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 DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RICHARD P. HUTCHISON
LANDMARK LEGAL FOUNDATION
3100 Broadway,
Suite 1210
Kansas City, MO 64111

MATTHEW C. FORYS
Counsel of Record
MICHAEL J. O'NEILL
LANDMARK LEGAL FOUNDATION
19415 Deerfield Avenue,
Suite 312
Leesburg, VA 20176
(703) 544-6100
matt@landmarklegal.org

Attorneys for Amicus Curiae

October 17, 2025

120683

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Page

Page

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Landmark Legal Foundation ("Landmark") is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution and individual rights. Landmark has filed amicus briefs to restore the separation of powers in multiple cases, such as *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020) and *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 145 S. Ct. 414 (2024).

Landmark urges this Court to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

INTRODUCTION AND SUMMARY OF ARGUMENT

Humphrey's Executor v. United States, 295 U.S. 602 (1935), "laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases." *Seila Law, LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 246 (2020) (Thomas, J., concurring in part, dissenting in part). Despite the weight of authority against it: the Constitution, the Federalist Papers, the Decision of 1789, and a judicial

---

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

opinion from the only man to serve as President and Chief Justice, William H. Taft, *Humphrey's Executor* still stands. *Myers v. United States,* 272 U.S. 52 (1926), held that the power to remove appointed executive officers is vested in the President. Less than a decade later, the *Humphrey's Executor* Court upheld the Federal Trade Commission's statutory removal protection, distinguishing it from *Myers* due to the Commission's structure and function. The Court asserted that to the extent the FTC engaged in any executive function, not "executive power in the constitutional sense," it did so in discharge of quasi-legislative or quasi-judicial powers. *Humphrey's Executor*, 295 U.S. at 628. But Congress cannot alter the boundaries of the branches of government by mere statute. The case was wrongly decided in 1935 and continues to distort the constitutional order.

Almost a century after *Humphrey's Executor*, the FTC does not resemble Justice Sutherland's vision of an agency staffed by apolitical experts wielding only quasi-legislative and quasi-judicial powers. The FTC's Commissioners, like the leadership of other federal agencies, frequently have professional backgrounds common to other political appointments. And despite the assertion that their long terms of office would develop their technical expertise, they often leave early. The vision of an efficient government in service to the American people has not been fulfilled. "[A] system of disembodied independent agencies with enormous power over the American people and American economy operates in substantial tension with the principle of democratic accountability incorporated into the Constitution's text and structure, as well as historical practice and foundational Article II precedents." *Fed. Com. Comm'n v. Consumers' Rsch.*, 145 S. Ct. 2482, 2518 (2025) (Kavanaugh, J., concurring).

The consequences of *Humphrey's Executor*—a federal bureaucracy insulated from presidential control—have been detrimental to political accountability and individual liberty. The Court should correct the course it has taken since *Humphrey's Executor* and return to first principles: "The executive Power shall be vested in a President of the United States." Art. II, § 1, cl. 1. "[T]his does not mean *some of* the executive power, but *all of* the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

Even though it has been narrowed over time by the Court, *Humphrey's Executor* should now be explicitly overruled.

ARGUMENT

I. The Constitution, as expounded by the Federalist Papers, ratification debates, and the Decision of 1789, gives the President the power to remove executive officers like FTC Commissioners.

A. The Federalist Papers and ratification debates support a separation of powers with executive power vested in a single person.

The separation of powers in our constitutional system is "essential to the preservation of liberty," according to James Madison. The Federalist No. 51, p. 348 (J. Cooke ed. 1961) (J. Madison). He explained that "the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other." *Id.* at 349. The purpose of divided government was to "[diffuse] power the better to secure liberty." *Bowsher v. Synar*, 478 U.S.

714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

Not only was executive power vested in one branch in Article II, but it was also granted to a single person. This was a point of contention at the Constitutional Convention, where James Wilson was the chief proponent for a "single magistrate" as opposed to multiple administrators. The Constitution of the United States of America: Analysis and Interpretation 455-56 (Kenneth R. Thomas & Larry M. Eig eds., Centennial ed. 2013). Wilson reasoned that it would give the "most energy dispatch and responsibility to the office." 1 Records of the Federal Convention of 1787, at 65 (Max Farrand ed., 1911). At the Pennsylvania Ratifying Convention, he expanded upon the virtue of responsibility, noting that it is more difficult for a single executive to hide his misconduct. "The executive power is better to be trusted when it has no screen." 2 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 480 (2d ed. 1888). And he tied responsibility to the staffing of the government. With a single person, "no appointment can take place without his nomination; and he is responsible for every nomination he makes." *Id.*

By contrast, independent agencies like the FTC diffuse responsibility. Ultimately, independent agencies are "wholly accountable neither to the President nor to Congress." Michael Uhlmann, *A Note on Administrative Agencies*, *in* The Heritage Guide to the Constitution 278 (David F. Forte & Matthew Spalding eds., 2d ed. 2014). They are "specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President's accountability to the people."

Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (internal quotation marks and alteration omitted).

Justice Kagan admitted in her dissent in *Seila Law* that "[n]ot every *innovation in governance*—not every experiment in administrative independence—has proved successful." *Seila Law,* 591 U.S. at 262 (Kagan, J., concurring in judgment with respect to severability and dissenting in part) (emphasis added). She argued, however, that "the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about administrative structure to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture." *Seila Law*, 591 U.S. at 262. This deference to the political branches that the Constitution supposedly requires should not trump the judiciary's duty to interpret the law. Mirroring her language, Alexander Hamilton once wrote that an independent judiciary is necessary to protect the Constitution and individual liberty from ill-conceived innovations in governance.

> This independence of the judges is equally requisite to guard the constitution and the rights of individuals from the effects of those ill humours which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which . . . have a tendency in the mean time to occasion *dangerous innovations in the government*, and serious oppressions of the minor party in the community.

The Federalist No. 78, p. 527 (J. Cooke ed. 1961) (A. Hamilton) (emphasis added).

It is true that the Constitution does not specifically address the President's right to remove executive officers. But the separation of powers "is undoubtedly carved into the Constitution's text by its three articles separating powers and vesting the Executive power solely in the President." *Trump v. United States*, 603 U.S. 593, 637-638 (2024) (quoting *Seila Law*, 591 U.S., at 227, 140). And the Consumer Financial Protection Bureau (CFPB) itself, at issue in *Seila Law*, showed how an independent agency is inherently at odds with the separation of powers. The lengths to which Congress tried to make the CFPB a near autonomous agency were remarkable. Among many features of independence, the CFPB director was granted a five-year term with removal protection and could stay in office beyond the term until a successor was appointed and qualified. 12 U.S.C. § 5491(c)(1). As originally conceived by Congress, it would thus be possible that a President would not be able to appoint his own director. And depending on partisan control of the Senate, a director or the director's hand-picked deputy could theoretically stay in the post indefinitely. *See* 12 U.S.C. § 5491(b)(5). Just like the FTC, the CFPB was not a legislative or judicial aid or a tiny agency with a limited purview. The director wielded "vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *Seila Law*, 591 U.S. at 203.

If Congress can insulate the administration of consumer finance statutes from the President, what limiting principle prevents it from similarly cordoning off other departments from direct presidential control?

See Seila Law, 591 U.S. at 228 n. 11. The *Seila Law* dissent from Justice Kagan suggested that Congress could not disrupt the President's "performance of his own constitutional duties" such as restricting the removal of "close military or diplomatic advisers." *Id.* at 276. But if a central critique of the President's unfettered removal power is that it is not explicitly provided for in the Constitution, the same argument applies to the dissent's proposed carve out as well. This would allow a multi-headed executive branch, a form of government specifically rejected at the Constitutional Convention.

Justice Kagan's dissent raised the issue of when Congress and the President have "disagreements about administrative structure." *Id.* at 262. But in such cases the statute prevails. Despite all the powers afforded to the President, revoking or ignoring laws passed that chip away at the power of the executive is not among them. Beyond the legislative veto, which can be overridden by a determined Congress, it is unclear how else the President is constitutionally empowered to protect his authority from the statutory creations of Congress. The power and responsibility of judicial review lie solely with the federal courts. And while the argument proffered by the *Seila Law* dissent that the subject matter expertise of the political branches should be respected is well-taken, the dissent sidesteps the role of the Court as a watchdog against constitutional violations.

Another critique of the argument for presidential removal power is that Alexander Hamilton initially wrote in the Federalist Papers that the Senate, if consulted for removals as well as appointments, would act as a stabilizing force for the executive branch. The Federalist

No. 77, p. 515 (J. Cooke ed. 1961) (A. Hamilton). But this does not provide the full picture. Hamilton was a vocal proponent of a strong executive branch. Writing in The Federalist Nos. 70 & 72, Hamilton argued that a unitary executive promotes energy and democratic accountability, and that executive officers ought to be superintended by the President. The Federalist No. 70, pp. 471, 476 (J. Cooke ed. 1961) (A. Hamilton); The Federalist No. 72, p. 487 (J. Cooke ed. 1961) (A. Hamilton). By the time Hamilton wrote the *Pacificus* letters, moreover, he fully embraced executive removal power. Steven G. Calabresi & Christopher S. Yoo, The Unitary Executive: Presidential Power from Washington to Bush 56 (2008). The *Pacificus* letters were a series of published essays from 1793 to 1794 in which Hamilton, writing as Pacificus, debated James Madison, writing as Helvidius, on the nature of executive power. Hamilton himself regarded these letters as a superior articulation of his views on the Constitution. *Id.* These debates, coupled with Hamilton's later writing on the Decision of 1789 ("the Decision"), show that his opinion had changed. *Id.* According to Hamilton, the power to remove officials lies with the President.

B. The Decision of 1789 and Founding Era Administrations show that the Framers' plan for a strong, single executive was fulfilled in practice through their support for the removal power.

Hamilton's ultimate understanding of the removal power comports with how the Framers acted when they moved from political theory to practice. Many were members of the First Congress, where they passed a law implying that the President was granted removal authority by the Constitution itself, not by any act of Congress. Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1762-63 (2023). The composition of this Congress gives the Decision of 1789 special weight because it included the very men who drafted the Constitution only two years earlier. *Myers*, 272 U.S. at 174-75. This Congress was careful to limit the language of the removal power to mere implication. Anything stronger could be construed by later generations to be Congress *granting* the President this power. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Corn. L. Rev. 1021, 1049-50 (2006).

The Decision centered on the Department of Foreign Affairs, the precursor to the Department of State. The First Congress debated which branch of government would have the authority to remove officers from the Department. When the debate was settled, and Congress passed the law, the statute did not specifically give the President removal power. *Decision of 1789 and Removals in Early Republic*, Art. II, § 2, cl.2.3.15.2, The Constitution Annotated (Library of Congress), Congress.gov, https://constitution.congress.gov/browse/essay/artII-S2-C2-3-15-2/ALDE_00013108/ (last visited Oct. 14, 2025). University of Virginia Law Professors Prakash and Bamzai offer a compelling explanation for why Congress took this course of action. In June of 1789, the draft of the Foreign Affairs bill included a clause that the Secretary of Foreign Affairs could be removed by the President. Bamzai & Prakash, *supra* at 1794. Some Representatives feared that this wording could be construed as Congress *granting* the President this power. *Id.* Congress amended the bill to exclude this language. *Id.* "Proponents of the two amendments . . . approved them precisely because they supposed that the Constitution granted removal authority to the President, and they wanted to banish any suggestion that Congress was conveying a removal power." *Id.* at 1795-96. Thus, the law was intentionally written to avoid any explicit grant of removal power, a grant they believed the Constitution had already made. Congress mirrored this language in the Treasury and War Department bills. Congress's intent in doing so was clear: "In private correspondence, many legislators, including opponents, read the three statutes as a legislative endorsement of the proposition that the President had a constitutional power to remove. Members of the House and Senate, as well as the Vice President, said as much." *Id.* at 1798. Although the First Congress was never unanimous on the issue, evidence strongly suggests a majority coalesced around the idea that the President possessed an inherent constitutional authority to remove executive officers.

The consequences of the Decision of 1789 were not merely theoretical. The historical record reflects that President Washington often exercised the removal power that the Decision implied he had. Over the course of his tenure, Washington removed almost twenty officers. Because no statute granted him this power, "President Washington must have concluded that the Constitution empowered him to dismiss [officers]." *Id.* at 1777. And President Washington was not alone in his belief that removal authority was vested solely in the executive. President Jefferson wielded this power with more vigor than Washington ever did, drawing the ire of many. Prakash, *supra* at 1066 (Jefferson removed over one hundred officers). The reaction of Jefferson's opponents, however, is telling. They criticized the President, claiming the removals were excessive in volume and alleging that his actions encouraged political division. Notably, even the harshest critics never questioned whether Jefferson actually possessed the constitutional authority to remove these officers. Bamzai & Prakash, *supra* at 1781-82.

Between the Decision of 1789 and the early Presidents' liberal wielding of this authority, it is thus clear that in the early years of our Republic, a consensus had been reached as to where the removal power lies. James Madison, speaking to the House of Representatives, argued "I conceive that if any power whatsoever is in its nature executive it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (Gales & Seaton eds., 1789). Madison also remarked, "[i]nasmuch as the power of removal is of an executive nature, and not affected by any constitutional exception, it is beyond the reach of the legislative body." The Congressional Register (June 16, 1789) *reprinted in* 11 The Documentary History of the First Federal Congress of the United States of America, 4 March 1789-3 March 1791 869 (Charlene Bangs Bickford et al. eds., 1992). In short, if the power to remove officials is inherent to the President under the Constitution, then it cannot be taken away by statute.

II. *Humphrey's Executor* was wrongly decided at the outset because the FTC wielded executive power and was neither a judicial nor a legislative agency.

To distinguish the FTC from the general rule for executive officers announced in *Myers v. United States*, Justice Sutherland described the commission in detail. The FTC was "non-partisan; and it must, from the very nature of its duties, act with entire impartiality."

Humphrey's Executor, 295 U.S. at 624. Furthermore, "[i]ts duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.* He stressed the Commissioners' expertise: "its members are called upon to exercise the trained judgment of a body of experts 'appointed by law and informed by experience.'" *Id*. (quoting *Illinois Cent. R.R. Co. v. Interstate Com. Comm'n,* 206 U.S. 441, 454 (1907)).

The Court made an equally important claim: the agency cannot be "an arm or an eye of the executive" for "in the contemplation of the statute, [it] must be free from executive control." *Humphrey's Executor*, 295 U.S. at 628. The Court thus places heavy emphasis on the intent of Congress as a starting point for its non-executive analysis. Ultimately, however, congressional intent provides a poor foundation for the argument. If Congress intended to form an agency wielding executive power outside of the executive and floating somewhere between the other two branches, it had no constitutional authority to do so. Their intent cannot trump the separation of powers.

A. The FTC's power to investigate and make reports to Congress does not make it a legislative agency.

The Court asserted that, "[i]n making investigations and reports [on unfair methods of competition] for the information of Congress under § 6 [of the FTCA], in aid of the legislative power, [the FTC] acts as a legislative agency." *Humphrey's Executor*, 295 U.S. at 628 (citing An Act to Create a Federal Trade Commission, ch. 311, § 6, 38 Stat. 717, 721-722 (1914)). Three subsections of Section 6 require such investigating and reporting, as codified at 15 U.S.C. §§ 46(d), (f), and (h).

- Section 46(d) required the FTC to "investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation" at the order of "the President or either House of Congress."

- Section 46(f) required the FTC "make annual and special reports to the Congress and to submit therewith recommendations for additional legislation."

- Section 46(h) called for the FTC to "investigate, from time to time, trade conditions in and with foreign countries where . . . conditions . . . may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable."

The argument that these requirements effectively render the FTC a legislative aid is not persuasive. Executive branch agencies were often required by statute to provide reporting to Congress. For example:

- The Department of Agriculture. As part of his original duties, the Commissioner of Agriculture was required to "annually make a general report in writing of his acts to the President [and to Congress]." 7 U.S.C. § 2207 (originally enacted as Act of Aug. 30, 1954, ch. 1076, 68 Stat. 966 (1954)). Further, he would "make special reports on particular subjects whenever required to do so by the President or either House of Congress." *Id.*

- The Department of State. Under an 1842 Act of Congress, the Secretary of State was directed to "lay before Congress, annually . . . in a compendious form, all such changes and modifications in the commercial systems of other nations . . . as shall have come to the knowledge of the Department." Act of Aug. 16, 1842, ch. 181, 5. Stat. 507. In 1856, Congress amended this act, stating "to enable the Secretary of State to make said report, it is . . . the duty of consuls . . . of the United States in foreign countries, to procure and transmit . . . authentic commercial information respecting said countries." Act of Aug. 18, 1856, ch. 170, 11. Stat. 139. This task was later assigned to the Department of Commerce. 15 U.S.C. § 183.

- The Bureau of Labor Statistics. Congress required the agency to "collect, collate, and report at least once each year, or oftener if necessary, full and complete statistics of the conditions of labor and the products and distribution of the products of the same." 29 U.S.C. § 2. These reports were to be distributed "to the President and Congress." 29 U.S.C. § 6.

The statutory language for these other departments is similar to that of the FTC. Despite the use of the word "investigate," § 46(h) appears substantially similar to the Acts of 1842 and 1856 that require the State Department to collect data on the economies of foreign nations. And § 46(f) resembles the requirements for all three of these agencies to make routine reports to Congress.

Unlike §§ 46(f) and (h), subsection (d) does not merely call for the FTC to provide routine information to Congress. Instead, it instructs the agency to investigate and report on violations of the law at the behest of Congress or the President. But this requirement cannot make the FTC legislative in nature. The investigatory powers of Congress and the President are not the same. Investigations of violations of the law are a traditionally executive function. *See Interstate Com. Comm'n v. Brimson*, 154 U.S. 447 (1894). When the President orders the FTC to carry out investigations under § 46(d), the FTC is wielding executive power. But legislative investigations must be carried out to aid legislating. Congress cannot investigate individuals for violations of the law in the absence of a legitimate legislative purpose. *See Kilbourn v. Thompson*, 103 U.S. 168 (1880). "[N]either house [of Congress] is invested with 'general' power to inquire into private affairs and compel disclosures." *McGrain v. Daugherty*, 273 U.S. 135, 173-74 (1927) (citing *Harriman v. Interstate Com. Comm'n*, 211 U.S. 407 (1908); *Fed. Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1924)). "Furthermore, Congress may not issue a subpoena for the purpose of 'law enforcement,' because 'those powers are assigned under our Constitution to the Executive and the Judiciary.'" *Trump v. Mazars USA, LLP*, 591 U.S. 848, 863 (2020) (quoting *Quinn v. United States*, 349 U. S. 155, 161 (1955)).

This precedent calls the logic of *Humphrey's Executor* into question. The Court has been clear in several instances that Congress cannot investigate violations of the law without a link to a legitimate legislative purpose. *See Kilbourn v. Thompson,* 103 U.S. 168 (1881); *Marshall v. Gordon*, 243 U.S. 521 (1916); *Watkins v. United States*, 354 U.S. 178 (1957). Yet the *Humphrey's Executor* Court, by stating that the FTC is quasi-legislative when it investigates and reports to Congress, implies Congress has given itself general investigative powers, assuming the role of the executive via the FTC. If the majority in *Humphrey's* is correct, and the FTC is a legislative agency when it carries out these tasks, then the Federal Trade Commission Act (FTCA) would unconstitutionally violate the separation of powers. To avoid such a reading of the statute, the only logical conclusion is that the FTC, in investigating violations of antitrust laws, when directed to do so by Congress, still acts as an executive agency and wields purely executive power. And while Congress may not issue subpoenas for law enforcement purposes, the FTC is empowered to do so under 15 U.S.C. § 49, further suggesting it retains its executive character while engaging in such investigations at the behest of the legislature. Even if Congress has directed it to make the investigation for the purposes of legislating, this does not change the fundamental character of the agency anymore than asking the FTC to report on foreign commerce. Law enforcement investigations are carried out by executive agencies, and Congress directing them to initiate one and requesting a report on it cannot change that fact.

Such a reading of subsections (d), (f), and (h) would also fit well with this Court's precedent in regard to the Interstate Commerce Commission (ICC). While the ICC was not mandated by statute to carry out investigations on violations of the law by Congress, it was tasked with providing reports to Congress. Interstate Commerce Act, ch. 104 § 21, 24 Stat. 379, 387 (1887). And its investigations have been deemed to be an exercise of executive power when involving violations of the law. "The power given [to the ICC to investigate violations of the law] is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but *not legislative*." *Interstate Com. Comm'n v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U.S. 479, 501 (1897) (emphasis added). The nature of law enforcement investigations remains executive, whether the recipient of the report after the fact is Congress or some other member of the executive branch.

Justice Sutherland's quasi-legislative argument simply does not mesh with the text of the Federal Trade Commission Act. Other executive branch agencies had similar reporting requirements, yet they remained executive. And Supreme Court precedent makes clear investigating violations of the law is traditionally an executive function. When Congress exercises such investigative authority, it is limited and must be connected to legislating. When it directs an agency to investigate and report on violations of the law by private parties, that agency remains executive in nature, performing an executive function to aid Congress. Therefore, it can only be concluded that the FTC's powers of investigation and reporting are executive functions, perfectly consistent with established precedent.

B. The FTC's role as a master of chancery for courts does not make it a judicial agency.

Justice Sutherland next addressed the FTC's supposed judicial role. "Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary." *Humphrey's Executor*, 295 U.S. at 628. This argument is curious, however, for it contradicts precedent from the Court just three years prior. Administrative agencies can act in support roles for the judiciary without exercising Article III power. In *Crowell v. Benson*, 285 U.S. 22 (1932), the Court addressed whether the Employees' Compensation Commission (ECC) unconstitutionally assumed Article III power by serving as a fact finder in workers' compensation claims. The Court ultimately concluded that executive branch agencies such as the ECC could fill such a role without assuming the power of the judiciary. Chief Justice Hughes stated:

> The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department.

Crowell, 285 U.S. at 56-57.

Chief Justice Hughes asserted that Congress has the authority to create and has created administrative agencies for the determination of "various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." *Id*. at 50 (quoting *Ex parte Bakelite Corp*., 279 U.S. 438, 451 (1929)). These agencies included those involved in "interstate and *foreign commerce*, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans." *Crowell*, 285 U.S. at 51 (emphasis added). Yet he makes clear these agencies are not granted with "the judicial power conferred by the Constitution," which belongs to the courts. *Id*. at 50. Instead, these agencies are limited to fact-finding "relieving the courts of a most serious burden while preserving their *complete* authority to insure the proper application of the law." *Id*. at 54 (emphasis added).

The Court also provided, as an example of such fact-finding not impeding upon the power of the judiciary, the "historic practice" of "call[ing] . . . the assistance of . . . *masters* and commissioners or assessors." *Id*. at 51 (emphasis added). And "the reports of masters and commissioners in such cases are essentially of an advisory nature." *Id*. Administrative agencies, when acting in a manner similar to masters and commissioners, do not wield the power of the judiciary. They remain a part of the executive branch, acting as a temporary aid because of their expertise in "matters ordinarily outside of judicial competence." *Id*. at 89 (Brandeis, J., dissenting). They are not "agenc[ies] of the judiciary." *Humphrey's Executor*, 295 U.S. at 628. *Crowell* should have controlled the Court's analysis of § 7 of the FTCA but it was ignored.

Even if *Crowell* and *Humphrey's Executor* could be harmonized, Justice Sutherland's reliance on § 7 would have been misplaced. The FTCA states courts "may . . . refer [any suit in equity] to the commission, as a master in chancery, to ascertain and report an appropriate form of decree therein." 15 U.S.C. § 47. But it "may adopt or reject such report, in whole or in part, and enter such decree as the nature of the case may in its judgment require." *Id.* The quasi-judicial description of the FTC in *Humphrey's* is thus based around a permissive, rather than mandatory, provision in the statute. It allows courts to call upon the FTC as a temporary fact finder whose reports are in no way binding. Section 7 creates a temporary, ancillary function for the FTC, which could in theory have remained entirely unused if courts so elected. Yet the Court turned this molehill into a towering mountain in their analysis, while ignoring the numerous permanent, mandatory functions of the agency, laid out in §§ 5 and 6.

C. The FTC did carry out executive functions, which necessarily involved the exercise of executive power.

The *Humphrey's* Court drew up one final argument in defense of its characterization of the FTC. Justice Sutherland wrote "[t]o the extent that [the FTC] exercises any executive function -- as distinguished from executive power in the constitutional sense -- it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Humphrey's Executor*, 295 U.S. at 628. This statement, however, contains two errors. The FTC did exercise executive functions besides those already discussed, and carrying these out did involve executive power. The FTCA lays out many permanent and defining tasks for the FTC to carry out, found in §§ 5, 6, and 9 of the Act. A non-exhaustive list includes the following:

- "[P]revent persons, partnerships, or corporations . . . from using unfair methods of competition." 15 U.S.C. § 45(a)(2).

- Issue Cease and Desist orders to anyone found to be practicing unfair methods of competition. 15 U.S.C. § 45(b).

- Investigate the business practices of parties subject to the Act. 15 U.S.C. § 46(a).

- Require parties to file with the commission and provide access to files and other documents related to their finances and business practices. 15 U.S.C. § 46(b).

- Investigate whether and to what extent a party is complying with a court order to cease unfair methods of competition. 15 U.S.C. § 46(c).

- Create rules and regulations necessary for the enforcement of the Act. 15 U.S.C. § 46(g).

- Issue subpoenas and request writs of mandamus. 15 U.S.C. § 49.

These provisions fall into three categories of functions: enforcement of the law, investigation of violations of the law, and rulemaking. All three have been found to be quintessentially executive. On enforcement of the law, the Court had said prior to *Humphrey's Executor*, "[l]egislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions." *Springer v. Gov't of the Philippine Islands*, 277 U.S. 189, 202 (1928). And again, "[the President] is charged specifically to take care that [the laws] be faithfully executed." *Myers*, 272 U.S. at 117.

The Court has been similarly clear on investigation. In *Interstate Com. Comm'n v. Brimson*, 154 U.S. 447 (1894), the Court noted the problem with saying an executive agency could not carry out its function of investigating violations of the law. "An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce . . . and to require the production of books, documents, and papers relating to that subject, would go far towards defeating the object [of national control of interstate commerce] . . . ." *Id.* at 474. The Court has also considered FTC investigations to be an executive function, which are limited by statute and the Constitution. *See Fed. Trade Comm'n v. American Tobacco Co.*, 264 U.S. 298 (1924).

Rulemaking has also long been viewed as an executive function. "From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations . . . ." *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

It cannot accurately be stated, therefore, that in 1935 the FTC only carried out minimal executive functions in the discharge of its duties under §§ 6 and 7. There is a long list of activities which can only be described as wholly executive functions delegated to the FTC by Congress in the FTCA. And since their functions were not part of the judiciary or legislature, it would not be accurate to describe these functions as involving no executive power. Ultimately, the FTC exercised both executive functions and power from its inception, and *Myers v. United States* should have controlled. The FTC continues to exercise executive power without full presidential control in violation of the Constitution.

III. Justice Sutherland's idealistic vision that only apolitical experts would lead the FTC has not occurred in practice after decades of experience.

The practical experience of the FTC does not come close to Justice Sutherland's multi-prong justification for an independent agency: a body of nonpartisan experts engaging in neither political nor executive duties, but quasi-judicial and quasi-legislative ones. Daniel A. Crane, *Debunking* Humphrey's Executor, 83 Geo. Wash. L. Rev. 1835 (2015). Professor Crane argues that rather than being apolitical, the FTC "has become the creature of Congress," subject to political pressure. *Id.* at 1856. In terms of expertise, it does not surpass the Justice Department's Antitrust Division. *Id.* at 1857-59. Rather than quasi-legislative and quasi-judicial, the FTC's character "has increasingly become that of a conventional law enforcement department." *Id.* at 1863.

Humphrey's Executor drew justification from the legislative intent that the FTC be "nonpartisan, and . . . act with entire impartiality." *Humphrey's Executor*, 295 U.S. at 624. However, there is little in the statute itself to ensure this occurs. The FTCA does require that "[n]ot more than three of the Commissioners shall be members of the same political party," 15 U.S.C. § 41, but this rule only addresses the balance of the Commission as a whole and places no specific requirements on individual appointees. This balancing requirement has thus done little to prevent individuals with discernible partisan ties from serving on the Commission, if that was what Justice Sutherland expected.

Both Commissioners recently removed by the President previously served as staff to Democratic Senators, Commissioner Slaughter as Chief Counsel to Senator Schumer of New York and Commissioner Bedoya as Chief Counsel for Senator Franken of Minnesota. *Rebecca Kelly Slaughter*, Federal Trade Commission, https://www.ftc.gov/about-ftc/commissioners-staff/rebecca-kelly-slaughter (last visited Oct. 10, 2025); Peter Kaplan, *Alvaro Bedoya Sworn in as FTC Commissioner*, Federal Trade Commission (May 16, 2025), https://www.ftc.gov/news-events/news/press-releases/2022/05/alvaro-bedoya-sworn-ftc-commissioner. Similarly, both of their predecessors in their seats on the FTC served as campaign advisors for partisan presidential campaigns. Commissioner Slaughter's predecessor, Commissioner Edith Ramirez, worked as a Latino Outreach Coordinator for Barack Obama's 2008 campaign for President before he appointed her to the FTC. Christine Perkins, *The Power of the Outsider*, Harvard Law Bulletin: Fall 2015, (Oct. 5, 2015), https://hls.harvard.edu/today/the-power-of-the-outsider/. Commissioner Bedoya's predecessor, Commissioner Rohit Chopra, served on Hillary Clinton's 2016 campaign transition team before joining the FTC. Kimberly Hefling & Michael Stratford, *Clinton names Warren ally to transition team*, Politico (Aug. 30, 2016), https://www.politico.com/story/2016/08/clinton-transition-team-rohit-chopra-227550.

This phenomenon is by no means constricted to one party's appointees to the FTC. Of the three current Commissioners, two previously served as counsel to Republican Senators, including the then-Senate Republican Leader Mitch McConnell. *Andrew N. Ferguson*, Federal Trade Commission, https://www.ftc.gov/about-ftc/commissioners-staff/andrew-n-ferguson (last visited Oct. 10, 2025); *Mark R. Meador*, Federal Trade Commission, https://www.ftc.gov/about-ftc/commissioners-staff/mark-r-meador (last visited Oct. 10, 2025). Moreover, among their immediate predecessors on the FTC was a former Chief Counsel to Senator Cornyn of Texas. *Noah Joshua Phillips*, Federal Trade Commission, https://www.ftc.gov/about-ftc/commissioners-staff/noah-joshua-phillips (last visited Oct. 10, 2025). This pattern of appointments with partisan backgrounds has been notably consistent in recent years. Only three nonpartisan appointees have served on the Commission since the Kennedy Administration, with the most recent of them appointed in 2003. Adam Bernstein, *Philip Elman Dies at 81*, The Washington Post (Dec. 1, 1999), https://www.washingtonpost.com/archive/local/1999/12/02/philip-elman-dies-at-81/fad34f1a-e069-46a2-b57d-e8f597fc1c30/; Victoria Streitfeld, *FTC Commissioner Mary L. Azcuenaga To Resign*, Federal Trade Commission (March 26, 1998), https://www.ftc.gov/news-events/news/press-releases/1998/03/ftc-commissioner-mary-l-azcuenaga-resign; *Pamela Jones Harbour*, Federal Trade Commission, https://www.ftc.gov/about-ftc/commissioners-staff/pamela-jones-harbour (last visited Oct. 10, 2025).

The *Humphrey's Executor* decision also cites "the Congressional intent to create a body of experts who shall gain experience by length of service" as a policy basis for permitting removal protections. *Humphrey's Executor,* 295 U.S. at 625. This is another justification that has not rung true over the decades. In 1969, then-Professor Richard Posner found that the average term of service for Commissioners who had served in the preceding twenty years, each appointed two seven-year terms, was under four years. And the most common destination for retiring Commissioners was not to use their newfound experience by remaining in public service, instead exiting to private firm work. Richard A. Posner, *The Federal Trade Commission*, 37 U. Chi. L. Rev. 47, 86 (1969). Just a few years before in 1961, FTC Commissioner Philip Elman wrote forcefully about the need to "keep [Commissioners] on the job longer" for the purpose of developing the expertise necessary for the job. According to him, "[p]erhaps in time [Commissioners] would acquire the expertise about which we hear so much and find so little." Philip Elman, *The FTC and Procedural Reform*, 14 Admin. L. Rev. 105, 107 (1961). It does not seem that this issue of Commissioners ending their service early has abated. Recent scholarship confirms that the large majority of twenty-first-century FTC Commissioners (eleven out of seventeen as of 2023) have similarly left their offices without completing their terms. Thomas Smith, *Reclaiming* Humphrey's Executor: *Expertise and Impartiality in the FTC*, 37 BYU J. Pub. L. 437, 448 (2023).

Of course, previous work with the political branches presents no inherent conflict with the impartiality required by the FTCA, nor does it diminish any of the Commissioners' expertise in antitrust matters. Similarly, resigning early from the Commission is ultimately within an appointee's rights and could be for a variety of reasons. However, these incongruences between the ideals in *Humphrey's Executor* and the actual experiences of regulatory agencies are unmistakable. When an exception to the constitutional standard set forth in *Myers* was made in *Humphrey's Executor*, the Justices did so because they asserted that the FTC was a nonpartisan body of experts. *Humphrey's Executor*, U.S. 295 at 624. It is unlikely that the Justices contemplated so many appointees having deep ties to the political parties and even serving on the campaigns of those who would later appoint them. Former Commissioner William Kovacic himself has also written that the FTCA drafters likely would not have expected the Commission to become so routinely dominated by lawyers, with little representation of economists or business leaders. William E. Kovacic, *The Quality of Appointments and the Capability of the Fed. Trade Comm'n*, 49 Admin. L. Rev. 915, 935–37 (1997). To the extent that the 1935 FTC was ever an agency so unique in its structure and membership that it warranted an exception from *Myers*, it is unclear what has distinguished it so meaningfully in recent decades.

Other independent federal agencies, such as the Consumer Product Safety Commission (CPSC), are similarly led by Commissioners who do not appear to be apolitical experts. In the prior presidential administration, the CPSC Commissioners were all lawyers who had worked as congressional staff. *See* Brief for Landmark

Legal Foundation as Amicus Curiae Supporting Petitioners at 6-9, *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 145 S. Ct. 414 (2024) (No. 23-1323). As part of a study published in 1987, the Government Accountability Office (GAO) interviewed former CPSC chairmen and executive directors. Robert S. Adler, *From "Model Agency" to Basket Case – Can the Consumer Product Safety Commission be Redeemed?*, 41 Admin. L. Rev. 61, 84 (1989). There was a consensus among these former officials that "CPSC Commissioners often do not understand the technical issues that the staff has to deal with in its work." *Id.* They also found that the "Commissioners tend to 'micromanage' the day-to-day operations of the agency," and that the "Commission['s] decisions are not prompt." *Id.* Thus, other independent agencies have failed to meet Justice Sutherland's vision in *Humphrey's Executor* as well. There is no reason to uphold this precedent in light of decades of practice.

FTC Commissioners wield executive power. As a result, they should be directly accountable to the President. The Court should make clear that the exercise of *any* executive power beyond presidential control violates the separation of powers.

CONCLUSION

Landmark urges this Court to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Respectfully submitted,

Richard P. Hutchison
Landmark Legal
Foundation
3100 Broadway,
Suite 1210
Kansas City, MO 64111

Matthew C. Forys
Counsel of Record
Michael J. O'Neill
Landmark Legal
Foundation
19415 Deerfield Avenue,
Suite 312
Leesburg, VA 20176
(703) 544-6100
matt@landmarklegal.org

Attorneys for Amicus Curiae

October 17, 2025