No. 25-332

IN THE

Supreme Court of the United States

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

Petitioners,

v.

REBECCA SLAUGHTER, ET AL.,

Respondents.

On Writ of Certiorari Before Judgment to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONERS

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INTEREST OF 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 sometimes even the Judiciary, have neglected them for so long. NCLA aims to defend these civil liberties—primarily by advocating for 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 administrative state within the

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

Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed in this case by Congress's flouting of the Constitution's Separation of Powers by infringing the President's absolute authority to remove Commissioners of the Federal Trade Commission. By limiting the President's authority to remove Commissioners solely "for inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41, Congress improperly and unconstitutionally compels the President to act contrary to his judgment to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This unconstitutional usurpation of the executive power, which Article II mandatorily vests in the President alone, not only violates the Separation of Powers but also ruptures our representative form of government. It does so by infringing Americans' right to elect the Executive whose exercise of executive power remains accountable to the people.

INTRODUCTION AND SUMMARY

Separation of Powers serves as a foundation for our Constitutional Republic: not as a mere mechanical guide to the functioning of the federal government, but to protect individual liberty and self-governance. *See FCC v. Consumers' Research*, 145 S. Ct. 2482, 2537 (2025) (Gorsuch, J., dissenting) (citing *Gundy v. United States*, 588 U.S. 128, 152 (2019) (Gorsuch, J., dissenting)) ("The framers divided power among legislative, executive, and judicial branches not out of a desire for formal tidiness, but to ensure ours would indeed be a Nation ruled by 'We the People.'"). Distrust—and disregard—for Americans and our Constitution led to the explosion of the administrative state in the early-to-mid-1900s. Congress then merged legislative, executive and judicial powers into this newly formulated fourth branch of government, with unaccountable bureaucrats soon constricting liberty, just as the Framers feared. *See id.* at 2517 (Kavanaugh, J., concurring) (noting that independent agencies whose principals are not removable at will by the President "belong to what has been aptly labeled a 'headless Fourth Branch'") (quoting *Freytag v. Commissioner*, 501 U.S. 868, 921 (1991) (Scalia, J., concurring in part and concurring in judgment)).

The Federal Trade Commission ("FTC") is one such creature of Congress that exercises legislative, executive and judicial powers—improperly consolidating the powers the Constitution vests in the three separate branches of government. This case concerns Congress's usurpation of executive power, which Article II mandatorily vests in the President, stating that it "shall be vested in a President of the United States of America." U.S. Const. art. II, § 1.

The text, structure and historical context of Article II establish that the President, as the sole head of the executive branch, holds an absolute and unqualified removal authority over officials exercising executive power. A President's absolute and unqualified removal authority does not depend on the quantity or quality of executive power possessed by an agency or an official. Rather, the President possesses absolute and unqualified authority to remove agency officials possessing or exercising executive authority because they can only lawfully exercise such authority in the President's stead.

As shown below, FTC Commissioners exercise executive authority. Accordingly, under Article II, the President possesses the absolute authority to remove them, and neither Congress nor the Courts have authority to interfere in the President's unilateral decision to remove Respondent Slaughter. By purporting to limit the President's authority to remove FTC Commissioners solely "for inefficiency, neglect of duty, or malfeasance in office," 15 U.S.C. § 41, Congress unconstitutionally violated the Separation of Powers.

The Take Care Clause, Separation of Powers principles, and the need to carry out executive power confirm this conclusion. Layers of constitutional text and principles thus compel a repudiation of limits on the President's removal power, and it is the Constitution—not some other prudential principle invented by the Court—that controls.

At stake is not merely the structure of the government, but, more fundamentally, the ability of Americans to enjoy elective control over those who govern them. When agencies act independently of that control, they become free to rule Americans without electoral accountability, creating populist resentment and calling into question the democratic nature and very legitimacy of our government.

Accordingly, *stare decisis* cannot justify this Court in excusing the errors of prior decisions, including *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). That decision should be overturned, and this Court should adopt the original understanding of the Separation of Powers through which the Framers crafted a seamless garment of governance designed to cloak all future generations with an impenetrable liberty.[2]

ARGUMENT

I. THE PRESIDENT'S EXECUTIVE POWER INCLUDES AN ABSOLUTE, UNQUALIFIED REMOVAL AUTHORITY

By statute, a duly appointed Commissioner of the FTC may be removed by the President only "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. That statute violates the Constitution's Separation of Powers because the FTC

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[2] Federal courts also lack the equitable power to order the reinstatement of officials removed by the President—whether or not such removal is with cause—because that sort of equitable remedy was not traditionally available at our founding. *See* Brief of Petitioners at 37-47.

possesses and exercises executive power by, among other things, enforcing scores of federal statutes through civil litigation, including by seeking both injunctions and civil penalties. *See, e.g.*, 15 U.S.C. §§ 45(m)(1)(A), 53(b), 57b. The FTC further exercises the President's executive power by assisting in foreign law-enforcement investigations, including by entering cooperative agreements with other countries. *See* 15 U.S.C. § 46(j).[3] Because the FTC exercises the President's executive power, both domestically and abroad, the President possesses an absolute and unqualified removal power over FTC Commissioners, as shown below.

A. Article II Mandatorily Vests All Executive Power in the President

The text, structure and historical context of Article II establish that the President, as sole head of the Executive Branch, holds all executive power. First, the text: Article II provides that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1. That language vests one person, "*a* President" with "*the* executive Power"—not "most" executive power, not "some" executive power, but "*the* executive power" in its entirety. As this Court held in *Seila Law LLC v. Consumer Financial Protection Bureau*, 591 U.S. 197 (2020): "Under our Constitution, the 'executive

[3] FTC has entered into numerous Cooperative Agreements and Memoranda of Understanding on behalf of the United States with foreign governments, with the FTC Chairman signing those agreements. *See International Cooperation Agreements*, FTC, https://www.ftc.gov/policy/international/international-cooperation-agreements (last visited Oct. 15, 2025).

Power'—all of it—is 'vested in a President,' … ." *Id.* at 203.

The Constitution's vesting of executive power in one President was intentional and very different from the division of legislative power between the two chambers—the House of Representatives and the Senate. *Id.* at 223. While "[t]he Framers viewed the legislative power as a special threat to individual liberty," requiring that power to be further divided, "the Framers thought it necessary to secure the authority of the Executive so that he could carry out his unique responsibilities." *Id.*

Madison aptly explained the reasoning: "[T]he weight of the legislative authority requires that it should be … divided, the weakness of the executive may require, on the other hand, that it should be fortified." *Id.* (quoting The Federalist No. 51, at 350 (Madison) (Cooke ed., 1961)). Such fortification of the executive came first from the President's veto power, but also from Article II's vesting of the executive power in the President—and the President alone. *Morrison v. Olson*, 487 U.S. 654, 698-99 (1988) (Scalia, J., dissenting). During the Constitutional Convention, the Framers rejected proposals for "multiple executives, or a council of advisers." *See id.* at 699 (citing 1 Max Farrand, *Records of the Federal Convention of 1787*, at 66, 71-74, 88, 91-92 (rev. ed. 1966); 2 Max Farrand, *Records of the Federal Convention of 1787*, at 335-337, 533, 537, 542 (rev. ed. 1966)). Instead, the Framers "insist[ed] … upon unity in the Federal Executive to ensure both vigor and accountability" to the people. *Printz v. United States*, 521 U.S. 898, 922 (1997).

B. The Executive Power Is the Power to Exercise the Nation's Action, Strength or Force, Including Law-Executing Power

Echoing ideas that had been developing since the Middle Ages, the Founders distinguished three types of government power: legislative will, the executive's power to carry out the nation's action, strength or force, and the judiciary's judgment. In this vein, Alexander Hamilton summarized that the Constitution divides the government's powers into those of "Force," "Will" and "[J]udgment"—that is, executive force, legislative will, and judicial judgment. The Federalist No. 78, at 523 (Hamilton).

Of central concern here is this vision of executive power as the nation's action, strength or force. Jean-Jacques Rousseau, for example, associated executive power with society's "strength," and Thomas Rutherforth defined it as the society's "joint strength," *see* Philip Hamburger, *Nondelegation Blues*, 91 Geo. Wash. L. Rev. 1083, 1120 (2023). The Federalist No. 78, at 523. *See generally Nondelegation Blues*, *supra* 8, at 1122-25 (detailing historical support for the conclusion that executive power includes the nation's action, strength or force); Philip Hamburger, *Delegating or Divefsting?*, 115 Nw. U. L. Rev. Online 88, 111-15 (2020) (explaining that "[a]nother definition, which was familiar in the eighteenth century, viewed executive power as a nation's lawful action, strength, or force").

The President's executive power was thus very broad. It included law-executing power, such as bringing prosecutions and other enforcement actions. *Nondelegation Blues*, *supra* 8, at 1121. But it also included lawful action abroad, such as negotiations with other nations and other conduct of foreign policy, *see id*. at 1119-20—something that matters here because the FTC engages in foreign negotiations, *see, e.g.*, *International Cooperation Agreements*, *supra* note 3. Of course, executive power remains subject to law regardless of whether it is exercised abroad or domestically, but executive power in the foreign sphere was not as tightly confined by law and thus included much discretionary action falling outside the sphere of law enforcement.

Confirming the breadth of executive power, Locke, Montesquieu and Blackstone viewed foreign affairs as part of the monarch's executive power, and while the Constitution placed other constraints on the President, foreign matters remained similarly within the President's executive power. *Nondelegation Blues*, *supra* 8, at 1119-20. As for the Framers, they "deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law*, 591 U.S. at 223-24 (quoting The Federalist No. 70, at 471 (Hamilton)). Such descriptors illustrated the Framers' view of the executive as a law-enforcer, but also much more. *See also id*. at 224 (explaining that the Framers "gave the Executive the '[d]ecision, activity, secrecy, and dispatch' that 'characterize the proceedings of one man'") (quoting The Federalist No. 70, at 472 (Hamilton)).

Professors Saikrishna Prakash and Michael Ramsey likewise observe that the President's executive power has always been understood to include a wide range of diplomatic, military and other foreign affairs authorities. *See* Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 750. As they explained, it was widely understood that "foreign affairs powers were part of the executive power." *The Executive Power over Foreign Affairs*, *supra* 10, at 253. Significant American commentators and leaders likewise viewed executive power expansively to reach foreign affairs, "immediately before, during, and after the Constitution's ratification." *Id*.

This broad historic understanding of executive power aptly explains the President's authority in foreign affairs, which cannot easily be understood as mere law enforcement. His authority abroad, however, makes eminent sense when "executive power" maintains its historical meaning as the nation's action, strength or force.

This capacious understanding of executive power to include the full range of government action or force is also textually clear from the Take Care Clause. The Constitution recites that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. This duty, tellingly, is restricted to executing the *law*, unlike the Vesting Clause that speaks broadly of "the executive Power." *See id*. art. II, § 1, cl. 1. The Take Care Clause thereby serves as a reminder that the President's executive power is not limited to executing the law, but more expansively refers to his power to execute the nation's action, strength or force. *See Delegating or Divesting?*, *supra* 8, at 115 ("Evidently, the Constitution does not consider the law executing authority to be the same as the executive power," suggesting that "the law-executing authority … is merely an element of the executive power" and that "the executive power is the nation's action, strength, or force.").

C. The President's Executive Power Includes Both Appointments and Removal, but Unlike Appointments, Removal Is Unqualified and Thus Absolute

Although the President's executive power includes both appointments and removal authority, the Constitution treats them quite differently. Article II modifies and delimits the Executive's power of appointments, but in its purposeful silence, it leaves the removal power unconstrained.

The President, by himself, cannot execute either the law or the nation's action, strength or force—so he necessarily must rely on a hierarchy of subordinates, whether 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). The appointment and removal of such individuals was therefore necessary for carrying out the President's executive power and indeed was considered a central part of that power. *Myers*, 272 U.S. at 134. As Madison would state in the First Congress, "[i]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789).

Article II, however, distinguished between the President's executive power as to appointments and as to removal. It limited his appointment authority.

For appointing "Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States," U.S. Const. art. II, § 2, cl. 2, the President must obtain "the Advice and Consent of the Senate."

Conversely, Article II remains silent about removal, thereby leaving the President's executive removal power entirely unlimited. As explained 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. When it was suggested that Congress should limit the President's executive power over removal by requiring Senate approval, Madison responded:

> The constitution affirms, that the executive power shall be vested in the president: Are there exceptions to this

> proposition? Yes there are. The constitution says that, in appointing to office, the senate shall be associated with the president, unless in the case of inferior officers, when the law shall otherwise direct. Have we a right to extend this exception [to removals]? I believe not. If the constitution has invested all executive power in the president, I venture to assert, that the legislature has no right to diminish or modify his executive authority.

James Madison (June 16, 1789), *in* 11 *Documentary History of the First Federal Congress* 868-69 (Charlene Bangs Bickford et al. eds., The Johns Hopkins Univ. Press 1992). Similarly, rejecting limits on removals, Madison said that although the power of appointment "be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." 1 Annals of Cong. 582 (1789) (quoted in *Myers*, 272 U.S. at 128).

In 1789, the First Congress rejected efforts to statutorily limit the President's removal authority, in what is misleadingly called "The Decision of 1789." This framing inaccurately suggests the President owes his unlimited removal authority to Congressional acquiescence. In fact, the Constitution's text and structure establish the President's absolute removal authority—by granting the President executive power without qualifying his executive removal authority. The 1789 debate, thus, merely confirmed the contemporaneous understanding of the Constitution.

This Court has recognized the import of this history, noting, for instance, in *Free Enterprise Fund* that "[s]ince 1789, the Constitution has been understood to empower the President to keep … officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010). *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."); *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)).

In short, at the time of the Founding it was clearly understood that the President's unlimited removal power differed from, and stood in contrast to, his somewhat cabined power of making appointments.

II. THE CONSTITUTION'S TAKE CARE CLAUSE CONFIRMS THE PRESIDENT'S ABSOLUTE AND UNQUALIFIED REMOVAL AUTHORITY

The Take Care Clause of the Constitution and the historical understanding of executive power to include the nation's action, strength, and force further establish the executive power includes an authority to remove subordinates acting under every corner of the

President's executive power—regardless of whether those subordinates act for him in law enforcement or in more discretionary matters of foreign affairs. *See Seila Law*, 591 U.S. at 238; *Free Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 134.

The Executive's absolute removal authority provides the sole mechanism for the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President, of course, may, and indeed 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. At the same time his *duty* "to take Care that the Laws be faithfully executed" is non-delegable, and he remains exclusively responsible for this function of the government. It therefore follows that the President must hold the power to remove individuals who, in his view, do not help him fulfill, or worse yet, undermine his duty of faithful execution of the nation's laws. Said otherwise, the President cannot "take Care that the Laws be faithfully executed" if he cannot enforce the faithfulness of the officers who execute them.

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 threat of removal allows the President to exercise ultimate control over his stubborn subordinates, ensuring that through *their* actions or inactions, *he* doesn't fail in *his* duty "to take Care that the Laws" are faithfully executed. "[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. *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 498 ("[E]xecutive power without the Executive's oversight ... subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"); *id*. at 513 ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so.").

This holds especially true for agency officials, like FTC Commissioners, who execute the law through litigation. "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). FTC's enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power *Humphrey's Executor* never weighed.

Any official who alone or jointly holds authority to file suit to "remedy" "a breach of the law" must be directly answerable to the President and removable by him. The Take Care Clause thus underscores that the President's executive power includes an absolute authority to remove officials who execute the law through litigation.

III. Independent Agencies Interfere with the Separation of Powers, the Conduct of Executive Power, and "Democratic" Accountability

A. Separation of Powers Interference

The very concept of an "independent agency" is anathema to the Constitution, which by design ensures the electorate maintains the power to hold both lawmakers and the law enforcer accountable. "But when Congress delegates authority to an independent agency, no democratically elected official is accountable," for as Justice Kavanaugh noted in his concurrence in *FCC v. Consumers' Research*:

> Whom do the people blame and hold responsible for a bad decision or policy adopted by an independent agency? Such a system of disembodied independent agencies with enormous power over the American people and American economy operates in substantial tension with the principle of democratic accountability incorporated into the Constitution's text and structure, as well as historical practice and foundational Article II precedents.

145 S. Ct. at 2517-2518 (Kavanaugh, J., concurring).

The existence of independent agencies represents much more than a tension, however: "Because independent agencies wield substantial power with no accountability to either the President or the people, they 'pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.'" *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring in part, dissenting in part) (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

Arguments to the contrary, which champion the need for "independence," rest on misgivings about our constitutional structure, a not-so-genteel disgust for the electorate's choice, and a belief that bureaucratic experts must be liberated not only from the people but also from their President. *See Nondelegation Blues*, *supra* 8, at 1180-87 (explaining the racist and classist history to the rise of the administrative state); Philip Hamburger, *Is Administrative Law Unlawful?* (2014) 355-76, 441-78.

The Constitution makes clear that when an agency exercises executive power, it is the President's judgment—and his alone—that matters, for Article II vests in him "*the* executive power." "To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government," who along with the Vice President are the only officials "elected by the entire Nation." *Seila Law*, 591 U.S. at 224. It is not for an agency or the courts to supplant the President's judgment. If he fails in executing the law or in exercising the nation's action, strength, or force, the Constitution provides for accountability via the electorate and impeachment.

That such accountability may seem woefully insufficient to some stems not from any weakness in our constitutional structure, but from the Court's abandonment of the fundamental principle of Separation of Powers and the Court's disregard for the "Constitution['s] promise[] that our elected representatives in Congress, and they alone, will make the laws that bind us." *Consumers' Rsch.*, 145 S. Ct. at 2539 (Gorsuch, J., dissenting); *see also id*. at 2519 (the Constitution commands "that Congress may not transfer to another branch powers which are strictly and exclusively legislative") (internal quotations omitted). It is because the administrative state has taken over so much lawmaking that a President's control over formerly independent agencies strikes fear in those opposing his policies.

The Constitution no more permits Congress to vest its own legislative power, or the judicial power of the courts, in an "independent agency" than it permits Congress to pilfer the President's executive authority. If the Court harbors concerns that the President may grasp too much power by firing agency heads, the answer is not to limit his executive power, but to return to first principles, of which Separation of Powers is foremost. When the legislature legislates, and the Courts adjudicate, there can be no valid concern that the President's mere execution of the law represents an authoritarian takeover.

B. Executive Power Interference

The Executive *is* the Nation's action, strength, and force. That definition of "executive power," grounded in the text and history of Article II, necessitates a broad concomitant authority to remove executive officials, for the President must have sufficient authority to sack people whom he views as undermining that strength or lacking in action or forcefulness. Just as the President must possess an unencumbered power to remove subordinates engaged in law enforcement, so too must he possess an absolute removal authority for all other sorts of subordinates responsible for exercising the nation's action or force on his behalf. *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).

It is doubly imperative that the President maintain an absolute and unqualified removal power over FTC Commissioners. Not only do they engage in domestic law-executing functions through civil litigation, but they also engage in investigative activities with foreign law-enforcement agencies. For instance, the FTC Chairman, on behalf of the Commission, executes Memoranda of Understanding and Cooperative Agreements with a variety of foreign officials, committing to work collaboratively to execute internationally the statutes within the FTC's purview. *See International Cooperation Agreements*, *supra* note 3. Given FTC's duty to execute the law through extra-territorial investigations, it is inconceivable the President would lack the absolute power to remove an FTC Commissioner: An FTC Commissioner opposing the President's international policy decisions would threaten the President's action, strength, and force abroad.

C. Accountability Interference

The President's removal authority is essential if the Executive is to be accountable to the people. 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."

The vast growth in executive power makes it more important than ever that such power be accountable through Presidential removal. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (quoting *Free Enter. Fund*, 561 U.S. at 498) ("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."). The contrary premise would permit agencies possessing executive power to defy the democratically elected president. For instance, in 2017 and 2025, the Consumer Product Safety Commission remained under control of the out-of-power party for months into the new administration. CPSC became not merely independent but actually antagonistic to the elected president's agenda. The same could easily happen at the FTC.

Our Constitution does not abide interference with the President's removal power. Faithfulness to the Vesting Clause of Article II requires recognizing the President's untrammeled authority to remove executive branch officials. If he cannot retain and remove those who execute the law, he no longer holds the full executive power the Constitution bestowed on him. *See Free Enter. Fund*, 561 U.S. at 514 ("Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.'") (citing The Federalist No. 70, at 478) (Hamilton)).

IV. THIS COURT SHOULD OVERRULE THE HOLDING, REASONING, AND LATER REFORMULATIONS OF HUMPHREY'S EXECUTOR

The Court has asked whether it should overrule *Humphrey's Executor*. The response is an emphatic "yes," and that answer concerns all aspects of *Humphrey's Executor*, from its original holding and reasoning to this Court's later reformulations of it.

A. The Supreme Court Wrongly Decided *Humphrey's Executor*

In *Humphrey's Executor*, the Supreme Court held the statute at issue in this case, 15 U.S.C. § 41, limiting Presidential removal of FTC Commissioners solely to cases of "inefficiency, neglect of duty, or malfeasance in office," did not violate the constitutional principle of Separation of Powers. That holding cannot withstand scrutiny for the reasons detailed above. *See supra* at 5-16.

However, the *Humphrey's* Court's reasoning is flawed, not just its conclusion. This Court should renounce that reasoning both to halt infringements on the President's removal power in other cases and to restore the original understanding of Separation of Powers. No constitutional doctrine is an island, and the decades-long disregard for the Constitution's purposeful vesting of divided power in our three separate branches of government has spun other non-textual, illogical, inconsistent, and insupportable doctrines. Only by returning to the vesting clauses—and specifically here Article II's vesting of all executive power in the President—will the Court be able to tailor a unifying body of administrative law.

1. FTC Exercises Executive Power

In holding the President lacked the power to remove FTC Commissioners, the Court in *Humphrey's Executor* stated the Commissioners "occup[y] no place in the executive department and … exercise[] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628. That premise was wrong, as the discussion of FTC cease-and-desist orders in *Humphrey's Executor* revealed, 295 U.S. at 620-21.

This Court has previously acknowledged *Humphrey's Executor* rested on a flawed premise. *See Seila Law*, 591 U.S. at 216 n.2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); *Morrison*, 487 U.S. at 734 n.28 (But "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree.").

2. The President Holds All Executive Power

A second fundamental flaw in *Humphrey's* reasoning concerns the Court's apparent view that a President holds absolute removal authority only over "purely executive officers; … ." 295 U.S. at 628. The *Humphrey's* Court used the "purely executive officer" language throughout its opinion, *id*. at 628, 631-32. It also distinguished *Myers* by stressing the postmaster position in that case involved "an executive officer restricted to the performance of executive functions" who was "charged with no duty at all related to either the legislative or judicial power." *Id*. at 627. The decision concluded that "the exclusive and illimitable power of removal by the Chief Executive" established in *Myers*, applied only to "include all purely executive officers. It goes no farther." *Id*. at 627-28.

This aspect of *Humphrey's Executor* badly misreads *Myers* and gives an unserious and erroneous assessment of the Separation of Powers principle. *See Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part) (noting that "[u]nlike the thorough analysis in *Myers*, the Court's thinly reasoned decision [in *Humphrey's Executor*] is completely 'devoid of textual or historical precedent for the novel principle it set forth'") (quoting *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting)).

Contrary to *Humphrey Executor*'s cramped reading, *Myers*'s holding was not limited to "purely executive officers" like the postmaster. Rather, *Myers*, which "anchored its analysis in evidence from the founding era," 591 U.S. at 241 (Thomas, J., concurring in part), spoke broadly of Article II conferring on the

President "the general administrative control of those executing the laws." *Myers*, 272 U.S. at 164. The *Myers* Court concluded that "the power to remove officers appointed by the President and the Senate vested in the President alone." *Id.* at 114. It repeatedly described this removal power as "unrestricted." *Id.* at 115, 134, 150, 172, 176. The Court in *Myers* further reasoned that the President must be able to remove not just officers who disobey his commands but also those he finds "negligent and inefficient," *id.* at 135—close to the FTC's "inefficiency, neglect of duty, or malfeasance" standard—and those who exercise their discretion in a way that is not "intelligen[t] or wis[e]," *id.*, those who have "different views of policy," *id.* at 131, and those in whom he has simply lost confidence, *id.* at 124.

Humphrey's premise that the President holds an absolute and unqualified removal authority only over "purely executive officers" cannot be reconciled with the text or historical context of Article II. Article II vests *all* executive power in the President—not most or some, but all. So, he has absolute removal authority over officials possessing or exercising any executive power on his behalf, for the President would otherwise not control subordinates' exercise of his authority. That remains true even if an official performs other duties that are not "purely executive."

Because *Humphrey's* wrongly concluded that the FTC exercised no executive power, the Court did not base its holding on whether Commissioner Humphrey was a "purely executive officer." In overruling *Humphrey's Executor*, this Court should clarify the President possesses absolute removal authority over officials who exercise any executive power on behalf of the President. *See Seila Law*, 591 U.S. at 238 (holding the President maintains the authority both to "supervise and [to] remove the agents who wield executive power in his stead").

3. Concepts of Quasi-Legislative and Quasi-Judicial Agencies Conflict with the Separation of Powers

Humphrey's Executor also fundamentally misconceived the Separation of Powers, describing the FTC as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 628. The Court then cast the FTC as "act[ing] in part quasi legislatively and in part quasi judicially," adding "[t]he authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; … ." *Id.* at 629. The power to create such agencies, the Court added, includes the "power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime." *Id.*

No doubt in 1935 when the Court decided *Humphrey's Executor*, the country was in the throes of Congress liberating the federal government from the constraints the Constitution imposed on the three branches of government through the vesting of specific power in each branch. Woodrow Wilson had previously embraced the transfer of legislative power to agencies, finding that preferrable to persuading "a voting majority of several million"—and not merely "Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes"—to accept their progressive policies. *Nondelegation Blues*, *supra* 8 at 1182. The shift of lawmaking power from elected legislators to the intelligentsia of agencies was racist, classist, and unsympathetic to religious concerns. *See generally id*. at 1180-1192.

The Court's opinion in *Humphrey's Executor* ignored the unsettling origins of the administrative state, while detailing the prevailing pragmatic political view of the time—one that rationalized the need for a supposedly independent quasi-judicial and quasi-legislative nonpartisan commission, which would be "called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience." 295 U.S. at 624 (internal quotation and citation omitted). This Court in *Humphrey's Executor* then, citing the Congressional Record, unironically said that the debates of both houses surrounding the creation of the FTC

> demonstrate[d] that the prevailing view was that the Commission was not to be "subject to anybody in the government but * * * only to the people of the United States"; free from "political domination or control" or the "probability or possibility of such a thing"; to be "separate and apart from any existing department of the government—not subject to the orders of the President."

Id. at 625.

The irony, of course, is that the FTC by not being "subject to anybody in the government" would also *not* be subject "to the people of the United States." *Id*. The Commissioners were not elected and so, unlike members of Congress, they could face no consequences at the ballot box. By eliminating the President's absolute removal power over Commissioners, Congress shredded the only other basis for accountability the Framers embedded in the Constitution, namely the people's choice of President.

This Court in *Free Enterprise Fund* stressed that point, explaining that the executive's absolute removal authority ensures that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community." 561 U.S. at 498 (quoting 1 Annals of Cong. 499 (1789) (J. Madison)). In *Collins v. Yellen*, the Court likewise reiterated that "because the President, unlike agency officials, is elected, this control is essential to subject Executive Branch actions to a degree of electoral accountability." *Id*. at 252. *See also Free Enterprise Fund*, 561 U.S. at 498 ("[E]xecutive power without the Executive's oversight ... subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts").

To restore accountability, this Court should denounce *Humphrey's* premise that Congress may ignore the vesting clauses and assign agencies quasi-legislative and quasi-judicial power. As Justice Thomas stressed in his concurrence in *Seila Law*, "the Court's premise [in *Humphrey's* Executor] was entirely wrong." 591 U.S. at 247 (Thomas, J., concurring in part). He continued:

> The Constitution does not permit the creation of officers exercising "quasi-legislative" and "quasi-judicial powers" in "quasi-legislative" and "quasi-judicial agencies." No such powers or agencies exist. Congress lacks the authority to delegate its legislative power, and it cannot authorize the use of judicial power by officers acting outside of the bounds of Article III. Nor can Congress create agencies that straddle multiple branches of Government. The Constitution sets out three branches of Government and provides each with a different form of power—legislative, executive, and judicial. See Art. I, § 1; Art. II, § 1, cl. 1; Art. III, § 1.

Id.

As Justice Thomas detailed, *Humphrey's Executor* wrongly framed the FTC as possessing quasi-legislative and quasi-judicial power, for our Constitution does not leave a void for independent governmental action. Rather, the Constitution vests *all* government powers in the legislative, executive, or judicial branch. *Id. See also Free Enterprise*, 561 U.S. at 483 ("Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)); *Consumers' Rsch.*, 145 S. Ct. at 2519 (Gorsuch, J., dissenting) (stressing that the

Constitution commands "that Congress may not transfer to another branch powers which are strictly and exclusively legislative") (internal quotations and citations omitted).

4. This Court's Subsequent Refinements of *Humphrey's Executor* Prove No More Logical—nor Constitutional

The cases heralded in by the Court's abandonment of the constitutionally mandated Separation of Powers in *Humphrey's Executor* are likewise flawed. First there was *Morrison*, wherein this Court upheld the "good cause" removal provision contained in the independent counsel statute even though the independent counsel undisputedly exercised executive powers. Having already abandoned the textual and historical understanding of Article II's vesting of executive powers in the President, the Court in *Morrison* deviated further from the Constitution. So, like *Humphrey's Executor*, *Morrison* ignored *Myers* and the longstanding view that the President holds an absolute and unqualified removal authority over officials exercising his executive power and held that Congress can limit the President's removal authority so long as the limitation does not "unduly interfer[e] with the role of the Executive Branch." *Morrison*, 487 U.S. at 693. *Morrison*'s reasoning, however, bore no resemblance to the original reasoning in *Humphrey's Executor,* other than the Court's disregard of precedent and the Constitution. Like *Humphrey's Executor*, *Morrison* cannot be reconciled with the text of Article II, which places all executive authority in the President.

Nor does the gloss this Court put on *Humphrey's Executor* in *Seila Law* quite address the fundamental Separation of Powers problem. There this Court refused to overrule *Humphrey's Executor*. Instead, this Court tiptoed around the case, maintaining it stood for the proposition that Congress could provide "for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." 591 U.S. at 216.

If that were all *Humphrey's Executor* stood for, the Article II problem would be non-existent both in this case and every other case involving independent agencies because all such agencies exercise some executive powers, including the FTC. Yet the lower courts continue to read *Humphrey's Executor* more broadly. *See Brief of Petitioner* at 35-36, 38 n.2 (cataloging lower court decisions reading *Humphrey's* as prohibiting the President from removing officials exercising executive authority).

So, while this Court could be said to have placed *Humphrey's Executor* on life support over the years, *see Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part) (explaining that the Court's decision repudiated almost every aspect of *Humphrey's Executor*), the Court should now unequivocally overrule *Humphrey's Executor*, declaring it not merely mostly dead, but all dead—for there is a big difference in the two as seen by the lower courts' continued clinging to *Humphrey's Executor*.

B. Overruling *Humphrey's Executor* and Returning to the Textual Standard of Vesting Is Imperative

Overruling *Humphrey's Executor* and its progeny and returning to first principles is essential for the Court to restore consistency to its administrative law jurisprudence, for it is only by focusing on the historical understanding of our written Constitution that the interrelated concepts in this area of law join as a seamless garment to safeguard our liberties. *See Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part) ("The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people.").

This Court has already begun repairing the tattered remnants of constitutional Separation of Powers. But, to date, the Court has failed to adopt a unifying approach to administrative law—one that starts and ends with the Constitution's vesting clauses. Indeed, the Court has applied non-textual concepts such as the nondelegation doctrine, the private nondelegation doctrine, the intelligible principle test, and the major questions doctrine—all unnecessary concepts given the Constitution's textual standard of "vesting." *See Consumers' Rsch.*, 145 S. Ct. at 2538 (Gorsuch, J., dissenting) (explaining "[t]he Court has sometimes mitigated its failure to police legislative delegations by deploying other tools, like the major questions doctrine"); *see id.* at 2518 (Kavanaugh, J., concurring) (suggesting two possible solutions to the Separation of Powers problem caused by Congressional delegations of authority to independent agencies, namely overruling *Humphrey's* or adopting "a more stringent version of the nondelegation doctrine to delegations to independent agencies").

Justice Gorsuch expanded on this point in *Gundy v. United States*, 588 U.S. 128 (2019), writing:

> When one legal doctrine becomes unavailable to do its intended work, the hydraulic pressures of our constitutional system sometimes shift the responsibility to different doctrines. And that's exactly what's happened here. We still regularly rein in Congress's efforts to delegate legislative power; we just call what we're doing by different names. We apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.

Id. at 166 (Gorsuch, J., dissenting).

These doctrines all share a common thread: the Court's abandonment a century ago of constitutional Separation of Powers and its failure to pay homage to the vesting clauses. This case may concern only the executive powers Article II vests in the President, but by focusing on vesting in overruling *Humphrey's Executor*, the Court's decision would undo damage in all areas of administrative law. *See Delegating or Divesting, supra* 8 at 89 ("Both delegation and executive power need to be reconsidered on the basis of the Constitution and its history.").

* * *

The Court's "tolerance of independent agencies in *Humphrey's Executor*" was not merely "an unfortunate example of the Court's failure to apply the Constitution as written," but rather "[t]hat decision has paved the way for an ever-expanding encroachment on the power of the Executive, contrary to our constitutional design." *Seila Law*, 591 U.S. at 241 (Thomas, J., concurring in part).

The Court's more recent decisions suggest a return to the Constitution's text and historical understanding, apparently recognizing that, when consulted, the Constitution provides consistent and cohesive answers that reconcile the disjointed reasoning from its past decisions. Today's case offers a further opportunity to clarify that the President, as *the* executive, possesses an absolute and unqualified removal authority. By restoring the Court's Separation of Powers jurisprudence to its proper textual and historical meaning of "vesting," this Court can begin "to find" its "way back," from "the modern, enfeebled" constitutional substitutes. *See Consumers' Rsch.*, 145 S. Ct. at 2538-39 (Gorsuch, J., dissenting).

Stare decisis is no bar to an overdue course correction for this Court, which holds a "responsibility to 'examin[e] without fear, and revis[e] without reluctance,' any 'hasty and crude decisions' rather than leaving 'the character of [the] law impaired, and the beauty and harmony of the [American constitutional] system destroyed by the perpetuity of error.'" *Gamble v. United States*, 587 U.S. 678, 716 (2019) (Thomas, J., concurring) (quoting 1 J. Kent, Commentaries on American Law 444 (1826); some alterations in original). Not only does the Court's legitimacy rest on its willingness to correct its own past errors, but the very legitimacy of our government is at stake.

CONCLUSION

For the foregoing reasons, this Court should REVERSE the district court's judgment.

Respectfully submitted,

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