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 FOR *AMICI CURIAE* PROFESSOR ANDREA SCOSERIA KATZ AND PROFESSOR JONATHAN GIENAPP IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, *amici curiae* Professor Andrea Scoseria Katz and Professor Jonathan Gienapp respectfully submit this brief in support of respondent Rebecca Kelly Slaughter.[1] Andrea Scoseria Katz is Associate Professor of Law at Washington University School of Law in St. Louis. Professor Katz teaches and writes about constitutional law, with a focus on presidential power. Jonathan Gienapp is Associate Professor of History and Law and the Nehal and Jenny Fan Raj Civics Faculty Fellow in Undergraduate Teaching at Stanford University. He specializes in the constitutional, political, legal, and intellectual history of the early United States.

SUMMARY OF ARGUMENT

In the years since this Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), legal historians—including originalists—have unearthed a rich body of evidence challenging the conventional wisdom concerning the scope of the President's removal powers at the Founding. Revisiting not only the Framers' intellectual influences, but also their driving philosophical concerns and political incentives, this scholarship explains that

[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission.

removal authority was not understood to be vested exclusively in the President as a matter of settled constitutional law, but rather was permissibly exercised by various actors in various ways, intentionally not settled by the text of the Constitution but governed by practical and policy considerations.

To be sure, many early *statutes* vested removal power in the President. One of the Framers' greatest fears was "to continue a bad man in office." *The Papers of James Madison*, vol. 12, *2 March 1789–20 January 1790 and supplement 24 October 1775–24 January 1789* at 173-174 (1979). Impeachment was cumbersome, and joint removal of officers by the Senate and the President perhaps more so; but presidential removal was quick, aided by the President's informational advantages. Thus, while the Founding generation disagreed broadly over what the executive power meant, at least some agreed that, in the President's hands, the removal power would be most usefully exercised.

As recent scholarship demonstrates, however, this utilitarian approach to removal also explains why some statutes enacted during the Founding era declined to give the President unfettered removal power. Where expansive notions of presidential authority conflicted with the imperatives of good government, early Congresses (uncontroversially) sided with the latter. For example, certain statutes insulated early financial regulators from removal entirely on the grounds that those regulators required stability in

their jobs and insulation from political manipulation. Other early statutes vested removal authority in actors other than the President, such as the courts. And for officers involved in the delicate job of managing the money supply—inspecting imports, collecting taxes, coining money, delivering the mail, and others—criminal prosecution was frequently the preferred mode of removal.

Against this backdrop, the late nineteenth-century rise of the modern "administrative state"—marked by the creation of new departments within the Executive Branch, helmed by a new class of executive officers with specialized areas of authority and expertise—did not so much upset a tradition of unilateral presidential removal authority as apply the more heterodox set of early American removal practices to a new context. To be sure, the modern capitalist economy brought a proliferation of seemingly new forms of regulation, plus a merit-based civil service. But if Gilded Age Americans were uniquely fixated on officer independence as an antidote to corruption in Washington, the structures and arrangements they put into place to achieve those ends—including statutes that limited the President's authority to remove—were not new. Rather, these structures were deeply rooted in longstanding American traditions.

Two important conclusions follow from recent scholarship's understanding of removal at the Founding. First, although the President has always exercised considerable removal power, that power was not

unfettered: it was circumscribed by law, including, at times, by the requirement that officials could only be removed for cause. Second, and relatedly, removal has not been treated as a settled feature of executive power emanating from the Constitution; rather, it has functioned as a management tool deployed by Congress to ensure an honest and effective administration. Understood this way, the limits on presidential removal authority that this Court recognized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), are consistent both with practice stretching back to the Founding and with other decisions from this Court recognizing robust presidential removal authority in certain contexts.

ARGUMENT

I. HISTORICAL EVIDENCE EXPLORED SINCE *SEILA LAW* DEMONSTRATES THAT THE FOUNDERS RECOGNIZED LIMITS ON THE PRESIDENT'S REMOVAL POWER

The Constitution says nothing about removal, and its Framers at Philadelphia said very little about it either. Faced with this puzzling omission, a cohort of presidentialist scholars submit that there existed an unwritten original public "consensus" that removal power was executive in its nature. Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal,* 136 HARV. L. REV. 1756, 1758 (2023). New scholarship since *Seila Law*, however, suggests that this inference is unwarranted. Rather than reflecting "consensus,"

the Framers' silence on removal may have been the work of human error, a conscious decision for "strategic ambiguity," conceptual confusion, or reflective of profound ambivalence in its exercise. *Compare* FORREST MCDONALD, THE AMERICAN PRESIDENCY 180 (1994), *with* Jed H. Shugerman, *The Indecisions of 1789: Inconstant Originalism and Strategic Ambiguity,* 171 U. PENN. L. REV. 753, 761-62 (2023), *and* JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 244-45 (1996). Indeed, our Constitution—and the removal power in particular—was left, by its drafters, "necessarily unfinished and incomplete." JONATHAN GIENAPP, THE SECOND CREATION: FIXING THE AMERICAN CONSTITUTION IN THE FOUNDING ERA 5 (2018).

A. Early American Practice Conflicts with the Existence of a Presidential Removal Power in the Constitution

Following this Court's decision in *Seila Law*, originalists revisited an old debate: does the Constitution vest the president with the power of removal? Reexamining the Framers' intellectual influences, early debates on the presidency, and laws and norms structuring our early government reveals that the Framers had widely divergent ideas about the executive power. To the extent that the Constitution endorsed any theory of presidential removal, the drafters did so largely because they considered it the arrangement most conducive to effective administration. But where presidentialism and good government

diverged, early Congresses prioritized good government. This can be seen in two classes of statutes: those that insulated early officers from removal, and those that vested removal in actors other than the President.

1. The Framers' Models of Executive Power Did Not Treat Removal as an Inherent Attribute of Executive Authority

Despite the text's silence, removal has often been treated as part of the "executive power" vested in the President by Article II of the Constitution. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE 3-4 (2008). Scholars who support this unitary reading of Article II have pointed to the Framers' intellectual influences as evidence that they would have given exclusive removal authority to the President. But that assertion is flawed: the traditions from which the Framers drew did not necessarily treat removal as inherent to execution.

Multiple layers of historical experience shaped early American thinking on the executive power: the great disputes of Stuart England, which still resonated in eighteenth-century America; alarm over the rise of ministerial "corruption" under the Hanoverian kings; and lessons learned from the efforts of early state constitutions to cabin executive power within strict republican limits. RAKOVE, *supra* at 245.

Whether the monarchy—a looming symbol of executive power for this generation—served as a blueprint for the Framers in designing the presidency is a complicated question. Certainly, in a period of passionate anti-monarchical sentiment, no one publicly avowed to desire a king. Yet the King's bundle of powers may have served as at least a drafting guide for the President's own. *See* MICHAEL MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 11, 39 (2020); Ilan Wurman, *In Search of Prerogative*, 70 DUKE L. J. 93, 122-28 (2020).

Whether presidential power was inspired by the British monarchy or not, even the monarchy lacked an unlimited removal power. High offices like the privy council and the cabinet served at the King's pleasure, but there were countless other officers whom not even the King could legally remove. Jed Shugerman, *Removal of Context: Blackstone, Limited Monarchy, and the Limits of Unitary Originalism*, 33 YALE J. L. & HUM. 125, 128-29 (2022); Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 STAN. L. REV. 175, 202, 204-05 (2021). For centuries, officeholding was treated as a property right; thus, at common law, "some act of ceremony" was required before certain officers could be removed. Jane Manners & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 COLUM. L. REV. 1, 31 (2021). Jurists like Matthew Bacon and William Blackstone outlined four categories of officer tenure,

only one of which ("during pleasure") was removable at will. Jed Shugerman, *Venality: A Strangely Practical History of Unremovable Offices and Limited Executive Power*, 100 NOTRE DAME L. REV. 213, 242-58 (2024). The other three provided tenure "for Life," "for Years or a limited time," or "of Inheritance." *Id.* at 255-56; *see also* 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 732 (1740); BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND, at 36 (2016).

To the extent the royal prerogative has been suggested as an alternate fount for removal, recent scholarship has rejected the idea that Article II's Vesting Clause contains such a "hidden but dramatic message." Caleb Nelson, *Must Administrative Officers Serve at the President's Pleasure?*, Democracy Project (Sep. 29, 2025); *see also* Julian D. Mortenson, *Article II Vests Executive Power, Not the Royal Prerogative,* 119 COLUM. L. REV. 1169, 1172-73, 1224-28 (2019) (removal not among the 39 prerogatives Blackstone described the King exercising).

The argument that the President's duty under Article III to "take care that the laws be faithfully executed" would make no sense absent unfettered removal authority, *see* Michael D. Ramsey, *Presidential Power and What the First Congress Did Not Do*, 99 NOTRE DAME L. REV. REFLECTION 47-49 (2023); Wurman, *supra* at 140-45, is unconvincing. In proper context, the Take Care clause was a device, like the oath of office, to *limit* executive discretion. Andrew Kent, Ethan J. Leib & Jed Shugerman, *Faithful*

Execution and Article II, 132 HARV. L. REV. 2111, 2117-18 (2019). Not only is the clause found within a list of presidential duties rather than powers, but similar commands of fidelity had been required for centuries for humble offices like town constable, weigher of bricks, vestryman of the church, recorder of deeds, and inspector of flax and hemp—positions that undoubtedly lacked "supreme" law enforcement power. *Id.* at 2118.

In fact, new empirically-minded scholarship on how laws were executed at the Founding suggests that the modern-day command-and-control idea of "good faith" execution would have been a foreign concept for the Framers. Top-down oversight of customs inspectors and mail carriers was a challenge for a resource-strapped and information-poor young government setting up new operations, especially in far-flung Western territories. Christine K. Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 176, 183-84, 190 (2022). Oversight routinely fell to independent judges or private citizens themselves. *Id.* Officers who overstepped their statutory duties were often sued by private citizens in ordinary tort suits. Nathaniel Donahue, *Officers at Common Law,* 135 YALE L.J. (forthcoming, 2026). Indeed, where the government failed to enforce the law, private citizen suits were a widely accepted alternative. James E. Pfander, *Public Law Litigation in Eighteenth Century America,* 92 FORDHAM L. REV. 469, 491-92 (2023). Thus, in the early Republic, the executive power was frequently decentralized, devolved even to individuals

who, by their very nature, could not be removed because they did not hold formal office.

Nor do state constitutions support an American tradition of unfettered executive power of removal, as some scholars have argued. *See, e.g.*, Bamzai & Prakash, *The Executive Power of Removal*, *supra* at 1768-70. The states typically created weaker executive branches than the modern presidency. JEFFREY S. SUTTON, WHO DECIDES? STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION 148 (2022). Their constitutions said little about removal, and when they did, they vested that power outside the governor's hands. Andrea S. Katz & Noah A. Rosenblum, *Removal Rehashed,* 136 HARV. L. REV. F. 404, 407-08 (2023). Overall, state constitution-writers were less concerned with defining powers "of an executive nature" than with preventing their governors from accessing the powers an executive "might wield" to the public's detriment—such as the veto, appointment, and the capacity to manipulate politics through patronage. Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 AM. J. LEG. HIST. 229, 245-47 (2023).

2. The Framers' Early Enactments Do Not Support the Existence of a Presidential Removal Power Under the Constitution

The "Decision of 1789," often viewed as emblematic of the Framers' intent to vest removal power

in the President, CALABRESI & YOO, *supra* at 42, has also recently been reassessed. In June 1789, after four days of heated debate, the First Congress determined that the nation's first department, Foreign Affairs, would be headed by a Secretary removable only "by the President." Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789). The Departments of War and Treasury followed that summer. Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789); Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

Although the First Congress ultimately gave the President authority to remove these three Secretaries, the range of congressional opinions on executive power was "quite broad, to put it mildly." J. DAVID ALVIS ET AL., THE CONTESTED REMOVAL POWER, 1789-2019 16 (2013). Supporters of vesting this removal authority in the President had different, even incompatible, reasons for their position: *presidentialists* believed the power was granted by the Constitution, while *congressionalists* believed the Constitution's silence authorized Congress to vest it. GIENAPP, SECOND CREATION, *supra* at 158; Shugerman, *The Indecisions of 1789*, *supra* at 864-65. Madison believed that removal was settled by the Constitution. Rep. William Loughton Smith (SC), 1 *Annals of Congress* 464 (Joseph Gales & William W. Seaton eds., 1834). But others had "doubts," and voted, at least in part, based on "where the power can be most *usefully*

deposited for the security and benefit of the people." *Id.* at 476, 608 (emphasis added).

Further complicating the picture were switches in position. Shugerman, *The Indecisions of 1789, supra* at 778-79, 863 & n. 630. Votes changed over the course of four days, often with no reasons given, and a last-minute modification to the language of the Foreign Affairs act added further confusion. *See id.* Madison went from a firm advocate of congressional regulatory authority to an equally firm defender of inherent presidential power during the course of the debate. *Id.* at 778-79. Anti-presidentialist William Loughton Smith of South Carolina gleefully reminded the delegates that *The Federalist Papers*, Madison's own prior work, had taken a contrary view of the question, but when Smith learned that Alexander Hamilton, the author of *Federalist 77*, had changed his mind on removal, Smith was stunned and questioned Hamilton's motives: "[H]e is a Candidate for the office of Secretary of Finance!" Gienapp, *Removal and the Changing Debate*, *supra* at 237.

Legislators' varied motives aside, what the First Congress actually said about removal was quite limited. Indeed, it is difficult to extract a "firm answer" to the broader constitutional question concerning removal from the record of the Decision of 1789. John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1332 (1999). Fundamentally, the Decision only pertained to the removal of those three

Department heads. Even scholars who view the Decision as having settled the removal power's existence concede that it does not authorize the President to remove legislative, judicial, quasi-legislative, or quasi-judicial officers. Saikrishna Prakash, *Removal and Tenure in Office,* 92 VA. L. REV. 1779, 1850 (2006). Indeed, with historical evidence casting doubt on the existence of an original public consensus on removal, some unitary theorists have abandoned their stronger claims concerning the President's powers. Ilan Wurman, *Some Thoughts on My Seila Law Brief*, Yale J. Reg. Notice & Comment Blog (Dec. 1, 2021); Michael Ramsey, *Blackstone on Removal Power: Reprise,* The Originalism Blog (Dec. 2021); *see also* Jed H. Shugerman, *Movement on Removal,* 63 AM. J. LEG. HIST. 258, 269 (2024) (discussing Professor Michael McConnell's change in position); Gary Lawson & Jed H. Shugerman, *Presidential Removal as Article I, Not Article II*, at 21 (Nov. 11, 2025) (unpublished manuscript), https://ssrn.com/abstract=5736583 ("[S]ome originalists have been skeptical of the originalist argument for presidential removal for quite some time, and recently more originalists have concluded that the evidence is against the argument.").

Thus, far from a "consensus in the early republic" that removal was the exclusive prerogative of the President, the textual silence in the Constitution about removal was "filled, in practice, with a cacophony of disagreement and competing positions." Andrea S. Katz, Noah A. Rosenblum & Jane Manners, *Disagreement and Historical Argument or How Not to*

Think About Removal, 58 U. MICH. J. L. REF. 555, 566 (2025).

B. Early Congresses Placed Limits on Removal Power and Early Presidents Used Their Removal Power Sparingly

Even considering the Decision of 1789, the notion that removal was an exclusively presidential function is contradicted by early American practice. Congress used its extensive powers to create offices outside of the formal executive chain of command. This included independent officers and commissions, as well as officers who were removable by Congress or the judiciary, chiefly those with financial duties. That such statutes created a system of "removal by committee" is perhaps explained by the early Republic's limited aptitude for top-down supervision combined with the fear of allowing corrupt officers to remain in power. Meanwhile, if the President possessed an illimitable removal power, early presidents certainly didn't show it. The first six occupants of the office, from Washington to John Quincy Adams, exercised the removal power quite timidly. Fear of appearing monarchical, prevailing norms against partisanship, and a long common law tradition that protected office-holding as a form of property all help explain why early presidents were reluctant to wield removal power. Taken together, statutes and presidential practice show that removal in the early Republic was neither illimitably, nor exclusively, presidential.

1. Early Congresses Created Independent Commissions and Established Removal Powers Outside the Executive Branch

Whatever the Decision of 1789 may have stood for in legislators' minds, it did not establish that officer independence was an unconstitutional infringement on the President's executive power. Discussing the office of Comptroller during the 1789 debates on the Treasury, Madison proposed a term-of-years tenure, observing: "[T]here 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." *Annals of Congress*, *supra* at 636. To Madison, the office seemed a hybrid: "I do not say the office is either executive or judicial; I think it rather distinct from both, though it partakes of each, and therefore some modification, accommodated to those circumstances, ought to take place. I would, therefore, make the officer responsible to every part of the Government." *Id.* at 638.

Congress appears to have acted on Madison's theory of independent officers, passing statutes that constrained removal of those whose functions were not purely executive. Recent scholarship reveals numerous early statutes creating multimember commissions or shared decision-making structures equivalent to today's "independent agencies." Christine Kexel Chabot, *Interring the Unitary Executive*, 98 NOTRE DAME L. REV. 129, 139 (2022); Victoria F. Nourse, *The*

New History of Multi-Member Commissions at the Founding, 1789-1840 (Oct. 19, 2025) (unpublished manuscript), https://ssrn.com/abstract=5628110.

Then, as now, commissions or boards contained officers who operated with substantial independence from the President and who could not be removed at will. One was the Sinking Fund Commission, a five-member board created in August 1790 with indefinite power to purchase debt up to $400 billion in today's dollars. Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 3-4. (2020). The Commission made "purchasing decisions independently of a unified executive policy." *Id.* at 4. Its five original members included Vice President John Adams and Chief Justice John Jay, two officers who could not be fired by President. *See id.* The other three were Secretary of Treasury Alexander Hamilton, Secretary of State Thomas Jefferson, and Attorney General Edmund Randolph—all men whom "[o]ne would expect . . . to have a clear grasp on the original public meaning of the Constitution." *Id.* Hamilton, a defender of a strong executive, proposed the commission himself and expressed no doubts about its constitutionality. *Id.* at 40-42.

The Sinking Fund Commission was not unique—rather, its structure was "commonplace." Chabot, *Interring the Unitary Executive*, *supra* at 175. From 1789-1840, Congress created multi-member commissions to address, among other topics, assessing

property values, banking, the mint, patents, canals, turnpikes, planning the District of Columbia, bankruptcy, the military, and Indian affairs. Nourse, *supra* at 2-3, 21. In establishing these administrative bodies, Congress "knowingly rejected complete presidential control." Chabot, *Interring the Unitary Executive*, *supra* at 139. That rejection was not controversial. Early presidents agreed to and upheld arrangements protecting commissioners' "impartiality" or "disinterestedness" through structural insulation from removal, Nourse, *supra* at 3, and, as evidenced by the Sinking Fund Commission, distinguished executive branch officers served on these bodies, Chabot, *Is the Federal Reserve Constitutional?*, *supra* at 35-37. Indeed, such commissions boasted "a 'who's who' of founders over 40 years." Nourse, *supra* at 3. None of these Founders discerned a tension between the commissions on which they served and the Constitution they helped to draft.

From the Founding era through the early nineteenth century, Congress also established removal mechanisms that did not involve the President, demonstrating that removal could be accomplished without the control of the executive branch. One such mechanism was "congressional removal." Saikrishna Prakash, *supra* at 1786-88. Congress had exercised such authority even before the Constitution was ratified. *See* The Northwest Ordinance, 1 Stat. 51 (July 13, 1787) (territorial governor's commission "shall continue in force for the term of three years, unless sooner revoked by Congress"). And Congress

continued to arrogate such power to itself following ratification, often by including term limits in legislation. *See, e.g.*, Act of Sept. 24, 1789, ch. 20, §§ 27-28, 1 Stat. 29, 88 (granting marshals four-year terms and allowing them to exercise some continuing powers even "when removed from office, or when the term for which the marshal is appointed shall expire"); Act of Apr. 30, 1790, ch. 10, § 1, 1 Stat. 119, 119 (commissioned military officers "shall be raised for the service" for a period of three years); Act of Sept. 22, 1789, ch. 16, 1 Stat. 70, 70 (Postmaster General would serve "until the end of the next session of Congress, and no longer"). These provisions treated removal and term expiration as functionally equivalent, reflecting an understanding that Congress could structure officer removal through statutory expiration dates.

Officers handling public funds were subject to an arguably stricter mechanism of accountability: "removal by judges." Jed H. Shugerman, *The Decisions of 1789 Were Anti-Unitary: An Originalist Cautionary Tale*, at 44 (Aug. 15, 2021) (unpublished manuscript), https://ssrn.com/abstract=3597496; *see* Prakash, *supra* at 1795 (referring to these as "contingent removals"). The origins of this method of removal stretched back as far as fifteenth-century England, where laws sometimes specified that an officeholder's failure to well and faithfully execute the office—sometimes phrased as a failure to demean oneself while in office—was cause for removal. Kent, Leib & Shugerman, *supra* at 2147-48. The First Congress frequently authorized judicial removals on a similar

basis, often to prevent and punish corruption. For example, the Judiciary Act provided that officers convicted of taking bribes "shall be forever disabled from holding any office of trust or profit under the United States." Judiciary Act 1789, ch. 5, § 35, 1 Stat. 29, 46. The Treasury Act, passed just weeks later, specified that officers "guilty of a high misdemeanor" would "upon conviction be removed from office, and forever thereafter incapable of holding any office under the United States." Treasury Act 1789, ch. 12, § 8, 1 Stat. 65, 67. Judicial removal was likewise applied to tax collectors, land surveyors, collectors of taxes on whiskey, and officers of the mint. *See* Act of Sept. 1, 1789, ch. 11, § 34, 1 Stat. 55, 64-65; Act of Mar. 3, 1791, ch. 15, § 39, 1 Stat. 199; Act of Apr. 2, 1792, ch. 16, § 18, 1 Stat. 246, 250. The frequency with which early Congresses employed legislative and judicial removal processes demonstrates that they did not view removal as a solely executive function.

2. Early Presidents Used Removal Power Modestly

Between 1789 and 1829, presidents seldom removed officers,[2] a fact that suggests "beyond question that the power to remove was confined to cases of

[2] Even accepting, as petitioners' *amici* contend, that "Washington removed over twenty officers" and "Jefferson removed over one hundred officers" (Landmark Legal Found. Br. 10), those numbers constituted only a small fraction of the total number of federal officers at the time.

moral delinquency." LEONARD D. WHITE, THE JEFFERSONIANS: A STUDY IN ADMINISTRATIVE HISTORY, 1801-1829 381 (1951). Both Federalist and Republican presidents agreed that the removal power was not a viable tool for administrative control.

President Adams is an instructive case, because he was under great pressure to use removal to clear out his political enemies from office. But Adams refused, contending that removal on the ground "that it was the pleasure of the President, would be harsh and odious—inconsistent with the principle upon which I have commenced the Administration, of removing no person from office but for cause." *Id.* at 380. To Adams, a removal unjustifiable before public opinion would not only "indicate an irritable, hasty, and vindictive temper," but would also kindle "the most selfish and sordid passions … to distort the conduct and misrepresent the feelings of men whose places may become tire prize of slander upon them." *Id.* at 380-81. Adams was gesturing at then-extant norms: continuance in office and respect for honest officeholders, temperance and non-partisanship for the president.

In fact, from 1789 to 1829, there was only one set of presidential removals made for party reasons: Jefferson's "Revolution of 1800." Some scholars have pointed to this episode as proof of the President's robust power of removal. CALABRESI & YOO, *supra* at 4; Bamzai & Prakash, *The Executive Power of Removal*, *supra* at 1802-18. But Jefferson's presidency fails to

support an unlimited removal power for at least three reasons.

First, Jefferson's own constitutional philosophy did not support expansive government power by implication. Where Jefferson took extraordinary action, such as the Louisiana Purchase, he preferred it to be grounded in "prerogative," and left outside the Constitution. ALVIS ET AL., *supra* at 50. Jefferson never once, in public or in private, claimed that the Vesting Clause entitled him to remove officials at will. *Id.* at 54. Second, Jefferson removed only a "relatively small number of officers," a plurality of them Adams' midnight appointments, during his "Revolution." WHITE, *supra* at 379. Third, even after his landslide election win, Jefferson took pains to justify his removals with "for cause" rationales, bowing to established norms: of some one hundred removals effectuated over two terms, Jefferson told a protégé, only about fifteen had been for political reasons. ALVIS ET AL., *supra* at 52-53. After he fired a Federalist customs collector in New Haven, Connecticut, Jefferson wrote to a group of disgruntled local merchants, insisting that as soon as Republicans achieved their "just share" of the administration, he would "return with joy to that state of things when the only questions concerning a candidate shall be, is he honest? is he capable? is he faithful to the constitution?" Thomas Jefferson to Elias Shipman and Others, July 12, 1801, WRITINGS OF THOMAS JEFFERSON 498-500 (1984).

President Jefferson's most famous removal, of course, was one that never took place. Instead of invoking removal power, Jefferson deemed William Marbury's never-delivered commission a "nullity." ALVIS ET AL., *supra* at 53. This episode is suggestive of the idea that, once vested, possession of the office is akin to a property right. Indeed, Chief Justice John Marshall's subsequent landmark opinion alluded to this notion: "In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property." *Marbury v. Madison*, 5 U.S. 137, 155 (1803).

The limitations on presidential removal power imposed by Congress and early presidents' acquiescence in this state of affairs buttress the broader point about removal in the Founding era and early Republic: removal was not settled as a constitutional question, but rather was embedded in an ongoing give-and-take where Congress could condition the grant of power on its appropriate exercise, and presidents were expected to display "modesty and forbearance" in order to preserve this "harmonious system." Joseph Story, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 397 (1833).

II. THE MODERN ADMINISTRATIVE STATE IS COMPATIBLE WITH EARLIER LIMITATIONS ON PRESIDENTIAL REMOVAL POWER

The practices surrounding removal laid down during the early Republic carried through to, and survived, the immense changes to the American state that began in the late 1800s. A "fierce discontent" had seized a turn-of-the-century America beset with economic depression and unchecked monopolies, rising labor unrest, a thriving spoils system, and the 1881 assassination of President Garfield. MICHAEL MCGERR, A FIERCE DISCONTENT iii, vii (2005). Angry citizens demanded help, and new forms of regulation sprung up to meet popular demand: regulation of drugs and the food supply, bans on unfair methods of competition, laws defining the workday, and civil service reform. ROBERT HARRISON, CONGRESS, PROGRESSIVE REFORM, AND THE NEW AMERICAN STATE 4-5 (2004).

The success of this state-building project rested on convincing the American people that government worked for the public interest. Structural independence for regulatory agencies would carve out space for expertise in government but also, it was hoped, barricade government against industry capture, a frequent vice of Gilded Age legislatures. The Interstate Commerce Commission, erected to counterbalance the power of the railroads, typified this model. STEPHEN

SKOWRONEK, BUILDING A NEW AMERICAN STATE 248-84 (1982).

Officer removal—or the absence thereof—took on a new valence as the building block of independent agencies. Yet no President in this period voiced constitutional objections to new statutes that insulated officers from removal at will. These presidents saw a familiar Hamiltonian logic in the forms the burgeoning administrative state was taking: expertise, impartiality, and insulation from politics could be an aid to good government. *See* Federalist 72 (Hamilton) *The Federalist* 183 (Ian Shapiro ed. 2009) (warning of "a disgraceful and ruinous mutability in the administration of the government" caused by presidents-elect trying "[t]o reverse and undo what has been done by a predecessor" by "promot[ing] a change of men to fill the subordinate stations"). Early courts blessed these arrangements, as well. And this Court, even when it upheld more robust forms of presidential authority to remove certain officers, did not depart from the heterodox, outcome-driven mechanisms for removal stretching back to the Founding.

A. Anti-Corruption Reforms and Civil Service Professionalization Gave Rise to Independent Agencies Whose Officers Were Often Shielded from At-Will Removal

Gilded Age America was eager to move beyond the painful legacies of its recent past, one of which

included the clashes between southerner Andrew Johnson and a Radical Republican Congress that hated him. RICHARD WHITE, THE REPUBLIC FOR WHICH IT STANDS 11-63 (2017). After President Johnson repeatedly tried to sabotage the North's Reconstruction plans, including by firing his own Secretary of War, Congress passed the Tenure of Office Act of 1867, which barred the President from firing members of his own Cabinet without the Senate's consent, and then impeached him for firing in defiance of the statute. *See id.* at 36-45, 49-50, 53, 55, 75, 92. Years later, U.S. Solicitor General James M. Beck called this "one of the most discreditable chapters in the history of this country," a view Chief Justice Taft shared. Brief for the United States at 95, *Myers v. United States*, 272 U.S. 52 (1926); *see also Myers,* 272 U.S. at 167-68. Beck's point was that the Senate's intrusion into removal was unconstitutional harassment of the President, never to be repeated. Chief Justice Taft's 1926 opinion in *Myers* ensured that it never would—though, as discussed below, even this touchstone of presidential removal recognized limits on the firing power.

Prior to *Myers*, removal became an increasingly salient issue in the late nineteenth century due to two parallel developments: public backlash against government corruption, which reached a fever pitch in the 1870s-80s, and an emerging movement calling for professionalization in the federal bureaucracy.

In 1873, a speculative bubble in the railroads burst, and America's booming postwar economy crashed, leaving banks shuttered and city streets choked with investors demanding their money back. Andrea S. Katz, *A Regime of Statutes*, 2 J. AM. CONST. HIST. 737, 746 (2024). Within the year, revelations broke out of Washington that the Grant administration was handing out war pensions to nonexistent persons, providing government contracts to the President's family members, and helping whiskey distillers evade taxes—and then splitting the profits. *Id.* Seven years later, President James Garfield, an ambivalent reformer himself, was assassinated by a disappointed office seeker. ARI HOOGENBOOM, OUTLAWING THE SPOILS 182-86, 209-13 (1968). Garfield's death galvanized a grassroots anti-corruption movement calling for merit-based examinations and protected tenure for civil servants, and a chastened Republican Party, drubbed in the 1882 midterms, reluctantly passed the Pendleton Act the next year. *Id.* at 236-37. The landmark act insulated a whole class of officers from the influences of nepotism and partisanship, establishing merit-based hiring and protection from politically motivated dismissals.

Simultaneously, many Americans were starting to realize that many of their agencies were woefully unprofessional and behind the times. Calling for making American government "less unbusiness like," Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 201 (1887), reformers launched a "revolution in administration" centered around the values of

efficiency, expertise, centralization, and scientific management, WILLIAM J. NOVAK, NEW DEMOCRACY 226 (2022). Leading academic treatises of the time proposed a model of public administration that divided "politics" from "administration," with structural separations to match. *See* FRANK J. GOODNOW, POLITICS AND ADMINISTRATION 9 (1900); HERBERT J. CROLY, PROGRESSIVE DEMOCRACY 351-77 (1914). Meanwhile, cities started to experiment with multimember commissions to concentrate expertise and circumvent the power of urban bosses and machine politics. Hiroshi Okayama, *The Interstate Commerce Commission and the Genesis of America's Judicialized Administrative State*, 15 J. GILDED AGE & THE PROG. ERA 129 (2016).

The commission form spread to the federal government with the milestone establishment of the Interstate Commerce Commission in 1887. Robert Rabin, *Federal Regulation in Historical Perspective,* 38 STAN. L. REV. 1189, 1189-91, 1195-96 (1986). Created to limit the power of the railroads to sway legislators, the ICC had a mixed record of effectiveness in its early years. *Id.* at 1212-15. Nevertheless, under the Wilson administration, the commission form spread again. In addition to the Federal Trade Commission (1914) and the Federal Reserve Board (1913), President Wilson and his Congress created commissions to oversee tariff, radio, and shipping policy.

This rise of independent agencies was not seen as a restriction on presidential power. Quite the

opposite: presidentialists conceived of these bodies as information-gatherers, learned policy advisers, managers, and organizers—aides to presidential policy-making. For example, all three of the Progressive era presidents—Teddy Roosevelt, William Howard Taft, and Woodrow Wilson (who generally disagreed on many things)—at one point supported the establishment of a permanent tariff commission, in part to take pressure off politicians on rate-setting, a vexed political issue. W. Elliot Brownlee, *The Creation of the U.S. Tariff Commission*, *in* A CENTENNIAL HISTORY OF THE UNITED STATES INTERNATIONAL TRADE COMMISSION 73-93 (Paul R. Bardos ed., 2017).

B. *Myers*, *Humphrey's Executor*, and Other Cases Concerning Removal in the Modern Administrative State All Fit Within the Deep-Rooted Understandings of the Removal Power

It is against this background that one should read this Court's late-nineteenth and early-twentieth century decisions concerning removal authority.

In retrospect, it should not be a surprise that one of the earliest modern removal cases, *Perkins v. United States*, 116 U.S. 483 (1886), involved the firing of a Navy cadet. At the time, the U.S. navy was smaller and less equipped than those of many European countries; Teddy Roosevelt warned that if the United States was attacked by any self-respecting global power, "our forces [would] be utterly at its mercy." THEODORE ROOSEVELT, THE SELECTED

SPEECHES AND WRITING OF THEODORE ROOSEVELT 111 (2014). *Perkins* arose from the government's implementation of a new educational system to modernize this backwards navy, including through firing unpromising cadets. The Secretary of the Navy removed a cadet without clear authority to do so, and suggested that, regardless of statutory removal protections, he had "lawful power to discharge [the cadet] from the service at will." *Perkins*, 116 U.S. at 484. Recognizing Congress's ability to protect inferior officers, the Court disagreed. Indeed, the Court had "*no doubt* that when congress, by law, vests the appointment of inferior officers in the heads of departments, it may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485 (emphasis added).

A decade later, in *Parsons v. United States*, 167 U.S. 324 (1897), the Court considered whether President William McKinley had wrongly fired a district attorney who enjoyed a term-of-years restriction. The Court defended the President, reasoning that a term-of-years restriction only set a maximum duration for the officer and did not restrict the President's authority to fire *before* that term ended. *Id.* at 343. Critically, however, to determine whether Congress had meant to authorize the President to remove officers before their term ended, the *Parsons* court looked to legislative intent, rather than the constitutional text. Specifically, the Court reasoned that the *repeal* of the Tenure of Office Act, which required Senate ratification of a removal, was not intended to preclude the President from removing an officer before their term

expired when earlier removal could previously be achieved at least with Senate approval. *Id.*

Six years later, in *Shurtleff v. United States*, 189 U.S. 311 (1903), the Court held that the President could fire a customs appraiser (a low-ranking Treasury officer) for unspecified reasons, even where the statute had listed for-cause removal. Writing for the *Shurtleff* majority, Justice Peckham recognized a "general power of appointment [and removal]" in the President, but also noted that Congress "could attach such conditions to the removal of an officer appointed under this statute as to it might seem proper[.]" *Id.* at 314-15. Indeed, the issue in *Shurtleff* was not whether Congress *could* limit the power of removal, but whether the Customs Administrative Act contained sufficiently "clear and explicit language" to "take away this power of removal in relation to an inferior office created by statute." *Id.* at 315.

In all these cases, the Court reconciled reformist interests of modernization and professionalization with presidential accountability. Its overall rule of removal seemed to be that while the power was inherently presidential, Congress nonetheless possessed significant latitude in structuring the conditions of federal office, including by placing explicit limitations on removal.

Indeed, even *Myers* contains important limits on presidential removal power. *See* Robert Post, *Tension in the Unitary Executive: How Taft Constructed the Epochal Opinion of* Myers v. United States, J. SUP.

CT. HIST. 167, 183 (2020); *see also Seila Law*, 591 U.S. at 198; *Free Enterprise Fund v. Pub. Acc't Oversight Bd.*, 561 U.S. 477, 492-93 (2010); *Collins v. Yellen,* 594 U.S. 220, 256 (2021) (all citing *Myers*). First, *Myers'* holding applied specifically to the Tenure of Office Act, an anomalous statute that, like its 1867 predecessor, did more than impose removal limits: it inserted the Senate into the process of removing postmasters. Act of July 12, 1876, ch. 179, § 6, 19 Stat. 78, 80 Justice Taft described this as "an extreme proposition" departing from "the long-established usage of the federal government," and thus difficult to explain except as the result of a "heated political difference of opinion between [President Johnson] and the majority leaders of Congress[.]" *Myers,* 272 U.S. at 167, 177.

Second, *Myers* explicitly shields inferior officers from removal because Congress can vest their appointment elsewhere than the President. *Id.* at 127. Evidence from *Myers*' drafting further supports this point: correspondence demonstrates that Justice Harlan F. Stone asked Justice Taft to take removal to its logical conclusion and give the president "unrestricted removal power of all executive subordinates, superior and inferior." Post, *supra* at 183. But Taft refused, perhaps because he believed too much in civil service professionalism. This seems plausible, for even as president (1909-1913), Taft had requested that *all* postmasters be placed into the classified service, explaining that political patronage was as dangerous to "a proper and efficient government system of civil service as the boll weevil is [to] the cotton crop." *Id.* at

170. Indeed, even in *Myers*, Taft acknowledged that "the extension of the merit system rests with Congress." *Myers,* 272 U.S. at 174.

Third, *Myers*' language suggests function-based exceptions for officers exercising "duties so peculiarly and specifically committed to the discretion of a particular officer," in which case it would "raise a question" of whether the President could overrule or influence their decision. *Myers,* 272 U.S. at 135. In cases where an officer exercised "duties of a quasi judicial nature," Taft reasoned, the President *could not* "properly influence or control" their decision in any given case. *Id.*; *see also* Prakash, *supra* at 1786 (supporting independence for such officers). Nonetheless, Taft reasoned that, while the President should not *interfere* with such officers' decision-making, there were strong reasons why the President should be able to "consider [a] decision after its rendition as a reason for removing the officer." *Id.* at 135. Of course, despite Taft's recognition of these reasons favoring a broader removal power, the threat of at-will removal would tend to destroy the very independence Taft purported to respect and protect. Thus, Taft also recognized that there was no "conclusive" congressional determination on the constitutional issue. *Id.* at 136. At the same time, Taft's reflections on non-executive officers were not necessary to decide that case, as no one disputed that a postmaster was an executive officer.

Humphrey's Executor, 295 U.S. 602 (1935), in which the Court upheld the constitutionality of for-

cause removal protections for Federal Trade Commissioners, is often accused of narrowing *Myers*' holding. *See Morrison v. Olson,* 487 U.S. 654, 726 (1988) (Scalia, J., dissenting) (*Humphrey's* "gutt[ed]" Taft's opinion "in six quick pages devoid of textual or historical precedent"); C.B. Cross, *The Removal Power of the President and the Test of Responsibility,* 40 CORNELL L. Q. 81, 81 (1954). But contemporary practice shows that the other branches viewed *Humphrey's* as quite compatible with *Myers*. In its time, *Myers* was read as bearing *only* on executive officers. For its part, Congress continued to legislate functions-based exceptions to the presidential removal power. Beau Baumann, *Remembering Congress in the* Myers-*to*-Humphrey's *Interregnum* at 1-3 (manuscript on file with *amici*). When it came time to argue *Humphrey's*, Congress's lead lawyers read *Myers* to be limited to exclusively executive functions. *Id.* at 3-5. Drawing on Taft's own reasoning in a 1928 tariff case concerning the constitutionality of delegations of rule-making authority, the lawyers argued that the nature of any exercise of delegated authority depended on its "extent and character." *Id.* at 35. The Tariff Commission, which made rules, aided Congress in its lawmaking duties and exercised a "quasi-legislative" character. *Id.* By extension, the Senate's lawyers argued, the FTC did the same. *Id.* at 37-39.

The *Humphrey's Executor* framework thus vindicated the institutional wisdom that had emerged from decades of struggle against Gilded Age corruption. Its functions-based approach to removal

protections acknowledged that independent regulatory agencies, born of necessity in response to corporate capture and political machines, required structural independence to fulfill their statutory mandates. The removal question before the Court in *Humphrey's Executor*—and now—was thus far from abstract: it went to the heart of whether the institutional reforms of the late nineteenth and early twentieth centuries could survive as effective checks on executive power and private interests. The Court's answer was clear: Congress possessed constitutional authority to structure administrative agencies with removal protections appropriate to their functions, and such protections *served* rather than undermined the separation of powers. That determination was not novel: the practical considerations that animated *Humphrey's Executor* have long animated understandings of the removal power going back to the Founding.

CONCLUSION

Since 2020, historical work has cast doubt on the existence of a removal power under Article II of the Constitution. At a minimum, it has shown that the removal power was not illimitable at the Founding. Early statutes provided forms of removal for officers handling money that bypassed the executive power. Additionally, they circumscribed presidential removal by creating bodies whose members were not removable by the President. In proper context, the nineteenth-century precedents that gave rise to *Humphrey's Executor* and other markers of agency

independence are consistent with a centuries-old tradition of function-based exceptions to the removal power.

Respectfully submitted,

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