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 D.C. CIRCUIT

BRIEF OF *AMICI CURIAE* TODD HARPER AND TANYA OTSUKA IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

Amici Todd Harper and Tanya Otsuka were appointed by the President and confirmed by the Senate to serve as Members of the National Credit Union Administration ("NCUA") Board. Like Petitioner Rebecca Slaughter, Harper and Otsuka were unlawfully removed from their positions by the President without cause. A federal district court determined the removal to be unlawful, and their case is currently pending in the D.C. Circuit.

Amici submit this brief to underscore the need for the Court to issue a decision on the questions presented in this case that leaves room for consideration of the functional and historical features of each agency. In that regard, the NCUA is an independent financial regulator, comparable in design and purpose to the Federal Reserve and the Federal Deposit Insurance Corporation ("FDIC"), but serving credit unions rather than banks. It raises distinct separation of powers concerns. In that regard, the Government contends that whether a historical exception to the Executive's removal power exists for the Federal Reserve is a "question that the court need not decide." Pet. Br. 29. If that is so, then the Court should make clear it is not limited to the Federal

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

Reserve, and that other agencies may raise distinct constitutional issues.

SUMMARY OF ARGUMENT

The Court should not overturn *Humphrey's Executor*. But if it chooses to revisit that framework, the analysis should turn not on formal labels about whether an agency is "executive," but on functional separation of powers concerns guided by a historical analysis specific to the agency at hand.

For more than a century, Congress has structured the Nation's financial regulators as independent, bipartisan, multi-member bodies whose members serve fixed terms and are removable only for cause. That design reflects a consistent constitutional and institutional judgment: that the Nation's credit, currency, and deposit systems require stability, expertise, and continuity beyond the political cycle. This judgment has deep roots in pre-Founding English practice protecting officials responsible for market stability and in the Founding-era adoption of that model.

Today, the Federal Reserve "follows in the distinct historical tradition of the First and Second Banks of the United States," *Trump* v. *Wilcox*, 145 S. Ct. 1415, 1415 (2025), and modern financial regulators like the NCUA stand within that same tradition. Like other Depression-era market stabilizers, the NCUA was designed to operate outside direct presidential control and was explicitly modeled on the Federal Reserve and the FDIC. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 26 (1978).

If the Court revisits its framework for considering agency independence, it should do so in a way that considers the specifics of the particular agency from a historical and functional perspective. Agencies like the NCUA underscore the importance of this point. Invalidating for-cause removal protections writ large for independent financial regulators would not only depart from historical precedent and constitutional design, but also carry profound practical consequences including heightened market uncertainty, diminished public confidence in monetary and deposit stability, and an erosion of the structural safeguards that have long underpinned the Nation's financial security and economic growth.

ARGUMENT

I. The Court Should Not Overrule *Humphrey's Executor*.

The Court should not overrule *Humphrey's Executor*. For nearly a century, this Court has recognized that independent, multi-member agencies are consistent with the separation of powers. The political branches, in turn, have relied on that settled precedent to create and sustain dozens of independent agencies vested with critical responsibilities—structured on the understanding that removal protections are constitutionally permissible.

II. If The Court Revisits *Humphrey's Executor*, It Should Engage In A Functional And Historical Analysis Specific To The Particular Agency.

If the Court revisits *Humphrey's Executor*, it should apply an analysis tailored to the FTC—one that analyzes the Commission's particular functions and history. The independence of the FTC raises distinct functional and historical questions unlike those raised for other agencies, including independent financial regulators like the NCUA. The constitutional analysis should hew to the specifics of particular agencies.

Removal questions have long depended on functional realities. A faithful application of Article II turns not on formal labels but on the *actual scope* of executive power an agency exercises and whether its structure meaningfully guards against encroachment on the President's constitutional role. See *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 219 (2020); *Collins* v. *Yellen*, 594 U.S. 220, 251–56 (2021). Any refined approach should preserve that functional framework by focusing on the authority an agency wields and the structural safeguards that keep it within constitutional bounds.

The first step is identifying whether the agency exercises "substantial executive authority." That distinction separates bodies that merely assist Congress or adjudicate limited disputes from those that carry out the core tools of "faithfully executing the laws," such as investigating, issuing binding rules, imposing penalties, and bringing enforcement actions. See *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492–98 (2010). If the agency does exercise executive authority, the second step is evaluating any mitigating structural features, which reflects the Court's instruction that Article II is violated when an agency's design leaves too little room for meaningful presidential oversight. See *Seila Law*, 591 U.S. at 220–26; *Collins*, 594 U.S. at 262–63.

Relevant considerations include whether the agency litigates through the Department of Justice, whether its enforcement tools are subject to executive checks, whether power is vested in a multi-member, politically balanced body rather than a single director, and whether features such as staggered terms, budgetary oversight, or reporting obligations preserve channels of presidential supervision. See, *e.g.*, *Free Enter. Fund*, 561 U.S. at 492–98; *Wiener* v. *United States*, 357 U.S. 349, 353–54 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 602, 624 (1935). These features do not erase an agency's independence; rather, they operate to ensure that any executive power the agency wields remains bounded in a manner consistent with the President's constitutionally required ability to supervise execution of the laws.

This functional approach is consistent with the Founding-era understanding that some governmental functions require structural arrangements that maintain accountability to the public even while exercising executive authority—a point James Madison emphasized during the Decision of 1789 debates. When the First Congress created the Treasury Department, Madison argued that the Comptroller of the Treasury, a principal officer second only to the Secretary and charged with safeguarding federal accounts, should hold office under tenure protections. He explained that the Comptroller's duties were "not purely of an executive nature" but also "partake of a judiciary quality," and that there were "strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government." Madison concluded that such an officer ought to "hold his office by such a tenure as will make him responsible to the public generally," and he was "very well satisfied" that Congress could constitutionally provide such insulation. See Joseph Gales, ed., *The Debates and Proceedings in the Congress of the United States, First Congress, First Session* 635–36 (Vol. 1, Washington, D.C., Gales & Seaton 1834) (House of Representatives, "Treasury Department," June 29, 1789).

This history underscores that the analysis cannot begin and end with whether an officer exercises any executive power. As Madison recognized and this Court has likewise acknowledged, some officers may perform executive functions while still warranting a measure of independence necessary to protect public accountability and institutional integrity. Any framework replacing or refining *Humphrey's Executor* should preserve that balance: weighing the scope of executive power an agency wields against the structural safeguards that temper and constrain it.

III. The NCUA's Distinct Roles And Historical Tradition Underscore The Need For An Agency-Specific Analysis.

"In separation-of-powers cases this Court has often put significant weight upon historical practice." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 23 (2015) (citation modified). That same historically informed, functional approach is appropriate here, where the inquiry involves balancing the President's removal authority against the Nation's enduring tradition of independent financial oversight.

This Court has already signaled the importance of history by noting that a historical exception may exist to the President's removal power for the Federal Reserve. See *Wilcox*, 145 S. Ct. at 1415 (rejecting argument that decision necessarily implicated constitutionality of for-cause removal protection for Federal Reserve Board of Governors because the Fed "is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States"); *Seila Law*, 591 U.S. at 222 n.8 (assuming that "financial institutions like the Second Bank and the Federal Reserve can claim a special historical status"); cf. *id.* at 285 (Kagan, J., concurring in part and dissenting in part) ("Congress has historically given—with this Court's permission—a measure of independence to financial regulators like the Federal Reserve Board and the FTC."); *PHH Corp.* v. *Consumer Fin. Protection Bureau*, 881 F.3d 75, 192 n.17 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (describing the Fed Chair as "an anomaly due to the Federal Reserve's special functions in setting monetary policy and stabilizing the financial markets").

But the principle is broader than that. History has a significant role to play in the constitutional analysis, so any exception for the Federal Reserve must be considered as part of a broader analysis, and the role of history goes beyond the Federal Reserve. Indeed, the NCUA follows in the same historical tradition as the Federal Reserve, and its independence rests on the same constitutional foundations. That history, summarized below, highlights the need for agency-by-agency analysis rather than the broadside approach that the Government would take—one that would invalidate all protections save for the Federal Reserve.

First, the NCUA Board was explicitly modeled on the Federal Reserve Board to serve a parallel role for credit unions. See H.R. Rep. No. 1383, 95th Cong., 2d Sess. 26 (1978). Both the Federal Reserve Board and the NCUA Board share unique features among federal agencies: each acts as a lender of last resort to financial institutions in their purview, a market-stabilizing function inherited from the Bank of England and the First Bank of the United States. Compare 12 U.S.C. §§ 1795–1795k (NCUA), with 12 U.S.C. §§ 248(b), 343, 347b (Federal Reserve). In the

NCUA's case, this function exists precisely to serve credit unions "the same way that the Federal Reserve System discount window provide[s] access to loans for banks." Nat'l Credit Union Admin., *Central Liquidity Facility* (Oct. 7. 2025), https://ncua.gov/support-services/central-liquidity-facility. Both also resemble quasi-private institutions, as they are financed "in whole or in part by fees charged to those who make use of their services or are subject to their regulation." *CFPB* v. *Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 467 (2024) (Alito, J., dissenting) (describing the NCUA and Federal Reserve).

The NCUA's functions also bear relation to the "Federal Reserve's special functions in setting monetary policy and stabilizing the financial markets." *PHH Corp.*, 881 F.3d at 192 n.17 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). By statute, the Board sets permissible interest rates on credit-union loans in consultation with "[f]ederal financial institution regulatory agencies," including the Federal Reserve Board. 12 U.S.C. § 1757(5)(A)(vi). Adjusting these rates directly influences the availability and cost of credit in the credit-union system, much as the Federal Reserve Board shapes credit conditions in the banking sector. Likewise, as noted, the NCUA provides liquidity support through its Central Liquidity Facility, a function that stabilizes markets in parallel with the Federal Reserve's lender-of-last-resort role.

Second, the NCUA Board's independence is rooted in Founding-era and English traditions of insulated financial oversight. Modern American credit unions trace their origins to pre-Revolutionary War, English "friendly societies," which were member-owned cooperatives that pooled member savings to provide mutual aid, offer basic financial security in times of hardship, and help working-class members purchase or build homes. See Erdis W. Smith, *Federal Credit Unions: Origin and Development*, 18 Soc. Sec. Bull. 3 (Nov. 1955); Simon Cordery, *British Friendly Societies, 1750–1914*, 12–29 (Palgrave Macmillan 2003).

As these grassroots cooperatives grew in popularity in England amid rising poverty, mounting national debt, and with banks largely out of reach for the ordinary populace, Parliament began to recognize and regulate them through the Friendly Societies Act of 1793, enacted "for the protection and encouragement of friendly societies in [the Great British] kingdom." 33 Geo. III, c. 54, § 1, reprinted in *The Statutes at Large: From Magna Charta to the End of the Eleventh Parliament of Great Britain* 205 (Danby Pickering ed., Vol. XXXIX, 1793). The Act granted these organizations tax-exempt status and legal standing, and vested oversight in Crown officials, principally the "clerks of the peace," who, among other things, chartered societies and monitored trustees investing member funds in Crown securities. *Id.* §§ 1, 5–9. Although clerks of the peace held office under the Crown, they could not be removed without cause. Saikrishna Prakash & Steven Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72, 96 (2006). The Act also granted supervisory authority to the Exchequer and its Crown-appointed Barons, who exercised judicial and regulatory functions and, like the clerks of the peace, were removable only for cause. 33 Geo. III, c. 54, § 8; see 12 & 13 Will. III, c. 2, § 3, reprinted in *The Statutes at Large: From the Eighth Year of King William III to the Second Year of Queen Anne* 357, 360 (Danby Pickering ed., Vol. X, 1764).

Parliament's insulation of friendly-society regulators reflected the longstanding English practice of protecting officials critical to market stability, a tradition dating back to the Stop of the Exchequer in 1672, when the Crown's suspension of debt payments precipitated the worst economic crisis of its era. See Moshe Milevsky, *The Day the King Defaulted: Financial Lessons from the Stop of the Exchequer in 1672* (Palgrave Macmillan 2017). That crisis spurred the creation of an independent Bank of England and the establishment of protections against at-will removal for key Exchequer officials, including its Barons. See Douglass North & Barry Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. Econ. Hist. 803, 812–17 (1989); John Clapham, *The Bank of England: A History Vol. I*, 1–12 (1945).

Congress in the early Republic sought to stabilize the post-Revolutionary economy by adopting Alexander Hamilton's plan for a national bank modeled on the Bank of England. See Roger Lowenstein, *America's Bank* 2 (Penguin Press 2015).

Inspired by the English tradition of freeing markets and related regulators from Crown interference, Hamilton urged insulation of the bank to make "the public confidence [in it] more firm, stable and unqualified" and to avoid "calamitous abuse" by partisan interference, for "what Government ever uniformly consulted its true interest, in opposition to the temptations of momentary exigencies?" and "what nation was ever blessed with a constant succession of upright and wise Administrators?" Alexander Hamilton, *Report on a National Bank (1790)*, in 7 Papers of Alexander Hamilton 305, 327, 331 (Harold Syrett ed., 1963).

Congress adopted Hamilton's design, tasking the First Bank of the United States with providing "security for an upright and prudent administration" of "the national finances," and providing the President no removal authority over its directors. Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 191, 192–93. In practice, the First Bank became the Republic's earliest lender of last resort, supplying emergency liquidity during the Financial Panic of 1792 and establishing a tradition in which U.S. financial regulators would play a stabilizing role in times of crisis. See Richard Sylla et al., *Alexander Hamilton, Central Banker: Crisis Management During the U.S. Financial Panic of 1792*, 83 Bus. Hist. Rev. 61, 77 (2009).

The Great Depression prompted Congress to overhaul federal regulation of financial institutions. Congress strengthened the Federal Reserve's independence and created the Federal Deposit

Insurance Corporation to insure banking deposits amid widespread bank runs, all with the goal of preventing systemic collapse. See Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162; Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684.

In 1934, Congress also enacted the Federal Credit Union Act, Pub. L. No. 73-467, 48 Stat. 1216, responding to concerns (mirroring the pre-revolutionary English experience with friendly societies) that ordinary people lacked access to banks and bank credit, and that "industrial recovery depend[ed] on the[ir] buying power." S. Rep. No. 555, 73d Cong., 2d Sess. 1, 3 (1934); see H.R. Rep. No. 2021, 73d Cong., 2d Sess. 1–2 (1934). The Act formally placed federal credit unions under federal regulation, with a statutory framework traceable to England's Friendly Societies Act of 1793. See Smith, *supra*.

In 1970, Congress overhauled the credit-union regulatory scheme by creating the National Credit Union Administration, which was to be an "independent Federal agency for the supervision of federally chartered credit unions," Pub. L. No. 91-206, 84 Stat. 49, and which Congress created to place "the credit union supervisory body on a par with the agencies which supervise and regulate banks," like "the Federal Reserve Board," 116 Cong. Rec. 2417 (1970). Eight years later, Congress adopted the NCUA's current multi-member board structure. Congress excised all references to NCUA administrators "serv[ing] at the pleasure of the President." Moreover, drawing on the multi-member structure endorsed by this Court in *Humphrey's Executor*, Congress replaced the NCUA single administrator with a three-member Board, each member of which serves a fixed, staggered six-year term, with no more than two members from the same political party, and all of whom must be "broadly representative of the public interest" with experience in financial services, financial regulation, or financial policy. 12 U.S.C. § 1752a.[2]

Today, the NCUA's independence continues the same model of insulated oversight that was drawn from English tradition going back to the 1600s, adopted in the Bank of England, carried through by Hamilton and Congress to the design of the First Bank, and persists in the Federal Reserve. Cf. *Seila Law*, 591 U.S. at 271–74 (Kagan, J., concurring in part and dissenting in part) ("the First Congress gave officials handling financial affairs—as compared to

[2] Notwithstanding the absence of an express for-cause removal provision in the NCUA's enabling statute, the district court in *Harper* v. *Bessent* held that "the text and history of the NCUA statute, along with the structure and function of the NCUA Board, confirm Congress restricted the President's power to remove Board members." 2025 WL 2049207, at *14 (D.D.C. July 22, 2025). That conclusion flows clearly from the settled law at the time, and legal context against which Congress acted. The same Congress that amended the NCUA's governing statute also amended the statute governing the International Trade Commission, and in so doing, published a joint statement explaining that a proposed for-cause removal provision was unnecessary "because the Commission is an independent agency with quasi-legislative and quasi-judicial responsibilities and removal of the Commissioners is subject to the standards set down by the Supreme Court." H.R. Rep. No. 518, 95th Cong., 1st Sess. 6 (1977) (citing *Humphrey's Executor* and *Wiener*).

diplomatic and military ones—some independence from the President" and that tradition carried forward).

Third, the NCUA Board exercises authority coextensive in scope and character with that of the Federal Reserve Board. Like the Federal Reserve, the NCUA only regulates prescribed financial institutions (and their related persons), and in doing so, wields the same suite of statutory tools. Both agencies may promulgate binding regulations, initiate enforcement actions, issue cease-and-desist orders, remove financial-institution officers and directors, and impose daily civil penalties up to $1,000,000. 12 U.S.C. §§ 1818(b)–(e), (i); 1844(b). Indeed, Congress granted these powers to the Federal Reserve and the NCUA simultaneously in 1989—in the same statute, the Financial Institutions Reform, Recovery, and Enforcement Act, enacted in response to the savings and loan crisis. Pub. L. No. 101-73, §§ 902, 904–05, 907, 103 Stat. 183. Congress also requires the Federal Reserve, other federal banking agencies, and the NCUA to jointly establish "their own pool of administrative law judges" and "develop a set of uniform rules and procedures for administrative hearings," further underscoring their common legal footing. *Id.* at 486.

In sum, the NCUA stands firmly within the longstanding tradition of independent financial regulators that dates to the Founding. In adopting the current NCUA governance structure, Congress recognized—as it had since the earliest days of the

Republic—that public confidence in the financial markets depends on supervising agencies being seen as "immune from political influence." *Swan* v. *Clinton*, 100 F.3d 973, 983 (D.C. Cir. 1996). That insight echoes Hamilton's original design for the Sinking Fund Commission, which he urged Congress to create as a "complete barrier" against short-term political pressure. Hamilton, *supra*, at 105. That principle shaped the architecture of modern finance and lives on in Congress's deliberate and constitutional insulation of the NCUA Board.

To the extent the Court revisits *Humphrey's Executor*, it should underscore the need for consideration of the particular role and historical tradition of agencies, and it should make express that the question of for-cause removal protections for independent financial regulators is not before the Court.

IV. Preserving The Independence of Financial Regulators Serves Critical Market And Institutional Goals.

Much has been written about the economic importance of central-bank independence. See, e.g., Daniel K. Tarullo, *The Federal Reserve and the Constitution*, 97 S. Cal. L. Rev. 1, 48 (2024) (warning that if Federal Reserve Board Members are removable at will, "the presumed independence of the Federal Reserve would [be] called into question" and "there could be a period of volatility as market actors speculated on whether the President might use the implicit threat of removal to force a change in policy"); Cristina Bodea & Raymond Hicks, *Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions*, 69 Int'l Org. 35, 38 (2015) (noting the economic importance of the public's "belie[f] that the central bank is free from interference and that the law [governing the bank] is unlikely to change swiftly").

The same institutional values that support central-bank independence apply to other financial regulators, including the NCUA. The NCUA shares not only legal DNA with the Federal Reserve, but also a parallel functional role within its domain. It supervises and regulates a vital sector of the U.S. financial system, operates a liquidity facility analogous to the Federal Reserve's discount window, and plays a central role in resolving distressed institutions—all with the aim of promoting systemic stability. Like the Federal Reserve, the NCUA's ability to perform these functions depends on a foundation of independence from short-term political pressures. This ensures that decisions affecting credit markets and consumer savings are made with a long-term view rather than short-term expediency.

Eroding removal protections for NCUA Board members would inject short-term political incentives into critical decisions meant to safeguard long-term stability and would ultimately undermine confidence in the broader financial safety net. And if NCUA Board members can be removed or sidelined at will, investors may not treat that development as one necessarily confined to the credit-union sector. They may perceive such action as a signal that no independent financial regulator is safe—not even the Federal Reserve—given the structural and functional parallels between the agencies. That perception alone could unsettle expectations about interest rates, liquidity conditions, and the continuity of financial policy.

A ruling that weakens the NCUA's independence would invite future encroachments on sister agencies and risk undermining the credibility of U.S. monetary and financial governance in ways that are impossible to reverse. Market confidence—and with it, the Nation's economic stability—rests on the independence of those entrusted to safeguard the public's credit and deposits.

CONCLUSION

The Court should not overrule *Humphrey's Executor*. To the extent it modifies the framework of analysis, it should emphasize the need for agency-specific evaluation of functional and historical considerations. To the extent it reserves a "Federal Reserve exception," it should not pass judgment on how broadly that exception sweeps, and whether it potentially captures other agencies (like the NCUA).

Respectfully submitted,

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