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 IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* LEGAL HISTORIANS NOAH A. ROSENBLUM AND NATHANIEL DONAHUE IN SUPPORT OF THE RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae Noah A. Rosenblum and Nathaniel Donahue are, respectively, a professor and a fellow in legal history at New York University School of Law. They have researched the history of the terms "quasi-legislative" and "quasi-judicial" used in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) and are interested in bringing this history to the Court's attention. Further biographies are included in the Appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly a century, *Myers v. United States* and *Humphrey's Executor* have delineated Congress's authority to place limits on the removal of executive branch officers. Nonetheless, recent concurring and dissenting opinions from this Court have suggested that the unanimous decision in *Humphrey's Executor* was erroneous and poorly-reasoned because it "depart[ed] from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and quasi-judicial.'" *E.g.*, *Seila Law LLC v. CFPB*, 591 U.S. 197, 246 (2020) (Thomas, J., concurring in part and dissenting in part). Based on the grant of certiorari in this case, the Court is now considering whether to overrule *Humphrey's Executor*. Before doing so, however, it must consider "the nature of [the decision's alleged] error, the quality of [its] reasoning, the 'workability' of the rules [it]

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1 No party in this case authored this brief in whole or in part or made any monetary contribution to its preparation and submission.

imposed on the country, [its] disruptive effect on other areas of the law, and the absence of concrete reliance." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 268 (2022).

Drawing on recent research and scholarship, this brief challenges the premise that the reliance of *Humphrey's Executor* on the categories of quasi-legislative and quasi-judicial decision-making rendered that unanimous opinion erroneous and poorly reasoned. Far from handwaving and obfuscation, these terms were part of this country's law long before *Humphrey's Executor*. Rooted in distinctions drawn by the Founders, including James Madison in the First Congress, the taxonomy was developed throughout the nineteenth century at both the state and federal levels, and provided jurists with a coherent framework to address separation of powers issues. Numerous pre-*Humphrey's Executor* sources reveal that quasi-legislative agencies, as understood at the time, held the power to create binding rules and regulations, and quasi-judicial bodies adjudicated specific disputed. Because these functions were not purely executive, they called for a degree of independence from executive control.

These categories thus provided a time-tested method for distinguishing between duties and powers afforded to administrative agencies by statute that fell within the executive's sole discretion, and those that did not—and therefore could reasonably be subject to limits imposed by the other branches, including judicial review of administrative action (as in appeals of quasi-judicial decision-making) or, as relevant here, congressional limitations on removal. Against the backdrop of these well-settled categories, *Humphrey's*

Executor readily concluded that the Federal Trade Commission ("FTC") was a "predominantly quasi judicial and quasi legislative" body, 295 U.S. at 624, and that Congress properly determined that a "for cause" requirement for removal of an FTC Commissioner was necessary to protect the agency's independence and expertise.

By using the well-understood terms "quasi-legislative" and "quasi-judicial," *Humphrey's Executor* cannot be said to have been "egregiously wrong on the day it was decided." *Dobbs*, 597 U.S. at 268. Nor has it become "egregiously wrong" with the passage of time. To the contrary, the "quasi" categories, enshrined in the Administrative Procedure Act ("APA") as rulemaking and adjudication, continue to undergird modern administrative law. The terms similarly appear across twentieth century separation-of-powers jurisprudence.

Read in proper historical context, the quasi categories provided, and continue to provide, historically grounded and workable definitions to guide the Court's review of congressional limitations of the President's authority to remove officers at will. Their use in *Humphrey's Executor* provides no basis to overturn that decision.

ARGUMENT

I. The Terms "Quasi-Legislative," "Quasi-Judicial," and "Purely Executive" Were Well Established Long Before *Humphrey's Executor*.

In recent decades, some dissenting and concurring opinions of this Court have suggested that *Humphrey's Executor* invented the quasi-judicial and quasi-legislative taxonomy out of whole cloth, without substantial grounding in law or logic. Justice Scalia, dissenting in *Morrison v. Olson*, criticized *Humphrey's Executor* as an "activist . . . Court bent on reducing the power of [the] President" by drawing a "line between 'purely executive' functions and 'quasi-legislative' or 'quasi-judicial' functions" that is neither "clear" nor "rational." 487 U.S. 654, 724-25 (1988). Justice Thomas, concurring and dissenting in part in *Seila Law*, characterized the terms "quasi-judicial" and "quasi-legislative" as "handwaving and obfuscating phrases." 591 U.S. at 197, 246 .

These critiques are contradicted by the historical record. As *Humphrey's Executor* noted, the concept that some offices have hybrid functions that may warrant restrictions on removal power is traceable to James Madison. 295 U.S. at 631. As early as 1789, as the First Congress considered creating the Office of the Comptroller of the Treasury, Madison proposed that "the Comptroller should hold his office during years, unless sooner removed by the President." 1 ANNALS OF CONG. 636 (1789). At the same time, he recognized that that office was not "purely of an executive character" but also performed duties "of a judicial quality." *Id.* For such an office, Congress had the

power and discretion to restrict presidential direction and control. *Id.* Madison explained:

> It will be necessary . . . to consider the nature of this office, to enable us to come to a right decision on the subject; in analysing its properties, we shall easily discover that ***they are not purely of an executive nature***. It seems to me that ***they partake of a judiciary quality as well as executive***, perhaps the latter obtains in the greatest degree. . . . [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***.

Id. at 635-36 (emphasis added).

Madison continued that "the legislative power is sufficient to establish this office . . . as to answer the purposes [judicial and executive] for which it is prescribed." *Id.* And in response to objections about Congress's ability to control the Comptroller's tenure, he argued that given Congress's broad powers under the Constitution, "it can never be said, that by limiting the tenure of an office, we devise schemes for the overthrow of the executive department." *Id.*

Less well-known, but equally important to an assessment of *Humphrey Executor's* reasoning, is the fact that the concepts of quasi-legislative, quasi-judicial, and purely executive functions were robustly developed in the years that followed. The use of the terms and the Court's reasoning provoked no

controversy among the Justices at the time. The unanimous *Humphrey's Executor* Court included four Justices who had decided *Myers* nine years earlier. Indeed, the author of *Humphrey's Executor*, Justice Sutherland, was also a member of the majority in *Myers*. None of these Justices perceived a contradiction between the holdings of *Humphrey's Executor* and *Myers*. And Chief Justice Taft, who authored *Myers* but was no longer a member of the Court when *Humphrey's Executor* was decided, was also familiar with and used approvingly these terms of art in his own writing. Far from made-up phrases, *Humphrey's Executor* relied on a well-founded taxonomy that reflected the actual practice of government and that had been invoked repeatedly throughout this Nation's history.

A. The Concept of "Quasi-Legislative" Functions Has Deep Historical Roots

Quasi-legislative bodies, and the use of the term "quasi-legislative" to describe them, existed long before *Humphreys Executor*. This Court repeatedly used the term in the early twentieth century. It referred to the Interstate Commerce Commission ("ICC"), for instance, as "quasi legislative" and "quasi judicial." *Mitchell Coal & Coke Co. v. Pa. R. Co.*, 230 U.S. 247, 282-83, 296 (1913); *Harriman v. ICC*, 211 U.S. 407, 421 (1908). These bodies were tasked with carrying out prospective lawmaking, including through binding rulemaking. Disputes over their proper scope and function, which occurred at both the federal and state levels, provided concrete—and known—meaning to quasi-legislative duties and powers decades prior to *Humphrey's Executor*.

1. Eighteenth and nineteenth century federal and state laws delegating the power to make laws

The concept of quasi-legislative actions derives from a practice from before "the formation of this republic" of legislatures delegating to the executive or local governments the ability to implement legislation upon certain factual findings or future events, i.e., "the power to determine some . . . state of things upon which the law . . . intends to make its own action depend." *People ex rel. Caldwell v. Reynolds*, 10 Ill. (5 Gilman) 1, 11 (1848); *Boyd v. Bryant*, 35 Ark. 69, 74 (1879); *see also Cincinnati, W. & Z. R. Co. v. Comm'rs of Clinton Cnty.*, 1 Ohio St. 77, 89-90 (1852) ("Scarcely a year of our legislative history has passed which has not added to, and taken from [the counties], powers and duties of this character.").

These laws often went beyond merely giving the executive or localities the right—yes or no—to implement a law. They often required the implementing authority to exercise discretion to provide particulars for a law that merely stated its objective in general terms. Thus, the legislature was permitted to give another body "the agency and discretion . . . to accomplish in detail what [the legislature] authorized or required in general terms." *Caldwell*, 10 Ill. at 13.

In an early precedent that guided many of these cases, this Court addressed a statute that permitted the President, by proclamation, to revive a congressional ban on shipping from England if he determined that England had taken actions that "violate[d] the neutral commerce of the United States."

Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 384 (1813). The Court rejected the argument that "Congress could not transfer the legislative power to the President," and held that Congress was permitted "to exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct," including when certain factual findings were made by the executive. *Id.* at 386, 388.

The nineteenth century saw a growing practice of state legislation similarly conditioned only upon another body's actions. Often, the condition was a vote of a locality to opt into a law passed by the state legislature, referred to as "local option laws." *See Boyd*, 35 Ark. at 73. For instance, in *Caldwell*, the petitioners argued a local option law was unconstitutional because it was not "finished and obligatory," but "merely a bill prepared" by the state legislature, then "submitted to the people . . . to be by them passed into a law." 10 Ill. at 10-11. The Illinois Supreme Court rejected this non-delegation attack: "[t]he law, as passed, was complete and perfect, although its principal provisions were to take effect upon a contingency[.]" *Id.* at 11.

Over the next few years, the Supreme Courts of Ohio, Pennsylvania, and Vermont reached the same conclusion on similar delegations. *See Clinton Cnty.*, 1 Ohio St. 77; *Moers v. Reading*, 21 Pa. 188 (1853); *State v. Parker*, 26 Vt. 357 (1854). Others joined in over the following decades. *See Boyd*, 35 Ark. at 74 ("The legislature can not delegate the power to make laws, but it can make a law to delegate the power to determine some fact or state of things upon which the law makes or intends to make its own action depend."); *State ex rel. Maggard v. Pond*, 93 Mo. 606, 621-22

(1887) ("[T]he legislature may pass a law to take effect or go into operation on the happening of a future event or contingency[.]").

These cases make clear that what was delegated was not merely the right to declare a law operative, but also the right to provide implementing details—in essence, to perform quasi-legislative functions. As *Clinton County* noted, the legislature's power to delegate extended to matters that "requir[ed] the exercise of judgment and skill," as opposed to a simple binary determination of whether the contingency had taken place. *Clinton Cnty.*, 1 Ohio St. at 92-93. *Caldwell* agreed, stating that laws "need not . . . make every provision for doing that which they may authorize to be done" in order to be "properly . . . done in the exercise of legislative powers." *Caldwell*, 10 Ill. at 12-13. The legislature may enact a law "in general terms," leaving the "rest," the specifics of its implementation, "to the agency of others[.]" *Id.* at 13.

2. The emergence of the term "quasi legislative"

Given the prevalence of these laws, in the Nineteenth Century, jurists developed a common lexicon for the type of power wielded through the delegations: "quasi legislative." *Locke's Appeal*, 72 Pa. 491, 499-500 (1873). Quasi-legislative power was "the discretion and determining power necessary to regulate the affairs . . . that owing to . . . want of knowledge and time, the legislature cannot determine for itself, but which by its *law* it directs to be done by others." *Id.* (emphasis in original). This "determining power" was the "quasi-legislative" power delegated to

"commission[s], . . . council[s], . . . court[s] . . . [or] the people themselves." *Id.* at 499-500.

This language arose most prominently in cases, building on the local option jurisprudence, which endorsed the power of local municipalities to regulate their affairs through councils or commissions, or through referenda. *See Town of Lisbon v. Clark*, 18 N.H. 234, 243 (1846) (holding that town votes on town "rules, orders and by-laws," or repealing the same, were an "exercise of [the town's] quasi legislative function"); *People ex rel. Post v. City of Brooklyn*, 6 Barb. 209, 215 (N.Y. Sup. Ct. 1849) (stating "counties, towns, cities, villages" are "clothed with a local sovereignty and a quasi-legislative authority to regulate [their] local affairs"), *overruled on other grounds by People ex rel. Griffin v. City of Brooklyn*, 4 N.Y. 419 (1851); *Comm'rs Ct. of Lowndes Cnty. v. Bowie*, 34 Ala. 461, 464 (1859) (stating that county court "exercises a quasi-legislative authority").

These decisions reasoned that such delegations of quasi-legislative powers were appropriate because they were necessary to the legislature's ability to legislate. *Clinton County* noted that the legislature "might perform their duties directly, but . . . could not as understandingly and efficiently do it, as by the employment of [] subordinate agencies." 1 Ohio St. at 89-90. Per *Locke's Appeal*, "[t]he Constitution grants the power to legislate, but it does not confer knowledge." 72 Pa. at 496. Without the power to delegate to those with knowledge, "legislation would become oppressive, and yet imbecile"; a requirement that all laws be absolute "would be almost to destroy the government." *Caldwell*, 10 Ill. at 12-13; *see also*

Locke's Appeal, 72 Pa. at 498-99 ("To deny this would be to stop the wheels of government.").

The same logic—and lexicon—were echoed in the federal courts long before *Humphrey's Executor*. In 1874, the Supreme Court referred to the "quasi legislative powers" vested in "municipal corporations." *Loan Ass'n v. Topeka*, 87 U.S. (20 Wall.) 655, 659 (1874); *see also Yick Wo v. Hopkins*, 118 U.S. 356, 370-71 (1886) (explaining that the principle that "the law is the definition and limitation of power" is exemplified by jurisprudence regarding "the *quasi* legislative acts of inferior municipal bodies"); *Baer Bros. Mercantile v. Denver & R.G.R. Co.*, 233 U.S. 479, 486 (1914) (referring to the ICC's "quasi legislative" authority to fix prospective rates with binding effect).

In *Marshall Field Co. v. Clark*, the Supreme Court relied on *Locke's Appeal* to uphold Congress's delegation of the decision whether to impose certain tariffs, contingent upon a determination that foreign countries had imposed "unequal and unreasonable" duties on the United States. 143 U.S. 649, 692-93 (1892). "Legislative power was exercised when [C]ongress declared that the suspension should take effect upon a named contingency," and therefore was not improperly delegated. *Id.* at 693. Further,

> to assert that a law is less than a law, because it is made to depend on a future event or act, is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and

> impossible to fully know. . . . There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be a subject of inquiry and determination outside of the halls of legislation.

Id. at 694 (quoting *Locke's Appeal*, 72 Pa. at 491).

Legal writers and commentators also deployed the terminology. Adolf A. Berle traced the history of quasi-legislative and quasi-judicial bodies, noting that "in the early creation of commissions, as their structure was obviously not that of courts . . . and could not constitutionally be that of legislative bodies," the courts sought to regard them "as executive arms." A. A. Berle, Jr., *The Expansion of American Administrative Law*, 30 HARV. L. REV. 430, 433-34 (1917). The courts rapidly found that this delineation was "not possible," and instead "began to talk of 'quasi-judicial' and 'quasi-legislative' functions." *Id.* Ernst Freund divided a casebook section on the "administrative power" between the "executive, quasi judicial, and quasi legislative functions." Ernst Freund, CASES ON ADMINISTRATIVE LAW at ix (1911).

Frank Goodnow suggested legislatures could properly rely upon executive bodies wielding quasi-legislative authority to "fill up [the] details" of statutes. Frank J. Goodnow, COMPARATIVE ADMINISTRATIVE LAW at 26-28 (1893); *see also* U.G. Dubach, *Quasi-Legislative Powers of State Boards of Health*, 10 AM. POLI. SCI. REV. 80, 94 (1916) (explaining legislatures often "delegate[d] quasi-legislative power to expert administrative boards" and

"le[ft] the details to experts" where they could not "understand the minute details" or anticipate all circumstances or contingencies).

In 1916, former President Taft—not yet Chief Justice, and a decade before writing *Myers*—recognized the growth of quasi-legislative and quasi-judicial functions. He noted that Congress had

> found it necessary to impose upon the President or his subordinates not only a purely Executive function, but to enlarge this into what are really quasi-legislative and quasi-judicial duties. Frequently in statutes covering a wide field, Congress confers upon the particular subordinate of the President, who is to execute this law, the power to make rules and regulations under it which are legislative in their nature.

William Howard Taft, OUR CHIEF MAGISTRATE AND HIS POWERS 79 (1916).

The legislature's ability to rely on an expert, quasi-legislative body was central to disputes over the new FTC after its 1914 creation. The Seventh Circuit explained that "the increasing complexity of human activities" necessitated the creation of "quasi legislative" agencies for which "Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining . . . the facts which bring into play the principles established by Congress." *Sears, Roebuck & Co. v. FTC*, 258 F. 307, 312 (7th Cir. 1919).

The Second Circuit agreed, noting *Sears* "pointed out that grants of similar [quasi legislative] authority to administrative officers had not been found repugnant to the Constitution." *Royal Baking Powder Co. v. FTC*, 281 F. 744, 745 (2d Cir. 1922).

B. The Concept of "Quasi-Judicial" Functions Has Deep Historical Roots

As noted in the discussion above, "quasi-judicial" was also a well-established term-of-art when *Humphrey's Executor* was unanimously decided. The historical record shows that the practice of delegating seemingly judicial tasks to entities outside the judiciary arose as early as the 1600s, with state and federal courts using the term "quasi-judicial" to describe such duties by the nineteenth century. As also noted above, in the First Congress James Madison made the distinction between functions that were "purely of an executive nature" and those that "part[ook] of a judiciary quality." 1 ANNALS OF CONG. 636.

Like judges, quasi-judicial officers and commissions rendered authoritative interpretations of the law and how it applied to the facts of a given case in matters governing liberty and personal property. And like judicial decision-making, quasi-judicial decision-making triggered various procedural protections, importantly including decisionmaker independence. As Madison noted, "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the government," and Congress could properly structure the tenure of such offices as "necessary to secure [the officer's] impartiality." *Id.* Officers

engaged in quasi-judicial duties were often insulated from political control or direction, and instead subject to judicial review.

As early as the seventeenth century, legislatures shifted certain duties from local courts to proto-administrative authorities. Under English and early American tradition, local justices of the peace exercised both adjudicative and administrative responsibilities, the latter including tasks like setting county taxes and granting licenses. Frank J. Goodnow, *The Writ of Certiorari*, 6 POL. SCI. Q. 493, 505-06 (1891); Hendrik Hartog, *The Public Law of a County Court; Judicial Government in Eighteenth Century Massachusetts*, 20 AM. J. LEGAL HIST. 282, 282-84 (1975). States began separating these functions as early as 1683, Goodnow, *Certiorari*, 6 POL. SCI. Q. at 505-06, and, over the eighteenth and nineteenth centuries, local legislatures increasingly transferred many of the regulatory duties previously assigned to justices of the peace to more specialized officers and eventually agencies, Hartog, *County Court*, 20 AM. J. LEGAL HIST. at 284.

In the nineteenth century, courts began using the term "quasi-judicial" to describe the duties of specialists whose work bore functional and procedural similarities with that of the judiciary. *See, e.g.*, *Easton v. Calendar*, 11 Wend. 90, 95 (N.Y. Sup. Ct. 1833) (referring to the tax assessment duties of school district trustees as "quasi-judicial"); *Newburyport v. Essex Cnty. Comm'rs*, 53 Mass. (12 Met.) 211, 223 (1846) (noting that county commissioners who "estimate . . . the value of [property]" engaged in "a quasi judicial act," requiring "the exercise of skill and judgment" for which they were "specially chosen");

Downer v. Lent, 6 Cal. 94, 95 (1856) (*"*The power of the Board of Pilot Commissioners is quasi judicial . . . . They are public officers to whom the law has entrusted certain duties, the performance of which requires the exercise of judgment.").

As one court explained, officers could be described as "'quasi judicial,' if they were invested by the Legislature with the power to decide on the property rights of others, they act[ed] judicially in making their decision, whatever may be their public character." *Drainage Comm'rs v. Griffin*, 1345 Ill. 330, 341 (1890). Another court distinguished between matters decided on "pure discretion" and those aided by evidence, the latter of which were judicial or quasi-judicial and therefore required procedural protections. *Kuntz v. Sumption*, 19 N.E. 474, 475 (Ind. 1889). As contemporary legal scholars noted, these specialists exercised "discretionary functions" similar "to those of a judge who decides controversies between individuals." Thomas Gaskell Shearman & Amasa Angell Redfield, A TREATISE ON THE LAW OF NEGLIGENCE 186 (1869).

Because these specialists' "discretionary functions" affected individuals' rights and property, they were increasingly accompanied by court-like procedural protections, such as notice and evidentiary requirements. *E.g.*, *Stuart v. Palmer*, 74 N.Y. 183, 193 (1878) ("[T]he duties of assessors in making assessments are of a judicial nature and that it is a fundamental rule that in all judicial or quasi judicial proceedings, whereby the citizen may be deprived of his property he shall have notice, and an opportunity of a hearing before the proceedings can become effectual." (citation omitted)); *see also* Freund, CASES

at 10-43 (excerpting cases showing courts' gradual acceptance of agencies with judicial-like roles and the accompanying importation of court-like procedural protections into such functions).

The concept of a quasi-judicial act or officer permeated the federal government, including the judiciary, as early as the mid- to late-nineteenth century. In a series of cases from more than half a century before *Humphrey's Executor*, this Court held that Land Officers could wield quasi-judicial power and make conclusive rulings on the facts before them, if sanctioned by Congress. *See Castro v. Hendricks*, 64 U.S. (23 How.) 438, 443 (1859) ("[T]he surveyor general exercises a quasi judicial power . . . . But, then, the Commissioner of the Land Office, by virtue of enabling acts of Congress, exercises a supervision and control over the acts of the subordinate officers[.]"); *Vance v. Burbank*, 101 U.S. 514, 519 (1879) ("The appropriate officers of the Land Department have been constituted a special tribunal to decide such questions, and their decisions are final to the same extent that those of other judicial or quasi-judicial tribunals are."); *United States v. Minor*, 114 U.S. 233, 243 (1885) (same).

And while the Land Officers' decisions could be overturned by their superiors in the executive branch, *Castro*, 64 U.S. at 443, this Court also permitted Congress to place the decisions of quasi-judicial officers, such as those in the patent office, under the sole supervision of the courts. *See Butterworth v. United States ex rel. Hoe*, 112 U.S. 50, 61-64 (1884) (addressing a statute allowing litigants to appeal patent office determinations directly to the courts because "the action of the Commissioner is quasi-

judicial"). In *Butterworth*, this Court emphasized that the examination of patent claims "involves the adjudication of disputed questions of fact, upon scientific or legal principles, and is, therefore, essentially judicial in its character, and requires the intelligent judgment of a trained body of skilled officials, expert in the various branches of science and art, learned in the history of invention, and proceeding by fixed rules to systematic conclusions." *Id.* at 59.

Likewise, in *United States v. Duell*, this Court rejected the argument that Congress "had no power to authorize the court of appeals to review the action of the [patent] commissioner in an interference case, on the theory that the commissioner is an executive officer, that his action in determining which of two claimants is entitled to a patent is purely executive, and that, therefore, such action cannot be subjected to the revision of a judicial tribunal." 172 U.S. 576, 582 (1899). To the contrary, "in deciding whether a patent shall issue or not, the commissioner acts on evidence, finds the facts, applies the law, and decides questions affecting not only public but private interests; and . . . in all this he exercises judicial functions." *Id.* at 586. Because this action "was essentially judicial in its nature," there were no separation-of-powers issues regarding Congress's decision to subject the commissioner's decision to judicial, as opposed to executive, review. *Id.* at 587-89.

The ICC, which resolved disputes over unfair rates, was another early example of a federal body that exercised quasi-judicial power. *See, e.g., Harriman*, 211 U.S. at 421 (referring to the ICC's "quasi-judicial duties"). As this Court affirmed in *ICC v. Louisville & Nashville Railroad Co.*, the delegation of quasi-judicial

power required procedural safeguards, such as a hearing and a decision reasonably based on the evidence, and it was the prerogative of the courts, not the executive branch, to review the ICC's quasi-judicial actions. 227 U.S. 88, 91-92 (1913); *see also Mitchell Coal & Coke Co.*, 230 U.S. at 282 ("The [ICC], so far as it passes any quasi judicial judgment upon such matters, does so by pursuing methods that are modeled upon those of the courts . . . .").

The FTC itself was also recognized as serving a quasi-judicial function prior to *Humphrey's Executor*. In the conference report for the statute that created the FTC, Representative J. Harry Covington explained that the commission would be "judicial in nature," much like the ICC and the Patent Office. 51 CONG. REC. 14933 (1914). To the extent that an FTC commissioner "act[ed] in a quasi judicial capacity, . . . his decision [was] not reviewable by his superior executive officer . . . but only by a court." *Id.* And, in the decades leading up to *Humphrey's Executor*, courts explicitly recognized the FTC as a body that exercised quasi-judicial functions. *E.g.*, *Sears, Roebuck & Co.*, 258 F. 307 at 312; *Royal Baking Powder Co.*, 281 F. at 745.

Before *Myers*, Congress added as independent commissions the Federal Reserve Board, the United States Shipping Board, and the Railroad Labor Board, with the Federal Radio Commission and Federal Power Commission coming soon after *Myers* without disrupting its holding. The *Humphrey's Executor* decision built on and applied these pre-existing characterizations; it did not invent them.

Finally, as with the term "quasi-legislative," legal thinkers wrote about quasi-judicial powers, duties, and officers well before *Humphrey's Executor*. As discussed, Ernst Freund organized the first chapter of his 1911 treatise on administrative law by distinguishing between "executive, quasi judicial, and quasi legislative functions." Freund, CASES at 4. And President Taft, again writing in his 1916 book on executive power, observed "that Congress had found it necessary to impose upon the President or his subordinates not only a purely Executive function, but to enlarge this into what are really quasi-legislative and quasi-judicial duties." Taft, OUR CHIEF MAGISTRATE at 79. With regard to quasi-judicial powers, President Taft explained:

> Congress may exercise a choice as to whether it shall give jurisdiction to pass upon the claims of those seeking these rights to an Executive tribunal or a Judicial tribunal. . . . Soldiers' pensions . . . and patents under the homestead and other general land laws for government lands, are granted upon application, after a hearing before an Executive tribunal, to determine whether the applicants come within the conditions of the act granting the pension or the land. Under the immigration acts are officers exercising similar quasi- judicial powers subject to review by the head of the department only, for the purpose of determining whether immigrants who

> come to this country are eligible under its laws to enter.

Id. at 80.

Likewise, in a 1923 report on how to reorganize the federal administrative branch, William Willoughby, a former member of Taft's Commission on Economy and Efficiency, recommended bringing all independent agencies under presidential control except those primarily engaged in quasi-judicial or quasi-legislative duties, namely the ICC, the FTC, and the Shipping Board. William F. Willoughby, THE REORGANIZATION OF THE ADMINISTRATIVE BRANCH OF THE NATIONAL GOVERNMENT at 12 (1923). Willoughby explained that these agencies' "duties . . . are of a legislative and judicial or at least of a quasi-legislative and quasi-judicial character," and as such it is "highly improper" that "their activities should be subject to executive direction and control." *Id.* Rather, for actions of a quasi-judicial character, "control should be vested in the courts." *Id.*

C. Purely Executive Duties Were Those Committed by the Constitution or Statute to the Executive's Discretion

While nineteenth century jurisprudence acknowledged the legislature's power, where necessary, to limit the President's control of quasi-legislative and quasi-judicial functions, legal history also acknowledged a third category of purely executive action, which fell beyond the other branches' reach. This category was understood and defined long before *Humphrey's Executor* and included constitutional grants of authority to the President or statutory grants

from Congress of certain discretionary, political decision-making authority. *Humphrey's Executor* drew on this history and understanding, using the President's "purely executive" powers to delineate which officers must be removable at will.

Most often, the concept of "purely executive" power arose in cases confronting whether executive action could be compelled by mandamus. In *Kendall v. United States ex rel. Stokes*, this Court noted that the judicial branch—via writs or otherwise—could not "direct or control" the executive where its power is "derived [directly] from the constitution." 37 U.S. (12 Pet.) 524, 608 (1838). In that context, "the departments may be regarded as independent of each other. But beyond that, all are subject to regulations by law, touching the discharge of the duties required to be performed." *Id.* at 610. The relief petitioners sought was permitted, as it did not "interfere in any respect whatever, with the rights or duties of the executive[: . . .] The mandamus does not seek to direct or control the postmaster general in the discharge of any official duty, partaking in any respect of an executive character; but to enforce the performance of a mere ministerial act." *Id.*

Based on this distinction, the Court presaged *Humphrey's Executor* nearly a century earlier: the President "is beyond the reach of any other department" only insofar "as his powers are derived from the constitution," but "it by no means follows that every officer in every branch of th[e executive] department is under the exclusive direction of the President." *Kendall*, at 610. Only the discharge of "certain political duties imposed upon many officers in the executive department . . . [are] under the direction

of the President." *Id.* Beyond those functions, Congress can "impose upon any executive officer any duty they may think proper, which is not repugnant to any rights secured and protected by the constitution, and in such cases, the duty and responsibility grow out of and are subject to the control of the law and not the direction of the President." *Id.* at 610-11.

A few decades later, in *Mississippi v. Johnson*, this Court built upon the framework enunciated in *Kendall*. 71 U.S. (4 Wall.) 475 (1867). The Court distinguished between acts which the executive branch performed subject only to congressional legislation, and conduct that implicates the President's enumerated roles in the Constitution. *Id.* at 499. The duties in that case—to assign generals to certain military districts and provide them with sufficient forces to discharge their duties—invoked the President's constitutional role "as commander-in-chief," and therefore were "purely executive and political," and mandamus would not lie. *Id.*

The Court further developed the distinction in *Public Clearing House v. Coyne*, 194 U.S. 497 (1904). There the Court considered whether the grant of authority to the Postmaster General to seize certain mail was executive in nature or encroached on the judiciary and implicated the due process rights of individuals. The Court concluded that it was in the power of Congress to "entrust" the Postmaster General with such discretion, and in exercising that discretion, the Postmaster General was carrying out a "purely executive" function of enforcing Congress's directive. *Id.* at 509.

As the Court had explained in *Kendall*, the sorts of political duties outlined in *Johnson* and *Coyne*, wherein the Constitution or Congress granted the executive department discretion, were within the exclusive ambit of executive authority. However, anything beyond—even though housed in the executive department—were subject to congressional limitations deemed "proper" by the legislative branch. 37 U.S. at 611.

The rationale in *Humphrey's Executor* was entirely consistent with this conception of purely executive power. The President's "illimitable power of removal" related to officers "who w[ere] responsible to the President, and to him alone." 295 U.S. at 631. That statement closely parallels the opinion a century earlier in *Kendall*, wherein this Court observed that only "certain political duties" are "under the direction of the President." 37 U.S. at 610. Beyond such purely executive functions, this Court recognized in *Kendall* and again in *Humphrey's Executor* that the Congress may limit and direct the President's authority. *Id.*

II. Humphrey's Executor Faithfully Applied the Categories of Quasi-Legislative, Quasi-Judicial, and Purely Executive.

By the time of *Humphrey's Executor*, "quasi-legislative," "quasi-judicial," and "purely executive" were well-developed concepts. A body exercising authority to determine the details of general legislative policy exercised quasi-legislative power. Quasi-judicial duties required "the exercise of skill and judgment" to apply the law in a given case. Both contrasted with purely executive power, which was political and discretionary and, under *Kendall*, arose

only in the discharge of "certain political duties imposed upon many officers in the executive department . . . under the direction of the President." 37 U.S. at 610. Beyond such purely executive functions—in the realm of quasi-legislative and quasi-judicial powers—this Court had long recognized that the Congress may restrict the President's authority as necessary to effectuate its legislation.

Humphrey's Executor noted the deep historical roots of the quasi categories. Commenting on the "Decision of 1789" related to removal of the head of the Department of Foreign Affairs and discussed in *Myers*, the *Humphrey's* Court relied on Madison's distinction between the executive's ability to remove those performing purely executive offices and those of a quasi-judicial character. The Court "observe[d] that when, at a later time, the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply." *Humphrey's Ex'r*, 295 U.S. at 631.

Humphrey's Executor deployed the three categories according to their well understood meanings. Whereas *Myers* addressed a purely executive officer—"a postmaster," who is "restricted to the performance of executive functions"—the FTC wielded "predominantly quasi judicial and quasi legislative" authority, requiring "the trained judgment of a body of experts appointed by law and informed by experience." *Humphrey's Ex'r*, 295 U.S. at 624, 627. "The Federal Trade Commission is an administrative body created by Congress ***to carry into effect legislative policies***

embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or a judicial aid." *Id.* at 628 (emphasis added). The Court echoed the precedents cited *supra*, explaining that "***in filling in and administering the details*** embodied by that general standard" of the proscription of unfair methods of competition, "the commission acts ***in part quasi legislatively and in part quasi judicially***." *Id.* (emphasis added).

Humphrey's Executor explained that a rule prohibiting removal restrictions for commissioners in bodies wielding quasi-judicial and quasi-legislative power would be inimical to separation of powers, because it would inject exclusive executive control into the functions of the other branches. *See id.* at 630 ("The power of removal here claimed for the President falls within this principle, since its coercive influence threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which, as already fully appears, was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments.").

And just as the precedents discussed above emphasized the necessity of the legislature's ability to create quasi-legislative and quasi-judicial bodies as part of its legislative powers, the Court emphasized that "legislative reports in both houses of Congress clearly reflect the view that a fixed term was ***necessary*** to the effective and fair administration of the law." *Id.* at 624 (emphasis added). As Congress explained,

> [t]he work of this commission will be of a most exacting and difficult character, demanding persons who have experience in the problems to be met—that is, a proper knowledge of both the public requirements and the practical affairs of industry. It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.

Id.

The statutory requirement that commissioners only be removed for cause—just like the legislature's power to instruct a quasi-legislative body to apply its specific knowledge in execution of the general legislative policy, or protect a quasi-judicial officer's neutrality—was therefore inherent to Congress's "Power . . . to make all Laws which shall be necessary and proper for carrying into Execution" its permissible legislation. U.S. CONST. art. I, § 8, cl. 18.

While *Humphrey's Executor* has been accused of treating *Myers v. United States* with "indignity," *Morrison*, 487 U.S. at 725-26 (Scalia, J., dissenting), the two decisions are in fact consistent with each other and with the jurisprudence on which each relied. The 6-3 decision in *Myers*, authored by Chief Justice Taft, held that Congress could not draw the removal power to itself for a purely executive office and that if Congress chose to "leave with the President the right to appoint" a postmaster first class, it could not restrict

the President's power to remove them. *Id.* at 192-93. *Humphrey's Executor*—with the only four justices from the *Myers* majority remaining on the Court joining the unanimous opinion—took no issue with *Myers*. 295 U.S. at 626, 631-32 (noting *Myers* "examine[d] at length the historical, legislative, and judicial data bearing upon" the scope of the President's removal power, and agreeing it is "the power of the President alone to make the removal . . . [of] purely executive officers"). The Court simply relied upon the well-known quasi categories—with which Chief Justice Taft was well acquainted, as shown in his own writings—to determine the reach of *Myers* conclusion.

III. The FTC's Modern Powers Remain Quasi-Judicial and Quasi-Legislative As Understood By the *Humphrey's Executor* Court.

The nature of the FTC has not changed in any manner relevant to the application of the quasi categories. The Government contends that the additional authority Congress granted to the FTC since 1935 suggests the FTC's powers now extend beyond those designated quasi-legislative and quasi-judicial and would be considered executive. In particular, the Government points to: (a) the ability of the FTC to bring suit; (b) the ability to issue substantive rules; (c) expanded adjudicatory authority; (d) broadened investigatory powers; and (e) the ability to conduct foreign policy by entering into agreements with foreign law enforcement agencies. Petitioners' Br. at 25-28. None of these, taken individually or collectively, would disturb the classification of the FTC as exercising principally quasi-legislative and quasi-judicial power.

First, the ability of the FTC to bring suit is not new. As this Court recognized in *Humphrey's Executor*, Congress had already empowered the FTC to "apply to the appropriate circuit court of appeals for . . . enforcement" of the FTC's orders. *Humphrey's Ex'r*, 295 U.S. at 620-21. But the Court properly understood that role to be quasi-judicial since "to the extent that [the FTC] exercises any executive function—as distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* at 628. The ICC had similar authority at the time to institute suit to enforce its orders. *See* Hepburn Act, ch. 3591, § 5, 34 Stat. 584, 590 (1906). Nonetheless, as discussed *supra*, the ICC was considered a paradigmatic example of an agency that was exercising predominantly quasi-judicial and quasi-legislative power.

Second, the ability to issue substantive rules is quasi-legislative and would have been understood as such by the *Humphrey's Executor* Court. As discussed in detail above, the concept of quasi-legislative authority had developed throughout the nineteenth century to refer to precisely this sort of power.

Third, the FTC's expanded adjudicatory authority is just an expansion of quasi-judicial authority. As the Court observed in *Humphrey's Executor*, the FTC already had the authority to bring administrative hearings in 1935 and to issue orders. The Government argues that, under the FTC's current authority, orders become final and enforceable without judicial intervention and permit the FTC to issue civil

penalties. But each of these adjudicatory functions is an authority that was recognized at the time of *Humphrey's Executor* as a quasi-judicial power.

Fourth, the FTC's broadened investigatory powers do not undermine the conclusion of this Court in *Humphrey's Executor*. In 1935, the FTC had "wide powers of investigation in respect of certain corporations subject to the act, and in respect of other matters . . . ." 295 U.S. at 621. The Government merely observes that the scope of the agency's investigative powers has expanded.

Finally, the FTC's ability to enter into cooperation agreements with foreign law enforcement agencies does not change its functions. Any such cooperation is permissible only with the "prior approval and ongoing oversight of the Secretary of State, and with final approval of the agreement by the Secretary of State . . . ." 15 U.S.C. § 46(j)(4). The Secretary of State ultimately is wielding this power, not the FTC.

These powers do not undermine the Court's 1935 holding that the FTC exercised "predominantly quasi judicial and quasi legislative" power. *Humphrey's Ex'r*, 295 U.S. at 624.

IV. The APA and Twentieth Century Jurisprudence Reinforced the Quasi Categories.

Because the taxonomy and reasoning in *Humphrey's Executors* were not anomalous, but instead were the product of a well-worn framework for understanding the separation of powers, the framework remained the bedrock of federal

administrative agencies in the succeeding decades. Following *Humphrey's Executor*, in 1946, Congress enacted the APA to provide procedural guardrails for the exercise of quasi-legislative authority, i.e., rule-making, and quasi-judicial authority, i.e., adjudicatory hearings, by administrative agencies. Congress approached the APA from the perspective that these functions of administration are "fundamentally *not* executive," thereby enshrining the quasi categories further within administrative law. Emily S. Bremer, *The Rediscovered Stages of Agency Adjudication*, 99 WASH. U. L. REV. 377, 442 (2021) (emphasis in the original); *see also* Emily S. Bremer, *Presidential Adjudication*, 110 VA. L. REV. 1749, 1752 (2024).

Moreover, in analyzing the authority of administrative agencies, this Court and individual Justices have continued to use the quasi categories. One year after the APA was enacted, in *SEC v. Chenery Corp.*, the Court noted that the SEC has "rule-making powers," which permit the "quasi-legislative promulgation of rules to be applied in the future." 332 U.S. 194, 203 (1947). Two decades later, Justice Black noted that "[m]ost administrative agencies . . . are granted two functions . . . : (1) the power under certain conditions to make rules having the effect of laws, that is, generally speaking, quasi-legislative power; and (2) the power to hear and adjudicate particular controversies, that is quasi-judicial power." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 770 (1969) (Black, J., concurring). More recently, in interpreting the APA, Justice Gorsuch observed that "at the time of the APA's adoption, conventional wisdom regarded agency rules as 'quasi-legislative' in nature." *United States v.*

Texas, 599 U.S. 670, 696 (2023) (Gorsuch, J., concurring).

The quasi categories' understanding of executive power similarly remains in force today. While this Court has stated that all exercises of agency power "*must be* exercises of [] the 'executive Power,'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (emphasis in original), it has also acknowledged that executive power takes different forms, with differing authority, depending on its source. "[O]f course not all of the President's official acts all within his 'conclusive and preclusive' authority," and there are "areas where his authority is shared with Congress." *Trump v. United States*, 603 U.S. 593, 609-10 (2024). "[T]he Constitution does not vest every exercise of executive power in the President's sole discretion," and Congress "may sometimes use [its concurrent] authority to regulate the President's official conduct[.]" *Id.* at 651-52 (Barrett, J., concurring in part) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). As Madison explained in 1789, the President's "right to remove subordinate officers at pleasure" applies to those officers which aid "in the performance of duties" the President "ha[s] an unquestionable right to do[,]" but an office which "partakes of each" of executive and judicial should be "responsible to every part of government." 1 ANNALS OF CONG. 637-38.

Far from being a dead-letter, the quasi-legislative and quasi-judicial categories continue to inform the authority exercised by administrative agencies and the procedural safeguards imposed upon those agencies through the APA. The taxonomy, therefore, continues to have vitality and remains a useful lens for

considering the separation of powers. The continued use of these categories is an indication of the enduring persuasiveness of the reasoning in *Humphrey's Executor*.

CONCLUSION

For the reasons set forth above, this Court should affirm the Court of Appeals' decision in this case.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX — LIST OF *AMICI*

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