No. 25-332

In the Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, *et al.*,

Petitioners,

v.

REBECCA K. SLAUGHTER, *et al.*,

Respondents.

On Writ of Certiorari
Before Judgment to the United States District Court
for the District of Columbia

BRIEF OF OPEN MARKETS INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The Open Markets Institute (OMI) is a non-profit organization dedicated to protecting democracy and individual liberties from concentrated economic power and control. OMI does so by promoting fair competition throughout our political economy, a broadly shared prosperity, and innovation that serves the public interest. OMI regularly provides expertise on antitrust law and competition policy to Congress, federal agencies, courts, journalists, and members of the public. It does not accept any funding or donations from for-profit corporations.[1]

SUMMARY OF ARGUMENT

Congress has broad constitutional authority to structure the entire federal government. This power includes creating new departments and offices and restricting the President's authority to remove their leaders. The Necessary and Proper Clause holds that Congress can make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*." U.S. Const. art. I, § 9 (emphasis added). Given its breadth, this Article I provision has been referred to as "a kind of master clause" that "assigns Congress authority to implement all the 'Powers' vested by the Constitution anywhere in the government." John F. Manning, *Foreword: The Means of Constitutional Power*, 128

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[1] Under this Court's Rule 37.6, *amicus curiae* state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission, and that no person other than *amicus curiae* and its counsel made such a monetary contribution.

Harv. L. Rev. 1, 63 (2014). Accordingly, in the words of Professor Peter Strauss, "The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984).

Instead of recognizing the Constitution's broad grant of legislative power, President Trump and his allies argue that the President has unlimited power to fire anyone in the executive branch, for any reason, and at any time. They base their argument on the sparse text of the Vesting and Take Care Clauses in Article II of the Constitution. U.S. Const. art. II, §§ 1, 3. Even though the FTC Act expressly allows the President to remove commissioners for "inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41, they claim that the executive cannot ensure that the laws are faithfully executed if he does not have absolute removal power. This argument runs directly counter to the plain text of the Constitution and longstanding practice and would open the door to potentially extreme abuses of power. Thus, this Court must uphold *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and Congress's broad power under the Necessary and Proper Clause to structure the federal government as its sees fits, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-16, 420 (1819), including to guard against blatant corruption and naked partisanship in breach of the President's duty to take care of the faithful execution of the law.

1. While Article II vests executive power in the President and requires that he ensure the laws are faithfully executed, the Constitution grants Congress expansive authority under the Necessary and Proper Clause to structure the whole federal government.

U.S. Const. art. I, § 8, cl. 18. These two powers go hand in hand. Congress can mandate that agency heads can be removed only for cause by the President but cannot interfere with the President's duty to see that the laws are faithfully executed by reserving removal authority for itself in statute. *Myers v. United States*, 272 U.S. 52, 163 (1926); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

Congress has legitimate reasons for protecting agency officials from at-will removal. It has long been understood that those who hold office "only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor*, 295 U.S. at 629. That's why Congress acted to ensure that – if there is a conflict between the President's wishes on one side and statutory laws as enacted by Congress on the other – officials at bipartisan, multimember agencies should not fear losing their job if they apply and follow the law. The legislative requirement that officials be removed only for "inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41, protects agency leaders committed to carrying out their statutory responsibilities while also enabling the President to fulfill his Article II duty to faithfully execute the law by removing corrupt or indolent officials. Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129, 147 (2022).

2. Since the late eighteenth century, Congress has repeatedly placed limitations on the President's removal powers. The First Congress created the Sinking Fund Commission in 1790 as a multimember body and at least two of its members—the Vice President and the Chief Justice—could not be removed from the commission by President Washington. Christine Kexel Chabot, *Is the Federal*

Reserve Constitutional? An Originalist Argument for Independent Agencies, 96 Notre Dame L. Rev. 1, 49-50 (2020). This commission was not an aberration: During the first one hundred years of the Republic, Congress restricted the President's ability to remove officials in several agencies, including the Second Bank of the United States and the Interstate Commerce Commission. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 30 (1994); Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1113-14 (2000). Accordingly, Congress has possessed and exercised the power to restrict the President's removal authority since the founding of the United States. Given that it was not unconstitutional for Congress to restrict the President's removal powers in 1790, it likewise was not unconstitutional when it did so once again in the FTC Act in 1914. This Court should be skeptical of the Petitioners' claim that the President has newfound powers that did not exist for the past 230 years.

3. Congress's decision to set up the Federal Trade Commission as a multimember, bipartisan agency has been vindicated by experience. For the past century, the FTC has been front and center in protecting the American public from unfair corporate practices. In addition to enforcement actions that hold bad actors accountable, the FTC has conducted industry studies that informed major federal legislation and undertaken rulemakings to protect citizens, consumers, and independent businesses from corporate misconduct. One reason the FTC has been able to undertake politically fraught, multi-year investigations and rulemakings is that the President could not remove commissioners without cause. Over

the past century, the FTC has produced in-depth studies of key sectors such as meatpacking, utilities, and pharmaceuticals. The FTC has also written rules that outlawed coercive and deceptive practices in funeral and consumer credit markets.

ARGUMENT

I. Congress has the constitutional authority and sensible reasons to limit the President's removal powers.

Congress has expansive authority to structure the *entire* federal government and restrict the President's ability to remove officials at executive agencies and departments. Under the Necessary and Proper Clause of Article I, Congress can make "all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and *all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof*." U.S. Const. art. I, § 9 (emphasis added). The Necessary and Proper Clause puts decisions on "what kinds of officers—in what departments, with what responsibilities—the Executive Branch requires" in the hands of Congress. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 266 (2020) (Kagan, J., concurring in part). Accordingly, "the Necessary and Proper Clause gives Congress express power to prescribe the means by which both the executive and judicial powers are carried into execution." John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2006 (2011). As Chief Justice Marshall stated in one of the canonical Supreme Court decisions in American history, the Necessary and Proper Clause empowered Congress "to exercise its best judgment in the selection of measures to carry into execution the

constitutional powers of government" and "avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances" so that it can enact legislation "adapted to the various crises of human affairs." *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415-16, 420 (1819).

In contrast to Congress's express authority under the Necessary and Proper Clause, the text of the Constitution is silent regarding the President's removal powers. *See* 1 Annals of Cong. 486 (1789) (Joseph Gales ed., 1834) (statement of Rep. Lawrence) ("In the case of removal, the Constitution is silent . . . ."). As such, this Court has invoked the Vesting and Take Care Clauses, U.S. Const. art. II, §§ 1, 3, to give the President *some* power to remove those who exercise executive power. *Seila Law*, 591 U.S. at 227; *Morrison v. Olson*, 487 U.S. 654 (1988). The President's implied duty under the Take Care Clause "encompasses the duty to ensure competence, observance of law, and prevention of misconduct." Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1842 (2015).

Given the text of Articles I and II, Congress may restrict the President's powers as long as it does not interfere with the President's duty to take care of the faithful execution of the law. *Myers v. United States*, 272 U.S. 52, 163 (1926); *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). In this regard, the President's "constitutional powers are feeble, [while] Congress's powers are broad." Jerry L. Mashaw, *Recovering American Administrative Law: Federalism Foundations, 1787-1801*, 115 Yale L.J. 1256, 1271 (2005). Accordingly, the "Constitution's silence on most matters administrative provides extremely modest textual support for the notion that all

administration was to be firmly and exclusively in the control of the President." *Id.*

In the FTC Act, Congress used its powers under the Necessary and Proper Clause to structure the FTC to carry out its statutory mandate while also recognizing the President's duties to faithfully execute the laws. Congress did not grant the respondent absolute protection from removal. That would be a very different case than the one here and likely would infringe on the President's Article II powers. Instead, Congress decided that the President can remove commissioners for "inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41. This legislative choice empowers FTC commissioners to fulfill their statutory obligations while still enabling the President to carry out his constitutional duty to take care that the laws are faithfully executed by removing commissioners who flout their official responsibilities or engage in corruption. Christine Kexel Chabot, *Interring the Unitary Executive*, 98 Notre Dame L. Rev. 129, 147 (2022). Indeed, by restricting the President's removal authority, these protections can reinforce his obligation to "ensure faithful execution by enabling independent agencies to prioritize the law over the President's immediate political wishes." *Id.* at 192.

But the President and supporting *amici* argue that the Constitution grants the President complete authority to remove agency heads. This argument fails because the text of Article II, whether in the Vesting or Take Care Clauses, grants the President no such power. As Chief Justice Rehnquist wrote for the majority in *Morrison*, this theory "depends upon an extrapolation from general constitutional language which we think is more than the text will bear." *Morrison*, 487 U.S. at 690 n.29. Whereas some state

constitutions contain express separation of powers clauses, the U.S. Constitution does not. Noah A. Rosenblum, *History and Fetishism in the New Separation of Powers Formalism*, 173 U. Pa. L. Rev. 2151, 2168 (2025); *see also* Manning, *Separation of Powers*, *supra*, at 1944 ("[T]he Constitution contains no Separation of Powers Clause. . . . [And] [t]he historical record, moreover, reveals no one baseline for inferring what a reasonable constitutionmaker would have understood 'the separation of powers' to mean in the abstract."). On the contrary, a holistic examination of the nation's foundational document reveals that "[t]he text and structure of the Constitution impose few limits on Congress's ability to structure administrative government." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 597 (1984).

This Court has recognized "that 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." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). With this understanding, Congress has good reason for protecting agency officials from at-will removal in exercising its powers under the Necessary and Proper Clause. Agency members should never be tempted or pressured to violate their legal duties in order to pander to the President. At times, they may have to make decisions that are not politically expedient. Granting job protections to agency officials can empower them to carry out the statutory duties that Congress gave them, even if it displeases the President and his advisors.

This fear of presidential pressure on inferior officers to violate the law dates to the founding of the

United States. When the House debated the President's removal powers in 1789, some Representatives expressed serious concern that unlimited removal authority could open the door to major abuses of power. An absolute removal power "might allow the President to evade the law." Chabot, *Interring the Unitary Executive, supra*, at 156. Rep. William L. Smith worried that the President could compel officers to thwart Congress's directives if he were able to "threaten[] him with a removal." Annals of Cong., *supra*, at 472 (statement of Rep. Smith). But if the officer had tenure, he could "dare to defy the shafts of malevolence" and "Machiavelian [sic] policy" of the President. *Id.*

Indeed, this case only underscores why Congress provided job protections to certain officials. This case involves a civil servant who has ably served under three administrations. She was originally nominated to her position by President Trump in 2018 and nominated for a second term by President Biden in 2023. Earlier this year though, President Trump attempted to fire her not because of any failure in her official capacity but instead because she was alleged to have different priorities than the White House did. If the heads of agencies believe that they can be dismissed without cause and without recourse, they may neglect or flout their statutory duties and opt to please the President instead.

While the respondent was targeted because of purported disagreements on policy, another federal employee allegedly lost his position because he followed the law instead of pleasing the President. Todd Arrington was until recently the director of the Dwight D. Eisenhower Presidential Library. According to reports, Mr. Arrington was forced to resign after 30 years of service because he refused to

give President Trump a sword from the Eisenhower collection. The President wanted to give the sword to King Charles during his state visit to the United Kingdom. Mr. Arrington, however, refused to hand it over because, under the law, all items housed at presidential libraries belong to the U.S. Government and must be preserved for the American public. Jennifer Schuessler & Minho Kim, *After Declining to Give Trump a Sword for King Charles, A Museum Leader is Out*, N.Y. Times (Oct. 2, 2025), https://www.nytimes.com/2025/10/02/arts/design/trump-eisenhower-king-charles-sword.html. If the story is true, Mr. Arrington's decision to follow the law instead of pleasing the President made him unfit for the job. He did not fail to take care of the law, nor did he impede the president's ability to properly execute the law, and yet the result speaks for itself.

II. Beginning with the First Congress, the legislative branch has put restraints on the President's ability to remove members of federal agencies and commissions.

Since the founding of the United States, Congress has placed limitations on the President's ability to remove officers of certain agencies. The First Congress intensely debated the question of the President's constitutional removal power. Given the varied views on legislative and executive removal powers and lack of broad agreement, let alone consensus, this Congress reached what could be called the "Indecisions of 1789." Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity*, 171 U. Pa. L. Rev. 753 (2023). While some members endorsed absolute removal authority for the President under the Constitution, this view commanded support from "a mere fraction of a fraction, a minority of a minority." Edward S.

Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 369 (1927).

At the time, "Congress emphatically did not imagine that all federal administrative activities should be performed by officials lodged in departments and accountable directly and exclusively to the President." Mashaw, *supra*, at 1303. For example, Congress ensured that the Department of Treasury, which was created in 1789, was insulated from the President by (1) not labeling it as an executive department, (2) directing the Secretary of Treasury to report to Congress, not the president, and (3) "restrict[ing] the President's power to remove the comptroller of the department." Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1117-18 (2000).

In line with this understanding of the constitutional division of power, the First Congress created an office over which the President had incomplete removal power. In 1790, it established the Sinking Fund Commission. This multimember body was established to pay off the national debt by distributing funds that had been allocated by Congress for the purpose. Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 41-43 (2020). The Sinking Fund Commission consisted of Alexander Hamilton, Thomas Jefferson, John Adams, John Jay, and Edmund Randolph (respectively, the Secretaries of Treasury and State, the Vice President, the Chief Justice, and the Attorney General). *Id.* at 53.

Under the Constitution, President Washington could not remove the Vice President or the Chief Justice from their offices, and thus, could not remove them from the Commission. Congress did this on purpose because it wanted the Commission to be partly insulated from the executive. Rosenblum, *supra*, at 2174-75. For the creators of the Commission, this protection from complete presidential control was necessary to prevent the President from interfering with its decisions and commandeering funds for more politically expedient uses. Chabot, *Federal Reserve*, *supra*, at 37-38.

Early Congresses "acted in [the] spirit of pragmatic compromise" regarding questions about the separation of powers. Mashaw, *supra*, at 1292. They "created departments and officers, charged them with administrative tasks, and subjected them to political supervision in a variety of ways that exhibit modest concern for rigid or formal conceptions of the separation of powers." *Id.* at 1291. Rather than any congressional agreement on constitutional removal power for the President, what emerged in the early years of the United States were "familiar modern concerns and administrative techniques" for promoting national development and defense. *Id.* at 1277.

Congress continued this practice of restricting presidential removal authority in the nineteenth century. In 1816, the federal legislature created the Second Bank of the United States, "which by statute had twenty-five directors, only five of whom could be appointed or removed by the president." Patricia A. McCoy, *Constitutionalizing Financial Instability*, 2020 U. Chi. L. Rev. Online 66, 69. This powerful institution has been called "the first truly independent agency in the republic's history."

Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1, 30 (1994). Notably, the Court upheld the creation of the Second Bank as a legitimate exercise of Congress's powers under the Necessary and Proper Clause. *McCulloch*, 17 U.S. at 316. In the Tenure of Office Act of 1820, Congress enacted fixed, four-year terms for certain executive officials including district attorneys and stated they could be "be removable from office at pleasure." 3 Stat. 582 (1820). Given the explicit grant of removal power to the President, this Act suggested that the President's absolute removal power is statutory, not constitutional, in origin. Corwin, *supra*, at 377. In line with its broad power to structure the federal government, Congress during the Civil War established the Office of the Comptroller of the Currency and limited the President's power to remove the comptroller. McCoy, *supra*, at 69-70.

In 1887, Congress established the Interstate Commerce Commission (ICC) to regulate the railroad industry. Breger & Edles, *supra*, at 1113-14. As a multimember, bipartisan commission, the ICC's structure became the model for many other regulatory agencies that exist today. *Id.* at 1137-38. Justice Sutherland described this agency type as "a body of experts who shall gain experience by length of service—a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Executor*, 295 U.S. at 625-26. Even as it became the template for modern multimember agencies, restrictions on the President's power to remove commissioners at the ICC dated to earlier offices like the Sinking Fund Commission,

In addition to being in clear conflict with the text of the Necessary and Proper Clause in Article I, conferring absolute removal authority on the President would ignore 230 years of practice. It is odd that after more than two centuries, the current President would claim constitutional powers that his predecessors did not enjoy, based solely on a theory developed by a small clique of elite lawyers beginning in the 1980s. Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 Harv. L. Rev. 352, 376-77 (2020).

III. The Federal Trade Commission's record vindicates Congress's decision to design it as a multimember, bipartisan agency.

For more than a century, the FTC has ably served the American people. More than just an enforcement body, the FTC's industry studies laid the groundwork for major legislation while its rulemakings reshaped markets to the benefit of consumers and businesses. The FTC could successfully undertake projects that required multi-year planning and execution, in part, because its leadership could operate free of arbitrary presidential interference. *See* Andrew I. Gavil & William E. Kovacic, *A Defense of the "For Cause" Termination Provisions of the Federal Trade Commission Act*, Progressive Pol'y Inst. 16 (July 2025) ("[F]or cause protections have supported an independence norm that promotes integrity in government, impartial decision-making, and the rule of law."), https://www.progressivepolicy.org/wp-content/uploads/2025/07/PPI-A-Defense-of-the-For-Cause-Termination-Provisions-of-the-FTC-Act.pdf.

By comparison, an executive department in which officials can be removed at will by the President is more vulnerable to improper pressures from the

White House. *See, e.g.*, Dave Michaels, *Top Justice Department Antitrust Officials Fired Amid Internal Feud*, Wall St. J. (July 29, 2025), https://www.wsj.com/us-news/law/top-justice-department-antitrust-officials-fired-amid-internal-feud-0c98d57c. To be sure, the FTC, much like any century-old institution, has had its ups and downs. *See generally* David A. Hyman & William E. Kovacic, *Can't Anyone Here Play This Game? Judging the FTC's Critics*, 83 Geo. Wash. L. Rev. 1948 (2015). But a non-exhaustive review of the FTC's investigatory and regulatory accomplishments shows that Congress was wise when it decided to establish it as a multimember, bipartisan commission.

i. Landmark industry studies

Congress authorized the FTC to conduct industry-wide studies. In addition to investigations into suspected violations of the FTC and Clayton Acts, the FTC is empowered to undertake studies of entire markets and sectors. 15 U.S.C. § 46(b). In 2024, the FTC completed an investigation of the data collection, usage, and sharing practices of leading social media and streaming companies. Fed. Trade Comm'n, A Look Behind the Screens: Examining the Data Practices of Social Media and Video Streaming Services (Sept. 2024). Historically, FTC studies laid the foundation for major legislative enactments to reform sectors such as meatpacking, utilities, and pharmaceuticals.

At the request of President Woodrow Wilson during World War I, the FTC conducted a groundbreaking investigation into the meatpacking industry, focusing on the "Big Five" packers—Swift, Armour, Morris, Wilson, and Cudahy—who dominated the national supply of beef, pork, and

mutton. William E. Kovacic & Marc Winerman, *Outpost Years for a Start-Up Agency: The FTC from 1921-1925*, 77 Antitrust L.J. 145, 196 (2012). The investigation uncovered widespread abuses of power, including collusive and unfair competitive practices across transportation, storage, and retail meat markets. Fed. Trade Comm'n, Report of the Federal Trade Commission on the Meat-Packing Industry (1919), vols. I–V.

The findings of the FTC report were instrumental in the drafting and passage of the Packers and Stockyards Act of 1921, which remains a cornerstone of antitrust and fair-trade regulation in agriculture. The Act gave the U.S. Department of Agriculture (USDA) the authority to oversee packers, stockyards, and live poultry dealers, focusing on deceptive, discriminatory, and unfair trade practices. Packers and Stockyards Act of 1921, Pub. L. No. 67–51, 42 Stat. 159 (codified as amended at 7 U.S.C. §§ 181–229c).

Beginning in 1928, the FTC, at the direction of the Senate, undertook a massive, multi-year study into the structure, conduct, and abuses of public utility holding companies. Over the course of the investigation, the FTC produced more than 95 volumes of reports. It documented practices such as pyramidal ownership structures that concentrated control in the hands of a few promoters with minimal investment; overleveraging and excessive holding company layers; self-dealing within corporate groups that inflated rates paid by customers; and a systematic propaganda campaign by private utilities in schools, colleges, and the press against public ownership and effective public regulation. Fed. Trade Comm'n, Utility Corporations, Final Report of the

Federal Trade Commission to the Senate of the United States (1935).

Congress relied on the FTC's reports for enacting the Public Utility Holding Company Act of 1935 (PUHCA). The law abolished byzantine holding company structures, generally confined holding companies to operations in a single integrated geographic area, and required approval from the Securities and Exchange Commission before the acquisitions of new systems or the issuance of securities. Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803 (repealed 2005). PUHCA established more economically and operationally coherent utility systems across the country and placed holding companies on a much sounder financial footing.

In 1949, the FTC completed a major study of merger activity during the 1940s. The FTC concluded that mergers and acquisitions contributed to the loss of many independent enterprises and the greater centralization of business ownership. Fed. Trade Comm'n, Report of the Federal Trade Commission on the Merger Movement: A Summary Report (1948). This report helped motivate the passage of the Celler-Kefauver Anti-Merger Amendments of 1950, which strengthened Section 7 of the Clayton Act. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 231 (1960). This law authorized the government to challenge both stock and asset acquisitions and non-horizontal mergers. Celler-Kefauver Act, Pub. L. No. 81-899, 64 Stat. 1125 (1950) (codified at 15 U.S.C. § 18).

More recently, between 2002 and 2009, the Federal Trade Commission conducted a 6(b) study into settlement agreements between brand-name

pharmaceutical companies and potential generic entrants. The study focused on so-called "pay-for-delay" or reverse payment agreements—settlements in which a brand-name manufacturer offers a generic competitor consideration in exchange for delaying the launch of a competitive product. Fed. Trade Comm'n, Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions (Jan. 2010). The study revealed that from 2005 to 2009, the number of settlements involving payments and delayed entry increased significantly, particularly following several appellate court decisions that upheld the agreements. The FTC estimated that pay-for-delay agreements cost U.S. consumers $3.5 billion per year in higher prescription drug costs. *Id.* at 2.

This study provided the evidentiary and analytical foundation for the FTC's successful enforcement campaign against pay-for-delay agreements. Notably, the Supreme Court in 2013 held that reverse payment settlements are subject to antitrust scrutiny. *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013). The Court emphasized that large, unexplained payments from a patent holder to a generic challenger can signal collusive intent, especially when they cannot be justified by avoided litigation costs or the provision of services. *Id.* at 157. Since *Actavis*, the FTC has brought successful cases targeting reverse payment settlements. *E.g.*, *Impax Labs., Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021).

ii. Major rules to protect consumers

Congress gave the Federal Trade Commission the power to write substantive rules. The FTC has the authority to enact both competition and consumer protection rules. 15 U.S.C. § 46(g); 15 U.S.C. § 57a. *See also Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d

672, 693 (D.C. Cir. 1973) ("Section 6(g) plainly authorizes rule-making and nothing in the statute or in its legislative history precludes its use for this purpose.").

The FTC led the way to regulate cigarettes nationally. One week after the publication of the Surgeon General's landmark 1964 report on the adverse health effects of smoking, the FTC initiated a rulemaking to mandate health warnings on cigarette packages. Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking, 29 Fed. Reg. 8324 (July 2, 1964), withdrawn, 30 Fed. Reg 9485 (July 29, 1965). Following aggressive tobacco industry lobbying, Congress enacted legislation that superseded the rule and established a statutory system of disclosures. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-82, 79 Stat. 282, codified at 15 U.S.C. §§ 1331–40. Nonetheless, FTC action was critical in regulating a product now universally recognized to be harmful to human health.

The FTC's Funeral Rule stands as one of the agency's most successful and enduring uses of its consumer protection authority under Section 18 of the FTC Act. Finalized in 1984, the rule was the product of nearly a decade of investigation that exposed widespread deceptive and coercive practices in the funeral industry. The FTC found a lack of price transparency, coercive bundling of products and services, and misrepresentations about legal requirements (e.g., falsely claiming embalming was mandatory). Funeral Industry Practices Trade Regulation Rule, 59 Fed. Reg. 1592, 611 (Jan. 11, 1994) (codified at 16 C.F.R. § 453). This rule exemplifies effective prophylactic regulation in a

market in which consumers are especially vulnerable to exploitative and deceptive marketing practices.

The Credit Practices Rule curtailed predatory and deceptive lending practices in consumer credit markets. Trade Regulation Rule; Credit Practices, 49 Fed. Reg. 7740 (Mar. 1, 1984), petition denied by *Am Fin. Servs. Ass'n v. FTC*, 767 F.2d 957 (D.C. Cir. 1985). Enacted after extensive public hearings and industry study, the rule was designed to standardize fair credit terms, eliminate hidden traps in consumer contracts, and reduce the use of coercive collection tactics. The rule prohibits provisions and practices that exploit consumers' lack of bargaining power or legal sophistication. The outlawed terms include wage assignments, which allow creditors to garnish wages without a court order, pyramiding of late charges, and confessions of judge in which consumers waive their right to contest legal claims in court. 16 C.F.R. § 444.2.

As these examples show, the FTC has been at the forefront of protecting the American public from being exploited by unscrupulous actors for more than a century. This body of experts must be able to continue to act "independent of executive authority" and "free to exercise its judgment without the leave or hindrance" by those with political goals such as the President and his advisors. *Humphrey's Executor*, 295 U.S. at 625. Congress tasked the FTC with implementing specific laws, and it is vital that it remain free to continue acting in a bipartisan and impartial manner.

CONCLUSION

For the reasons stated above, the judgment should be upheld.

Dated: November 14, 2025

Respectfully submitted,

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