

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 FORMER MEMBERS OF
MULTIMEMBER BOARDS AND COMMISSIONS
AS *AMICI CURIAE* IN SUPPORT OF
RESPONDENT**

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<i>FTC v. Am. Nat. Cellular, Inc.</i> , 810 F.2d 1511 (9th Cir. 1987)	27
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<i>Lewis v. NLRB</i> , 357 U.S. 10 (1958)	25
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<i>NLRB v. United Food & Com. Workers Union Local 23</i> , 484 U.S. 112 (1987)	25
<i>PHH Corp. v. CFPB</i> , 881 F.3d 75 (D.C. Cir. 2018)	1, 4, 5, 6, 8, 9, 10, 11, 19, 29
<i>SEC v. Blinder, Robinson & Co.</i> , 855 F.2d 677 (10th Cir. 1988)	7
<i>Seila Law LLC v. CFPB</i> , 591 U.S. 197 (2020)	5, 29
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<i>The Pocket Veto Case</i> , 279 U.S. 655 (1929)	19
<i>Ticor Title Ins. Co. v. FTC</i> , 814 F.2d 731 (D.C. Cir. 1987).....	28
<i>United States v. Eaton</i> , 169 U.S. 331 (1898)	7
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<i>United States v. Smith</i> , 286 U.S. 6 (1932)	23
<i>United States v. Smith</i> , 962 F.3d 755 (4th Cir. 2020)	7
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25 U.S.C. § 2704(b)(6)	27
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42 U.S.C. § 5841(e).....	26
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5 U.S.C. § 3349c	12
52 U.S.C. § 30106	26
Act of June 10, 1890, 26 Stat. 131 (1890).....	21
Act of June 29, 1936, Pub. L. 74-836, 49 Stat. 1985 (1936)	22
Act of Mar. 3, 1887, Pub. L. No. 49-354, 24 Stat. 500 (1887)	20
Federal Trade Commission Act, Pub. L. 63-203, 38 Stat. 717 (1914).....	22

Intelligence Reform and Terrorism Prevention Act,
 Pub. L. 104-458, 118 Stat. 3638 (2004)..... 28

Interstate Commerce Act of 1887, Pub. L. 49-104, 24
 Stat. 379 (1887)..... 20

OTHER AUTHORITIES

1 Op. Att’ys Gen. 212 (1818)..... 14

Aaron L. Nielson & Christopher J. Walker, *The Early
 Years of Congress’s Anti-Removal Power*, 63 Am. J.
 Legal Hist. 219 (2023) 15

*Administrative Management in the Government of the
 United States*, The President’s Committee on
 Administrative Management (1937)..... 24

Alexander K. Obrecht, *Regulatory Uncertainty: A Case
 Study for Applying a Predictable and Steady Hand*,
 Wyo. Law., Dec. 2017 at 34 9

Edwin S. Corwin, *Tenure of Office and the Removal
 Power Under the Constitution*, 27 Colum. L. Rev.
 353 (1927).....13, 15, 18

Gary Richardson & David W. Wilcox, *How Congress
 Designed the Federal Reserve to Be Independent of
 Presidential Control*,
 39 J. Econ. Persps. 221 (2025) 24

Jacob E. Gersen, *Designing Agencies*, in RESEARCH
 HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW
 (Daniel A. Farber & Anne Joseph O’Connell eds.,
 2010)..... 8

Jane Manners & Lev Menand, <i>The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence</i> , 121 Colum. L. Rev. 1 (2021)	20, 25
Kenneth Culp Davis, ADMINISTRATIVE LAW OF THE SEVENTIES, 15 (1976)	8
Kira R. Fabrizio, <i>The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation</i> , 29 J. L., Econ., & Org. 765 (2013)	9
Leonard D. White, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY (1948)	15
Marshall J. Breger & Gary J. Edles, <i>Established by Practice: The Theory and Operation of Independent Federal Agencies</i> , 52 Admin. L. Rev. 1111 (2000) .	21
Marshall J. Breger and Gary J. Edles, INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS (2015)	26
Neal Devins & David E. Lewis, <i>The Independent Agency Myth</i> , 108 Corn. L. Rev. 1305 (2023)	11
Nicholas R. Bednar & Todd Phillips, <i>Commission Quorums</i> , Minn. Legal Studies Research Paper No. 2025-42 (rev. Aug. 22, 2025) [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5347384 .] (last visited Nov. 11, 2025)	11
Presidential Statement on Signing the Consumer Product Safety Improvement Act of 1990, U.S.C.C.A.N. 4400-1, 1990 WL 300981 (Nov. 16, 1990)	12

Prof. James M. Landis, <i>Report on Regulatory Agencies to the President-Elect</i> , Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 86th Cong., 2d Sess. (Comm. Print 1960)	25
Rachel E. Barkow, <i>Insulating Agencies: Avoiding Capture Through Institutional Design</i> , 89 Tex. L. Rev. 15 (2010)	9, 10
Robert E. Cushman, THE INDEPENDENT REGULATORY COMMISSIONS (1941)	21, 22, 23, 25
Roy L. Ash, <i>A New Regulatory Framework: Report on Selected Independent Regulatory Agencies</i> , President's Advisory Council on Executive Organization, Washington, D.C. (1971)	26
The Federalist No. 39 (James Madison) (Ian Shapiro ed., 2009)	14
The Papers of James Madison, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789 (ed. Charles F. Hobson and Robert A. Rutland 1979)	18
Todd Phillips, <i>Commission Chairs</i> , 40 Yale J. on Reg. 277 (2023)	6
William J. Donovan & Ralstone R. Irvine, <i>The President's Power to Remove Members of Administrative Agencies</i> , 21 Corn. L. Q. 215 (1936)	13
RULES	
Sup. Ct. R. 37.6	1

LEGISLATIVE MATERIALS

1 Annals of Cong. 389-90 (May 19, 1789).....	14
H.R. Rep. No. 74-1147 (1935)	24
H.R. Rep. No. 74-1371 (Conf. Rep.) (1935)	24

INTERESTS OF *AMICI CURIAE*

Amici Curiae are 33 former board members of independent federal agencies. They are listed in the Appendix with their former positions and agencies, terms of service, appointing President, and party affiliation (where the agency is one with statutory or customary bipartisanship requirements). *Amici* include Republican and Democratic members and appointees of Republican and Democratic presidents.

Based on their experience, *Amici* have an interest in preserving the collaborative decision-making benefits of independent agency boards structured in line with this Court's precedents in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Wiener v. United States*, 357 U.S. 349 (1958). See *PHH Corp. v. CFPB*, 881 F.3d 75, 183-88 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).¹

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners cast *Humphrey's Executor* as an inscrutable exception to a rule mandating at-will presidential removal of all principal officers. But removal protection for members of multimember boards and commissions is grounded in the important structural differences between agencies headed by boards and those with single heads discussed in then-Judge Kavanaugh's opinion in *PHH Corp. v. CFPB*, 881 F.3d at 183-88. The exception finds firm support in

¹ No counsel for a party authored this brief in whole or in part. No party, counsel for a party, or any person other than *Amici Curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. See Sup. Ct. R. 37.6.

the history of multimember bodies dating back to the Founding era, and in the political branches' consistent re-evaluation, ratification, application, and extension of the multimember board model in the ninety years since this Court's decision in *Humphrey's Executor*.

Amici's multimember board service across parties, administrations and agencies has shown them firsthand how removal protections—typically in concert with bipartisan representation, staggered terms, and presidential chair selection—create an administrative framework that decreases regulatory volatility and improves policy outcomes by balancing accountability to the executive with fidelity to delegated legislative authority. Since this Court's ruling in *Humphrey's Executor*, Congress, in legislation signed by many presidents, has consistently reassessed and approved such arrangements to ensure the faithful execution of the laws. The considered adherence of the political branches to the multimember model should weigh heavily against overruling precedent.

ARGUMENT

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court rejected a constitutional challenge to the statutory provision limiting the grounds for removal of a member of the Federal Trade Commission. The Court declined the government's invitation in that case to rely on broad language in *Myers v. United States*, 272 U.S. 52 (1926), because “the narrow point actually decided [in *Myers*] was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress.” 295 U.S. at 626. *Myers* concerned the validity of a direct congressional

role in removing an officer—not the constitutionality of a statutory standard for removal by the appointing executive official.²

In deciding whether to overrule *Humphrey’s Executor* and to mandate at-will removal of members of multimember boards and commissions, this Court should likewise decline to treat as binding on this issue statements in recent decisions involving agencies headed by a single principal officer. Differences in the structure of multimember boards versus single-headed agencies, the century-long tradition of insulating multimember boards from at-will executive control, and the adherence by the political branches to the multimember board model after considering criticisms of that model all support reaffirming *Humphrey’s Executor*, not overruling it.

The Court’s approach to the question whether Congress can enact removal restrictions when it creates a multimember board should be the same as it was in *United States v. Perkins*, 116 U.S. 483 (1886),

² See, e.g., *Myers*, 272 U.S. at 106 (“This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate.”); *id.* at 114 (“[T]he exact question which the House voted upon [in 1789] was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate.”); *id.* at 119 (“Does this make the Senate part of the removing power? And this, after the whole discussion in the House is read attentively, is the real point which was considered and decided in the negative by the vote already given.”). To be sure, *Myers* includes more expansive language, see *id.* at 127, 158-61, 171-72, but that language is *obiter dicta* by the opinion’s own standard. See *id.* at 142 (explaining why the Court was not bound by statements in *Marbury*).

when this Court addressed for-cause removal of inferior officers. Put simply, with Congress's creation of an office comes a say in the standards by which an officeholder may be removed. Congress has the constitutional prerogative to pass regulatory and oversight statutes; it may choose whether to create an agency tasked with executing such a statute; and it has discretion over how to structure agencies and offices so that their execution of the law remains faithful to the statute Congress passed. Faithful execution of a statutory delegation necessarily entails harmonizing choices made by the enacting Congress with the policy preferences of later presidential administrations. Requiring cause to remove members of multimember boards does not interfere unduly with the powers vested exclusively in the President; rather, such removal restrictions help ensure faithful execution of the authority delegated by Congress to the executive branch.

I. Removal Restrictions on Multimember Bipartisan Boards of Experts Allow Congress to Promote Faithful Execution of the Laws While Preserving Executive Influence.

Boards with for-cause removal standards, mandatory bipartisan representation, and staggered terms function very differently from agencies with a single head, as then-Judge Kavanaugh recognized in his dissenting opinion in *PHH Corp. v. CFPB*, 881 F.3d at 183-88. The multimember board structure preserves sufficient presidential control—including in many instances via the power to designate the chief executive chair—while also supporting the faithful execution of

the laws by limiting agency discretion to nullify statutory policy choices made by Congress.

1. Removal restrictions on members of bipartisan multimember boards and commissions, in contrast to those on single officers heading agencies, do not “impede[]” the President’s “duty” to oversee the execution of the law. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 217, 220 (2020). Members of bipartisan multimember boards and commissions of experts do not exercise the same authority as a single principal officer heading an agency. “Multi-member independent agencies do not concentrate all power in one unaccountable individual, but instead divide and disperse power across multiple commissioners or board members. The multi-member structure thereby reduces the risk of arbitrary decision making and abuse of power, and helps protect individual liberty.” *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

In the absence of at-will removal, “the multi-member structure of independent agencies operates as a critical substitute check on the excesses of any individual independent agency head.” *Id.* at 166. While then-Judge Kavanaugh characterized this check as operating “[i]n lieu of Presidential control,” *id.*, statutory removal restrictions do not leave the President powerless. Even before vacancies arise, the President can generally select new commission chairs. *Id.* at 166-67. Commission chairs typically control agency staff and have greater influence over agency policymaking than other members.³ And because of

³ The authority of chairs varies from agency to agency; some have “strong” chairs who can block certain agency actions desired by a majority of board members through control over agendas or

staggered terms, a newly elected President is likely to be able to influence an increasingly large portion of the Board, incrementally changing the composition in a predictable and continuous manner. *See id.* at 190 (“[T]he staggered terms mean that a President will have ever-increasing influence (through appointments) over an independent agency during the course of that President’s term.”). Moreover, statutory bipartisanship requirements mean that a board is likely to include some incumbent members receptive to the President’s agenda. To be sure, as described further below, removal protections help ensure that presidential influence is exercised in a more consistent manner than it would be through removal and replacement of the entire board at will. But these restrictions do not eliminate presidential control.

Moreover, as *Amici*’s own experiences confirm, apart from strong executive chairs, “in a multi-member independent agency, no single commissioner or board member can *affirmatively* do much of anything.” *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting) (emphasis in original). In constitutional terms, the board or commission as a whole acts as the “head of department” and principal officer.⁴ Agency activity

disproportionately influence agency decision-making through control over staff. *See* Todd Phillips, *Commission Chairs*, 40 Yale J. on Reg. 277 (2023). Phillips describes the FTC as having a chair with chief executive authority, but not unilateral agenda control. *Id.* at 299-300. The President can select the FTC chair, who has no fixed term. *Id.* at 305-08. Presidential selection of the agency chair “can make commissions less independent.” *Id.* at 312, 329-31.

⁴ *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513 (2010) (“[W]e see no reason why a multimember body may not be the ‘Hea[d]’ of a ‘Departmen[t]’”).

generally depends on decisions made by at least a majority of the board members.⁵ Consequently, the question for presidential accountability is not the degree of control over each and every member of a board or commission, but over the body as a whole.⁶

2. Removal protections for bipartisan multimember boards tend to improve agency decision making. The experience of *Amici* bears out then-Judge

⁵ The extent to which an officeholder can wield power matters for Article II purposes; thus, a substitute officer may *temporarily* perform the duties of a principal officer without becoming a principal officer who must be presidentially appointed and confirmed by the Senate pursuant to Article II. *United States v. Eaton*, 169 U.S. 331 (1898); *United States v. Smith*, 962 F.3d 755, 764 (4th Cir. 2020); *see NLRB v. SW Gen., Inc.*, 580 U.S. 288, 293-96 (2017). The substitute is exempt from the “critical” constitutional “safeguard” of advice and consent, *SW Gen., Inc.*, 580 U.S. at 293 (citation omitted), even though he performs the exact same executive functions as would a permanent holder of the office. Similarly, concern about removal protection impeding the President’s ability to control a multimember commission’s powers is mitigated when a single member protected from removal cannot by himself control the agency or the executive power it wields.

⁶ As the Tenth Circuit noted in a decision rejecting a removal-restrictions-based constitutional challenge to an SEC enforcement action: “First, as the President has the power to choose the chairman of the SEC from its commissioners to serve an indefinite term, it follows that the chairman serves at the pleasure of the President. Second, as the chairman controls key personnel, internal organization, and the expenditure of funds, the chairman exerts far more control than his one vote would seem to indicate. Third, it can safely be assumed that in exercising his power of appointment, even as to commissioners who are not members of his party, the President will tend to appoint those persons who are sympathetic to his own views.” *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988).

Kavanaugh’s observation that “[m]ulti-member independent agencies benefit from diverse perspectives and different points of view among the commissioners and board members. The multiple voices and perspectives make it more likely that the costs and downsides of proposed decisions will be more fully ventilated.” *PHH Corp.*, 881 F.3d at 184 (Kavanaugh, J., dissenting). Board members must consult with and attempt to persuade other members. “As compared to a single-Director independent agency structure, a multi-member independent agency structure—and its inherent requirement for compromise and consensus—will tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails.” *Id.* As then-Judge Kavanaugh observed: “A multi-member independent agency can go only as far as the middle vote is willing to go.” *Id.*⁷

Amici’s experience confirms that multimember bodies composed of members with varied perspectives generally reach better conclusions than those which lack such diversity, because views must be tested in the crucible of debate and discussion among the members. Indeed, the same dynamics apply to other decision-making bodies, including reviewing courts, and are why “we want appellate courts to be made up of plural members” *PHH Corp.*, 881 F.3d at 179 (quoting Kenneth Culp Davis, *ADMINISTRATIVE LAW OF THE SEVENTIES*, 15 (1976)).

⁷ This is consistent with social science research. See Jacob E. Gersen, *Designing Agencies*, in *RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW* 350 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010) (multimember, bipartisan composition reduces the “variance” in agency policies).

Although changes in administration inevitably produce changes in agency policies and priorities, the structure of independent agency boards tends to dampen radical shifts. One reason is that board members appointed by a previous administration or who are members of a different party than the President may dissent from an abrupt policy change. Such a dissent “can serve as a ‘fire alarm’ that alerts Congress and the public at large that the agency’s decision might merit closer scrutiny.” *Id.* at 185 (quoting Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 41 (2010)). This moderating influence is particularly important when considering regulations that implicate long-term plans and investments by regulated parties, and where radical and sudden shifts, regardless of policy direction, can create negative externalities for regulated parties by virtue of their unpredictability and abruptness. *See, e.g.*, Alexander K. Obrecht, *Regulatory Uncertainty: A Case Study for Applying a Predictable and Steady Hand*, Wyo. Law., Dec. 2017, at 34, 35 (explaining how the “lack of regulatory certainty” affects how, where, and whether individual companies deploy capital in the oil and gas industry); Kira R. Fabrizio, *The Effect of Regulatory Uncertainty on Investment: Evidence from Renewable Energy Generation*, 29 J. L., Econ., & Org. 765 (2013) (explaining how “perceived regulatory instability reduces new investment and undermines policy goals”).

There is a downside to rapid and drastic change of any kind, because of the potential harm such unpredictable departures from past practice can impose on regulated parties. And there is a concomitant benefit to all regulated parties from the smoother approach to changes in regulation that

multimember boards with statutory removal protections are likely to produce. Transforming these boards into entities whose members can be replaced wholesale and without cause will create rapid and discontinuous changes in policy that Congress did not intend when it created these agencies in the first place and delegated significant regulatory power to them.

In addition, the ability of an administration to replace all board members of an agency in one fell swoop through at-will removal will increase the likelihood that the agency will be subject to regulatory “capture . . . that is, undue influence . . . by regulated entities or interest groups . . .” *PHH Corp.*, 881 F.3d at 185 (Kavanaugh J., dissenting). Just as a single official is more vulnerable to regulatory capture than a board, *id.*, so too a group of individuals all appointed at the same time by the same administration is more likely to fall victim to capture than a group serving staggered terms appointed by successive administrations.

Finally, for-cause removal protections coupled with staggered terms promote expertise within an agency. “Giving agency officials a tenure for a term of years can also foster expertise, as agency heads gain wisdom from their experience on the job. . . . [I]n the case of multimember agencies, the terms of the members must be staggered so that institutional expertise can accumulate without gaps.” Barkow, *supra* 9, at 29. Eliminating for-cause removal protection would tend to increase the amount of time necessary for an agency to accumulate expertise among its members, and, as an entire new slate of board members could begin with every new administration,

would erase the expertise of longer-serving board members and their institutional knowledge.

3. Removal restrictions are also necessary to maintain Congress’s design of multimember boards with staggered terms, quorums, and bipartisan membership requirements. Especially when Congress delegates to an agency the authority to “exercise a degree of discretion” in executing a statutory mandate, *see Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394-95 (2024), it has an interest in structuring the agency to remain faithful to legislative intent.

The division of authority among board members also typically means that a quorum is required for board action. Removal restrictions help to ensure that an agency will possess a necessary quorum. *See PHH Corp.*, 881 F.3d at 179 n.6 (Kavanaugh, J., dissenting) (noting the “quorum provisions applicable to independent agencies”); Nicholas R. Bednar & Todd Phillips, *Commission Quorums*, Minn. Legal Studies Research Paper No. 2025-42 at 34 (rev. Aug. 22, 2025) (“In forty-one commissions (53.9%), Congress has imposed *some* sort of quorum rule by statute.”), [available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5347384.] (last visited Nov. 11, 2025)

Without removal protections, a President may use dismissals to functionally shut down the agency, contrary to Congress’s intent for the agency to be able to act consistent with its statutory mandate. *See* Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 Corn. L. Rev. 1305, 1361 (2023) (“[T]he quorum requirement facilitates the neutering of disfavored independent agencies.”). That Congress did

not intend such a result is evidenced by the fact that Congress often includes in an agency's organic statute a mechanism for members to remain in place after the expiration of their term so the agency may function until their replacement has been confirmed by the Senate.⁸ *See, e.g.*, 15 U.S.C. § 41 (establishing that an FTC Commissioner will continue to serve "upon the expiration of his term of office . . . until his successor shall have been appointed and shall have qualified"); 5 U.S.C. § 3349c (exempting multimember boards from the Federal Vacancies Reform Act). Undoing removal protections would allow the President to circumvent Congress's intent that an agency remain functioning. As a result, laws would go unenforced, and the rights of those who rely on such agencies would not be vindicated.

Similarly, removal restrictions protect the institutional memory that is a benefit of agency boards with staggered terms. Without removal restrictions, an administration could sidestep the staggered term arrangement Congress often creates by statute. If the President may remove any member at once and for any reason, the statutory requirement of staggered terms would be functionally meaningless, and the benefit of predictable, continuous, and smooth transitions within an agency would be lost. The same is true of statutory requirements for bipartisan appointments. A president who could remove members of one party at will could

⁸ For example, as explained in the accompanying presidential signing statement, in 1990 Congress reduced the quorum requirement for the Consumer Product Safety Commission so that it could continue to function when it had only three members. Presidential Statement on Signing the Consumer Product Safety Improvement Act of 1990, U.S.C.C.A.N. 4400-1, 1990 WL 300981 (Nov. 16, 1990).

easily defeat a statutory requirement to appoint members of both parties.

II. Founding Era History Is Consistent with the Creation of Multimember Boards and Commissions with Removal Restrictions.

The Court’s holding in *Humphrey’s Executor* that Congress may impose for-cause restrictions on presidential removal of members of multimember boards is not an obsolete and fact-bound exception to a rule that the President generally may remove at will any officer he appoints. To begin with, there is no such rule of removal in the text of the Constitution, and the “decision of 1789” in the First Congress did not decide the validity of for-cause removal standards, but rather whether impeachment or congressional approval of a specific removal decision could be required.⁹

As Petitioners’ *amicus* Professor Wurman points out (Br. at 19-20), the question whether Congress (by impeachment and conviction) or the Senate (by advice and consent) can participate directly in the removal of a presidential appointee is different from whether Congress can place for-cause restrictions on presidential removal of members of multimember boards and commissions when it creates those offices. See Edwin S. Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 354, 397 (1927) (drawing same distinction in analysis of *Myers*); William J. Donovan & Ralstone R. Irvine, *The President’s Power to Remove Members of*

⁹ That is how this Court described the 1789 debate in *In re Hennen*, 38 U.S. 230, 259 (1839) and *Parsons v. United States*, 167 U.S. 324, 329 (1897).

Administrative Agencies, 21 Corn. L. Q. 215, 221 (1936) (describing the “precise holding” of *Myers*).

On the latter question, Madison argued (in both the Federalist Papers and in the 1789 debates) that the removal standard was a matter for Congress to decide when it created an office. The Federalist No. 39 (James Madison), at 194 (Ian Shapiro ed., 2009); 1 Annals of Cong. 389-90 (May 19, 1789). In 1818, Attorney General Wirt accepted that Congress could enact explicit restrictions on removal. He advised President Monroe that a statute creating an office “without defining the tenure by which it shall be held” is consistent with a commission to serve at the President’s pleasure, because, “[w]henever Congress intend a more permanent tenure, (during good behavior, for example) they take care to express that intention clearly and explicitly” Duty of the President as to a Register of Wills, 1 Op. Att’y Gen. 212, 213 (1818).

History shows that from the beginning, Congress has created multimember boards and commissions including members who were not subject to at-will presidential removal. There is a robust constitutional tradition of housing certain functions within multimember bodies that have a degree of independence from the President when Congress deems such independence necessary for the *faithful* execution of the laws.

The modern independent agency traces its lineage to the Interstate Commerce Commission (ICC) created in 1887. But multimember commissions that included members who were not subject to at-will removal by the President date back to the Founding

era. Both the Sinking Fund Commission and the Mint Commission included the Chief Justice as a member, and the Sinking Fund Commission also included the Vice President—then a rival of the President rather than a running mate, and in all events not removable by the President.¹⁰

The historical record does not show that Congress based the structure of these early multimember agencies on a unique constitutional carve-out for monetary policy. Rather, as Petitioners’ *amicus* the Chamber of Commerce notes, Congress perceived a need to create a body with a degree of independence from the President, and did so by establishing a multimember commission that included members whom the President could not remove. Chamber of Commerce Br. at 24-26; see Corwin, *supra* 13, at 366-67 (discussing Madison’s argument for independence of the Comptroller based on what might be deemed the “quasi-judicial” function of determining citizen claims against the government); accord Donovan & Irvine, *supra* 13, at 220.

The example of the Founding-era commissions shows that notwithstanding the “decision of 1789,”

¹⁰ Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress’s Anti-Removal Power*, 63 Am. J. Legal Hist. 219, 224-26 (2023) (discussing Sinking Fund and Mint Commissions); see Leonard D. White, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY* 351 (1948) (describing Sinking Fund Commission). To be sure, these entities also included board members the President could remove. But whether the President had some degree of control over a multimember board or commission as a whole is distinct from whether a board complied with a posited Founding-era constitutional rule that *every* principal officer must be subject to at will removal. See *Collins v. Yellen*, 594 U.S. 220, 253 n.19 (2021).

Congress always has perceived itself to have the power to create offices in multimember bodies that were not subject to at-will presidential removal. The Board of Regents of the Smithsonian Institution, first established in 1846, is another example of a multimember board that included members not subject to at-will removal. 20 U.S.C. § 41. Thus, our constitutional history reflects an understanding that Congress could create government entities with a degree of independence by including on a multimember board officers who are not subject to at-will presidential removal.

The substantive policy areas in which Congress has chosen to insulate members of boards or commissions from unfettered presidential control have not been limited to agencies dealing with public debts or coinage. Congress has created multimember boards and commissions for oversight purposes and to execute its constitutional authority to regulate interstate and foreign commerce. To many of these agencies, Congress has delegated a portion of its power to fill out statutory standards through regulations and adjudications—what Justice Jackson described in a dissent as “completing unfinished law.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-89 (1952) (Jackson, J., dissenting).

The delegation of legislative powers to agencies to “fill up the details’ of a statutory scheme,” *Loper Bright Enters.*, 603 U.S. at 395 (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)), creates a principal-agent problem for Congress: the agency might exercise delegated authority in a manner inconsistent with the law Congress enacted. *De novo* judicial review of agency interpretations of statutory authority is one important constraint, but it does not solve the problem

entirely. An agency might still take policy steps that may be inconsistent with faithful execution, for example by choosing broadly not to enforce a statute.¹¹ While in extreme cases such policies might trigger litigation and judicial intervention, agency policies that conflict with the authorizing statute may often be hard to detect from the outside. When the agency is a multimember bipartisan board, non-enforcement policies or selective enforcement may trigger corrective deliberation by the board or even a “fire alarm” from a dissenting member. Thus, agency structures are one means of ensuring that agencies do not use their enforcement discretion to thwart the will of Congress. Just as the Founders relied on structural checks and balances among the branches to maintain fidelity to the constitutional structure, Congress has used the checks and balances built into multimember boards and commissions to ensure that agencies remain faithful to their statutory roles.

Congress also established multimember bodies to ensure that the executive can be trusted to faithfully execute laws in which the executive itself may have an institutional interest (such as the Merit Systems Protection Board), much as it has created “Article I courts” with protections against removal to ensure the appearance of fairness in matters such as tax or contract disputes between the government and private citizens. *See Kuretski v. Comm’r IRS*, 755 F.3d 929 (D.C. Cir. 2014) (rejecting challenge to for-cause

¹¹ *Cf. Texas v. United States*, 809 F.3d 134, 181 (5th Cir. 2015) (questioning whether Congress would have delegated to the Department of Homeland Security the authority to “make 4.3 million otherwise removable aliens eligible for lawful presence” via the Deferred Action for Parents of Americans and Lawful Permanent Residents program).

removal provision for Tax Court judges). Indeed, that was Madison's rationale for giving a degree of independence to the Comptroller of the Treasury in the First Congress.¹² Corwin, *supra* 13, at 366-67.

The delegation of legislative power or the assignment of adjudicative functions does not literally place an agency within the legislative or judicial branch. But the Court's reference in *Humphrey's Executor* to "quasi legislative[]" or "quasi judicial[]" functions, 295 U.S. at 628, explains why Congress could constitutionally insulate members of multimember boards from at-will removal: to promote the faithful execution of statutory schemes that involve exercising delegated legislative power or adjudicating disputes.

III. The Political Branches Have Repeatedly Reassessed and Approved Multimember Boards Since *Humphrey's Executor* and Have Relied on Removal Restrictions in Conferring Statutory Authority.

Although the structural differences between multimember boards and agencies headed by a single officer and the history of multimember boards would justify reaching the same conclusion today as the Court did in *Humphrey's Executor*, the history of Congress's close attention to and reliance on this Court's decisions

¹² Madison explicitly connected "reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government" to the Comptroller's adjudicatory function "between the United States and the particular citizens; this partakes strongly of the judicial character" The Papers of James Madison, vol. 12, 2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789 at 265-67 (ed. Charles F. Hobson and Robert A. Rutland, 1979).

in *Humphrey's Executor* and *Wiener* also weighs in favor of leaving precedent in place.

All three branches have played their respective and critical roles in the creation and maintenance of for-cause removal protections for multimember bodies. “In separation of powers cases, the Supreme Court has repeatedly emphasized the significance of historical practice.” *PHH Corp.*, 881 F.3d at 166 (Kavanaugh, J., dissenting).

Congress has taken its cue from this Court in deciding how to exercise its constitutional powers through the creation of new agencies and offices. The creation of the ICC, the model for many present-day multimember boards, followed the Court’s approval of removal restrictions for inferior officers in *Perkins*. Congress briefly paused the enactment of express statutory removal restrictions after broad *dicta* in *Myers* cast doubt not only on direct congressional participation in a removal decision, but also on the validity of statutory for-cause removal standards. But after *Humphrey's Executor*, Congress resumed—and the executive acquiesced in—the creation of multimember agencies with statutory removal protections. Congress continued to follow that model after considering constitutional and policy criticisms over the last nine decades. “[L]ong settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” regulating the relationship between Congress and the President. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

1. Congress created the ICC during a period of re-examination of presidential removal. In 1886, this

Court “adopt[ed]” the view of the Court of Claims that “[t]he constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.” *Perkins*, 116 U.S. at 485. The Court rejected the argument that the statutory removal restriction was “an infringement upon the constitutional prerogative of the executive” for an inferior officer, while reserving decision on the validity of restrictions on the removal of principal officers, which “d[id] not arise in this case, and need not be considered.” *Id.* at 484.

A few months after *Perkins*, the Senate passed a repeal of the Tenure of Office Act, the 1867 statute that had purported to require Senate approval of the removal of officers appointed with Senate advice and consent—exactly the kind of direct congressional involvement in carrying out a specific removal decision that the First Congress had rejected and that this Court later held unconstitutional in *Myers*. The House passed the repeal bill and the President signed it into law in March 1887. Act of Mar. 3, 1887, chs. 353, 354, Pub. L. No. 49-354, 24 Stat. 500 (1887).

Against the backdrop of repeal of the Tenure of Office Act, in February 1887 Congress created the ICC, a five-member commission of experts no more than three of whom could be from the same political party and who were subject to removal only for “inefficiency, neglect of duty, or malfeasance in office.” Interstate Commerce Act of 1887, Pub. L. 49-104, 24 Stat. 379, 383 § 11 (1887).¹³ It is reasonable to infer from the

¹³ Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 52-62 (2021), describes the

context that Congress's pivot in 1887 from *ex post* congressional involvement in officer removal (as had been authorized by the Tenure of Office Act) to the kind of *ex ante* removal standards upheld for inferior officers in *Perkins* was a deliberate effort to create an agency with a degree of independence while remaining within constitutional bounds.

2. Congress used the ICC as a model for the FTC and other agencies. The Customs Administrative Act in 1890 created a board of appraisers with a partisan balance and subject to removal only for inefficiency, neglect of duty, or malfeasance. Act of June 10, 1890, ch. 407, 26 Stat. 131, 136 (1890).¹⁴ The Federal Reserve Act in 1913 created a seven-member board, including the Secretary of the Treasury and Comptroller of the Currency as *ex officio* members. The appointive members served staggered ten-year terms, subject to removal for cause.¹⁵ The Federal Trade Commission Act in 1914, like the Interstate Commerce Act, created a five-member board with a partisan balance and fixed terms of office, subject to removal for inefficiency, neglect of duty, or malfeasance. Pub. L. 63-203, 38 Stat.

historical and legislative context of the adoption of the inefficiency, neglect of duty, or malfeasance standard for removal. Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1128-30 (2000), describes the ICC's evolution from an agency housed within the Department of the Interior, to a completely independent body in 1889, and in 1906 to "a very powerful agency" with ratemaking authority.

¹⁴ In *Shurtleff v. United States*, 189 U.S. 311 (1903), the Court held that the statutory removal standard was not clear enough to preclude removal on other grounds when the appointment was not for a fixed term.

¹⁵ Robert E. Cushman, *THE INDEPENDENT REGULATORY COMMISSIONS* 150 (1941).

717 (1914). That was the provision this Court upheld in 1935 in *Humphrey's Executor*.¹⁶

Congress continued to apply the ICC model to new regulatory entities, and it continued to reassess the model. In his seminal and comprehensive 1941 book, *THE INDEPENDENT REGULATORY COMMISSIONS*, Robert Cushman reviewed the debates over the structure of new agencies as Congress assessed agencies' performance and added new requirements governing the structure of their boards and commissions. For example, in 1916 Congress established the Shipping Board comprised of five members

with staggered six-year terms and with the customary bipartisan limitation. They were to be chosen upon the basis of fitness for the duties of the office and of fair representation of the geographical divisions of the country. They were removable by the President for inefficiency, neglect of duty, or malfeasance in office. The board was to elect its own chairman from its members.

Cushman, *supra* n.15, at 232. In 1936 Congress replaced the Board with the United States Maritime Commission, requiring a bipartisan board of five members who were removable only for neglect of duty or malfeasance in office. Act of June 29, 1936, Pub. L. 74-836, § 201(a), 49 Stat. 1985 (1936).

¹⁶ At the time President Roosevelt removed Humphrey, the FTC was slated to assume additional regulatory power under the 1933 Securities Act. Cushman, *supra* n.15, at 331.

The Radio Act in 1927 established a bipartisan board of five members with six-year staggered terms. Cushman, *supra* n.15, at 302. The Radio Board originally was a temporary body intended to lay the groundwork for regulation by the Department of Commerce. *Id.* at 303. But in 1934, Congress replaced the Board with the seven-member Federal Communications Commission, shifting authority away from the Commerce Department to an independent agency of experts. *Id.* at 322-24. In 1930, Congress similarly replaced the prior Federal Power Commission of *ex officio* executive branch officials with an independent body of five members with staggered terms and a partisan balance. *Id.* at 287; *see id.* at 288-90 (discussing congressional debate over change in structure).¹⁷ The Securities and Exchange Commission established in 1934 was comprised of a bipartisan five-member board with staggered terms. *Id.* at 335.

After omitting explicit removal restrictions for regulatory boards and commissions for several years in deference to language in this Court's decision in *Myers*, Congress returned to implementing for-cause removal protections in legislation creating new agency boards and commissions in the aftermath of *Humphrey's Executor*. Cushman, *supra* n.15, at 366 (describing

¹⁷ The debates show that Congress interpreted this Court's 1926 decision in *Myers* to preclude it from adding the customary restrictions on the removal of board members. *See* Cushman, *supra* n.15, at 293-94. A controversy over the removal of commission staff members by new members of the board led to efforts in the Senate to reconsider their nominations and ultimately to a quo warranto action that came before this Court in *United States v. Smith*, 286 U.S. 6 (1932). The Court held that the Senate's notification to President Hoover of its consent authorized the issuance of a commission of appointment and was not subject to reconsideration under Senate rules.

immediate impact of the *Humphrey's* decision in Congress).

In 1935, when Congress amended the Federal Reserve Act to establish more centralized control over monetary policy, it invested power in a multimember board with fixed terms and partisan balance subject to for-cause removal—rejecting proposals that would have left board members subject to at-will removal. Gary Richardson & David W. Wilcox, *How Congress Designed the Federal Reserve to Be Independent of Presidential Control*, 39 J. Econ. Persps. 221, 223-31 (2025). In July 1935, Congress also established the National Labor Relations Board as an independent agency with members subject to removal for neglect and malfeasance. 29 U.S.C. § 153(a).¹⁸

3. Despite criticism of the “headless fourth branch” from the presidential Brownlow Committee in 1937, which recommended placing the functions of several independent agencies within executive departments under presidential control,¹⁹ Congress

¹⁸ Congress referred to *Humphrey's Executor* as the reason for adding explicit removal protection. H.R. Rep. No. 74-1147, at 14 (1935) (“The other amendment to this section is merely clarifying. It provides that the decision of the Supreme Court in the recent *Humphreys case* [sic] shall be embodied in this statute so as not to leave the matter open to further litigation. The Court held that a Federal Trade Commissioner could not be removed by the President except for neglect of duty.”); *see also* H.R. Rep. No. 74-1371 (Conf. Rep.) at 4 (explaining that in light of the Supreme Court’s decision in *Humphrey's*, Congress feared that the omission of explicit removal protections for the NLRB members would be understood to permit their at-will removal).

¹⁹ *Administrative Management in the Government of the United States*, The President’s Committee on Administrative Management 30, 36 (1937).

created the Civil Aeronautics Authority the following year (1938), followed by the Federal Maritime Commission (1961); the National Transportation Safety Board (1967); the Occupational Safety and Health Review Commission (1970); and the Postal Regulatory Commission (1970). Each of those agencies were headed by boards and commissions whose members were subject to for-cause removal protection. Manners & Menand, *supra* n.13, at 74-79; Cushman, *supra* n.15, at 415.²⁰

Congress continued to experiment with and to adjust the balance between regulatory independence and presidential control. *See* Cushman, *supra* n.15, at 705 (discussing division of authority under Civil Aeronautics Act); *id.* at 707 (Shipping Board). One noteworthy example was the 1947 division of NLRB functions between a Board with removal restrictions and a General Counsel without them. *Lewis v. NLRB*, 357 U.S. 10, 16, n.10 (1958). Congress thus separated the NLRB into “two independent branches,” and made the general counsel “independent of the Board’s supervision and review.” *NLRB v. United Food & Com. Workers Union Local 23*, 484 U.S. 112, 118, 129 (1987).

In 1971, the President’s Advisory Council on Executive Organization (known as the Ash Council) criticized the “independence and remoteness in practice” from the political branches of multimember

²⁰ Professor James M. Landis authored a Report on Regulatory Agencies to the President-Elect in 1960, in another instance of the political branches’ continuing reassessment of agency structures. Senate Judiciary Committee, Subcommittee on Administrative Practice and Procedure, 86th Cong., 2d Sess. (Comm. Print 1960).

boards.²¹ However, rather than implementing the Council's recommendations to shift regulatory functions to executive agencies headed by presidential appointees,²² Congress continued to apply the ICC model to new regulatory functions. For example, the Consumer Product Safety Commission was established in 1972 with a board of five commissioners subject to removal only for "neglect of duty or malfeasance." 15 U.S.C. § 2053(a).

Congress created the Federal Election Commission as an independent agency in 1974. 52 U.S.C. § 30106. *See Buckley v. Valeo*, 424 U.S. 1, 141 (1976) (per curiam) (observing that the President "may not insist" on the removal of commissioners at will). Also in 1974, Congress created the Nuclear Regulatory Commission with five members subject to removal for inefficiency, neglect of duty, or malfeasance. 42 U.S.C. § 5841(e). When Congress shifted Federal Power Commission duties to the Federal Energy Regulatory Commission in 1977, it did so in independent agency form, creating a multi-member board with tenure and removal protections.²³ 42 U.S.C. § 7171(b). The Federal Mine Safety and Health Review Commission, established in 1977, has five members serving six-year terms removable only for inefficiency, neglect of duty, or malfeasance. 30 U.S.C. § 823(a), (b)(1). The Merit Systems Protection Board created in 1978 has a three-

²¹ Roy L. Ash, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies*, President's Advisory Council on Executive Organization, Washington, D.C. 4 (1971); *id.* at 14 (quoting "headless fourth branch").

²² Ash, *supra* n.21 at 5-6; 23-25.

²³ Marshall J. Breger and Gary J. Edles, *INDEPENDENT AGENCIES IN THE UNITED STATES: LAW, STRUCTURE, AND POLITICS* 43 (2015).

member board with seven-year terms subject to removal only for inefficiency, neglect of duty, or malfeasance. 5 U.S.C. § 1202(a), (d).

Congress continued to create independent commissions in the 1980s. The National Indian Gaming Commission, created to regulate tribal gaming, is an independent agency with a board comprised of a presidentially-appointed chair and two associate members appointed by the Secretary of the Interior. 25 U.S.C. § 2704(b)(1). The Commissioners are removable only “for neglect of duty, or malfeasance in office, or for other good cause shown.” *Id.* § 2704(b)(6). And while Congress formally placed the United States Sentencing Commission in the Judicial Branch, the Commission makes substantive policy decisions and issues guidelines that are similar in form (and pre-*Booker*, in effect) to agency regulations. Yet this Court upheld the statute limiting presidential removal of Commission members “only for neglect of duty or malfeasance in office or for other good cause shown,” 28 U.S.C. § 991(a). *See Mistretta v. United States*, 488 U.S. 361, 411 (1989).²⁴

²⁴ Courts also rejected constitutional challenges to FTC enforcement actions based on removal restrictions during this period. *FTC v. Am. Nat. Cellular, Inc.*, 810 F.2d 1511, 1513 (9th Cir. 1987) (finding “no case purporting to limit or overrule *Humphrey’s Executor*. On the contrary, we note the continuing vitality of that authority as recently shown in *Bowsher v. Synar*, 478 U.S. 714 (1986).”); *FTC v. Am. Nat. Cellular*, 868 F.2d 315, 318 (9th Cir. 1989) (“reliance on *Humphrey’s Executor* . . . buttressed by the Supreme Court’s recent decision in *Morrison v. Olson*, 487 U.S. 654 (1988) . . .”); *Hosp. Corp. of Am. v. FTC*, 807 F.2d 1381, 1392 (7th Cir. 1986) (Posner, J.) (deeming insufficiently presented a “seismic” challenge “that would make every independent federal administrative agency unconstitutional.”);

In 1990, Congress authorized the Chemical Safety and Hazard Investigation Board with five-year terms and removal for “inefficiency, neglect of duty, or malfeasance in office.” 42 U.S.C. § 7412(r)(6). In 1995, Congress replaced the ICC with the Surface Transportation Board—an “independent establishment” with a five-member bipartisan board subject to the same removal standard. 49 U.S.C. § 1301(a)-(b).

Even more recently, in 2006, Congress created the Federal Maritime Commission (FMC) in the latest iteration of a shipping regulatory agency. FMC is an “independent establishment” with a board of five commissioners, no more than three of whom may be members of the same party, subject to removal for inefficiency, neglect of duty, or malfeasance. 46 U.S.C. § 46101(a)-(b). The Privacy and Civil Liberties Oversight Board (PCLOB) was created by Congress in 2004 as a component of the Executive Office of the President. Pub. L. 104-458, § 1062, 118 Stat. 3638, 3684 (2004). To strengthen the PCLOB’s ability to make independent recommendations to Congress as well as the Executive, in 2007 Congress transformed the PCLOB into an independent agency with a five-member board chosen for their expertise, no more than three of whom may be members of the same party. 42 U.S.C. § 2000ee. A district court concluded that “the PCLOB’s structure and function as a multimember, nonpartisan, expert oversight board is operationally incompatible with at-will Presidential removal” *LeBlanc v. PCLOB*, 784 F.Supp.3d 1, 29 (D.D.C. 2025) (citation modified).

see also Tigor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987) (dismissing challenge as unripe).

4. The long history of congressional action to create multimember boards and commissions with various forms of removal protections shows that there is a tradition of independence for such bodies, distinct from the tradition of at-will removal of single agency heads at issue in *Seila Law* and *Collins*. In contrast to the “the lack of historical precedent” noted in *Free Enters. Fund*, 561 U.S. at 505, and *Seila Law*, 591 U.S. at 220, there is abundant precedent for multimember boards with removal protection, both before and after this Court’s decision in *Humphrey’s Executor*. See *PHH Corp.*, 881 F.3d at 173 (Kavanaugh, J., dissenting) (listing independent agencies in chronological order); *id.* at 177 (“That deeply rooted tradition—namely, that independent agencies are headed by multiple commissioners or board members—has been widely recognized by leading judges, congressional committees, and academics who have studied the issue.”). History also shows that Congress has consistently relied on that tradition, and on *Humphrey’s Executor*, in continuing to create boards and commissions with tenure protections. See *Hilton v. S.C. Pub. Railways Comm’n*, 502 U.S. 197, 202 (1991) (“*Stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response.”).

This history helps to illustrate that limiting a given President’s ability to change the practical meaning of statutes enacted by previous Congresses and signed by previous Presidents does not deprive the President of any constitutional power under Article II. “To contend that the obligation imposed on the

President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible.” *Kendall v. United States*, 37 U.S. 524, 613 (1838). The faithful execution of statutory power requires the President to exercise policy discretion within the bounds set by Congress. Stripping statutory removal protections would undermine choices Congress made—with this Court’s guidance—to ensure that these agencies have some measure of independence and expertise, and to allow them faithfully to execute their statutory authority.

CONCLUSION

The Court should not overrule *Humphrey’s Executor*.

November 13, 2025

Respectfully submitted,

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APPENDIX

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Amici Curiae are:

- Robert S. Adler, Commissioner, Consumer Product Safety Commission, 2009-2021, Acting Chair, 2019-2021, Democrat, President Obama
- Luis A. Aguilar, Commissioner, Securities and Exchange Commission, 2008-2015, Democrat, President George W. Bush, reappointed by President Obama
- Cynthia L. Attwood, Commissioner, Occupational Safety and Health Review Commission, 2010-2025, Acting Chair, 2015-2016, Chair, 2016-2017 and 2021-2025, President Obama, reappointed by President Trump
- Peter A. Bradford, Commissioner, Nuclear Regulatory Commission, 1977-1982, Democrat, President Carter
- Jerry Lee Calhoun, Member, Federal Labor Relations Authority, 1985-1988, Republican, Chair, 1985-1988, President Reagan
- Rachelle B. Chong, Commissioner, Federal Communications Commission, 1994-1997, Republican, President Clinton
- Robert F. Cohen, Jr., Commissioner, Federal Mine Safety and Health Review Commission, 2008-2018, President George W. Bush, reappointed by President Obama

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- Charles I. Cohen, Member, National Labor Relations Board, 1994-1996, Republican, President Clinton
- Devra Davis, Member, Chemical Safety and Hazard Investigation Board, 1993-1995, President Clinton
- Ernest W. DuBester, Member, Federal Labor Relations Authority, 2009-2022, Chair, 2013, 2017, and 2021-2023, Democrat, President Obama, reappointed by President Trump, reappointed by President Biden
- Michael F. Duffy, Commissioner, Federal Mine Safety and Health Review Commission, 2002 and 2010-2012, Chair, 2003-2009, President George W. Bush
- Ross E. Eisenbrey, Commissioner, Occupational Safety and Health Review Commission, 2001, President Clinton
- Richard Engler, Member, Chemical Safety and Hazard Investigation Board, 2015-2020, President Obama
- Sharon Bradford Franklin, Chair, Privacy and Civil Liberties Oversight Board, 2022-2025, Democrat, President Biden
- John E. Higgins, Jr., Member, National Labor Relations Board, 1988-1989 and 1996-1997, Republican, President Reagan, reappointed by President Clinton

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- Harry R. Hoglander, Member, National Mediation Board, 2002-2017, Chair, 2004-05, 2007-08, 2010-11, 2012-13, 2014-15, and 2017, Democrat, President George W. Bush, reappointed by President Obama
- Peter J. Hurtgen, Member, National Labor Relations Board, 1997-2001, Chair, 2001-2002, Republican, President Clinton
- Gregory B. Jaczko, Commissioner, Nuclear Regulatory Commission, 2005-2012, Chair, 2009-2012, Democrat, President George W. Bush
- Joshua M. Javits, Chair and Member, National Mediation Board, 1988-1993, Independent, President Reagan, reappointed by President George H.W. Bush
- Nicholas Johnson, Commissioner, Federal Communications Commission, 1966-1973, Democrat, President Lyndon Johnson
- Allison Herren Lee, Commissioner, Securities and Exchange Commission, 2019-2022, Acting Chair, 2021, Democrat, President Trump
- Wilma B. Liebman, Member, National Labor Relations Board, 1997-2008, Chair, 2009-2011, Democrat, President Clinton, reappointed by President George W. Bush
- Raymond A. Limon, Member, Merit Systems Protection Board, 2022-2025, Acting Chair, 2022, Democrat, President Biden

- Lauren McFerran, Member, National Labor Relations Board, 2014-2020, Chair, 2021-2024, Democrat, President Obama, reappointed by President Trump
- Mark Gaston Pearce, Member, National Labor Relations Board, 2010 and 2017-2018, Chair, 2011-2016, Democrat, President Obama
- R. David Pittle, Commissioner, Consumer Product Safety Commission, 1973-1982, Acting Chair, 1981, Democrat, President Nixon, reappointed by President Carter
- Jerry Poje, Member, Chemical Safety and Hazard Investigation Board, 1997-2004, President Clinton
- Beth Rosenberg, Member, Chemical Safety and Hazard Investigation Board, 2013-2014, President Obama
- Nancy Harvey Steorts, Chairman, Consumer Product Safety Commission, 1981-1984, Republican, President Reagan
- Elisse B. Walter, Commissioner, Securities and Exchange Commission, 2008-2013, Acting Chair, 2009, Chair, 2012-2013, Democrat, President George W. Bush
- Stuart E. Weisberg, Commissioner, Occupational Safety and Health Review Commission, 1994-1999 and 1999-2000, Chair, 1994-1999, President Clinton

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- Thomas E. Wheeler, Chair, Federal Communications Commission, 2013-2017, Democrat, President Obama
- Darryl R. Wold, Commissioner, Federal Election Commission, 1998-2002, Chair, 2000, Republican, President Clinton