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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC has a strong interest in ensuring that the Constitution is interpreted in accordance with its text and history and therefore has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Joseph Story believed the Decision of 1789 was likely wrong—an "unjustifiable construction of the constitution" that was "dangerous" to the nation's "liberties." 3 *Commentaries on the Constitution of the United States* 390-91 (1833). "The public, however, acquiesced in this decision," and so regardless of any "aberration from the true constitutional exposition of the power of removal," it would "be difficult … after forty years' experience, to recall the practice to the correct theory." *Id.* at 395, 397.

James Madison, an advocate of presidential removal, believed the Bank of the United States was unconstitutional. But despite leading that charge in Congress, he recognized as President that his personal views had been "precluded … by repeated recognitions under varied circumstances of [the Bank's] validity." 28 Annals of Cong. 189 (1815). The "reiterated sanctions" that the elected branches had given the Bank, for "a long period of time," represented "a construction

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

put on the Constitution by the Nation." Letter from James Madison to Lafayette (Nov. 1826).

In short, "Madison and other prominent founders did not consider the Constitution's meaning to be fully settled at the moment it was written" but "expected subsequent practice to liquidate [its] indeterminacy." Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. Chi. L. Rev. 519, 521, 547 (2003). A long-continued practice of the elected branches could therefore represent a "decision of the Nation" sufficient to "over-rule individual opinions." Letter from James Madison to Moses Dawson (Feb. 20, 1836).

This Court's decisions "have continually confirmed Madison's view," *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014), reflecting the principle that historical practice should be judicially overturned only if "plainly in violation of the Constitution," Thomas M. Cooley, *General Principles of Constitutional Law* 140 (1880); *e.g.*, *INS v. Chadha*, 462 U.S. 919, 945 (1983) (rejecting practice that violated "unambiguous provisions of the Constitution"). Thus, this Court has always given "great weight" to "longstanding practice" in separation-of-powers disputes, *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (quotation marks omitted), recognizing that "a regular course of practice" can "liquidate our founding document's terms," *Houston Cmty. Coll. Sys. v. Wilson*, 595 U.S. 468, 474 (2022) (quotation marks omitted). When faced with a "doubtful question," "on which human reason may pause," historical practice can "put at rest" the Constitution's meaning. *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

Those principles resolve this case, even if *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), had never been decided. Constitutional liquidation requires "an ambiguous text and a clear historical

practice." *Noel Canning*, 573 U.S. at 613 (Scalia, J., concurring in the judgment). Both are unquestionably present here.

It is hard to imagine a more "doubtful" question, *McCulloch*, 17 U.S. at 401, than the scope of presidential removal authority, "one of the oldest constitutional debates in American law," Aditya Bamzai & Peter M. Shane, *The Removal Question: A Timeline and Summary of the Legal Arguments*, 78 Stan. L. Rev. 64, 64 (2025). The Constitution's silence on this question provoked "a great diversity of opinion" after Ratification, *In re Hennen*, 38 U.S. 230, 259 (1839), including "four competing positions" in Congress, William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 59 (2019), three of which stubbornly divided the legislators even after long debate.

The very need for the Decision of 1789, and the wide disagreement it produced, illustrates the Constitution's ambiguity on removal. The Constitution's meaning generally is "fixed according to the understandings of those who ratified it." *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 28 (2022). But the text is silent on removal authority, removal was not an essential attribute of the executive's power in England or the states, and the topic was not discussed in Philadelphia or the ratifying conventions. The *Federalist* proclaimed that Senate consent would be required to remove, meaning that each new administration "would not occasion so violent or so general a revolution in the officers of the government as might [otherwise] be expected." *The Federalist No. 77*, at 459 (Clinton Rossiter ed., 1961) (Alexander Hamilton). Those assurances helped "quiet the just alarms" about an "arbitrary exercise of this prerogative of the executive." 3 Story, *supra*, at 390. That Hamilton and Madison changed their positions in 1789 underscores that

presidential removal was a post-Ratification development, not an aspect of original public meaning.

The scope of presidential removal authority was thus a point of "ambiguity or doubt" at Ratification. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). And even the result of the 1789 debate "is open to conflicting interpretations." Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 Cato Sup. Ct. Review 157, 158. Inherent presidential authority became accepted after 1789 through the "practice of government," 1 James Kent, *Commentaries on American Law* 290 (1826), including subsequent legislation, executive practice, and "general acquiescence and silence" over the next several decades, 3 Story, *supra*, at 395.

Moreover, because the 1789 debate focused only on where removal power was lodged, it did not address whether Congress could "modify or abridge" this power. Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1052 (2006). Accordingly, even after the acceptance of presidential removal as a "practical construction" of the Constitution, *Hennen*, 38 U.S. at 259, it remained "speculative" whether Congress could forbid removals entirely for particular offices, 3 Story, *supra*, at 389, not to mention take the lesser step of requiring good cause. Nothing in the established practice that developed in this era precluded Congress from limiting the causes of removal in that way. Demonstrating the point, at the very historical moment that the elected branches recommitted to the Decision of 1789 by repealing the Tenure of Office Act, in 1887, they also enacted the Interstate Commerce Commission's good-cause removal conditions. No one saw a contradiction.

Multimember agencies with good-cause tenure thus have existed for most of the nation's history. They have been part of our government for longer than

the light bulb.[2] Well before the FTC's creation, they numbered among "the most powerful entities within the federal government." Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. Rich. L. Rev. 691, 695 (2018). For 150 years, these agencies have wielded "significant executive power." *Seila Law LLC v. CFPB*, 591 U.S. 197, 204 (2020). This "legislative practice … marked by the movement of a steady stream for a century and a half" signals an "unassailable ground for the constitutionality of the practice." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327-28 (1936).

Both of the elected branches have long contributed to this historical practice. Very little unites Presidents Grover Cleveland, Benjamin Harrison, Woodrow Wilson, Franklin D. Roosevelt, Harry Truman, John F. Kennedy, Lyndon Johnson, Richard Nixon, Gerald Ford, Jimmy Carter, Ronald Reagan, George H.W. Bush, and Bill Clinton. But all thirteen signed legislation creating regulatory bodies with good-cause removal conditions. And virtually *every* president since the 1880s has kept these agencies active by nominating their leaders and approving their appropriations.

The only reason there is a "deeply rooted historical practice of independent agencies," *PHH Corp. v. CFPB*, 881 F.3d 75, 174 (D.C. Cir. 2018) (Kavanaugh, J., dissenting), is that, for over a century, president after president has helped create them, modify them, fund them, and appoint their leaders. The executive branch, therefore, has not just "repeatedly acquiesced

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[2] *See* White House Historical Association, *When Was Electricity First Installed at the White House?*, https://www.whitehousehistory.org/questions/in-what-year-was-electricity-installed-in-the-white-house (electricity installed in White House and in State, War, and Navy Building in 1891).

in the practice" of independent agencies, *United States v. Midwest Oil Co.*, 236 U.S. 459, 471 (1915), but has actively shaped and supported them. Such active cooperation, for more than a century, is the strongest evidence one could reasonably demand for an elected branch's acquiescence in a historical practice.

In established-practice cases, this Court typically finds acquiescence by a political branch based on much less. Often simply a failure to resist or "repudiate the power claimed" suffices. *Midwest Oil*, 236 U.S. at 471; *e.g.*, *The Pocket Veto Case*, 279 U.S. 655, 675 (1929). And every *affirmative* indicator of acquiescence recognized in prior cases is present here: (1) approving legislation, *Grisar v. McDowell*, 73 U.S. 363, 381 (1867), (2) amending existing legislation, *Dames & Moore v. Regan*, 453 U.S. 654, 681 (1981), (3) making or approving appointments to office, *Mistretta v. United States*, 488 U.S. 361, 399 (1989), and (4) funding the activities in question, *Grisar*, 73 U.S. at 381. Even as presidents routinely deployed signing statements against, for instance, the legislative veto, similar complaints about independent commissions have been rare, and direct resistance nonexistent. Overall, the executive branch has more than "acquiesced" in these institutions. *Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015).

Petitioner claims insight into the definitive meaning of Article II that eluded Joseph Story, Oliver Wendall Holmes Jr., and many others throughout history. But the American people, through their representatives, have given "public sanction" to multimember independent agencies for generations. Letter from James Madison to Martin L. Hurlbut (May 1830). A "limitless [removal] power" is not compelled by original public meaning and "would transform the established practice of the political branches." *Mazars*, 591 U.S. at 867. That alone should be dispositive.

ARGUMENT

I. Historical Practice Can Liquidate Constitutional Meaning.

"When faced with a dispute about the Constitution's meaning or application, '[l]ong settled and established practice is a consideration of great weight,'" *Houston Cmty. Coll.*, 595 U.S. at 474 (quoting *Pocket Veto Case*, 279 U.S. at 689), because "'a regular course of practice' can illuminate or 'liquidate' our founding document's 'terms & phrases,'" *id.* (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819)). Especially in cases concerning "the allocation of power between [the] two elected branches," *Mazars*, 591 U.S. at 862 (citation omitted), this Court puts "significant weight upon historical practice," *Zivotofsky*, 576 U.S. at 23 (citation omitted), including practice that "began after the founding era," *Noel Canning*, 573 U.S. at 525. Those principles should resolve this case.

A. The importance of historical practice in settling constitutional meaning was first recognized by the Framers. As Alexander Hamilton wrote, "time only … can mature and perfect so compound a system, can liquidate the meaning of all the parts, and can adjust them to each other in a harmonious and consistent whole." *Federalist No. 82*, *supra,* at 491. James Madison acknowledged that all laws are "more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." *Federalist No. 37*, *supra*, at 229. "[O]ther Federalists also argued that interpretation would resolve difficulties" and "settle uncertainties." Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 310 (1989). A need for liquidation, therefore, "was foreseen at the birth of the Constitution." Letter from James Madison to Spencer Roane, *supra*.

"So powerful was the force of this 'liquidation' to Madison that, as President, he signed the bill creating a Second Bank of the United States in spite of having maintained in 1791 that the Bank was unconstitutional." Michael W. McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. Rev. 1745, 1774 (2015). Notwithstanding his own views, Madison recognized "the reiterated sanctions given to the power by the exercise of it, thro' a long period of time," with the "acquiescence of the people," as "a construction put on the Constitution by the Nation." Letter from James Madison to Lafayette, *supra*; *see* 28 Annals of Cong. 189 (1815) (message from President Madison stating that his constitutional objections had been "precluded … by repeated recognitions, under varied circumstances, of [the Bank's] validity"). As Madison saw it, "the decision of the Nation had been sufficiently manifested, to over-rule individual opinions." Letter from James Madison to Moses Dawson, *supra*.

B. From the start, this Court agreed that established practices of the elected branches can settle constitutional meaning. In *Stuart v. Laird*, 5 U.S. 299 (1803), the Court rejected a constitutional challenge to Justices sitting as circuit judges, because "practice and acquiescence … for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction." *Id.* at 309. In *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816), the Court relied on the "historical fact" that it had "sustained th[e] appellate jurisdiction [in question] in a great variety of cases," with the "acquiescence" of the states. *Id.* at 352. And in *McCulloch v. Maryland*, the Court declared that the Bank's constitutionality could "scarcely be considered as an open question," given the "exposition of the

constitution, deliberately established by legislative acts." 17 U.S. at 401.

These precedents established "that the judiciary, in passing upon questions of law which have been considered and acted upon by the other departments, should give great weight to their opinions, especially if they have passed unchallenged for a considerable period." Cooley, *General Principles of Constitutional Law*, *supra*, at 139-40. Courts should reject these constructions only if "plainly in violation of the Constitution." *Id.* at 140.

C. Historical practice can liquidate constitutional meaning "even when that practice began after the founding era." *Noel Canning*, 573 U.S. at 525. This Court has long relied on such practice. *E.g.*, *id.* at 528-29 (intra-session recess appointments beginning after Civil War); *Ex parte Grossman*, 267 U.S. 87, 118 (1925) ("long practice under the pardoning power" starting in 1840); *Pocket Veto Case*, 279 U.S. at 691 (veto practice that began more than 20 years after the Founding and flourished only after Lincoln); *Mistretta*, 488 U.S. at 390 ("more than a century" of judges determining sentencing factors).

While the earliest practices may also illuminate "original meaning," later practices that shed no light on original meaning can still "liquidate ambiguous constitutional provisions." *United States v. Rahimi*, 602 U.S. 680, 738 (2024) (Barrett, J., concurring) (citation omitted). Thus, "nearly everyone seems to agree … that [historical] glosses need not necessarily originate in the near aftermath of the Founding." Richard H. Fallon Jr., *The Many and Varied Roles of History in Constitutional Adjudication*, 90 Notre Dame L. Rev. 1753, 1778 (2015); *see* Baude, *supra*, at 59 (excluding post-Founding practice would be "wrong").

D. The executive branch recognizes that "a significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the executive and legislative branches." 18 Op. O.L.C. 232, 233 (1994). That recognition is longstanding. *See, e.g.*, 10 Op. Att'y Gen. 356, 356 (1862) (describing issue as "settled" by "continued practice" and "acquiescence"). When "[d]isagreements and uncertainties … are two centuries old," as here, courts must give "weight to the considered constitutional judgments of the political branches." 18 Op. O.L.C. at 235.

E. To be sure, practice does not control if "the people have plainly expressed their will in the Constitution." Thomas M. Cooley, *Constitutional Limitations* 85 (4th ed. 1878); *see* McConnell, *supra*, at 1774 (explaining the differences between liquidation and "continually evolving meaning"). For example, legislative vetoes, despite their prevalence, violated "[e]xplicit and unambiguous provisions of the Constitution," which left it "beyond doubt" that "lawmaking was a power to be shared by both Houses and the President." *Chadha*, 462 U.S. at 945, 947. But liquidation is necessary "when the meaning of the Constitution is not clear from text in light of original meaning." McConnell, *supra*, at 1774.

F. Respecting historical practice serves "deep constitutional values." Baude, *supra*, at 35. By "fixing" meaning, "liquidation promotes the rule of law values of stability, equality, and predictability." McConnell, *supra*, at 1776. It "generat[es] legal certainty by giving weight to past decisions," Baude, *supra*, at 42-43, ensures "consistency," and "protect[s] reliance interests," Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 Harv. L. Rev. 411, 427 (2012).

Moreover, liquidation honors "implicit bargain[s]" between the elected branches. *Id.* at 435. Conversely, "judicial invalidation of [a] practice will undo only part of the bargain, potentially creating an imbalance in executive-legislative relations." *Id.* at 457. And "because the Constitution's textual references to executive power are so spare," "historical practice may provide the most objective basis for decision." *Id.* at 428.

While resembling *stare decisis*, "liquidation by longstanding practice of democratically accountable bodies" is "more democratic." McConnell, *supra*, at 1776. As Madison put it, a liquidated practice was "a construction put on the Constitution by the Nation," Letter from James Madison to Lafayette, *supra*, endorsed by the "public sanction," Letter from James Madison to Martin L. Hurlbut, *supra*.

II. Presidential Removal Authority Was Ambiguous at the Founding and Settled Through Historical Practice.

The President's removal power was established by practice, not original public meaning. It arose from the process of constitutional liquidation, no less than the later qualification of that power with respect to independent agencies did. Consistent with the Madisonian vision, both developments reflect a "practical construction" of the Constitution that settled an initial "ambiguity." *McPherson*, 146 U.S. at 27.

A. Removal Authority Was Uncertain at the Founding.

One could scarcely imagine a more "doubtful question," "on which human reason may pause," *McCulloch*, 17 U.S. at 401, than removal power under the Constitution—"one of the oldest constitutional debates in American law," Bamzai & Shane, *supra*, at 64.

So ambiguous was the removal question after the Constitution's ratification that "extensive debate" in Congress, Aditya Bamzai & Saikrishna Bangalore Prakash, *How to Think About the Removal Power*, 110 Va. L. Rev. Online 159, 191 (2024), generated "at least four competing positions," Baude, *supra*, at 9. Even the result of that debate "is open to conflicting interpretations." Wurman, *supra*, at 158. The only clear outcome—a rejection of Senate participation in removals—contradicted the position advocated at the time of Ratification. *See Federalist No. 77*, *supra*, at 459 (Hamilton).

In short, the very existence of the President's removal power was "much disputed … in the early history of this government," *Hennen*, 38 U.S. at 259, and emerged from a "practical construction," *id.*, followed by "acquiescense and long practice," *Myers v. United States*, 272 U.S. 52, 152 (1926). That same process of liquidation later established the validity of good-cause tenure for bodies like the FTC.

Text. As illustrated by the fierce congressional debate in 1789, removal authority cannot be resolved by constitutional text alone.

The Constitution expressly provides only for impeachment but otherwise "is silent with respect to the power of removal." *Hennen*, 38 U.S. at 258. While presidents have "the" executive power and responsibility to ensure faithful execution of the laws, U.S. Const. art. II, Congress may pass laws necessary and proper to carry the President's powers into execution, *id.* art. I, § 8, cl. 18 ("all" powers of the federal government), and may create the nation's "Departments" and "Officers," *id.* art. II, § 2, cl. 2. "It would be natural to conclude," as many in the First Congress did, that "Congress has broad authority to address [removal] by statute." Caleb Nelson, *Must Administrative Officers*

Serve at the President's Pleasure?, The Democracy Project (Sept. 29, 2025).

While the Constitution "relied upon a conception of 'executive power' from existing usage," Bamzai & Prakash, *Removal Power*, at 173, removal authority was not an essential attribute of the executive's power at the Founding.

"[T]he British Crown lacked power to remove all officers," and "Parliament could enact laws curbing the Crown's removal authority." Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1791 (2023); *see* Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 182, 220 (2021) (Parliament "exercised significant control over the tenure of officers appointed to execute the laws"). So even if the presidency was modeled on the monarchy—*but see* 1 *Records of the Federal Convention of 1787*, at 65 (Max Farrand ed., 1911) (James Wilson) (denying that "the Prerogatives of the British Monarch" were "a proper guide in defining the Executive powers")—that model did not invariably equate executive power with removal. *See* Bamzai & Prakash, *Executive Power*, at 1790 ("common law and parliamentary law constrained removal," and only *some* officers were removable at pleasure).

Removal authority was not inherently linked with the executive in America, either. In "state and colonial governments at the time of the Constitutional Convention," it "had sometimes been lodged in the Legislatures or in the courts." *Myers*, 272 U.S. at 118; *see* 1 Annals of Cong. 392 (1789) (Rep. Smith) (in many states, "the chief Executive Magistrate appoints to office, but cannot remove"); *id.* at 534 (Rep. White) ("it will not be found that he has in any [state], of necessity, the right of … removing officers"). Perhaps some

of these arrangements were seen as "vesting part of the executive power in another branch of the government," *Myers*, 272 U.S. at 118, but even states with executive-power vesting clauses and explicit separation-of-powers clauses "frequently gave the legislature control over key administrators," Bamzai & Shane, *supra*, at 84 (statement of Peter Shane). Thus, Founding-era state practice does not support any consensus that executive power necessarily encompassed removal, much less removal at pleasure. *Cf. Federalist No. 66*, *supra*, at 404 (Hamilton) (stating only that "those who hold offices during pleasure" are "dependent on the pleasure of those who appoint them").

Claims of a pre-Ratification consensus on presidential removal must explain away not just contemporary state practice but also the Opinions Clause, U.S. Const. art. II, § 2, cl. 1, which arguably clashes with broad unwritten presidential authority over executive officers. They must also explain the choice to specifically enumerate the powers to pardon, receive ambassadors, and be commander-in-chief, *id.*; *id.* art. II, § 3, which suggests that the Framers listed the royal powers they wished to incorporate.

And even if all these tensions could be successfully addressed, that would still leave just the bare assertion that the Vesting and Take Care Clauses, alone, were widely understood to require exclusive presidential removal at pleasure. But that assertion is belied by the *Federalist* and the debates in the First Congress.

Drafting and Ratification. Removal authority "was not discussed" in Philadelphia, *Myers*, 272 U.S. at 109-10, with one notable exception. The Framers declined to adopt a proposal to name specific department heads who would serve "during pleasure." 2 *Farrand's Records* 335. Instead, they empowered

Congress to structure federal offices—a power they understood to fall within the Necessary and Proper Clause. *See id.* at 345.

As important as the deliberations in Philadelphia is what the ratifying public was told, because the Constitution's "meaning is fixed according to the understandings of those who ratified it." *Bruen*, 597 U.S. at 28; *see Rahimi*, 602 U.S. at 737 (Barrett, J., concurring) ("for an originalist, the history that matters most is the history surrounding the ratification of the text"). Anyone who read the *Federalist* would have understood that the "tenure of the ministerial offices generally will be a subject of legal regulation, conformably to … the example of the State constitutions." *Federalist No. 39*, *supra*, at 242 (Madison). Readers were also assured that the "consent of that body [the Senate] would be necessary to displace as well as to appoint." *Federalist No. 77*, *supra*, at 459 (Hamilton). "A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the government as might be expected if he were the sole disposer of offices." *Id.*[3]

These assurances "had a most material tendency to quiet the just alarms of the overwhelming influence, and arbitrary exercise of this prerogative of the executive," 3 Story, *supra*, at 390, which otherwise "might prove fatal to the personal independence, and freedom of opinion of public officers, as well as to the public liberties of the country," *id.* Although Hamilton and Madison changed their minds in 1789, that only underscores that presidential removal was a post-

[3] The suggestion that Hamilton was not discussing Senate consent for removals is refuted by his later acknowledgment that he changed his mind. He never claimed he was misunderstood. *See* Bamzai & Prakash, *Executive Power*, at 1779.

Ratification development resting on practical construction, not original public meaning. Senate participation in removals "was the construction given to the constitution while it was pending for ratification." Kent, *supra*, at 288. At that time, exclusive presidential removal authority "never appears to have been avowed by any of its friends." 3 Story, *supra*, at 393.

It is undeniable, therefore, that when the Constitution was ratified, it was not widely understood to mandate exclusive presidential removal authority—much less removal at pleasure for all offices. On the contrary, removal generated "a great diversity of opinion … in the early history of this government." *Hennen*, 38 U.S. at 259.

B. Presidential Removal Was Established by Practice.

Because of the Constitution's ambiguity, liquidation, not original public meaning, settled the existence of inherent presidential removal authority. And that initial settlement did not address, much less preclude, the use of good-cause removal conditions for regulatory officers.

The Decision of 1789. The most significant thing about the First Congress's removal debate is that it was necessary. A clear constitutional mandate would not have produced four contending viewpoints, three of which stubbornly divided the first Congress even after long debate. *See infra.* None of the participants ever suggested they were expounding views that the Framers or ratifiers had previously considered or regarded as textually implicit. *See* Jonathan Gienapp, *Removal and the Changing Debate over Executive Power at the Founding*, 63 Am. J. Legal Hist. 229, 233 (2023). This was unsettled terrain. *See* 1 Annals of

Cong. 480 (1789) (Rep. Madison) (describing how he changed his mind between May and June).

Also significant is that no clear consensus emerged, except about the president's authority to remove the Foreign Affairs Secretary, because none of the three main camps could muster a majority. Thus, "few scholars" argue today "that the Decision of 1789 governs by its own force. And those who do should probably walk back such claims." Wurman, *supra*, at 177. Instead, "an emerging consensus of scholars across the ideological spectrum now agrees that the First Congress reflected little consensus about the meaning of Article II." Jed H. Shugerman, *Movement on Removal: An Emerging Consensus about the First Congress and Presidential Power*, 63 Am. J. Legal Hist. 258, 259 (2023).

The Decision of 1789 did, however, put the gears in motion for a gradual liquidation of presidential removal authority over the next three decades. That is why pro-removal scholarship increasingly emphasizes "post-1789 evidence" and "nineteenth-century practice," pivoting "away from original public meaning circa Ratification." *Id.* at 264, 279.

In brief, some Congressmembers in 1789 insisted that the Foreign Affairs Secretary would inherently be "removable by the President." 1 Annals of Cong. 385 (1789). But others, citing the *Federalist*, argued that removals required "the advice and consent of the Senate." *Id.* at 396. Still others, originally including Madison, *id.* at 389, believed that Congress could assign removal where it wanted, *id.* at 392. Emphasizing Madison's statements in the debate while ignoring this wide disagreement exemplifies "looking over a crowd and picking out your friends." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation omitted). As scholars have long documented,

without repudiation, "no majority emerged *either* for the proposition that the Constitution itself authorized [presidential removal] *or* for the proposition that Congress can decide by statute whether to grant this power." Nelson, *Administrative Officers*, *supra*.

Parliamentary maneuvering yielded language that presupposed a presidential removal power—but "the text did not specify the source of that power." Bamzai & Shane, *supra*, at 68. Specifically, two different majorities approved two amendments. 1 Annals of Cong. 600-08 (1789). The first brought together all who favored presidential removal, "whether they thought that Article II settled the question or left the matter to Congress," and the second brought together the Article II camp with the Senate-participation camp. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 201 (1995). Disagreement on removal required a vice-presidential Senate tiebreaker. *Myers*, 272 U.S. at 115.

Liquidation of the Removal Power. Standing alone, the 1789 legislation "left presidential removal to shadowy implication." Prakash, *supra*, at 1052. But it came to be viewed as a "practical construction" of the Constitution, *Hennen*, 38 U.S. at 259, that the nation "acquiesced in," Kent, *supra*, at 289.

This shift was gradual. Congress immediately repeated the same fight over the Treasury Secretary, resulting in the same compromise. *See* Prakash, *supra*, at 1064 (describing the Senate's refusal to explicitly "acknowledge the Power of removal in the President" (citation omitted)). Despite Madison's advocacy of presidential removal, he declared (though he did not favor the proposal) that Congress could vary the rule for the Treasury's Comptroller, because his duties

were "not purely of an executive nature." 1 Annals of Cong. 635 (1789).

In subsequent years, however, Congress stopped including language about presidential removal—except for offices with fixed terms, *see infra* at 22—suggesting it was now deemed superfluous. *See* Bamzai & Prakash, *Executive Power*, at 1776. Presidentially issued commissions often stated that officers were removable at pleasure, even where legislation was silent. *Id.* at 1777. Over the next few decades, presidents increasingly removed officers without explicit statutory authority to do so. *See* Bamzai & Shane, *supra*, at 70-72.

The President's removal authority was understood to be a "constructive power which he has exercised, because the Legislature have … acknowledged that he had it." 11 Annals of Cong. 526 (1802) (Rep. Henderson). It "was not expressly found in the Constitution, but sprang from Legislative construction." *Id.* at 33 (Sen. Mason). By the 1820s, James Kent wrote that despite Founding-era disagreement, Congress's "legislative construction" had since been "acquiesced in." Kent, *supra*, at 289. Removal power "continued to rest on this loose incidental declaratory opinion of congress, *and the sense and practice of government since that time*." *Id.* at 290 (emphasis added).

Joseph Story also attributed the entrenchment of presidential removal to "general acquiescence and silence." 3 Story, *supra*, at 395. Expressing strong doubts about the correctness of the Decision of 1789, he acknowledged: "The public, however, acquiesced in this decision," representing an "extraordinary" instance "of a power, conferred by implication on the executive by the assent of a bare majority of congress." *Id.* Whatever "the true constitutional exposition of the power of removal," it would "be difficult, and perhaps

impracticable, after forty years' experience, to recall the practice to the correct theory." *Id.* at 397.

In the same period, Daniel Webster similarly argued in Congress that the Decision of 1789 "was erroneous." 11 Reg. Deb. 470 (1835). But he conceded that it "has been *established by practice*, and recognized by subsequent laws, as the settled construction of the Constitution." *Id.* (emphasis added).

As late as the 1850s, individual Justices insisted that exclusive presidential removal authority went against "the true construction of the constitution," but acknowledged that it "has been, perhaps, too long established and exercised to be now questioned." *U.S. ex rel. Goodrich v. Guthrie*, 58 U.S. 284, 306-07 (1854) (McLean, J., dissenting).

C. The President's Established Removal Authority Is Compatible with Good-Cause Tenure for Multimember Agencies.

During the decades when presidential removal authority was being "settled," *Hennen*, 38 U.S. at 259, by "acquiescense and long practice," *Myers*, 272 U.S. at 152, the question of whether legislation could limit the President's *reasons* for removing particular officers was not discussed. Only when industrialization fostered a desire for oversight bodies that could accumulate expertise "informed by experience," *Ill. Cent. R.R. Co. v. ICC*, 206 U.S. 441, 454 (1907), did the branches find reason to employ such removal conditions. Nothing in the Decision of 1789, or the settled practice that followed, conflicted with that development.

"[T]he Decision of 1789 did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President." Prakash, *supra*, at 1073. The question was simply

"whether the removal was to be by the President alone, or with the concurrence of the Senate." *Hennen*, 38 U.S. at 259. Only three representatives ever suggested "that the constitutional power of removal is *illimitable*." James Hart, *The American Presidency in Action: 1789*, at 206 (1948). And "these assertions were never really contested," because the debate focused on where the removal power was lodged, not "whether it was a power that Congress could modify or abridge." Prakash, *supra*, at 1072.

Indeed, Hamilton explained in 1802 that removal was "left to the pleasure or discretion" of the President only "in instances in which it is not otherwise provided by the Constitution *or the Laws*." *The Examination No. XVII* (Mar. 20, 1802) (emphasis added). He reiterated: "The pleasure of the President … is understood to be subject to the direction of the law." *Id.*

Story thus wrote that it remained "speculative" whether Congress could create fixed-term offices that were completely exempt from removal. 3 Story, *supra*, at 389. Kent described the Decision of 1789 as covering officers "whose term of duration is not specially declared." Kent, *supra*, at 289; *see also Reynolds v. Bussier*, 5 Serg. & Rawle 451, 460-61 (Pa. 1820) (citing the Decision of 1789 for the proposition that "the tenure of ministerial offices … is during pleasure, *unless the law by which the office is established order it otherwise*" (emphasis added)); *United States v. Perkins*, 116 U.S. 483, 484 (1886) (identifying as an open question whether legislation could "restrict the power of removal").

Conditioning the President's inferred removal power, therefore, is not equivalent to restricting an expressly defined authority like the pardon power. As the uncertainty above demonstrates, the underlying scope of the removal power itself was unclear, because

it was not settled by text, historical practice, or judicial precedent.

Significantly, too, despite the "dominant pattern" of legislative silence on removal, Bamzai & Prakash, *Executive Power*, at 1776, whenever Congress gave officers fixed terms, it took pains to specify that they were removable at "pleasure." Act of Sept. 4, 1789, ch. 20, § 27, 1 Stat. 73, 87; *see* Act of Feb. 27, 1801, ch. 15, § 7, 2 Stat. 103, 106; Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582; Act of July 2, 1836, ch. 270, § 33, 5 Stat. 80, 87-88. That choice arguably implied that where an officer's term was fixed, removal power had to be specified or it did not exist. If nothing else, the consistency of this pattern indicates enough uncertainty about the matter that Congress felt compelled to remove doubt.[4]

As the nineteenth century progressed, Congress began limiting removals. It conferred tenure "during good behaviour," Act of Feb. 24, 1855, ch. 122, § 1, 10 Stat. 612, 612 (Court of Claims judges), demanded "reasons" for removals, Act of June 3, 1864, ch. 106, § 1, 13 Stat. 99, 100 (Comptroller of the Currency), required court-martials, Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92 (military officers), and conditioned removal on specific causes, Act of Feb. 4, 1887, ch. 104, § 11, 24 Stat. 379, 383 (Interstate Commerce Commission).

Congress also backtracked on the Decision of 1789 by requiring Senate consent for department-head removals. Act of Mar. 2, 1867, ch. 154, § 1, 14 Stat. 430,

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[4] The only apparent exception was for justices of the peace in the territories and District of Columbia, whom some regarded "as Article III judges," subject to "good-behavior tenure." Bamzai & Prakash, *Executive Power*, at 1804.

430. After presidents of all stripes objected to this requirement, *see Myers*, 272 U.S. at 168, Congress repealed it. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500. But within a month, the elected branches established the ICC Commissioners' good-cause tenure. Although removal authority was clearly on the minds of Congress and the President in early 1887, no one suggested that these removal conditions for regulatory bodies violated the Constitution or settled practice.

III. Historical Practice Has Also Settled the Legitimacy of Multimember Independent Agencies.

A. Multimember Independent Agencies Have Wielded Executive Power for Most of the Nation's History.

The elected branches have created regulatory bodies with good-cause tenure for nearly 150 years. From the start, these agencies wielded "significant executive power." *Seila Law*, 591 U.S. at 204. The ICC, for instance, had investigative and enforcement authority over the monumentally important railroad industry, and could issue cease-and-desist orders, require payment of reparations, and enforce its orders in court. *See* Act of Feb. 4, 1887, §§ 12-16, 20, 24 Stat. at 382-85, 386-87. While the Interior Secretary initially had some supervisory authority, *see id.* §§ 18, 21, 24 Stat. at 386-87, it was eliminated two years later, *see* Act of Mar. 2, 1889, ch. 382, §§ 7-8, 25 Stat. 855, 861-62. And soon after, the elected branches established the Board of General Appraisers, with identical removal conditions, to regulate imported goods. *See* Act of June 10, 1890, ch. 407, § 12, 26 Stat. 131, 136.

Congress later empowered the ICC to set railroad rates and prescribe "fair" and "reasonable" practices, *see* Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 584,

589, enhancing its status as "a very powerful agency," Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1130 (2000). Meanwhile, the Board of General Appraisers was "one of the most powerful entities within the federal government." Bamzai, *supra*, at 695. Over the following century, the elected branches established "a multitude of new agencies" with similar structures. Breger & Edles, *supra*, at 1116. Independent boards and commissions thus enjoy a solid foundation in historical practice.

These independent agencies have always wielded significant executive power. While this Court described their powers as "predominantly quasi-judicial and quasi-legislative," *Humphrey's Ex'r*, 295 U.S. at 624, rulemaking, adjudication, and enforcement are exercises of the executive power, *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). Independent agencies have thus exercised significant executive power for well over a century.

Humphrey's Executor left no doubt that courts would enforce good-cause removal conditions. *See* 295 U.S. at 629 (making clear that the holding covered "the Interstate Commerce Commission and the Court of Claims," because "illimitable power of removal is not possessed by the President in respect of officers *of the character of those just named*" (emphasis added)). And presidents continued working with Congress over the next 90 years to further ensconce independent agencies as an indelible feature of the government. Less than two months after *Humphrey's*, the elected branches created the National Labor Relations Board on a similar model, *see* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935). Many other new agencies followed.

Since the 1880s, therefore, "independent agencies have played a significant role in the U.S. Government," with "substantial executive authority" to regulate "vast swaths of American economic and social life." *PHH Corp.*, 881 F.3d at 173 (Kavanaugh, J., dissenting). "A legislative practice … marked by the movement of a steady stream for a century and a half" suggests an "unassailable ground for the constitutionality of the practice." *Curtiss-Wright*, 299 U.S. at 327-28.

B. The Executive Branch Has Enabled and Acquiesced in this Historical Practice.

The only reason that independent agencies play "a significant role in the U.S. Government," *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting), is that, for over a century, president after president has helped create them, modify them, fund them, and appoint their leaders. For generations, presidents across the political spectrum have not only "repeatedly acquiesced in the practice" of creating these agencies, *Midwest Oil*, 236 U.S. at 471, but have actively shaped and supported them.

Starting with Grover Cleveland, at least thirteen presidents have placed their signatures on legislation creating regulatory boards or commissions with good-cause removal conditions.[5] Virtually *every* president

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[5] *See* 24 Stat. 379, 383 (1887) (ICC) (Cleveland); 26 Stat. 131, 136 (Board of General Appraisers) (Harrison); 38 Stat. 717, 718 (1914) (FTC) (Wilson); 49 Stat. 449, 451 (1935) (NLRB) (Roosevelt); 60 Stat. 755, 756-57 (1946) (Atomic Energy Commission) (Truman); 75 Stat. 840, 840 (1961) (Federal Maritime Commission) (Kennedy); 80 Stat. 932, 936 (1966) (National Transportation Safety Board) (Johnson); 86 Stat. 1207, 1210 (1972) (Consumer Product Safety Commission) (Nixon); 88 Stat. 1233, 1243

since the 1880s has actively kept these agencies running by nominating their leaders and approving their appropriations.

This is the strongest evidence one could ask for to demonstrate an elected branch's acquiescence in a historical practice. Presidents have not merely submitted to the practice or failed to act, but have affirmatively cooperated in developing and perpetuating these institutions. Without presidential acquiescence, there simply would be no "deeply rooted historical practice of independent agencies." *PHH Corp.*, 881 F.3d at 174 (Kavanaugh, J., dissenting).

This Court typically finds acquiescence based on much less. Simply failing to resist another branch's conduct often suffices. *E.g.*, *Pocket Veto Case*, 279 U.S. at 675 (relying on "the practical construction given to the constitutional provision by the President through a long course of years, in which Congress has acquiesced"); *Midwest Oil*, 236 U.S. at 474, 471 (relying on a "long-continued practice, known to and acquiesced in by Congress," as evidenced by failure to "repudiate the power claimed").

Elsewhere, this Court has relied on the same indicators of acquiescence found here:

(1) ***Approving legislation.*** *E.g.*, *Dames & Moore*, 453 U.S. at 680 ("Crucial to our decision [is] that Congress has implicitly approved the practice of claims settlement by executive agreement," "best demonstrated

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(1974) (Nuclear Regulatory Commission) (Ford); 91 Stat. 565, 582 (1977) (Federal Energy Regulatory Commission) (Carter); 98 Stat. 1837, 2018 (1984) (United States Sentencing Commission) (Reagan); 104 Stat. 2399, 2565 (1990) (Chemical Safety Board) (Bush); 109 Stat. 803, 933 (1995) (Surface Transportation Board) (Clinton). Some presidents created multiple agencies.

by Congress' enactment of [a particular statute]"); *Grisar*, 73 U.S. at 381 (similar). Notably, the legislation in these examples only *implicitly* endorsed the practice in question.

(2) ***Amending existing legislation.*** *E.g.*, *Dames & Moore*, 453 U.S. at 681 ("Congress has frequently amended [the statute] to provide for particular problems arising out of settlement agreements, thus demonstrating Congress' continuing acceptance of the President's claim[ed] settlement authority"). Notably, many presidents have signed bills adjusting the functions of independent agencies.

(3) ***Making or approving appointments to office.*** *E.g.*, *Mistretta*, 488 U.S. at 399 (describing history of extrajudicial appointments for federal judges and explaining that "[a]ll these appointments were made by the President with the 'Advice and Consent' of the Senate," and that "[t]hus, at a minimum, both the Executive and Legislative Branches acquiesced in the assumption of extrajudicial duties by judges").

(4) ***Funding the activities in question.*** *E.g.*, *Grisar*, 73 U.S. at 381 ("The action of the President in making the reservations in question was indirectly approved by the legislation of Congress in appropriating moneys for the construction of fortifications and other public works upon them.").

Through *all* of these means, the executive branch has "placed its stamp of approval" on independent agencies. *Regan*, 453 U.S. at 680.

True enough, signing a bill may not always indicate acquiescence, given the "otherwise valuable effect" the bill might have. *Myers*, 272 U.S. at 170. But here a "long-continued action" has "been allowed to be so often repeated as to crystallize into a regular practice." *Midwest Oil*, 236 U.S. at 472-73. The case for acquiescence is not just "the mere presence of acts on the statute book," or a single provision that was "imposed as a rider" on an appropriations act. *Myers*, 272 U.S. at 170-71. For 150 years, presidents have helped create and modify dozens of independent agencies, have appointed people to run them, and have supported their operations by funding them.

Meanwhile, presidential objections to these agencies appear to have been rare and short-lived. Presidents have many tools available to resist constitutional intrusions. They have, for instance, repeatedly deterred legislation that would "limit how the executive branch conducts diplomacy." Bradley & Morrison, *supra*, at 458. Not only has such direct resistance been virtually nonexistent for independent agencies, but there has been an apparent dearth of sustained opposition even through the weak tea of signing statements, which presidents have long used to note constitutional objections. *See* Christopher N. May, *Presidential Defiance of Unconstitutional Laws: Reviving the Royal Prerogative*, 21 Hastings Const. L.Q. 865, 933-36 (1994) (presidents systematically wielded signing statements against legislative veto provisions in the twentieth century, yet appear to have made almost no similar objections to removal provisions). *But see Presidential Statement on Signing Bill Amending Clean Air Act*, 26 Weekly Comp. Pres. Doc. 1824 (Nov. 15, 1990) (rare signing statement objecting to removal conditions for independent commission).

Nor have presidents employed the stronger medicine of vetoing independent agencies or refusing to fund them. And acquiescence does not require history to be *entirely* devoid of dispute. *See Mistretta*, 488 U.S. at 400-01 (relying on "continuing, albeit controversial, practice" that "spawned spirited discussion and frequent criticism"); *Midwest Oil*, 236 U.S. at 473 ("weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation"). In short, the history of presidential challenges to independent agencies is "one of anomalies only." *Chiafalo*, 591 U.S. at 596. The "weight of historical evidence" firmly shows that, "[f]or the most part," the executive branch "has acquiesced" in these institutions. *Zivotofsky*, 576 U.S. at 23. And then some.

This record is especially meaningful given that constitutional liquidation rarely benefits Congress. "In any controversy between the political branches over a separation-of-powers question, staking out a position and defending it over time is far easier for the Executive Branch." *Noel Canning*, 573 U.S. at 593 (Scalia, J., concurring in the judgment). "All Presidents have a high interest in expanding the powers of their office," whereas individual Congressmembers "may have little interest in opposing Presidential encroachment," especially when the President "is the leader of their own party." *Id.* Moreover, "the President faces neither the collective-action problems nor the procedural inertia inherent in the legislative process." *Id.*; *see* Bradley & Morrison, *supra*, at 452-54 (discussing veto-gates). If anything, "the standard for executive acquiescence should be lower than for legislative acquiescence." Bradley & Morrison, *supra*, at 454.

Regardless, "the greatest weight" should "be reserved for *bipartisan* institutional acceptance over

time," *id.* at 455, which is what has sustained independent agencies for over a century. In the Madisonian model of liquidation, the "key idea of acquiescence" was that opposition to a practice eventually subsided, resulting in either "bipartisan" or "institutional" acceptance. Baude, *supra*, at 18-19. "The strongest cases of acquiescence appeared to combine the two," as with the national bank. *Id.* Here, Congresses and presidents of both parties have jointly endeavored to create and maintain dozens of multimember independent agencies for more than half of the nation's history.

That should resolve this case, even if *Humphrey's Executor* had never been decided. The validity of independent commissions is one of the "doubtful" questions about the "division of power between the branches" that has been "adjusted by the departments themselves." 1 Annals of Cong. 520 (1789) (Rep. Madison). The legitimacy of their creation has been settled by "the reiterated sanctions given to the power by the exercise of it, thro' a long period of time," with the "acquiescence of the people at large." Letter from James Madison to Lafayette, *supra.* This longstanding historical practice is "a construction put on the Constitution by the Nation," more powerful than any "private opinion." *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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