

**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 SENIOR WHITE HOUSE
LAWYERS, GOVERNMENT OFFICIALS,
FEDERAL JUDGES, GOVERNORS, AND
MEMBERS OF CONGRESS WHO WERE
APPOINTED OR NOMINATED BY
REPUBLICAN PRESIDENTS, OR WHO WERE
ELECTED AS REPUBLICANS, AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

Amici comprise former White House lawyers, senior government officials, federal judges, governors, and members of Congress who were appointed or nominated by Republican Presidents, or who were elected as Republicans. *Amici* include senior officials who served in one or more of the Republican Administrations of Presidents Nixon, Ford, Reagan, George H.W. Bush, George W. Bush, and Trump, including as White House Counsel to the President, Department of Justice leaders, Executive Branch agency heads and senior appointees, and independent agency officials. *Amici* also include retired federal judges appointed by Republican presidents, as well as former governors and members of Congress elected as Republicans.

Collectively, *amici* have decades of government experience, spanning the last fifty years. Their interest in this case lies in preserving the separation of powers and checks and balances that are fundamental to our Constitution and the rule of law in our country.

SUMMARY OF ARGUMENT

1. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), was an originalist decision, written by the Justice who is considered the intellectual

¹ The full list of *amici* is set forth in the Appendix to this brief. No counsel for a party to this case authored this brief in whole or in part, no party or counsel for a party contributed money that was intended to fund preparing or submitting this brief, and no person other than *amici* or their counsel contributed money that was intended to fund the preparation or submission of this brief.

progenitor of originalism. In an opinion by Justice Sutherland, the unanimous Court upheld the removal protections in the Federal Trade Commission (FTC) Act based on evidence regarding the Constitution’s original meaning and intent, including statements by James Madison and Chief Justice John Marshall. The test adopted in *Humphrey’s*—examining the character of the office at issue—directly tracks the framework James Madison proposed in the First Congress. Madison explained there that when an executive officer “partake[s]” of the responsibilities of the other branches, “strong reasons” exist “why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.” 1 Annals of Cong. 611-12 (1789) (Joseph Gales ed., 1834) (James Madison).

2. Historical scholarship since *Humphrey’s* has strongly reinforced the Court’s originalist analysis. From the Founding, Congress has repeatedly passed, and Presidents have repeatedly signed, legislation limiting the removal of members of multimember commissions, particularly those administering economic matters. Early examples include the creation of the Sinking Fund Commission, the Mint, and the First and Second Banks of the United States—all entities that regulated aspects of the economy, with governance structures limiting presidential removal.

The FTC fits squarely within this historical tradition. President Wilson championed both its creation and its removal protections as part of his “New Freedom” economic agenda, alongside the Federal Reserve. As the first Trump Administration’s Solicitor General conceded in *Seila Law*, the FTC and

other regulatory agencies share the same “basic structural features,” and “[i]t has been generally recognized that a removal restriction is concomitant of such a body.” Gov’t Br. Supporting Vacatur at 11, *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020) (No. 19-7) (citation omitted). In contrast, the current Administration’s ahistorical and anti-originalist logic would lead to holding unconstitutional not only the FTC’s removal protections, but also identical protections for the Federal Reserve and all other multimember agencies. This would be a profoundly radical outcome.

3. The Court’s reasoning in *Humphrey’s* is further supported by the FTC’s history since 1935. The Solicitor General argues that, regardless of its character in 1935, the FTC now exercises “executive” authority. This is both a conceptual and a factual error.

As an initial matter, as *Humphrey’s* held, when agencies operate in accordance with the congressional design for the Executive Branch, they are respecting Congress’s Article I authority, not diminishing that of the President under Article II. 295 U.S. at 628. Congress’s power to create agencies with cross-branch powers is not a novel concept—indeed, it reflects core originalist principles. Madison repeatedly articulated this point in defending the Constitution. *The Federalist* No. 48, at 309 (Clinton Rossiter ed., 1961); No. 47, at 304. This Court has likewise recognized the originalist principle that executive offices may perform “mixed” roles. As Justice Barrett has pointed out, the Constitution “does not vest every exercise of executive power in the President’s sole discretion”; rather, “Congress has concurrent authority over many

Government functions, and it may sometimes use that authority to regulate the President’s official conduct.” *Trump v United States*, 603 U.S. 593, 651-52 (2024) (Barrett, J., concurring).

Nor, from a constitutional perspective, are there any differences between the powers the FTC exercises today and the powers it exercised in 1935. To the contrary, what has changed is the President’s power: the FTC today is more under the control of the President than it was in 1935. Following a congressional amendment to the FTC Act, the President now designates the FTC’s Chairman, and the Chairman in turn sets the agency’s agenda by appointing the heads of the FTC’s bureaus. Additionally, the FTC can no longer bring an action for penalties against a regulated party that violates a cease-and-desist order, but rather, must ask the Attorney General to do so. These congressional amendments have shifted the balance of power since 1935 toward *greater*, not lesser executive control over the FTC. If the Administration seeks still more power over the FTC, it must pursue that goal through legislation, not by seizing control unilaterally in violation of the separation of powers.

4. This Court has recognized that “long 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.” *NLRB v. Noel Canning*, 573 U.S. 513, 524 (2014) (cleaned up). Overruling *Humphrey’s* would require rejecting not only the principles of originalism, but also the value of *stare decisis*, since *Humphrey’s* is part of a long chain of opinions over the past 90 years. The Court

unanimously endorsed the “philosophy” of *Humphrey’s* in *Wiener v. United States*, 357 U.S. 349, 356 (1958), extended it in *Morrison v. Olson*, 487 U.S. 654, 690-91 (1988), and preserved it in *Seila Law LLC v. CFPB*, 591 U.S. 197, 220 (2020).

Judicial modesty and respect for historical practice and judicial precedent demand that only the strongest considerations can justify concluding that all previous generations—including this Court’s own predecessors in unanimous and near-unanimous decisions—misinterpreted the Constitution. No such considerations exist here. Overruling *Humphrey’s* would constitute a radical departure from both historical and judicial precedents, ushering in, for the first time in our Nation’s history, unchecked presidential control over multimember agencies to which Congress granted a modest degree of administrative protection in order to advance constitutional checks and balances.

ARGUMENT

I. *Humphrey’s* Is an Originalist Decision, Rooted in the Separation of Powers.

Humphrey’s was decided on originalist grounds. This is not surprising, since it was written by Justice Sutherland, who is considered the intellectual progenitor of originalism.² In upholding the FTC’s

² Justice Sutherland “argued for something like originalism without using the term.” Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 Mich. L. Rev. 809, 811 n.9 (2015). He “was second to none in his commitment to the view

removal protections, Justice Sutherland’s opinion for the Court examined the Constitution’s language and structure, as well as the Framers’ original intent regarding removal and the separation of powers.

Humphrey’s built on the historical analysis in *Myers v. United States*, 272 U.S. 52, 176 (1926), which held that Congress could not constitutionally require that the President obtain Senate advice and consent before removing a postmaster. All four surviving Justices from the *Myers* majority joined the unanimous decision in *Humphrey’s*, as did the two surviving dissenters in that case. Because *Myers* “ha[d] been so recently decided,” the Court in *Humphrey’s* found it unnecessary to repeat the “wealth of material” set forth therein regarding the “historical, legislative and judicial data bearing upon the question [of executive removal], beginning with what is called ‘the decision of 1789’ in the first Congress and coming down almost to the day when the opinions were delivered.” 295 U.S. at 626.

Humphrey’s did nonetheless highlight three aspects of the evidence presented in *Myers*. First, the Court noted that “[a] reading of the debates” regarding the Decision of 1789 “shows that the President’s illimitable power of removal was not

that the sole goal of constitutional interpretation is to maintain and effectuate the Constitution’s original meaning.” Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 Santa Clara L. Rev. 373, 377 (2012); see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 Fordham L. Rev. 453, 462 (2013) (describing Sutherland’s dissent in *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398 (1934), as a “famous example” of “[o]riginalist ideas . . . that predate contemporary debates and the word ‘originalism.’”).

considered in respect of other than executive officers.” *Id.* at 631. Second, the Court observed that “when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply.” *Id.* (citing 1 Annals of Cong. 611-12 (1789) (Joseph Gales ed., 1834)). Third, the Court examined Chief Justice Marshall’s analysis in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162, 165-66 (1803), which distinguished between officers such as justices of the peace for the District of Columbia and “officers appointed to aid the President in the performance of his constitutional duties,” concluding that only the latter were removable at the President’s will. 295 U.S. at 631.

The Court concluded that Congress’s ability to “condition the power” of the President to remove an officer “depend[s] upon the *character of the office . . .*” *Id.* (emphasis added). This test directly tracks the framework James Madison proposed in the First Congress’s debate over the Comptroller of the Treasury. See 1 Annals of Cong. 611-12 (James Madison); see also *Humphrey’s*, 295 U.S. at 631. Madison explained that Congress’s power to protect officers from removal depends upon the “nature of th[e] office.” 1 Annals of Cong. 611. Madison further stated that when an executive office “partake[s]” in the qualities of the other branches, “there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government.” *Id.* at 611-12.

Humphrey's thus adopted the precise constitutional framework articulated by one of the Constitution's principal architects. Applying that test, the Court found that the FTC was "created by Congress to carry into effect legislative policies embodied in the statute . . . and to perform other specified duties as a legislative or judicial aid." 295 U.S. at 628. The legislation made clear that the FTC "must be free from executive control" and its duties "performed without executive leave." *Id.* Accordingly, the FTC could not "in any proper sense be characterized as an arm or eye of the executive." *Id.* The FTC's removal protections were not incidental—they were essential to its statutory design.

Humphrey's recognized that the separation of powers lay at the heart of the dispute. But the Court identified the main threat as usurpation by the Executive, not by Congress. Citing both James Wilson and Justice Story, the Court stressed the "fundamental necessity" of preventing "control or coercive influence" of one branch over the others. *Id.* at 629. The Court concluded that "[t]he power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence" of the Commission. *Id.*

Congressional choices to limit the removal power deserve particular respect where—as *Humphrey's* recognized—they form part of the checks and balances necessary to restrain presidential power. As the Court there noted, "one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.* at 629.

II. The Originalist Analysis of *Humphrey's* Is Supported by Both the History of the Founding Era and Subsequent Practice, Including the Intertwined History of the FTC and the Federal Reserve.

Subsequent scholarship on the Founding era has only strengthened the originalist conclusions of *Humphrey's*. As the Solicitor General notes, “Founding-era practice trumps later practice.” U.S. Br. 29 (citing *Powell v. McCormack*, 395 U.S. 486, 541-47 (1969)). Recent scholarship demonstrates that such Founding-era practice supports *Humphrey's*, as does the subsequent history of federal administrative agencies, including the intertwined creation of the FTC and the Federal Reserve.

As recognized in *Humphrey's*, 295 U.S. at 631, the Decision of 1789—the First Congress’s debate over whether the President could unilaterally remove executive officers—cannot alone resolve the removal question. Modern scholarship has confirmed the decision’s limited evidentiary value.³ Indeed, relying exclusively on the Decision undermines the originalist

³ As Professor Nelson recently noted, “a litany of scholars” who have looked at the debates and votes involved in the Decision of 1789 “have convincingly argued that they do not show a consensus for any particular interpretation of the Constitution.” Caleb Nelson, *Special Feature: Must Administrative Officers Serve at the President’s Pleasure?*, N.Y.U. L. Democracy Project (Sept. 29, 2025), <https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure>; William Baude (@WilliamBaude), X, *Bombshell - Caleb Nelson, one of the most respected originalist scholars in the country, comes out against the unitary executive interpretation of Article II!* (Sept. 29, 2025, 4:56 PM), <https://x.com/WilliamBaude/status/1972767388887384268>.

argument for a broad removal power, since such arguments “pivot[] further away from original public meaning circa Ratification 1787–88,” and depend instead on mid-nineteenth-century practices and beliefs. Jed Shugerman, *Movement on Removal: An Emerging Consensus about the First Congress and Presidential Power*, 63 Am. J. Legal Hist. 258, 279 (2023).

Looking beyond the Decision of 1789, it is clear that the First Congress and its successors created multimember agencies with removal protections, particularly to ensure economic stability. See Jerry Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L.J. 1256, 1291, 1301-02 (2006). The Sinking Fund Commission is a particularly striking example. Established by the First Congress in 1790 to purchase U.S. securities and repay the national debt, the Commission was structured as an independent, five-member board, on which the Chief Justice and the Vice President served as *ex officio* members. See Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129, 172 (2022). Because the President could not remove either the Chief Justice or the Vice President from their constitutional offices, he likewise could not remove them from their positions on the Commission. This structure limited presidential power, since the President could not disburse monies from the Fund without the Commission’s consent. *Id.*

In 1792, Congress adopted a similar structure for the federal Mint, authorizing the Chief Justice, Secretary of Treasury, Comptroller of the Treasury, Secretary of State, and Attorney General to inspect

coinage. An Act Establishing a Mint, and Regulating the Coins of the United States, ch. 16, § 18, 1 Stat. 246, 250 (1792); see Chabot, *supra*, at 200; Mashaw, *supra*, at 1301. The Chief Justice’s *ex officio* role as an assayer under the Mint Act again shielded this commission from exclusive executive control in order to help ensure public confidence in the economy by “secur[ing] a due conformity of the said gold and silver coins to their respective standards.” *Id.*

The First and Second Banks of the United States, which likewise performed functions that otherwise would have fallen to the Executive, had multimember boards with members the President could not remove. The First Bank was wholly privately controlled, with all of its twenty-five directors solely appointed and removable by its shareholders. See An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 4, 1 Stat. 191, 192-93 (1791). Nonetheless, the Bank “acted as the federal government’s fiscal agent,” including by “collecting tax revenues, securing the government’s funds,” and managing “the U.S. Treasury’s interest payments to European investors.” Andrew T. Hill, *The First Bank of the United States*, Fed. Rsrv. Hist. (Dec. 4, 2015), <https://www.federalreservehistory.org/essays/first-bank-of-the-us>. The Second Bank likewise acted as “fiscal agent for the federal government”; its board consisted of twenty-five directors, only five of whom were appointed by the President and confirmed by the Senate. Andrew T. Hill, *The Second Bank of the United States*, Fed. Rsrv. Hist. (Dec. 5, 2015) <https://www.federalreservehistory.org/essays/second-bank-of-the-us>; see also An Act to Incorporate the

Subscribers to the Bank of the United States, ch. 44, § 8, 14 Stat. 266, 269-70 (1816). James Madison, as President, supported the creation of a Second Bank, believing that its propriety was “settled by precedent.” See Letter from Albert Gallatin to Nicholas Middle (Aug. 14, 1830), in 2 *The Writings of Albert Gallatin* 431, 435 (Henry Adams ed., 1879).

The Sinking Fund Commission, the Mint, and the First and Second Banks—together with Madison’s views regarding the Comptroller of the Treasury discussed above—show that since the Founding era, the Framers understood Congress to possess constitutional authority to restrict the executive removal power, particularly with respect to entities whose responsibilities touched upon the economy. This Court has recognized as much, describing the Sinking Fund Commission as a “multi-member” body “materially different” from agencies run by single nonremovable officers. *Collins v. Yellen*, 594 U.S. 220, 253 n.19 (2021).⁴

This Founding-era tradition has continued throughout our Nation’s history. Contrary to the suggestion that *Humphrey’s* ushered in a new era, U.S. Br. at 32-34, a multitude of regulatory agencies already existed at the time *Humphrey’s* was decided. As Justice McReynolds observed in his *Myers* dissent, by 1926 Congress had created numerous agencies with removal restrictions, including “the Interstate Commerce Commission, Board of General Appraisers, Federal Reserve Board, Federal Trade Commission,

⁴While *Collins* suggested that the Commission did not operate “beyond the President’s control,” 594 U.S. at 253 n.19, its structure ensured that the President could never take unilateral control of the Commission through removals alone.

Tariff Commission, Shipping Board, Federal Farm Loan Board, [and] Railroad Labor Board.” *Myers*, 272 U.S. at 181 (McReynolds, J., dissenting).

The FTC is thus part of a long historical tradition. President Wilson championed—not merely ratified—both its creation and its removal protections, as one of three pillars of his “New Freedom” economic agenda, alongside the Federal Reserve and the Tariff Commission. W. Elliot Brownlee, *The Creation of the U.S. Tariff Commission*, in *A Centennial History of the U.S. International Trade Commission* 71, 72 (U.S. Int’l Trade Comm’n 2016), https://www.usitc.gov/publications/other/centennial_book/chapter3.pdf. The Federal Reserve and FTC were designed as complementary institutions: just as the Federal Reserve would independently regulate the Nation’s banks and financial system, the FTC would play an analogous role in the corporate sphere.⁵ Like the FTC, the Federal Reserve followed the model of “expert, multimember commissioner regulation of economic sectors” established by agencies such as the Interstate Commerce Commission (ICC). Lev Menand, *The Supreme Court’s Federal Carveout: An Initial Assessment* 6-7 (Colum. Pub. L. Rsch. Working Paper, May 27, 2025).

As the Solicitor General in the first Trump Administration acknowledged in his brief in *Seila Law v. CFPB*, 591 U.S. 197 (2020), every independent regulatory agency from the ICC onward—including the FTC and Federal Reserve—has shared the same

⁵ See James. C. Lang, *The Legislative History of the Federal Trade Commission Act*, 13 Washburn L.J. 6, 15 (1974); Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control and Competition*, 71 Antitrust L.J. 1, 17 (2003).

“basic structural features.” Gov’t Br. at 27, *Seila Law*, No. 19-7 (U.S.) (citation omitted). The Solicitor General further acknowledged, “[i]t has been generally recognized that a removal restriction is concomitant of such a body.” *Id.* at 27-28 (quoting Robert E. Cushman, *The Independent Regulatory Commissions* 188 (1941)). Such restrictions “reinforce the long-term continuity and expertise that the structure of multimember agencies with staggered-term memberships was designed to promote” and “promote the deliberative group decision making that the structure of multimember agencies was already designed to facilitate.” *Id.* at 28-29.⁶

In contrast to the first Trump Administration’s approach in *Seila Law*, the current Administration takes a radically ahistorical and anti-originalist position, claiming sweeping presidential authority to remove anyone at will: not only FTC Commissioners but also Federal Reserve Governors and presumably all other agency members, notwithstanding congressionally enacted removal restrictions. This radical position is precisely what the Solicitor General advanced, and this Court rejected, in *Humphrey’s*, stating that “[i]f Congress is without authority to prescribe causes for removal of members of the [federal] trade commission . . . that power at once becomes practically all-inclusive in respect of civil officers with the exception of the judiciary provided for by the Constitution.” 295 U.S. at 629. As *Humphrey’s*

⁶ The Solicitor General further argued that “*Humphrey’s Executor’s* ‘quasi-legislative’ and ‘quasi-judicial’ characterizations are best regarded as referring to the *manner* in which a multimember body is intended to operate—through an interactive deliberative process and voting in the nature of a true ‘legislative’ or ‘judicial’ body—not to its functions.” *Id.* at 32.

held, the Constitution does not vest such “all-inclusive” power in any President.

III. Since *Humphrey’s*, Congress has Given the President More, Not Less, Control Over the FTC.

The history of the FTC since 1935 further supports this Court’s reasoning in *Humphrey’s*. Contrary to the Solicitor General’s claim, no changes to the FTC have made its powers more “executive” in an Article II sense than they were in 1935. In contrast, post-1935 amendments to the FTC Act have given the President *more* control over the FTC, not less.

A. From a Constitutional Perspective, the Powers Exercised by the FTC Today Do Not Differ From the Powers the FTC Exercised in 1935.

The FTC’s current powers—civil enforcement, rulemaking, adjudication, investigation, and limited foreign coordination—are not “new.” Cf. Gvt’s Reply Brief at 3–5, *Trump v. Slaughter*, No. 25-332 (U.S. Sept. 16, 2025). All are encompassed within the categories of powers that the Court considered in *Humphrey’s*.

As an initial matter, the Administration confuses “executive authority” in the Article II sense, with the “execution” of congressional design in accordance with Congress’s Article I authority. As the Court held in *Humphrey’s*, “[t]o the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and

effectuation of its *quasi*-legislative or *quasi*-judicial powers, or as an agency of the legislative or judicial departments of the government.” 295 U.S. at 628.

This concept was not novel—it was quintessentially originalist. *Humphrey*’s rooted this insight in Madison’s statement that an executive office might partake of the responsibilities of another branch. 295 U.S. at 631; 1 Annals of Cong. 611-12. Madison also repeatedly articulated this position in the debate over the Constitution, stating that the branches “should not be so far separated as to have no constitutional control over each other,” and that a “partial mixture” of governmental powers is necessary for the preservation of liberty. *The Federalist No. 48*, at 309, *No. 47*, at 307 (C. Rossiter ed., 1961). As Justice Brandeis—who joined the unanimous opinion in *Humphrey*’s—noted in his *Myers* dissent, the purpose of separation of powers is “to save the people from autocracy” through “the inevitable friction incident to the distribution of the government powers among the three departments.” 272 U.S. at 293.

This Court has likewise recognized that executive offices may perform “mixed” roles. As Justice Barrett explained in her concurring opinion in *Trump v United States*, 603 U.S. 593, 651-52 (2024) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)), the Constitution “does not vest every exercise of executive power in the President’s sole discretion”; rather, “Congress has concurrent authority over many Government functions, and it

may sometimes use that authority to regulate the President's official conduct."⁷

The Department of Justice has also previously recognized this principle. As the Department's Office of Legal Counsel acknowledged, "for-cause and fixed-term limitations on the power to remove officers with adjudicatory duties affecting the rights of private individuals will continue to meet with consistent judicial approval: the contention that the essential role of the Executive Branch would be imperiled by giving a measure of independence to such officials is untenable under both precedent and principle."⁸

Nor has there been a change in the powers of the FTC that alters the conclusion reached in *Humphrey's*. First, the FTC's authority to file suits against private parties has not changed in constitutional character since 1935. At that time, the

⁷ The President's constitutional duty to ensure that the laws "be faithfully executed," U.S. Const. Art. II, § 3, does not lead to a different conclusion. As Justice Holmes noted in his dissent in *Myers*, 272 U.S. at 177, "[t]he arguments drawn from the executive power of the President, and from his duty . . . to take care that the laws be faithfully executed . . . seem to me spider's webs inadequate to control the dominant facts[,] since "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power."

⁸ The Constitutional Separation of Powers Between the President and Congress, 20 Op. O.L.C. 125, 169 (May 7, 1996). Significantly, although these officers are sometimes called "independent," they possess only "a measure of independence." *Id.* They remain politically accountable in two ways: first, they may be removed by the Executive "for cause"; and second, they are answerable to Congress, in particular to congressional oversight and appropriations committees.

FTC could bring enforcement suits for violations of its cease-and-desist orders, authority which the Court expressly considered before concluding that this fact did not substantively transform the character of the Commission. 295 U.S. at 620-21. The power to enforce federal law through litigation has never been exclusively executive.⁹ That the FTC now seeks injunctions, civil penalties, and restitution rather than only cease-and-desist enforcement does not transform the power's constitutional status.

Second, the FTC's authority to promulgate substantive rules also is not "new." From the start, the FTC Act authorized the Commission to "make rules and regulations for the purpose of carrying out the provisions of this Act." Pub. L. No. 203, § 6(g), 38 Stat. 717, 722 (1914). This plain-text grant means what it says: the FTC was granted substantive rulemaking authority from 1914 forward. *Nat'l Petroleum Refiners Ass'n v. Fed. Trade Comm'n*, 482 F.2d 672, 698 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974). *Humphrey's* recognized the FTC's quasi-legislative authority to make policy, which the Commission then exercised through case-by-case adjudication rather than formal rulemaking. Indeed, the Court explicitly noted this quasi-legislative authority to "carry into effect legislative policies embodied in the statute in accordance with the legislative standard" by "filling in and administering the details" of statutory standards.

⁹ Congress itself has the power to intervene to defend statutes when the Executive refuses to do so. See *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 940 (1983) ("We have long held that Congress is the proper party to defend the validity of a statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional.").

295 U.S. at 628.¹⁰ Congress intended to create an independent body of experts “who shall gain experience by length of service” and determine the meaning of the FTCA’s prohibition of “unfair methods of competition” through this process. *Id.* at 625.

Nor is it relevant, from a constitutional perspective, that the FTC originally exercised this authority through case-by-case adjudication, rather than generalized rulemaking. The choice between these procedures makes no constitutional difference because agencies may choose to “formulate new standards of conduct”—that is, create substantive policy—through either rulemaking or adjudication. *Sec. & Exchange Comm’n v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947) (calling the rulemaking power “quasi-legislative”). In other words, rulemaking and adjudication are constitutionally equivalent methods of exercising quasi-legislative power.

Third, just as in 1935, the FTC’s adjudicatory authority has not substantially changed in character. Under the original terms of the FTCA, the Commission issued cease-and-desist orders after adjudication, which became final upon service to the regulated party. Pub. L. No. 203, § 5, 38 Stat. 717, 719-20 (1914). A regulated party, upon being served a cease-and-desist order, could immediately petition a court of appeals for relief, at which time the

¹⁰ The Court in this regard invoked Chief Justice Marshall’s statement in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), separating “those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”

Commission was required to file the record of its hearing and could no longer modify its order. *Id.* at 720. The Commission could bring an action in a court of appeals “for the enforcement of its order” if it felt the regulated party had disobeyed it.¹¹ *Id.* The *Humphrey’s* Court considered this scheme and found it constituted the exercise of quasi-judicial authority. 295 U.S. at 620-21.

Today, under 15 U.S.C. § 45(b) and (g), an order becomes final only after the expiration of a 60-day appeal window. Regulated parties can petition for judicial review of Commission cease-and-desist orders before they become final. 15 U.S.C. § 45(g). But finality matters only for enforcement: it does not preclude judicial review but merely marks when penalties accrue. 15 U.S.C. § 45(l). This minute procedural change—from immediate effect upon service to a sixty-day compliance window—hardly qualifies as constitutionally significant. Thus, contrary to the Administration’s suggestion, see U.S. Br. at 27, FTC orders under 15 U.S.C. § 45(g) and (l) cannot “become final and enforceable without judicial intervention”—judicial review was available in 1935 and remains available today.

¹¹ While the FTCA did not use the “final” or “finalize” language currently present in 15 U.S.C. § 45(g), the addition of that procedural language does not mark a substantive change that rises to the level of a constitutional distinction. Congress enacted § 45(g), like § 45(l), in 1938, just three years after *Humphrey’s*. Ch. 49, § 3, 52 Stat. 111, 113-14 (1938). Section 45(g) was added merely “for the purpose of making definite the time when a Commission order to cease and desist shall become final.” 83 Cong. Rec. 397 (1938). Congress added § 45(l) because it was “believed to be necessary in order to enforce obedience to Commission orders after they shall have become final.” *Id.*

Fourth, the FTC’s broad investigative powers remain unchanged in constitutional character. Since 1914, the FTC has possessed authority “[t]o gather and compile information concerning, and to *investigate* . . . the organization, business, conduct, practices, and management of *any corporation engaged in commerce*, excepting banks and common carriers,” including by “requir[ing] . . . corporations . . . to file with the [C]ommission . . . annual or special, or both annual and special, reports.” Ch. 311, § 6(a)-(b), 38 Stat. 717, 721 (emphasis added). The Commission could subpoena witnesses and compel the production of corporate documents, both with the backing of the district courts. Ch. 311, § 9, 38 Stat. 717, 722-23.

No statute enacted since 1935 has constitutionally expanded this investigative authority. The Administration cites two legislative enactments: the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. 94–435, 90 Stat. 1383, and the Medicare Prescription Drug, Improvement and Modernization Act of 2003, Pub. L. 108–173, 117 Stat. 2066. But neither statute differs in kind or degree from the powers the FTC possessed in 1935. Hart-Scott-Rodino formalizes merger review, while the Medicare Improvement Act merely directs drug manufacturers to notify the FTC when they reach statutorily mandated agreements. Pub. L. No. 108-173, § 1112, 117 Stat. 2461. Both statutes impose narrower requirements than the broader investigative authority in place at the time of *Humphrey’s*. 295 U.S. at 621, 628.

Finally, the FTC’s narrow authority to coordinate with foreign law enforcement is in furtherance of its existing powers, not an affirmative

grant of executive foreign affairs power. Congress enacted 15 U.S.C. § 46(j) in 2006 to further information sharing to address transborder consumer frauds enabled by the Internet. S. Rep. No. 109-219, at 2 (2006). The statute authorizes the Commission to share information with foreign law enforcement agencies investigating fraudulent or deceptive commercial practices. The authority is tightly circumscribed. The FTC cannot initiate these communications; instead, it must wait for a written request from a foreign law enforcement agency. 15 U.S.C. § 46(j)(1). The FTC may negotiate reciprocity agreements as required by the law governing the foreign law enforcement agency, but only with prior and final approval from the Secretary of State, who maintains an ongoing oversight role. 15 U.S.C. § 46(j)(4). The Executive thus retains a robust check on the Commission's limited coordination authority.

By authorizing this limited information exchange, Congress did not infringe upon an exclusively executive power. As the Court has recognized, Congress also has a foreign affairs role. *Zivotofsky v. Kerry*, 576 U.S. 1, 21 (2015); see also Ryan M. Scoville, *Legislative Diplomacy*, 112 Mich. L. Rev. 331, 333 (2013) (international activities of Congress include “negotiating agreements”). Delegating to the FTC the authority to coordinate with foreign authorities on consumer fraud investigations—subject to State Department approval and oversight—does not transform this “predominantly quasi-judicial and quasi-legislative agency” into a predominantly executive one, or otherwise interfere with executive authority. *Humphrey's*, 295 U.S. at 624.

B. The Executive Has More Power over the FTC Today Than It Did in 1935.

Today, the President has far *greater* control over the FTC's governance and enforcement than his predecessor did in 1935. First, the President exercises greater control over FTC governance. Since 1950, the President has had the power to designate the FTC Chairman—authority he did not have when *Humphrey's* was decided. Reorganization Plan No. 8 of 1950, § 3, 15 Fed. Reg. 3175, *reprinted in* 5 U.S.C. app., *and in* 64 Stat. 1264 (codified at 15 U.S.C. § 41). Before 1950, Commissioners chose the Chairman from amongst themselves, and the position rotated annually. Ch. 311, 38 Stat. 717, 718 (1914). This consolidation of authority in a presidentially-selected Chairman represented a significant shift in the agency's structure. See Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* 160 (1993) (arguing that these changes “eroded” the FTC's “autonomy”).

The President now can select a Chairman aligned with his political agenda. Because “[n]ot more than three of the Commissioners shall be members of the same political party,” the President, in our two-party system, will have the option of selecting from at least two Commissioners of his own party as candidates for Chairman. 15 U.S.C. § 41. The Chairman in turn appoints leaders of the FTC's enforcement bureaus, who discharge the Chairman's priorities through such specialized functions as fair marketplace rules development, the investigation and prosecution of deceptive and fraudulent entities, and the enforcement of antitrust laws. FTC Organization

Chart, Bureaus & Offices, <https://www.ftc.gov/about-ftc/bureaus-offices>.

President Trump has exercised this authority. On Inauguration Day 2025, he promoted Commissioner Andrew Ferguson to Chairman. Upon his appointment, Chairman Ferguson expressed his intention to carry out the President's agenda: "Under the President's leadership, we will end the previous administration's assault on the American way of life, and we will usher in a new Golden Age for American businesses, workers, and consumers." Press Release, Fed. Trade Comm'n, Andrew N. Ferguson Takes Over as FTC Chairman, (Jan. 22, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/andrew-n-ferguson-takes-over-ftc-chairman>. Thus, while the Solicitor General contends the President must be able to fire Commissioners at will to further his agenda, the Administration already has indicated it has the ability to execute the President's agenda through presidential appointment of the FTC Chairman.

Second, the President exercises greater control over FTC enforcement. In 1935, the FTC could file suits in federal court for penalties against parties that violated its cease-and-desist orders. Ch. 311, 38 Stat. 717, 719-20 (1914). Today, under 15 U.S.C. § 45(l), only the Attorney General may file these punitive enforcement suits. The FTC has thus lost a measure of its power to sue to enforce its own regulations, and accordingly, the President has greater authority over FTC enforcement actions today than when *Humphrey's* was decided.

If the Administration seeks still more power over the Commission, it must pursue this through the

democratic political process. Congressional assent to greater executive control over independent agencies is achievable, as demonstrated not only by amendments to the FTC Act, but also by Congress’s elimination of the “for cause” removal protections for the Federal Reserve Board in 1933.¹² The Executive’s unilateral power grab here thus violates both the separation of powers and core democratic values.

IV. Respect for Practice, Precedent and Stability Also Requires Upholding *Humphrey’s*.

Edmund Burke, a founder of modern conservatism, advocated for limited government and gradual reform, guided by his faith in the “latent wisdom” of past generations. Edmund Burke, *Reflections on the Revolution in France* 87 (L.G. Mitchell ed. Oxford Univ. Press 2020) (1790). James Madison expressed similar sentiments in *The Federalist* No. 49, referencing “that veneration which time bestows on every thing.” See also Louis J. Virelli III, *Constitutional Traditionalism in the Roberts Court*, 73 U. Pitt. L. Rev. 1, 4 (2011). Overturning *Humphrey’s* would run roughshod over these values.

Respect for prior practice has particular importance in the context of decisions involving the separation of powers. As this Court recognized, and as the Solicitor General acknowledged in *Seila Law*, “long settled and established practice is a

¹² Banking Act of 1933, ch. 89, § 6(a), 48 Stat. 162, 166-67. Congress restored the Federal Reserve’s “for cause” removal protection in 1935 only after intense political debate. See Former Federal Reserve Governors’ Br. at 8-16, *Trump v. Cook*, No. 25A312 (U.S. Oct. 29, 2025).

consideration of great weight in a proper interpretation of constitutional provisions regulating the relationship between Congress and the President.” *Noel Canning*, 573 U.S. at 524 (cleaned up); Gov’t Br. at 14-15, *Seila Law*, No. 19-7. Here the “long settled and established practice” of multimember commissions with removal protections dates back to our Founding era; in addition, the particular “for cause” removal language at issue here has been included in numerous Congressional enactments signed by Presidents over the course of more than half the life of our Nation.

Respect for judicial precedent is no less important. “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But overruling *Humphrey’s* would require overturning not just that case, but a string of subsequent cases. In *Wiener*, 357 U.S. at 356, a unanimous Court concluded that “[t]he philosophy of *Humphrey’s Executor*, in its explicit language as well as its implications, preclude[d]” the President from removing a War Claims Commissioner “merely because he wanted his own appointees.” In *Morrison*, the Court extended *Humphrey’s* to the Independent Counsel, finding that “[t]he characterization of the agencies in *Humphrey’s Executor* and *Wiener* as ‘quasi-legislative’ or ‘quasi-judicial’ in large part reflected our judgment that it was not essential to the President’s proper execution of his Article II powers that these agencies be headed up by individuals removable at will.” 487 U.S. at 690-91 (footnote

omitted). Finally, in *Seila Law*, 591 U.S. at 204, 220, the Court recognized *Humphrey’s* as an exception to the general rule against congressionally-mandated removal protections, expressly distinguishing the FTC’s multimember structure and historical stature from the CFPB’s “novel” single director structure with “no basis in history and no place in our constitutional structure.”

Each factor in the various formulations articulated by Members of this Court regarding the rejection of precedent—(1) the nature of the ostensible error; (2) the quality of the reasoning; (3) workability; (4) effect on other areas of law; and (5) reliance interests¹³—cuts against overruling a decision that has endured for nine decades, been endorsed by large majorities of this Court, and survived profound shifts in law, politics, and culture.

First, the alleged “error” involves an Act of Congress. If the Administration loses, it can advance its views politically.¹⁴ But if the Court overrules

¹³ See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024); *Erlinger v. United States*, 602 U.S. 821, 862 (2024) (Kavanaugh, J., dissenting); *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 263-90 (2022); *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020); *Janus v. Am. Fed’n of State, Cnty. & Mun. Emps., Council 31*, 585 U.S. 878, 917 (2018).

¹⁴ See *In re Aiken Cnty.*, 645 F.3d 428, 447-48 (D.C. Cir. 2011)(Kavanaugh, J., concurring)(“[A]s President Roosevelt suggested in the wake of *Humphrey’s Executor* itself, Congress and the President remain free to craft legislation that would increase the accountability of these agencies by making the agency heads removable at will — accompanied, if Congress chooses, by more tightly drawn substantive statutes so as to prevent excessive delegations of power to the Executive Branch or perceived concentration of power in the President.”).

Humphrey's, it removes the issue from the political arena entirely, making it unconstitutional for Congress to ever create agencies with removal protections. This would be profoundly undemocratic. For-cause removal protections represent consistent legislative action, throughout our history, by democratically accountable Congresses, with approval by democratically accountable Presidents. The President can always petition Congress for greater control—indeed, Congress has already given the President more control over the FTC.

Second, as demonstrated above, *Humphrey's* is a thoroughly originalist decision, authored by a proto-originalist Justice, examining constitutional text and structure and the Framers' original intent. Subsequent historical analysis has only reinforced this analysis. Some of this Court's most respected members, including Justice Frankfurter for a unanimous Court in *Wiener* and Chief Justice Rehnquist for the Court in *Morrison*, have followed and extended the "philosophy" of *Humphrey's*.

Third, *Humphrey's* remains eminently workable. Numerous agency statutes permit presidential removal for cause, often specifically inefficiency, neglect of duty, and malfeasance¹⁵—language predating the Constitution itself. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of*

¹⁵ See, e.g., 12 U.S.C. § 242 (Federal Reserve); 39 U.S.C. § 202 (Postal Service); 12 U.S.C. § 4512 (Federal Housing Finance Agency); 42 U.S.C. § 7171(b)(1) (Federal Energy Regulatory Commission); 49 U.S.C. § 1111(c) (National Transportation Safety Board).

Agency Independence, 121 Colum. L. Rev. 1, 6 (2021). By contrast, jettisoning *Humphrey*'s and its successor Supreme Court decisions would radically disturb a settled legal landscape and immediately threaten the independence of the Federal Reserve and all other existing commissions and boards.¹⁶

Fourth, overturning *Humphrey*'s would violate the separation of powers by vastly expanding executive power at Congress's and the Court's expense. See Joseph L. Story, *Commentaries on the Constitution of the United States* § 517 ("In absolute governments the whole executive, legislative, and judicial powers are . . . exclusively confined to a single individual; and such a form of government is denominated a despotism, as the whole sovereignty of the state is vested in him."). Removal protections preserve the rule of law and protect against arbitrary presidential action. See David M. Driesen, *The Specter of Dictatorship: Judicial Enabling of Presidential*

¹⁶ In this regard, even if this Court were to find some of the powers of the FTC irreducibly executive, the severability clause of the FTC Act would direct that those provisions be severed, not that the FTC's removal protections be eliminated. 15 U.S.C. § 57. As *Humphrey*'s made clear, the FTC's removal protections were central to Congress's goal: the creation of a body of experts "free to exercise its judgment without the leave or hindrance of any other official or any department of the government." 295 U.S. at 626-27. To allow Commissioners to be removed "at the mere will of the President might be to thwart, in large measure, the very ends which Congress sought to realize . . ." *Id.* It would equally thwart the congressional purpose to hold that a President could at his "mere will" remove a Commissioner so long as back pay was provided, since that would allow the President to reshape the FTC in contravention of the congressional design at a trivial cost. Indeed, if a president may remove Commissioners at will, the FTC that Congress intended would cease to exist.

Power 5 (2021). No version of unitary executive theory allows a president to ignore constitutional structures Congress establishes. See Caleb Nelson, *Special Feature: Must Administrative Officers Serve at the President's Pleasure?*, N.Y.U. L. Democracy Project (Sep. 29, 2025), <https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure>. Executive usurpation of constitutional authority is no less grave than congressional encroachment. Compare *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), with *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

Finally, the reliance interests here are substantial. Justice Brandeis explained why officials' reliance interests deserve respect in his dissent in *Myers*, 272 U.S. at 295: "protection of the individual, even if he be an official, from the arbitrary or capricious exercise of power was [at the Founding] believed to be an essential of free government." But the reliance interests here go far beyond individual officials. The Administration asks the Court to deconstruct stabilizing safeguards in our political and economic system that have existed since the Founding. From the Nation's birth, the public, private businesses, and regulated entities have relied on these agencies' independent decisions.

The Administration proposes a profoundly anti-Burkean and anti-Madisonian step: radically restructure a system by eroding constitutional checks and balances and concentrating all power—including economic power—in the President's hands. Accepting this invitation would overrule a long line of

precedents, violate separation of powers, and deal an enormous blow to the stability and freedom of our Nation. This Court should not ratify such a profoundly anti-originalist attempt by the President to permanently unbalance the separation of powers.

CONCLUSION

For all the foregoing reasons, *Amici* submit that this Court should rule in favor of respondents in No. 25-332.

Respectfully submitted,

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Counsel to the Vice President
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Governor of Massachusetts (R-MA 1991-1997)
Assistant Attorney General, Criminal Division
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Hon. Christine Todd Whitman

Governor of New Jersey (R-NJ 1994-2001)
Administrator, Environmental Protection Agency
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General Counsel, U.S. Dept. of Commerce (1989-1993)

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