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 U.S. Court of Appeals for the D.C. Circuit

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The Federal Trade Commission ("FTC") and other federal agencies frequently subject the Chamber's members to administrative enforcement actions and regulate their day-to-day activities through reams of rulemakings. The Chamber therefore has a significant interest in ensuring that these administrative actions respect the Constitution's structural limitations. But because the analysis may differ depending on the federal agency in question, the Chamber submits this brief to address two points. First, insulating the FTC from the President's removal power violates Article II of the Constitution. Second, such a holding would not undermine the independence

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[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

of the Federal Reserve System ("Federal Reserve" or "Fed") in supervising the country's money supply.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress may not bar the President from supervising the officers who exercise executive power on his behalf, including by the threat of removal. The statute purporting to restrict the President's ability to remove FTC Commissioners is thus unconstitutional. The district court erred by enforcing that law to nullify the President's "conclusive and preclusive" removal authority. *Trump v. United States*, 603 U.S. 593, 609 (2024) (citation omitted). This Court should reverse.

The Constitution vests "[t]he executive Power" in a single elected President. U.S. Const. art. II, § 1, cl. 1. And it confers upon him alone the solemn duty to "take Care that the Laws be faithfully executed." *Id.* art. II, § 3. The Framers adopted that unitary structure to promote accountability and ensure that a leader "chosen by the entire Nation" will "oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Yet the President can hardly ensure the faithful execution of the laws "if he cannot oversee the faithfulness of the officers who execute them." *Id.* at 484.

Article II therefore grants the President the "prerogative to remove executive officials." *Seila Law LLC v. CFPB*, 591 U.S. 197, 214 (2020). Indeed, "[s]ince 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. And "Congress lacks authority to control the President's

'unrestricted power of removal'" for principal officers. *Trump*, 603 U.S. at 608–09 (quoting *Myers v. United States*, 272 U.S. 52, 176 (1926)). To hold otherwise would hamstring the President's ability to ensure that executive officers remain accountable to him, and thus that he remains accountable to the people for his Administration. In these ways, our Constitution's "unitary Executive" serves "not merely to assure effective government but to preserve individual freedom." *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting); *accord Seila Law*, 591 U.S. at 223–24.

The law here runs roughshod over these structural safeguards. FTC Commissioners are principal officers of the United States. They run the show at one of the government's most powerful agencies, which "enforces a variety of antitrust and consumer protection laws affecting virtually every area of commerce." FTC, *What the FTC Does*, https://bit.ly/4pUd9dY (last visited Oct. 15, 2025). Nevertheless, Congress has statutorily insulated these agency heads from removal by the President. *See* 15 U.S.C. § 41. That tenure protection ensconces agency leaders who are "neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is." *Seila Law*, 591 U.S. at 224–25. That violates Article II.

The lower courts held otherwise based on *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Yet that neglects this Court's own reading of the precedent. "*Humphrey's Executor* permitted Congress to give 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." *Seila Law*, 591 U.S. at 216 (emphasis added).

That is far from the case here. FTC Commissioners wield all sorts of executive powers. But these agency leaders may not exercise such powers without remaining accountable to the President, as this Court has repeatedly stressed in recent months. In *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025), the Court stayed orders enjoining the President's removal of members of the National Labor Relations Board and the Merit System Protections Board because "the Government [was] likely to show that both the NLRB and MSPB exercise considerable executive power." The Court then said the same thing with respect to the Consumer Product Safety Commission in *Trump v. Boyle*, 145 S. Ct. 2653, 2654 (2025).

The FTC is no different. *See Trump v. Slaughter*, ___ S. Ct. ___ (2025) (granting a stay in this case). If anything, it exercises more expansive executive authority. The FTC "has enforcement or administrative responsibilities under more than 80 laws," which provide the FTC with sweeping authority to issue regulations, undertake investigations, and prosecute violations of dozens of provisions. FTC, *Legal Library: Statutes*, http://bit.ly/46Ov1yj (last visited Oct. 15, 2025) (listing 87 statutes). There is no constitutional justification for insulating such extensive executive responsibilities from presidential supervision.

The FTC's indisputable exercise of executive power makes this case straightforward. *Humphrey's Executor* limits removal only for officers who

"exercise[] *no part* of the executive power vested by the Constitution in the President." 295 U.S. at 628 (emphasis added). That is plainly not true for the modern-day FTC, and the Court does not need to decide the historical question whether it was true in 1935. *Cf. Morrison*, 487 U.S. at 689 n.28 ("[I]t 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."). *Humphrey's Executor* may be left to its own reading of the facts then before it.

If this Court disagrees, though, then it should bury *Humphrey's Executor* once and for all. All of the *stare decisis* factors counsel in favor of doing so. The decision is egregiously wrong. It has proven unworkable. It is inconsistent with related decisions. And it has not engendered any concrete reliance interests. There is no reason to hold onto *Humphrey's Executor* any longer.

Some members of this Court have expressed concern that discarding *Humphrey's Executor* might threaten the independence of the Federal Reserve. *See Wilcox*, 145 S. Ct. at 1421 (Kagan, J., joined by Sotomayor and Jackson, JJ., dissenting from the grant of the application of the stay) ("For the Federal Reserve's independence . . . rests largely on *Humphrey's*."). That concern, however, is misplaced. The Federal Reserve's control over the Nation's "money supply is not an *executive* function" in the first place, and so lodging that power in an entity insulated from presidential control "does not offend the traditional principle that all executive power is vested in the President." *Consumers' Rsch. v. Consumer*

Prod. Safety Comm'n, 98 F.4th 646, 657 (5th Cir. 2024) (Oldham, J., dissenting from denial of rehearing en banc) (emphasis added).

That understanding finds support in "the distinct historical tradition of the First and Second Banks of the United States." *Wilcox*, 145 S. Ct at 1415 (majority op.). Those banks—which were precursors to the Federal Reserve—set monetary policy and operated outside executive control. The same goes for the Sinking Fund Commission, which the First Congress created to direct open-market purchases of U.S. securities.

These early examples of Congress limiting the President's authority over monetary policy "provide[] contemporaneous and weighty evidence of the Constitution's meaning." *CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd.*, 601 U.S. 416, 432 (2024) (citation omitted). That is, they may support unconventional structures, including removal protections, at quasi-private entities that exercise non-executive functions.

But no similar text, structure, or history supports removal protections for FTC Commissioners, who unquestionably exercise "executive Power" delegated from the President. U.S. Const. art. I, § 1, cl. 1. Their removal protections undermine the President's "take Care" authority. *Id.* art. II, § 3. And the early Republic provides no historical analog for such a scheme. In short, insulating the FTC from the President "has no basis in history and no place in our constitutional structure." *Seila Law*, 591 U.S. at 220.

The decision below should be reversed.

ARGUMENT

I. FTC Commissioners Must Be Removable by the President at Will.

Congress may not shield FTC Commissioners from the President's removal authority. Text, history, and this Court's precedent make that clear. And *Humphrey's Executor* provides no obstacle to ensuring that this executive agency remains accountable to the President.

Article II's text establishes a unitary executive. It proclaims that "[t]he executive Power shall be vested in a President of the United States." U.S. Const. art. II, § 1, cl. 1. And it does not vest that power in anyone else. "The entire 'executive Power'" thus "belongs to the President alone." *Seila Law*, 591 U.S. at 213.

Of course, the President "alone and unaided" cannot perform all the nation's executive functions. *Myers*, 272 U.S. at 117. He necessarily must rely on "the assistance of subordinates." *Id.* Nevertheless, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213. After all, it is the President's responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. And because "[t]he buck stops with the President," he "must have some 'power of removing those for whom he can not continue to be responsible.'" *Free Enter. Fund*, 561 U.S. at 493 (quoting *Myers*, 272 U.S. at 117).

The Framers quickly embraced this understanding in the "decision of 1789," concluding after "great debate" that the President's ability to remove executive officials was "essential to the executive

power." *Myers*, 272 U.S. at 121, 142. Without that ability, it would be "impossible for the President" to fulfill his constitutional prerogative, and to "keep [his] officers accountable" to the law and the people whom he serves. *Seila Law*, 591 U.S. at 214–15 (citations omitted); *see* 1 *Annals of Cong.* 518 (1789) (Joseph Gales ed., 1834) (James Madison) (explaining that the President's removal power is necessary to preserve "the chain of dependence" and to ensure that "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community").

That is why "the President's removal power is the rule, not the exception." *Seila Law*, 591 U.S. at 228. This Court has recognized "only two exceptions to [this] unrestricted removal power"—"one for multimember expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 204, 218; *see Morrison*, 487 U.S. at 691–96; *Humphrey's Executor*, 295 U.S. at 628–29.

This case involves neither, but to the extent there is any doubt on that score, the Court should make clear that *Humphrey's Executor* does not stand in the way.

A. No Exception to the President's Removal Authority Applies.

The exception for "inferior officers with limited duties" plainly does not apply here. *Seila Law*, 591 U.S. at 218. As in *Seila Law*, "[e]veryone agrees" that FTC Commissioners are "not . . . inferior officer[s]." *Id.* at 219. They are appointed by the President with

the advice and consent of the Senate, supervise their own agency, and "have the 'power to render a final decision on behalf of the United States' without any . . . review by [a] nominal superior or any other principal officer in the Executive Branch." *United States v. Arthrex, Inc.*, 594 U.S. 1, 14 (2021) (citation omitted). Moreover, the FTC's statutory duties are "far from limited." *Seila Law*, 591 U.S. at 219. Few agencies possess such wide-ranging and consequential powers. *See infra* at 10–12.

The *Humphrey's Executor* exception does not apply either. *Humphrey's Executor* involved a presidential attempt to remove a member of the FTC, which in its original form had been purportedly designed as a "non-partisan" body of "experts" that "must, from the very nature of its duties, act with entire impartiality." 295 U.S. at 624. The Court viewed the early FTC's duties as "neither political nor executive," but rather, as "quasi-judicial and quasi-legislative." *Id.* In other words, the FTC performed "specified duties as a legislative or as a judicial aid." *Id.* at 628. As a "legislative agency," it "ma[de] investigations and reports thereon for the information of Congress." *Id.* And as an "agency of the judiciary," it made recommendations to courts. *Id.*

This Court has since clarified that *Humphrey's Executor* should not be read expansively. It "permit[s] Congress to give for-cause removal protections to a multimember body of experts," but only where that body is statutorily "balanced along partisan lines" and "perform[s] legislative and judicial functions" such that it can be "said not to exercise *any* executive power." *Seila Law*, 591 U.S. at 216 (emphasis added).

The *Humphrey's Executor* exception thus applies to tenured officials who are "wholly disconnected from the executive department." *Humphrey's Executor*, 295 U.S. at 630. But it does not—and under Article II cannot—apply to those who wield executive power vested in the President. In fact, *Humphrey's Executor* itself recognized that an officer "in the executive department" remains "subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627.

The modern-day FTC falls well outside the *Humphrey's Executor* exception. Through the FTC Act and others, Congress has charged the Commission with far-reaching executive "authority to bring the coercive power of the state to bear on millions of private citizens and businesses." *Seila Law*, 591 U.S. at 219–20.

Consider the FTC's rulemaking powers. The FTC has the authority to "define" and proscribe "unfair or deceptive" trade practices. 15 U.S.C. § 57a(a)(1)(B). And, more broadly, it is empowered to make any "rules and regulations for the purpose of carrying out the provisions" of the FTC Act. *Id.* § 46(g); *see also id.* § 45a. The FTC possesses similar rulemaking authority for implementing a host of other statutes. *See, e.g.*, 15 U.S.C. §§ 18a(d), 68d(a), 69f(b), 70e(c), 1454(a), 2101(c), 2302(b), 2823(a), 3053, 5711(a), 6102(a), 6502(b)(1), 6804(a)(1)(C), 7607; 42 U.S.C. §§ 6294, 13232(a), 17021(b). Because the FTC issues "binding rules fleshing out" these statutes, *Seila Law*, 591 U.S. at 218, it exercises a power that is "the very essence of 'execution' of the law," *Collins v. Yellen*, 594 U.S. 220, 254 (2021) (citation omitted).

The FTC's executive powers do not stop with rulemaking. The FTC can also bring enforcement proceedings and issue cease-and-desist orders for perceived violations of dozens (if not hundreds) of statutory provisions. *See, e.g.*, 15 U.S.C. §§ 21(a), 45(b)–(c), (g), 45b(d), 45c(b), 45d(b), 45f(c), 68d(a), 69f(a), 70e(a), 1456(b), 1679h(a), 1681s(a), 1691c(c), 1692l(a), 1693o(c), 2823(a), 5711(c), 6105(b), 6502(c), 7706(a), (d), 7803(b), 8404; 42 U.S.C. § 6303(a). "Under our constitutional structure," these administrative adjudications likewise "*must be* exercises of . . . the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (quoting U.S. Const. art. II, § 1, cl. 1).

The FTC's investigatory powers are broad too. The agency can investigate nearly any business that "affects commerce" and require the filing of reports for "such information as it may require" concerning trade. 15 U.S.C. § 46(a)–(b). Not only that, but the FTC can help foreign authorities investigate possible violations of various foreign laws. *See id.* §§ 46(i)–(j), 6201, 6202(b). And the FTC can issue subpoenas and civil investigative demands to coerce compliance with its investigations. *See id.* §§ 49–50, 57b-1.

The FTC can then act on its investigations by suing individuals and businesses in federal court for monetary and injunctive relief. *See, e.g.*, *id.* §§ 18a(f), 53(a), 57b(a), 1681s(a)(2). And it can seek to impose knee-buckling civil penalties in the process. *See, e.g.*, *id.* §§ 45(m)(1), 45b(d)(2)(B), 45c(b)(2)(B), 45d(b)(2)(B), 45f(c)(2)(b), 1681s(a)(2), 8404(b). This "power to seek daunting monetary penalties against private parties in federal court" is "a quintessentially executive

power" as well. *Seila Law*, 591 U.S. at 219; *see also Trump*, 603 U.S. at 620 ("Investigative and prosecutorial decisionmaking is 'the special province of the Executive Branch.'" (quoting *Heckler v. Chaney*, 470 U.S. 821, 832 (1985)).

At bottom, the modern-day FTC wields substantial executive power. That is beyond dispute. It follows that Congress may not insulate FTC Commissioners from presidential control.

B. *Humphrey's Executor* Should Not Be Read to Protect the Modern-Day FTC.

The lower courts reached the opposite conclusion by overreading *Humphrey's Executor* and brushing aside *Myers* and its progeny. *See* Pet.App.54a–67a; Pet.App.3a–10a. That was error. Indeed, this Court "has already considered and rejected" similar efforts to "minimize[] *Myers*" and "downplay[] the decision of 1789." *Seila Law*, 591 U.S. at 231.

For good reason. As explained above, the President's removal power "was discussed extensively in Congress when the first executive departments were created." *Free Enter. Fund*, 561 U.S. at 492. "The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." *Id.* (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 *Documentary History of the First Federal Congress* 893 (2004)). That has long been the "settled and well understood construction of the Constitution." *Ex parte Hennen*, 38

U.S. (13 Pet.) 225, 259 (1839). And that is the understanding that controls here.

The lower courts countered that "*Humphrey's Executor* involved the exact same provision of the FTC Act" as this case. Pet.App.54a; *see also* Pet.App.4a. But the Court's holding was not so broad. *Humphrey's Executor*'s holding—made clear by its *ratio decidendi*—was that 15 U.S.C. § 41 could limit the President's removal authority *insofar as* the 1935 FTC "exercise[d] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628; *see also Seila Law*, 591 U.S. at 215 ("Rightly or wrongly, [*Humphrey's Executor*] viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" (quoting *Humphrey's Executor*, 295 U.S. at 628)).

In reaching that conclusion, *Humphrey's Executor* did not consider any of the executive powers that the FTC possessed at the time. *See Seila Law*, 591 U.S. at 219 n.4 ("[W]hat matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court."). Nor could it consider how the FTC's executive powers have only grown over the past 90 years. *See supra* Section I.A.

Humphrey's Executor now stands as an outlier that is inconsistent with how *Myers*, *Free Enterprise Fund*, *Seila Law*, and *Collins* have all read Article II. These decisions recognize that Article II bars tenure protections for principal officers. And a mountain of this Court's precedent establishes that the modern-day FTC exercises substantial executive powers. *See, e.g.*, *Trump*, 603 U.S. at 620; *Seila Law*, 591 U.S. at

219; *City of Arlington*, 569 U.S. at 304 n.4. The district court's opinion thus wrongly "*expands* the borders of *Humphrey's Executor* by extending the rule from agencies that *do not* exercise executive power to those that *do*." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 357 (5th Cir. 2024) (Jones, J., concurring in part and dissenting in part).

As principal officers, FTC Commissioners may not be shielded from presidential oversight by for-cause protection. *See, e.g.*, *Collins*, 594 U.S. at 250–56; *Seila Law*, 591 U.S. at 228; *Myers*, 272 U.S. at 163–64. "The Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people." *Seila Law*, 591 U.S. at 238. The law here runs afoul of that basic principle.

C. If *Humphrey's Executor* Would Apply, Then It Should Be Overruled.

This Court can apply the original understanding of Article II and reverse while leaving *Humphrey's Executor* in 1935. But if *Humphrey's Executor* stands in the way, then it should be overruled.

As this Court has "often recognized, *stare decisis* is 'not an inexorable command.'" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018) (citation omitted). Its force is indeed "at its weakest," as here, "when we interpret the Constitution." *Agostini v. Felton*, 521 U.S. 203, 235 (1997). And all the typical "*stare decisis* considerations" in this case "weigh in favor of letting [*Humphrey's Executor*] go." *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024).

Take first "the quality of the decision's reasoning." *Franchise Tax Bd. v. Hyatt*, 587 U.S. 230, 248 (2019).

As already explained, "the Court's thinly reasoned decision is completely 'devoid of textual or historical precedent for the novel principle it set forth.'" *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part) (citation omitted). The Court cited nothing to support its conception of "quasi-judicial" and "quasi-legislative" agencies. *Humphrey's Executor*, 295 U.S. at 628–29. And it certainly did not explain how Congress could vest unaccountable agencies with executive power.

It is no surprise, then, that the "underpinnings" of *Humphrey's Executor* have been "erode[d] by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). This Court repudiated its analysis nearly four decades ago. *See Morrison*, 487 U.S. 689 & n.28. And it has not looked back. The Court has made clear that *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power" was wrong. *Seila Law*, 591 U.S. at 216 n.2 (majority op.). And all officers who exercise executive power must answer to the President. *See Collins*, 594 U.S. at 252; *Seila Law*, 591 U.S. at 224; *Free Enter. Fund.*, 561 U.S. at 513–14.

Humphrey's Executor has also "proved unworkable." *Janus*, 585 U.S. at 929. Courts historically had "difficulty" distinguishing between "executive" and "quasi-legislative" officials. *Morrison*, 487 U.S. at 689 n.27. And though this Court has rightly jettisoned *Humphrey's Executor*'s faulty reasoning, that has only further befuddled the lower courts, who cannot figure out how to sensibly apply an "out of step" precedent whose logic "ha[s] been overtaken" but still technically remains on the books.

Consumers' Rsch., 91 F.4th at 346 (majority op.). There is no reason to perpetuate this "train of thought" that is "predestined for incoherence." *Id.* at 353; *see also id.* at 352 ("This impasse arises because the holding of *Humphrey's* is still 'in place' even though its reasoning 'has not withstood the test of time.'" (quoting *Seila Law*, 591 U.S. at 216 n.2)).

Finally, *Humphrey's Executor* has not engendered any "concrete reliance interests." *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 288 (2022). It does not implicate "property and contract rights." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991). And given this Court's "constant tinkering with and eventual turn away from" *Humphrey's Executor*, it "is hard to see how anyone" could "reasonably expect a court to rely on [the decision] in any particular case." *Loper Bright*, 603 U.S. at 410; *see Boyle*, 145 S. Ct. at 2654; *Wilcox*, 145 S. Ct. at 1415; *Seila Law*, 591 U.S. at 216 & n.2, 219 & n.4; *Free Enter. Fund*, 561 U.S at 492–93; *Morrison*, 487 U.S. 689 & n.28.

* * *

In sum, the "removal power" helps the President maintain "control over the subordinates he needs to carry out his duties as the head of the Executive Branch." *Collins*, 594 U.S. at 252. And it ensures that these Officers "serve the people effectively and in accordance with the policies that the people presumably elected the President to promote." *Id.* By reinstating Respondent to the FTC's leadership against the wishes of the elected President, the lower courts disregarded Article II's commands. The decision below should be reversed—whether this Court overrules *Humphrey's Executor* or not.

II. Ruling for the President Would Not Imperil the Independence of the Federal Reserve.

Upholding the President's removal authority here would not imperil the Federal Reserve's independence. That is because "[t]he Federal Reserve is a uniquely structured, quasi-private entity" with a "distinct historical tradition." *Wilcox*, 145 S. Ct. at 1415. This case involving the FTC thus does not bear on the removal restrictions for Federal Reserve officials.[2]

Indeed, early congressional practice shows that managing the nation's money supply falls outside the scope of executive power. As explained below, the First Congress created the Sinking Fund Commission to "facilitate orderly management of the nation's debts," and the Commission's "structure and operation reflected a substantial measure of independence from the political branches." Peter Margulies, *Reform and Removal at the Federal Reserve: Independence, Accountability, and the Separation of Powers in U.S. Central Banking*, 108 Marq. L. Rev. 117, 167 (2024). The First and Second Banks of the United States continued that tradition in the years that followed. They were structured, not as government agencies,

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[2] This Court's consideration of the FTC's removal protections also implicates different considerations from those underlying the structure of self-regulatory organizations, such as the Financial Industry Regulatory Authority and NASDAQ, *see, e.g.*, *Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.*, 121 F.4th 1314, 1319–20 (D.C. Cir. 2024) (discussing history of self-regulatory organizations), or the Financial Accounting Standards Board, which the SEC relies upon to set generally accepted accounting principles, *see* 15 U.S.C. § 77s(b)(1). These private organizations are not part of the Executive Branch, and so their structures present different constitutional issues from the FTC.

but as chartered corporations. Both banks "used the same sorts of open-market tools to control monetary policy that the Fed does today." Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 Cornell L. Rev. 843, 901–02 (2024). "And like the Fed, the First and Second Banks had private shareholders in addition to government shareholders." *Id.* at 902.

Those early historical precedents are relevant to "fix[ing] the meaning of the Constitution." *Printz v. United States*, 521 U.S. 898, 915 n.9 (1997). And they suggest that monetary policy is "not an executive function," like the enforcement of the laws. *Consumers' Rsch.*, 98 F.4th at 657 (Oldham, J., dissenting from the denial of rehearing en banc). In fact, nobody argued otherwise during the frequent Founding-era debates over the wisdom and constitutionality of the National Banks. *See, e.g.*, *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). Even President Andrew Jackson, the Second Bank's most prominent critic and the man responsible for its demise, never made that argument.

Because the Federal Reserve likewise exercises "special functions in setting monetary policy and stabilizing the financial markets," *PHH Corp. v. CFPB*, 881 F.3d 75, 192 n.17 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting), it may—unlike the FTC—"claim a special historical status," *Seila Law*, 591 U.S. at 222 n.8. And so the Court should make clear that its ruling in this case does not implicate the Federal Reserve. Its independence is essential to the credibility of our monetary policy and the status of the US dollar as the preeminent global reserve currency.

A. The Federal Reserve's Structure Differs from Other Agencies.

The structure of the Federal Reserve, the entity responsible for "control[ling] the paper money supply," is unique. Bamzai & Nielson, *supra*, at 846. Unlike traditional government agencies, it "is composed of both public and private elements." *Comm. for Monetary Reform v. Bd. of Govs. of the Fed. Rsrv. Sys.*, 766 F.2d 538, 539–40 (D.C. Cir. 1985); *see also Melcher v. Fed. Open Mkt. Comm.*, 644 F. Supp. 510, 519 (D.D.C. 1986), *aff'd on other grounds*, 836 F.2d 561 (D.C. Cir. 1987).

The Federal Open Market Committee ("FOMC"), which directs U.S. monetary policy, consists of twelve members. Seven of those members are drawn from the Federal Reserve's Board of Governors. *See* 12 U.S.C. § 263(a). Those members are appointed by the President with the advice and consent of the Senate, and they have statutory tenure protection. *See id.* §§ 241–42. Five members, however, are drawn from the officers of the twelve regional Federal Reserve Banks, which are owned by the commercial banks within their regional districts. *See id.* §§ 263(a), 282. Those members are generally subject to supervision and removal by the Board of Governors. *See id.* § 248(f).

This unique structure of the Federal Reserve—which mixes private and public elements and thereby insulates monetary policy from the President—drew from historical precedents that date to the Founding.

B. The First and Second National Banks Support the Constitutionality of Removal Protections for the Federal Reserve.

The history of the First and Second Banks of the United States shows that monetary policy differs from traditional executive action. These National Banks were precursors to the Federal Reserve, and both set monetary policy while operating outside of executive control.

The function of the First Bank "was essentially that now served by the Federal Reserve Board in regulating the money supply." Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 47 (2012). "By managing its lending policies and the flow of funds through its accounts, the bank could—and did—alter the supply of money and credit in the economy and hence the level of interest rates charged to borrowers." Federal Reserve Bank of Philadelphia, *The First Bank of the United States: A Chapter in the History of Central Banking* 9 (2021). All the while, the First Bank "operated more independently of congressional instruction, or indeed presidential direction, than does the Federal Reserve Board today." Mashaw, *supra*, at 47.

The First Bank's structure fundamentally differed from a government agency. Like the Federal Reserve, it had both government and private shareholders. *See First Bank of the United States*, *supra*, at 4; Bamzai & Nielson, *supra*, at 902. The First Bank's initial $10 million capitalization was likewise divided between the government and private investors. *See First Bank of the United States*, *supra*, at 4. And instead of

"placing appointment of the Bank President in the U.S. President's control," Congress "prescribed who could serve as a director—specifically excluding foreign nationals." Bamzai & Nielson, *supra*, at 875. The First Bank's shareholders selected these twenty-five directors, who then chose its president. *See First Bank of the United States*, *supra*, at 5; Act of Feb. 25, 1791, ch. 10, § 4, 1 Stat. 191, 192–93. The First Bank was thus privately controlled, though Congress authorized the Treasury Secretary to inspect the Bank's books and remove government deposits at any time. *See* Bamzai & Nielson, *supra*, at 875. The First Bank was controversial, and Congress allowed its charter to expire in 1811. *Id.* at 876.

Five years later, Congress chartered the Second Bank of the United States. *See* Act of Apr. 10, 1816, ch. 44, §§ 1, 21, 3 Stat. 266, 266, 276. It was like the First in many ways. *See* Federal Reserve Bank of Philadelphia, *The Second Bank of the United States: A Chapter in the History of Central Banking* 5–6 (2021). "[L]ike its predecessor, the Second Bank could engage in monetary policy by using its holdings to control the amount of credit available." Bamzai & Nielson, *supra*, at 877. In fact, the "Second Bank possessed a greater power to control monetary policy than the First, due to its larger capitalization of thirty-five million dollars (seven of which came from the United States) and twenty-five branches." *Id.* It "had a greater impact on the Nation than any but a few institutions, regulating the Nation's money supply in ways anticipating what the Federal Reserve does today." *Seila Law*, 591 U.S. at 274 (Kagan, J., joined by Ginsburg, Breyer, and Sotomayor, JJ., concurring in part and dissenting in part).

The Second Bank's structure differed from the First's in a key respect: Congress empowered the President to appoint five of the Second Bank's twenty-five directors with the Senate's advice and consent. *See* Act of Apr. 10, 1816, § 8, 3 Stat. 269. Still, the other twenty directors were elected each year by the private stockholders. *See id.* And "as with the First Bank, the President of the Second Bank was not nominated by the U.S. President, but was chosen by the bank's directors." Bamzai & Nielson, *supra*, at 877. "This unusual structure . . . mixed private and public features," prompting some to wonder whether the Second Bank was a commercial bank or a government bank. *Id.*

Despite this structure, no one argued that the Second Bank was unconstitutional because it was performing an *executive* function insulated from presidential control. Instead, most viewed the Bank to be a private entity. *See* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 Geo. Wash. L. Rev. 1299, 1299 (2019). And those who argued that the Bank was unconstitutionally performing sovereign functions used "a variation of the modern argument that Congress may not delegate such functions to private entities." *Id.*

In all these ways, the First and Second Banks were prototypes for the Federal Reserve. *See Seila Law*, 591 U.S. at 274 (Kagan, J., concurring in part and dissenting in part). Like the Federal Reserve today, the National Banks' directors made significant policy decisions that had a dramatic effect upon the Nation's

money supply, yet 80% of those directors fell outside the control of the President.

Thus, the legacy of the National Banks establishes a historical practice, which has continued into the present, of employing a public-private hybrid institution to set monetary policy. Like the Banks of the United States—but unlike other modern agencies—the Federal Reserve is a "*sui generis* mishmash of the public and private sectors," Bamzai & Nielson, *supra*, at 853, tasked with carrying out "special functions in setting monetary policy and stabilizing the financial markets," *PHH Corp.*, 881 F.3d at 192 n.17 (Kavanaugh, J., dissenting). These are not traditional "executive" functions. *Consumers' Rsch.*, 98 F.4th at 657 (Oldham, J., dissenting from denial of rehearing en banc). And at the same time that they were establishing the Executive Branch, the Framers insulated these functions from direct presidential control.

C. The Sinking Fund Commission Further Suggests that the Federal Reserve Is Constitutionally Distinct from the FTC.

The National Banks are not the only historical precursors to the Federal Reserve. The Sinking Fund Commission was another Founding-era entity engaged in monetary policy, "with substantial independence from the President," to repay the national debt through open-market purchases of United States securities. Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 Notre Dame L. Rev. 1, 4, 34 (2020); *see* Act of Aug. 12, 1790, ch. 47, § 2, 1 Stat. 186, 186. The Commission also helped the

United States "cope with credit crunches when financial institutions were short on cash" by buying "Treasury bonds and notes from private sources." Margulies, *supra*, at 167. "These open-market purchases . . . inject[ed] liquidity into the system" to stave off financial disaster, foreshadowing the same "actions that the Federal Reserve" would take nearly 220 years later "to address the Great Recession of 2008." *Id.* at 167–68.

The Sinking Fund Commission was "proposed by Alexander Hamilton, passed by the First Congress, and signed into law by President George Washington." Chabot, *supra*, at 1. Under Hamilton's original proposal, the multimember Commission would have included five officers: the Vice President, the Chief Justice, the Speaker of the House, the Treasury Secretary, and the Attorney General. *See* 2 *Annals of Cong.* 2071 (1790). At the time of this proposal, the vice presidency went to the runner-up in the presidential election. *See* U.S. Const. art. II, § 1, cl. 3. Thus, three of the five officers would have possessed complete independence from the President, who had no ability to direct their action and needed at least one of their votes to act. *See* Chabot, *supra*, at 37.

Providing the Commission with this independence from executive control sought to avoid the issues that plagued earlier sinking funds in England. The King's ministers often diverted resources for their own short-term political benefit. *See id.* at 37–38. And the American people, keenly aware of this British experience, were cognizant of "the executive branch's incentive to spend money and put more money into circulation." Margulies, *supra*, at 162. So the

"Framers, including Madison and Hamilton in the Federalist essays," emphasized "the value of independence" for those tasked with setting monetary policy and managing the country's finances. *Id.* And they acted accordingly in designing the new government.

The Sinking Fund Act of 1790 modified Hamilton's proposal by replacing the Speaker of the House with the Secretary of State on the Commission. *See* Act of Aug. 12, 1790, § 2, 1 Stat. 186. But this was not done to increase executive oversight; rather, it was thought necessary to avoid the constitutional prohibition on members of Congress holding other offices. *See* Bamzai, *supra*, at 1339; U.S. Const. art. I, § 6, cl. 2.

Although substituting the Secretary of State for the Speaker of the House meant that three members of the Commission were subject to removal by the President, "the Commission's structure" made it "difficult for the president to control it in the real world." Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 63 Am. J. Legal His. 219, 220, 225 (2023). In fact, two of the Commission's original members—Thomas Jefferson and Alexander Hamilton—were "known political rivals." Chabot, *supra*, at 41. Because the Commission required at least three votes to approve a purchase, if these men disagreed, the vote of the entirely independent Vice President or Chief Justice would be decisive.

That happened at least once. During the financial panic of 1792, four Commissioners met to consider purchases proposed by Hamilton, but they split, with Jefferson and Attorney General Edmund Randolph

voting against Hamilton's proposal. *Id.* at 44. The Fifth Commissioner, Chief Justice John Jay, was absent because he was riding circuit. *Id.* Weeks passed before the Commission approved purchases. *See id.* at 45. "Even though President Washington approved purchases in response to the 1792 market crash," he lacked authority to direct the Commission to approve open-market purchases earlier, and the "Commission's independent structure prevented it from acting as quickly as it could have." *Id.* at 46.

The Sinking Fund Commission thus provides another historical analogue to the FOMC, which similarly purchases United States securities pursuant to a statutory mandate. *See* 12 U.S.C. § 263(b). This history indicates that the Federal Reserve's independent structure "is consistent with the original meaning of the Constitution." Chabot, *supra*, at 54.

* * *

In short, the Federal Reserve can "claim a special historical status" in its responsibility for monetary policy. *Seila Law*, 591 U.S. at 222 n.8 (majority op.). The FTC, however, cannot. Congress may not insulate FTC Commissioners from the President's oversight as they wield executive power in his name.

CONCLUSION

This Court should reverse.

Respectfully submitted,

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