No. 25A264

IN THE

Supreme Court of the United States

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

Applicants,

v.

REBECCA KELLY SLAUGHTER, *et al.*,

Respondents.

TO THE HONORABLE JOHN ROBERTS, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE D.C. CIRCUIT

OPPOSITION TO APPLICATION FOR STAY PENDING APPEAL

AARON CROWELL
GREGORY A. CLARICK
DAVID KIMBALL-STANLEY
Clarick Gueron Reisbaum LLP
41 Madison Avenue, 23rd Floor
New York, New York 10010

LAURENCE M. SCHWARTZTOL
DEMOCRACY AND RULE OF LAW CLINIC,
HARVARD LAW SCHOOL
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

AMIT AGARWAL
Counsel of Record
BEAU TREMITIERE
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Avenue NW,
Suite 163
Washington, DC 20006
(202) 579-4582
amit.agarwal@protectdemocracy.org

BENJAMIN L. BERWICK
15 Main Street, Suite 312
Watertown, Massachusetts 02472

Counsel for Respondents

385510

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Legislative Materials

Administrative Materials

Other Authorities

INTRODUCTION & SUMMARY OF THE ARGUMENT

Ninety years ago, this Court was tasked with deciding whether the President may fire a Commissioner of the Federal Trade Commission without cause. The Court ruled that he may not. Under a valid provision of the FTC Act, the Court held, "no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute." *Humphrey's Executor v. United States*, 295 U.S. 602, 632 (1935).

In March of this year, President Trump purported to fire Respondent Rebecca Slaughter, a Commissioner of the FTC, during the prescribed term for which she was appointed. The President did not remove Respondent for one or more of the causes named in the applicable provision of the FTC Act.

Word for word, that provision is the same today as it was in 1935. It provides: "Any Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41 (2025); *compare* 295 U.S. at 620 ("'Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.'") (quoting 15 U.S.C. § 41 (1935)).

Since 1935, this "Court has repeatedly and expressly left *Humphrey's Executor* in place, and so precluded Presidents from removing Commissioners at will." App.2a. A "chorus" of lower courts have ruled the same way. App.71a.

Against that backdrop, the district court ruled that President Trump's attempt to remove Respondent without cause violated federal law as determined by this Court. The district court and the court of appeals denied a stay pending appeal.

This Court should do the same. Where, as here, the district and circuit courts have both denied a stay, a party seeking relief in this Court bears an "especially heavy" burden of persuasion. *Packwood v. Senate Select Comm.*, 510 U.S. 1319, 1320 (1994) (Rehnquist, C.J., in chambers). Applicants here have not met that burden.

Likelihood of success. Since 1914, the FTC Act, as authoritatively construed by this Court, has barred the President from removing a Commissioner of the FTC without cause. Applicants agree that the Court should not disturb established precedent on the emergency docket—*i.e.*, before "full briefing and argument." App.19 n.2. That modest concession is altogether proper—and fatal to their stay application. As the court of appeals explained, Applicants are "not likely to succeed on appeal because any ruling in [their] favor . . . would have to defy binding, on-point, and repeatedly preserved Supreme Court precedent." App.3a.

The decisions on which Applicants rely did not undo this Court's precedent upholding the FTC Act's for-cause provision. *Seila Law*, for example, expressly and repeatedly declined to overrule any precedent, specifically including *Humphrey's Executor*. Similarly, recent stay orders explained that the President's general removal power is "subject to narrow exceptions recognized by [this Court's] precedents." *Trump v. Wilcox*, 145 S. Ct. 1415 (2025). *Humphrey's Executor* is one such exception.

Even if this Court's decision upholding the validity of 15 U.S.C. § 41 (1935) did not control Applicants' challenge to the validity of the identically worded text of 15 U.S.C. § 41 (2025), Applicants still have not met their burden of showing that they are likely to succeed on the merits. Applicants' main argument for evading this Court's

precedent upholding the for-cause removal provision of the FTC Act is that some post-1935 amendments involving other provisions of the U.S. Code *interact* with the for-cause removal provision in ways that create new constitutional concerns. That argument fails for two independent reasons.

First, as the courts below explained, the agency's post-1935 authorities "are outgrowths of its original powers, rather than dramatic transformations." App.63a–64a. Second, even assuming certain *post-1935* amendments to the FTC Act create new constitutional concerns, Applicants have not met their burden of showing that the *pre-1935* for-cause removal provision is unconstitutional as applied to this case. That failure, standing alone, warrants denial of their stay application.

Irreparable injury. In several recent cases that did not involve a for-cause removal requirement blessed by a unanimous and directly controlling precedent of this Court, the Court found that the Government faced a "risk of harm from an order allowing a removed officer to continue exercising the executive power." *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025). That judgment "inform[s] how a court should exercise its equitable discretion in like cases." *Id.* But this case is not like those, for several reasons.

First, pertinent legal and historical context, including this Court's directly applicable precedent, puts the FTC in a different posture. For ninety years prior to Respondent's termination, every President—including President Trump himself for a total of 50 months—acquiesced in this Court's holding that the for-cause removal requirement of the FTC Act is constitutionally valid. The protracted and unanimous

acquiescence of all three branches of government in the law at issue here—a law that affirmatively *empowers* the President to remove commissioners for good cause—defeats Applicants' assertion that their continued adherence to that still-binding precedent while their appeal is pending would cause them irreparable harm.

Second, as the trial court found and the court of appeals agreed, the facts of this case do not suggest that Respondent's continued service on the FTC is likely to cause the kind of harm contemplated in *Wilcox* and *Boyle*. Applicants fail to engage with the critical factual distinctions between those cases and this one, and their harm analysis is—at a minimum—in substantial tension with their own conduct.

Public interest and balance of equities. The remaining stay factors provide an independent basis for denying discretionary equitable relief. Applicants rebuke the "lower courts" for "defy[ing]" this Court's decisions and acting "like a picky child." App.3, 27. But those courts did just what this Court has told them to do—"follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989); *see* App.13a (applying that rule and stressing "substantial public interest in having lower courts stay in their lane"). If that directive does not apply here, it's hard to see when it would. Accordingly, granting Applicants' request would undermine the authority of this Court and effectively vitiate an important and longstanding principle of sound judicial administration.

In addition, the public interest would be served by requiring continued compliance with this Court's precedent approving a law that has been on the books

since 1914. If the application is denied, the President would have to do, for the pendency of this appeal, what he chose to do for years—follow the plain text of the FTC Act as construed by this Court and work with a presidential appointee who was unanimously confirmed by the United States Senate. If she engages in inefficiency, neglect of duty, or malfeasance in office, he could fire her at any time.

If, on the other hand, the application is granted, the agency Congress created would be severely wounded and radically transformed. As this Court has already determined, the FTC Act's for-cause restriction cannot be surgically excised; it "vitally contribute[s]" to the agency's mission and is inextricably intertwined with the Act's other structural provisions—including those requiring bipartisanship, staggered terms, accumulation of experience, and expertise-driven decision-making. *See Humphrey's Executor*, 295 U.S. at 626.

What's more, granting a stay would hand the President plenary control over pre- *and* post-1935 powers that Congress decided *not* to place in the President alone, including the precise powers this Court held Congress could and did vest in an insulated FTC. Regardless of whether Applicants' capacious view of Article II is correct, nothing in the Constitution or the FTC Act supports that result. If the President is to be given new powers Congress has expressly and repeatedly refused to give him, that decision should come from the people's elected representatives. At a minimum, any such far-reaching decision to reverse a considered congressional policy judgment should not be made on the emergency docket.

STATEMENT OF THE CASE

Statutory Background. In 1914, Congress passed, and President Wilson signed, the FTC Act, Pub. L. No. 63-203, 38 Stat. 717–724, which created the Federal Trade Commission and directed it to prevent "unfair methods of competition in commerce," *id.* § 5, 38 Stat. at 719. From the beginning, Congress gave the FTC a variety of powers to achieve these statutes' ends. *See* App.41a–42a. Among other things, Congress empowered the FTC to issue "complaint[s] stating . . . charges" and giving notice of a hearing, FTC Act § 5, 38 Stat. at 719; to hold hearings with written records, *id.*; and, after such hearings, to issue reports with cease-and-desist orders, *id.* at 719–20, which could be enforced in the federal courts of appeals, *id.* at 720. The Commission's findings of fact, if supported by testimony, would be deemed conclusive in that enforcement proceeding, *id.* Congress also gave the FTC rulemaking authority, *id.* § 6(g), 38 Stat. at 722, and authorized the Commission to perform investigations into business practices and issue subpoenas, *id.* § 9, 38 Stat. at 722; *see also id.* § 6(b), 38 Stat. at 721. The Commission was also empowered to assist courts in drafting decrees for antitrust cases, *id.* § 7, 38 Stat. at 722, and to help the Attorney General assure compliance with antitrust orders by performing investigations and reporting findings, *id.* § 6(c), 38 Stat. at 721.

The Commission's structure has always been critical to its mission. The FTC Act provided that the FTC "shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate . . . for terms of seven years" and that Commissioners are removable by the President only

for "inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. As the Senate Report explained, "it is essential that [the Commission] should not be open to the suspicion of partisan direction," and thus no more than three members of the Commission may be of the same party. S. Rep. No. 63-597 at 11 (1914).

The FTC Act has been amended over the years, *see* App.5a–9a; 42a; 63a–67a; but its provisions regarding the appointment and removal of Commissioners have remained undisturbed since 1914, with one exception. Reorganization Plan No. 8 of 1950 gave the FTC Chair administrative authority over the Commission and empowered the President to select the Chair from among the Commission's members. 15 Fed. Reg. 3175 (May 24, 1950). The primary purpose of this change was "to promote the better execution of the laws" and "the more effective management of the executive branch of the Government and of its agencies." *See* Pub. L. No. 109, 63 Stat. 203, 203. Today, the President's chosen Chair presides at Commission meetings and hearings, controls its expenditures, and is responsible for all personnel decisions. *See* 15 U.S.C. § 41; 16 C.F.R. §§ 0.8, 0.10.

Factual Background. In 2018, President Trump appointed Rebecca Slaughter ("Respondent") to serve as a Commissioner of the FTC. App.43a. In 2023, President Biden appointed her to serve a second term on the Commission, which expires on September 25, 2029. *Id.* Both times, she was unanimously confirmed by the Senate.

On March 18, 2025, Respondent received an email with a message from President Trump: "I am writing to inform you that you have been removed from the

Federal Trade Commission, effective immediately." *Id.* The message did not allege that Respondent had engaged in any "inefficiency, neglect of duty, or malfeasance in office." App.44a. Respondent was then denied access to her office and work equipment; her staff members were placed on administrative leave or reassigned; and she was listed as a "Former Commissioner" on the FTC website. *Id.* In short, she was rendered unable to fulfill her official duties. *Id.*

After the purported firing of Commissioners Slaughter and Alvaro M. Bedoya,[1] the FTC had, *de facto*, only three Commissioners, all Republicans: Applicants Chairman Ferguson and Commissioner Holyoak, as well as Commissioner Mark Meador, who was confirmed during the pendency of this action. *See id.*

Procedural History. Respondent filed this action on March 27, 2025, *see id.*, and filed a motion for expedited summary judgment, the entry of declaratory relief, and a permanent injunction, *see id.*, which the district court granted on July 17, 2025, *see* App.38a–81a. The district court concluded, in sum, that "[Applicants'] removal of Ms. Slaughter was blatantly unlawful according to the FTC Act, *Humphrey's Executor*, and a chorus of courts that have rejected [the] identical arguments" that Applicants offered to defend their actions "time and again." App.71a.

The district court denied Applicants' motion for a stay pending appeal. App.37a. The district court held that Applicants were unlikely to succeed on the merits under

[1] FTC Commissioner Alvaro Bedoya was fired on the same day as Commissioner Slaughter. He joined Commissioner Slaughter as a Plaintiff in this action but resigned his position before summary judgment was granted. App.45a. The District Court held that Bedoya thus lacked standing to pursue his claims, which were dismissed without prejudice. *See* App.46a-48a.

Humphrey's Executor, and rejected Applicants' argument that this Court's emergency order in *Trump v. Wilcox*, 145 S. Ct. 1415 (2025), changed that calculus. App.33a–35a. In addition, the court held that Applicants failed to "elucidat[e] the precise injuries they will face" from Commissioner Slaughter's service pending appeal and "ma[d]e no effort to contest the court's harm analysis," as offered in its summary judgment opinion, "as it pertains to Ms. Slaughter." App.35a–36a. As to the public interest, the district court reasoned that granting the application would allow Defendants to "dismantl[e] the independence of an agency that Congress deliberately shielded from executive overreach," thus "mak[ing] a mockery of the FTC" and the separation of powers. App.37a.

On September 2, 2025, the D.C. Circuit also denied Applicants' stay motion and lifted its prior administrative stay. App.1a–14a. Judge Rao dissented. App.15a–29a. The court of appeals reasoned that Applicants are unlikely to succeed on the merits of their appeal because "any ruling in [their] favor from this court would have to defy binding, on-point, and repeatedly preserved Supreme Court precedent," specifically, *Humphrey's Executor*. App.3a. In so holding, the panel rejected Applicants' argument that the FTC "has outgrown *Humphrey's Executor*," because "the present-day Commission exercises the same powers that the Court understood it to have in 1935." App.5a–7a. The court of appeals further held that this Court's orders in *Wilcox*, 145 S. Ct. 1415 (2025), and *Trump v. Boyle*, 145 S. Ct. 2653 (2025), did not call for a different result. App.10a. Among other considerations, the panel noted that (a) those cases concerned the extension of *Humphrey's Executor* to new agencies, whereas the

FTC is directly protected under *Humphrey's Executor, see* App.10a–12a; (b) the equities in this case differ because Commissioner Slaughter is the sole remaining Democrat on the Commission, which has three Republican members, (c) individual Commissioners wield no unilateral authority, and (d) the public interest favored adherence to precedent. App.12a–13a.

Applicants now ask this Court for a stay pending appeal and certiorari before judgment. Respondent respectfully submits that the former should be denied and the latter granted in part.

ARGUMENT

"Stays pending appeal to this Court are granted only in extraordinary circumstances." *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers). To obtain such a stay, the applicant must show (1) a "reasonable probability" of obtaining certiorari; (2) a likelihood of success on the merits, and (3) "a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). Whether to grant a stay is "an exercise of judicial discretion," and "depend[s] upon the circumstances of the particular case." *Nken v. Holder*, 556 U.S. 418, 433 (2009). "The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34.

Applicants have not carried their burden on any of the stay factors.

A. Applicants Are Not Likely to Succeed on the Merits

1. *Humphrey's Executor* Controls this Case.

As it has since the FTC was created 111 years ago, 15 U.S.C. § 41 bars

Presidents from removing FTC Commissioners without cause. *See* FTC Act, Pub. L. No. 63-203, § 1, 38 Stat. 717, 718 (1914). In 1933, President Roosevelt nevertheless sought to remove FTC Commissioner Humphrey because his continued service was deemed in tension with the "aims and purposes of [his] Administration." *Humphrey's Executor*, 295 U.S. at 612. President Trump seeks to do the same to Commissioner Slaughter now. *See* App.43a–44a ("Your continued service on the FTC is inconsistent with my Administration's priorities."). And, just as President Roosevelt justified his actions by arguing that the FTC Act's removal protections are "an unconstitutional interference with the executive power of the President" under Article II, *Humphrey's Executor*, 295 U.S. at 626, President Trump offers the identical justification today, *see* App.54a; App.10.

In *Humphrey's Executor*, this Court unanimously rejected this argument. The Court held that it is "plain under the Constitution that the illimitable power of removal is not possessed by the President" over FTC Commissioners, and that Commissioners cannot be removed "except for one or more of the causes named in the applicable statute." 295 U.S. at 629, 632. In the last 90 years, this Court has both reaffirmed this decision, *see Wiener v. United States*, 357 U.S. 349, 356 (1958); *Morrison v. Olson*, 487 U.S. 654, 686–696 (1988), and repeatedly declined to revisit it, *see Free Enter. Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 228 (2020); *Collins v. Yellen*, 594 U.S. 220, 250–251 (2021).

Here, the district court held that President Trump's attempt to terminate

Commissioner Slaughter was "unlawful according to the FTC Act [and] *Humphrey's Executor*." App.71a. The court could not have done otherwise: (a) "*Humphrey's Executor* involved the exact same provision of the FTC Act that Ms. Slaughter seeks to enforce"; (b) the "facts" here "almost identically mirror those of *Humphrey's Executor*"; and (c) and "*Humphrey's Executor* remains good law today." App.54a–55a. Any "different result" would therefore "amount[] to the implied overruling of a ninety-year-old, unanimous, binding precedent." App.54a.

The court of appeals likewise concluded that Applicants are "highly unlikely to succeed on appeal because" the "exact question" they seek to raise in this case "was already asked and unanimously answered by [this] Court" in *Humphrey's Executor*. App.3a. The courts below are not alone; every court that has ever heard a challenge to the FTC's removal protections has ruled the same way. *See, e.g., Meta Platforms v. FTC*, No. 24-5054, 2024 WL 1549732, at *2 (D.C. Cir. Mar. 29, 2024) (per curiam); *Illumina v. FTC*, 88 F.4th 1036, 1047 (5th Cir. 2023); *FTC v. Am. Nat'l Cellular*, 810 F.2d 1511, 1514 (9th Cir. 1987); *Meta Platforms v. FTC*, 723 F. Supp. 3d 64, 86 (D.D.C. 2024); *FTC v. U.S. Anesthesia Partners*, No. 4:23-CV-03560, 2024 WL 2137649, at *8 (S.D. Tex. May 13, 2024); *FTC v. Precision Patient Outcomes*, No. 22-CV-07307-VC, 2023 WL 3242835, at *1 (N.D. Cal. May 3, 2023); *FTC v. Roomster Corp.*, 654 F. Supp. 3d 244, 259–60 (S.D.N.Y. 2023).

In sum, insofar as "an applicant's likelihood of success must be made under 'existing law,'" *Netchoice, LLC v. Paxton*, 596 U. S. ___, ___ (2022) (Alito, J., dissenting) (slip op., at 2), Applicants have "no likelihood of success on appeal given controlling

and directly on point Supreme Court precedent." App.2a; *see also Merrill v. Milligan*, 595 U. S. ___, ___ (2022) (Roberts, C. J., dissenting) (slip op., at 1) (stay inappropriate where "District Court properly applied existing law"). Of course, unlike the courts below, this Court does have the authority to revisit *Humphrey's Executor*, but Applicants concede it would be proper to do so only "after full briefing and argument," not at this stage. App.17 n.2. That concession is dispositive of their application, because this Court's precedent approves the precise law Applicants ask the Court to strike down.

2. *Seila Law* Does Not Invalidate Removal Protections for the FTC.

Applicants contend that the courts below "improperly bound themselves to an expansive reading of *Humphrey's Executor* that this Court repudiated in *Seila Law*." App.17. Specifically, Applicants argue that *Seila Law* "narrow[ed]" *Humphrey's Executor* such that the President has illimitable "power to remove, at will, any principal officers who exercise 'substantial' or 'important' executive power"—regardless of the agency's structure, history, or any other factor—and that the FTC fails this test. *Id.* at 11–12. This argument, however, is contrary to *Seila Law*'s holding and reasoning, and it has been rejected by every court to consider it.

Seila Law is clear: the question presented was whether to "extend" its prior "precedents to the novel context of an independent agency led by a single Director," a "new situation, never before confronted by the Court," 591 U.S. at 204, 238. The Court tailored its holding accordingly. *See id.* at 204 (holding CFPB's "configuration" unconstitutional because it "concentrat[ed] power in a unilateral actor insulated from

Presidential control"). *Collins* confirms this reading, holding that "[a] straightforward application of our reasoning in *Seila Law* dictates the result" because "[t]he FHFA . . . is an agency led by a single Director." 594 U.S. at 251.

Thus, reading *Seila Law* to strike down removal protections for the multimember FTC is directly contrary to both *Seila Law*'s explicitly limited holding and its declaration that it was "not revisit[ing] [its] prior decisions allowing certain limitations on the President's removal power," 591 U.S. at 204, and specifically "not revisit[ing] *Humphrey's Executor*," *id.* at 228, in which the Court "held that Congress could create expert agencies led by a group of principal officers removable by the President only for good cause," *id.* at 204.

Moreover, under Applicants' analysis, only the power possessed by an agency is relevant to whether a removal protection is permissible; the agency's structure is irrelevant. *See* App.11–12. But *Seila Law* "h[e]ld that the structure of the CFPB violates the separation of powers," 591 U.S. at 205, and it did so largely because it lacked the hallmarks of a "traditional independent agency headed by a multimember board or commission," *id.* at 207, including multimember leadership, partisan balance, staggered terms, a chair appointed by the President, and participation in the appropriations process, *see id.* at 204–07. Indeed, even after finding that the CFPB exercised "significant executive power," *id.* at 204, seven Justices expressed the view that Congress could remedy any constitutional defect in the CFPB's structure by "converting" the CFPB "into a multimember agency," a suggestion entirely at odds with Appellants' interpretation. *Id.* at 237; *id.* at 298 (Kagan, J., concurring in part).

Seila Law also emphasized that whether an agency's "structure" has a "foothold in history or tradition" is highly relevant to the constitutional analysis. *See id.* at 220–222. Here, the historical record is crystal clear: the 111-year-old FTC is the quintessential "traditional independent agency headed by a multimember board or commission." *Id.* at 207. Its structure and removal protections are mirrored in statutes creating some "two-dozen multimember independent agencies," *id.* at 230, adopted and adhered to by every Congress and President over the last 150 years[2] and repeatedly reaffirmed by this Court, first directly and unanimously in *Humphrey's Executor* and *Wiener*, and more recently in decisions where the failure to adhere to this "tradition" was decisive, *see Seila Law*, 591 U.S. at 207; *Collins*, 594 U.S. at 251; *Free Enter. Fund*, 561 U.S. at 501; *see also PHH Corp.*, 881 F.3d at 174 (Kavanaugh, J., dissenting) (discussing "deeply rooted historical practice of independent agencies as multi-member agencies").

The fact that Applicants' analysis would not only invalidate the FTC's removal protections, but also "stamp [a] multitude of comparable acts . . . as likewise invalid," runs contrary to this Court's longstanding instruction to give such an "impressive array of legislation . . . unusual weight": "A legislative practice such as we have here, evidenced not by only occasional instances, but marked by the movement of a steady stream for a century and a half of time, goes a long way in the direction of proving the

[2] The FTC's removal protections trace their lineage to 1887, when Congress established the Interstate Commerce Commission (ICC) to regulate the railroads and granted its commissioners the very same protection. *See* An Act to Regulate Commerce, ch. 104, § 11, 24 Stat. 379, 383 (1887).

presence of unassailable ground for the constitutionality of the practice . . . ." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327–28 (1936). *Seila Law* was guided by these same principles, and the fact that Applicants do not even try to reconcile their position with the "[l]ong settled and established practice" of all three branches, *The Pocket Veto Case*, 279 U.S. 655, 689 (1929), further undermines their assertion that they are likely to succeed on the merits here.[3]

For all these reasons, "a chorus of courts . . . have rejected" the "identical argument[]" Applicants offer here, App.71a, and reaffirmed the FTC's removal protections after *Seila Law*, *see supra* Section A.1 (collecting cases). Applicants can ask this Court to modify longstanding precedent affirming the FTC's removal protections, but they should not pretend that *Seila Law*—which explicitly assured Congress and the American people that it was making no such radical change—already did so.

3. Post-1935 Amendments Do Not Change the Result.

Applicants also assert that "*Humphrey's Executor* . . . does not control this case"

[3] Statutory construction further confirms that "Congress has not been on an unconstitutional legislating spree for the past 150 years." Jane Manners, Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 68 (2021). In *Seila Law*, some parties urged the Court to "avoid" the "constitutional problem" by "broadly construing the statutory grounds for removing the CFPB Director from office," but they failed to "advance[] any workable standard derived from the statutory language," 591 U.S. at 229–30. Recent scholarship, however, has traced the terms "inefficiency," "neglect of duty," and "malfeasance" back to their roots and demonstrated that this "INM" standard specifically targets "the official misbehavior that the Take Care Clause . . . obliges the President to prevent." *See* Manners & Menand, 121 Colum. L. Rev. at 8, 67. Thus, in this case, the constitutional concerns Applicants identify also can be harmonized with longstanding governmental practice through basic statutory interpretation.

because the "modern FTC" purportedly possesses sweeping new "executive power" that distinguishes it from the "New Deal-era FTC as understood in *Humphrey's Executor*." App.12, 18. This argument ignores the scope of the FTC's authority as considered in *Humphrey's Executor* and inflates the extent of its current powers. The court of appeals rightly held that this argument "fails to persuade," *see* App.5a–10a, and agreed with the district court that "*Humphrey's Executor* . . . did address each of the agency's original abilities," and that any relevant "'new' abilities are outgrowths of its original powers, rather than dramatic transformations of the 'character of the office.'" App.63a–64a (quoting *Humphrey's Executor*, 295 U.S. at 632).

First, Applicants contend that "the modern FTC exercises broad power to initiate judicial proceedings against private parties." App.12. But the 1935 FTC "could level charges against entities it suspected of violating the FTC Act, order them to cease whatever conduct gave rise to the charges, and then seek enforcement in federal court." App.65a (citing FTC Act § 5, 38 Stat at. 719–21). *Humphrey's Executor* acknowledged this authority in full. 295 U.S. at 620–21. And the Court understood that "if a case-and-desist order were disobeyed, the Commission itself could 'apply' directly to the circuit courts for 'enforcement' of those orders . . . a power that parallels the Commission's current authority to seek injunctions in federal court." App.6a (quoting 295 U.S. at 620-621). Accordingly, the FTC's current authority to initiate judicial proceedings closely parallels that original authority. *See, e.g., FTC v. Am. Nat. Cellular*, 810 F.2d 1511, 1514 (9th Cir. 1987); *LabMD v. FTC*, 894 F.3d 1221, 1233 (11th Cir. 2018); *Fanning v. FTC*, 821 F.3d 164, 714 (1st Cir. 2016).

Second, Applicants incorrectly assert that *Humphrey's Executor* "did not discuss rulemaking at all." App.12. Section 6 of the original FTC Act gave the FTC the power to "make rules and regulations for the purpose of carrying out the provisions of this Act." FTC Act § 6(g). This Court acknowledged the FTC's rulemaking function, noting its "quasi legislative" role and acknowledging the Commission's remit "[i]n administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard." *Humphrey's Executor*, 295 U.S. at 628. In modern parlance, this is a paradigmatic summary of agency rulemaking. *See, e.g. INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (noting that "rule making" resembles "lawmaking," and citing *Humphrey's Executor* for the proposition that this Court "has referred to [such] agency activity as being 'quasi-legislative' in character"); App.6a–7a, 63a.[4]

Third, Applicants suggest the FTC is a categorically different agency today because, under the original FTC Act, cease-and-desist orders "lacked binding effect

[4] Rather than directly engage with this element of *Humphrey's Executor*, Applicants seek to bolster their argument with a string-cite to post-1935 statutes granting the FTC rulemaking power in extremely specific contexts. *See* App.13. But Applicants ignore the numerous instances in which Congress restricted the FTC's authority over various industries and issues. *See, e.g.*, 1980 FTC Improvement Act, Pub. L. No. 96-252, §§ 5, 11, 19, 94 Stat. 374 (restricting FTC regulation of, *inter alia*, children's advertising, the funeral industry, and investigations of the insurance industry); FTC Act Amendments of 1994, Pub. L. No. 103-312, §§ 2, 9, 108 Stat. 1691 (same with respect to agriculture cooperatives); Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.*; 5 C.F.R. § 1320.3(c) (requiring FTC to submit any attempts to collect information from ten or more persons for Office of Management and Budget review); Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (transferring enforcement of fourteen FTC rules to the CFPB); *see also* App.64a ("Congress may have given the FTC a new type of conduct to regulate, but adding" additional "goal[s] is not the same as inflating or augmenting the mechanisms by which the FTC pursues potential law breakers").

until courts granted injunctions enforcing them," whereas they may now "become final and enforceable even without a separate court-ordered injunction." App.13 (citing 15 U.S.C. § 45(g), (l); Wheeler-Lea Act, ch. 49, § 3, 52 Stat. 113–114 (1938)). But this is misleading. For one thing, the FTC has possessed adjudicative authority since 1914 and, indeed, that authority is expressly discussed in *Humphrey's Executor*, *see* 295 U.S. at 620–21; *see also Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587, 594–95 (1934) (acknowledging the FTC's power, "after hearing, [to] order the violator to divest itself of [] stock held" in violation of the Clayton Act). Moreover, under current FTC authority, only if "judicial review favors the Commission (or if the time to seek judicial review expiries)" does "the Commission's order normally become[] final (and enforceable)." *AMG Capital Mgt. LLC v. FTC*, 593 U.S .67, 72 (2021); *see also Floersheim v. Engman*, 494 F.2d 949, 953 (D.C. Cir. 1973).[5] Thus, Applicants are wrong to suggest that the current FTC enjoys a freewheeling authority that its 1935 predecessor lacked.

Fourth, Applicants suggest that "the modern FTC" enjoys wide-ranging investigative powers, whereas *Humphrey's Executor* only understood the FTC to undertake investigations "for the information of Congress," and not to enforce the terms of the statute directly. App.14. But "[t]he FTC's organic statute, passed in 1914, gave it broad investigatory powers like the ability to issue subpoenas, compel

[5] The same is true for more recently enacted statues cited by Applicants. *See, e.g.*, 42 U.S.C. § 6303(d) (provision of Energy Policy and Conservation Act providing for determination of penalties that become final and enforceable only once judicial review has occurred or been waived).

testimony, and acquire evidence." App.62a (citing FTC Act §§ 6(a)–(b), 9)). And while *Humphrey's Executor* did note that the FTC has undertaken "many . . . investigations" and "some have served as the basis of congressional legislation," 295 U.S. at 621, the Court also observed that when Congress "empowered" the FTC "to prevent . . . unfair methods of competition," it granted the Commission "among other things . . . wide powers of investigation," *id.* at 620–21. In addition, *Humphrey's Executor* acknowledged that the FTC could initiate litigation by "issu[ing] a complaint stating its charges," *id.* at 620; Applicants wrongly assume that the Court did not understand that the FTC's complaints and charges would be based on its investigations.

And that is precisely what occurred. For example, in its 1935 Annual Report, the FTC stated that "[t]he most common origin" of investigations "is through complaint by a consumer, a competitor, or from public sources other than the Commission itself" and that even in the absence of a complaint "the Commission may initiate an investigation to determine if the laws administered by it are being violated." Annual Rep of the Federal Trade Commission 43 (1935).[6] After investigating, if the Commission decided that a "formal complaint should issue," then the "case" would be "transmitted to the chief counsel for preparation of formal complaint and trial of the case" or "to the chief trial examiner for negotiation" of a stipulated resolution. *Id.* at 44. The Commission's 1935 report listed many such areas of investigation. *Id.* at 47–89.

Finally, Applicants assert for the first time that "the modern FTC exercises

[6] *Available at* https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1935/ar1935_0.pdf

substantial foreign-relations power." App.15. To support this novel assertion, they cite one statutory provision: 15 U.S.C. § 46(j). But the role contemplated for the FTC in negotiating international agreements in some narrowly defined circumstances under § 46(j)(4) is made subject to the "prior approval," "ongoing oversight," and "final approval" of the Secretary of State. *Id.* Thus, it is simply not a grant of "substantial foreign-relations power" outside the President's purview. Section 46(j)(1) also authorizes, in limited circumstances, the FTC to provide "assistance" to "foreign law enforcement agencies" investigating "possible violations of law prohibiting fraudulent or deceptive commercial practices," but that simply mirrors the 1935 FTC's authority to "investigate . . . trade conditions in and with foreign countries" under certain circumstances (FTC Act § 6(h), 38 Stat. 717, 722), which was among the "wide powers of investigation" expressly recognized by *Humphrey's Executor*, 295 U.S. at 620–21.

The development of the FTC's authorities from *Humphrey's Executor* to the present day is thus a story of continuity, not transformation. As both courts below found and numerous courts have agreed, the FTC has not "outgrown" *Humphrey's Executor*. App.5a; *see also* App.61a-70a; *supra* Sections A.1-2.

4. *Wilcox* and *Boyle* Do Not Alter Applicants' Likelihood of Success on the Merits.

Applicants assert that this Court's orders in *Wilcox* and *Boyle* establish their likelihood to succeed on the merits here. *See* App.16–17. The district court (App.33a–35a) and the court of appeals (App.10a–11a), carefully considered and correctly rejected this contention.

The stay orders in *Wilcox* and *Boyle* "[are] not . . . decision[s] on the merits of

the underlying legal issues" in those cases, *Ind. State Police Pension Tr. v. Chrysler*, 556 U.S. 960, 960 (2009), much less this one. Moreover, as the court of appeals emphasized, *Wilcox* and *Boyle* "present[] the never-before-decided question of whether *Humphrey's Executor* should be extended to the statutes providing for-cause removal protection" for NLRB, MSPB, and CPSC officials. App.10a–11a. By contrast, "the present case involves the exact same agency, the exact same removal provision, and the same exercises of executive power already addressed by [this] Court in *Humphrey's Executor*," App.10a.

Thus, in light of "recent Supreme Court decisions preserving that precedent," and the *Wilcox* order's "express[] reaffirm[ation] that the President's removal authority remains 'subject to narrow exceptions recognized by our precedents,'" App.11a (quoting *Wilcox*, 145 S. Ct. at 1415), the courts below concluded that "[g]ranting" a stay in this case "would ignore the Supreme Court's stay order in *Wilcox*, not comply with it," App.11a; *see also id.* 34a–35a. In addition, *Wilcox* stated that the agencies at issue likely exercise "considerable executive power," yet (a) cautioned that those agencies may nevertheless "fall[] within . . . a recognized exception" allowing removal protections, and (b) emphasized that the "structure[]" and "distinct historical tradition" of the Federal Reserve is highly relevant in considering the validity of its removal protections, 145 S. Ct. at 1415, two statements that directly contradict Applicants' contention that merely wielding executive power ends the analysis.

Finally, *Wilcox* and *Boyle* do not involve one of the key features of this case: a tenure-protection provision that this Court has previously upheld and which

Applicants seek to override based on *subsequently enacted* statutes impacting the agency's authority. *See infra* Section A.5.

5. Applicants' Attack on Post-1935 Amendments Does Not Establish the Invalidity of the Pre-1935 Removal Protection.

Applicants' sole defense for their admitted violation of 15 U.S.C. § 41 is that this for-cause removal provision—the only provision of the Act directly at issue here—is unconstitutional as applied to this case. Applicants assert that the President was free to disregard that provision because the holding of *Humphrey's Executor* "rested on . . . 'the 1935 FTC,'" but post-1935 amendments to the FTC Act *purported* to invest "[t]he modern FTC" with "considerable executive power" that, they contend, is inconsistent with for-cause removal protections. App.3.

This argument is incorrect, as both courts below concluded. *See* App.5a-10a, 60a-70a; *supra* Section A.3. But even if it had merit, Applicants' argument rests on an further unsound assumption: that the President was free to resolve this conflict between (a) the valid pre-1935 removal provision, and (b) certain post-1935 amendments that allegedly *interact* with that provision to create a new constitutional problem, by simply tossing aside the preexisting for-cause removal provision this Court upheld in *Humphrey's Executor*. Applicants have not even attempted to carry their burden of persuasion on this case-dispositive issue.

Principles set forth in this Court's severability caselaw point to the flaw in Applicants' argument. This Court "has long applied severability principles in cases . . . where Congress added an unconstitutional amendment to a prior law" that could and did stand on its own. *Barr v. AAPC*, 591 U.S. 610, 630 (2020) (plurality

opinion of Kavanaugh, J.). "In those cases, the Court has treated the original, pre-amendment statute as the 'valid expression of the legislative intent.'" *Id.* (citing *United States v. Jackson*, 390 U.S. 570, 586 (1968); *Frost v. Corporation Comm'n of Okla.*, 278 U.S. 515, 526–527; (1929); *Truax v. Corrigan*, 257 U.S. 312, 342 (1921); *Eberle v. Michigan*, 232 U.S. 700, 704–705 (1914)).

That approach reflects legal and practical considerations. As a matter of law, an "unconstitutional statutory amendment *'is a nullity' and 'void' when enacted, and for that reason has no effect on the original statute*." *Id.* at 631 (emphasis added; quoting *Frost*, 278 U.S. at 526-27). As a practical matter, the Court's established methodology yields results that are "stable, predictable, and commonsensical," and avoids enmeshing the courts in "free-wheeling" policymaking determinations that could not be made "in a principled way." 591 U.S. at 626-27 & n.7, 636 (emphasizing that "[c]ourts would be largely at sea" in choosing whether to invalidate "all or part" of a later-enacted law "rather than all or part of the" original statute).

Here, Applicants argue that at some time after 1935 (they never state when precisely), certain amendments to the FTC Act vested FTC Commissioners with an impermissible amount of executive power in light of their statutory removal protection. But even if that were correct, under settled severability principles, "the correct result" would be to "leave in place" that previously enacted protection. *See* 591 U.S. at 633-34. Indeed, traditional principles would "require" that result, *id.* at 631.

Despite these established principles, Applicants simply assume that any constitutional problem identified in this case would be cured by invalidating the 111-

year-old for-cause removal requirement. Even if courts had discretion to choose that result, there are compelling reasons not to do so.

To begin, as this Court has explained, 15 U.S.C. § 41 effectuates policy goals that "vitally contribute" to the operation of the Act:

> [T]he language of the act, the legislative reports, and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the congressional intent to create a body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes, it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute.

Humphrey's Executor, 295 U.S. at 625–26.

As this Court's authoritative construction of the FTC Act makes clear, the for-cause removal provision is inextricably intertwined with other structural provisions and legislative policies that Congress and this Court deemed essential to the statutory scheme. Congresses and Presidents have revised the FTC Act over the last century, but they have left the statute's removal protections untouched. It is as true today as it was in 1935: "[T]o hold that . . . the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office." *Id.*

Likewise, if a court invalidated the for-cause removal provision, it would not merely be exercising "the negative power to disregard an unconstitutional enactment," *Seila Law*, 591 U.S. at 237-38 (quoting *Massachusetts v. Mellon*, 262 U. S. 447, 488 (1923)); it would be affirmatively handing the President control over specific statutory authorities that Congress—before and after 1935—affirmatively decided *not* to vest in

the President alone. That would include the powers that—as this Court unanimously held—Congress was permitted to (and did) vest in an agency enjoying some degree of insulation from presidential control. Even if Applicants' view of Article II is correct, nothing in the text of the Constitution or in any Act of Congress supports that result.

To be sure, there are plausible *policy* arguments for seeking to address the alleged constitutional infirmity of which Applicants complain by blacking out the for-cause removal provision. *Cf. Bowsher v. Synar*, 478 U.S. 714, 775 n.14 (1986) (White, J., dissenting); *id.* at 777-78 (Blackmun, J., dissenting). Here, however, there are equally strong—indeed, persuasive—legal *and* practical reasons for concluding that any new problems created by post-1935 amendments do not retroactively invalidate the pre-1935 for-cause removal provision. *See Barr*, 591 U.S. at 630; *cf. Bowsher*, 478 U.S. at 734-35 (majority opinion) ("Severance at this late date of the removal provisions enacted 65 years ago would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch.").

This Court need not resolve the legal or practical issues discussed above: the FTC Act's removal protections are valid under governing law and Applicants concede that cannot change at this stage, *see* App.19 n.2. But Applicants' failure to even attempt to demonstrate that any alleged constitutional problems caused by *post-1935* amendments to the FTC Act should be addressed by invalidating the *pre-1935* for-cause removal restriction this Court upheld in *Humphrey's Executor* further underscores that, at this stage, they have not carried their burden of showing that they are likely to succeed on the merits moving forward.

B. Applicants Are Not Likely to Prevail on Their Remedial Arguments.

"It is a settled and invariable principle that every right, when withheld, must have a remedy." *Marbury v. Madison*, 5 U.S. 137, 147 (1803) (citing 3 William Blackstone, Commentaries *109). Applicants seek to unsettle that principle. As they see it, the President could defy federal law as determined by this Court, withhold a Senate-confirmed appointee's right to serve in office, and no court could provide a meaningful remedy.

In their stay application in the district court, Applicants did not claim that their remedial argument was likely to succeed on appeal.[7] Defs.' Mot. to Stay Pending Appeal, No. CV 25-909, 2025 WL 2145665 (D.D.C. July 18, 2025), ECF No. 54 at 3–4. And for good reason: that argument mischaracterizes the relief ordered by the district court, conflates merits and remedial issues, misapprehends the precedents on which Applicants rely, contravenes foundational principles of American jurisprudence, and yields intolerable practical consequences.

Applicants argue that "Article II precludes a court from ordering the reinstatement of an executive officer removed by the President." App.20. Even if that were so, the district court did not order anyone to reinstate Respondent. App.38a–39a. Because the President's attempted removal was "illegal and void," Respondent's "office never became vacant" and there was no need for the district court to order

[7] That alone justifies the denial of discretionary equitable relief on this ground. "A party must ordinarily move first in the district court for . . . a stay of the judgment . . . of a district court pending appeal." Fed. R. App. P. 8(a)(1)(A). That requirement would be meaningless if a party may seek a stay in an appellate court on a ground not raised in the application that had to be filed in the district court.

reinstatement. *See Kalbfus v. Siddons*, 42 App. D.C. 310, 321 (D.C. Cir. 1914); App.80a n.12. Accordingly, the district court declared the President's attempted termination "unlawful" and "without legal effect," confirmed that Respondent "remains a rightful member of the [FTC]," and ordered the non-presidential defendants to treat Respondent as what she is—a properly appointed Commissioner of the FTC. App.38a–39a. No court-ordered reappointment, reinstatement, or other process was needed. *See Severino v. Biden*, 71 F.4th 1038, 1042–43 (D.C. Cir. 2023); *Swan v. Clinton*,100 F.3d 973, 980 (D.C. Cir. 1996); *id.* at 989 (Silberman, J., concurring) (explaining such injunctions provide plaintiff "all the relief" he will "ever need").

Applicants' repeated references to the President's Article II powers (App.20–22), add nothing to their remedial argument. The *merits* question here is whether Article II allowed the President to fire Respondent without cause in violation of the FTC Act. Assuming it did not—the only circumstance in which a court's remedial authority would be relevant—nothing in text of Article II or related caselaw says that courts are powerless to remedy an illegal firing not authorized by the Constitution.

Reliance on the "Decision of 1789" (App.20) is likewise misplaced. Congress's decision to make certain officers removable at will by the President does not suggest courts would be powerless to grant relief if the President illegally attempts to fire other officers not subject to at-will removal.

Applicants' theory would render much of this Court's removal jurisprudence pointless. The Court has rejected the notion that the President has the power to fire *any* officer at-will, "no matter what the relation of the executive to the discharge of

their duties and no matter what restrictions Congress may have imposed regarding the nature of their tenure," *Wiener v. United States*, 357 U.S. 349, 352 (1958). Even *Myers v. United States*, 295 U.S. 52, 132 (1926) recognized that "[t]he degree of guidance . . . that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act." Under Applicants' theory, however, such distinctions would be meaningless: the President could blow past any such limitation and no court could do anything about it.

For the first time in this Court, Applicants argue that "an express statement by Congress" is required "to authorize judicial remedies that could burden the President's Article II powers" (App.21). Even if not waived, that argument fails on its own terms: By definition, an order remedying an illegal removal—*i.e.*, a removal not authorized by Article II—would not "burden the President's Article II removal powers."

The district court's order comports with traditional principles of equity. Before courts of law and equity merged, this Court explained that "a court of equity" should not "restrain or relieve against proceedings for the removal of public officers." *White v. Berry*, 171 U.S. 366, 376 (1898); *see In re Sawyer*, 124 U.S. 200, 212 (1888). That principle has no application here. The district court did not "restrain or relieve against" any pending proceeding; nor did it bar the President "from making a wrongful removal of a subordinate appointee," or "restrain the appointment of another," *White*, 171 U.S. at 376–77, in any future proceeding. Rather, it adjudicated the legality of an already-attempted removal, declared that action to be unlawful and without effect,

and ordered the non-presidential defendants to treat Respondent in accordance with her rightful status. *Compare White*, 171 U.S. at 369 *with Sawyer*, 124 U.S. at 206.

On any reading, the cases Applicants cite do not support their position that the district court lacked authority to grant *any* meaningful relief. Just the opposite: Those cases confirm that "courts of law" may "determine the title to a public office" in at least six ways not involving backpay—including, as relevant here, "by mandamus." *See White*, 171 U.S. at 377; *Sawyer*, 124 U.S. at 212; App.80a n.12 (alternative ruling).

Likewise, Respondent's right to mandamus relief is not "unclear." App.23. The President purported to fire Respondent in violation of the for-cause removal requirement of the FTC Act upheld by this Court. *See* 295 U.S. at 631–632. "[O]verwhelming" authority establishes that "mandamus" is an "appropriate remedy" for an illegal removal from office—including when the power of removal may not be exercised "except for the causes specified" by law. *Kalbfus*, 42 App. D.C. at 319–21.

Finally, Applicants' plea for the relevant remedial authority to be confined to "judicial or local offices" (App.23) has no basis in law or logic. The foundational "principle that every right, when withheld, must have a remedy," *Marbury*, 5 U.S. at 147, applies regardless of whether the illegally removed officer is a federal judge, the Chairman of the Federal Reserve, a justice of the peace, or a Commissioner of the FTC.

C. Applicants Do Not Satisfy the Remaining Equitable Stay Factors

With respect to the remaining equitable stay factors, Applicants heavily rely on this Court's stay orders in *Wilcox* and *Boyle*. App.23–24. While those orders do "inform how a court should exercise its equitable discretion in like cases," *Boyle*, 145 S. Ct.

2653, 2654, the court of appeals did not "defy" this Court in concluding that *Wilcox* and *Boyle* do not dictate that a stay is required in this case, App.3. Rather, the panel correctly recognized that whether a stay is appropriate ultimately "depend[s] upon the circumstances of the particular case," *Nken*, 556 U.S. at 433, and concluded that "the equitable calculus in this case differs in relevant respects" from *Wilcox* and *Boyle*. App.12a. This conclusion was correct.

Irreparable Harm. Applicants assert that *Wilcox* and *Boyle* control the harm analysis here. App.24. As both the district court and court of appeals recognized, those cases are not like this one, for both legal and factual reasons.

"[I]n removal cases not governed by on-point Supreme Court precedent" (*id.*), this Court has found that the Government faces "a risk of harm from an order allowing a removed officer to continue exercising the executive power." *Boyle*, 145 S. Ct. 2653, 2654. But the Court "has not applied that harm determination to a case where binding Supreme Court precedent establishes the wrongfulness of the removal." App.12a.

Nor should it. The Government generally suffers irreparable harm when a court *prevents* a duly-enacted statute from being "effectuat[ed]"—even if the validity of that law is fairly in doubt and the subject of ongoing litigation. *See, e.g.*, *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., in chambers). *A fortiori*, that should also be the case when, as here, the law at issue has been unanimously blessed by this Court, has been on the books since 1914, and has been followed by every President since 1935—including President Trump himself for 50 months. At minimum, that legal and historical context puts this case in a different posture than cases like *Wilcox* and *Boyle*.

As the courts below found, the facts of this case are also distinguishable for purposes of the harm analysis. In *Wilcox*, Applicants argued that the judgment below threatened to tip the partisan balance of power on the NLRB (which, with *Wilcox*, "would have two Democratic members, one Republican member, and two vacancies") and the MSPB (which, with Harris, "would have one Democratic member, one Republican member, and one vacancy"). App. to Stay at 33, *Trump v. Wilcox*, 145 S. Ct. 1415 (Apr. 9, 2025). Similarly, plaintiffs in Boyle are three Democratic appointees to a bipartisan five-member Commission who, when they resumed their duties, effectively controlled the agency. App. to Stay at 2, *Boyle v. Trump*, 145 S. Ct. 2653 (Jul. 2, 2025). As Applicants now note, after winning below, Harris granted "a stay of the firing of roughly 6000 employees at the Department of Agriculture," and members the CPSC moved to "nullify most decisions the agency had taken since their removal." App.24. In sum, in those cases the plaintiffs' service at the NLRB, MSPB, or CPSC pending appeal "could affect the agency's composition in a way that would empower it to take meaningful regulatory actions that conflict with the President's agenda." App.12a.

Respondent, by contrast, is now the lone Democrat on a Commission (1) with a governing majority of three Republican appointees; (2) every other mechanism of Presidential control courts have found critical in analyzing removal protections, *see, e.g.*, *Seila Law*, 591 U.S. at 218, 225–26; *PHH Corp.*, 881 F.3d at 183–191 (Kavanaugh, J., dissenting); as well as (3) rules dictating, in effect, that "individual Commissioners wield no unilateral authority," that "the Commission functions as a collegial body, and every significant action requires at least a majority vote of a quorum of

Commissioners," App.13a; *see also* 16 CFR § 4.14(c) (providing that "[a]ny Commission action . . . may be taken only with the affirmative concurrence of a majority of the participating Commissioners"). Thus, Respondent has no power to direct the FTC to take any "executive" actions by the agency.

Applicants fail to address these distinctions. They assert that, "[e]xperience shows that judicially reinstated officers can seriously disrupt the President's policy agenda," and recount what occurred at *other* agencies, *i.e.*, the Special Counsel, MSPB, and CPSC, when their illegally terminated members were permitted to serve pending appeal. App.24–25. This misses the point of the courts' reasoning below: this case is different because Respondent cannot "seriously disrupt the President's policy agenda," App.24. *See* App.12a–13a, 35a–36a.

Nor does Applicants' appeal to the FTC's non-partisan structure counsel a different result. True, Republican FTC Commissioners need not vote as a bloc. App.25. But even ignoring party designations, the FTC has a governing majority of Commissioners in whom the President apparently has full confidence, including one Commissioner he recently nominated (App.44a), and another he selected to serve as Chair (App.43a). As Applicants concede, the only way Commissioner Slaughter's "vote could be dispositive" is if "the three Republican members [] disagree among themselves," App.25, which is to say, if Commissioners who have the President's support agree with her about a substantive issue. Yet Applicants cannot explain why it would create "chaos" (App.25) or cause any irreparable harm if the Commission took bipartisan action endorsed by two Commissioners the President supports. To the

contrary, that result would reflect the core benefit of bipartisan, multimember boards, which require "compromise and consensus," which "tend[s] to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails." *PHH Corp*, 881 F.3d at 184 (Kavanaugh, J., dissenting).[8]

Applicants' final argument is, in effect, that they must prevail because either (a) Commissioner Slaughter indeed has no unilateral authority (and thus her presence on the Commission pending appeal is of little import); or (b) she does have such authority (in which case she cannot serve pending appeal without irreparably harming the President). *See* App.26. This argument reflects, again, Applicants' core misunderstanding of the functions and benefits of traditional multimember Commissions. "The point is simple but profound. In a multi-member independent agency, no single commissioner or board member can affirmatively do much of anything," *PHH Corp.*, 881 F.3d at 183 (Kavanaugh, J., dissenting). Nevertheless, a minority member still provides a critical "built-in monitoring system" by issuing dissents that can act as "a fire alarm that alerts Congress and the public at large that the agency's decision might merit closer scrutiny." *Id.* (quotation marks omitted).

Applicants' disagreement with the lower courts' harm analysis is also in tension with their own conduct. Today, Applicants say they will be irreparably harmed if the President must work with Respondent for just one more day (even though he would

[8] Applicants also assert that recusals could theoretically change the calculus in a specific case. App.25. They cite no such case, however, and, as the district court noted, "that remote possibility is not enough to meet the demanding standard of irreparable harm," which requires far more than "'some possibility of irreparable injury." App.36a (quoting *Nken*, 556 U.S. at 434 (internal quotation marks omitted)).

retain the power to fire her for cause). But the President asserted the right to fire principal officers with removal protections within days of taking office. *See Wilcox v. Trump*, 775 F. Supp. 3d 215, 222 (D.D.C. 2025) (noting Gwynne Wilcox was fired on January 27, 2025). Nevertheless, he did not seek to remove Respondent until March 17, 2025. Applicants have not asserted that (a) the President's priorities changed over those two months; (b) that Respondent did anything in that period to trigger her termination; or (c) the President agreed with Respondent's policy views during his first administration, when he appointed her to the FTC and left her in place for two and a half years. *See* App.43a.

Similarly, Applicants now say that the FTC will be irreparably harmed by the inclusion of a minority or dissenting vote. Reflecting on his service in the last presidential administration, however, Applicant Ferguson said the opposite. As he explained, "it's helpful for markets, for Courts, for litigants, for government transparency, to have people on the other party pointing" to legal and other substantial disagreements "and saying" as much "in dissents." Pls.' Statement of Material Facts Not in Dispute, *Slaughter et al. v. Trump et al.*, No. CV 25-909, 2025 WL 2145665 (D.D.C. Apr. 11, 2025), ECF No. 20-1 ¶ 15. This is precisely what happened when Respondent was able to resume her duties after the rulings below. The FTC's actions remained fully guided by the majority, but she was able to dissent, raise concerns, and identify issues for the public, Congress, and regulated parties.[9]

[9] *See Federal Trade Commission Files to Accede to Vacatur of Non-Compete Clause Rule*, Fed. Trade Comm'n (Sep. 5, 2025) https://perma.cc/LEA5-WKWA (noting Commissioner Slaughter's dissent); *FTC Takes Action to Protect Workers from*

In sum, legal and historical considerations conclusively defeat Applicants' assertion of irreparable injury; and, even if they did not, the lower courts permissibly found that, if a stay is denied, Applicants are not likely to suffer the kind of harm alleged in other recent removal cases.

Public interest and balance of the equities. As the district court explained, the public interest would not be served by "removing a Commissioner who has dutifully fulfilled her public service role," "*especially when her removal contravenes federal law and established Supreme Court precedent*." App.78a (emphasis added). It is no answer to say that "the authority to evaluate respondents' job performance belongs to the President, not the district court" (App.27). Like every other official, high or petty, the President has no "authority" to violate federal law as determined by this Court. *See Humphrey's*, 295 U.S. at 631–632 (holding "no removal [of an FTC Commissioner] can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute"). And the President's evaluation of Respondent's "job performance" is not at issue in this case; it is undisputed that Respondent engaged in no "inefficiency, neglect of duty, or malfeasance in office," *see* 15 U.S.C. § 41; App.44a.

Contrary to Applicants' assertion, the pertinent countervailing interest has nothing to do with Respondent's wish to hold onto employment, salary, and personal "political power," App.26. "Permitting [Respondent's] removal necessarily *destroys*" a law that lies at the heart of the "legislatively crafted" scheme governing the FTC—"in

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Noncompete Agreements, Fed. Trade Comm'n (Sep. 4, 2025), https://perma.cc/5KFH-EL58.

a way that injures Ms. Slaughter, the FTC, *and* Congress" (App.75a) (emphases added), as well as the public at large. As this Court has already determined, that law cannot be surgically excised from the Act; it "vitally contribute[s]" to the agency's mission and is inextricably intertwined with other key structural provisions that define its nature and purpose. *See* 295 U.S. at 626.

Put another way, the Executive does not just seek to turn the FTC into a "subservient" body that is "subject to the whims of the President and wholly lacking in autonomy," App.75a. It also threatens all the other key attributes—including bipartisanship, expertise, staggered terms, tenure, and the Commission's status as a five-headed body—that make the agency what it is and that justified its creation in the first place. For example, *de facto*, the agency now has no Democrats and three heads instead of five. And why have three *or* five, or require bipartisanship, if they all serve at the "mere will of the President"? *Humphrey's Executor*, 295 U.S. at 626.

Finally, both courts below found that adherence to this Court's precedents and respect for the rule of law counseled against granting Applicants' stay request. App.12a–13a, 35a–37a, 78a. That analysis is correct.

Again, the most obvious factor setting this case apart is that "[this] Court has not applied [the *Boyle* and *Wilcox*] harm determination to a case where binding Supreme Court precedent establishes the wrongfulness of the removal." App.12a. The traditional equitable concern of respecting Acts of Congress pending resolution of disputes on the merits applies *a fortiori* given that *Humphrey's Executor* upheld the removal protection at issue in this case. *See, e.g.*, *Turner Broadcasting System, Inc. v.*

FCC, 507 U.S. 1301, 1301, (1993) (Rehnquist, C. J., in chambers) (Acts of Congress "should remain in effect pending a final decision on the merits by this Court"); *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 202 (1991) ("Adherence to precedent promotes stability, predictability, and respect for judicial authority."); *Walters v. National Assn. of Radiation Survivors*, 468 U.S. 1323, 1324 (1984) (Rehnquist, J., in chambers) ("The presumption of constitutionality which attaches to every Act of Congress" is "an equity to be considered" in the stay analysis).

In short, this case does not just involve precedent; it also involves an important line of authority *about* precedent. Time and again, this Court has explained that lower courts must "follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas*, 490 U.S. at 484; *see* App.13a (applying that rule and stressing "substantial public interest in having lower courts stay in their lane"). If that directive does not apply here, it is hard to see when it would. *See* App.53a (explaining that "the key substantive question in this case" is "whether a unanimous Supreme Court decision about the FTC Act's removal protections applies to a suit about the FTC Act's removal protections").

Finally, Applicants treat *Wilcox* and *Boyle* as, in effect, establishing a rule that the President is always entitled to a stay pending appeal when he has decided to terminate an official, even in direct violation of the law, *see* App.27–28. That overreads those cases and would have harmful and unintended practical consequences. For example, the Court in *Wilcox* expressly acknowledged that removal protections for the Federal Reserve may be constitutional, notwithstanding any decision with respect to

the NLRB and MSPB. *See* 145 S. Ct. at 1415. To what end? Under Applicants' theory, President Trump could remove Federal Reserve chairman Jerome Powell tomorrow without cause, obtain a stay of any judgment finding the removal unlawful, and simply let the Chairman's term expire during the pendency of that litigation, even if this Court would have ruled such a removal unlawful. The *Wilcox* stay order itself—to say nothing of law and logic—counsels against such a result.

D. The Court Should Grant Certiorari Before Judgment

Applicants ask this Court to construe their stay request as a petition for a writ of certiorari before judgment and to grant the petition. App.28. Respondent concurs in that request and agrees that Applicants' first question presented is ripe for the Court's consideration. Applicants' second question presented does not warrant review.

It is of imperative public importance that any doubts concerning the constitutionality of traditional independent agencies be resolved promptly. *See* Sup. Ct. R. 11. Moreover, when, as here, "the question is whether to narrow or overrule one of this Court's precedents," further "percolation in the lower courts is not particularly useful." *Boyle*, 145 S. Ct. at 2654–55 (Kavanaugh, J., concurring). This case also "involves the exact same agency, the exact same removal provision, and the same exercises of executive power . . . addressed by [this] Court in *Humphrey's Executor*," App.10a. Thus, to the extent this Court seeks to address the implications of recent jurisprudence for the law enunciated in that foundational precedent, *see, e.g. Wilcox*, 145 U.S. at 1420 (Kagan, J., dissenting) (observing that these issues will be addressed "surely next Term"), this case is an eminently suitable vehicle. Indeed, because lower

courts have (correctly) understood *Humphrey's Executor* to squarely control questions pertaining to the for-cause removal provision of the FTC Act, *only* this Court can provide further authoritative guidance.

The Court should not grant review, however, on "whether the district court's order restoring respondent to office exceeded the court's remedial authority," App.28. Applicants point to no division among the lower courts on that question, and there is none. In addition, the district court correctly rejected Applicants' position that federal courts are powerless to grant any meaningful form of relief when the President violates a statutory removal restriction of the kind at issue here. *See supra* Part B.

CONCLUSION

The application for a stay pending appeal should be denied. Certiorari before judgment should be granted as to Applicants' first question presented.

Respectfully Submitted,

AARON CROWELL
GREGORY A. CLARICK
DAVID KIMBALL-STANLEY
CLARICK GUERON REISBAUM LLP
41 Madison Avenue, 23rd Floor
New York, New York 10010

LAURENCE M. SCHWARTZTOL
DEMOCRACY AND RULE OF LAW CLINIC,
HARVARD LAW SCHOOL
1525 Massachusetts Avenue
Cambridge, Massachusetts 02138

AMIT AGARWAL
Counsel of Record
BEAU TREMITIERE
PROTECT DEMOCRACY PROJECT
2020 Pennsylvania Avenue NW,
Suite 163
Washington, DC 20006
(202) 579-4582
amit.agarwal@protectdemocracy.org

BENJAMIN L. BERWICK
15 Main Street, Suite 312
Watertown, Massachusetts 02472

Counsel for Respondents

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