, *Humphrey's Executor* has not gotten better with age. Instead, its poor reasoning has soured. Over the past ninety years, *Humphrey's Executor* has enabled a host of separation-of-powers violations, which have had real consequences for countless businesses and individuals who have found themselves in the crosshairs of these "independent" agencies' law-enforcement activities. The targets of these extraconstitutional entities have no meaningful recourse to any elected officials, as none of them has the power to rein in these free-floating administrative bodies. Nor can the President remove the unelected heads when their policy and law enforcement priorities conflict with his.

As Judge Rao explained below, *Humphrey's* "is inconsistent with the Constitution's vesting of all executive power in the President and with more recent Supreme Court decisions." J.A. 132 (dissenting). And today, *Humphrey's Executor* is "nearly, *nearly*, zombified precedent." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 98 F.4th 646, 648 n.10 (5th Cir. 2024) (Willett, J., concurring in the denial of rehearing en banc). This Court has seemingly "all but overturned" it. *Trump v. Boyle*, 145 S. Ct. 2653, 2655 (2025) (Kagan, J., dissenting). Even its holding as applied to the 1935 Federal Trade Commission ("FTC") (as described by the *Humphrey*'s Court) no longer applies to today's FTC, let alone to the myriad other "independent agencies" wielding executive power today. Yet the specter of *Humphrey's Executor* continues to haunt our constitutional order.

There is simply no reason to allow this zombified precedent to roam any longer. This Court should sweep *Humphrey's* "into the dustbin of repudiated constitutional principles." *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting). The time has come to "place[] a tombstone on" *Humphrey's* that "no one can miss." *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 417 (2024) (Gorsuch, J., concurring).

Our constitutional Republic will be healthier for it. Leaving *Humphrey's* on the books "does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty." *Seila*

Law, 591 U.S. at 251 (Thomas, J., concurring in part, dissenting in part). And neither *Humphrey's Executor*'s stale vintage nor any putative "reliance" interest federal officials may claim to have in insulation from political accountability justify retaining the "quasi-legislative, quasi-judicial" charade upon which that decision rests.

For the foregoing reasons, this Court should squarely overrule *Humphrey's Executor*. In so doing, it should make clear, at a minimum, the President's plenary at-will removal authority under Article II extends to all principal Officers who wield Executive power, and that Congress cannot statutorily restrict this indefeasible power. This clear rule would give lower courts much-needed guidance in resolving ongoing litigation challenging the President's at-will removal power.

ARGUMENT

I. The Constitution Does Not Authorize a Headless Fourth Branch.

"Our system of government rests on one overriding principle: All power stems from the consent of the people." *United States Term Limits v. Thornton*, 514 U.S. 779, 846 (1995) (Thomas, J., dissenting). "Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). The Founders "viewed the principle of separation of powers as the absolutely central guarantee of a just Government." *Morrison*, 487 U.S. at 697 (Scalia, J., dissenting). To protect liberty, the Constitution "sets out three branches and vests a different form of power in each—legislative, executive, and judicial." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part, dissenting in part) (citing U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.). "These grants are exclusive." *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment).

"'If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.'" *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress 581). That document "establishes three branches of government, not four[,]" and thus "there can be no fourth branch, headless or otherwise." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 892 (3d Cir. 1986) (Becker, J., concurring in part). "Nor can Congress create agencies that straddle multiple branches of Government." *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring in part, dissenting in part). The Constitution requires that these powers must be kept separate and cannot be blended.

As an additional guardrail, "the Framers insisted upon accountability for the exercise of executive power," "lodg[ing] full responsibility . . . in a President of the United States, who is elected by and accountable to the people." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). "Whereas the Framers *divided* the Legislative Power, they *unified* the Executive."[2] *Harris v. Bessent*, No. 25-5037, 2025 WL 980278, at *3 (D.C. Cir. Mar. 28, 2025) (Walker, J., concurring), vacated on reconsideration en banc, No. 25-5037, 2025 WL 1021435 (D.C. Cir. Apr. 7, 2025). The Constitution provides in no uncertain terms that "[t]he executive Power shall be vested in a President," U.S. Const. Art. II, § 1, cl. 1, who "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, thereby "creat[ing] a strongly unitary executive." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1213 (2014).

Under our constitutional structure "[t]he entire 'executive Power' belongs to the President alone," *Seila Law*, 591 U.S. at 213, "including the power of appointment and removal of executive officers," *Myers*, 272 U.S. at 164. This ensures "[t]he buck stops with the President," *Free Enter. Fund*, 561 U.S. at 493, who "bears responsibility for the actions of the many departments and agencies within the Executive Branch," *Trump v. United States*, 603 U.S. 593, 607 (2024). As Article II "make[s] emphatically clear," the President is "personally responsible for his branch."

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[2] "The insistence of the Framers upon unity in the Federal Executive—to insure both vigor and accountability—is well known." *Printz v. United States*, 521 U.S. 898, 922 (1997). They "provided for a unitary executive to ensure that the branch wielding the power to enforce the law would be accountable to the people." *In re Sealed Case*, 838 F.2d 476, 488 (D.C. Cir. 1988) (Silberman, J.). The "unitary Executive" was designed "not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting).

Akhil Reed Amar, America's Constitution: A Biography 197 (2005).

The President's at-will removal power flows directly from the Constitution, not from Congress.[3] *See Seila Law*, 591 U.S. at 204; *Myers*, 272 U.S. at 163–64. Article II's "vest[ing of] the executive power in the President" grants him power to "remove without cause executive officers who exercise [executive] power on his behalf," cabined only by "narrow exceptions" under this Court's precedent. *Trump v. Wilcox*, 145 S. Ct. 1415, 1416 (2025) (citations omitted).

Founding-era practice and original understanding further support reading Article II to confer plenary at-will removal power. The removal power "was discussed extensively in Congress when the first executive departments were created in 1789." *Seila Law*, 591 U.S. at 214 (cleaned up). "Most members of [the First] Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 796 n.556 (2003). "Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal

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[3] "It is true that there is no removal clause in the Constitution, but neither is there a separation of powers clause or a federalism clause." *Seila Law*, 591 U.S. at 227 (cleaned up).

power."[4] *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring in part, dissenting in part). The First Congress thus "confirmed that Presidents may remove executive officers at will." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting).

Nor may Congress limit the core at-will removal power Article II exclusively vests in the President. "[N]o statute can take that Presidential power away."[5] *Collins v. Yellen*, 594 U.S. 220, 267 (2021) (Thomas, J., concurring). "The exclusive constitutional authority of the President disables the Congress from acting upon the subject." *Trump*, 603 U.S. at 607 (cleaned up).

[4] This "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986) (citation omitted).

[5] "Unlike several state constitutions of the founding era, Article II does not specify or suggest that appointment or removal are default allocations from which Congress can depart." Aditya Bamzai & Saikrishna Prakash, *How to Think About the Removal Power*, 110 Va. L. Rev. Online 159, 174 (2024). "[B]ecause the Constitution nowhere grants Congress the authority to strip that power from the President, the President's removal power was originally understood to be nondefeasible." *Consumers' Rsch.*, 98 F.4th at 651 (Oldham, J., dissenting from denial of rehearing en banc) (citing Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1789 (2023))

II. The At-Will Removal Power is Indispensable for Accountability.

"As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)). Because the President's "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 can not continue to be responsible." *Myers*, 272 U.S. at 117. To properly oversee and control the Executive Branch, the President must have "unrestricted power to remove the most important of his subordinates in their most important duties[.]" *Id.* at 134.

More broadly, "because the President, unlike agency officials, is elected," the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability." *Collins*, 594 U.S. at 252. "Not merely an abstract idea of political theory, the President's accountability is a hallmark of our democracy[.]" *In re Sealed Case*, 838 F.2d at 489. "Without presidential responsibility" for the actions of his subordinates "there can be no democratic accountability for executive action."[6]

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[6] "[W]hen Congress delegates authority to an independent agency, no democratically elected official is accountable." *FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2518 (2025) (Kavanaugh, J., concurring).

United States v. Arthrex, Inc., 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring in part, dissenting in part).

"[O]nly through the President can the Executive Branch and its millions of personnel be held democratically accountable." *Dellinger v. Bessent*, No. 25-5028, 2025 WL 559669, at *17 (D.C. Cir. Feb. 15, 2025) (Katsas, J., dissenting). Article II's vesting of at-will removal power allows the President to ensure unelected officials "serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." *Collins*, 594 U.S. at 252. "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." *Id.* at 278 (Gorsuch, J., concurring in part).

"At-will removal ensures that the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." *Id.* at 252 (majority op.) (cleaned up). It "is a 'powerful tool for control,'" *Kennedy v. Braidwood Mgmt.*, 145 S. Ct. 2427, 2443 (2025) (citation omitted), and a "means of ensuring supervision and direction," *id.* at 2445. After all, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher*, 478 U.S. at 726.

The President's at-will removal power also protects liberty. "Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Collins*, 594 U.S at 278–79 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)). The President's Article II at-will removal power guards against this threat. Limits on that core Executive power allow "wholly unaccountable government agent[s] [to] assert the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken." *Id.* at 278 (Gorsuch, J., concurring in part). For this reason, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects." *Id.* at 277 (Gorsuch, J., concurring in part).

III. For-Cause Removal Protections for Officers Wielding Substantial Executive Power Empower a Fourth Branch.

As Justice Robert Jackson explained long ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century[.]" *Ruberoid Co.*, 343 U.S. at 487 (dissenting). The problem is far worse today, as Congress has devised ever more novel and powerful administrative bodies unmoored from the Constitution. *See City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting). "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people." *Free Enter. Fund*, 561 U.S. at 499. For good reason. "President Truman colorfully described his power over the administrative state by complaining, 'I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing.'

President Kennedy once told a constituent, 'I agree with you, but I don't know if the government will.'" *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting) (citations omitted).

That holds true today. As it stands now, "the President actually controls surprisingly little of the Executive Branch. Only a tiny percentage of Executive Branch employees are subject to Presidential removal." *Feds for Med. Freedom v. Biden,* 63 F.4th 366, 390 (5th Cir. 2023) (en banc) (Ho, J., concurring). The bulk of the federal bureaucracy is shielded from presidential removal—and thus from accountability to the People through the elected President—by civil service laws. *See id.* (Ho, J., concurring). This means that "a modern president is more or less stuck with thousands of civil servants whom he did not appoint and have little loyalty toward him." Jason Marisam, *The President's Agency Selection Powers*, 65 Admin. L. Rev. 821, 863 (2013).

This "make[s] it virtually impossible for a President to implement his vision without the active consent and cooperation of an army of unaccountable federal employees."[7] *Feds for Med. Freedom*, 63 F.4th at 390 (Ho, J., concurring). "Even if a president has the perfect ally running an agency, that ally may still fail to produce the desired results if the ally runs into resistance from his civil servants." Marisam, 65 Admin. L. Rev. at 863. And those unelected

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[7] "[O]ver time the tenure-like protections for the civil service have sharply reduced the president's ability to change the direction of the permanent bureaucracy[.]" John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1956–57 (2009).

bureaucrats are almost impossible to fire because "they enjoy a de facto form of life tenure, akin to that of Article III judges."[8] *Feds for Med. Freedom*, 63 F.4th at 391 (Ho, J., concurring). These tenure-like protections embolden some federal employees to view themselves "as a free-standing interest group entitled to make demands on their superiors." *Id.* (Ho, J., concurring). And they do.

Now consider what *Humphrey's Executor*, under a maximalist reading, layers on top of this. "To supervise and direct executive officers, the President must be able to remove those officers at will. Otherwise, a subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting). *Humphrey's Executor* dashes this scheme by blessing Congress's creation of free-floating administrative bodies that "are not supervised or directed by the President." *Id.* at 164 (Kavanaugh, J., dissenting).

"Because of *Humphrey's Executor*, the President cannot remove an independent agency's officers when the agency pursues policies or makes decisions the President disagrees with." *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). This effectively means that "the President does not have the final word in the Executive Branch about" policy decisions made by independent agencies. *Id.* at

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[8] These removal protections cause "a rather curious distortion of our constitutional structure." *Feds for Med. Freedom*, 63 F.4th at 390 (Ho, J., concurring).

446 (Kavanaugh, J., concurring). And the President "lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch[.]" *Id.* at 442 (Kavanaugh, J., concurring).

This is not just a theoretical problem. The FTC's failed prosecution of Qualcomm is a perfect example, putting the FTC at odds with the Department of Justice ("DOJ"), which shares authority to enforce federal antitrust laws. *See FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019). Unlike the Executive-controlled DOJ, the President cannot rein in the FTC. This has happened before. And the agencies have opposed one another during prior Administrations, particularly during periods of divided government. *See* Daniel A. Crane, *Debunking Humphrey's Executor,* 83 Geo. Wash. L. Rev. 1835, 1854 (2015). So too the Nuclear Regulatory Commission stymying the Department of Energy's efforts to close Yucca Mountain. *See In re Aiken Cty.*, 645 F.3d at 448 (Kavanaugh, J., dissenting).

More recent examples abound. Consider the efforts by three Consumer Product Safety Commission ("CPSC") Commissioners appointed by the prior Administration to actively thwart the current President's policies. *See* Gov't Stay App. at 7–9, 19, *Trump v. Boyle*, No. 25A11 (U.S., filed July 2, 2025). The National Labor Relations Board ("NLRB") and Merit Systems Protection Board ("MSPB") offer similar cautionary tales. *See Harris*, 2025 WL 980278, at *19 (Walker, J., concurring) (detailing harms from reinstatement of removed officials).

That is no small thing. "By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause." *Seila Law*, 591 U.S. at 276 (Breyer, J., dissenting) (citation omitted); *see Free Enter. Fund*, 561 U.S. at 549–56 (Breyer, J., dissenting) (Appendix A listing agencies). "Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause[.]" *Seila Law*, 591 U.S. at 261 (Breyer, J., dissenting).

These free-floating administrative bodies are, "in effect, a headless fourth branch of the U.S. Government."[9] *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). And they "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy. The list goes on." *Id.* at 170 (Kavanaugh, J., dissenting). "Such a system of disembodied independent agencies with enormous power over the American people and American economy" breaks the Constitution's promise of "democratic accountability" and runs counter to our Nation's history and tradition. *Consumers' Rsch.*, 145 S. Ct. at 2517–18 (Kavanaugh, J., concurring). And as this Court has suggested, irreparable harm flows from allowing agency heads to retain their positions

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[9] As the now-FTC Chairman has observed: "Americans cannot vote us out when we get it wrong. And Congress has tried to insulate us from the one person in the Executive Branch whom the people can vote out[.]" Dissenting Statement of Commissioner Andrew Ferguson, *In the Matter of the Non-Compete Clause Rule*, Matter No. P201200, at 7 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

against the President's wishes. *See Wilcox*, 145 S. Ct. at 1416–17; *Boyle*, 145 S. Ct. at 2654. This state of affairs should not stand.

IV. The Time Has Come to Inter *Humphrey*'s *Executor*.

This Court should "place[] a tombstone on" *Humphrey's Executor* that "no one can miss." *Loper Bright*, 603 U.S. at 417 (Gorsuch, J., concurring). "[*S*]*tare decisis* should be no barrier to overruling" *Humphrey's Executor*.[10] Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 Federalist Soc'y Rev. 216, 223 (2021).

A. *Humphrey's* Was Poorly Reasoned.

Humphrey's Executor was not only poorly reasoned but its constitutional holding has become lonelier with time. *See generally Seila Law,* 591 U.S. at 243–51 (Thomas, J., concurring in part, dissenting in part) (explaining why). It "laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Id.* at 246 (Thomas, J., concurring in part, dissenting in part). All in "six quick pages devoid

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[10] In any event, "it may be that *stare decisis* is not even applicable in this context; because *Myers* has never been overruled, the Court's precedents on removal power could be viewed as conflicting, requiring the Court to pick one line or the other." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 223; *see Harris*, 2025 WL 980278, at *7 (Walker, J., concurring).

of textual or historical precedent[.]" *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting).

On its terms, "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Seila Law*, 591 U.S. at 216. In upholding the FTC Commissioners' statutory for-cause removal protections, the *Humphrey's* Court placed great weight on its view that the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." 295 U.S. at 624. It described the 1935 FTC as acting "as a legislative or as a judicial aid."[11] *Id.* at 628. "Such a body," the Court found, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id*. Based upon this understanding of the 1935 FTC, the Court concluded that this administrative body did not "exercise executive power in the constitutional sense." *Id.* And thus FTC Commissioners "occup[y] no place in the executive department and . . . exercise[] no part of the

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[11] *Cf.* Powers and Duties of the Fed. Trade Comm'n in the Conduct of Investigations, 34 Op. Att'y Gen. 553, 557 (1925) ("A main purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation.").

executive power vested by the Constitution in the President."[12] *Id.*

Humphrey's thereby "approved the concept of an agency that was controlled by (and thus within) none of the Branches." *Mistretta v. United States*, 488 U.S. 361, 423 (1989) (Scalia, J., dissenting). It "relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of 'the executive power vested by the Constitution in the President.'"[13] *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring in part, dissenting in part) (quoting *Humphrey's Executor*, 295 U.S. at 628).

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[12] This understanding of the 1935 FTC's powers was informed by the parties' briefs. The brief for Humphrey's Executor described the FTC as "a legislative agent of Congress and an agent of the Courts." Br. for Samuel Rathbun, Executor, 1935 WL 32964, at *47 (filed Mar. 19, 1935). The brief asserted that the FTC's activities as a "direct agent of Congress is perhaps the most important single function performed by the Commission," "estimat[ing] that approximately one-half of the total amount expended by the Commission has been spent on account of investigations undertaken as such an agent of Congress in aid of legislation[.]" *Id.* at *44–*46. The government, for its part, effectively acknowledged that the FTC's primary duties were conducting investigations and submitting "Reports to Congress on special topics[.]" Br. for the United States, 1935 WL 32965, at *24–26 (filed April 6, 1935).

[13] "Remarkably, the [*Humphrey's*] Court did not pause to examine how a purpose to create a body 'subject only to the people of the United States'—that is, apparently, beyond control of the constitutionally defined branches of government—could itself be sustained under the Constitution." Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 611–12 (1984).

"The problem is that the [*Humphrey's*] Court's premise was entirely wrong." *Id.* (Thomas, J., concurring in part, dissenting in part). "The allocation of powers in the Constitution is absolute[.]" *Ass'n of Am. R.R.*, 575 U.S. at 69 (Thomas, J., concurring).

As this Court has recognized, *Humphrey's* "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 591 U.S. at 216 n.2. In whichever manner one chooses to describe the vast and varied powers wielded by independent agencies, "under our constitutional structure" *all* of those powers "must be exercises of" Article II executive power.[14] *City of Arlington*, 569 U.S. at 304 n.4 (citing U.S. Const. art. II, §1, cl. 1); *see Arthrex*, 594 U.S. at 17. Indeed, "[i]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Seila Law*, 591 U.S. at 216 n.2 (cleaned up). Therefore, because these entities exercise executive power, "the so-called independent agencies are necessarily part of the Executive Branch, not some headless fourth branch." J.A. 134 (Rao, J., dissenting). Accordingly, these bodies must be subject to presidential control, which necessarily entails at-will removal power.

In short, "consent of the governed is a sham if an administrative agency, by design, does not

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[14] "Congress lacks the power to delegate to Executive Branch officers either the legislative power or the judicial power." *Fleming*, 987 F.3d at 1116 (Rao, J., concurring in part, dissenting in part) (citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001); *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).

meaningfully answer for its policies to either of the elected branches." *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting). But that is what *Humphrey's Executor* allows. *See Ruberoid Co.*, 343 U.S. at 487–88 (Jackson, J., dissenting). That cannot be squared with Article II vesting of *all* executive power in the President. This "demonstrably erroneous interpretation of the Constitution" should be jettisoned for that reason alone. *Gamble v. United States*, 587 U.S. 678, 719 (2019) (Thomas, J., concurring).

B. *Humphrey's Executor* Cannot Be Squared with This Court's Modern Precedent.

Over a series of cases, this "Court has repudiated almost every aspect of *Humphrey's Executor*," *id.* at 239 (Thomas, J., concurring in part and dissenting in part), "eviscerated its reasoning and rejected attempts to extend it to new situations," J.A. 132 (Rao, J., dissenting) (cleaned up). That process began over twenty-five years ago in *Morrison*, which jettisoned *Humphrey's Executor*'s fiction of free-floating "quasi-judicial" and "quasi-judicial" power unmoored from any single branch of government. *See Morrison*, 487 U.S. at 689–91 & nn. 28, 30. "*Morrison* expressly repudiated the substantive reasoning of *Humphrey's Executor*." *Seila Law*, 591 U.S. at 250 n.4 (Thomas, J., concurring in part, dissenting in part). *Cf. id.* at 217 (majority op.). Indeed, "all Members of the Court who heard *Morrison* rejected the core rationale of *Humphrey's Executor*." *Id.* at 249 (Thomas, J., concurring in part, dissenting in part); *see Morrison*, 487 U.S. at 725 (Scalia, J., dissenting).

Then came *Free Enterprise Fund*, which held that "multilevel protection from removal" for Officers "is contrary to Article II's vesting of the executive power in the President." 561 U.S. at 484. Its reasoning marked a further shift away from *Humphrey's* and toward *Myers*. *See In re Aiken Cty.*, 645 F.3d at 444–46 (Kavanaugh, J., concurring) (listing examples). *Free Enterprise Fund* characterized *Myers* as a "landmark" decision. *See Free Enter. Fund*, 561 U.S. at 492. "And it reaffirmed *Myers*' 'principle that Article II confers on the President "'the general administrative control of those executing the laws,' including the removal power." *Harris*, 2025 WL 980278, at *10 & n.107 (Walker, J., concurring) (quoting *Free Enter. Fund*, 561 U.S. at 492 (quoting *Myers*, 272 U.S. at 164)). This "created further tension (if not outright conflict) with *Humphrey's Executor*."[15] *Seila Law*, 591 U.S. at 249 (Thomas, J., concurring in part, dissenting in part).

Next, in *Seila Law* this Court expressly cabined *Humphrey's Executor* to "multimember expert agencies that do not wield substantial executive power[.]" *Id.* at 218 (majority op.). For that reason, after *Seila Law* "*Humphrey's Executor* does not even satisfy its own exception." *Id.* at 250 (Thomas, J., concurring in part, dissenting in part). With *Seila Law*, this Court "repudiated almost every aspect

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[15] *Free Enterprise Fund* may "be read to undermine the constitutionality of any removal restriction that prevents the President from controlling or supervising execution of the laws." Rao, 65 Ala. L. Rev. at 1208.

of *Humphrey's Executor*." *Id.* at 239 (Thomas, J., concurring in part, dissenting in part).

Collins continued to chip away at whatever remained of *Humphrey's Executor*'s already cracked foundation, applying *Seila Law* and observing that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head." 594 U.S. at 251–52; *see id.* at 273 (Kagan, J., concurring in part, dissenting in part) (noting "majority's extension of *Seila Law*'s holding"). "After *Collins*, the only question left on the table appears to be whether an officer protected by a removal restriction exercises executive power." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 222.

Underscoring this, citing *Myers*, this Court recently noted that it has "held that Congress lacks authority to control the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed.'" *Trump*, 603 U.S. at 608–09 (quoting *Myers*, 272 U.S. at 106, 176). This Court reiterated that "[t]he President's management of the Executive Branch requires him to have unrestricted power to remove the most important of his subordinates . . . in their most important duties." *Id.* at 597 (cleaned up). And this Court underscored that the at-will removal authority is one of the President's "core constitutional powers" "within his exclusive sphere of constitutional authority." *Id.* at 606, 609. Assuming one was even needed, that decision may well have put the nail in *Humphrey's Executor*'s coffin.

Most recently, a majority of this Court ghosted *Humphrey's* in its interim docket decisions staying district court injunctions blocking the President's at-will removal of the heads of the NLRB, MSPB, and CPSC. *See Wilcox,* 145 S. Ct. at 1416–17; *Boyle,* 145 S. Ct. at 2654.

In sum, *Humphrey's Executor* has "been mostly ignored in recent years by Supreme Court majorities—like a benched quarterback watching *Myers* (and the original meaning of the Constitution) from the sideline," *Harris*, 2025 WL 980278, at *13 (Walker, J., concurring), and "seems nigh impossible to square with the Supreme Court's current separation-of-powers sentiment," *Consumers' Rsch.*, 98 F.4th at 649 (Willett, J., concurring in the denial of rehearing en banc). And the degree to which *Humphrey's* "runs against mainstream currents in our law regarding the separation of powers," *Loper Bright*, 603 U.S. at 427 (Gorsuch, J., concurring), further counsels in favor of squarely overruling it.

C. Today's FTC Does Not Fit Within *Humphrey's Executor.*

Even on its own terms, *Humphrey's* holding does not cover today's FTC. "Rightly or wrongly, the [*Humphrey*'s] Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"[16] *Seila Law*, 591 U.S. at 215. Indeed, the *Humphrey's*

[16] "[W]hat matters is the set of powers the Court considered as the basis for its decision [in *Humphrey's Executor*], not any latent powers that the agency may have had not alluded to by the Court." *Seila Law*, 591 U.S. at 219 n.4.

Court "seem[s] to have assumed" the 1935 FTC "exercised no governmental power whatever, but merely assisted Congress and the courts in the performance of their functions." *Mistretta*, 488 U.S. at 423 (Scalia, J., dissenting). But regardless of whether *Humphrey's* characterization of the FTC's activities was true in 1935, "the FTC has evolved significantly over time." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 357 (5th Cir. 2024) (Jones, J., concurring in part, dissenting in part).

The 1935 FTC did not remotely resemble *today's* FTC. And the 1935 FTC's powers are not in the same ballpark as those the FTC has today. "[T]he FTC of today wields vastly more *executive* power than it did when the Supreme Court first considered its constitutionality during FDR's first term." *Consumers' Rsch.*, 98 F.4th at 648 (Willett, J., concurring in denial of rehearing en banc). It is beyond dispute "that FTC commissioners are principal officers who exercise 'substantial executive power.'" J.A. 133 (Rao, J., dissenting); *see* J.A. 108–14. (describing FTC's executive powers).

When *Humphrey's Executor* was decided the FTC *did not* have consumer protection authority, independent litigating authority, the power to seek injunctions and money damages directly in federal court, or to bring contempt actions. *See* Crane, 83 Geo. Wash. L. Rev. at 1864. For that matter, the 1935 FTC lacked power to seek *any* retrospective relief, such as restitution and civil penalties. *See Heater v. FTC*, 503 F.2d 321, 321–22 (9th Cir. 1974); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948). And while the 1935 FTC issued procedural "rules" for its inhouse administrative proceedings, *see, e.g., Griffiths*

Hughes, Inc. v. FTC, 63 F.2d 362, 363 (D.C. Cir. 1933), "the agency itself did not assert the power to promulgate substantive rules until 1962," *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 & n.27 (D.C. Cir. 1973).

Congress did not grant the FTC *any* authority to bring enforcement actions in federal court until 1938. It was not until three years *after Humphrey's* that Congress for the first time granted the FTC authority to seek preliminary injunctive relief in federal court for violations of Section 12 of the FTC Act. *See* Pub. L. No. 447, § 13(a), 52 Stat. 111, 115 (1938) (codified at 15 U.S.C. § 53(a)). In 1973, Congress expanded the scope of that authority to cover Section 5, also granting FTC power to seek permanent injunctions and directly enforce subpoenas. *See* Pub. L. No. 93-153, §§ 408(b), (f), 87 Stat. 576, 591–92 (1973) (codified at 15 U.S.C. § 53(b)).

In 1975, Congress further empowered FTC to seek substantial civil penalties for knowing violations of Section 5.[17] *See* Pub. L. No. 93-637, § 205(a), 88 Stat. 2183, 2200–01 (1975) (codified at 15 U.S.C. § 45(m)). That legislation also provided the FTC with authorization to obtain "restitution" and other backward-looking remedies in federal court, as well as authorized FTC to issue regulations banning what it deemed "unfair or deceptive" business practices. *See id.* §§ 202(a), 206(a), 88 Stat. at 2193, 2201 (codified

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[17] Today, FTC uses "Notices of Penalty Offenses" to trigger its authority to seek civil penalties for first-time violators. *See* FTC, Notice of Penalty Offenses, https://www.ftc.gov/enforcement/penalty-offenses.

at 15 U.S.C. §§ 57a, 57b). Since then, Congress has granted the FTC authority to seek civil penalties for violations of other statutes and regulations it promulgates. *See, e.g.*, 15 U.S.C. §§ 1681s(a)(2), 6502(c), 6505(d). Civil penalty authority is "a quintessentially executive power not considered in *Humphrey's Executor*." *Seila Law*, 591 U.S. at 219.

Today's FTC "has enforcement or administrative responsibilities under more than 80 laws."[18] The agency has sweeping power to investigate companies using compulsory process. *See* 15 U.S.C. § 49 (subpoenas); *id.* § 57b-1(c) (civil investigative demands). And it routinely prosecutes companies in federal court.[19] *See also Morrison,* 487 U.S. at 692 n.31 (noting FTC's "prosecutorial power[]" "to bring civil actions to recover civil penalties" (citing 15 U.S.C. § 45(m)); *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34, 63 (D.D.C. 2022) (finding "prosecutor" is "best analogy" for Commissioner voting to bring enforcement action). *See generally AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 72–74 (2021).

The FTC has a "Criminal Liaison Unit [that] helps prosecutors bring more criminal consumer fraud

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[18] FTC, Legal Library: Statutes, https://www.ftc.gov/legal-library/browse/statutes.

[19] The FTC also has inhouse enforcement powers and "houses (and by design) both prosecutorial and adjudicative activities." *Axon v. FTC*, 598 U.S. 175, 189 (2023). The cease-and-desist orders it issues become final and enforceable without Article III involvement in certain circumstances. *See* 15 U.S.C. §§ 45(g), (l).

cases."[20] The FTC has even brought court actions resulting in incarceration. *E.g.*, *FTC v. Cardiff*, No. 18-2104, 2020 U.S. Dist. LEXIS 137800, at *22–24 (C.D. Cal. July 24, 2020) (granting FTC's incarceration request). And the FTC itself has been appointed as a "special prosecutor" to prosecute a criminal contempt action. *FTC v. Am. Nat'l Cellular*, 868 F.2d 315, 322–23 (9th Cir. 1989). The FTC even engages in foreign-affairs activities and is statutorily empowered to "provid[e] assistance to a foreign law enforcement agency[.]" 15 U.S.C. § 46(j)(2).

In sum, today's "FTC bears little resemblance to the" administrative body described by this Court in *Humphrey's Executor*, Crane, 83 Geo. Wash. L. Rev. at 1870, and "has essentially become the executive agency that the *Humphrey's Executor* Court denied it was," *id.* at 1839. That is yet another reason to jettison *Humphrey's in toto*.

D. The Sky Will Not Fall If This Court Erects a Tombstone for *Humphrey's Executor*.

Nor would overruling *Humphrey's Executor* have disruptive consequences or upset reliance interests. *See* Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224. That is because "*Humphrey's Executor* is not necessary to the *existence* of any particular agency." *In re Aiken Cty.*, 645 F.3d at 446 n.5 (Kavanaugh, J., concurring). And "the remedy for holding an independent agency unconstitutional under Article II

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[20] FTC, Criminal Liaison Unit, https://www.ftc.gov/enforcement/criminal-liaison-unit.

is *not* to abolish the agency." *Id.* (Kavanaugh, J., concurring) (citing *Free Enterprise Fund*, 561 U.S. at 508–09). It is instead to "giv[e] the elected and accountable President greater control over the agency (by making the heads of agencies removable at will, not for cause)." *Id.* (Kavanaugh, J., concurring).

"[B]oth *Free Enterprise Fund* and *Seila Law* adopt a strong—perhaps insurmountable—presumption that a removal restriction may be severed from the remainder of a law and an agency's structure and powers thereby left otherwise unchanged." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224; *see Seila Law*, 591 U.S. at 233–38; *Free Enter. Fund*, 561 U.S. at 508–10. And *Collins* takes reliance interests "off the table." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224; *see Collins*, 594 U.S. at 257. Under *Collins*, actions taken by agency officials protected by unconstitutional removal restrictions are not void ab initio and retrospective relief will almost never be available.[21] *See* 594 U.S. at 257–61.

This means that "even an outright overruling of *Humphrey's Executor* and what it came to stand for would upset no one's reliance on the work of independent agencies to date." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224. For that matter, "*Humphrey's Executor* does not affect the size and scope of the administrative state." *In re Aiken Cty.*, 645 F.3d at 446 n.5 (Kavanaugh, J., concurring).

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[21] "[A]n unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)[.]" *Collins*, 594 U.S. at 259.

It is thus hard to see why "this modest step to restore democratic accountability to our federal bureaucracy," *Consumers' Rsch.*, 98 F.4th at 650 (Ho, J., dissenting from denial of rehearing en banc), is objectionable.

Whatever putative "reliance" interest unelected "heads" of free-floating administrative bodies may claim in tenure protections that shield them from accountability, any such interest pales in comparison to the People's interest in representative self-government. "Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design." *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part, dissenting in part). This, too, counsels in favor of putting *Humphrey's Executor* out to pasture for good.

Finally, this Court should not be swayed by any parade-of-horribles handwaving about the Federal Reserve. Any suggestion that overruling *Humphrey's Executor* would somehow require invalidating the for-cause removal protections for Federal Reserve Members and imperil markets lacks merit. As this Court has repeatedly suggested, whatever its merits, the Federal Reserve is *sui generis* and, unlike FTC, appears to have analogs tracing back to the Founding.

"The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States." *Wilcox*, 145 S. Ct. at 1417 (citing *Seila Law*, 591 U.S. at 222, n.8). It "should not be seen as a model for other Government bodies." *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 467 n.16 (2024) (Alito, J., dissenting). For good reason: Unlike law enforcement agencies, "the Fed's most important responsibility is administration of the money supply," which "is not an executive function[.]" *Consumers' Rsch.*, 98 F.4th at 657 (Oldham, J., dissenting from denial of rehearing en banc).

This Court should not "compromise when it comes to our Government's structure." *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part, dissenting in part). There is no reason to do so here. *Humphrey's Executor* has haunted our constitutional halls for far too long; it is time it be allowed to rest in peace.

CONCLUSION

This Court should reverse the decision below and squarely overrule *Humphrey's Executor*.

Respectfully submitted,

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

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