

In the
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.,
Applicants,

v.

LISA D. COOK, MEMBER OF THE BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM

ON APPLICATION TO STAY THE PRELIMINARY INJUNCTION
OF THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

**BRIEF OF *AMICUS CURIAE* PROFESSOR AARON L. NIELSON
IN SUPPORT OF NEITHER PARTY**

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INTEREST OF *AMICUS CURIAE*

The Court appointed Professor Aaron Nielson to serve as *amicus curiae* in *Collins v. Yellen*, 594 U.S. 220 (2021), to defend the constitutionality of the Federal Housing Finance Agency (FHFA). He briefed issues involving Article II of the U.S. Constitution, the meaning of “for cause,” and the scope and history of presidential removal. Professor Nielson has since co-authored at least three articles relevant to the present dispute: Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORNELL LAW REVIEW 843 (2024); Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress’s Anti-Removal Power*, 63 AMERICAN JOURNAL OF LEGAL HISTORY 219 (2023) [hereinafter, *Early Years of Congress’s Anti-Removal Power*]; and Aaron L. Nielson & Christopher J. Walker, *Congress’s Anti-Removal Power*, 76 VANDERBILT LAW REVIEW 1 (2023) [hereinafter, *Congress’s Anti-Removal Power*].

Drawing on lessons from *Collins* and this related scholarship, Professor Nielson submits this brief to assist the Court to understand the broader framework governing the Federal Reserve System (“the Federal Reserve” or “the Fed”). He takes no position on any case-specific factual disputes in this litigation. Rather, his interest lies in ensuring that the Court correctly interprets Congress’s statutes and situates those statutes within their broader constitutional and institutional structure.¹

¹ No counsel for any party authored this brief in whole or in part, and no entity or person aside from *amicus curiae* and his University has made a monetary contribution toward its preparation or submission. The University of Texas supports activities related to faculty members’ research and scholarship. The University is not a signatory to the brief, and the views expressed are those of the *amicus curiae*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Few institutions are as significant as the Federal Reserve, which stands “atop the global financial system and, indeed, the global economy, in a way that no institution has ever done before.” PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* x (2016). The Fed’s monetary decisions affect employment, inflation, and financial stability more generally. Because sound monetary policy requires thinking beyond the next election, moreover, framers like Alexander Hamilton recognized the importance of independent central banking. Consistent with that history, the Fed enjoys considerable monetary independence in the real world.

But does that monetary independence violate Article II of the U.S. Constitution? Applying the reasoning of the Court’s Article II cases, why wouldn’t the President have unfettered power to fire members of the Fed’s Board of Governors for any reason? Yet if the President has such unfettered removal power, how can the Fed conduct monetary policy with any degree of independence?

The purpose of this brief is to help the Court square the circle. Under a straightforward application of precedent, the President enjoys a broad constitutional power to remove the leadership of Executive Branch agencies, and that is true even if Congress has designated such agencies as “independent” or purported to provide their leaders with statutory protections from removal. Thus, in *Trump v. Slaughter*, No. 25-332, precedent supports the President being able to remove today’s Federal Trade Commission (FTC) leaders at will. For example, the core analysis from *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020)—as reinforced in *Collins*—regarding the scope of *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), draws no evident

distinction between single-headed or multi-headed agencies that exercise executive power. *Seila Law* and *Collins* thus imply—and maybe more than imply—that *Humphrey’s Executor* does not protect the leaders of agencies like today’s FTC.

The Federal Reserve, however, is different in kind. Whereas the modern FTC indisputably exercises executive power, the Fed’s core function is monetary policy, which need not and often does not require executive power. This point is confirmed by the First and Second Banks of the United States, both of which conducted early monetary policy, and neither of which could have been constitutional if Article II applied. As the Court and scholars explained contemporaneously with debates about those banks, their functions did not require sovereignty, especially given that the banks were quasi-private entities. Similar points can be made about the Fed. The Court thus is correct that “[t]he Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.” *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

Given the Fed’s “unique[]” functions and history, *id.*, it is *sui generis*. On one hand, the Fed’s key function—monetary policy—has its own tradition. And on the other, the statutory removal protections that Congress provided the Fed are limited, especially compared to the FTC’s. In fact, the Fed Chair and Vice Chairs can point to no statutory language protecting them from removal, and the only protection Congress afforded the Fed Governors is that they cannot be fired before their tenures end “unless sooner removed for cause by the President.” 12 U.S.C. §242. Such a bare “for cause” restriction appears to give the President more removal authority than other removal provisions[.]” *Collins*, 594 U.S. at 256 (citing, *inter alia*, *NLRB v. Electrical*

Workers, 346 U.S. 464, 475 (1953)). Giving that statutory language its most natural reading, moreover, may be especially apt for the Fed considering statutory history. Congress re-enacted the “for cause” provision here in 1935, *after* the Court decided *Humphrey’s Executor*. Congress was aware of *Humphrey’s Executor*—a front-page, thunderbolt decision—but decided not to use the more protective language from the FTC Act. Because the White House two centuries ago had less ability to influence the First and Second Banks than the White House today has with respect to the Fed, the Court’s analysis regarding the Fed should differ from other agencies.

Granted, Congress has also tasked the Fed with functions that do require executive power, and one day the Court may need to decide the implications of those functions, including whether (and, if so, how) severability should apply. But the Court need not do so here. President Trump, after all, does not rest on Article II removability with respect to Governor Cook; instead, he relies on statutory power. President Trump has also ordered that the White House’s Office of Information and Regulatory Affairs (OIRA) should not review the Fed’s monetary decisions. *See* Exec. Order No. 14215 (Feb. 18, 2025) (“This order shall not apply to the Board of Governors of the Federal Reserve System or to the Federal Open Market Committee in its conduct of monetary policy.”). The Court thus need not wade into Article II.

Furthermore, the Constitution provides Congress with tools to safeguard monetary independence. For more than a century, the Fed’s independence has primarily rested on norms, politics, and institutional design, each of which Congress can influence to encourage independent monetary policy. Drawing on lessons from James Madison and Hamilton, *Amicus* has documented what he and Professor Christopher

Walker dub “Congress’s anti-removal power.” The Constitution’s structure, combined with the framers’ insights about how politics works, demonstrates that Congress has potent anti-removal tools to help protect “stability in the administration.” THE FEDERALIST NO. 76, at 457 (Alexander Hamilton) (C. Rossiter ed. 1961). These anti-removal tools are particularly strong when used to enforce entrenched norms.

Accordingly, if Congress determines that the Fed or other agencies need more independence, and if lawmakers are willing to expend the political resources, Congress can provide that independence without offending Article II. It thus is not true that reading “for cause” most naturally—or, for that matter, applying cases like *Seila Law* and *Collins* in *Slaughter*—means that the federal government will be deprived of expertise. Instead, Congress’s anti-removal power offers a constitutionally sound way to ensure both greater independence and accountability.

ARGUMENT

I. The Court’s Cases Teach That Congress May Not Restrict the President’s Power to Fire Heads of Executive Agencies.

The Court in recent years has repeatedly adopted principles that—if taken to their logical conclusion—cast doubt on *Humphrey’s Executor*. The trend began with *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), which concerned a board within the Securities and Exchange Commission (SEC). Members of the board could not be removed at will by SEC Commissioners, who themselves (the Court assumed) could not be removed at will by the President. The Court held that “such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.” *Id.* at 484.

The Court’s conclusion—that *Humphrey’s Executor* could be distinguished because the FTC and the President are separated by one level of removal, whereas the PCAOB and the President were separated by two—raised questions. For one, there is a strong argument that SEC Commissioners do not enjoy statutory protection from removal. “When a statute does not limit the President’s power to remove an agency head, we generally presume that the officer serves at the President’s pleasure.” *Collins*, 594 U.S. at 248. Furthermore, “Congress created the SEC at a time when, under this Court’s precedents, it would have been *unconstitutional* to make the Commissioners removable only for cause.” *Free Enterprise*, 561 U.S. at 546-47 (Breyer, J., dissenting) (citing *Myers v. United States*, 272 U.S. 52 (1926)).

The Court also did not explain why its logic would not extend beyond the multi-level context. Whether there is one or two levels of removal protection, the key point is that President’s ability to control the use of executive power is impaired. Because that is so, much of *Free Enterprise Fund*’s reasoning applies equally to single-level removal protections. See, e.g., Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in Free Enterprise Fund v. PCAOB*, 79 FORDHAM L. REV. 2541, 2559-60 (2011). Alarmed by that implication, Justice Breyer dissented at length.

Any assumption, moreover, that *Free Enterprise Fund*’s impact would be confined to multilevel protection was dispelled in *Seila Law*. That case involved the CFPB, a powerful regulator in many respects modeled on the FTC but with a key difference: Whereas the FTC is headed by a multimember body, the CFPB is headed by a single director. In *Seila Law*, the Court held that the CFPB’s single-director structure was

unconstitutional because the CFPB “wields significant executive power” but the President could not remove the director at will. 591 U.S. at 204.

In reaching that conclusion, the Court read *Humphrey’s Executor* narrowly: “Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’” *Id.* at 215. Justice Thomas thus urged overruling *Humphrey’s Executor* outright because the Court “has repudiated almost every aspect of” it. *Id.* at 239 (Thomas, J., concurring in part). Justice Kagan dissented, emphasizing that if removal protections for a single person are unconstitutional, removal protections for multiheaded agencies should be *more* unconstitutional. *See id.* at 293 (Kagan, J., dissenting) As Court-appointed *amicus* there observed, “If it is unconstitutional to impose for-cause removal restrictions on one officer exercising executive power, imposing those restrictions on five officers exercising executive power would seem five times worse.” Brief for Court-Appointed *Amicus Curiae*, *Seila L. LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7), 2020 WL 353477, at *40-41.

Then came *Collins*. The FHFA Director could be removed only “for cause.” The Court explained that a “‘for cause’ restriction appears to give the President more removal authority than other removal provisions,” and that under this Court’s precedent, “disobeying an order is generally regarded as ‘cause’ for removal.” 594 U.S. at 256; accord Kent Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1374-75 & nn. 142-43 (2012); John F. Manning, *The Independent Counsel Statute: Reading “Good Cause” in Light of Article II*, 83 MINN. L. REV. 1285, 1301 (1999). Even so, and even though the FHFA “regulates primarily Government-sponsored enterprises, not purely private actors,” and exercises orders of magnitude

less coercive power than the CFPB, the Court held that the protection violated Article II. *Collins*, 594 U.S. at 251. Within weeks, President Biden invoked *Collins* to remove the FHFA Director and the Social Security Commissioner.

Although members of the Court disagree about *Free Enterprise Fund*, *Seila Law*, and *Collins*, their rule is clear: “Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’” *Seila L.*, 591 U.S. at 203 (quoting U.S. CONST. ART. II, §§1, 3). This carries with it power to remove “subordinate officers,” else “the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Id.* (quotation omitted). Hence, “[t]he President’s power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II” and history. *Id.* at 2192. The only “exceptions” involve “multimember expert agencies that do not wield substantial executive power” or “inferior officers with limited duties and no policymaking or administrative authority.” *Id.* at 218.

Given that rule, the outcome in *Slaughter* appears almost to be a foregone conclusion. Whatever can be said about the FTC today, it exercises vast amounts of executive power. In fact, as Professor Daniel Crane observes, the FTC now is essentially “a conventional law enforcement department,” not unlike the “the Justice Department” or any other “traditional law enforcement agenc[y].” Daniel Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1836, 1863, 1868 (2015); accord Aaron L. Nielson, *Humphrey’s Executor and the Future of Presidential Power*, CIVITAS OUTLOOK (Sept. 9, 2025), <https://perma.cc/ZLW8-76SN>.

II. The Fed Is Different In Kind From Other Agencies.

The question looming over the “independent agency” debate is what to do with the Fed. Madison reasoned in 1789 that the President has Article II authority to remove executive officers. But Hamilton recognized in 1790 that monetary policy requires at least some independence. Does overruling or limiting *Humphrey’s Executor* in *Slaughter* therefore threaten independent monetary policy?

No, because the Fed should not be treated like other agencies. This is not because the Court lacks the courage of its convictions, but because the Fed’s core function—monetary policy—has its own unique history. This point is confirmed by the First and Second Banks of the United States, both of which would have been hopelessly unconstitutional under Article II if they exercised executive power. Furthermore, as the Court explained in *Collins*, a “for cause” removal protection is more limited than other protections. When these points are combined, it is apparent that the Fed’s independence is *sui generis* and should not rise and fall with the FTC’s.

A. A Brief History of U.S. Central Banking.

1. Before the founding, other nations had central banks. *See, e.g.*, CHARLES P. KINDLEBERGER, A FINANCIAL HISTORY OF WESTERN EUROPE 48-56 (2d ed. 1993). After the founding, Treasury Secretary Hamilton turned his attention to the issue.

Hamilton concluded that Congress should establish a national bank independent from political control. *See* Alexander Hamilton, *Report on a National Bank* (Dec. 13, 1790), in 1 REPORTS OF THE SECRETARY OF THE TREASURY 65 (1828). He explained that “to attach full confidence to an institution of this nature,” the bank must be “under a *private* not a *public* direction, under the guidance of *individual interest*, not of *public*

policy.” *Id.* After all, although it is “true” that “the real interest of the Government [would be] not to abuse” monetary power, “what Government ever uniformly consulted its true interest, in opposition to the temptations of momentary exigencies?” *Id.* Currency manipulation “is an operation so much easier than the laying of taxes, that a government, in the practice of paper emissions, would rarely fail in any such emergency, to indulge itself too far in the employment of that resource, to avoid, as much as possible, one less auspicious to present popularity.” *Id.* at 82. Or using a more modern vocabulary, when it comes to monetary policy, someone must be “the chaperone who has ordered the punch bowl removed just when the party [is] really warming up.” CONTI-BROWN, *supra*, at 3 (quotation omitted).

2. In 1791, Congress chartered the First Bank of the United States. The First Bank issued notes that “would be ‘receivable in all payments to the United States,’ thereby rendering them a *de facto* circulating currency.” Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1342 (2019). It also “acted as the federal government’s fiscal agent, collecting tax revenues, securing the government’s funds, making loans to the government, transferring government deposits through the bank’s branch network, and paying the government’s bills.” FED. RES. BANK OF PHILADELPHIA, *THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING* 5 (2021) [hereinafter, *FIRST BANK OF THE UNITED STATES*].

Yet the First Bank was not a federal agency. Instead, it “accepted deposits from the public and made loans to private citizens and businesses.” *Id.* at 8. And like a private bank, shareholders purchased shares, with the overwhelmingly majority of

the funds coming from private investors. *Id.* at 4. The First Bank's structure also differed from a government agency's. Although Congress "pledged" the "faith of the United States" not to charter another bank for two decades, the government did not control the bank. Bamzai, *supra*, at 1342. Instead, shareholders elected 25 directors, and those directors in turn selected the bank president. *Id.* But the government was not entirely aloof, either. Congress, for instance, empowered the Secretary of the Treasury "to inspect the bank's books, require statements of the bank's condition as frequently as once each week, and remove the government's deposits at any time for any reason." FIRST BANK OF THE UNITED STATES, *supra*, at 8.

The First Bank's "prominence as one of the largest corporations in America and its branches' broad geographic position in the emerging American economy allowed it to conduct a rudimentary monetary policy." *Id.* at 8-9. "When it wanted to slow the growth of money and credit, it would present [to others] the notes [in its vault] for collection in gold or silver, thereby reducing state banks' reserves and putting the brakes on state banks' ability to circulate new banknotes." *Id.* at 9.

In 1811, the First Bank's charter expired after Congress refused to reauthorize it. See FIRST BANK OF THE UNITED STATES, *supra*, at 10. In criticizing the First Bank, Henry Clay objected that the bank influenced monetary policy. He observed that the bank did more than just "aid[] in the collection of the revenue," but rather had "made to diffuse itself throughout society, and to influence all the great operations of credit, circulation, and commerce." *On Renewing the Charter of the First Bank of the United States* (1811), reprinted in 1 THE LIFE AND SPEECHES OF THE HONORABLE HENRY CLAY 210, 214 (Daniel Mallory, ed., Robert P. Bisby & Co., N.Y., 1843).

3. Five years (and a war) later, Congress reversed course and chartered—also for a period of 20 years—the Second Bank of the United States. *See* FEDERAL RESERVE BANK OF PHILADELPHIA, THE SECOND BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 5-6 (2021) [hereinafter, SECOND BANK OF THE UNITED STATES]. The Second Bank again helped facilitate the government’s fiscal affairs while operating largely within a private financial system. *Id.* at 6. This bank also could shape monetary policy. In fact, its influence was greater thanks to its extensive network of branch offices and substantial capitalization. *Id.* at 6, 8-9.

The Second Bank’s structure marked a notable departure from the First Bank’s, however. Congress granted “the President [authority] to appoint five of the Bank’s twenty-five directors with the Senate’s advice and consent.” Bamzai, *supra*, at 1343. Congress further required that no more than three directors hail from the same State and that the twenty privately-chosen directors be “annually elected at the banking house in the city of Philadelphia ... by the qualified stockholders of the capital of the said bank, other than the United States[.]” Act of Apr. 10, 1816, ch. 44, §8, 3 stat. at 269. As with the First Bank, though, the Second Bank’s president continued to be selected by the directors, not the U.S. President. *Id.* at 270.

Following criticism from President Jackson (who feared the bank may have “manipulat[ed]” monetary policy “during the election campaign of 1828” to hurt him politically), the government did not renew the Second Bank’s charter. SECOND BANK OF THE UNITED STATES, *supra*, at 5, 12. Instead, Congress eventually established the Office of the Comptroller of the Currency “to regulate state banks that participated in a new federal banking scheme.” Bamzai & Nielson, *supra*, at 878.

4. Even a glance at the First and Second Banks confirms that they could not possibly be constitutional if Article II applied. Scholars disagree about whether Article II provides the President with plenary authority to remove Executive Branch leaders. But no one disputes that the Appointments Clause—plain on the face of Article II—applies to such leaders. Under the Appointments Clause, the President must nominate principal officers to the Senate, and must do the same for inferior officers unless Congress by law has vested appointment “in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. Const. art. II, §2, cl. 2. Yet for the First and Second Banks, most directors were not appointed by the President, nor were the bank presidents. Such an arrangement would be impossible if these banks were subject to Article II. After all, if they were part of the government, their leaders surely would have been officers. *See, e.g.,* Jennifer L. Mascott, *Who Are “Officers of the United States”?*, 70 STAN. L. REV. 443, 531 (2018).

Instead, the First and Second Banks existed outside of the federal government’s sovereignty. As the Court reasoned in 1824, the federal government “held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank.” *Bank of the United States v. Planters’ Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 908 (1824). And “[s]o” it was too “with respect to the present Bank. ... *The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.*” *Id.* (emphasis added).

In other words, with respect to “[t]he Bank of the United States, ... if the stock belong[s] exclusively to the government, [it] would be a *public* corporation; but

inasmuch as there are other and private owners of the stock, it is a *private* corporation.” JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 9-10 (2d ed. 1843). As James Kent explained, “[a] bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation,” while “a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature.” JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 222 (1827).²

At the same time, Congress cannot relinquish sovereign functions. For example, “[e]ven if the federal government elected to call the Department of State a ‘private’ corporation by statute, ... the department would still accomplish ‘sovereign’ functions, necessitating its categorization as ‘public’ and triggering related constitutional ramifications.” Bamzai, *supra*, at 1354; *see also* ANGELL & AMES, *supra*, at 9 (discussing separate “class” of corporations that was “*municipal*” or “*political*” because it was “endowed with a portion of political power”). Where to draw the line was (and is) difficult, but “the key point for purposes here is that [jurists] understood the Banks of the United States to fall on the non-sovereign side of the line.” Bamzai & Nielson, *supra*, at 900; *cf. Buckley v. Valeo*, 424 U.S. 1, 138-39 (1976) (not all functions require executive power). Thus, although the banks raise complex questions about

² *See also* Kent, *supra*, at 222 (“The same thing may be said of insurance, canal, bridge and turnpike companies. The uses may, in a certain sense, be called public, but the corporations are private A hospital, founded by a private benefactor, is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded ... in the same manner, is a private charity, though from its general and beneficent objects, it may acquire the character of a public institution.”).

sovereignty, executive power, and Congress’s flexibility to create entities, the key point here is that they conducted a form of early monetary policy while operating outside of Article II’s ordinary requirements.

B. The Federal Reserve System.

In 1913, Congress created the Federal Reserve System. This entity—really, a collection of entities—is complicated, and plainly is not like other agencies.

1. Although the Fed Chair often commands the spotlight, the Fed’s governing authority is the Board of Governors. The Board is responsible for overseeing “all aspects of the operation of the Federal Reserve System[.]” *THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES* 7 (11th ed. 2021). Members of the Board are appointed by the President with Senate confirmation to serve staggered 14-year terms “unless sooner removed for cause by the President.” 12 U.S.C. §242. “By statute, the Board is composed of seven members who represent the nation’s varied commercial and geographic interests.” Bamzai & Nielson, *supra*, at 854 (citing 12 U.S.C. §241).

The Chair is drawn from the Board of Governors and is separately nominated by the President and confirmed by the Senate to a four-year term, with the possibility of reappointment. 12 U.S.C. §242. The Chair is significant (in large part) because of its ability to influence the Board, but the position has few—though not zero—duties. *See* Bamzai & Nielson, *supra*, at 855. The President (by statute) may remove the Chair from the Board of Governors only “for cause,” but no statute purports to provide the position of Chair itself with separate protection.

There are also two Vice Chairs, both of whom are Governors who have been nominated by the President and confirmed by the Senate to four-year terms. One Vice

Chair fills in for the Chair, while the other—the Vice Chair for Supervision, created in 2010—enjoys substantial supervisory powers. Although the President cannot by statute remove them at will from the Board of Governors, no statute purports to protect them from being removed from serving as Vice Chairs.

The Fed, however, also has a private character because of the twelve regional Federal Reserve Banks. These banks serve as the Fed’s “operating arms,” with responsibilities that include “examin[ing] and supervis[ing] financial institutions, act[ing] as lenders of last resort, and provid[ing] U.S. payment system services[.]” FED EXPLAINED, *supra*, at 7-8. Private banks hold stock in them, and each operates under the “supervision and control” of a nine-member board of directors, divided into “Class A,” “Class B,” and “Class C.” Bamzai & Nielson, *supra*, at 856-57. Member banks elect Class A and Class B directors—Class A representing member-bank interests and Class B representing the public—while the Fed’s Board of Governors appoints Class C directors. *Id.* Directors serve staggered three-year terms. *Id.*

Finally, the Federal Open Market Committee (FOMC) is responsible for overseeing the Fed’s “open market operations.” It consists of the Fed’s Board of Governors along with “five representatives of the Federal Reserve banks,” each of whom must be either a “president or first vice president” of a Reserve Bank. 12 U.S.C. §263(a). The FOMC convenes “at least four times each year,” *id.*, and “direct[s] open market operations that set[] U.S. monetary policy,” FED EXPLAINED, *supra*, at 13.

2. The Fed’s most important role is managing the nation’s money supply. To do so, it engages in open-market operations—buying and selling U.S. Treasury securities—along with setting the discount rate and reserve requirements for member

banks. It also provides check clearing, wire transfers, and other payment services, and serves as lender of last resort. The Fed additionally regulates financial institutions, enforces capital and liquidity standards, and issues rules. *See, e.g., Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 805 (2024). Some of these functions—especially those tasks requiring legal coercion—bear the hallmarks of executive power. *See, e.g., Buckley*, 424 U.S. at 137-41.

C. History and Structure Entitle the Fed to Unique Treatment.

Two aspects confirm the Fed’s unique status. First, the Fed’s primary function is monetary policy. And second, the Board’s “for cause” protection is limited. Especially combined, these aspects counsel in favor of a different analysis for the Fed.

1. As the First and Second Banks confirm, Congress can place monetary policy outside of ordinary political control, at least so long as a bank is not owned entirely by the government. The Fed, by design, has extensive private involvement. By contrast (and suffice it to say), agencies like the FTC have no private shareholders.

Nor do other agencies’ independence have the same “basis in history.” *Seila L.*, 591 U.S. at 220. As Professor Bamzai has documented, the early nation respected removal with respect to financial regulation. *See, e.g., Bamzai, supra*, at 1305. In fact, in 1864, Congress *repealed* a removal protection (that had only existed for a year) for the Comptroller of the Currency, with one Senator observing it was “well-settled law that under the Constitution of the United States the President has the absolute power of appointment and the equally absolute power of removal,” and Congress should “leave the responsibility of removal to the President himself.” *Congress’s Anti-Removal Power, supra*, at 33-34 (quoting CONG. GLOBE, 38th Cong., 1st Sess. 1865

(1864)). Yet the First and Second Banks existed for decades, even though—if Article II applied—the constitutional violation would have been obvious.

Monetary policy thus can be different in kind from other things agencies do. In fact, that longstanding tradition continues to this day. Although President Trump has not been shy about exercising his Article II powers, he excluded the “conduct of monetary policy” from OIRA review. Exec. Order No. 14215. Nor is he an outlier with respect to this tradition. Much of the Fed’s independence results not from statutory law, but rather an agreement in 1951 between the Fed and the Treasury Department that came to “form[] the basis in perception and in fact of the idea that the Fed’s monetary policy is institutionally separate from the economic policies of the [P]resident.” CONTI-BROWN, *supra*, at 37. The considered judgment of many Presidents that monetary policy is unique should not be brushed aside lightly.

2. At the same time, the protection here is limited. Today’s President has more statutory authority to influence the Fed than past Presidents had to influence the First and Second Banks. Combining monetary policy (which is unique) with a bare “for cause” provision (which is limited) should result in distinct treatment.

As *Amicus* explained in *Collins*, although certainly not the same as at-will removal, the word “cause”—at issue there, too—“confer[s] the weakest protection” in removal law. *Collins v. Mnuchin*, 938 F.3d 553, 619 n.15 (5th Cir. 2019), *aff’d in part sub nom, Collins*, 594 U.S. 220 (quoting Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (And Executive Agencies)*, 98 CORNELL L. REV. 769, 788 (2013)). “Cause” means a “sufficient reason,” *Cause*, merriam-webster.com, <https://perma.cc/79NJ-JDCL>, and *includes* terms like inefficiency, neglect, or

malfeasance, but is broader than all of them, *see, e.g.*, 45 U.S.C. §154 (“inefficiency, neglect of duty, malfeasance in office, or ineligibility, *but for no other cause*”) (emphasis added); 29 U.S.C. §153(a) (“neglect of duty or malfeasance in office, *but for no other cause*”) (emphasis added); 42 U.S.C. §10703(h) (“malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, *but for no other cause*”) (emphasis added).

Furthermore, as *Amicus* also explained in *Collins*, this reading accords with ordinary usage. “Cause” denotes a legitimate reason for termination. *E.g.*, 82 Am. Jur. 2d, *Wrongful Discharge* §121 (2025). And although Governors have their own views, they still must do a good job, for “[t]he legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough,” *Electrical Workers*, 346 U.S. at 475, especially since even public “employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist,” *Elrod v. Burns*, 427 U.S. 347, 366 (1976) (plurality). Figuring out how that general language shakes out with respect to the Fed sometimes may be difficult, but nothing in the Federal Reserve Act suggests a different meaning. On the contrary, in 1933, before *Humphrey’s Executor*, Congress deleted “for cause” from the statute. Then in 1935, post-*Humphrey’s Executor*, Congress re-inserted it. *E.g.*, Bamzai & Nielson, *supra*, at 885. Congress thus decided not to use the text that the Court blessed in *Humphrey’s Executor*, even though “Humphrey’s case was a *cause celebre*—and not least in the halls of Congress.” *Wiener v. United States*, 357 U.S. 349, 353 (1958). Congress’s decision *not* to use stronger language is notable.

3. The Fed is thus different in kind from other agencies—both in power and scope of statutory protection. True, the Fed does more than just monetary policy, and some ways of doing monetary policy potentially may require executive power. Congress too has tasked the Fed with new duties that plainly require executive power, including with respect to criminal law. *See, e.g.,* Bamzai & Nielson, *supra*, at 887. Nor is it always easy to distinguish functions that require executive power from those that do not, making analogies to history difficult. *See, e.g., id.* at 906-08. All these observations may prompt questions for another day. But the Court need not resolve such questions about the Fed in this case or *Slaughter*. President Trump does not rest on Article II for Governor Cook’s removal but instead invokes the statute. The Court thus need not and should not address unnecessary constitutional issues.

III. Congress Has Other Tools to Protect Independence.

Whatever the Court decides here or in *Slaughter*, it will not follow that Congress is powerless to protect agency expertise. Congress has tools to discourage removal and has used them with respect to the Fed and other agencies. If necessary, Congress could use these tools more deliberately to protect monetary independence.

A. James Madison argued for a robust Article II removal power in the Decision of 1789. His argument then, and now, attracted disagreement. But even while defending that power, he agreed that politics would make it difficult for a President to “wantonly dismiss a meritorious and virtuous officer.” 1 ANNALS OF CONG. 517 (1789) (Joseph Gales ed., 1834). The danger of a removal power, he observed, is that “the President can displace from office a man whose merits require that he should be continued in it.” *Id.* at 518. Madison thus asked, “What will be ... the restraints that

operate to prevent” that danger from occurring? *Id.* He then answered his own question: One “restraint” is fear of impeachment. *Id.* And apart from that extreme measure, “the community will take side ... against the President” and “facilitate those combinations” that harm him politically. *Id.* Madison then finished the thought: “To displace a man of high merit, and who from his station may be supposed a man of extensive influence, are considerations which will excite serious reflections beforehand in the mind of any man who may fill the presidential chair.” *Id.*

That political dynamic exemplifies Congress’s anti-removal power. The idea is simple: By empowering Congress with tools that make removal politically costly for the President, the Constitution enables Congress to make removal less likely.

The most obvious anti-removal tool is the Appointments Clause. Because the President knows that the Senate may refuse to confirm a replacement if it disapproves of the incumbent’s removal, the President is less likely to remove the incumbent, especially if Congress has designed the office such that it needs a Senate-confirmed leader. Hamilton identified this dynamic and emphasized that the Clause’s “silent operation” is to prevent removal. THE FEDERALIST NO. 76, *supra*, at 457. As he put it, if “a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him, by the apprehension that a discountenance of the Senate might frustrate the attempt,” which rejection would “bring some degree of discredit upon himself.” THE FEDERALIST NO. 77, *supra*, at 459.

Hamilton was not a game theorist, but he understood politics. If the President cannot (i) get a replacement confirmed or (ii) install an acting official, he is less likely

to fire the incumbent. Both of those checks on removal are within Congress’s control. Many separation-of-powers cases, moreover, strengthen Congress’s anti-removal power. “Indeed, the Justices who most fervently oppose *Humphrey’s Executor* have also most aggressively argued that the President should not be able to duck the Appointments Clause.” *Congress’s Anti-Removal Power*, *supra*, at 9 (citing *SW General, Inc. v. NLRB*, 580 U.S. 288, 311 (2017) (Thomas, J., concurring), and *NLRB v. Noel Canning*, 537 U.S. 513, 569 (2014) (Scalia, J., concurring in the judgment)).

Once one sees that the Constitution “silent[ly]” empowers Congress to discourage removal, one also sees that Congress has many tools to encourage such “stability in the administration,” THE FEDERALIST NO. 76, *supra*, at 457, including:

Congress's Toolkit for Strengthening Its Anti-Removal Power		
Tool		Description
Soft Tools	Impose Removal Reason-Giving Requirement	This requires the President to report a reason (any reason or a specific good-cause reason) to Congress for the firing.
	Enact Statutory Signals of Agency Independence	These include labeling the agency as "independent," setting a term of years for the office, and enacting legislative findings that reinforce independence.
	Require Congressional Hearings on Removal	A hearing with the fired official and other witnesses could be required whenever removed or for failure to comply with reason-giving requirements.
Hard Tools	Heighten Senate Cloture Vote Threshold on Replacement Nominee	Senate cloture vote could be increased above a simple majority for removal, or more narrowly when the President does not provide adequate reasons.
	Slow Down Senate Confirmation Process on Replacement Nominee	Procedures for hearing, debate, and consideration of subsequent nominee could be drawn out if removal was not for good reasons.
	Impeach the President (or Threaten Impeachment)	Congress could signal in enacted legislative findings that presidential impeachment is on the table for improper removal, with impeachment being the ultimate hard tool.
Anti-Evasion Tools	Prevent Recess Appointments	The Senate can ensure it is never in a recess long enough to allow the President to make a recess appointment replacement.
	Reform the Vacancies Act for Use of Acting Officials	Congress could reform the Federal Vacancies Reform Act to increase removal costs by limiting the President's options for acting or temporary leaders.
	Limit Subdelegations and Acting Officials Authority	Congress can narrow the authority of an agency under an acting leader or otherwise prohibit the subdelegation of agency authority within the agency.

Congress's Anti-Removal Power, *supra*, at 68; see also, e.g., *The Early Years of Congress's Anti-Removal Power*, *supra* (offering early examples).

B. Notably, Congress has already used its anti-removal power with respect to Fed. The Fed's primary safeguard is not a statutory removal protection but rather norms backed by fear of political consequences. The Chair, for example, does not appear to be protected by any removal protection. As *Collins* explains, “[w]hen a statute does not limit the President’s power to remove an agency head, we generally presume that the officer serves at the President’s pleasure,” especially “when Congress includes particular language in one section of a statute but omits it in another section of the same Act.” 594 U.S. at 248 (citations omitted). Congress’s decision not to enact removal protection for the Chair, while enacting express protection for the Governors, suggests that the Chair *qua* Chair has no statutory protection.

Yet despite occasional saber-rattling, Fed Chairs generally are safe. Presidents are wary of interfering because doing so prompts objections, and Congress—armed with its own megaphone—is quick to respond. Of course, norms do not always hold, even if backed by politics. The White House could decide, for example, that the Fed Chair is doing such a poor job that removal is warranted. But that is not typical. And if it were to happen, there may be good reason for removal; no one claims that removal is *never* warranted, a position that finds no support in the relevant statutes.

Congress, moreover, has signaled that it will push back against meritless removal. Specifically, Congress has declared that the Fed’s Board of Governors is an “independent regulatory agency.” 44 U.S.C. §3502(5). As *Collins* explains, “Congress has described many agencies as ‘independent’ without imposing any restriction on

the President’s power to remove the agency’s leadership.” 594 U.S. at 249. Yet history shows that labels can act as a signal that removal is disfavored, which may “discourage removal.” *Congress’s Anti-Removal Power*, *supra*, at 52.

Nor is the Fed the only agency for which Congress’s anti-removal power applies. The only protection for the Comptroller of the Currency, for example, is a reasoning requirement. *See* 12 U.S.C. §2. That requirement is an intentional use by Congress of its anti-removal power. In fact, the key Senator explained that although the President may still remove for any reason, requiring him to give a reason—even a poor one—would naturally “limit” the use of removal “by ensuring that he would ‘not exercise this power unless he has good reasons for it,’” which would be “a very prudent and proper check[.]” *Id.* at 34 (CONG. GLOBE, 38th Cong., 1st Sess. 2122 (1864)). Similar requirements provide some protection for inspectors general. *See id.* at 7.

C. If Congress is concerned about the Fed or other agencies, it can use more of these anti-removal tools, and use them more deliberately. To be sure, whether Congress should do so is a policy question for Congress and voters. But holding that removal protections do not apply in a particular case—either because a statute’s text does not stretch so far, or (as appears likely in *Slaughter*) because Article II supersedes that text—does not mean that Congress is powerless. Accordingly, whatever the Court decides with respect the statutory question in this case or the constitutional question in *Slaughter*, the Court’s determination will not remotely spell the end of agency expertise, let alone independent monetary policy.

CONCLUSION

The Court should reaffirm that the Fed is different in kind from other agencies and that Congress possesses tools to safeguard monetary independence.

Respectfully submitted,

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