

No. 25-332

IN THE
Supreme Court of the United States

DONALD J. TRUMP, et al.,

Petitioners,

v.

REBECCA KELLY SLAUGHTER, et al.,

Respondents.

**On Writ of Certiorari to the U.S. Court of
Appeals for the District of Columbia Circuit**

**BRIEF OF *AMICUS CURIAE* PROFESSOR
MICHAEL T. MORLEY IN SUPPORT OF
NEITHER PARTY**

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INTEREST OF *AMICI CURIAE*¹

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SUMMARY OF ARGUMENT

1. In the event this Court overturns *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), it should afford substantial weight to concerns regarding balance of powers among the branches of the federal government when crafting relief. In particular, it should avoid applying severability doctrine in a manner likely to create a dozen or two powerful new executive agencies Congress never intended, dramatically expanding the President's authority over broad swaths of the economy. *Cf. Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020). Allowing the President to remove an agency's heads at will increases his direct control over every statutory provision and regulation the agency enforces, interprets, or administers. As applied in this context, this Court's typical, statute-specific approach to severability, *see, e.g., Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam), would mask the overall

¹ No counsel for a party authored this brief in whole or in part, and no counsel or party other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

cumulative impact on balance of powers of invalidating most or all restrictions on presidential removal of agency heads throughout the U.S. Code while allowing the underlying grants of power to the Executive Branch to remain intact.

Moreover, had Congress known a particular organic act's restrictions on removal were unconstitutional, Congress would most likely have either reduced the substantive authority it delegated to the Executive Branch or incorporated different methods of cabining that power, rather than simply passing the remainder of the act as-is without those restrictions. This Court's current approach to severability cannot recognize this possibility, and in this context is therefore heavily weighted toward systematically expanding Executive power by simply severing restrictions on removal. *See, e.g., Seila Law LLC*, 591 U.S. at 235, 237; *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010). And once this Court changes the status quo by severing those provisions, a range of factors make it very unlikely Congress will be able to amend the underlying statute to restore its intended balance of powers among the branches by limiting the Executive's authority.

Accordingly, this is the rare case in which this Court might consider applying alternate remedial approaches. For example, it could avoid substantial disruptions by creating an exception to the usual rule, *see Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993), and ruling that, beyond this case, its holding has purely prospective effect only to future statutes purporting to create ostensibly independent agencies,

see, e.g., Johnson v. New Jersey, 384 U.S. 719, 731-32 (1966); *Linkletter v. Walker*, 381 U.S. 618, 638 (1965).

Alternatively, there may be cases where a court—without effectively re-writing a statute—could alleviate any constitutional problem by enjoining the agency from exercising a particular grant of power or performing a certain function in order to eliminate the constitutional need for presidential control, rather than invalidating the applicable restrictions on the President’s removal authority. *Cf. Seila Law LLC*, 591 U.S. at 237. Finally, if this Court declares that removal restrictions are inseverable from the rest of an organic act, it can stay its ruling—allowing the agency to continue operating in the interim—to give Congress an opportunity to craft a successor agency based on an appropriate balance of powers among the government’s branches. *See, e.g., Buckley*, 424 U.S. at 142; *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982).

2. Conversely, should this Court conclude that the Constitution allows Congress to limit the President’s power to remove the heads of certain independent agencies, it should hold that wrongfully removed officials may seek reinstatement through a writ of mandamus against the other agency heads and other appropriate agency officials. 28 U.S.C. § 1361; *See* 3 WILLIAM BLACKSTONE, COMMENTARIES 110 (1769); THOMAS TAPPING, THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND 64 (1853); *see, e.g., James Bagg’s Case* (1615), 77 Eng. Rep. 1271; 11 Co. Rep. 93b (K.B.); *Knipe v. Edwin* (1695), 87 Eng. Rep.

394, 394, 4 Mod. 281 (K.B.); *Rex v. Blooer* (1760), 97 Eng. Rep. 697, 699, 2 Burr. 1043, 1045 (K.B.).

If the position has already been filled, however, it may be necessary for the wrongfully removed official to instead seek quo warranto, TAPPING, *supra* at 77, pursuant to appropriate statutory procedures, against their successor, *see* D.C. Code §§ 16-3501 to -3503. Injunctive relief, in contrast, was historically unavailable as a remedy for wrongful removal from public office, *In re Sawyer*, 124 U.S. 200, 212 (1888).

ARGUMENT

This Court has requested briefing on whether statutory removal protections for members of the Federal Trade Commission (“FTC”) violate separation of powers and whether this Court should overturn *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). *See Trump v. Slaughter*, No. 25A264 (25-332) (U.S. Sept. 22, 2025) (granting stay and petition for certiorari and ordering supplemental briefing). This brief addresses remedial issues that will arise depending on how this Court chooses to resolve these questions.

Part I suggests various ways this Court may take into account the substantial balance of powers concerns among the branches that will arise should this Court overturn *Humphrey’s Executor* and hold that statutory restrictions on the President’s authority to remove the heads of (formerly) independent agencies are unconstitutional. Conversely, Part II demonstrates that, should this Court instead uphold statutory restrictions on the President’s power to remove independent agency

heads, a federal court may issue writs of mandamus or quo warranto against the agency's other commissioners or board members, as well as other appropriate agency personnel, to restore a wrongfully removed Commissioner or board member to office.

**I. SHOULD THIS COURT OVERTURN
HUMPHREYS EXECUTOR, IT SHOULD
GIVE DUE REGARD TO BALANCE OF
POWERS CONCERNS AMONG THE
BRANCHES WHEN CRAFTING RELIEF**

In the event this Court decides that Congress may not constitutionally restrict the President's authority to remove the heads of independent agencies—either in general or in certain cases—this Court should place appropriate weight on balance-of-power concerns at the remedial stage when deciding how its holding applies to existing statutes and agencies. It should not approach severability in a manner which would almost automatically create a dozen or more “purely” executive departments Congress never intended, *see, e.g., Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020), dramatically expand presidential authority over broad swaths of American life, and shift the balance of powers among the federal government's branches even more decisively toward the Executive, *see* ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010) (“We live in a regime of executive-centered government, in an age after the separation of powers, and the legally constrained executive is now a historical curiosity.”); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* x (1973)

("[T]he Presidency[] has got out of control and badly needs new definition and restraint.").

1. This Court should not overlook the unique balance-of-power considerations that will arise should it become necessary to craft relief in this case. *Cf. Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 692 (1987) ("[T]he absence of the [legislative] veto necessarily alters the balance of powers between the Legislature and Executive Branches of the Federal Government."). Allowing the President to remove agency heads at will increases his direct control over every statutory provision and regulation the agency enforces, interprets, or administers. Removing the restrictions that Congress has imposed on particular delegations of authority to the Executive Branch, while allowing those delegations to remain in place, fundamentally alters the "legislative bargain" embodied by the underlying statute. *Id.*

Ordinarily, a court decides whether to sever a statutory provision based on its relationship to the particular law of which it is a part. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 108 (1976). Here, however, scores of federal laws may suffer from the same constitutional defect (depending on the scope of this Court's ruling). A statute-specific seriatim approach to severability in this context, however, would mask the overall cumulative impact on balance of powers caused by invalidating most or all restrictions on removal throughout the U.S. Code while allowing the underlying grants of power to the Executive Branch to remain intact.

Similarly, this Court typically approaches severability in a purely binary matter. It determines whether, had Congress known that a particular provision was unconstitutional, it still would have enacted the remainder of the statute or instead chosen to adopt nothing. *See Brock*, 480 U.S. at 685 (“[T]he unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted.”). This analysis inevitably leads the Court to conclude—especially when a statute contains a severability clause—that Congress would have preferred to pass the remainder of the statute rather than remaining inert and abandoning altogether the policy goals the statute sought to promote. *Seila Law LLC*, 591 U.S. at 235, 237 (“[T]here is nothing in the text or history of the Dodd-Frank Act that demonstrates Congress would have preferred no CFPB to a CFPB supervised by the President. . . . [I]t is far from evident that Congress would have preferred no CFPB to a CFPB led by a Director removable at will by the President.”); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010) (“[N]othing in the statute's text or historical context makes it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will.” (quotation marks omitted)); *see also Brock*, 480 U.S. at 697 (“[W]e cannot conclude that Congress would have failed to enact the Airline Deregulation Act, including the EPP's first-hire program, if the legislative veto had not been included.”). In this context, as applied to all statutes potentially impacted by this Court's ruling, such reasoning results in an

Executive Branch with dramatically enhanced powers.

2. The Court's typical approach to severability works well regarding discrete, limited, self-contained provisions of much larger statutes. For example, in *Reno v. ACLU*, 521 U.S. 844, 882 (1997), this Court concluded that two provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Feb. 8, 1996), which prohibited sending or displaying "indecent" messages to minors, *see* 47 U.S.C. § 223(a), (d) (Supp. 1997), were unconstitutional. There was no serious argument that the rest of the 103-page act dealing with matters such as interconnection and infrastructure sharing for telecommunications-related entities, broadcast licenses, cable services, and a wide range of other issues should have been enjoined or otherwise invalidated as a result. There was no reason to believe that Congress's desire to adopt those completely unrelated sections would have differed had it known about the First Amendment problems with the Act's protections for minors.

The situation is different regarding the elimination of structural statutory restrictions on the Executive Branch. Had Congress known the Constitution bars it from protecting the heads of ostensibly independent agencies from at-will presidential removal, it would not have been stuck with the stark choice between either passing the rest of the statute as-is without the challenged protections, or doing nothing at all and declining to ameliorate the underlying problem the statute was intended to address. *Cf. Seila Law LLC*, 591 U.S. at 235, 237; *Free*

Enter. Fund, 561 U.S. at 509; *Brock*, 480 U.S. at 697. Rather, in many cases, Congress most likely would have adopted an alternate statutory scheme containing different limits or restrictions on the authority it delegated to the Executive Branch. Congress reasonably might have narrowed the scope of the powers it conferred, imposed additional substantive restrictions on them, required the agency to follow additional procedures before exercising those powers, expanded the scope of judicial review, mandated additional reporting, incorporated sunset clauses, or otherwise changed the statute to help preserve the balance of powers among the branches and ensure the Executive remained subject to adequate checks. Of course, the Court is generally not in a position to predict which alternatives Congress might have preferred or re-write a statute to incorporate these hypothetical counterfactual provisions. *Seila Law*, 591 U.S. at 238 (“[W]e cannot re-write Congress’s work by creating office’s terms, and the like.”); *Free Enter. Fund*, 561 U.S. at 509-10 (declining to “blue-pencil” a statute because “editorial freedom . . . belongs to the Legislature, not the Judiciary”). But this analysis demonstrates that current severability doctrine will not only dramatically upset the balance of powers among the branches, but do so in a way that is unlikely to accurately reflect Congress’s (hypothetical and counterfactual) intent.

3. Once this Court alters the status quo by severing restrictions on executive authority from the underlying statutory grants of power to the Executive Branch, it will be difficult for Congress to change that result, even if a majority of members wish to do so. At

any given time, numerous important bills are pending in each chamber that congressional majorities would support, but there is no political incentive to push them onto Congress's limited legislative agenda. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 98-99 (1988). Bills vindicating checks and balances and other structural principles must compete against budgets, appropriations measures, and other bills responding to crises or other more immediate, tangible concerns. Likewise, bills that promote the broad public interest or fundamental background principles can lose out to measures that benefit concentrated, well-financed constituencies which have a substantial incentive to push them through the process. *Id.* at 105; see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965).

Moreover, merely by establishing a new status quo, a court ruling severing a law can generate new constituencies which benefit from that outcome and are able to mobilize against legislative efforts to modify it. And the legislative process is comprised of over a dozen vetogates: points at which a bill can be defeated. See William N. Eskridge, Jr., *Vetogates, Chevron, and Preemption*, 83 NOTRE DAME L. REV. 1441, 1444-48 (2008). Even a measure with broad support can be killed at any point along the lengthy process if it is opposed by a major constituency of a Representative or Senator who controls a vetogate. See JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* 105 (1997); Michael Sant'Ambrogio, *The Extra-Legislative Veto*, 102 GEO. L.J. 351, 377 (2014). Finally, and perhaps most importantly in this context,

when judicial rulings enhance the Executive's power, the President can protect such windfalls by vetoing attempts to amend or repeal the underlying statutes. U.S. CONST. art. I, § 7, cl. 2. Particularly in our modern hyperpartisan environment, it is extremely unlikely that Congress would be able to muster the supermajorities required to overcome a veto. *See* U.S. Senate, *Veto*, 1789 to Present, <https://www.senate.gov/legislative/veto/vetoCounts.htm>. Thus, this Court should not assume that Congress will reject a judicial severability decision of which majorities in each chamber disapprove.

4. *Humphrey's Executor* is a nearly century-old precedent. Congress has long acted in reliance on it, *see* Brief of 27 Members of Congress as *Amici Curiae* in Support of Appellees and Affirmance, *Boyle v. Trump*, No. 25-1687, D.E. #47, at 15-17 (4th Cir. filed Aug. 29, 2025) (identifying agencies and citing for-cause removal restrictions), and numerous major modern agencies are dependent on it. For the reasons discussed above, a remedial approach that effectively requires courts to simply sever most or all removal restrictions would dramatically enhance the President's authority, disrupt the balance of powers among the branches, fail to accurately reflect Congress's intentions concerning the extent of power it wishes the Executive Branch to have, and likely be highly resistant to efforts at reform or repeal. Conversely, deeming laws containing such restrictions to be inseverable would, in many cases, be impracticable and risk major economic disruptions.

Consequently, this is the rare case where the Court should consider either applying an alternative

remedy or directing lower courts to do so in future cases. For example, this Court could rule that, beyond this case, its holding otherwise has purely prospective effect and is not retroactively applicable to other extant agencies. This approach would require an exception to holdings generally requiring that new rulings be applied retroactively. See *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993); *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987). But it is comparable to the Court's implementation of many of the new constitutional rights and remedies it recognized in the mid-Twentieth Century concerning states' criminal justice systems. For example, this Court did not require *Miranda* warnings until its 1966 ruling in *Miranda v. Arizona*, 384 U.S. 436 (1966). The Court has held that *Miranda* "safeguards a fundamental trial right." *Withrow v. Williams*, 507 U.S. 680, 691 (1993) (quotation marks omitted). Despite its importance, however, this Court concluded that *Miranda* "should not be applied retroactively." *Johnson v. New Jersey*, 384 U.S. 719, 731-32 (1966). Rather, *Miranda* extended only to trials that began after that ruling was handed down. *Id.*

This decision was driven in large part by practical considerations. Applying *Miranda* retroactively "would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Id.* at 731. The Court emphasized, "[W]e do not disparage a constitutional guarantee in any manner by declining to apply it retroactively." *Id.* at 728; see also *Linkletter v. Walker*, 381 U.S. 618, 638 (1965) (declining to apply *Mapp v.*

Ohio, 367 U.S. 643, 655 (1961), retroactively to avoid “serious[] disrupt[ion] [to] the administration of justice”). It may be appropriate to similarly apply a ruling overturning *Humphrey’s Executive*, beyond this case, only to future statutes.

Alternatively, there may be cases where a court—without effectively re-writing a statute—could alleviate any constitutional problem by enjoining the agency from exercising a particular grant of power or performing a certain function in order to eliminate the constitutional need for presidential control, rather than invalidating the applicable restrictions on the President’s removal authority. *Cf. Seila Law LLC*, 591 U.S. at 237 (recognizing there can be multiple ways of resolving constitutional problems created by statutory restrictions on the President’s removal power over agency heads); *Free Enter. Fund*, 561 U.S. at 509 (“[T]he language providing for good-cause removal is only one of a number of statutory provisions that, working together, produce a constitutional violation.”).

Finally, this Court might rule that when a statute with a removal restriction is inseverable, the appropriate remedy is to direct and immediately stay issuance of a formal mandate for a specified period of time. *See* Sup. Ct. R. 45.3. This approach would allow agencies to continue their current operations until the mandate issues. During that time, Congress may craft and enact a new law containing what it deems to be the proper allocation of authority between the Legislative and Executive Branches. In *Buckley v. Valeo*, for example—which held unconstitutional the

structure of an earlier incarnation of the Federal Election Commission (“FEC”)—this Court

stay[ed], for a period not to exceed 30 days, [its] judgment insofar as it affects the authority of the [FEC] to exercise the duties and powers granted it under the Act. This limited stay . . . afford[ed] Congress an opportunity to reconstitute the Commission by law or to adopt other valid enforcement mechanisms without interrupting enforcement of the provisions the Court sustain[ed], allowing the . . . Commission in the interim to function de facto in accordance with the substantive provisions of the Act.

424 U.S. 1, 142 (1976) (per curiam); *see also N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982) (“[W]e stay our judgment until October 4, 1982” to “afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws.”).

The prospect of this Court completely enjoining both the challenged statute as well as the operations of the agency it created when the mandate eventually issues would likely induce interparty and interbranch negotiation and compromise. Such cooperation would be far less likely if this Court instead allowed the Executive Branch to retain all of its statutory grants of authority while severing the restrictions Congress had placed upon them.

**II. CONVERSELY, IF CONGRESS MAY LIMIT
THE PRESIDENT'S REMOVAL AUTHORITY
OVER INDEPENDENT AGENCY HEADS,
WRITS OF MANDAMUS AND QUO
WARRANTO ARE APPROPRIATE
REMEDIES TO RESTORE WRONGFULLY
REMOVED OFFICIALS TO OFFICE**

This Court requested briefing on whether “a federal court may prevent a person’s removal from public office, either through relief at equity or at law.” *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). See *Trump v. Slaughter*, No. 25A264 (25-332) (U.S. Sept. 22, 2025). Although injunctive relief would face obstacles, a federal court may restore a wrongfully removed agency head to office through a common law writ of mandamus or quo warranto to the agency’s remaining commissioners or board members, as well as other appropriate agency personnel.

1. The availability of equitable relief to return a wrongfully removed official to public office is debatable. Only a few months ago, this Court reaffirmed that federal courts may grant “only those sorts of equitable remedies ‘traditionally accorded by courts of equity’ at our country’s inception.” *Trump v. CASA, Inc.*, 606 U.S. 831, 832 (2025) (quoting *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 (1999)); see also Michael T. Morley, *The Federal Equity Power*, 59 B.C. L. REV. 217, 220 (2018) (explaining that current doctrine requires federal courts to “apply a uniform body of federal equitable principles tracing back to the English Court of Chancery—as interpreted by the Supreme Court—when deciding whether to grant

equitable relief, regardless of whether the underlying claim arises under federal or state law” (citing *Guaranty Trust Co. v. York*, 326 U.S. 99, 104-05 (1945))).

“It is a principle of universal application that an injunction will not issue when its object is to try title to public office.” 1 JOHN NORTON POMEROY, JR., A TREATISE ON EQUITABLE REMEDIES; SUPPLEMENTAL TO POMEROY’S EQUITY JURISPRUDENCE, § 333, at 589 (1905). Equity historically neither extended to “political rights” nor applied where an “adequate remedy at law” existed. *Id.*; see also *In re Sawyer*, 124 U.S. 200, 212 (1888) (“[A] court of equity has no jurisdiction over the appointment and removal of public officers The jurisdiction to determine the title to a public office belongs exclusively to the courts of law”); accord *White v. Berry*, 171 U.S. 366, 376-77 (1898).

2. Since the early Seventeenth Century, English courts recognized mandamus—a remedy at law—as an appropriate remedy for compelling the return of a wrongfully removed person to public office. See Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 745 (2005) (“Mandamus originated in early English cases in which petitioners had been wrongly denied or removed from public office.”); see also James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex Parte Young*, 72 STAN. L. REV. 1269, 1297 (2020) (explaining that, since 1615, “mandamus has regularly empowered courts of common law to compel public officers to . . . restor[e] someone to his citizenship or office”); Audrey Davis, Note, *A Return*

to the Traditional Use of the Writ of Mandamus, 24 LEWIS & CLARK L. REV. 1527, 1540 (2020) (“During the seventeenth and eighteenth centuries, individuals frequently employed mandamus to seek restoration to a public office.”).

Blackstone explains a writ of mandamus was a command in the king’s name issued by the Court of King’s Bench to “any person, corporation, or inferior court of judicature, within the king’s dominions; requiring them to do some *particular* thing therein specified, which appertains to their office and duty . . .” 3 WILLIAM BLACKSTONE, COMMENTARIES 110 (1769). It “may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution to an office . . .” *Id.* He specifically noted, “A mandamus therefore lies to compel the admission or restoration of the party applying, to any office or franchise of a public nature whether spiritual or temporal . . .” *Id.* The writ may be addressed to “an inferior judge or other person.” *Id.*

A nineteenth century treatise echoed these sentiments:

Wherever there is a right to execute an office, to perform a service, or exercise a function or franchise, (more especially if it be a matter of public concern, or attended with profit) and a person is kept out of possession or dispossessed of such a right, and has no specific legal remedy, the Court of [King’s Bench] will assist by mandamus for the sake of justice.

THOMAS TAPPING, *THE LAW AND PRACTICE OF THE HIGH PREROGATIVE WRIT OF MANDAMUS, AS IT OBTAINS BOTH IN ENGLAND, AND IN IRELAND* 64 (1853); *see also* VIII *ENCYCLOPEDIA OF THE LAWS OF ENGLAND: LODGER TO MORTGAGE* (A. Wood Renton, ed. 1898) (“The remedy by mandamus is frequently applied to compel the . . . restoration to certain public offices and franchises.”). Thus, the writ of mandamus “lies to restore to the office of alderman one improperly removed therefrom.” TAPPING, *supra* at 88; *see also id.* at 92 (“It lies also to restore to the office of archdeacon.”); *id.* at 105 (“It lies to command restoration to the office of Capital Burgess”); *id.* at 185 (“So a mandamus to restore to such office [clerk to turnpike trustees] will be granted on an illegal removal.”); *id.* at 191 (“It appears that a mandamus has been granted to restore to the office of master weigher of the King’s Beam”).

One of the earliest and most prominent examples of mandamus being used to restore a wrongfully removed person to public office was *James Bagg’s Case* (1615), 77 Eng. Rep. 1271; 11 Co. Rep. 93b (K.B.). King’s Bench issued a writ to the “mayor and commonality of the Borough of Plymouth.” EDITH G. HENDERSON, *FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW: CERTIORARI AND MANDAMUS IN THE SEVENTEENTH CENTURY* 50 (1963). It declared the Mayor and Commonality “did unduly, unjustly and without reasonable cause remove . . . James [Bagg] from the office of one of the twelve capital burgesses and magistrates” of Plymouth. *Id.* The writ “enjoin[ed]” the respondents to “restore the said James to his aforesaid office of capital burgess and magistrate of the said Borough, with all the liberties,

privileges and benefits pertaining thereto,” or show cause why they would not. *Id.*

In *Knipe v. Edwin* (1695), 87 Eng. Rep. 394, 394, 4 Mod. 281 (K.B.), King’s Bench expressly identified restoration to public office, rather than damages, as the proper remedy for wrongful dispossession. The high steward of Westminster had named Edwin as bailiff of Westminster, while the Dean and Chapter had appointed someone else to the position. *Id.* King’s Bench issued a writ of mandamus ordering the Dean and Chapter to admit Edwin to the position. *Id.* at 395. The court granted such relief, even though Edwin could have pursued an action on the case, since that alternative “will not put the man in possession of the office, for by that he shall only recover damages.” *Id.* Thus, the potential availability of damages was insufficient to prevent a wrongly displaced officeholder from seeking mandamus to restore him to the position.

Mandamus evolved into an effective remedy for wrongly displaced officeholders. “[A]n individual seeking an office from which he had been denied” became “the typical situation in which mandamus was sought during the seventeenth and eighteenth centuries.” Richard E. Flint, *The Evolving Standard for Granting Mandamus Relief in the Texas Supreme Court: One More “Mile Marker Down the Road of No Return,”* 39 ST. MARY’S L.J. 3, 22 (2007). “Redress was accomplished quickly and inexpensively: the ejected common councillor [sic] was reinstated, the applicant for the liberties of a freeman was admitted, and the aborted mayoral election was re-staged.” Kevin Costello, *Mandamus and Borough Political Life, 1615*

to 1780, 42 J. LEG. HIST. 171, 201 (2021). By 1760, Lord Manfield, Chief Justice of King’s Bench, would declare, “A mandamus to restore is the true Specific Remedy where a person is wrongfully dispossessed of any Office or Function which draws after it Temporal Rights, in all cases where the established Court of Law has not provided a Specific Remedy by another form of proceeding.” *Rex v. Blooer* (1760), 97 Eng. Rep. 697, 699, 2 Burr. 1043, 1045 (K.B.).

Mandamus was incorporated into early American practice. In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 170 (1803), Chief Justice John Marshall recognized mandamus was an appropriate remedy to compel even cabinet-level officials to perform their duties. The Court explained that the propriety of mandamus depended on “the nature of the thing to be done” rather than “the office of the person to whom the writ is directed.” It went on to declare that William Marbury had presented “a plain case for a mandamus, either to deliver [his] commission” as a justice of the peace “or a copy of it from the record.” *Id.* at 173.

Echoing *Knipe*, the *Marbury* Court held that detainee—suing to recover the lost salary—was not a sufficient alternative for wrongful deprivation of a public office. *Id.* “The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing.” *Id.*²

² Of course, the Court concluded that Article III barred Congress from granting it jurisdiction to entertain an original petition for a writ of mandamus. *Marbury*, 5 U.S. at 175-76, 180.

Current law gives federal district courts original jurisdiction “of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361; *see, e.g., Alexander v. Fioto*, 430 U.S. 634, 636 n.4 (1977) (exercising jurisdiction over an appeal in a lawsuit for a writ of mandamus against the Secretary of the Army). A party must satisfy three requirements to obtain a writ of mandamus. Each of these requirements is satisfied when a wrongfully removed official seeks a writ of mandamus returning them to their rightful office.

First, the petitioner must have “no other adequate means to attain the relief he desires.” *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004) (quotation marks omitted). If this Court agrees that injunctions may not be used to return a person to office, then mandamus would be the main alternative vehicle for providing such relief. And it has already held that damages alone are an insufficient remedy in such cases. *Marbury*, 5 U.S. at 173.

Second, the petition must have a “clear and indisputable” right to the writ. *Cheney*, 542 U.S. at 381 (quoting *Kerr v. U.S. Dist. Court for the N. Dist. of Cal.*, 426 U.S. 394 (1976)). This requirement would automatically be satisfied if this Court concludes that Congress may constitutionally limit the President’s authority to remove independent agency heads, and the President violates such a restriction. The removal would be illegal, and the officeholder would have a clear and indisputable right to retain their position.

Third, the court “must be satisfied that the writ is appropriate under the circumstances.” *Id.* The United States argues that separation-of-powers concerns counsel against restoring wrongfully displaced federal officers to their positions. *Brief for the Petitioners* at 38-40. But such concerns are best addressed at the merits stage, in determining whether Congress may validly restrict a President’s ability to remove certain agency heads. It makes little sense to hold that Congress has the power to protect independent agency heads from removal, but that Article II requires Congress to protect such restrictions only through liability rules (i.e., *ex post* damages claims). See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability Rules: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (explaining entitlements may be protected either by liability rules or property rules). Such a misguided approach would effectively allow the President to violate statutory restrictions by paying for the privilege. See also Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2471-80 (2014) (applying the Calabresi & Melamed “Cathedral Model” to constitutional disputes and arguing that constitutional restrictions generally should not be enforceable solely through liability rules); cf. *Wiener v. United States*, 357 U.S. 349, 349, 356 (1958) (holding, in a suit for backpay, that the President lacked constitutional and statutory authority to remove a member of the War Claims Commission). While backpay alone might make the wrongfully removed official economically whole, such limited relief fails to vindicate Congress’s interest—and the public’s interest—in ensuring that certain agencies

perform their functions free of partisan interference. *See, e.g., Wiener*, 357 U.S. at 356 (“[I]t must be inferred that Congress did not wish to have hang over the Commission the Damocles’ sword of removal by the President for no other reason than that he preferred to have on that Commission men of his own choosing.”).

For a writ to be “appropriate,” however, it should be directed toward the other agency heads and appropriate personnel, compelling them to allow the petitioner to continue exercising the powers of his or her office. Separation of powers concerns counsel that the writ should not be directed against the President. *Cf. Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867) (“[T]his court has no jurisdiction of a bill to enjoin the President in the performance of his official duties”); *see also Franklin v. Massachusetts*, 505 U.S. 788, 802-03 (1992) (questioning whether a President “might be subject to a judicial injunction requiring the performance of a purely ministerial duty” (quotation marks omitted)).

Accordingly, if this Court concludes Congress may validly limit the President’s ability to remove the heads of at least certain independent agencies, a court generally may return wrongfully removed commissioners or board members to office through a properly crafted writ of mandamus.

3. A writ of mandamus may not be available, however, when an agency head is wrongfully removed and someone else has been appointed to fill the vacancy. “For the consequence of granting a rule in such a case, would be that a second person would be admitted to an office already filled by another”

TAPPING, *supra* at 77. The proper remedy in such cases would be quo warranto to oust the incumbent and allow the wrongfully removed official to resume their position. *Id.*; see also HORACE G. WOOD, A TREATISE ON THE LEGAL REMEDIES OF MANDAMUS AND PROHIBITION, HABEAS CORPUS, CERTIORARI, AND QUO WARRANTO 73 (2d ed. 1891).³

In American practice, quo warranto may be sought only by, or in the name of, the Government. *Wallace v. Anderson*, 18 U.S. 291, 292 (1820). An individual may seek such relief in the Government’s name only when authorized by statute. *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 502 (1933); see also *Nebraska Territory v. Lockwood*, 70 U.S. 236, 239-40 (1865) (“The right to institute such proceedings is inherently in the Government of the nation.”). The proceedings “must be brought against the person who is charged with exercising an office or authority without lawful right.” *Johnson*, 289 U.S. at 502.

The U.S. District Court for the District of Columbia may issue a quo warranto in the name of the United States against any person who, within the District of Columbia, “usurps, intrudes into, or unlawfully holds or exercises . . . a public office of the United States, civil or military.” D.C. Code § 16-3501. A private party may ask the Attorney General or U.S. Attorney to institute such an action. *Id.* § 16-3502. Should the Attorney General refuse to do so, that party may petition the court to issue the writ in the name of the United States. *Id.* § 16-3503. The court may grant the petition, making that party a relator, if

³ Mandamus and quo warranto have been described as potentially “concurrent remedies.” TAPPING, *supra* at 78.

“the reasons set forth in [it] are sufficient in law.” *Id.*; *see also id.* § 16-3502 (“The writ may not be issued on the relation of a third party except by leave of the court . . .”). The court may require the relator to post bond. *Id.* § 16-3502. *See generally Andrade v. Lauer*, 729 F.2d 1475, 1498 (D.C. Cir. 1984).

A relator “must have a personal interest in the office [at issue] before he can sue in the name of the United States” through quo warranto. *Newman v. United States*, 238 U.S. 537, 551 (1915). Such an interest is not “common to every other member of the public.” *Id.* at 551; *see also Andrade*, 729 F.2d at 1498 (“[A] claimant to the [quo warranto] defendant’s office” may be “sufficiently ‘interested’ to bring a quo warranto action.”). Accordingly, when a person claims to have been wrongfully removed from office, and that position has been subsequently filled, quo warranto pursuant to the D.C. Code’s statutory requirements is an appropriate form of relief. *See also Bessent v. Dellinger*, 145 S. Ct. 515, 517 (2025) (Gorsuch, J., dissenting from order holding application for interim relief in abeyance) (discussing the “(potential) availability of quo warranto” for a federal official who claims to have been wrongfully removed).⁴

⁴ Of course, the D.C. Code’s quo warranto provisions appear to be inapplicable to federal offices located outside the District of Columbia. *See* D.C. Code § 16-3501. This Court should leave open the possibility that, in the absence of statutory authorization for quo warranto proceedings concerning federal offices outside of Washington D.C., a petitioner seeking restoration to such a position may be able to pursue mandamus, even if the position has been subsequently filled.

CONCLUSION

For these reasons, in the event this Court overturns *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), it should give due regard to balance-of-power concerns among the branches in crafting relief. Conversely, if this Court affirms Congress' authority to establish independent agencies under certain circumstances, then it should hold that federal courts may return a wrongfully removed agency head to office through a writ of mandamus or quo warranto.

Respectfully Submitted.

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