No. 24A966

IN THE

Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES, ET AL.
v.
GWYNNE A. WILCOX

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL., APPLICANTS
v.
CATHY A. HARRIS

On Application to Stay the Judgments of the United States District Court for the District of Columbia

AMICUS CURIAE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF STAY

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INTEREST OF THE AMICUS CURIAE[1]

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil rights organization and public-interest law firm devoted to defending constitutional freedoms from the administrative state's depredations. Professor Philip Hamburger founded NCLA to challenge multiple constitutional defects in the modern administrative state through original litigation, *amicus curiae* briefs, and other advocacy. The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, and the right to have laws made by the nation's elected lawmakers through constitutionally prescribed channels (*i.e.*, the right to self-government). These selfsame civil rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, the President, federal agencies, and even sometimes the Judiciary, have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although the American People still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional state within the Constitution's United States is the focus of NCLA's concern.

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus* or its counsel made a monetary contribution to its preparation or submission.

NCLA is particularly disturbed by the injunctions issued below, which flout the Constitution's separation of powers and purport to override the President's absolute authority to remove officials who exercise executive power on his behalf. Most troubling is the district court's order mandating the reinstatement of removed officials—an extraordinary remedy that exceeds the traditional bounds of equitable relief and infringes the President's executive power under Article II. Courts do not possess the power to "reappoint" principal officers removed by the President. Doing so here represents a further assault on the separation of powers by wresting from the President the Article II appointments authority necessary for him to fulfill his constitutional duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

INTRODUCTION AND SUMMARY

Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." Such power includes the separate authorities to both appoint and remove officers who exercise executive power on his behalf. The text, structure, and original understanding of the Constitution confirm that the President, as the sole head of the Executive Branch, possesses an unqualified and exclusive authority to remove these executive officers—including members of the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB).

Three provisions of Article II are central to this analysis. *First*, the Vesting Clause confers the entire "executive Power" upon the President. *Second*, the Take Care Clause charges the President alone with the duty to "take Care that the Laws

be faithfully executed." *And third*, the Appointments Clause governs how Principal Officers of the United States may be appointed with the advice and consent of the Senate—but notably says nothing about their removal.[2] That structural silence is telling.

When read together and in light of the proper historical understanding of the function and structure of the provisions—particularly the Constitution's express mandates governing the appointment of "Officers of the United States" and its corresponding silence concerning their removal—it becomes clear that Article II's grant of executive power confers upon the President an absolute and unqualified removal authority. Accordingly, neither Congress nor the courts have authority to interfere in the President's decision to remove NLRB and MSPB members.

Even assuming *arguendo* that Congress could condition or limit the removal of such officers, a court still may not compel their reinstatement even in the face of unlawful removal. Judicial commands to treat removed officials as if they remain in office run headlong into Article II and transgress the limits of equitable power. No tradition or historical practice supports such relief; and courts of equity, both at the Founding and today, lack authority to reappoint officials whom the President removes. Such illegitimate reinstatement represents a further assault on Article II.[3]

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[2] The Constitution does provide for alternative means of appointing *inferior* officers; however, by definition, an "inferior" officer must have a "superior" other than the President. *United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021) (quoting *Edmond v. United States*, 520 U.S. 651, 662 (1997)) (internal quotation marks omitted). Because the Members of the NLRB and the MSPB have no such "superior," it necessarily follows that they are principal officers. In any event, no party disputes that Members of these Boards are indeed principal officers.

[3] This is not to say that the President may contravene the law. Rather, it is to say that the remedy is political (*e.g.*, impeachment), with the courts remaining open to award an improperly removed officer

Because the injunctions below not only intrude on the President's core Article II power, but also grant equitable relief far beyond what is within any federal court's remit, Applicants are likely to succeed on the merits of their appeal. Accordingly, this Court should stay those injunctions. It should also grant *certiorari* before judgment to resolve this recurring issue of exceptional constitutional importance before illegitimate reinstatements further hinder the President's actions.

ARGUMENT

I. ARTICLE II GRANTS THE PRESIDENT UNQUALIFIED AUTHORITY TO REMOVE OFFICERS WHO EXERCISE *HIS* EXECUTIVE POWER

The Constitution vests "the executive Power" in a single individual—the President of the United States. U.S. Const. Art. II, § 1. That grant is not partial, contingent, or diluted across the branches of government. It is complete and exclusive. And it necessarily carries with it the authority to oversee, direct, and, when necessary, remove those who wield executive power in the President's name. As the Supreme Court has long recognized, a President who lacks the ability to remove principal officers cannot be held fully accountable for faithfully executing the law. The Framers did not design a system of divided responsibility or diffused accountability: They vested executive power in one person precisely so that the public would know who to praise—or blame—for the actions of the Executive Branch.

This foundational principle is not undermined by the absence of explicit removal language in Article II. To the contrary, that silence speaks volumes. Whereas

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whatever compensation is due. Indeed, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) was just such a case.

the appointments authority is carefully cabined and shared with the Senate, the removal authority is left to flow naturally from the President's general grant of executive power. That structural logic, affirmed by practice dating back to the First Congress and repeatedly reaffirmed, reflects the original understanding of the significance of vesting all executive power in a single person, the President. Any effort to limit the President's removal authority—whether by statute or by judicial decree—is incompatible with the Constitution's clear vesting of *all* executive power in the President alone.

A. Unqualified Removal Authority Is Inherently Necessary to Preserve the Vesting of All Executive Power in the President

The Constitution provides the executive power "shall be vested" in the President. The President, by himself, however, cannot execute the law, so he necessarily must rely on subordinates—whether principal officers, inferior officers, or employees—to do most of the execution. *See Myers v. United States*, 272 U.S. 52, 134 (1926); *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890). Yet, the President, by using subordinate officers or employees, does not thereby *irretrievably* delegate away his "executive power." Rather, that power remains fully and permanently vested in the President. As this Court held in *Seila Law LLC v. Consumer Financial Protection Bureau*, the President maintains the authority to both "supervise and remove the agents who wield executive power in his stead." 591 U.S. 197, 238 (2020).

Such removal authority is, in fact, essential if executive power is to be accountable. As the Court explained in *Myers*, 272 U.S. at 134, "[t]he imperative reasons requiring [the President to possess] an unrestricted power to remove the most

important of his subordinates in their most important duties must therefore control the interpretation of the Constitution as to all appointed by him." *See also Seila Law*, 591 U.S. at 238 ("In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead."); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep … officers accountable—by removing them from office, if necessary."); *Fleming v. U.S. Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring-in-part and dissenting-in-part) ("Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power 'remained with the President' unless 'expressly taken away' by the Constitution.") (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789)).

Indeed, because of the vast growth in executive power, it is more important now than ever before that such power be accountable through presidential removal. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) ("Today, thousands of officers wield executive power on behalf of the President in the name of the United States. That power acquires its legitimacy and accountability to the public through 'a clear and effective chain of command' down from the President, on whom all the people vote.") (quoting *Free Enter. Fund*, 561 U.S. at 498). Accordingly, faithfulness to the Vesting Clause of Article II requires recognition of the President's untrammeled authority to remove executive branch officials, for if the President cannot retain and

remove those who execute the law, he no longer wields the full law-executing authority that the Constitution bestowed on him.

B. Only by Possessing Absolute Removal Authority Can the President "Take Care that the Laws Be Faithfully Executed"

The Executive's absolute removal authority provides the chief mechanism for the President to "take Care that the Laws be faithfully executed." U.S. Const. Art II, § 3. As noted above, the President must delegate much of his *authority* to carry the laws into execution to subordinates. *See Myers*, 272 U.S. at 117; *Cunningham*, 135 U.S. at 63-64. But his *duty* to "take Care that the Laws be faithfully executed" is non-delegable, so he remains exclusively responsible for this function. Ultimately, the President must hold the authority to remove individuals who, in his view, do not help him fulfill, or worse yet, who undermine his duty to faithfully execute the Nation's laws. Said otherwise, if such subordinates are essential for executing the law, then the Constitution must also "empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483.

Only by threat of removal may the President exercise consummate control over his subordinates, thereby ensuring that through *their* actions or inactions, *he* does not fail in *his* duty to "take Care that the Laws" are executed faithfully. "[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Myers*, 272 U.S. at 164.

"A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) (quoting U.S. Const. art. II, § 3). It therefore follows that any official who is authorized to bring suit on behalf of the United States as a "remedy for a breach of the law," such as NLRB member Wilcox, must be directly answerable to the President and removable by him. Likewise, any officials authorized to make final agency adjudications, which bind the United States, like NLRB member Wilcox and MSPB member Harris, must also be directly answerable and removable. The Take Care Clause thus punctuates and confirms that the President's executive power includes a discretionary and unreviewable authority to remove officials who exercise his authority under that clause.

C. Unlike the Constitution's Appointments Authority, the Removal Authority Is Absolute

Although the President's executive power includes both hiring and firing authority, the Constitution treats them differently. Article II modifies and limits executive authority over appointments, but its purposeful silence leaves the removal authority unrestrained.

That executive authority to remove officers is absolute was spelled out in 1789 by Representative John Vining of Delaware:

> [T]here were no negative words in the Constitution to preclude the President from the exercise of this power, but there was a strong presumption that he was invested with it; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his

> executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

John Vining (May 19, 1789), in 10 Documentary History of the First Federal Congress 728 (Charlene Bangs Bickford, et al., eds.) (The Johns Hopkins Univ. Press, 1992). James Madison was equally emphatic, writing:

> The legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. … The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the constitution stipulates for the independence of each branch of the government.

James Madison (June 22, 1789), in 11 Documentary History of the First Federal Congress 1032 (Charlene Bangs Bickford, et al., eds.) (The Johns Hopkins Univ. Press, 1992).

Madison rejected the argument that limits on presidential appointments implied similar limits on removals, writing that although the authority over appointment "be qualified in the constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." *Id.* (quoted in *Myers*, 272 U.S. at 128).

The First Congress confirmed these views: In 1789, the First Congress rejected efforts to statutorily limit the President's removal authority, in what has since been (somewhat misleadingly) referred to as "The Decision of 1789." Branding this rejection a "decision" inaccurately suggests the President owes his unlimited removal authority to congressional acquiescence. In fact, it has always been the Constitution's text and structure that established the President's absolute removal authority—by

granting the President executive power without additional language qualifying his executive removal authority. Thus, the 1789 debate merely provides further evidence of the contemporaneous understanding of the Constitution.[4]

In short, at the time of the Founding it was clearly understood that the President's unlimited removal authority differed from, and stood in contrast to, his somewhat cabined authority to make appointments. Although both authorities are part of the "executive power," the latter was substantially qualified by the text of the Constitution itself, whereas the former remained unqualified and thus absolute.

Only through unqualified removal authority can the President maintain control over those who act in his name. Any judicial or legislative attempt to restrain that removal authority undermines the structure of the Constitution and the very notion of democratic accountability.

II. AN HISTORICAL UNDERSTANDING OF EXECUTIVE POWER FURTHER CONFIRMS THE PRESIDENT'S REMOVAL AUTHORITY IS ABSOLUTE AND UNQUALIFIED

The "executive power" is much broader than merely the power to execute the laws. Undoubtedly, such power includes the execution of law, but at the Founding it was understood as also including the nation's action, strength, or force. This more expansive foundation reinforces and broadens the conclusion that the President's "executive power" includes the authority to remove subordinates at will.

An understanding of executive power as the "nation's action, strength, or force" was a familiar concept at the time of the Founding. *See* Philip Hamburger, *Delegation*

[4] According to this Court: "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. More accurately, the Court might have said: "Since 1787, … "

or Divesting, 115 N.W.L.Rev. Online 88, 110-16 (2020). For example, Jean-Jacques Rousseau associated executive power with society's "force," and Thomas Rutherforth defined it as society's "joint strength." *See id.* at 112. As Alexander Hamilton understood and explained, the Constitution divides the government's powers into those of "Force," "Will," and "Judgment"—that is, executive force, legislative will, and judicial judgment. The Federalist No. 78, at 523 (Alexander Hamilton) (Cooke ed., 1961).

This vision of executive power included law enforcement but also much more. Conceiving of the executive power in this way has the advantage of, for example, explaining the President's power in foreign policy, which cannot easily be understood as mere law enforcement. That the Constitution adopted this broad vision of executive power is clear from its text—in particular, from the contrast between the President's "executive Power," U.S. Const. Art. II, § 1, and his duty to "take Care that the Laws be faithfully executed," *id.*, § 3. Article II frames the President's authority in terms of executive power, not merely "executing the law." The latter is merely a component of the former, which on one hand is limited by the requirement that the President "take Care that the Laws be faithfully executed," but also includes the "nation's action, strength, or force."

It further follows that the more expansive the definition of "executive power," the broader the concomitant authority to remove executive officials must be. Accordingly, because the Constitution vests in the President the "nation's action,

strength, or force," it follows that he must have sufficient authority to remove people whom he views as undermining that strength or lacking in action or forcefulness.

The second foundation matters not only because it is the more accurate understanding of the President's executive power but also because it clarifies the breadth of the President's removal authority. His law-executing authority, which is part of his executive power, reveals that he can hire and fire subordinates engaged in law enforcement. And his executive power—understood more fully as the nation's action or force—shows that he can also hire and fire all other sorts of subordinates. *See Collins v. Yellen*, 594 U.S. 220, 256 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.") (cleaned up). The ability to remove subordinates at will is thus inherently part of the President's extensive executive power. *See Seila Law*, 591 U.S. at 238; *Free Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 134.

III. THE DISTRICT COURT LACKS EQUITABLE POWERS TO ORDER THE REINSTATEMENT OF FIRED BOARD MEMBERS

Even assuming *arguendo* that Wilcox and Harris could be shielded from at-will removal by the President, it does not follow that the judiciary may command their reinstatement—nor compel Executive Branch officials to act as if Respondents continue to wield the President's executive authority even though he has removed them. As a formal matter, the injunctions below directed subordinate executive

officials not to remove Wilcox and Harris and to treat them as still occupying their offices. App.177a-178a, 216a-217a. But as Judge Rao rightly observed on appeal below, such injunctions necessarily operate on the President himself. App.9a-10a. The Constitution vests the authority to appoint, supervise, and remove principal officers exclusively in the President. Attempts to reinstate Wilcox and Harris are, in effect, directives to the President that fall outside of the court's equitable powers. Moreover, by virtue of the injunction, Respondents owe their continuation in office to the court and not to the President, meaning that, at best, their loyalties in exercising executive power (which is wholly vested in the President, *see ante*) will be split. Such divided loyalty is untenable and violates the separation of powers.

This Court has never held that reinstatement is a proper remedy for the removal of an Executive Branch officer. To the contrary, it has long been settled that courts lack jurisdiction to enjoin the President in the exercise of his official duties. *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1867). For that reason, the traditional remedy for an allegedly unlawful removal has never been reinstatement, but rather a claim for back pay. *See Humphrey's Executor v. United States*, 295 U.S. 602, 612 (1935); *Myers v. United States*, 272 U.S. at 106; *Wiener v. United States*, 357 U.S. 349, 349–51 (1958). That distinction is not merely technical. It reflects fundamental separation of powers: a court that purports to reinstate officers impermissibly arrogates the power to appoint from the President.[5]

[5] Such reinstatement further places courts as the supervisor of other Article II officials, whom the injunction compels to ignore the President's command to execute the law consistent with *his* directives and not those given by the reinstated officials.

An injunction reinstating Wilcox and Harris would also exceed the court's power to grant equitable relief. Federal courts may grant only those equitable remedies that were "traditionally accorded by courts of equity." *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). And as the Court explained more than a century ago, "[a] court of equity will not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." *White v. Berry*, 171 U.S. 366, 377 (1898) (citation omitted). There, the Court reversed an injunction that had barred the Secretary of the Treasury from removing a revenue officer—leaving no doubt that such matters are committed to the Executive's discretion, not the judiciary. By the late 19th century, it was "well settled" that "a court of equity has no jurisdiction over the appointment and removal of public officers." *In re Sawyer*, 124 U.S. 200, 212 (1888). As the Court noted, "[n]o English case has been found of a bill for an injunction to restrain [an] appointment or removal," and American courts have "denied" such equitable power "in many well-considered cases." *Id.*

This Court has never departed from that rule. Indeed, it has reaffirmed the principle in decisions spanning over a century. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 231 (1962); *Walton v. H. of Reps.*, 265 U.S. 487, 490 (1924); *Harkrader v. Wadley*, 172 U.S. 148, 165 (1898). And for good reason: permitting the judiciary to second-guess or enjoin executive removals would impermissibly intrude on powers the Constitution entrusts solely to the President. The injunctions here run headlong into this longstanding bar. These orders not only exceed the scope of traditional equitable

relief but they also upend the separation of powers that our constitutional structure instantiates.

However much the district court may have disagreed with the President's removal decisions, it lacked the constitutional and equitable authority to override them. Judicially compelled reinstatement of executive officers flatly contradicts Article II and centuries of Anglo-American equitable practice.

IV. THE COURT SHOULD GRANT CERTIORARI BEFORE JUDGMENT

The Court should grant the Government's petition for certiorari before judgment. The questions presented go to the very core of the separation of powers: whether putative statutory restrictions on the President's removal authority over members of multimember agencies are consistent with Article II's Vesting Clause, and whether a federal court may reinstate officers whom the President has removed. Each new injunction purporting to reinstate a removed official undermines the President's solemn duty to "take Care that the Laws be faithfully executed."

These cases easily meet the standard for certiorari before judgment. The President's removal authority is fundamental to ensuring that *all* executive power is vested in his office. *See, e.g.*, *Seila Law*, 591 U.S. 197 (2020); *Free Enterprise Fund*, 561 U.S. 477. The legal issues are fully developed. The district courts have entered final judgments; the D.C. Circuit has opined in panel and *en banc* proceedings; and it is a near certainty that this Court will ultimately need to resolve the questions presented.

In the meantime, critical federal agencies are operating under a cloud of legal uncertainty. The Government identified four multimember agencies—the NLRB,

MSPB, Federal Labor Relations Authority (FLRA), and Federal Trade Commission—embroiled in litigation brought by former members challenging their removals. *See* Gov't Br. 32, 37. Yet another injunction reinstating a removed official has issued in one of these cases. *See Grundmann v. Trump*, No. 25-cv-425, 2025 WL 782665 (D.D.C. Mar. 12, 2025) (reinstating FLRA member). And since the Government filed its April 9 Application, a former commissioner of the Equal Employment Opportunity Commission has filed yet another suit. *See Samuels v. Trump*, No. 25-cv-1069 (D.D.C. Apr. 9, 2025). More litigation and injunctions are inevitable, so until this Court speaks, the President's constitutional authority—and the legitimacy of a growing list of agencies' actions—will remain in question.

Granting *certiorari* would also address valid concerns raised by Justice Kagan that "[t]he risk of error increases when this Court decides cases … with barebones briefing, no argument, and scarce time for reflection." *Dep't of Educ. v. California*, No. 24A910, slip op. at *2 (U.S. Apr. 4, 2025) (Kagan, J., dissenting from grant of stay). A grant of *certiorari* would permit the Court to consider the issues raised in the regular course and the fullness of time.

The public, the Executive Branch, and the rule of law would all benefit from this Court's immediate attention to and definitive resolution of the questions presented. As Judge Henderson aptly put it: "Only the Supreme Court can decide the dispute"—"the sooner, the better." App.5a.

CONCLUSION

For the foregoing reasons and those provided by Applicants, the Court should stay the district court injunctions reinstating officials removed by the President. It should also grant certiorari before judgment.

April 14, 2025

Respectfully submitted,

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