No. 25-332

IN THE

Supreme Court of the United States

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

Petitioners,

v.

REBECCA KELLY SLAUGHTER, *et al.*,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE HONORABLE EDWIN MEESE III, THE HONORABLE MICHAEL B. MUKASEY, PROFESSOR STEVEN G. CALABRESI, AND PROFESSOR CHRISTOPHER S. YOO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Honorable Edwin Meese III served as the Seventy-Fifth Attorney General of the United States from 1985 to 1988, during which time he delivered a widely publicized speech noting the constitutional shortcomings of *Humphrey's Executor*. He was the first Ronald Reagan Distinguished Fellow at the Heritage Foundation, and he supervised the writing and editing of *The Heritage Guide to the Constitution* (2005).

The Honorable Michael B. Mukasey served as the Eighty-First Attorney General of the United States from 2007 to 2009. He was also a Judge on the U.S. District Court for the Southern District of New York from 1987 to 2006, where he served as Chief Judge from 2000 to 2006. In all these roles, he has been devoted to the separation of powers.

Steven G. Calabresi is the Clayton J. & Henry R. Barber Professor at Northwestern Pritzker School of Law. Justices of this Court have cited his work on presidential power. *See, e.g.*, *Printz v. United States*, 521 U.S. 898, 923 (1997) (Scalia, J.).

Christopher S. Yoo is the Imasogie Professor in Law & Technology at the University of Pennsylvania. He coauthored *The Unitary Executive: Presidential Power from Washington to Bush* with Professor Calabresi and has written other works on the removal power.

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[1] Under this Court's Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the brief's preparation or submission, and that no person other than amici and their counsel made such a monetary contribution.

INTRODUCTION & SUMMARY OF ARGUMENT

The Constitution's text and history show that the President has an unlimited power to remove at will all principal and superior officers[2] of the federal government who exercise executive power. This power is inherent in "The executive Power," which the Executive Power Vesting Clause grants solely and exclusively to the President. *See* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Law*, 104 Yale L.J. 541, 581 (1994).

All Presidents in U.S. history have argued that the Constitution gives them the removal power, and all fourteen presidents since FDR have vigorously used their executive powers to control the administrative state—despite *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). *See* Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* 3, 303-415 (2008).

Recent Supreme Court opinions have steadily undermined the foundations of *Humphrey's Executor*, which limits presidential power to remove superior officers who exercise executive power. It is now time to overrule *Humphrey's Executor* and hold that the

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[2] Principal officers are those officers who can be requested to give their opinions in writing by the President, and they are also the officers who can suspend presidential power under the Twenty-Fifth Amendment. Superior officers are those officers whose jobs are so important that they require presidential nomination, confirmation by the Senate, and presidential appointment. Traditionally, Deputy and Assistant Cabinet Secretaries, Judges of the inferior federal courts, Ambassadors, U.S. Attorneys, and commissioners on independent agencies have all been superior rather than inferior officers.

President has power to remove, at will, all principal and superior officers who exercise executive power. Today's Federal Trade Commission exercises executive power, whatever may have been the case in 1935.

Our Constitution's text, the early practice under the Constitution from 1789 to 1809, the practice over the entire 236 years of American history, considerations of democratic accountability, and stare decisis considerations all demonstrate that the Constitution gives the President the power to remove any principal or superior officer who exercises executive power.

ARGUMENT

I. Text and Original Public Meaning

The Preamble to the Constitution makes it clear that "We the People of the United States" are sovereign and have ordained and established the Constitution. Each of the federal government's three branches draws its power independently from We the Sovereign People, and therefore no one branch can alter the powers which another branch draws from the people. Congress can no more control the President's power to remove principal or superior officers who exercise executive power than it can alter the Article III federal courts' power to finally decide a case or controversy in a way that comports with the Constitution. *See* The Federalist No. 78 (Hamilton); *Marbury v. Madison*, 5 U.S. 137 (1803); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

We the Sovereign People of the United States said in the Constitution's first three articles that "All legislative Powers *herein granted* shall be vested in a Congress of the United States," U.S. Const. art. I, § 1,

cl. 1 (emphasis added), that "[t]he executive Power shall be vested in *a* President of the United States of America," *id.* art. II, § 1, cl. 1 (emphasis added), and that "[t]he judicial Power of the United States shall be vested *in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish*," *id.* art. III, § 1, cl. 1 (emphasis added).[3]

Comparing the Vesting Clauses of Articles I, II, and III leads to two conclusions. First, it is immediately apparent that the Vesting Clauses are a grant of *all* "The executive Power" to our *one* President alone, but that Congress is vested only with such powers as are "*herein granted*," most of which are enumerated in Article I, Section 8. Second, it is equally clear that presidential power differs radically from judicial power, which the Constitution vests both "*in one supreme Court, and in such inferior Courts* as the Congress may from time to time ordain and establish," and which shall extend to only nine categories of cases or controversies set forth in Article III, Section 2.

Article II does not mimic Article III by saying "The executive Power shall be vested in a President *and in such inferior officers as the Congress may from time to time ordain and establish*." *Cf. id.* art. III, § 1, cl. 1. Instead, the Constitution grants *all* the executive power to our one President alone. It sets up a federal government of limited and enumerated powers with a unitary executive but with a bicameral legislative branch and a plural judiciary.

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[3] The word "vest" comes from Latin and refers to the outer garments of office signifying power, which is why many judges and religious officers are empowered to act in a ceremony called an "investiture" in which they put on their official robes and simultaneously assume the powers of their offices.

The Constitution creates only three general types of power: legislative, executive, and judicial. Federal Trade Commissioner Slaughter does not exercise legislative power, which may be done only with bicameralism and presentment. *See Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 946 (1983).

She also does not exercise judicial power, since she does not hold office during good behavior, and her powers are not among those listed in the first paragraph of Article III, Section 2. It follows *a fortiori* that the power Slaughter does exercise, as a Federal Trade Commissioner, must be executive power, which renders her subject to removal at will by the President.

Plainly, the President on his own cannot execute all the laws himself. He needs help in doing that. As a result, it has always been understood that the President can implicitly delegate "[t]he executive Power" to principal and superior officers who exercise executive power. And the Federal Trade Commission, when it brings law enforcement actions, exercises such power. *See* 3 Annals of Cong. 712 (1792) (statement of Rep. Findley) ("It is of the nature of Executive power to be transferable to subordinate officers."). But the Constitution's text on its face presupposes that the President must in some way be able to control what those principal and superior officers are doing in his name.

The traditional answer that has been given for 236 years, in one form or another, to how the President may control the principal and superior officers in the executive branch is the one James Madison put forward in 1789:

> The question now resolves itself into this, Is the power of displacing, an executive power? I conceive that if 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. 481-82 (1789).

No president could possibly oversee or control the 1,000 or so principal or superior officers who exercise executive power if he could not fire them. Presidents might, and historically have, issued binding orders to principal or superior officers, either annulling something such an officer has done, or ordering an officer to do something, only to see such officers or their subordinates nullify the President's decision by simply ignoring it.

Presidential power to fire independent agency commissioners only "for cause" rather than "at will" confers a status on the members of administrative agencies best analogized to tenure in a major university. They cannot lose their jobs without a full-fledged trial and an appeal. No President in four years, or Cabinet Secretary who serves on average two years, could ever succeed in firing an independent agency commissioner "for cause," so they rarely bother to try. The only way to meaningfully empower Presidents to execute the law is to allow them to fire all principal and superior officers who exercise executive power.

Everyone in the government knows—as Scot Faulkner, the Reagan Administration's former personnel director memorably remarked—that "personnel is policy." Scot Faulkner, *Personnel Is Policy*, Wash. Exam'r (Feb. 2, 2016).[4] If a President wishes to change agency or departmental policy pursuant to an

[4] https://www.washingtonexaminer.com/opinion/223825/personnel-is-policy/.

election promise, the best way to do so is by firing principal or superior officer personnel. Presidents could not implement the platform on which they were elected by the American people without firing some hold-over staff of prior administrations. Presidential elections would be meaningless events if the President did not have a plenary executive power to remove and thereby control all principal and superior Officers of the United States who exercise executive power.

No ordinary Americans at the time of the Framing would have thought that there was an independent, headless fourth branch of government where superior officers had, in essence, life tenure. Neither the colonial governments nor Britain itself had any irremovable officers except for British judges. There were no Federal Trade Commissioners removable only for cause in the eighteenth century. Even colonial judges were removable at will in 1776, which led to a complaint in the Declaration of Independence.

The Framers' understanding of executive power is shown by the second definition below of the adjective "executive" in Samuel Johnson's influential 1755 *Dictionary of the English Language*:

> Exe'cutive. *adj.* [from *execute*.]
>
> 2. Active; not deliberative; not legislative; having the power to put in act the laws.

No President could possibly be said to "hav[e] the power to put in act the laws" if he could not fire all principal and superior officers who exercise executive power. The only plausible reading of the three Vesting Clauses, given the late eighteenth century history that paved the way for them, is to conclude that granting "The executive Power" to "*a*" President gives the

President the power to control all such officers, which is best accomplished by having the power to fire them. *See* Calabresi & Prakash, *supra*, at 581-82.

The President's power to control all exercises of executive power finds further textual support in the Take Care and Presidential Oath Clauses of Article II. *See Myers v. United States*, 272 U.S. 52, 117 (1926).[5] The President could not fulfill his duties under those two clauses if he could not control all principal and superior officers who exercise executive power. Article II's Executive Power Vesting Clause makes it possible for the President to fulfill his duties under those two Clauses by giving him the removal power.

There is one textual basis which those who deny that the President has the removal power resort to: the horizontal application of the Necessary and Proper Clause. That Clause provides: "Congress shall have Power … To make all Laws which shall be necessary and proper for carrying into Execution … all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

In fact, creating a headless fourth branch accountable at most only to congressional appropriators is neither "necessary"[6] nor "proper,"[7] nor does it "carry

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[5] *See also* Amit R. Vora, *Constitutional Crowding and Article II*, 85 Alb. L. Rev. 857, 859 (2022) (discussing the Oath Clause).

[6] Steven G. Calabresi, Elise Kostial, & Gary Lawson, *What* McCulloch v. Maryland *Got Wrong: The Original Meaning of "Necessary" Is Not "Useful," "Convenient," or "Rational"*, 75 Baylor L. Rev. 1 (2023).

[7] Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267 (1993).

into execution" the President's "executive Power." It binds down the President, instead of empowering him by creating a real Federal Trade Commission that he can run and control.

Congress has the power to create offices to *help* the President carry into execution the law or to limit the terms that officers can serve. Congress can specify requirements officers must meet, such as that the Solicitor General be learned in the law. But the President draws his executive power directly from "We the People" and not from Congress via the horizontal Necessary and Proper Clause as Professor Caleb Nelson has written. Caleb Nelson, *Must Administrative Officers Serve at the President's Pleasure?*, NYU Law Democracy Project (Sept. 29, 2025).[8]

The federal government's three branches are coequal in their core powers, contrary to Professor Nelson's essay. Congress does not sit as a superior branch above the executive and judicial branches with the authority to alter core executive and judicial powers. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (Congress cannot limit the President's appointment power); *Zivotofsky v. Kerry*, 576 U.S. 1 (2015) (Congress cannot limit the President's recognition power); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (Congress cannot reopen an Article III court's final judgment); *United States v. Klein*, 80 U.S. 128 (1871) (Congress cannot impair the effect of a President's pardon by telling the judicial branch what effect to give to it in a case or controversy).

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[8] https://democracyproject.org/posts/must-administrative-officers-serve-at-the-presidents-pleasure.

The Constitution creates three branches of the federal government, not four. *Compare* Lawrence Lessig & Cass Sunstein, *The President and the Administration*, 94 Colum. L. Rev. 1 (1994), *with* Calabresi & Prakash, *supra*, at 547-49, 559-60, 562-66, 608-10, 663. It would exceed Congress's power under the horizontal Necessary and Proper Clause to create something as important and unanticipated as a headless fourth branch. Such use of the Necessary and Proper Clause would represent Congress appropriating to itself a great and independent power that ought to have been enumerated on the Article I, Section 8 list. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012).

Moreover, Article II's Vesting Clause says: "The executive Power *shall* be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1 (emphasis added). The word *shall* in the Constitution means *must*. It does not mean *may*. In *Martin v. Hunter's Lessee*, 14 U.S. 304, 342 (1816), this Court wisely held that the federal judicial power *must* extend to all federal question cases decided by a State's highest court. *See* Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1031 (2007). For the same reasons, Article II's Vesting Clause precludes Congress from creating removal-for-cause limits on the President's removal-at-will executive power.

This Court's opinions likewise cohere with the constitutional text. In *Seila Law*, this Court held that the statutory for-cause restriction on the President's power to remove the single director of the Consumer Financial Protection Bureau violated the separation

of powers. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 204 (2020). In so holding, the Court that observed that executive officers "must remain accountable to the President, whose authority they wield." *Id.* at 213; *accord Collins v. Yellen*, 594 U.S. 220, 227-28 (2021) (striking down for-cause removal limit for single director of Federal Housing Finance Agency).

Seila Law, in turn, built on a wise precedent, set fifteen years ago by *Free Enterprise Fund*, where this Court held that Congress lacked the power to insulate, through two layers of statutory for-cause removal protections, members of the Public Company Officers Accounting Oversight Board. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 484 (2010). There, this Court observed that "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties," *id.* at 513-14, and this Court issued a warning that continues to ring true: "The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people," *id.* at 499.

That case, in turn, emphasized the centrality to this area of constitutional law of Chief Justice Taft's scholarly opinion upholding presidential removal power in *Myers v. United States*, 272 U.S. 52 (1926). As Taft affirmed, the President's power to control encompasses the power to remove—even over executive officers who have "duties of a quasi judicial character," such as "members of executive tribunals whose decisions after hearing affect interests of individuals." *Id.* at 135. In fact, according to Taft, *not* exercising the

executive power of removal over executive officers would violate Article II's Take Care Clause: "Otherwise [the President] does not discharge [the President's] own constitutional duty of seeing that the laws be faithfully executed." *Id.*

To this corpus of rationality, one might add the wisdom of Justice Scalia's courageous and now vindicated lone dissent in *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

II. Early Practice Under the Constitution

We have mentioned several aspects of the original public meaning of the Article II Vesting Clause's text that make us confident that President Trump has the power to fire at will Federal Trade Commissioner Slaughter. There are, however, at least two arguments from early practice under the Constitution that also make us confident that a headless fourth branch is unconstitutional. Traditionally, scholars have started (and stopped) their analyses of early practice with the congressional Decision of 1789, which supports an unlimited, constitutionally based presidential removal power.

Professors Calabresi and Prakash chose instead to start their analysis of early practice with the understanding in *the executive branch*, which the Constitution makes fully co-equal to the Congress. The President, quite independently of the Congress, draws his power directly from "We the People," who are sovereign, just as the federal courts draw, independently, their complete power from "We the People" to decide cases or controversies in accordance with the Constitution as the courts construe it. *See* Calabresi & Prakash, *supra*, at 637-42. We rely here on the following

scholarship: Saikrishna B. Prakash, *The Chief Prosecutor*, 73 Geo. Wash. L. Rev. 521 (2005); Leonard D. White, *The Federalists: A Study in Administrative History* (1948); Leonard D. White, *The Jeffersonians: A Study in Administrative History, 1801-1829* (1951); and Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington to Bush* (2008). For a response to recent critiques of these sources, see Aditya Bamzai & Saikrishna B. Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756 (2023).

A. Early Practice by the First Three Presidents

First, the early practice of the first three Presidents—George Washington, John Adams, and Thomas Jefferson—supports the idea that the Framers created a strong, unitary President who acted in all ways as if the Constitution gave him what Professors Calabresi and Prakash have called *the power to execute the law*. That power sometimes includes presidential power to execute the law without a congressional statute; presidential power to supervise, control, and direct subordinates; and presidential power when necessary to fire at will all principal and superior officers exercising executive power.

Professors Calabresi and Prakash pointed out in their 1994 article on this subject, *The President's Power to Execute the Laws*, that when President George Washington took the oath of office and became our first President on April 30, 1789, there was already a federal government under the Articles of Confederation that was up and running with what were in effect Cabinet Departments. Washington immediately asserted control and command over these

Departments *without waiting for Congress to authorize him legislatively to do so*. Calabresi & Prakash, *supra*, at 637. He had clearly assumed that the Executive Power Vesting Clause empowered him to assert control over the remnants of the Articles of Confederation government without any need for congressional authorization.

Thus, "five days after his inauguration, President Washington asked Acting Secretary of War Henry Knox to examine and provide a summary report on papers regarding a treaty with the Cherokee Indians that he was forwarding to Knox." Calabresi & Yoo, *supra*, at 40. A little more than a month later, "the President wrote to the Board of the Treasury and the Acting Secretaries of War and Foreign Affairs, asking them to provide him 'an acquaintance with the real situation of the several great Departments' and 'a full, precise, and distinct *general idea* of the affairs of the United States, so far as they are comprehended in or connected with' a particular department." Calabresi & Prakash, *supra*, at 637 (quoting 30 *Writings of George Washington* 344 (John C. Fitzpatrick ed., 1939)) (emphasis added). Washington sent a similar letter to the Postmaster General. *Id*. at 637 n.425 (citing *Writings of George Washington*, *supra*, at 344 n.30).

New Deal historian Leonard White, the preeminent administrative law historian of the early republic, wrote that once the new Cabinet Departments had been created and were up and running, "contacts between the President and his department heads were close and unremitting"—in fact, they included "hundreds of written communications and records of oral consultation." White, *The Federalists*, *supra*, at 32-33, 106-07. White describes Washington's contacts as

encompassing the "*approval of plans or actions* which had been submitted to him in writing"; "conveying *directions* concerning administrative operations"; "request[ing] his department heads," including Treasury Secretary Alexander Hamilton, "to give *opinions on the constitutionality of acts of Congress*"; and requesting his Secretaries to give "their *opinions on policy questions*, foreign and domestic alike." *Id.* at 32-33.

Washington used every means at his disposal to control the executive branch including having frequent breakfast meetings with his Cabinet Secretaries, reviewing their correspondence, and deciding both major and minor policy matters. Calabresi & Yoo, *supra*, at 41. Washington did not fail to fire officials or to force them to resign when he thought the circumstances warranted it. *Id.* For example, Washington fired at least seventeen civil officers of the government and six military officers. *Id.* at 42. Washington presumably acted on the basis of his constitutional authority, since no statute authorized him to make those removals. *Id.* Washington removed "three foreign ministers, Monroe, Carmichael, and Thomas Pinckney (at his request) as well as two consuls, eight collectors, and four surveyors of internal revenue." White, *The Federalists*, *supra*, at 285. In addition, Secretary of State Edmund Randolph's resignation under charges of misconduct "was in effect a removal." *Id.* at 288. "This was a particularly significant removal because … the district attorneys who were the government's prosecutors nominally reported at this time to the secretary of state." Calabresi & Yoo, *supra*, at 42.

Thus, Washington ran his administration in a way that realized the Framers' vision of a unitary executive branch. As White aptly observes: "All major

decisions in matters of administration and many minor ones were made by the President. No department head, not even Hamilton, settled any matter of importance without consulting the President and securing his approval." White, *The Federalists*, *supra*, at 27.

Our second President, John Adams, was just as vigorous in supervising, controlling, and directing the executive branch. Calabresi & Yoo, *supra*, at 59. Adams had opposed giving the Senate the power to confirm presidential appointments, thinking that would weaken the presidency too much. *Id.* Adams criticized the plural executive directory in France, writing to his Secretary of State Timothy Pickering: "The worst evil that can happen in any government is a divided executive; and as a plural executive must from the nature of men, be forever divided, this is a demonstration that a plural executive is a great evil, and incompatible with liberty. … This is my philosophy of government." Letter from John Adams to Timothy Pickering (Oct. 31, 1797).[9]

Adams removed twenty-one civil officers of the United States (counting two who were not reappointed) and six army officers. Calabresi & Yoo, *supra*, at 61. Among these were Secretary Pickering, one minister and four consular officers, one marshal, seven collectors, five surveyors, one supervisor, and one commissioner of court. *Id.*

As Leonard White explains:

> When the Federalists turned over the government to Jefferson in 1801 they left behind them a clear and consistent pattern of

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[9] *Founders Online*, National Archives, https://founders.archives.gov/documents/Adams/99-02-02-2200.

> executive relationships. They fully accepted the statement of the Constitution that the executive power was vested in the President. Their representatives in the legislative branch wrote this theory into the statutes conferring administrative authority. Their members in the executive branch put into practice what the Constitution and law enjoined. Washington made the decisions of executive policy, but on the basis of regular conference with department heads. ***. The power to govern was quietly but certainly taken over by the President. The heads of departments became his assistants. In the executive branch, according to Federalist orthodoxy, the President was undisputed master.

White, *The Federalists*, *supra*, at 36-37.

Our third President, Thomas Jefferson, similarly exercised control over the entire executive branch. As Professors Calabresi and Yoo have observed, he supported "a strong, independent, unitary executive" when he served as Secretary of State during the Washington administration. Calabresi & Yoo, *supra*, at 65. In a written opinion to President Washington, Secretary of State Jefferson specifically endorsed the principle that Article II's Vesting Clause conferred a general "grant" of the executive power on the President. Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions (Apr. 24, 1790), *in* 5 *Writings of Thomas Jefferson* 161, 162 (P. Ford ed., 1895). According to Alexander Hamilton: "It is not true … that [Jefferson] is an enemy to the power of the Executive, or that he is for

confounding all the powers in the House of Representatives. [W]hile we were in the administration together, he was generally for a large construction of the Executive authority and not backward to act upon it in cases which coincided with his views." Letter from Alexander Hamilton to James A. Bayard (Jan. 16, 1801).[10]

Jefferson's determination to control the executive branch completely was made clear in his vigorous and partisan removals of subordinate officers. Calabresi & Yoo, *supra*, at 68. As Prakash notes, Jefferson removed several district attorneys who he thought "had been too zealous in prosecuting alleged violations of the sedition act." Prakash, *The Chief Prosecutor*, *supra*, at 562. Since no statute authorized presidential removal of district attorneys, today called U.S. Attorneys, Jefferson must have thought that his power to make these removals stemmed from the Constitution. Calabresi & Yoo, *supra*, at 68. No one at the time, including Jefferson's Federalist Party opponents, questioned his power to make these partisan removals. *Id.*

Indeed, Jefferson inherited an executive branch that had acquired twelve years of Federalist Party appointees, and he removed many of them saying there needed to be fair representation of each party in the ranks of the federal government. *Id.* at 68-69. Unable to remove the Federalist appointed judges, Jefferson instead removed the vast majority of the U.S. Marshals and the district attorneys. *Id.*

As Professors Calabresi and Yoo conclude: "By the time Jefferson had completed his two terms in office,

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[10] *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-25-02-0169.

he was as enthusiastic and committed an advocate of the unitary executive as has ever walked the earth." *Id.* at 76. To illustrate, on January 26, 1811, Jefferson wrote a striking letter to a French friend, Destutt de Tracy, in which he noted that if Washington's cabinet had been a directorate, "the opposing wills would have balanced each other and produced a state of absolute inaction." Letter from Thomas Jefferson to Destutt de Tracy (Jan. 26, 1811).[11] It was the presence of a strong, unitary chief executive that provided the "regulating power which would keep the machine in steady movement." *Id.*

B. Early Practice in Congress: The Decision of 1789

One of the first orders of business for the first Congress was enacting the organic federal statutes governing the three great Cabinet Departments: the Department of Foreign Affairs, the Department of War, and the Department of the Treasury. Early drafts of these statutes purported themselves to give the President the power to remove officers of the United States in these three great Departments. In the Decision of 1789, both Houses of Congress voted to amend these bills to acknowledge that the Constitution itself gave the President the untrammeled power to remove departmental officers. *See* Saikrishna B. Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1028-29 (2005). The bills were thus altered to specify what would happen to items like departmental papers when the President used his constitutionally granted removal power. *Id.* at 1030-31.

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[11] *Founders Online*, National Archives, https://founders.archives.gov/documents/Jefferson/03-03-02-0258.

In *Myers v. United States,* 272 U.S. 52 (1926), Chief Justice Taft's 70-page long, scholarly majority opinion concluded that the First Congress had decided that the Constitution itself gave the President the removal power. Some revisionist scholars have questioned that conclusion, and the text of the bill setting up the Treasury Department was somewhat less clear on this point than the text of the bills setting up the Departments of Foreign Affairs and of War. Still, the Decision of 1789 was widely assumed until the 1860s to have resolved that the President was constitutionally authorized to remove all principal and superior officers at will who exercised executive power.

Given Presidents Washington's, Adams's, and Jefferson's clearcut endorsement of constitutionally granted removal power, the Decision of 1789 at a minimum represents a legislative acquiescence in that view, which was unchallenged until the 1830s.

C. Practice from 1832 to 2025

Subsequent practice from 1832 to 2025 has been characterized by episodic congressional attempts to limit the President's removal power, coupled with firm and consistent presidential non-acquiescence in those attempts. *See United States v. Midwest Oil*, 236 U.S. 459, 474 (1915) (requiring acquiescence by a coordinate branch before one can assume that that coordinate branch's original powers have been voided by longstanding practice); Calabresi & Yoo, *supra*, at 95-164; *see also* Leonard D. White, *The Jacksonians: A Study in Administrative History, 1829-1861* (1954). The first such attempt occurred during the Bank of the United States Wars between 1832 and 1836, when President Andrew Jackson vetoed the renewal of the

Bank's corporate charter on July 10, 1832, four years before the Bank's second charter expired.

In 1833, President Jackson ordered his Treasury Secretary William J. Duane to remove the federal government's huge deposits from the Bank and to put the money instead in 22 state-chartered banks. Duane refused; Jackson fired him on September 22, 1833. Jackson appointed future Chief Justice Roger B. Taney to be his new interim Treasury Secretary; Taney withdrew all federal deposits from the Bank, dealing that institution a devastating blow. The Senate—which the opposition and pro-bank Whig Party controlled—censured Jackson for firing Duane and for letting an unconfirmed Treasury Secretary make such a major decision. *See* Calabresi & Yoo, *supra*, at 105-08.

Nicholas Biddle, the Bank's President, proceeded to cause a financial panic and depression to punish Jackson, but Jackson persuaded the public that this simply showed that the Bank was a dangerous and corrupt institution. Jackson took the issue to the American people in the midterm elections of 1834, which he won decisively, and Jackson forced the Senate to expunge its resolution censuring him, which was a stinging defeat for the opposition Whig party. The net result was a complete and total vindication of Jackson's power to fire Treasury Secretary Duane, to appoint Taney as interim Treasury Secretary, and to withdraw all federal deposits from the Bank of the United States, which collapsed as a result. Congress tried in the Bank Wars to question Andrew Jackson's presidential removal power, and it suffered a stinging and thorough loss in that effort. *See id.* at 117-22.

Congress's next effort to limit presidential removal power came when it passed the Tenure of Office Act of

1867, which forbade President Andrew Johnson from firing Senate confirmed Cabinet Secretaries without the Senate approval in an unconstitutional effort to keep Lincoln appointees in office to prevent Johnson from stymying Reconstruction. *See id.* at 179; *see also* Leonard D. White, *The Republican Era: 1869-1901* (1958). The Tenure of Office Act was a blatant attempt to undo the Decision of 1789. Notwithstanding this unconstitutional act of Congress, Johnson fired Secretary of War, Edwin Stanton, without the Senate's consent, and the House of Representatives in response impeached Johnson. Johnson came within one vote of being removed from office by the Senate; he was not removed only because one-third plus one members of the Senate thought that the Tenure of Office Act was unconstitutional under the Decision of 1789. *See* Calabresi & Yoo, *supra*, at 179-87.

The Tenure of Office Act was greatly watered down on April 5, 1869, during the presidency of Ulysses S. Grant, and it was repealed outright with an acknowledgement that it had been unconstitutional, in 1887, at the insistence of President Grover Cleveland. Presidents Andrew Johnson, Ulysses S. Grant, Rutherford B. Hayes, Chester A. Arthur, and Grover Cleveland all took the position that the Tenure of Office Act was unconstitutional, and in the end, Congress capitulated and repealed the Act. *See id.* at 165-237.

The next big fight about the removal power arrived when *Humphrey's Executor* ruled, in 1935, that President Franklin D. Roosevelt's removal of Federal Trade Commissioner William Humphrey was unconstitutional. FDR was furious about this decision, and he appointed the Brownlow Commission in 1937 to fashion a legislative repudiation of *Humphrey's*

Executor. The Brownlow Commission was a presidentially appointed commission of political science and public administration experts that proposed that Congress eliminate all independent agencies and commissions in the executive branch and endorse the unitary-executive theory. The Brownlow Commission's recommendations formed the basis of the Reorganization Act of 1939 and the creation of the Executive Office of the President. Congress agreed to create the Executive Office of the President, which greatly added to presidential control over the executive branch, but to FDR's chagrin it declined to replace all the superior officers in the government who were removable only for cause with officers removable at will. *See id.* at 278-301.

The significance of this episode is that it shows—along with President Jackson's removal of Treasury Secretary Duane and President Johnson's removal of Secretary of War Stanton—an unwavering commitment by the President to an unlimited presidential power to remove, at will, all principal and superior officers who exercise executive power.

The most recent big fight about the removal power concerned the constitutionality of the Ethics in Government Act of 1978 (EIGA). This statute was a post-Watergate response to President Richard M. Nixon's firing of Watergate Special Counsel Archibald Cox in October 1973 to prevent Cox's subpoenaing of Nixon's tape recordings of himself committing crimes in the Oval Office. Under the EIGA, whenever there were credible allegations of criminal wrongdoing by a high-level official of the executive branch, the Attorney General was obligated to apply to a special three-judge court appointed by the Chief Justice for the

appointment of an independent counsel, removable only for cause, who would investigate and prosecute the wrongdoing in question. *See id.* at 365-66.

In *Morrison v. Olson*, 487 U.S. 654 (1988), the Supreme Court erroneously (in our view) upheld the constitutionality of the EIGA in a seven-to-one opinion over the dissent of Justice Scalia. *Morrison* concerned independent inferior officers exercising executive power, unlike this case which concerns an independent superior officer who exercises executive power. *See* 487 U.S. at 660-65. Justice Scalia's dissent argued both that *Humphrey's Executor* had been wrong in upholding limits on presidential removal, and that independent counsels prosecuting cases were core executive branch personnel who had to be removable by the President at will—and were not quasi-judicial, quasi-legislative officers like Federal Trade Commissioner Humphrey. *See id.* at 706-08 (Scalia, J., dissenting).

President George H.W. Bush vetoed the EIGA because of its limitation of presidential removal power when it came up for renewal during his presidency. *See* Calabresi & Yoo, *supra*, at 385-86. President Clinton signed a bill renewing the EIGA at the start of his presidency, but his Attorney General Janet Reno testified to Congress against renewing the Act in 1999, and the EIGA was allowed to sunset out of existence in 1999. *See id.* at 400. Republicans thought independent counsel Lawrence Walsh had abused his powers as an independent counsel in his prosecutions of cases arising out of the Iran-Contra scandal. Democrats felt that independent counsel Ken Starr had abused his powers in his prosecution of cases involving President Bill Clinton. By 1999, there was a bipartisan

consensus that the EIGA was both unconstitutional and unwise public policy. *See id.* at 400-04, 426-27.

The significance of the rise and fall of the EIGA is that, like the rise and fall of The Tenure of Office Act of 1867, the EIGA represented a congressional attempt to impose limits on the President's removal power between 1978 and 1999—an attempt that ultimately failed due to bipartisan presidential commitment to the idea that Congress lacks the power to impose limits on the presidential removal power over officers who exercise executive power. In the case of the EIGA, the incursion on the presidential removal power was less severe than it was with The Tenure of Office Act, which purported to limit the presidential removal power of superior officers like Federal Trade Commissioners, whereas the EIGA limited removal power of an allegedly inferior officer who was in fact a superior officer. *See Edmond v. United States*, 520 U.S. 651, 666 (1997) (holding that "[t]he power to remove officers" at will and without cause "is a powerful tool for control" of an inferior officer); *accord Free Enter. Fund*, 561 U.S. at 510.

The above fights—over President Jackson's firing of Treasury Secretary William Duane, President Johnson's firing of Secretary of War Edwin Stanton, President Franklin D. Roosevelt's effort to get Congress to abolish removal limits on non-congressional and non-Article III judges who were federal superior officers, and the EIGA's constitutionality—reveal that the great tectonic plates of the presidency and the Congress have repeatedly rubbed up against each other over the course of 236 years of American history, producing the legal equivalent of earthquakes from the Decision of 1789 to the present day.

No doubt such earthquakes will continue to occur, so long as we retain our current form of government. The consistent theme is that Congress schemes to limit presidential removal power over officers exercising executive power, and Presidents successfully fight against and defeat such limits. As Professors Calabresi and Yoo show, our practice over the last 236 years of presidential history has been one of presidential assertion of the removal power—even in the face of congressional attempts to curtail it. *See generally* Calabresi & Yoo, *supra*. Indeed, Presidents have not "acquiesced in" *any* congressional limitations on the removal power, *see Midwest Oil*, 236 U.S. at 474.

III. Considerations of Democratic Accountability

Humphrey's Executor should be overruled. There is now a vast headless fourth branch of the federal government that comprises undemocratic administrative agencies, many of which, like the Federal Trade Commission, are rendered by statute effectively unaccountable. These independent agencies have rulemaking personnel, prosecutorial officers who clearly exercise executive power, and administrative law judges all working in one building together sharing lunch in the cafeteria. They are a flagrant violation of the separation of powers, which is the central feature of our Constitution of 1787, *see Buckley*, 424 U.S. at 119.

The independent regulatory agencies are run by superior officers who are irremovable as a practical matter and who work for the congressional oversight and appropriations committees from which they get their budgets, to the extent they work for anyone who is democratically accountable at all. The President and Vice President are the only officers of the national

government who are elected by all the people of the United States. House and Senate committees are led by Chairs who represent only a fraction of the total population, which skews national policy execution of the laws to favor small and unrepresentative House districts and States. *See* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 Ark. L. Rev. 23, 91-92 (1995).

It is critical that the President, our only nationally elected officer—not congressional committee chairs from small and unrepresentative House districts and States—exercise control over the headless fourth branch. The issue here is: Should we have national democratic control of a sizable chunk of the government? *See* Steven G. Calabresi & Nicholas Terrell, *The Fatally Flawed Theory of the Unbundled Executive*, 93 Minn. L. Rev. 1696, 1712-16 (2008) (advancing other normative arguments for the unitary executive).

Presidential removal power, like all forms of governmental power, can be abused, which may become grounds for impeachment, removing the President from office, and disqualifying the President from holding office in the future. The President is thus democratically accountable through the impeachment process for misusing the removal power or his power to execute the laws. President Richard M. Nixon deservedly learned this lesson the hard way. The executive power of removal cannot be exercised to commit crimes.

IV. Stare Decisis Considerations

Every constitutional democracy in the world has what Professor Hans Kelsen called a *grundnorm*, i.e., a rule by which constitutions and amendments to constitutions are made and unmade. Hans Kelsen, *Pure Theory of Law* 8-9 (1960). The *grundnorm* of the Constitution of the United Kingdom is that any act of the King-in-Parliament with the House of Lords and the House of Commons is a sovereign act that cannot be questioned in any other place. Hence, U.K. judges do not truly have the power of judicial review of acts of parliament, just as the U.S. Supreme Court does not have the power of judicial review of constitutional amendments. In contrast, the Supreme Courts of India, Brazil, Germany, and Israel do have the power to review judicially some constitutional amendments, and they have all exercised that power in the last seventy years.

The *grundnorm* of the U.S. Constitution is that "We the People of the United States" ordained and established the Constitution through the very democratic process set out in Article VII. The legislative, executive, and judicial branches of the federal government independently draw their power from "We the People of the United States"—a power which Congress cannot alter under the horizontal Necessary and Proper Clause. The Constitution can be amended only under the rules set out in Article V. The President-in-Congress with the Senate and the House of Representatives cannot, by passing statutes for many decades purporting to limit presidential removal power, change the Constitution's meaning, which grants the President the power to remove at will all principal and superior officers who exercise executive power.

A ninety-year-old precedent such as *Humphrey's Executor* also cannot change the Constitution's meaning. Longstanding precedent may liquidate some ambiguities in the constitutional text—for example, standing doctrine has helped define what constitutes a case or controversy. But *Humphrey's Executor* was wrongly decided on the day it was issued, as it purported to allow Congress to greatly weaken its institutional rival, the President, by taking away one of his most critical powers: the removal power.

Humphrey's Executor has been publicly excoriated for the last forty years. In a nationally covered speech at the University of Dallas on February 27, 1986, Ronald Reagan's right-hand man, Attorney General Meese, discussed the central importance of the separation of powers and the unconstitutionality of the headless fourth branch of the federal government. As Meese put the point:

> The logical flaws and constitutional shortcomings [of *Humphrey's Executor*] … have been glossed over in the name of securing a powerful regulatory function for the national government. Such logic, reflecting as it does the early twentieth century confidence that politics and administration can be clearly and completely separated, falls short by its failure to appreciate that *any* institution that wields governmental power is inherently political. …
>
> [T]he foundations of *Humphrey's Executor* are crumbling. … [T]he distinctive expertise and impartiality of independent agencies appear much less compelling in the light of a half-century of experience.

Edwin Meese III, *Address Before the Federal Bar Association Annual Banquet* (Sept. 13, 1985), at 10-11.[12]

Attorney General Meese made it clear in that 1986 speech that he thought *Humphrey's Executor* needed to be overruled—and he reasserts that position in co-signing this amicus brief today.

A critical reason why the President needs to be able to fire officers and employees at will is the *in terrorem* effect that firing some principal and superior officers has on the other principal and superior officers in the federal government. The clear overruling of *Humphrey's Executor* would restore that *in terrorem* effect—which would, in turn, augment presidential control over the administrative state and thereby reduce the risk that it will "slip" from the people's control, *see Free Enter. Fund*, 561 U.S. at 499.

This Court has overruled major precedents that were older and more controversial than *Humphrey's Executor*. For example, *Swift v. Tyson*, 41 U.S. 1 (1842), was as consequential a precedent as is *Humphrey's Executor*, and it was overruled after 96 years by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *Roe v. Wade*, 410 U.S. 113 (1973), was overruled by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022), after 49 years, even though emotions run much higher over the abortion issue than they do over the headless fourth branch.

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[12] https://www.justice.gov/ag/speeches-attorney-general-edwin-meese-iii.

Arguments from the Constitution's text, the text's original public meaning, early practice under the Constitution, practice over the entire 236 years of American government under the Constitution, democratic policy considerations, and stare decisis considerations all ineluctably point to the same conclusion: *Humphrey's Executor* was wrongly decided and should be overruled.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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