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

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BRIEF AMICUS CURIAE OF ADMINISTRATIVE AND CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors who teach and write in the areas of administrative and constitutional law. Amici and their law school affiliations are identified in the Addendum to this brief. Based on their scholarship and experience, they have concluded that multi-member independent federal agencies, such as the Federal Trade Commission (FTC), serve an important function and that the for-cause limitation on the removal of FTC Commissioners does not violate the Constitution. They are filing this brief to set forth what they believe to be the proper method of analysis for the constitutional question presented in this case and also to explain why, even if the Court agrees with petitioners, that should not necessarily produce the same answer to the question of the validity of the removal of all multi-member agencies whose members have for-cause removal protections.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress created the Federal Trade Commission in 1914 with five members appointed by the President with the advice and consent of the Senate. Federal Trade Commission Act, 38 Stat.

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[1] Pursuant to Rule 37.6, amici state that no party, counsel for any party, or any person other than amici and their counsel authored this brief or made any monetary contribution for its preparation or submission.

717, 15 U.S.C. § 41. Members serve staggered seven-year terms, and no more than three members may be affiliated with the same political party. *Id.* Under the Act, a member "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." *Id.* A number of other federal agencies have similar structures and similar, although in some cases differently worded, protections against at-will removals by the President. For convenience, this brief will refer to all of them generically as "for-cause" limitations.

The principal question presented is whether the for-cause limit on removal of FTC Commissioners is unconstitutional as an infringement of the powers of the President or a violation of separation of powers. To start, the Commissioners were properly appointed by the President pursuant to Article II, section 2 of the Constitution, and there is no other constitutional provision that specifies the President's role in the removal of officers that he has appointed. In addition, under the law creating the for-cause removal limitation for this or any other current federal agency, neither House of Congress has any role in the removal decision. Like every other law, Congress's role ended when both Houses passed a bill and sent it to the President for his signature. The question then becomes, is the limitation at issue here unconstitutional because it violates an implied power of the President?

The President's theory of unconstitutionality is based on the concept of the unitary executive, which is not explicitly found in the Constitution. Rather, it is derived from Article

II, section 1, under which "the executive Power shall be vested in the President of the United States," and Article II, section 3, under which the President "shall take Care that [all] the laws be faithfully executed." Under this theory, in order for the President to carry out his duties, he must be able to remove all principal officers at will. These include members of the President's Cabinet and other officers who head federal agencies, as well as members of boards and commissions like the FTC, National Labor Relations Board (NLRB), Merit Systems Protection Board (MSPB), the Federal Reserve Board of Governors, and the Federal Election Commission (FEC). If this implied removal authority is as powerful as petitioners argue, however, it suggests that the express grants of other specific powers to the President—such as making him Commander in Chief of the Armed Forces and giving him the right to "require the opinions, in writing, from the principal officer in each of the executive departments"—would be redundant. As proposed by petitioners, this theory would apply to *all* entities within the Executive Branch, meaning that it would also enable the President to remove the for-cause protected judges of the Tax Court, the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces, all of which are part of the Executive Branch.

It is a striking feature of the Constitution that it does not itself create the departments of the government but instead leaves that task to Congress under its authority to enact all laws "necessary and proper" to carry out the Constitution's goals. Yet the unitary executive

approach to removal issues treats all entities within the Executive Branch as identical, even though Congress separately created each of them, in some cases for similar reasons and in others for very different ones. Significantly, the Take Care Clause resides in section 3 of Article II, which primarily concerns the President's relations with Congress, not section 2, which delineates the President's own powers. This fact also explains why the better reading of the Take Care Clause is that it instructs the President to ensure that his subordinates, as well as himself, follow the laws that Congress has enacted.

The purpose of the for-cause removal rules for agency members is different from those for federal civil service employees, who are protected by statute from arbitrary personnel actions designed to provide them with a considerable measure of job security. Officials who have been FTC Commissioners or held similar positions have little difficulty obtaining subsequent employment as Washington lobbyists or at law firms that rely on their experience and connections in serving their clients. Rather, the for-cause limitation serves to protect the public from direct presidential intervention in decisions and other actions that Congress has concluded should be made without direct presidential political and/or policy input. As such, those limitations protect the ability of the agency to carry out its mission as intended without the agency heads having the "Damocles sword." *Wiener v. United States,* 357 U.S. 349, 356 (1958).

Focusing on the work an agency actually does and how it does it illustrates why the unitary

executive approach to removal issues produces results very much at odds with the goals of Congress. The FTC uses rulemaking and adjudications (both internal and in federal court) with respect to laws designed to protect competition among businesses and guard against unfair practices that harm consumers. The FTC and similar agencies, such as the Securities and Exchange Commission (SEC) and the Consumer Product Safety Commission (CPSC), are designed to operate on a collective basis, hopefully achieving a consensus resolution that attracts all five commissioners. This goal is aided by the limits on partisanship of their members and staggered terms. Those features tend not only to produce greater stability for regulated parties and other affected persons, but the limits on partisanship also make the agency a greater reflection of the Congress that created it.

Another reason for creating some of these agencies is expertise. That is surely true for the NLRB, which is designed to create a neutral forum where disputes between management and employees over collective bargaining and other work-related issues can be resolved almost entirely through agency adjudications by Board members chosen for their experience in labor relations. Again, staggered terms, reinforced by customary limits on partisanship and removals only for-cause, reduce the likelihood of wild swings in the law when there is a change in the political party of a new President.

Similar—and arguably even stronger—neutrality concerns relate to the MSPB, where civil

servants seek review of adverse personnel decisions by agency heads that work for the President. If the MSPB is composed of officers who are subject to removal at will by the President, employees, whose only remedy is before the MSPB, will lack confidence that they will have a neutral forum in which to air their grievances. Concerns about lack of neutrality also extend to cases in the Tax Court, the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the Armed Forces Court of Military Appeals, in which one part of the Executive Branch is opposing a private party. But if petitioners' constitutional theory prevails, Congress would have little choice but to provide for all adjudications now handled by administrative agencies and the Article I courts to be adjudicated in the Article III courts.

Other agencies have for-cause removal restrictions because of the politically sensitive areas under their jurisdiction for which Congress concluded that presidential control or intervention would be inappropriate. Consider these agencies. The Federal Communications Commission (FCC) has the power to deny or revoke valuable broadcast licenses. If the agency was under the thumb of the President, it could be used to threaten networks or individual stations whose programming displeased the President or to reward those that did his bidding. The Federal Reserve has the vital and sensitive responsibility to control the money supply in order to limit inflation and, at the same time, stimulate job creation, tasks that Congress reasonably concluded should be excluded from presidential involvement. And perhaps most sensitive of all is the Federal Election Commission,

where the evenly balanced six members can determine the fate of a presidential re-election campaign and those of his political party.

On the other side of these very strong interests advanced by the for-cause removal rule is the inability of the President to remove an agency member who does not share their priorities, which, in this case, was the only reason the President gave in removing respondent from her position with the FTC. But that does not mean that the President lacks influence over what the FTC does. He appoints the Chair of the agency, who in turn controls most of the staff and largely sets the agenda. With staggered terms and the decision of some Commissioners to enter private practice before their terms are over, Presidents have frequent opportunities to have persons who share their priorities fill those vacancies. And lastly, because the annual budgets of all these agencies (except the Federal Reserve) must be approved by Congress in laws signed by the President, he can also have significant influence over the focus of the agency's work via the appropriations process.

This Court's decisions in *Nixon v. Administrator of the General Services Administration,* 433 U.S. 425 (1977) (*Nixon v. GSA)*, and *Morrison v. Olson*, 487 U.S. 654 (1988), provide the proper framework for deciding this case and those involving removal limitations for other multi-member federal agencies. Under those authorities, a law that alleges an infringement on the authority of the President must be upheld unless it substantially infringes on a significant constitutional power of the President. That test

requires a balancing of the interests supporting each of the laws involved against the degree to which the President is unable to carry out his constitutionally assigned functions. The interests in preserving the balanced, stable, and nonpartisan approach that Congress included in all of these agencies provide the proper basis to conclude that the President and the unitary executive theory do not overcome the decisions by Congress to include for-cause removal restrictions in the laws providing for the appointment of those officers who head these multi-member agencies.

At the very least, the significant differences in the operations of these agencies and the reasons why for-cause removal protection is important to achieving the goals Congress set for them make it clear that the unitary executive's "one size fits all" approach for determining the constitutionality of removal restrictions should be rejected. Congress created each of these agencies and established the term of office for their members. None of these government bodies, including the Cabinet Departments and the multi-member agencies, is provided for in the Constitution and most were not envisioned by the Framers. That is because the Necessary and Proper Clause in Article I, section 8, gives Congress the authority to "enact all powers necessary and proper" to carry into effect not only the powers of Congress but those vested "in any department or officer" of the Federal Government. As Professor Sunstein has concluded, "That suggests, at a minimum, considerable congressional control over the organization of the judicial and executive branches." Cass R. Sunstein, *Myth of the Unitary Executive, The Docket:*

Proceedings from the Administrative Conference of the United States, 7 Admin L.J. Am U. 299, 305 (1993).

Regarding the remedy question, petitioners urge the Court to limit the relief to an award of money damages, as if the harm from a wrongful firing of respondent was limited to the harm to respondent. But as this brief shows, the for-cause requirement for removal of FTC Commissioners was included to protect the public from presidential interference with the fairness of agency proceedings. If the remedy for wrongful removal in all cases is limited to the eventual payment of money damages, that would create a license whereby the President could remove any agency official at will, with the only consequence being an eventual payment from the Treasury. Courts of equity are not so limited.

ARGUMENT

CONGRESS HAS THE CONSTITUTIONAL AUTHORITY TO REQUIRE THAT REMOVALS OF MEMBERS OF THE FEDERAL TRADE COMMISSION AND OTHER MULTI-MEMBER AGENCIES ONLY BE FOR-CAUSE.

Amici agree with petitioners on one point: the limit on for-cause removals applicable to respondent Slaughter cannot be defended on the ground that the FTC is not part of the executive branch or that it is a quasi-judicial or quasi-legislative agency. There are only three branches of the federal government, and the FTC is not in the judicial or legislative branches. It plainly performs many functions that implement the laws that Congress has passed—the very definition of an entity within the executive branch. It adjudicates cases and writes legislative rules, and there is nothing quasi about these actions. Although this brief argues that the limit on the removal of FTC Commissioners is constitutional, this Court should end forever the use of "quasi" in separation of powers determinations. As Justice Robert Jackson said in his dissent in *Federal Trade Commission v. Ruberoid Co.,* 343 U.S. 470, 487-88 (1952), "The mere retreat to the qualifying 'quasi' is implicit with confession that all recognized classifications have broken down, and 'quasi' is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed."

Petitioners' position is clear and simple, but mistaken. The President is the head of the

executive branch, and under the Vesting and Take Care Clauses, he is responsible for everything that anyone in the executive branch does. Therefore, petitioners argue, he must have the power to remove at will at least all the heads of each agency (and conceivably other officers and perhaps even all employees) if he is to be held accountable for what they do.

To begin, petitioners' theory of the unitary executive, which is derived from the Take Care Clause, must confront the fact that the provisions that expressly confer powers on the President are in section 2 of Article 2, not section 3, where the Take Care Clause is located. If that latter clause is as powerful as petitioners argue, the Framers would not have needed to explicitly include provisions that enable the President to "require the Opinion, in writing, of the principal Officer in each of the executive Departments," Article II, section 2, if he could remove them at will. It would also have been unnecessary to make him Commander in Chief of the Army and Navy," *id.*, or to entitle him to "receive Ambassadors and other public Ministers." Article II, section 3.

Indeed, if the Take Care Clause empowers the President to remove officers at will, contrary to the laws passed by Congress, it should not have been included in section 3, which primarily deals with the President's relations with Congress, not with others in the executive branch. Section 3 commands the President to provide Congress with "the State of the Union;" allows him to recommend to Congress "such Measures as he shall judge necessary and expedient"; and provides that he

"may on extraordinary Occasions, convene both Houses, or either of them." *Id.* In this context, the Take Care Clause, which does not assign the President personally any duties, is properly read to direct him to ensure that his subordinates faithfully execute the laws Congress has enacted, rather than as a mandate that he have complete control over everything that happens in the executive branch. As Attorney General William Wirt opined in the very first published volume of Opinions of the Attorney General, "If the laws, then, require a particular officer by name to perform a duty, not only is that officer bound to perform it, but no other officer can perform it without a violation of the law; and were the President to perform it, he would not only be not taking care that the laws were faithfully executed, but he would be violating them himself." 1 Op. A.G. 624, 625 (1823).

Not only does petitioners' expansive unitary executive theory require this Court to overrule *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), but such a ruling would also extend to every agency that is not part of the judicial or legislative branches. That includes the NLRB, the MSPB, and the FEC, and, despite petitioners' protest to the contrary, the Federal Reserve. Indeed, petitioners' contention as to the unconstitutionality of for-cause limitations generally forces the President to conclude, as his brief does, that the limits on removals of officials at purely adjudicative agencies, like the War Claims Commission in *Wiener v. United States*, 357 U.S. 349 (1958), are also doomed: "To avoid confusion, the Court should clarify that, to the extent *Wiener*

suggests Congress may restrict the removal of executive officers, it, too, no longer remains good law." Pet. Br. at 30, n.1. That would mean that, because the "Article I" Tax Court, the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces as well as the purely adjudicative Occupational Safety and Health Review Commission (OSHRC) and Federal Mine Safety and Health Review Commission (FMSHRC) are in the executive, not the judicial, branch, the for-cause removal limits applicable to the judges of those courts and the commissioners of these agencies are also invalid under petitioners' view of the Constitution.

Amici's argument proceeds in two parts. First, we show that, under the analysis in *Nixon v. GSA* and *Morrison v. Olson,* the FTC removal restrictions are constitutional because they do not significantly impede the President's ability to carry out his constitutionally assigned functions. Second, if the Court should reach a contrary conclusion for the FTC, amici demonstrate that there are other multi-member agencies and courts within the executive branch for which the congressional justifications for restrictions on the removal of their officers are different and compelling. Accordingly, the Court should make clear that an overruling of *Humphrey's Executor* should not be read to cast doubt on the constitutionality of other agencies whose independence can be justified for other reasons.

The Removal Restrictions on FTC Commissioners Are Constitutional.

Petitioners rely heavily on language from *Myers v. United States,* 272 U.S. 52 (1926). But in that case, the law required Senate approval of the President's removal decision, which is not a condition of any current for-cause restrictions. As this Court observed in *Morrison v. Olson*, 487 U.S. at 686:

> As we observed in *Bowsher* [*v. Synar,* 478 U.S. 714, 724 (1986)], the essence of the decision in *Myers* was the judgment that the Constitution prevents Congress from 'draw[ing] to itself ... the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of the [Appointments Clause] and to infringe the constitutional principle of the separation of governmental powers.' *Myers, supra,* at 161.

As the Court continued there: "Unlike both *Bowsher* and *Myers,* this case does not involve an attempt by Congress itself to gain a role in the removal of executive officials other than its established powers of impeachment and conviction." *Id.* at 686. Instead, the Court framed the question as "whether the provision of the Act restricting the Attorney General's power to remove the independent counsel to only those instances in which he can show 'good cause,' taken by itself, impermissibly interferes with the President's

exercise of his constitutionally appointed functions." *Id.* at 685.

Far from backing away from *Humphrey's Executor,* the seven-justice majority opinion in *Morrison*, written by Chief Justice Rehnquist, embraced it: "In *Humphrey's Executor,* we found it 'plain' that the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies. Were the President to have the power to remove FTC Commissioners at will, the 'coercive influence' of the removal power would 'threate[n] the independence of [the] commission.'" *Id.* at 687-88 (citations omitted). It similarly reaffirmed the holding in *Wiener*:

> [T]he Commissioners were entrusted by Congress with adjudicatory powers that were to be exercised free from executive control. In this context, 'Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have someone else on that Commission. Accordingly, we rejected the President's attempt to remove a Commissioner 'merely because he wanted his own appointees on [the] Commission,' stating that 'no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute.

Id. (citations omitted). After reviewing the functions performed by the Independent Counsel,

the Court concluded that "we simply do not see how the President's need to control the exercise of that discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691-92.

Petitioners attempt to downplay the extensive and well-reasoned analysis in *Morrison* because the officer there was inferior, whereas here, respondent holds a principal office. Pet. Br. at 20. The *Morrison* opinion acknowledges that fact while also recognizing the importance of the office of Independent Counsel, which could even be assigned the function of investigating the conduct of the President, as its predecessor did in *United States v. Nixon,* 418 U.S. 683 (1974). Even more significant is that the decision reaffirmed *Wiener,* where the War Claims Commission's decisions were unreviewable by anyone, thereby making them principal officers, like respondent here. Amici recognize that this case involves principal not inferior officers, but that distinction should only be a factor in the balancing process, not itself determinative.

The *Morrison* Court also examined the statute at issue there from a separation of powers perspective to respond to the claim that the law was "unduly interfering with the role of the Executive," observing "first that this case does not involve an attempt by Congress to increase its own powers at the expense of the Executive Branch." *Morrison*, 487 U.S. at 694. In rejecting the claim of excessive interference, this Court concluded that the law at issue there did not "'impermissibly

undermine' the powers of the executive branch, . . . or 'disrupt[] the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions[.]" *Id.* at 695 (citing *CFTC v. Schor,* 478 U.S. 833, 856 (1986) and *Nixon v. GSA,* 433 U.S. at 443). That conclusion recognized the "Necessary and Proper" power of Congress to create new governmental institutions with varying degrees of presidential oversight. The President's Take Care responsibility cannot be eliminated, but that does not mean that Congress cannot limit the right of the President to remove respondent except for cause.

The *Morrison* opinion specifically addressed the very claim that is at the heart of petitioners' legal argument here: "It is undeniable that the Act reduces the amount of control or supervision that the Attorney General and, through him, the President exercises over the investigation and prosecution of a certain class of alleged criminal activity." *Id.* However, after reviewing both the limits on the control over the Independent Counsel and the manner in which the remaining controls could be asserted, the Court rejected the separation of powers challenge in a ruling that strongly supports respondent here:

> Notwithstanding the fact that the counsel is to some degree "independent" and free from executive supervision to a greater extent than other federal prosecutors, in our view these features of the Act give the Executive Branch sufficient control over the independent counsel to ensure that the

> President is able to perform his constitutionally assigned duties.

Id. at 696.

Although not a removal case, the decision in *Nixon v. GSA*, which was relied on in *Morrison*, is an important ruling in which the Court considered the President's interests and nonetheless upheld Congress's decision that an incursion on the President's executive privilege was justified. The statute there was supported by the then-serving President as well as the President who signed the act into law, just as the FTC Act and the other laws creating multi-member agencies were supported by the Presidents who signed them into law. And like this case, in which Congress has acted solely though the enactment of a law, and in which the President pointed to no express power of his in the Constitution that was being violated, the *Nixon* Court gave appropriate weight to the determination by Congress that the allegedly intrusive feature was reasonably necessary to achieve the goals that Congress set for the law.

Former President Nixon argued there for a separation of powers approach that would prevent Congress from exercising any control over the President and, in particular, the disposition of his papers and tapes. The Court rejected that approach in no uncertain terms:

> Rather, in determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing

> its constitutionally assigned functions. *United States v. Nixon*, 418 U.S. at 711-712. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.

Nixon v. GSA, 433 U.S. at 443.

There are two elements of this ruling that are of importance to this case. First, the disruption analysis is applied only when a statute interferes with a President's "constitutionally assigned functions." For example, that test would be met if Congress sought to limit the individuals a President could nominate to a principal office to only those on a list provided by the Senate, because that would interfere with the discretion expressly afforded him under the Appointments Clause in Article II, section 2. The same result would follow if Congress enacted a law that sought to control the conduct of military operations in a manner that interfered with the President's role as Commander in Chief, established by Article II, section 2. Here, however, the President can point to no language in section 2, which establishes the powers of the President, that provides him the "constitutionally assigned function" of removing officers of the United States at will.

Second, amici agree that the Constitution entitles the President to remove principal officers in at least some circumstances, but to prevail, petitioners must also establish that the for-cause limits here are not "justified by an overriding need

to promote objectives within the constitutional authority of Congress." *Id.* As amici now show, Congress had in 1914, and continues to have today, compelling reasons for limiting the President's authority to remove all FTC Commissioners except for good cause.

We begin with the features of the FTC Act that led the Court in *Humphrey's Executor* to uphold the for-cause limitation:

- The commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality.

- Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts "appointed by law and informed by experience."

- The legislative reports in both houses of Congress clearly reflect the view that a fixed term was necessary to the effective and fair administration of the law.

- It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.

- [O]ne advantage which the commission possessed over the Bureau of Corporations (an executive subdivision in the Department of

> Commerce which was abolished by the act) lay in the fact of its independence, and that it was essential that the commission should not be open to the suspicion of partisan direction.

295 U.S. at 624-25.

The Court's lengthy conclusion remains as applicable today as it was when written ninety years ago:

> To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

Id. at 626.

These reasons are more than sufficient to justify the modest limitation on removal applicable to respondent, but there are justifications that apply generally to multi-member bodies like the FTC. With five Commissioners, drawn from both political parties, the intended effect is that FTC Commissioners will seek consensus, which can best be obtained by moving to the center, especially with respect to the rules that the FTC is authorized to issue. Similarly, with staggered terms and limits on partisan appointments, swings in enforcement

policies and in administrative adjudications will be reduced, producing greater stability in the law.

There is one other advantage of an independent FTC that would be lost if petitioners are correct, and FTC Commissioners can be removed at will. Currently, both the Antitrust Division of the Justice Department and the FTC enforce what are basically one set of antitrust laws, but they by no means simply duplicate each other. They have different priorities, and they sometimes differ in their understanding of the law. They are, in effect, in competition. However, if the President can replace all the FTC Commissioners with persons whose views are aligned with his, as he can for the Attorney General and the head of the Antitrust Division, those differences will evaporate, and the benefits of this competition will be gone with them.

Denying the President the power to remove respondent for no reason other than that he would prefer to have someone else hold that office does not prevent the President from exerting significant influence, if not control, over the FTC and other similar agencies in the executive branch. Most importantly, the President selects the Chair, 15 U.S.C. § 41, who is the operating head of the agency. 16 C.F.R. § 0.8. Because the members serve staggered terms, and there are frequent resignations (both when administrations change and at other times), the President will have many opportunities to impact the FTC's direction.[2] And

[2] A list of former FTC Commissioners and the times they served (many shorter than the statute provides) can be found

because the budgets of all multi-member agencies (except the Federal Reserve) must be approved annually in a law that the President must sign, he has considerable influence over the FTC's work through the amount of funding that it receives, as well as through other limits or mandates imposed on it by laws signed by the President.

Amici recognize that this Court's decision in *Seila Law, LLC v. Consumer Financial Protection Bureau,* 591 U.S. 197 (2020) provides some support for petitioners' view of the unitary executive. However, although two Justices would have applied the ruling there to multi-member agencies as well as to the CFPB, *id.* at 239-52, the majority did not agree. In the course of its opinion, the Court noted the differences between the CFPB and multi-member agencies where there are a "diverse set of viewpoints and experiences." *Id.* at 206. It further observed that "the CFPB is led by a single Director who cannot be described as a 'body of experts' and cannot be considered 'non-partisan' in the same sense as a group of officials drawn from both sides of the aisle." *Id.* at 217. In addition, "while the staggered terms of the FTC Commissioners prevented complete turnovers in agency leadership and guaranteed that there would always be some Commissioners who had accrued significant expertise, the CFPB's single-Director structure and five-year-term guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise." *Id.* Finally, the "CFPB's receipt of funds outside the appropriations

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here: https://www.ftc.gov/about-ftc/commissioners-staff/former-commissioners.

process further aggravates the agency's threat to Presidential control," whereas the FTC's budget is very much a matter on which the President has a significant say. *Id.*

The most complete analysis of why the rationale for setting aside the for-cause removal restriction for the director of the CFPB does not apply to the FTC and other multi-member agencies is contained in a dissent by then-judge Kavanaugh in *PHH Corporation v. Consumer Financial Protection Bureau*, 881 F.3d 75, 164 (D.C. Cir 2018). That discussion is included in two separate parts of the dissent, *see id.* at 165-67 & 183-87, and it relies on many of the arguments made in this brief (and more) to compare the benefits of a multi-member agency with for-cause removal protections, staggered terms, and limits on partisanship, to the costs of for-cause removal protection for a single-member agency like the CFPB. The opinion also shows that the reduction in presidential accountability is much greater for the CFPB than it is for agencies like the FTC because "other than the President, the Director enjoys more unilateral authority than any other official in any of the three branches of the U.S. Government." *Id.* at 166.

In the end, the many valid reasons for permitting Congress to limit removal of respondent—unless petitioners can show cause for doing so—far outweigh the relatively modest burden that the removal restrictions place on the President. And they are surely not so significant

that they meet the tests in *Morrison v. Olson* and *Nixon v. GSA,* let alone justify overruling *Humphrey's Executor* and *Wiener,* as well as much of *Morrison*.[3]

Even if The Court Agrees that Respondent's Removal Was Proper, It Should Make It Clear that Many Other Similar Removal Restrictions Applicable to Other Agencies Are Not Subject to that Ruling.

When assessing the constitutionality of their applicable for-cause limitations, petitioners treat all multi-member agencies in the executive branch as if they are fungible. They are not. Congress created independent agencies in all shapes and sizes. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (Appendix, 1236–94) (2000). Many enabling statutes have particular expertise requirements for agency members; most have staggered terms and place limits on the number of seats held by one party. Many statutes also allow more direct communications with Congress or authorize independent litigating authority. *Id.* Because of these significant differences among

[3] In *Trump v. Cook*, 25A312. the President seeks to remove a member of the Board of the Federal Reserve for cause. In his Application for a Stay (at 20), the President has argued that "The determination of cause is committed to the unreviewable discretion of the President." If that extreme argument were correct (which it is not), then the viability of for-cause limitations would have no practical effect.

these agencies, the balancing required by *Morrison v. Olson* and *Nixon v. GSA* may well differ from that for the FTC. Amici urge the Court not to pass on the constitutionality of other for-cause limits applicable to other agencies, but only to make it clear that a ruling favoring petitioners in this case does not determine the outcome regarding for-cause limitations applicable to the heads of other multi-member federal agencies.

In particular, a number of these other agencies are primarily, if not entirely, adjudicative bodies and thus closely resemble the claims commission unanimously upheld in *Wiener* and reaffirmed in *Morrison*. As noted above, petitioners urge this Court to overturn *Wiener*, even without full briefing on the merits, presumably because that decision supports the independence of adjudicative agencies. For example, the only function of OSHRC and FMSHRC is to adjudicate enforcement cases brought by the Department of Labor. *See, e.g.*, *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442 (1977). Similarly, the primary function of the NLRB is to decide disputes between management and labor based on complaints brought by the agency's general counsel, who *is* an at-will appointee of the President. The members of the Board are chosen for their expertise in matters that come before the Board, and the balance sought is less about party politics than about management versus labor. Unless the affected parties have sufficient confidence in the fairness and neutrality of the Board as a whole, they will find other means to seek the economic benefits both sides desire, and

the goal of the NLRA—to secure labor peace—will be denied.[4]

A similar, but in amici's view, an even greater, need for perceived fairness is required for the MSPB. Its primary function is to adjudicate claims by federal employees that their employer unlawfully fired them or imposed other significant discipline on them. By statute, the MSPB is their exclusive forum to bring their grievances. *See Elgin v. Dept. of Treasury*, 567 U.S. 1 (2012). What makes the case for restrictions on removal of the members of the MSPB so imperative is that the employer whose conduct they are challenging is the United States Government, headed by the same President who wishes to be able to remove the MSPB members at will. If petitioners' claim that the leaders of all federal agencies must, as a matter of constitutional law, be removable by the President for any reason whatsoever is accepted, the President's resulting ability to remove MSPB members at will would be disastrous for federal employees. In the eyes of affected employees,

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[4] The absence of a specific limit on partisan appointments in the Board's enabling act itself is not dispositive on whether the President may appoint only members of his political party to the agency. There were no term limits or restrictions on at-will removals in *Wiener*, but this Court found them to be implied from the statute as a whole. For agencies without specific partisanship limits in their statutes, the implication would arise from a long history in the Senate of requiring balanced appointments, whether by political party or between management and labor. *See Established by Practice, supra,* 52 Admin. L. Rev. at 1273–74: "The [Act] is silent on party membership but by tradition two of the five seats have been reserved for individuals who are not members of the President's party."

Congress, and the public at large, a proceeding before a tribunal in which their ultimate boss can remove the tribunal's members at will will be seen as no remedy at all. If this Court tells Congress that it cannot provide for-cause protection for members of the MSPB—and likely many other adjudicative agencies—the only alternative for these thousands of cases each year will be for Congress to provide a forum in the federal courts, where the judges have lifetime tenure.

Ending for-cause protections raises other concerns for those whom Congress sought to protect when it created other federal agencies. Congress established the FCC to ensure that there is reasonable broadcasting service for the listening and viewing public. Through its licensing function, the FCC wields the powerful tool of being able to revoke the authority of stations and networks to exist. If a President is displeased with what a licensee is broadcasting and makes that known to the FCC Commissioners, who no longer have protection against at will removal, the Commissioners might take action against the licensee if they wish to remain in office, raising serious First Amendment issues.[5]

Another agency that clearly needs independence is the National Transportation Safety Board, which combines the functions of

[5] It's well-known that taking control of the media is a common technique used by authoritarians in other countries, *see e.g., How All of Russian TV Became State-Controlled*, AFTER RUSSIA: RUSSIA EXPLAINED, https://www.after-russia.org/en/explained/how-all-of-russian-tv-became-state-controlled.

adjudicating enforcement actions against pilots brought by the Federal Aviation Administration with its better-known mission of investigating accidents. The recent tragic accident near Reagan National Airport involving a collision between an Army helicopter and a private airliner illustrates the need for an independent investigative agency. In a similar vein, the Nuclear Regulatory Commission (NRC) must ensure the safety of nuclear power plants in a consistent manner so that plant operators can know their obligations and plan their expenditures without having to make large-scale adjustments when a new President takes office and chooses their Commissioners.

Financial regulation is another area that Congress has always regarded as requiring special concern for the independence of the governing agencies. These include both the Federal Deposit Insurance Corporation and the Board of Governors of the Federal Reserve, which are responsible for ensuring the safety and soundness of banking institutions, not primarily to protect their shareholders, but to prevent bank runs that can do great harm to depositors and customers. And as this Court recognized in *Trump v. Wilcox,* 145 S. Ct. 1451 (2025), and petitioners acknowledged in their brief, *see* Pet. Br. at 29, the history of the Federal Reserve's role in monetary policy evidences a further special concern from Congress different from, but in some ways similar to, the special reasons why Congress has included for-cause protection for the heads of other multi-member agencies besides the FTC.

There is one agency for which elimination of for-cause removal restrictions would impact our democracy itself by undermining the fairness of federal elections. The statute establishing the Federal Election Commission requires that the six seats be divided evenly between the two major parties. 52 U.S.C. § 30106. It also has a unique requirement in subsection (c): the affirmative votes of four members are necessary before the Commission may act. Thus, if the incumbent president can fire the Commissioners of the opposing party, he can prevent any actions from being taken against his party. For now, at least, the four-vote requirement might prevent the FEC from acting against the President's opponents.

However, if the Court were to reject the ruling in *Buckley v. Valeo,* 424 U.S. 1, 141 (1976) ("the President may not insist that [the FEC's] functions be delegated to an appointee of his removable at will"), the President would surely claim that the partisan limits in the FEC statute are also unconstitutional as a further interference with his responsibility for all actions taken by every federal agency. Indeed, he would likely argue that the check of Senate confirmation in the Appointments Clause is all that the Constitution permits, thereby invalidating the statutory limits on party membership. As harmful as that would be for all agencies when the President's party controls the Senate, as it does now, it would enable a President to create an FEC that would not only issue rules favorable to his party but also bring lawsuits that could handicap his opponents or, at the very least, cause them to spend time and money defending themselves. Surely, the Courts that

wrote *Humphrey's Executor, Morrison v. Olson,* and *Nixon v. GSA,* as well as the many Congresses that voted for, and the Presidents who signed, these for-cause restrictions into law, would never have approved of a theory of constitutional law that enabled such a weaponization of a federal agency.

Petitioners' mechanical theory—that the Constitution requires that the President be permitted to fire at will the principal officers in every entity within the executive branch—extends beyond what are normally considered to be administrative agencies to four Article I courts: The Tax Court, the Court of Federal Claims, the Court of Appeals for Veterans Claims, and the Court of Appeals for the Armed Forces. Those courts have no partisan limits for their members because their judges are supposed to be nonpartisan. Their terms of office are fifteen years, and they may only be removed for cause. Each court, though, adjudicates differently. The judges of the Armed Forces court sit en banc, and the Tax Court does on occasion, whereas the judges of the Claims Court hear cases individually. Some cases in the Court of Appeals for Veterans Claims are decided by a single judge, while others are decided by a panel of three judges. Still, all of these courts are part of the executive, not the judicial branch, because their judges do not have lifetime tenure.

For those four courts, there is one other element that is common to all the cases that each court hears: an agency of the federal government that reports to the President is on one side, and an individual or a private entity is on the other. Like the cases before the MSPB, fundamental fairness

dictates that these judges should not be subject to at-will removal by the President simply because the President disapproves of a ruling. Although petitioners do not specifically ask this Court to apply its removal theory to these courts, the Solicitor General is aware of the reach of petitioners' argument as his brief invoked a specific exclusion for "truly non-executive appointees, such as D.C. Court of Appeals judges," Pet. Br. 23 (citing D.C. Code §§ 11-1501, 11-1502). But that is correct only because they are District of Columbia officers, not federal ones. *See Palmore* v. *United States*, 411 U.S. 389, 397-404 (1973). Again, if petitioners prevail on their unitary executive theory, Congress will have no choice but to allow private parties in cases before these four federal courts to bring their claims in Article III courts where the President has no power of removal at all.

CONCLUSION

For the foregoing reasons and those set forth in respondent Slaughter's brief, the Court should hold that petitioners do not have the right to remove respondent Slaughter from her office as a Commissioner of the FTC without cause. If the Court rules to the contrary, amici urge the Court to state that the ruling does not apply to other multi-member agencies in the executive branch in order to allow members of those agencies to defend the removal restrictions applicable to them and demonstrate why the justifications for them differ in a constitutionally meaningful way from those applicable to the FTC.

Respectfully Submitted

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