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 TECHFREEDOM AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
TECHFREEDOM
1500 K Street NW
Washington, DC 20005
(771) 200-4997
cbarthold@techfreedom.org

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It advocates for public policy that enables experimentation, entrepreneurship, and investment.

Because technological progress flourishes only in a free and stable society, TechFreedom frequently submits amicus briefs in support of the rule of law, limited government, and an effective legal system. See, e.g., Br. of TechFreedom, *FCC v. Consumers Research*, No. 24-354 (U.S., Feb. 18, 2025) (opposing delegation of government power to unaccountable private entities); Br. of TechFreedom, *Loper Bright Enter. v. Raimondo*, No. 22-451 (U.S., July 20, 2023) (supporting the narrowing, but not the elimination, of *Chevron* deference); Br. of TechFreedom, *AMG Capital Mgmt. v. FTC*, No. 19-508 (U.S., Oct. 2, 2020) (opposing agency abuse of statutory remedial authority).

TechFreedom approaches this case with fidelity to the Constitution, a desire for efficient governance, and wariness of an unaccountable administrative state. But the core issues here go beyond those enduring principles. This case is ultimately about the need for stable and predictable legal rules, the importance of *stare decisis* (itself a constitutional value, embedded in

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* No party's counsel authored any part of this brief. No person or entity, other than TechFreedom and its counsel, helped pay for the brief's preparation or submission.

the Article III judicial power), and the preservation of republican government.

SUMMARY OF ARGUMENT

Eliminating the removal protections that have followed from *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), would be a "radical" move—one that would "wreak havoc" on our institutions of government, Cass R. Sunstein, *Administrative Law's Grand Narrative*, 77 Admin. L. Rev. 291, 301 (2024); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 Sup. Ct. Rev. 83, 112.

To be sure, *Humphrey's Executor* is not a model for constitutional reasoning. The decision claims that the FTC is a "quasi-judicial" and "quasi-legislative" agency, even though there are no "quasi" branches in our system. But that doesn't mean *Humphrey's Executor* was wrongly decided. In recent years, judges and academics have vigorously argued that for-cause removal protections, at least for multimember agencies, are constitutional. Their arguments rest on Congress's authority over offices, the historical record, and the functional benefits of agency independence.

Upholding *Humphrey's Executor* does not require doctrinal innovation, let alone "judicial activism." It does not even require embracing the decision as a matter of originalism (just accepting that the question is debatable). Keeping *Humphrey's Executor* is instead a matter of judicial restraint—of respect for precedent and continuity in the law. The Court should issue a

modest decision that preserves existing limits on the removal power.

That approach must confront three hurdles: (1) that *Humphrey's Executor* might no longer govern today's agencies, (2) that the decision might not merit *stare decisis* protection, and (3) that courts might lack authority to provide effective remedies. In this brief, we address each point in turn:

1. *Humphrey's Executor* remains controlling. The Government's attempt to confine it to the 1935 FTC ignores that *Humphrey's Executor* already understood the FTC to wield what amounts to executive power, yet upheld its insulation from at-will removal. Courts are not well-positioned to draw fine-grained distinctions about the scope of agency authority. Upholding *Humphrey's Executor* should mean preserving the independence of agencies whose structure has long been accepted as legitimate. Narrowing the decision to its facts, after it has formed the basis of agency independence for so many decades, would amount to gamesmanship.

2. *Stare decisis* only reinforces this outcome. Even if *Humphrey's Executor*'s reasoning is dubious, its outcome is defensible (if not flat-out correct), and there is no special justification to discard the ruling. *Humphrey's Executor* has proved workable, offering a clear line between traditional multimember commissions and novel structures. It has fostered a regulatory system that contains ample accountability. Overruling it would unsettle decades of practice and risk severe institutional harm, including threats to

the stability of financial markets. Even international legal arrangements could be thrown into doubt.

3. Effective relief is essential. Back pay cannot deter a president determined to flout statutory limits. Courts must be prepared to issue real remedies—injunctions or mandamus. Nothing prevents such relief; it requires only a judiciary willing to stand up for the rule of law.

ARGUMENT

THE COURT SHOULD PRESERVE REMOVAL PROTECTIONS FOR TRADITIONAL MULTIMEMBER AGENCIES.

Humphrey's Executor, a case about the FTC, controls this case about the FTC. To hold otherwise would be sophistry. Nor is *Humphrey's Executor* ripe for overruling. It is neither demonstrably wrong, nor unworkable, nor harmful. And because *Humphrey's Executor* governs, the Court must provide meaningful relief, whether by injunction or mandamus. Nothing in the law precludes such remedies.

A. The Scope of *Humphrey's Executor*.

The Government contends that *Humphrey's Executor* no longer applies even to the FTC itself. Pet.Br. 25-28. "What matters," this Court has said, "is the set of powers the Court" in *Humphrey's Executor* "considered as the basis for its decision." *Seila Law LLC v. CFPB*, 591 U.S. 197, 219 n.4 (2020). The FTC *of 1935*, the Government therefore concludes, is the only agency for which *Humphrey's*

Executor blesses removal restrictions. By this logic, "*Humphrey's* has few, if any, applications today." *Harris v. Bessent*, No. 25-5037 slip op. 15 (D.C. Cir., Mar. 28, 2025) (Walker, J., concurring).

But the FTC of 1935 already wielded executive power, as today understood, and the Court considered that power in *Humphrey's Executor*. As the decision notes, the FTC could, even then, issue cease-and-desist orders and enforce them in court. 295 U.S. at 620. Its powers have indeed expanded—it can now, for instance, proceed straight into court and obtain a preliminary injunction, 45 U.S.C. § 53(b)—but disputes over the removal power should not devolve into disputes over the precise calibration of agency authority. In such a world, observes Judge Willett, it would be "hard to tell how much [executive] power is required before an agency loses protection under the *Humphrey's* exception." *Consumers Research v. CPSC*, 91 F.4th 342, 353 (5th Cir. 2024).

Collins v. Yellen rightly warns that "courts are not well-suited to weigh the relative importance" of disparate agencies' authority. 594 U.S. 220, 253 (2021). The Court rejected the notion that "the constitutionality of removal restrictions hinges on such an inquiry." *Id.* In *Collins*, the Court was clarifying that it would not draw fine-grained lines among single-director agencies; they all lack removal protection. But the same logic applies here. Under *Humphrey's Executor*, courts should not draw fine-grained lines among traditional multimember commissions; they all ought to enjoy removal protection.

Preserving *Humphrey's Executor* while simultaneously creating a sweeping removal power would undermine the rule of law. For generations, lawmakers relied on the reasonable assumption that *Humphrey's Executor* permitted them to establish independent agencies. To now declare that the case never carried that weight would look like a trick—a "gotcha." It would suggest that decades of accepted legal development can be undone in an instant, swept aside by what appears, given the stakes, like a scholastic hairsplitting exercise. (Indeed, it is fair to say that *no one* would be happy. If the Court endorses broad presidential removal power while still leaving an amorphous "*Humphrey's Executor* exception" lurking on the books, proponents of the unitary executive could rightly complain that such an arrangement is both incomplete and incoherent.)

To uphold *Humphrey's Executor* should be to uphold the independence of the familiar multi-member agencies whose structure was, until recently, broadly accepted.

B. *Stare Decisis*.

"*Stare decisis et non quieta movere*" means "To stand by things decided and not disturb what is settled." This principle reaches back to before the Founding. *Ramos v. Louisiana*, 590 U.S. 83, 115 (2020) (Kavanaugh, J., concurring in part). Fidelity to precedent ensures that "the scale of justice" is "even and steady"—that it is not upended by "every new judge's opinion." *Id.* at 116 (quoting 1 W. Blackstone, Commentaries on the Laws of England 69 (1765)).

Stare decisis has teeth only when a majority of the Court encounter a precedent with which they disagree. That a decision is wrong, in their eyes, is the start, not the end, of any argument over whether *stare decisis* applies. As the Court has said many times, there must be some special justification, beyond sheer error, for overturning a precedent. *Id*. at 118-19.

There is no such justification for overturning *Humphrey's Executor*.

To begin with, is the decision "not just wrong, but grievously or egregiously wrong?" *Id*. at 121. No. Indeed, *Humphrey's Executor* may well be right. True, its reasoning is poor. ("The mere retreat to the qualifying 'quasi,'" Justice Robert Jackson mused, "is implicit with confession that all recognized classifications have broken down." *FTC v. Ruberoid Co.*, 343 U.S. 470, 487-88 (1952) (dissenting opinion).) But the result is quite possibly correct. The history of the removal power is a subject of spirited judicial and scholarly debate. See, e.g., *Seila Law*, 591 U.S. at 264-84 (Kagan, J., concurring in judgment and dissenting in part). "Reasonable people disagree intensely" about almost every scrap of evidence on the subject. Cass R. Sunstein & Adrian Vermeule, *Presidential Review: The President's Statutory Authority over Independent Agencies*, 109 Geo. L. J. 637, 639 (2021); compare Aditya Bamzai & Sai Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1762 (2023) (arguing for a unitary executive but acknowledging that "ours is not the only possible reading" of the historical record) with Noah A. Rosenblum & Andrea S. Katz, *Removal Rehashed*, 136 Harv. L. Rev. F. 404, 408-09, 411 (2023) (countering Bamzai and Prakash in

strident terms but acknowledging "diverging views on the executive power" and a lack of "consensus sufficient to liquidate constitutional meaning").

The Framers did not write clarity on this question into the Constitution, as they did with the appointments power. See Const. Art. II, § 2, cl. 2. In fact, "the question of removal authority was not explicitly discussed at the [constitutional] convention." Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 601 (1984). (By the time the convention took up the details of executive power, "the delegates were tired and irritable and anxious to go home." Forrest MacDonald, *The American Presidency: An Intellectual History* 180 (1994).) In the Republic's early years, the Founders remained "ambivalent" about how the President would oversee "those who would actually do the work of law-administration." Strauss, supra, Colum L. Rev. at 600 (While it lends some support to a strong removal power, the Decision of 1789 was not as clarifying as one might wish. *Id.*; Resp.Br. 29-30.) And historical practice since the Founding era has been, to put it bluntly, a mess. "Congress has been extremely inconsistent in its use of limitations on the President's removal power," and, conversely, "the executive branch has not consistently opposed independent agencies on constitutional grounds." Geoffrey P. Miller, *Independent Agencies*, 1986 Sup. Ct. Rev. 41, 72, 84. In short, "the [removal] question has been the subject of intense controversy" "throughout our history." Cass R. Sunstein & Lawrence Lessig, *The President and the Administration*, 94 Colum. L. Rev.

1, 5 (1994). There may be stronger and weaker answers here, but there are no definitive ones.

The Court often asks whether a precedent is "unworkable"—whether it has sowed confusion in the lower courts or distorted other areas of law. *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 602 (2022). *Humphrey's Executor* does neither. If anything, the Court could declare that its rule is straightforward: traditional multimember agencies get removal protections; novel structures do not. That's already the line taken in *Seila Law*, 591 U.S. 197 (no protection for single-director agencies), and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010) (no double-level removal protections).

The rule is not just workable, but sensible. Federal independent agencies have a venerable history, one that stretches back beyond the FTC (1914) to the Interstate Commerce Commission (1887) or even the Board of Supervising Inspectors of Steamboats (1852). See Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* 187-208 (2012). Multimember agencies divide power, enable dissent, and promote compromise. They are bipartisan, (ideally) deliberative, and accountable to both Congress (which sets the agency's budget) and the President (who typically designates the agency's chair). They may not reflect a pristine form of the separation of powers, but neither are they constitutional heresy. Quite simply, "multi-member bodies reflect the larger values of the Constitution." *PHH Corp. v. CFPB*, 881 F.3d 75, 187 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

That last point answers perhaps the biggest objection to *Humphrey's Executor*. If commissioners aren't elected, and can't easily be fired by someone who is, where's the democratic legitimacy? It's a reasonable point—but it goes only so far. These agencies are created by an elected Congress. Their officers are nominated by an elected president and confirmed by an elected Senate. Once appointed, they get summoned to the White House, and they're grilled at congressional oversight hearings. Congress controls every dollar they spend. The democratic legitimacy may not be elegant, as a matter of political theory, but it's very real. See Geoffrey P. Miller, *The Debate Over Independent Agencies in Light of Empirical Evidence*, 1988 Duke L. J. 215, 219 ("The President enjoys many powers to influence agency action other than the threat of removal, including appointments, budgetary control, and the promise of higher office. Conversely, the President is subject to many limitations other than requirements that removal be only 'for cause.'").

The Court often asks whether a precedent has produced harmful consequences. *Ramos*, 590 U.S. at 115 (Kavanaugh, concurring in part). Here, however, the harms would flow not from preserving precedent but from overturning it. Obviously, this Court has no roving authority to correct what some may consider unwise executive choices. But neither should the Court, by discarding established limits on removal, lend its authority to institutional disruption. Recent events illustrate the danger: presidential attempts to displace agency officials have been so aggressive that they've left some agencies unable to function, for lack of a quorum. See Nicholas R. Bednar & Todd Phillips,

Quorum Rules in the Face of Presidential Removal, Yale J. on Reg.: Notice & Comment (July 25, 2025), tinyurl.com/3m5rcuxr. What's more, the Federal Reserve—an institution that has long set interest rates free from political interference—could come under direct presidential control. The risk of a resulting financial crisis is obvious. (Suffice it to say that the rule of law is not served by simply declaring "a bespoke Federal Reserve exception." *Trump v. Wilcox*, 145 S. Ct. 1415, 1421 (2025) (Kagan, J., dissenting). See also Resp.Br. 28-29.)

The full negative consequences of discarding agency independence would be diffuse and difficult to predict. For example, how will other nations react? Some of them will likely perceive a weakening of the rule of law in the United States. Consider the European Union, whose data-protection regime restricts transfers of personal data to countries that fail to provide "adequate" safeguards, including the "complete independence" of "each supervisory authority." Regulation (EU) 2016/679, Apr. 27, 2016, Art. 52, tinyurl.com/2s3sxzd2. The current EU-U.S. Data Privacy Framework finds such "adequacy" largely in the fact that U.S. data protection law is enforced primarily by the FTC, whose commissioners can be removed only for cause. See Commission Implementing Decision (EU) 2023/1795, July 10, 2023, ¶60, tinyurl.com/kzv5ya53. If *Humphrey's Executor* is overturned, an EU tribunal could conclude that this premise has collapsed, jeopardizing the Framework and significantly disrupting transatlantic data flows and commerce.

This Court has not hesitated to overturn major precedents. See, e.g., *Loper Bright Enters. v. Raimondo*, 603 U.S. 369 (2024); *Janus v. AFSCME*, 585 U.S. 878 (2018). That is understandable, and scholarly and public reactions have often been overstated. But *stare decisis* serves an enduring purpose: it keeps the law stable, consistent, and predictable. The Court should not discard precedent merely to scratch an ideological itch. Preserving *Humphrey's Executor* would show proper fidelity to *stare decisis* and an appropriate measure of judicial restraint.

C. Remedy.

What happens when an officer is illegally removed? Everyone agrees that one option is back pay. But if the President decides he has unfettered power to remove officers, regardless what the courts say, back pay is a meaningless remedy. Having to cut checks with taxpayer money is unlikely to deter a determined president from removing officers in violation of the law.

A court must, rather, order the President to stop. There are three options: a declaratory judgment, an injunction, and a writ of mandamus.

Even if a court has statutory authority to issue a declaratory judgment, see 28 U.S.C. § 2202, what would such a declaration accomplish? A declaratory judgment spells out the legal rights of the parties; it doesn't compel anyone to act. This Court has previously "assume[d]" that a president would "likely … abide" by a district court's reading of a statute, even

without being strictly bound by it. *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992). That assumption does not seem safe today. Something more than declaratory relief is necessary.

To issue an injunction, a court would invoke its inherent equitable powers. Those are limited, this Court has explained, to the powers once wielded by English courts of equity. *Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999). That said, we abolished the formal distinction between law and equity nearly a century ago, and it's not clear why so much should still hinge on such arcane categories. (Equity was complicated enough when it was a living doctrine, let alone now that it is long dead.) No surprise that, although 19th-century cases say courts of equity couldn't enjoin the removal of executive officers, 20th-century cases say, in essence, "never mind." Compare *White v. Berry*, 171 U.S. 366 (1898), with *Sampson v. Murray*, 415 U.S. 61 (1974). No surprise either that, at a recent oral argument, Judge Katsas asked why courts should be "fussing over" the obscure distinctions between injunctions and mandamus. *Wilcox v. Trump*, No. 25-5057, oral arg. (D.C. Cir., May 16, 2025), tinyurl.com/4skyhbsm. The Court should simply confirm that "[m]uch water has flowed over the dam" since the 19th century, 415 U.S. at 71, and bless an injunction in this unique context.

Finally, mandamus. This was a proper remedy, in the English courts of old, for addressing wrongful removal. See *White*, 171 U.S. at 377; Resp.Br. 41-42. And although mandamus is an extraordinary remedy, reserved for blatant violations of law, the President's

defiance of the pertinent statutory removal restriction is beyond dispute. See 15 U.S.C. § 41. Nothing prevents the courts from ordering reinstatement via mandamus except the fear that it might look aggressive. Judge Rao suggests that issuing such a writ "threatens to send" the judiciary "headlong into a clash with the Executive." *Harris v. Bessent*, No. 25-5037 slip op. 11 (D.C. Cir., Apr. 7, 2025) (dissenting opinion). But it is the President who is creating this collision—not the courts.

Yes, the President could ignore a writ of mandamus (or an injunction). A president can always manufacture a constitutional crisis by defying a court order. The President could blow off an order enjoining the removal of an officer—or the extraordinary rendition of aliens, or a purge of federal employees, or the impoundment of federal funds. "At that point," Judge Silberman once wrote, "we would be headed, in accordance with our temperament, either to the basement or the barricades." *Swan v. Clinton*, 100 F.3d 973, 988 (D.C. Cir. 1996) (concurring opinion). It's no use for courts to preemptively retreat every time they fear the President won't listen. If that's the plan, the republic is lost.

CONCLUSION

The judgment should be affirmed.

November 14, 2025 Respectfully submitted,

CORBIN K. BARTHOLD
Counsel of Record
BERIN SZÓKA
TECHFREEDOM
1500 K Street NW
Washington, DC 20005
(771) 200-4997
cbarthold@techfreedom.org