

No. 25-332

In the Supreme Court of the United States

**DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS
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 AMICUS CURIAE OF
THE AMERICAN CENTER FOR LAW AND JUSTICE
IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS¹

Amicus Curiae, the American Center for Law and Justice (“ACLJ”), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared often before this Court as counsel for parties, *e.g.*, *Trump v. Anderson*, 601 U.S. 100 (2024); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); or for amici, *e.g.*, *Trump v. United States*, 603 U.S. 593 (2024); *Trump v. Hawaii*, 585 U.S. 667, 667 (2018); and *Trump v. Int’l Refugee Assistance Project*, 582 U.S. 571, 572 (2017). The ACLJ has a strong interest in defending the constitutional separation of powers and ensuring that each branch of government operates within its proper sphere of authority. The ACLJ is particularly concerned here with preserving the President’s fundamental responsibility to supervise executive officers.

SUMMARY OF ARGUMENT

The Constitution vests the authority to appoint and remove principal officers in the Executive Branch. This power is neither legislative nor judicial in nature; it is an inherent component of executive

¹ Pursuant to Supreme Court Rule 37.6, amicus states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from amicus, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief.

power under Article II. The question here is straightforward: May Congress then insulate FTC Commissioners from presidential removal? These are principal officers wielding substantial executive power. They answer to no one but themselves. The Constitution does not permit this arrangement. The President must be able to remove those who assist him in executing the law, or the Constitution becomes an empty promise and accountability to the people disappears.

First, separation of powers requires that the President have authority to remove FTC Commissioners. The Constitution vests “[t]he Executive power” in the President. U.S. Const. Art. II, Sec. 1. The FTC acts as an arm of the Executive Branch in implementing policy, bringing prosecutions, and enforcing laws. The President must therefore have supervisory authority over officers wielding such substantial executive power. Therefore, insulation of FTC Commissioners from presidential removal violates the separation of powers and distorts constitutional structure.

Humphrey’s Executor does not compel a different result. That decision addressed an at that time fundamentally different agency with sharply limited powers. Regardless of whether *Humphrey’s Executor*, 295 U.S. 602 (1935), was correctly decided for the FTC of 1935, it cannot be stretched to cover *today’s* FTC—an agency that Congress has transformed into a powerful executive enforcer. The FTC’s evolution from the limited agency in *Humphrey’s Executor* to today’s powerful enforcement body has left the analysis of that decision far behind. In short, even if *Humphrey’s Executor* was correctly decided in 1935—

a proposition this Court need not embrace—it does not govern today’s FTC. The agency’s evolution from adviser to enforcer is constitutionally significant, and when an agency’s function changes, so too does the constitutional analysis. The Constitution vests executive power in one President, not in a diffuse collection of unaccountable commissioners. To the extent *Humphrey’s Executor* says otherwise, it should be overruled.

ARGUMENT

The Constitution creates three branches and gives each distinct powers. These three branches, empowered by their respective vesting clauses, establish the foundation upon which the entirety of the federal government rests. This separation of powers is not merely incidental or accidental, it was an explicit and purposeful project, as the Founders understood the dangers of concentrated power. See THE FEDERALIST NOS. 9, 43, 47, 78 (Alexander Hamilton et al.). “The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the summer of 1787.” *Buckley v. Valeo*, 424 U.S. 1, 124 (1976). “No political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than” the Constitution’s separation of powers. THE FEDERALIST NO. 47 (James Madison).

The question before this Court is whether Congress may constitutionally insulate FTC Commissioners, principal officers with substantial executive authority and function, from presidential

removal without violating this constitutional balance. Congress may not; the Constitution does not permit this arrangement. The President must be able to remove those who assist him in executing the law. Separation of powers prohibits Congress from insulating principal executive officers from the President's control. To the extent that *Humphrey's Executor* says otherwise, it must be overruled.

I. The Constitution Vests Appointment and Removal Authority of Principal Officers in the President.

“[B]ecause it would be “impossib[le]” for “one man” to “perform all the great business of the State,” the Constitution assumes that lesser executive officers will “assist the supreme Magistrate in discharging the duties of his trust.” *Seila L. LLC v. CFPB*, 591 U.S. 197, 213 (2020) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)). The Constitution thus grants the power over the appointment of principal officers, as an executive function, to the President and the President alone. U.S. Const. art. II, §1, cl. 1. However, the responsibility and democratic accountability of these actions still lie with the President. To put it another way: “[t]he buck stops with the President, in Harry Truman’s famous phrase.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010). Necessarily pursuant to appointment power, and the “take care” charge, U.S. Const. art. II, §3, the President also “may remove without cause executive officers who exercise that power on his behalf[.]” *Trump v. Wilcox*, 145 S. Ct. 1415, 1416 (2025). *See also Free Enter. Fund*, 561 U.S. at 484 (emphasizing that “[t]he President cannot

‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”).

This Court has recently ruled in a number of cases that removal is indeed a core element of the President’s executive authority, at least with respect to principal officers. *See, e.g., Free Enter. Fund*, 561 U.S. 477 (2010) (holding “dual-for-cause” removal to be unconstitutional); *Seila L. LLC*, 591 U.S. 197 (2020) (holding an agency’s single head with “for-cause” removal unconstitutional). *Cf. United States v. Arthrex, Inc.*, 594 U.S. 1 (2021) (holding that patent judges’ decisions must be reviewable since they were not removable by the President).

These decisions are consistent with the historic understanding of the constitutional structure. The founding generation assumed that the Constitution, not Congress, granted removal power to the President. *See* Aditya Bamazai & Saikrishna Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1761 (2023) (mentioning James Madison, George Washington, Thomas Jefferson, and Alexander Hamilton as examples). The First Congress confirmed this view. *See Free Enter. Fund*, 561 U.S. at 492 (2010) (quoting 1 ANNALS OF CONG. 463 (1789)) (“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.’”); *see also* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021 (2006). It was only much later that Congress changed tack and attempted to modify this constitutional structure with the Tenure of Office Act of 1867. While it was

repealed only twenty years later, this Court acknowledged the historical aberration for what it was, declaring “the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid, and that subsequent legislation of the same effect was equally so.” *Myers v. United States*, 272 U.S. 52, 176 (1926).

Removal powers are similarly necessary for an “energetic” executive, that is, a President that can effectively address new and sudden challenges facing the nation. “[A]ll men of sense will agree in the necessity of an energetic Executive.” THE FEDERALIST NO. 70 (Alexander Hamilton). Hamilton’s “ingredients which constitute energy in the Executive” include “unity” and “competent powers.” *Id.* Thus, the Constitution dictates an executive with unitary authority to carry out his functions.

Energy in the Executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

Id. As a matter of first constitutional principles, when a limitation of the Executive’s removal power is such that it becomes an intrusion of the Legislature into

the Executive's power, and thus its unity, it violates our constitutional order.

II. FTC Commissioners Are Principal Officers Who Exercise Executive Power.

In addition to the President, the federal government includes principal officers, inferior officers, and non-officer employees. This case only asks this Court to rule on the President's removal power over *principal* officers, the apex of the President's power.

"The Constitution for purposes of appointment very clearly divides all its officers into two classes." *United States v. Germaine*, 99 U.S. 508, 509 (1878). "Principal officers are selected by the President with the advice and consent of the Senate. Inferior officers Congress may allow to be appointed by the President alone, by the heads of departments, or by the Judiciary." *Buckley v. Valeo*, 424 U.S. 1, 132 (1976). The Appointments Clause "prescribes the exclusive means of appointing 'Officers [of the United States].'" *Lucia v. SEC*, 585 U.S. 237, 244 (2018). The line between principal and inferior officers is drawn by looking at key factors, such as whether the officer is subject to removal by a higher official, whether the officer is empowered "to perform only certain, limited duties," and whether the authority of the officer is limited by the direction of a superior. *Morrison v. Olson*, 487 U.S. 654, 671 (1988). A key indicium of an officer's status as a principal officer is whether he reports to and is controlled by other officers. *Edmond v. United States*, 520 U.S. 651, 662-63 (1997). As this Court explained:

Generally speaking, the term “inferior officer” connotes a relationship with some higher ranking officer or officers below the President: Whether one is an “inferior” officer depends on whether he has a superior. It is not enough that other officers may be identified who formally maintain a higher rank, or possess responsibilities of a greater magnitude. If that were the intention, the Constitution might have used the phrase “lesser officer.” Rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, we think it evident that “inferior officers” are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate.

Id. at 662-63.

FTC Commissioners answer to no one, if not the President. They are appointed by him and have no direct superior. FTC Commissioners must therefore be principal officers. The executive authority they exercise illustrates this reality. Indeed, today’s FTC bears little resemblance to the agency discussed in *Humphrey’s Executor* in 1935. The subsequent Wheeler-Lea Act empowered the FTC to prohibit “unfair or deceptive acts and practices in commerce.” Wheeler-Lea Act of 1938, Pub. L. No. 75–447, 52 Stat. 111, 111 (1938). The Trans-Alaska Pipeline Authorization Act amendments of 1973 added investigative authority and power to seek preliminary injunctions. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93–153, 87 Stat. 576 (1973). The

Magnuson-Moss Act in 1975 granted rulemaking authority. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93–637, 88 Stat. 2183, 2193 (1975). Thanks to the progress of legislation: “[t]he agency that the Court evaluated in *Humphrey’s Executor* no longer exists.” Eli Nachmany, *The Original FTC*, 77 ALA. L. REV. 49 (forthcoming 2025).

These changes matter. The modern FTC does not just advise Congress or assist courts. It makes rules with the force of law. It prosecutes violations. It subpoenas witnesses with the force of executive authority. It can impose substantial penalties. This is executive power—the power to enforce law, not merely to recommend or investigate. This Court itself has acknowledged these changes: the “conclusion that the FTC [does] not exercise substantial executive power has not stood the test of time.” *Seila L. LLC*, 591 U.S. at 216 n.2.

The FTC now acts not only as a rule-maker and judge, but a prosecutor. The Commissioners do not merely advise; they do not just investigate and report. They have power to subpoena witnesses, 15 U.S.C. § 49, and “to gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce, excepting banks, savings and loan institutions, . . . Federal credit unions, . . . and common carriers.” 15 U.S.C. § 46(a). The Commission may “prosecute any inquiry necessary to its duties in any part of the United States,” 15 U.S.C. § 43. That is executive power.

Nor can the label “independent agency” change the analysis. The Constitution does not recognize such a category. It knows three branches, not four. Just as any judicial decision is ultimately reviewable by Article III courts and the Supreme Court, and any agency rulemaking can be overridden by Article I congressional legislation, *any* exercise of executive power *must* ultimately be controlled by the President. An “independent agency” would completely upend that; it would be the power of the federal government accountable to no one save unelected appointees.

The President is unique, as he is “the only person who alone composes a branch of government.” *Trump v. Mazars USA, LLP*, 591 U.S. 848, 868 (2020). All members of the Executive Branch, including civil service employees, thus derive any authority they may have from the President, and must therefore be subject to the President’s control.

III. To the Extent that *Humphrey’s Executor* Insulates Principal Officers from Presidential Removal, It Should be Overturned.

As discussed *supra*, the FTC in *Humphrey’s Executor* is simply not comparable to the FTC of today. Congress has systematically increased the FTC’s authority in the ninety years since 1935, meaning it is now a different agency in all but name. *Humphrey’s Executor* attempted to fashion a distinction between executive agencies, as discussed in *Myers*, and “quasi-legislative, quasi-judicial” agencies. The FTC at issue in *Humphrey’s Executor* had three limited powers: (1) intra-agency

adjudication leading to cease-and-desist orders enforceable only by courts through prospective relief; (2) corporate investigation and reporting; and (3) service as a master in chancery under court supervision. *See* Eli Nachmany, 77 ALA. L. REV. at 53.

Thus, *Humphrey's Executor* has two possible interpretations: authorizing limited non-executive agencies; or authorizing independent agencies wielding executive power. If it is the former, then the growth of the FTC's power since its decision renders the opinion moot, whether originally correct or not.² The original FTC issued cease-and-desist orders that only courts could enforce, and then only prospectively. It investigated companies and issued reports. It served as a court-appointed master in equitable proceedings. Those powers, while significant, resembled legislative fact-finding and judicial assistance more than executive enforcement. *Id.*

Humphrey's Executor reasoned that the FTC performed “quasi-legislative” and “quasi-judicial” functions. But the modern FTC's functions are not “quasi” anything. They are straightforwardly executive. When an agency prosecutes, adjudicates, and enforces—all without meaningful supervision—it exercises core executive authority. In other words,

² Such a conclusion would be questionable under our Constitution as well, though outside the scope of this case. *See Seila L. LLC*, 591 U.S. at 246 (Thomas, J., concurring in part and dissenting in part) (“*Humphrey's Executor* 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.’”).

although this case brings the FTC back before this Court, the Court need not necessarily decide whether any “quasi-legislative or quasi-judicial” bodies exist at all.

Insofar as *Humphrey’s Executor* goes further, that is it authorizes “independent agencies” wielding executive power, it is incompatible with our Constitution and the separation of powers, as this Court has affirmed. In *Seila Law v. CFPB*, the Court limited *Humphrey’s Executor*, applying it only to agencies that “performed legislative and judicial functions and was said not to exercise any executive power.” 591 U.S. 197, 215 (2020). This interpretation returns to the functional analysis at the heart of the constitutional separation of powers. Similarly, *Free Enterprise Fund v. PCAOB* addressed the critical issue of accountability through its focus on “dual layers” of removal protection. Inferior officers may receive removal protection only when supervised by a superior officer removable by the President. 561 U.S. 477, 484 (2010). That preserves the chain of accountability from the people through the President to those executing the law.

Principal officers in independent agencies cannot claim executive authority which our Constitution and the American voters have placed into the President’s hands. The President must be able to remove officers unaligned with his policy goals and should not be held captive by squatters refusing to leave their office. Justice Thomas’s concurrence in *Seila Law* exposed *Humphrey’s Executor*’s deeper problems. There is no constitutional authority to create “quasi” anything. *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part); see *Arlington v. FCC*, 569

U.S. 290, 305, n.4 (2013) (Even though the activities of administrative agencies “take ‘legislative’ and ‘judicial’ forms,” “they are exercises of—indeed, under our constitutional structure they must be exercises of—the ‘executive Power’” (quoting Art. II, §1, cl. 1)). The Constitution creates three branches with three types of power. Congress cannot invent a fourth branch to escape constitutional limits. “The Constitution establishes three departments of the federal government, and the so-called independent agencies are necessarily part of the Executive Branch, not some headless fourth branch.” App. 26a (Rao, J., dissenting).

The Constitution does not permit Congress to insulate an agency from presidential control. The President cannot faithfully execute the laws if agencies wielding his executive power operate beyond his reach. Democratic accountability would then vanish. The people elect a President to execute the law, but he would not control those doing the executing. That arrangement violates Article II. “The decision in *Humphrey’s Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people.” *Seila L. LLC*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part).

Constitutional analysis must follow function, not labels. The modern FTC’s function is executive. Its commissioners must be removable by the President. “[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.” *Morrison*, 487 U.S. at 690 n.28. Thus, “*Humphrey’s Executor* should be overruled because it

is inconsistent with the Constitution’s vesting of all executive power in the President.” App. 24a (Rao, J. dissenting).

CONCLUSION

Amicus therefore urges this Court to reverse.

Respectfully submitted,

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