

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 BEFORE JUDGMENT
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF OF *AMICUS CURIAE*
U.S. SENATOR ERIC SCHMITT
CHAIRMAN OF THE SENATE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION
IN SUPPORT OF PETITIONERS**

Thomas R. McCarthy
Counsel of Record
J. Michael Connolly
Tiffany H. Bates
Zachary P. Grouev
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard,
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

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Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*¹

Amicus curiae is United States Senator Eric Schmitt. Senator Schmitt represents Missouri in Congress and is Chairman of the Senate Judiciary Committee Subcommittee on the Constitution. The Subcommittee’s jurisdiction includes separation-of-powers issues like the important Article II question presented here. It also has significant oversight responsibilities—a function exercised most effectively when the entire Executive Branch is accountable to a President with whom “the buck stops.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010).

Senator Schmitt has been a leader in Congress’s ongoing effort to “rebuild the constitutional order we were meant to inherit from our Framers.” Sen. E. Schmitt, *Foreword—The Post-Chevron Working Group Report in Action: Reclaiming the Constitution from the Administrative State*, Yale J. Reg. Notice & Comment (Oct. 13, 2025), perma.cc/672B-3JRW. After this Court’s landmark decision in *Loper Bright*, Senator Schmitt produced a detailed report discussing further reforms to the administrative state. *See id.* One such reform was the Take Care Act, which would reaffirm the President’s removal power as a “crucial step in retrieving the unconstitutional authority wielded by agencies that are currently protected from the political processes of accountability intended by the Constitution.” Sen. E. Schmitt, *Post-Chevron Working*

¹ Pursuant to this Court’s Rule 37.6, counsel for *amicus curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or its counsel has made a monetary contribution to the preparation or submission of this brief.

Group Report, 13 Harv. J.L. & Pub. Pol’y Per Curiam, 18-19 (Summer 2025), perma.cc/8XVT-YYZS.

Amicus submits this brief to urge the Court to overrule whatever is left of *Humphrey’s Executor*—reaffirming the President’s authority to remove Executive Branch officials who wield power in his name and restoring a constitutional head to the infamous “headless Fourth branch.” *FCC v. Consumers’ Rsch.*, 145 S.Ct. 2482, 2517 (2025) (Kavanaugh, J., concurring).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President.’” *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020). As the head of the Executive Branch, “[t]he President’s duties are of ‘unrivaled gravity and breadth.’” *Trump v. United States*, 603 U.S. 593, 607 (2024). Chief among them, “he must ‘take Care that the Laws be faithfully executed,’ and he bears responsibility for the actions of the many departments and agencies within the Executive Branch.” *Id.*

“The Framers recognized, of course, that ‘no single person could fulfill [this] responsibility alone, [and] expected that the President would rely on subordinate officers for assistance.’” *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021). Thus today, “thousands of officers wield executive power on behalf of the President in the name of the United States.” *Id.* This “power acquires its legitimacy and accountability to the public through ‘a clear and effective chain of command’ down from the President, on whom all the people vote.” *Id.*

To ensure that this chain of command remains unbroken, the Constitution “confers on the President ‘the general administrative control of those executing the laws.’” *Free Enter. Fund*, 561 U.S. at 492 (quoting *Myers v. United States*, 272 U.S. 52, 163-64 (1926)). Put differently, because “[t]he buck stops with the President,” he “must have some ‘power of removing those for whom he can not continue to be responsible.’” *Id.* (quoting *Myers*, 272 U.S. at 117). This power flows from the Constitution, so it is “conclusive and preclusive.” *Trump*, 603 U.S. at 607; *see also Humphrey’s Ex’r v. United States*, 295 U.S. 602, 631 (1935) (explaining that *Myers* recognized an “illimitable power of removal” for “executive officers”).

The President’s indefeasible removal power “has long been confirmed by history and precedent.” *Seila Law*, 591 U.S. at 214. After extensive debate in the First Congress, “[t]he view that ‘prevailed, as most consonant to the text of the Constitution’ and ‘to the requisite responsibility and harmony in the Executive Department,’ was that the executive power included a power to oversee executive officers through removal.” *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), 16 Documentary History of the First Federal Congress 893 (2004)). One prescient point in the debate came from Representative John Vining of Delaware, who “argued that insulating administrators from the president’s power to fire them would create a monster with multiple, independent heads.” J. Postell, *Bureaucracy in America—The Administrative State’s Challenge to Constitutional Government*, 86 (2017). Vining foresaw that administrative independence would result in “a monster of a peculiar enormity” with “two heads, three heads, or four

heads” or “without any head at all.” *Id.* (quoting 1 Annals of Cong. 511 (1789) (J. Vining)).

Although the issue continued to be hotly debated, John Adams eventually cast a tiebreaking vote in the Senate to adopt language drafted by the pro-presidential-removal faction, thus reaching the “Decision of 1789.” *Id.* at 88. This outcome “convinced prominent politicians and jurists in the early republic that the issue was settled.” *Id.* One such convert was William Smith, who had been “prominent in opposing the president’s constitutional removal power” but later “wrote to James McHenry in 1797 that [i]f you look into the Debates of Congress you will find this subject fully handled; I was on that occasion on the wrong & Madison [who championed the President’s constitutional removal power] on the right side.” *Id.* (quoting from citation in L. White, *The Federalists: A Study in Administrative History, 1789-1801*, 21 n.20 (N.Y.: Free Press paperback ed., 1965)). Two others were James Kent and Joseph Story. *Id.* at 88 & nn.137-38. Thus, even those who initially opposed interpreting Article II to give the President a constitutional power of removal later “recognized that the decision of congress in 1789, and the universal practice of the government under it, had settled the question beyond any power of alteration.” *Parsons v. United States*, 167 U.S. 324, 330 (1897).

The Executive Branch held the same view. “In practice, early presidents operated as if they possessed the unconstrained discretion to remove subordinate officers at will.” Postell, *Bureaucracy in America* at 88. These early “practices established a relatively clear precedent: the president had the constitutional power

to remove officials at will, but this power should be used hesitatingly and sparingly” as “a matter of policy.” *Id.* Later, “[e]ach and every President from Andrew Jackson to James Buchanan ... operated under the presumption that the Constitution gives exclusive removal powers to the president, and that the power to remove administrative officials could be exercised at will.” *Id.* at 107. So did the lawyers who advised them. *Id.* at 107 & nn.50-51. “The consensus among presidents and Attorneys General, whether Whig or Democrat, was that the First Congress had construed the Constitution as providing the president with sole removal power, and that this construction of the Constitution was binding on future situations.” *Id.* at 107.

In 1926, this Court reaffirmed the President’s “prerogative to remove executive officials” after “conduct[ing] an exhaustive examination of the First Congress’s determination in 1789, the views of the Framers and their contemporaries, historical practice, and [judicial] precedents up until that point.” *Seila Law*, 591 U.S. at 214. “Just as the President’s ‘selection of administrative officers is essential to the execution of the laws,’” the Constitution secures the President’s power to remove Executive Branch officials when they have lost his confidence. *Id.* Any other rule “would make it impossible for the President to take care that the laws be faithfully executed.” *Id.* (cleaned up).

In a decision “considered by many at the time [to be] the product of an activist, anti-New Deal Court bent on reducing the power of President Franklin Roosevelt,” *Humphrey’s Executor* “gutt[ed]” *Myers*’ “carefully researched and reasoned 70–page opinion” in “six quick pages devoid of textual or historical precedent

for the novel principle it set forth.” *Morrison v. Olson*, 487 U.S. 654, 724-26 (1988) (Scalia, J., dissenting). Reasoning that the 1935 Federal Trade Commission performed “predominantly quasi judicial and quasi legislative” functions, *Humphrey’s* held that Congress could grant removal protections to an FTC Commissioner as an officer “who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.” 295 U.S. at 624, 628.

Since May 27, 1935, this Court has gradually repudiated *Humphrey’s* reasoning and significantly narrowed its holding. Rightly so. *Humphrey’s* conclusion that the FTC (or any similarly structured agency) is not meaningfully a part of the Executive Branch was wrong the day it was decided. *See id.* at 628 n.1 (citing a provision of the 1935 FTC’s organic statute “authoriz[ing] the President to direct an investigation and report by the commission in relation to alleged violations of the anti-trust acts”). It is even more wrong today. *See* Nachmany, *The Original FTC*, 77 Ala. L. Rev. (forthcoming 2025), perma.cc/LKD4-XYJ4 (arguing that the modern FTC has outgrown *Humphrey’s* dubious characterization). And rather than “quasi” legislative and judicial power (which cannot be delegated at all), regulatory functions like the FTC’s “are exercises of—indeed, under our constitutional structure ... *must be* exercises of—the [President’s] ‘executive Power.’” *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

Along the way, *Humphrey’s* defenders have conceded that there is no real distinction between single-headed agencies like the CFPB, which are subject to at-will removal, and multi-member commissions like

the FTC, which (arguably) are not. *Seila Law*, 591 U.S. at 285 (Kagan, J., dissenting in part) (“The CFPB wields the same kind of power as the FTC and similar agencies.”); *id.* at 293 (“More powerful control mechanisms are needed (if anything) for commissions.”). The result has been confusion and disarray as lower courts try to apply whatever remains of *Humphrey’s* to various Executive Branch officials and regulatory agencies.²

Because this case involves the FTC, (at least nominally) the same agency that was at issue in *Humphrey’s*, there are fewer grounds to distinguish the removal protections invoked today from the ones *Humphrey’s* upheld in 1935. The only arguable distinction left—that the modern FTC has outgrown its 1935 characterization—would so drastically narrow *Humphrey’s* as to effectively overrule it for anyone not an executor to the estate of a former FTC Commissioner named Humphrey. This Court should take the more direct approach and hold that there is no “head-

² *E.g.*, *Wilcox v. Trump*, 775 F.Supp.3d 215 (D.D.C. 2025) (NLRB); *U.S. Inst. of Peace v. Jackson*, 783 F.Supp.3d 316 (D.D.C. 2025) (Institute of Peace); *Perlmutter v. Blanche*, 2025 WL 2627965 (D.C. Cir. Sept. 10) (Register); *LeBlanc v. PCLOB*, 784 F.Supp.3d 1 (D.D.C. 2025) (Privacy and Civil Liberties Oversight Board); *Harris v. Bessent*, 775 F.Supp.3d 86 (D.D.C. 2025) (Merit Systems Protection Board); *Grundmann v. Trump*, 770 F.Supp.3d 166 (D.D.C. 2025) (Federal Labor Relations Authority); *Dellinger v. Bessent*, 766 F.Supp.3d 57 (D.D.C. 2025) (Office of Special Counsel); *Boyle v. Trump*, 2025 WL 1677099 (D. Md. June 13) (Consumer Product Safety Commission); *Abramowitz v. Lake*, 2025 WL 2480354 (D.D.C. Aug. 28) (Voice of America).

less Fourth Branch” exception to the President’s Article II removal power. *Humphrey’s Executor* should be overruled.

ARGUMENT

To answer a question like “[w]hether the statutory removal protections for members of the Federal Trade Commission violate the separation of powers,” *Trump v. Slaughter*, 2025 WL 2692050 (U.S. Sept. 22), this Court looks to “the Constitution’s text, the history against which that text was enacted, and congressional practice immediately following ratification,” *CFPB v. Cmty. Fin. Servs. Ass’n of Am., Ltd.*, 601 U.S. 416, 426 (2024). Most of the time, these sources resolve the question. *Id.* But if there is lingering ambiguity, the Court can also look to “[l]ong settled and established practice,” sometimes called “tradition,” as confirmatory evidence. *Id.* at 442 (Kagan, J., concurring); see also *NYSRPA v. Bruen*, 597 U.S. 1, 36-37 (2022); *United States v. Rahimi*, 602 U.S. 680, 717 (2024) (Kavanaugh, J., concurring) (articulating a similar “historical approach”).

Using this approach, this Court has already held that Article II gives the President an indefeasible power to remove most Executive Branch officials. See, e.g., *Myers*, 272 U.S. at 163-64; *Free Enter. Fund*, 561 U.S. at 492-93; *Seila Law*, 591 U.S. at 213-15; *Collins v. Yellen*, 594 U.S. 220, 256 (2021).

Though these decisions effectively confined *Humphrey’s* to its facts, they never outright overruled it because doing so was unnecessary to reach the correct result as a matter of original meaning. That is not true here. Everyone agrees that FTC Commissioners

are Executive Branch officials who would otherwise be removable under *Myers*, *Free Enterprise Fund*, *Seila Law*, and *Collins*. And this Court’s precedents grounding the President’s removal power in constitutional text and structure, history, and ratification-era practice speak for themselves on the merits. *Humphrey’s* narrow holding is all that is left.

Faced with a question it cannot avoid, this Court must consider whether *Humphrey’s Executor’s* exception to the President’s removal power is consistent with the Constitution. It is not.

I. *Humphrey’s Executor* is anti-constitutional.

The Framers of our Constitution “recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.” *Seila Law*, 591 U.S. at 223. “Their solution to governmental power and its perils was simple: divide it.” *Id.* On one level, that meant “split[ting] the atom of sovereignty” between the states and a national government. *Id.* On another, separating the “powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.” *Id.* Thus, “the power surrendered by the people [was] first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.” The Federalist No. 51, 351 (J. Cook ed. 1961) (J. Madison).

The Framers understood from experience that “to mark, with precision, the boundaries of these departments” would be meaningless if the Constitution provided only “parchment barriers against the encroaching spirit of power.” The Federalist No. 48, 332-33 (J.

Madison). “A dependence on the people” was the “primary controul,” bolstered by “auxiliary precautions” that made a “policy of supplying, by opposite and rival interests, the defect of better motives.” Federalist No. 51 at 349. In other words, to protect against the tendency towards a “gradual concentration” of power, the Framers ensured that each branch would have the “necessary constitutional means, and personal motives, to resist encroachments of the others.” *Id.*

For the legislative power, the Framers set ambition against ambition by bifurcating the federal Legislature into multiple chambers each made up of multiple members. *Seila Law*, 591 U.S. at 223. By dividing and subdividing power among many officials, each with different constituencies, the Framers sought to temper the natural tendency towards encroachment they observed in the many state governments that had relied on “a mere demarkation on parchment” to protect the separation of powers. *See* Federalist No. 48 at 338.

The Executive Branch was a “stark departure from all this division.” *Seila Law*, 591 U.S. at 223. “As the weight of the legislative authority” had required that it be divided, “the weakness of the executive” required “that it should be fortified.” Federalist No. 51 at 350. The goal was to foster “[e]nergy,” considered “a leading character in the definition of good government.” The Federalist No. 70, 471 (A. Hamilton). Energy in the executive was thought to be (and remains) “essential” to “the protection of the community,” “the steady administration of the laws,” “the protection of property” and “the security of liberty.” *Id.*

The Framers knew that “unity” was a key “ingredien[t]” to an energetic executive. *Id.* at 472. They also knew that unity could be destroyed, “either by vesting the [Executive] power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject, in whole or in part, to the control and co-operation of others, in the capacity of counselors to him.” *Id.* at 472-73. Thus, to “encourage energetic, vigorous, decisive, and speedy execution of the laws,” the Framers “plac[ed] in the hands of a single, constitutionally indispensable, individual the ultimate authority that, in respect to the other branches,” they had left divided. *Trump*, 603 U.S. at 610.

In the “constitutional scheme” that all this history ultimately produced, the President “occupies a unique position ... as the only person who alone composes a branch of government.” *Id.* (cleaned up); see also *id.* at 610-11 (explaining that as a singular official, the President was given “supervisory and policy responsibilities of utmost discretion and sensitivity”). This unique position comes from Article II’s Vesting Clause, which grants the President “all of” the “executive Power.” *Seila Law*, 591 U.S. at 203. Together with the President’s duty to “take Care that the Laws be faithfully executed” under Article II, §3, the Court has explained that the Vesting Clause “generally includes the ability to remove executive officials, for it is ‘only the authority that can remove’ such officials that they ‘must fear and, in the performance of [their] functions, obey.’” *Id.* at 213-14; see also 1 Annals of Cong. 463 (1789) (J. Madison) (“[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”).

Humphrey's endorsement of statutory removal protections for “independent” agencies is flatly inconsistent with the President’s power under the Vesting and Take Care Clauses. Indeed, *Humphrey's* itself conceded that its rule could not apply to a “purely executive office[r]” who exercised any “part of the executive power vested by the Constitution in the President.” 295 U.S. at 628. The 1935 FTC was different, *Humphrey's* said, because it exercised “quasi legislative and quasi judicial” power and thus “occupie[d] no place in the executive department.” *Id.* at 624, 628. But that distinction was always incorrect as a matter of fact. *See id.* at 628 n.1 (identifying a subsection in the FTC’s organic statute that allowed the President to order an investigation). And it was harshly criticized and eventually rejected in the intervening decades as a matter of constitutional theory. *See, e.g., FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting); *Bowsher v. Synar*, 478 U.S. 714, 761 (1986) (White, J., dissenting); *Morrison*, 487 U.S. at 689 n.28; *City of Arlington*, 569 U.S. at 304 n.4; J.A.132 (Opinion of Rao, J.) (explaining that this Court has “eviscerated [*Humphrey's*] reasoning and rejected attempts to extend it to ‘new situation[s]’”).

In sum, Article II vests the entire executive power, including an indefeasible power to remove Executive Branch officials, in the President alone. *Seila Law*, 591 U.S. at 213-15. “To hold otherwise would make it impossible for the President to take care that the laws be faithfully executed.” *Id.* at 214 (cleaned up). *Humphrey's* lone justification for departing from this general rule—that FTC Commissioners are not executive branch officials—was wrong from the start. As an

original matter and by the logic of this Court’s decisions in *Myers*, *Free Enterprise Fund*, *Seila Law*, and *Collins*, *Humphrey’s* was wrongly decided.

II. *Humphrey’s* should be overruled.

When this Court determines that one of its precedents is wrong, it considers whether the doctrine of *stare decisis* nevertheless “counsels continued acceptance” of the erroneous decision. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 263 (2022).

In *Dobbs*, the Court analyzed this question by reference to five factors. *Id.* at 268 (identifying “the nature of [the] error, the quality of [the erroneous decision’s] reasoning, the ‘workability’ of the rules [it] imposed on the country, [the decision’s] disruptive effect on other areas of the law, and the absence of concrete reliance” as relevant).³ Using those factors (or any others) *Humphrey’s* unjustified encroachment on the President’s removal power is ripe for reconsideration.

A. *Humphrey’s* error was egregious.

“An erroneous interpretation of the Constitution is always important, but some are more damaging than others.” *Dobbs*, 597 U.S. at 268. *Humphrey’s* has been one of the worst.

³ Several Justices have explained their individual views on *stare decisis* in similar terms. See, e.g., *Gamble v. United States*, 587 U.S. 678, 717-23 (2019) (Thomas, J., concurring); *Ramos v. Louisiana*, 590 U.S. 83, 115-24 (2020) (Kavanaugh, J., concurring in part); *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 416-27 (2024) (Gorsuch, J., concurring). Whatever the precise standard, the Court should overrule *Humphrey’s Executor*.

The separation of powers is the “virtue of our Constitution.” *Cochran v. SEC*, 20 F.4th 194, 214 (5th Cir. 2021) (en banc) (Oldham, J., concurring). And the President’s pride of place at the top of the Executive Branch is one of that Constitution’s distinguishing features. *Trump*, 603 U.S. at 610. The Framers considered and rejected alternatives that would have led to a less energetic executive because they knew that the opposite was necessary to resist encroachment and ultimately to protect liberty. *Cf. Free Enter. Fund*, 561 U.S. at 501.

Rather than even try to comply with the Constitution that the Framers drafted and the people ratified, *Humphrey’s* based its ruling on a desire to supplant the Constitution in pursuit of greater efficiency. *Cf. Cochran*, 20 F.4th at 218 (Oldham, J., concurring). Progressive Era thinkers like Woodrow Wilson “fundamentally disagreed with the Founders’ vision.” *Id.* at 215. They “thought the accumulation of all powers into one set of hands was—far from a vice—a virtue. And they wanted those all-powerful hands connected to an administrative agency, far away from the three branches of government the Founders worked so hard to create, separate, and balance.” *Id.* “[M]ost of all, [they] wanted power as far away from democracy and universal suffrage as possible.” *Id.* The result was an administrative state (which *Humphrey’s* insulates from democratic accountability) that has “undermined the capacity of our institutions to pursue the public interest.” J. Marini, *Unmasking the Administrative State—The Crisis of American Politics in the Twenty-First Century*, 27 (2019).

Humphrey's utter disregard for the Framers put it on a “collision course with the Constitution from the day it was decided.” *Dobbs*, 597 U.S. at 268. And although the Court has construed it narrowly, the decision still “poses a direct threat to our constitutional structure and, as a result, the liberty of the American people.” *Seila Law*, 197 U.S. at 239 (Thomas, J., concurring in part). Such an error “cannot be allowed to stand.” *Dobbs*, 597 U.S. at 269.

B. *Humphrey's* was poorly reasoned when it was decided and that reasoning has not aged well.

The quality of *Humphrey's* reasoning has been critiqued as uniquely poor, especially considering that *Myers* produced a “carefully researched and reasoned 70–page opinion” from which to start just ten years before. *Morrison*, 487 U.S. at 724-26 (Scalia, J., dissenting).

Rather than engage with Chief Justice Taft's exposition of constitutional text and structure, history, and practice, *Humphrey's* “gutt[ed]” *Myers* in “six quick pages devoid of textual or historical precedent for the novel principle it set forth.” *Id.* The distinction it attempted to draw between “purely executive officers” and independent agencies based on “quasi legislative” and “quasi judicial” power has been overwhelmingly rejected. See, e.g., *Ruberoide Co.*, 343 U.S. at 487 (Jackson, J., dissenting); *Bowsher*, 478 U.S. at 761 (White, J., dissenting); *Morrison*, 487 U.S. at 689 n.28; *City of Arlington*, 569 U.S. at 304 n.4; J.A.132 (Opinion of Rao, J.). Without this debunked “philosophy,” *Humphrey's* has no reasoning at all other than a vague sense that independent agencies are a good idea

as a matter of policy. But the “fact that a given law or procedure is efficient, convenient, [or] useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution, for convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.” *Free Enter. Fund*, 561 U.S. at 499 (cleaned up).

Humphrey’s “was more than just wrong. It stood on exceptionally weak grounds.” *Dobbs*, 597 U.S. at 270.

C. As understood today, *Humphrey’s* is unworkable.

“[A]nother important consideration in deciding whether a precedent should be overruled is whether the rule it imposes is workable—that is, whether it can be understood and applied in a consistent and predictable manner.” *Id.* at 280-81. One need only look to the proliferation of different tests and analyses courts have deployed in attempts to draw meaning from the dessicated husk of *Humphrey’s* “philosophy,” *supra* n.2, to see that the decision “has scored poorly on the workability scale,” *Dobbs*, 597 U.S. at 281.

There is no principled way for courts to distinguish one agency from another based on *Humphrey’s* actual reasoning, since that has been bad law for decades. So courts are left to conduct administrative seances—relying on vague indicators of congressional intent and factual distinctions that have nothing to do with whether an Executive Branch agency (which is always conceded and really ought to decide the case) is exercising executive power in the relevant sense. “Plucked

from nowhere,” these vague considerations seem “calculated to perpetuate give-it-a-try litigation” from disgruntled former Executive Branch officials. *Dobbs*, 597 U.S. at 286 (cleaned up).

As long as *Humphrey’s* exists, opportunistic litigants will continue to invoke the decision, and courts will struggle to apply it. “Continued adherence to [this unworkable precedent] would undermine, not advance, the ‘evenhanded, predictable, and consistent development of legal principles’” on which *stare decisis* is premised. *Id.*

D. *Humphrey’s* has had pernicious effects on the law.

That *Humphrey’s* has “led to the distortion of many important but unrelated legal doctrines ... provides further support for overruling” it. *Id.*

1. By permitting encroachment on the President’s removal power based on the dubious notion of quasi-legislative or quasi-judicial agencies capable of operating outside the Executive Branch, *Humphrey’s* paved the way for future courts to rely on the same “philosophy” to imply removal protections even when “Congress said nothing about it.” *Wiener v. United States*, 357 U.S. 349, 356 (1958). *Wiener* endorsed a freewheeling functionalist method of statutory interpretation without regard to the text or the significant body of prior case law inferring at-will removal from congressional silence. See *Parsons*, 167 U.S. at 338-39 (construing a statute providing for a term of years to permit at-will removal); *Shurtleff v. United States*, 189 U.S. 311, 317 (1903) (“[I]t would be a mistaken view to hold that the mere specification in the statute of some

causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient.”).

Courts tasked with applying this vague test for implied good-cause removal have been befuddled ever since, in no small part because its animating “philosophy of *Humphrey’s Executor*” was rejected long ago. See, e.g., *Leblanc*, 784 F.Supp.3d at 24-30 (inferring removal protections for members of the United States Privacy and Civil Liberties Oversight Board); J.M. Payne, *Taken for Granted? SEC Implied For-Cause Removal Protection and Its Implications*, Yale J. Reg. Notice & Comment (June 24, 2022), perma.cc/4BBW-SAUL (critiquing the widespread assumption, based on *Wiener*, that SEC Commissioners enjoy removal protection).

2. Switching gears to the Constitution, *Humphrey’s* has created more problems than it ever purported to solve. “[I]ndependent agency heads are not elected by the people and are not accountable to the people for their policy decisions.” *Consumers’ Rsch.*, 145 S.Ct. at 2517 (Kavanaugh, J., concurring). These powerful bureaucrats “sit uncomfortably at the outer periphery of the Executive Branch.” *Id.* And because “when Congress delegates authority to an independent agency, no democratically elected official is accountable,” those harmed by an independent agency’s poor decisions lack anyone to “blame and hold responsible.” *Id.* at 2517-18.

In truth (at least under *Humphrey’s*), independent agencies can be said to belong to “a monster of a pecu-

liar enormity ... without any head at all.” Postell, *Bureaucracy in America* at 86 (quoting 1 Annals of Cong. 511 (1789) (J. Vining)). And although *Humphrey’s* pitched removal protections for such agencies as a tool for checking the President, the practical result has been to aid the “gradual abdication of legislative and judicial powers” by incentivizing Congress to pass the buck to faceless bureaucrats on difficult or intractable issues. Schmitt, *Post-Chevron Working Group Report* at 25.

The resulting “system of disembodied independent agencies with enormous power over the American people and American economy” works “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.” *Consumers’ Rsch.*, 145 S.Ct. at 2518 (Kavanaugh, J., concurring). As a result, some have suggested “apply[ing] a more stringent version of the nondelegation doctrine to delegations to independent agencies.” *Id.* To be clear, overturning *Humphrey’s* would not mitigate the need for this Court and Congress to work together to strengthen and revitalize the nondelegation doctrine. See Schmitt, *Post-Chevron Working Group Report* at 24-26. But it *would* eliminate one of the most noxious forms of delegation and move one step closer to restoring the constitutional accountability in government that the Framers demanded.

“When vindicating a doctrinal innovation requires courts to engineer exceptions to longstanding background rules, the doctrine ‘has failed to deliver the ‘principled and intelligible’ development of the law

that stare decisis purports to secure.” *Dobbs*, 597 U.S. at 287. That maintaining whatever is left of *Humphrey’s* would require such reverse engineering counsels in favor of overruling it once and for all.

E. *Humphrey’s* has not engendered meaningful reliance interests.

Allowing Congress to enact removal protections for certain Executive Branch officials does not implicate the “[t]raditional reliance interests” that this Court sometimes considers. *Id.*

Unlike a decision affecting First or Second Amendment rights, overruling *Humphrey’s* would *individually* affect, at most, only the comparatively few Americans who work for the Executive Branch and enjoy statutory removal protection. Only a fraction of *that* fraction falls within the Court’s exceedingly narrow characterization of *Humphrey’s* after *Free Enterprise Fund*, *Seila Law*, and *Collins*. And for those to whom overruling *Humphrey’s* would make a legal difference, there is still no guarantee that doing so will upset existing arrangements. The President has always been able to remove executive officials “for cause,” a capacious standard properly understood; and the possibility of at-will removal does not automatically imply its immediate use.

“Nor has [*Humphrey’s*] been the sort of ‘stable background rule’ that fosters meaningful reliance.” *Loper Bright*, 603 U.S. at 410. This Court rejected *Humphrey’s* core premise—the possibility of a quasi-legislative or quasi-judicial agency that “occupies no place in the executive department” and “exercises no part of the executive power vested by the Constitution

in the President,” 295 U.S. at 628—decades ago. Since then, the Court has characterized *Humphrey’s* so narrowly it is unclear if any agency, including the 1935 FTC and its modern equivalent, ever really satisfied the exception. See *Seila Law*, 591 U.S. at 216 (cabining *Humphrey’s* to entities “perform[ing] legislative and judicial functions” and not “exercis[ing] any executive power”); *id.* at 219 n.4 (questioning whether the 1935 FTC met *Humphrey’s* own standard). Given the Court’s “constant tinkering with and eventual turn away from [*Humphrey’s*],” it “is hard to see how anyone—Congress included—could reasonably expect a court to rely on [it] in any particular case.” *Loper Bright*, 603 U.S. at 410.

Finally, to the extent Congress may have once relied on *Humphrey’s* when designing executive agencies’, it can and should amend the organic statutes that gave life to the formerly headless “Fourth Branch.” Policy concerns about the accumulation of authority in the Executive Branch are better addressed by exercising legislative power as the Framers intended than continuing to encroach on the President’s constitutional power of removal.

* * *

Humphrey’s Executor has belonged in the separation of powers anti-canon from the day it was decided. Denying the “President’s power to remove—and thus supervise—those who wield executive power on his behalf” flouts constitutional text and structure and elevates historical revisionism over an understanding of Article II that “was settled by the First Congress [and] confirmed [by this Court’s] landmark decision [in] *Myers*.” *Seila Law*, 591 U.S. at 204.

Rather than grapple with inconvenient history, *Humphrey*’s made a “retreat to the qualifying ‘quasi’” to justify a radical break from text, history, and ratification-era practice. *Ruberoid Co.*, 343 U.S. at 487-88 (Jackson, J., dissenting). This novel formulation of “administrative” power was rooted in Progressive Era ideas of replacing the “Founders’ tripartite system and their checks and balances [with] a ‘more efficient separation of politics and administration.’” *Cochran*, 20 F.4th at 218 (Oldham, J., concurring). And so it did, ushering in a period of administrative governance dominated by a “headless Fourth Branch” that exercised the President’s power yet was accountable to no one. *Consumers’ Rsch.*, 145 S.Ct. at 2517 (Kavanaugh, J., concurring).

This Court “long ago interred” the “abstract and ahistoric” philosophy of quasi-powers that purported to justify *Humphrey*’s deviation from the general rule of at-will removal. *Shurtleff v. City of Boston*, 596 U.S. 243, 279, 288 (2022) (Gorsuch, J., concurring in the judgment). Even *Humphrey*’s narrow holding—“that the [1935] FTC did not exercise executive power” and thus could be legitimately excised from the Article II chain of command—“has not withstood the test of time.” *E.g.*, *Seila Law*, 591 U.S. at 216 n.2.

In light of these developments, this Court has construed *Humphrey*’s extremely narrowly, establishing its Article II carve out for (the realistically null set of) multi-member, partisan-balanced regulatory commissions not exercising executive power as the “outermost constitutional limi[t] of permissible congressional restrictions on the President’s removal power.” *Seila Law*, 591 U.S. at 218. Even there, the Court has

steadfastly refused to extend *Humphrey's* beyond its precise characterization of the 1935 FTC. *Id.* at 219 n.4; *Collins*, 594 U.S. at 250-51, 256. There is thus a serious question whether the FTC—of 1935 or today—satisfies the standard it helped to create. *Cf.* Nachmany, *The Original FTC* at 1 (arguing that “because the statutory scheme evaluated in *Humphrey's Executor* no longer exists as it was” in 1935, *Humphrey's* “no longer applies to the modern FTC”).

None of this is a surprise. Maintaining “a system of disembodied independent agencies with enormous power over the American people and American economy” has always been fundamentally inconsistent with the “principle of democratic accountability incorporated into the Constitution’s text and structure, as well as historical practice and foundational Article II precedents.” *Consumers’ Rsch.*, 145 S.Ct. at 2518 (Kavanaugh, J., concurring). And the idea of carving out an exception to the President’s constitutional removal power for multi-member commissions understood to be acting as “quasi legislative and quasi judicial bodies,” *Humphrey's*, 295 U.S. at 629, has “proved to be fundamentally misguided,” *Loper Bright*, 603 U.S. at 407.

Humphrey's was “[i]ssued during a ‘bygone era’ when this Court took a more freewheeling approach to interpreting legal texts.” *Shurtleff*, 596 U.S. at 276 (Gorsuch, J., concurring in the judgment). Yet, “[l]ike some ghoul in a late-night horror movie,” *Humphrey's* “sits up in its grave and shuffles abroad” whenever an unelected bureaucrat thinks that he or she can run the Executive Branch better than the President the people chose. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch.*

Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment); *see supra* n.2 (collecting cases). These attempts to second-guess the President and undermine the democratic process will not stop until this Court “places a tombstone on [*Humphrey’s*] no one can miss.” *Loper Bright*, 603 U.S. at 417 (2024) (Gorsuch, J., concurring).

CONCLUSION

The Court should overrule *Humphrey’s Executor*.

Respectfully submitted,

Thomas R. McCarthy
Counsel of Record
J. Michael Connolly
Tiffany H. Bates
Zachary P. Grouev
ANTONIN SCALIA LAW SCHOOL
ADMINISTRATIVE LAW CLINIC
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com

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Counsel for Amicus Curiae