No. 23-1323

IN THE

Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,

Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae

July 17, 2024

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitution

Statutes

Rules

Other Authorities

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. Here, AFPF writes to highlight the critical importance of answering the question presented by Petitioners and the stakes for self-government and individual liberty.

SUMMARY OF ARGUMENT

The Petition squarely "tees up one of the fiercest (and oldest) fights in administrative law: the *Humphrey's Executor* 'exception' to the general 'rule' that lets a president remove subordinates at will." Pet. App. 2a (citation omitted). As illuminated by the

---

[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

Fifth Circuit's split panel opinion and underscored by its fractured 9-8 en banc denial, "this cert petition writes itself." Pet. App. 39a (Willett, J., concurring in the denial of rehearing en banc). And this Petition is an ideal vehicle to "push reset on *Humphrey's Executor*," *id.*, by making clear it does not extend to agencies like the Consumer Product Safety Commission ("CPSC") that wield substantial executive power.

At its core, "[t]his is a case about executive power and individual liberty." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 164 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). Unlike a fine wine, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), has not gotten better with age. Over the past ninety years, *Humphrey's Executor* has enabled a host of separation-of-powers violations, which have had real practical consequences for countless businesses and individuals who have found themselves in the crosshairs of these "independent" agencies' law enforcement activities. The targets of these extraconstitutional administrative entities often have no meaningful recourse to any elected officials, as none of them has the power to rein in these "independent" administrative bodies. Nor can they remove unelected officials whose public policy and law enforcement priorities conflict with those of the political branches—and, by extension, conflict with the will of the People.

Neither *Humphrey's Executor*'s stale vintage nor any putative "reliance" interest federal officials may claim to have in unconstitutional insulation from any political accountability justify extending the "quasi-legislative, quasi-judicial" charade upon which that

poorly reasoned decision rests to agencies like the CPSC that wield executive power. In *Seila Law LLC v. Consumer Fin. Prot. Bureau*, this Court "repudiated almost every aspect of *Humphrey's Executor*." 591 U.S. 197, 239 (2020) (Thomas, J., concurring in part and dissenting in part). In *Seila Law,* this Court made clear that its holding is limited to "multimember expert agencies that do not wield substantial executive power[.]" *Id.* at 218 (majority op.). And today, *Humphrey's Executor* is "nearly, *nearly*, zombified precedent[.]" Pet. App. 36a n.10 (Willett, J., concurring in the denial of rehearing en banc). But lower courts continue to misapprehend the scope of this constitutionally dangerous decision, as the decision below illustrates.

The time has come to "repudiate what is left of this erroneous precedent," *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part), and confine it to its facts. Our constitutional Republic will be healthier for it. Leaving the panel majority's overbroad reading of *Humphrey's Executor* unaddressed "does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty." *Id.* at 251 (Thomas, J., concurring in part and dissenting in part). Under our system of checks and balances, those who wield substantial executive power must be, in some way, accountable to the source of that power: the People, through the duly elected President. But "[t]here is no accountability to the people when so much of our government is so deeply insulated from those we elect. Restoring our democracy requires regaining control of the bureaucracy." Pet. App. 40a (Ho, J., dissenting from denial of rehearing en banc). Confining

Humphrey's Executor to its facts is a good starting place.

This Court should grant the Petition, reaffirm that it meant what it said in *Seila Law*, and sweep *Humphrey's Executor* "into the dustbin of repudiated constitutional principles." *Morrison v. Olson*, 487 U.S. 654, 725 (1988) (Scalia, J., dissenting).

ARGUMENT

I. The Constitution Does Not Authorize a Headless Fourth Branch.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). To protect liberty, the Constitution "sets out three branches and vests a different form of power in each—legislative, executive, and judicial." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring) (citing U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1). "[T]he legislature makes, the executive executes, and the judiciary construes the law[.]" *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.). "These grants are exclusive." *Dep't of Transp. v. Ass'n of Am. R.R.,* 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment).

"'If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.'" *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress, 581). This means that Congress cannot create administrative

bodies that "straddle multiple branches of Government. . . . Free-floating agencies simply do not comport with this constitutional structure." *Seila Law*, 591 U.S. at 247. "The Constitution establishes three branches of government, not four. . . . It therefore follows that there can be no fourth branch, headless or otherwise." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 892 (3d Cir. 1986) (Becker, J., concurring in part).

"To further safeguard liberty, the Framers insisted upon accountability for the exercise of executive power," "lodg[ing] full responsibility . . . in a President of the United States, who is elected by and accountable to the people." *PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting). The Constitution provides in no uncertain terms that "[t]he executive Power shall be vested in a President," U.S. Const. Art. II, § 1, cl. 1, who "shall take Care that the Laws be faithfully executed," U.S. Const. Art. II, § 3, thereby "creat[ing] a strongly unitary executive." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 Ala. L. Rev. 1205, 1213 (2014).

Under our constitutional structure "[t]he entire 'executive Power' belongs to the President alone," *Seila Law*, 591 U.S. at 213, "including the power of appointment and removal of executive officers," *Myers*, 272 U.S. at 164. This ensures "[t]he buck stops with the President," *Free Enter. Fund*, 561 U.S. at 493, who "bears responsibility for the actions of the many departments and agencies within the Executive Branch," *Trump v. United States*, 144 S. Ct. 2312, 2327 (2024). And for good reason. The "unitary Executive"—including the President's Article II at-will removal power—was designed "not merely to

assure effective government but to preserve individual freedom."[2] *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting).

"The President's management of the Executive Branch requires him to have unrestricted power to remove the most important of his subordinates . . . in their most important duties." *Trump*, 144 S. Ct. at 2335 (cleaned up). The President's at-will removal power flows directly from the Constitution, not from Congress. *See Seila Law*, 591 U.S. at 204; *Myers*, 272 U.S. at 163–64. "[T]he constitutional text and the original understanding, including the Decision of 1789, established that the President possesses the power under Article II to remove officers of the Executive Branch at will." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 692 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *overruled*, 561 U.S. 477 (2010).

"The President's removal power has long been confirmed by history and precedent. It was discussed extensively in Congress when the first executive departments were created in 1789." *Seila Law*, 591 U.S. at 214 (cleaned up). "Most members of [the First] Congress recognized that forbidding removal effectively would preclude presidential control of law execution and destroy presidential accountability for that task." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701,

---

[2] "The President occupies a unique position in the constitutional scheme as the only person who alone composes a branch of government." *Trump*, 144 S. Ct. at 2329 (cleaned up).

796 n.556 (2003). "Debates in the First Congress, the so-called Decision of 1789, made clear that the President is vested with plenary removal power." *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring in part and dissenting in part). The First Congress thus "confirmed that Presidents may remove executive officers at will." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., concurring).

Nor may Congress limit the core at-will removal power Article II exclusively vests in the President.[3] "[B]ecause the Constitution nowhere grants Congress the authority to strip that power from the President, the President's removal power was originally understood to be nondefeasible." Pet. App. 42a (Oldham, J., dissenting from denial of rehearing en banc) (citing Aditya Bamzai & Saikrishna Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1789 (2023)). Indeed, this Court has "held that Congress lacks authority to control the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed.'" *Trump*, 144 S. Ct. at 2328 (quoting *Myers*, 272 U.S. at 106, 176).

---

[3] Just this Term, this Court reiterated that the removal authority is one of the President's "core constitutional powers" "within his exclusive sphere of constitutional authority." *Trump*, 144 S. Ct. at 2327–28.

II. The At-Will Removal Power Serves As a Key Accountability Checkpoint.

"As Madison stated on the floor of the First Congress, 'if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.'" *Free Enter. Fund*, 561 U.S. at 492 (quoting 1 Annals of Cong. 463 (1789)). Given that the President's "selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible." *Myers*, 272 U.S. at 117. More broadly, "because the President, unlike agency officials, is elected," the President's removal power "is essential to subject Executive Branch actions to a degree of electoral accountability." *Collins v. Yellen*, 594 U.S. 220, 252 (2021). For "[w]ithout presidential responsibility there can be no democratic accountability for executive action." *United States v. Arthrex, Inc.*, 594 U.S. 1, 28 (2021) (Gorsuch, J., concurring in part, dissenting in part).

Article II's vesting of at-will removal power allows the President to ensure unelected administrative officials "serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." *Collins*, 594 U.S. at 252. "It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Id.* at 278 (Gorsuch, J., concurring in part). "At-will removal 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." *Id.* at 252 (majority op.) (cleaned up). After all, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

The President's at-will removal power also protects liberty. "Few things could be more perilous to liberty than some 'fourth branch' that does not answer even to the one executive official who is accountable to the body politic." *Collins*, 594 U.S at 278–79 (Gorsuch, J., concurring in part) (citing *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting)). The President's Article II at-will removal power guards against this threat. Limits on that core Executive power allow "wholly unaccountable government agent[s to] assert the power to make decisions affecting individual lives, liberty, and property. The chain of dependence between those who govern and those who endow them with power is broken." *Id.* at 278 (Gorsuch, J., concurring in part). For this reason, "[i]f anything, removal restrictions may be a greater constitutional evil than appointment defects." *Id.* at 277 (Gorsuch, J., concurring in part).

III. For-Cause Removal Protections For Officers Wielding Substantial Executive Power Empower a Fourth Branch.

As Justice Robert Jackson explained long ago, "[t]he rise of administrative bodies probably has been the most significant legal trend of the last century[.]" *FTC v. Ruberoid Co.*, 343 U.S. at 487 (dissenting). The problem is far worse today, as Congress has devised ever more novel and powerful administrative bodies

unmoored to the Constitution. *See City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting).

"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." *Free Enter. Fund*, 561 U.S. at 499. For good reason. "President Truman colorfully described his power over the administrative state by complaining, 'I thought I was the president, but when it comes to these bureaucrats, I can't do a damn thing.' President Kennedy once told a constituent, 'I agree with you, but I don't know if the government will.'" *City of Arlington*, 569 U.S. at 313–14 (Roberts, C.J., dissenting) (citations omitted).

That holds true today. As it stands now, "the President actually controls surprisingly little of the Executive Branch. Only a tiny percentage of Executive Branch employees are subject to Presidential removal." *Feds for Med. Freedom v. Biden,* 63 F.4th 366, 390 (5th Cir. 2023) (en banc) (Ho, J., concurring). The bulk of the federal bureaucracy is shielded from presidential removal—and thus from accountability to the People through the elected President—by civil service laws. *See id.* (Ho, J., concurring). This means that "a modern president is more or less stuck with thousands of civil servants whom he did not appoint and have little loyalty toward him." Jason Marisam, *The President's Agency Selection Powers*, 65 Admin. L. Rev. 821, 863 (2013).

This "make[s] it virtually impossible for a President to implement his vision without the active

consent and cooperation of an army of unaccountable federal employees."[4] *Feds for Med. Freedom*, 63 F.4th at 390 (Ho, J., concurring). "Even if a president has the perfect ally running an agency, that ally may still fail to produce the desired results if the ally runs into resistance from his civil servants." Marisam, 65 Admin. L. Rev. at 863. And those unelected bureaucrats are almost impossible to fire because "they enjoy a de facto form of life tenure, akin to that of Article III judges."[5] *Feds for Med. Freedom*, 63 F.4th at 391 (Ho, J., concurring). These tenure-like protections embolden some federal employees to view themselves "as a free-standing interest group entitled to make demands on their superiors." *Id.* (Ho, J., concurring). And they do.

Now consider what *Humphrey's Executor*, under a maximalist reading, layers on top of this. "To supervise and direct executive officers, the President must be able to remove those officers at will. Otherwise, a subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp.*, 881 F.3d at 168 (Kavanaugh, J., dissenting). *Humphrey's Executor* dashes this scheme by blessing Congress's creation of free-floating administrative bodies that

---

[4] "[O]ver time the tenure-like protections for the civil service have sharply reduced the president's ability to change the direction of the permanent bureaucracy[.]" John Yoo, *Unitary, Executive, or Both?*, 76 U. Chi. L. Rev. 1935, 1956–57 (2009).

[5] These removal protections cause "a rather curious distortion of our constitutional structure." *Feds for Med. Freedom*, 63 F.4th at 390 (Ho, J., concurring).

"are not supervised or directed by the President." *Id.* at 164 (Kavanaugh, J., dissenting).

"Because of *Humphrey's Executor*, the President cannot remove an independent agency's officers when the agency pursues policies or makes decisions the President disagrees with." *In re Aiken Cty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). This effectively means that "the President does not have the final word in the Executive Branch about" policy decisions made by independent agencies.[6] *Id.* at 446 (Kavanaugh, J., concurring). And the President "lacks day-to-day control over large swaths of regulatory policy and enforcement in the Executive Branch[.]" *Id.* at 442 (Kavanaugh, J., concurring).

That is no small thing. "By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause." *Seila Law*, 591 U.S. at 276 (Breyer, J., dissenting) (citation omitted). "Examples of independent agencies include well-known bodies such as the Federal Trade Commission, the Federal Communications Commission, the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Energy Regulatory Commission." *PHH Corp.*, 881 F.3d at 164 (Kavanaugh, J., dissenting); *see Free Enter. Fund*, 561 U.S. at 549–56 (Breyer, J., dissenting) (Appendix A

---

[6] The FTC's failed prosecution of Qualcomm is a perfect example, putting the FTC at odds with the DOJ, which shares authority to enforce federal antitrust laws. *See FTC v. Qualcomm Inc.*, 935 F.3d 752, 756 (9th Cir. 2019). Unlike the Executive-controlled DOJ, the President cannot rein in the FTC.

listing agencies). "Statute after statute establishing such entities instructs the President that he may not discharge their directors except for cause[.]" *Seila Law*, 591 U.S. at 261 (Breyer, J., dissenting).

These free-floating administrative bodies are, "in effect, a headless fourth branch of the U.S. Government."[7] *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting). And they "possess extraordinary authority over vast swaths of American economic and social life—from securities to antitrust to telecommunications to labor to energy. The list goes on." *Id.* at 170 (Kavanaugh, J., dissenting). Congress has granted many of these entities sweeping Executive power impacting private rights.

Consider the CPSC, which "has broad rulemaking discretion," "sweeping investigatory and enforcement powers," and, on top of this, "adjudicatory authority." Pet. App. 46a–47a (Oldham, J., dissenting from denial of rehearing en banc); *see* Pet. 3, 6–8. "At the time it was established" in 1971, the CPSC's "jurisdiction covered an estimated ten thousand consumer products and more than a million sellers and

---

[7] An FTC Commissioner recently observed: "Americans cannot vote us out when we get it wrong. And Congress has tried to insulate us from the one person in the Executive Branch whom the people can vote out, separating us even further from those whose lives we claim to govern." Dissenting Statement of Commissioner Andrew N. Ferguson, Joined by Commissioner Melissa Holyoak, *In the Matter of the Non-Compete Clause Rule*, Matter No. P201200, at 7 (June 28, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-noncompete-dissent.pdf.

producers." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 65–66 (2010). Since then, its powers have only grown. Today, the CPSC's reach extends to "consumer products representing $1.6 trillion in consumption[.]" Gov't Accountability Office, Consumer Product Safety Commission: Actions Needed To Improve Processes for Addressing Product Defect Cases 1 (Nov. 2020), https://perma.cc/3DU9-HN45. Many similarly structured entities likewise "exercise[e] substantial executive authority[.]" *PHH Corp.*, 881 F.3d at 173 (Kavanaugh, J., dissenting) (providing "sample list").

IV. The Panel Majority Misapprehended *Humphrey's Executor*'s Sweep.

As Petitioners explain, *see* Pet. 4, 14–23, *Seila Law—not Humphrey's Executor*—controls.[8] As *Seila Law* reaffirmed, Article II's "text, first principles, the First Congress's decision in 1789, *Myers*, and *Free Enterprise Fund* all establish that the President's removal power is the rule, not the exception." 591 U.S. at 200. And *Seila Law* makes pellucid that the *Humphrey's* exception "for multimember expert agencies that do not wield substantial executive power" is at the "outermost constitutional limits of permissible congressional restrictions on the President's removal power" under this Court's precedent. *Id.* at 218 (citation omitted); *see Trump*,

---

[8] *Amicus* believes that *Humphrey's Executor* should be squarely overruled. But this Court need not do so to resolve the question presented by the Petition. *See* Pet. 27–29.

144 S. Ct. at 2328 (referencing "only 'two exceptions to the President's unrestricted removal power'" (quoting *Seila Law*, 591 U.S. at 215)).

It is undisputed that the CPSC exercises substantial executive power. *See* Pet. App. 20a. Therefore, the *Humphrey's Executor* exception does not apply. That should have ended the analysis. But the panel majority overread *Humphrey's Executor* to expand its holding to cover administrative bodies that *do* exercise substantial executive power. *See* Pet. App. 29a (Jones, J., concurring in part, dissenting in part). That was error. "[T]he holding of that case is nowhere near as broad[.]" Pet. App. 50a (Oldham, J., dissenting from denial of rehearing en banc).

A. *Humphrey's Executor*'s Scope Is Cabined By Its Facts and This Court's Modern Precedent.

The Petition presents an ideal opportunity for this Court to clarify how lower courts should resolve the sweep of precedent that, while still on the books, is not only at odds with the Constitution's text and history but incompatible with the reasoning of this Court's subsequent decisions. *Cf.* Pet. 13. As Justice Gorsuch recently explained, "[a] past decision may bind the parties to a dispute, but it provides this Court no authority in future cases to depart from" the Constitution. *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2279 (2024) (concurring). After all, the Constitution is the "supreme Law of the Land." U.S. Const. art. VI, cl. 2.

Lower court judges should thus "decide every case faithful to the text and original understanding of the

Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc). While courts must "faithfully follow" this Court's precedents, courts "should resolve questions about the scope of those precedents in light of and in the direction of the constitutional text and constitutional history," *Edmo v. Corizon, Inc.*, 949 F.3d 489, 506 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc) (cleaned up), and "tread carefully before extending" dubious precedent, *Garza v. Idaho*, 586 U.S. 232, 259 (2019) (Thomas, J., dissenting).

Respectfully, that did not happen here. As the panel opinion acknowledged, "[t]he logic of *Humphrey's* may have been overtaken," Pet. App. 4a, and "*Seila Law* cast doubt on the constitutionality of agencies like the" CPSC, Pet. App. 24a. Its author wrote: "Count me among those skeptical of *Humphrey's Executor*, which seems nigh impossible to square with the Supreme Court's current separation-of-powers sentiment." Pet. App. 38a (Willett, J., concurring in denial of rehearing en banc). The panel simply did not give these considerations due weight in resolving Petitioners' Article II removal claim, instead adopting a maximalist reading of *Humphrey's Executor*.

While the panel opinion's author acknowledged that *Humphrey's Executor* involved different facts and was decided in a different legal landscape, *see* Pet. App. 36a–37a (Willett, J., concurring in denial of rehearing en banc), the panel nonetheless concluded that *Humphrey's Executor* controlled its analysis. *See* Pet. App. 25a. That conclusion is mistaken. After all,

"when judges reach a decision in our adversarial system, they render a judgment based only on the factual record and legal arguments the parties at hand have chosen to develop. A later court assessing a past decision must therefore appreciate the possibility that different facts and different legal arguments may dictate a different outcome." *Loper*, 144 S. Ct. at 2281 (Gorsuch, J., concurring).

So too here. "Rightly understood, the fact-bound holding of *Humphrey's Executor* does not encompass the [CPSC] Commission's removal protections." Pet. App. 51a (Oldham, J., dissenting from denial of rehearing en banc). The *Humphrey's Executor* "Court did not take a position on the question of whether Congress could restrict the President's authority to remove executive branch officers that wield more executive power than the 1935 FTC." Pet. App. 51a (Oldham, J., dissenting from denial of rehearing en banc); *see Humphrey's Executor*, 295 U.S. at 632. And even if it had, under this Court's modern precedent "only a very narrow reading of" *Humphrey's Executor* "is still good law," as Judge Walker has suggested elsewhere.[9] *Severino v. Biden*, 71 F.4th 1038, 1050 (D.C. Cir. 2023) (Walker, J., concurring).

---

[9] "[I]f Congress may not vest *any* nonexecutive power in an executive agency, it might be that little to nothing is left of the *Humphrey's* exception to the general rule that the President may freely remove his subordinates." *Severino*, 71 F.4th at 1050 (Walker, J., concurring). *Cf.* Pet. 32.

B. *Humphrey's Executor* Involved Inapposite Facts.

"Rightly or wrongly, the [*Humphrey*'s *Executor*] Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'"[10] *Seila Law*, 591 U.S. at 215. The *Humphrey's Executor* Court described the 1935 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." *Humphrey's Executor*, 295 U.S. at 628. *Cf.* Powers and Duties of the Fed. Trade Comm'n in the Conduct of Investigations, 34 Op. Att'y Gen. 553, 557 (1925) ("A main purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation.").

"Such a body," the Court found, "cannot in any proper sense be characterized as an arm or an eye of the executive." *Humphrey's Executor*, 295 U.S. at 628. Based upon this understanding of the 1935 FTC, the Court concluded that this administrative body did not "exercise executive power in the constitutional sense." *Id.* And thus FTC Commissioners "occup[y] no place in the executive department and . . . exercise[] no part

---

[10] "[W]hat matters is the set of powers the Court considered as the basis for its decision [in *Humphrey's Executor*], not any latent powers that the agency may have had not alluded to by the Court." *Seila Law*, 591 U.S. at 219 n.4.

of the executive power vested by the Constitution in the President."[11] *Id.*

On its terms, "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body, balanced along partisan lines, that performed legislative and judicial functions *and was said not to exercise any executive power*." *Seila Law*, 591 U.S. at 216 (emphasis added). Indeed, the *Humphrey's Executor* Court placed great weight on its view that the FTC's "duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative." 295 U.S. at 624.

By contrast, *this* case rests on fundamentally different facts. For starters, "[i]n 1935, the FTC satisfied the Court's test for insulation from at-will removal because it did not exercise any executive

---

[11] This understanding of the 1935 FTC's powers was informed by the parties' briefs. In a section titled "The Nature of the Federal Trade Commission," the brief for Humphrey's Executor described the FTC as "a legislative agent of Congress and an agent of the Courts." Br. for Samuel F. Rathbun, Executor, 1935 WL 32964, at *47 (filed Mar. 19, 1935). In discussing the FTC's powers, the brief asserted that the FTC's activities as a "direct agent of Congress is perhaps the most important single function performed by the Commission," "estimat[ing] that approximately one-half of the total amount expended by the Commission has been spent on account of investigations undertaken as such an agent of Congress in aid of legislation[.]" *Id.* at *44–*46. The government, for its part, effectively acknowledged that the FTC's primary duties were conducting investigations and submitting "Reports to Congress on special topics[.]" Br. for the United States, 1935 WL 32965, at *24–26 (filed April 6, 1935).

power." Pet. App. 28a (Jones, J., concurring in part, dissenting in part). "[U]nlike the 1935 FTC, the CPSC does exercise executive power." Pet. App. 28a (Jones, J., concurring in part, dissenting in part); *see* Pet. App. 46a–47a (Oldham, J., dissenting from denial of rehearing en banc); Pet. 7–8. For example, the CPSC possesses civil penalty authority, *see* 15 U.S.C. §§ 2069(a)–(b), 2076(b)(7)—"a quintessentially executive power not considered in *Humphrey's Executor*." *Seila Law*, 591 U.S. at 219.

C. *Humphrey's Executor* Turned On Reasoning Incompatible With This Court's Modern Separation of Powers Precedent.

Humphrey's Executor was also poorly reasoned, and its constitutional holding has only become lonelier with time. *See generally id.* at 243–51 (Thomas, J., concurring in part and dissenting in part) (explaining why). "*Humphrey's Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Id.* at 246 (Thomas, J., concurring in part and dissenting in part). It "relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of 'the executive power vested by the Constitution in the President.'" *Id.* at 247 (Thomas, J., concurring in part and dissenting in part) (quoting *Humphrey's Executor*, 295 U.S. at 628). "The problem is that the [*Humphrey's Executor*] Court's premise was entirely wrong." *Id.* (Thomas, J., concurring in part and dissenting in part).

Under our Constitution, Congress does not have the power to create these unconstitutional (and unaccountable) "[f]ree-floating agencies[.]" *Id.* (Thomas, J., concurring in part and dissenting in part). And however one chooses to describe the vast and varied powers wielded by independent agencies, "under our constitutional structure" *all* of those powers "must be exercises of" Article II executive power. *City of Arlington*, 569 U.S. at 304 n.4 (citing U.S. Const. art. II, §1, cl. 1).

D. Today's FTC Does Not Qualify For The *Humphrey's Executor* Exception.

Finally, *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 591 U.S. at 216 n.2. Today, it "does not even satisfy its own exception." *Id.* at 250 (Thomas, J., concurring in part and dissenting in part). Regardless of whether this Court's characterization of the FTC's activities was true in 1935, "the FTC has evolved significantly over time."[12] Pet. App. 28a (Jones, J., dissenting). The 1935 FTC did not remotely resemble *today's* FTC. Nor did it resemble the CPSC. And the 1935 FTC's powers are not in the same ballpark as those the FTC wields today.

---

[12] Congress can shift an entity's "constitutional position" by granting it different and greater powers. *See Crim v. Commissioner*, 66 F.4th 999, 1007 (D.C. Cir. 2023) (Walker, J., dissenting). That perhaps holds true for the FTC, which comes nowhere close to qualifying for the *Humphrey's Executor* exception today.

To put this in perspective, when *Humphrey's Executor* was decided the FTC *did not* have consumer protection authority, let alone independent litigating authority and the power to seek injunctions directly in federal court, as well as to enforce those injunctions in civil and criminal contempt actions. *See* Daniel A. Crane*, Debunking Humphrey's Executor,* 83 Geo. Wash. L. Rev. 1835, 1864 (2015) ("[A]t the time of *Humphrey's Executor*, the FTC had no power to sue in federal district court."); *see also* David M. FitzGerald, *The Genesis of Consumer Protection Remedies Under Section 13(b) of the FTC Act*, 2–6 (Paper, FTC 90th Anniversary Symposium) (Sept. 23, 2004) (describing evolution of FTC's powers), http://bit.ly/2kUIIcf.

For that matter, the 1935 FTC lacked power to seek *any* retrospective relief, such as restitution and civil penalties. *See Heater v. FTC*, 503 F.2d 321, 321–22 (9th Cir. 1974); *FTC v. Cement Inst.*, 333 U.S. 683, 706 (1948). And while the 1935 FTC issued procedural "rules" for its inhouse administrative proceedings, *see Griffiths Hughes, Inc. v. FTC*, 63 F.2d 362, 363 (D.C. Cir. 1933); *Nat'l Candy Co. v. FTC,* 104 F.2d 999, 1003 (7th Cir. 1939), "the agency itself did not assert the power to promulgate substantive rules until 1962," *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 & n.27 (D.C. Cir. 1973).

Congress did not grant the FTC *any* authority to bring enforcement actions in federal court until 1938. It was not until three years *after Humphrey*'s that Congress for the first time granted the FTC authority to seek preliminary (but not permanent) injunctive relief in federal court for violations of Section 12 of the FTC Act. Wheeler-Lea Act, Pub. L. No. 447, § 13(a), 52 Stat. 111, 115 (1938) (codified at 15 U.S.C. § 53(a));

see Fitzgerald, *supra*, 4. In 1973, Congress expanded the scope of that authority. Trans-Alaska Pipeline Authorization Act, Pub. L. No. 93-153, § 408(b), (f), 87 Stat. 576, 591–92 (1973) (codified at 15 U.S.C. § 53(b)).

It was not until 1975 that Congress provided the FTC with authorization to obtain "restitution" and other backward-looking remedies in federal court under limited circumstances. *See* Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, Pub. L. No. 93- 637, § 206(a), 88 Stat. 2183, 2201 (1975) (codified at 15 U.S.C. § 57b); Fitzgerald, *supra*, 6. Congress subsequently granted the FTC authority to seek knee-buckling civil penalties directly in federal court for first-time violations of other statutes and regulations. *See, e.g.,* 15 U.S.C. § 1681s(a)(2) (Fair Credit Reporting Act (2003)); *id.* § 6505(d) (Children's Online Privacy Protection Act (1998)); *id.* §45(m)(1)(a).

Today, the FTC routinely prosecutes companies in federal court seeking money damages.[13] *See also FTC v. Facebook, Inc*., 581 F. Supp. 3d 34, 63 (D.D.C. 2022) ("So what role does provide the best analogy for analyzing Chair Khan's actions in voting to file this case? The Court concludes it is that of a prosecutor."). *See generally AMG Capital Mgmt., LLC v. FTC*, 593 U.S. 67, 72–74 (2021). The FTC has a "Criminal Liaison Unit [that] helps prosecutors bring more

---

[13] The FTC's inhouse enforcement scheme "houses (and by design) both prosecutorial and adjudicative activities." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 189 (2023).

criminal consumer fraud cases."[14] The FTC has even brought court actions resulting in incarceration. *E.g.*, *FTC v. Cardiff*, No. 18-2104, 2020 U.S. Dist. LEXIS 137800, at *22–24 (C.D. Cal. July 24, 2020) (granting FTC's incarceration request). And, in fact, the FTC itself has been appointed as a "special prosecutor" to prosecute a criminal contempt action. *FTC v. Am. Nat'l Cellular*, 868 F.2d 315, 322–23 (9th Cir. 1989).

In sum, today's "FTC bears little resemblance to the" administrative body described by this Court in *Humphrey's Executor*. Crane, 83 Geo. Wash. L. Rev. at 1870. And as Judge Willett put it: "[W]e can forthrightly acknowledge that the FTC of today wields vastly more *executive* power than it did when the Supreme Court first considered its constitutionality during FDR's first term." Pet. App. 36a (Willett, J., concurring in denial of rehearing en banc). "The upshot is that the FTC has essentially become the executive agency that the *Humphrey's Executor* Court denied it was." Crane, 83 Geo. Wash. L. Rev. at 1839.

CONCLUSION

This Court should grant the Petition.

---

[14] FTC, Criminal Liaison Unit, https://www.ftc.gov/enforcement/criminal-liaison-unit.

Respectfully submitted,

Michael Pepson
Counsel of Record
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Ste. 1000
Arlington, VA 22203
(571) 329-4529
mpepson@afphq.org

Counsel for Amicus Curiae July 17, 2024