[ORAL ARGUMENT NOT YET SCHEDULED]

No. 25-5165

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUSAN TSUI GRUNDMANN,

Plaintiff-Appellee,

v.

DONALD J. TRUMP, in his official capacity as President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of Columbia

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* Constitutional Accountability Center (CAC) represents that counsel for all parties have consented to the filing of this brief.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus* is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights, freedoms, and structural safeguards that our nation's charter guarantees. In furtherance of these goals, CAC has studied the long history of for-cause removal protections for multimember independent agencies. CAC accordingly has a unique interest in this case and has developed expertise on the constitutional text and history surrounding Congress's authority to make agency leaders removable for cause.

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

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amicus* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Appellee, all parties, intervenors, and *amici* appearing in this Court are listed in the Brief for Appellants and Brief for Appellee.

II. RULINGS UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants and Brief for Appellee.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants and Brief for Appellee.

Dated: October 10, 2025

/s/ Brianne J. Gorod
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GLOSSARY

CFPB	Consumer Financial Protection Bureau
FLRA	Federal Labor Relations Authority
FTC	Federal Trade Commission
ICC	Interstate Commerce Commission

INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to the progressive promise of the Constitution's text and history. CAC works to improve understanding of the Constitution and accordingly has an interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress has been creating multimember independent agencies for most of the nation's history—they have been part of the federal government as long as the light bulb.[2] Nearly a century of Supreme Court precedent affirms their constitutionality. Relying on that precedent, Congress has established dozens of multimember agencies with leaders removable for cause, including the Federal Labor Relations Authority (FLRA). President Trump's attempt to remove Member Susan Tsui Grundmann without cause conflicts with binding Supreme Court precedent and long-established practice, and it finds no support in the Constitution's text or history.

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[2] *Compare* An Act to Regulate Commerce, ch. 104, § 11, 24 Stat. 379, 383 (1887) (establishing Interstate Commerce Commission), *with* 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 the White House and the State, War, and Navy Building in 1891).

Nearly 100 years ago, the Supreme Court upheld statutory removal protections for multimember independent agencies in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Since then, the Court has repeatedly reaffirmed that holding. *See Seila Law LLC v. CFPB*, 591 U.S. 197, 205-06 (2020) (confirming legitimacy of "a traditional independent agency, run by a multimember board"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 509 (2010) (holding multimember board with one layer of for-cause tenure to be adequately "subject . . . to Presidential oversight"); *Morrison v. Olson*, 487 U.S. 654, 724 (1988); *Wiener v. United States*, 357 U.S. 349, 352 (1958). And just recently, the Court once again made clear that agencies wielding "considerable executive power" may fall within *Humphrey's Executor*'s "recognized exception" to uninhibited removal authority. *Trump v. Wilcox*, 145 S. Ct. 1415, 1415 (2025).

Based on a misreading of *Seila Law*, Defendants would relegate *Humphrey's Executor* to a historical curiosity with no real application—even though the decision underpins much of the federal government's structure. But *Seila Law* addressed "a new situation" involving the "almost wholly unprecedented" creation of an independent agency "wield[ing] significant executive power" while led "by a single individual." 591 U.S. at 238, 220, 204, 213. Without "revisit[ing] [its] prior decisions," the Court found "compelling reasons not to *extend* those precedents to

the novel context of an independent agency led by a single Director." *Id.* at 204 (emphasis added).

Ignoring *Seila Law*'s holding and nearly all of the Court's explanation for that holding, Defendants argue that any agency with "substantial executive power" falls outside of *Humphrey's Executor*. But if that were true, *Seila Law* would have had no reason to analyze at length the structural innovations of the Consumer Financial Protection Bureau (CFPB) and their implications for presidential authority. It would have sufficed to conclude that the CFPB wields significant executive power. The Court, however, held that the CFPB fell outside of *Humphrey's Executor* because it was "an independent agency that wields significant executive power *and is run by a single individual*." *Seila Law*, 591 U.S. at 204 (emphasis added).

Specifically, *Seila Law* identified three features of the CFPB that it said distinguished it from "a traditional independent agency, run by a multimember board." *Id.* at 205-06. But the FLRA has none of those features. To the contrary, it closely resembles the independent agencies Congress has been creating for 150 years. Its multimember leadership avoids concentrating power in one person, and its staggered terms allow every President to influence its composition. This is precisely the structure approved in *Humphrey's Executor*. And additional features of the FLRA's structure give the President even more power over its operations.

Even if Supreme Court precedent were less clear than it is, established practice has long settled the legitimacy of agencies like the FLRA. In separation-of-powers cases, the judiciary places "significant weight upon historical practice," *Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (citation omitted), including practice that "began after the founding era," because it embodies "the compromises and working arrangements that the elected branches of Government themselves have reached," *NLRB v. Noel Canning*, 573 U.S. 513, 525-26 (2014).

While the CFPB's structure "lack[ed] a foundation in historical practice," *Seila Law*, 591 U.S. at 204, multimember independent agencies have existed for the majority of U.S. history. Since 1887, Congress has created dozens of these agencies—each time with presidential approval. And these agencies have long wielded significant executive power, as that concept is now understood. This "longstanding practice" carries "great weight in cases concerning the allocation of power between [the] two elected branches." *Trump v. Mazars USA, LLP*, 591 U.S. 848, 862 (2020) (citation omitted).

Defendants argue otherwise but are wrong for two reasons. First, contra their claim, the Supreme Court *did* consider the Federal Trade Commission's broad enforcement powers in *Humphrey's Executor*—the powers that today would be "considered 'executive,' at least to some degree." *Morrison*, 487 U.S. at 689 n.28. The Court expressly assessed the constitutional implications of the FTC's power to

bring charges of unfair methods of competition, issue cease-and-desist orders, and enforce those orders in court. Moreover, the Court stated that its holding would preserve not only the FTC's removal protections but also those of the Interstate Commerce Commission, which had immense rulemaking and enforcement power.

Second, whatever today's lawyers think of *Humphrey's Executor*'s precedential scope, its practical effect over the next century was to ensconce multimember independent agencies as part of the "working arrangements that the elected branches of Government themselves have reached." *Noel Canning*, 573 U.S. at 526. These agencies have become one of the "traditional ways of conducting government" that "give meaning" to the Constitution. *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

Multimember independent agencies are also consistent with the Constitution's original meaning. The Constitution "is silent with respect to the power of removal," *In re Hennen*, 38 U.S. 230, 258 (1839), and there was no agreement at the Founding that presidents had inherent or exclusive removal authority. Indeed, the topic was "much disputed . . . in the early history of this government." *Id.* at 259. Removal authority developed through a "practical construction" of the President's executive power, *id.*, and from "acquiescense and long practice," *Myers v. United States*, 272 U.S. 52, 152 (1926). In other words,

the President's removal power, just like the later qualification of that power with respect to multimember regulators, reflects a "practice of the government" that settled what was originally "a doubtful question." *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819).

Crucially, what became established in the antebellum period was only that presidents have inherent removal authority "independently of congressional provision, and without the consent of the Senate." *Myers*, 272 U.S. at 115. Congress's power to condition removal on good cause was not considered until later, when the complexity of industrial life fostered a need for regulatory bodies with institutional expertise and continuity. And over the past 150 years, the "traditional independent agency headed by a multimember board," *Seila Law*, 591 U.S. at 207, has become a staple of governance.

In *Seila Law*, as in *Free Enterprise Fund*, the Supreme Court confronted a "new situation," *Free Enter. Fund*, 561 U.S. at 483, and prohibited removal restrictions with "no foothold in history or tradition," *Seila Law*, 591 U.S. at 222. It did not license courts to strike down an established structure it has consistently upheld. Instead, courts must abide by *Humphrey's Executor*, "the case that directly controls." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quotation marks omitted).

ARGUMENT

I. Binding Precedent Affirms the Legitimacy of Multimember Independent Agencies Like the FLRA.

A. *Seila Law* Addressed Only the Innovation of Single-Director Leadership for Independent Agencies.

Seila Law made its limited scope clear: "We hold that the CFPB's leadership *by a single individual* removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 591 U.S. at 213 (emphasis added). Instead of utilizing "a board with multiple members," Congress "deviated from the structure of nearly every other independent administrative agency in our history," and "this arrangement" violated the separation of powers. *Id.* at 203.

Contrary to Defendants' arguments, therefore, *Seila Law* extends no further than "an independent agency *led by a single Director* and vested with significant executive power." *Id.* at 220 (emphasis added). As the Court explained, *Humphrey's Executor* permits Congress to "create expert agencies led by a *group* of principal officers removable by the President only for good cause." *Id.* at 204 (emphasis in original). But the Court was "asked to extend these precedents to a new configuration: an independent agency that wields significant executive power *and is run by a single individual*." *Id.* (emphasis added).

While refusing that invitation, the Court clarified that "we need not and do not revisit our prior decisions." *Id.* Rather, the Court declined "to extend those

precedents to the 'new situation' before [it]," *id.* at 220 (quoting *Free Enter. Fund*, 561 U.S. at 483), which introduced a "novel impediment" to presidential authority, *id.* at 215. Thus, *Seila Law* addressed only the new phenomenon of removal protections for "principal officers who, *acting alone*, wield significant executive power." *Id.* at 238 (emphasis added).

Going further, Defendants even suggest that any exercise of executive power makes for-cause tenure invalid. Appellants Br. 22. But that flatly contradicts the Court's recent affirmation that "exceptions recognized by our precedents" permit for-cause tenure for officers who exercise "executive power . . . on [the President's] behalf." *Wilcox*, 145 S. Ct. at 1415.

B. *Seila Law* Rested on Three Features of Single-Director Leadership that Do Not Characterize the FLRA.

Seila Law discussed three aspects of single-director agency leadership that in the Court's view made removal limits untenable: it was a historical anomaly; it introduced new barriers to presidential oversight; and it concentrated power in one person. None of this applies to the FLRA.

1. Historical Anomaly

"The CFPB's single-Director structure [was] an innovation with no foothold in history or tradition" that was "almost wholly unprecedented." *Seila Law*, 591 U.S. at 220-22. In "only a handful of isolated incidents" had Congress "provided

good-cause tenure to principal officers who wield power alone." *Id.* at 220 (quotation marks omitted).

The Court has been skeptical about "novel governmental structures," *id.* at 231, in many contexts. *E.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 549 (2012) ("sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent" (quotation marks omitted)). But multimember independent agencies are not novel. Their leaders have enjoyed removal protection since the 1880s. *See* Act to Regulate Commerce, § 11, 24 Stat. at 383 (hereinafter "ICC Act"). The FLRA bears the hallmarks of these traditional agencies. *Compare id.* (ICC has five Commissioners, balanced along partisan lines, serving six-year terms, removable for cause), *with* 5 U.S.C. § 7104 (FLRA has three Members, balanced along partisan lines, serving five-year terms, removable for cause).

Congress made a considered decision to hew to this tradition when it created the FLRA, opting to "guarantee[]" the new agency's "[i]mpartiality" by "protecting authority members from unwarranted 'Saturday night' removals." 124 Cong. Rec. 25721-22 (1978) (statement of Rep. Ford). The FLRA's structure emerged from months of deliberation involving both legislative chambers and the Carter administration. During this period, the White House itself came to favor "removal for cause only." *Id.* at 25722. Later, the Senate adopted a for-cause

removal provision that originated in the House, while ensuring that the agency's General Counsel—appointed by the President—would be removable at will by him as well. H.R. Rep. No. 96-1717, at 152 (1978) (Conf. Rep.).

Notably, therefore, Congress divided the FLRA's leadership between the three-member Authority and the agency's separate prosecutorial office, headed by a General Counsel who is removable "at any time by the President." 5 U.S.C. § 7104(f)(1). This division of power substantially mimics the structure of the National Labor Relations Board, as amended by Congress nearly 80 years ago. *See* Labor Management Relations Act, Pub. L. No. 80-101, § 101, 61 Stat. 136, 139 (1947). And the assignment of enforcement power to a removable-at-will official allows presidents to exert even more influence over the FLRA's priorities.

2. Greater Encroachment on Presidential Oversight

Seila Law also concluded that removal protections for solo agency heads are a unique "impediment to the President's oversight of the Executive Branch," because they "foreclose[] certain indirect methods of Presidential control." 591 U.S. at 215, 225. Given the CFPB Director's five-year term, some presidents might "*never*" be able to appoint a Director and could not remove one holding diametrically opposed views. *Id.* Nor would presidents "have the opportunity to appoint any other leaders [of the agency] . . . who c[ould] serve as a check on the Director's authority." *Id.*

In contrast, FLRA Members serve staggered terms, ensuring regular vacancies. 5 U.S.C. § 7104(c). The President designates the Chairperson, who is the agency's "chief executive and administrative officer." *Id.* § 7104(b). And, as noted, the President both appoints and may remove at will the General Counsel, who is responsible for investigating and prosecuting unfair labor practices. *Id.* § 7104(f). Every President therefore has an opportunity to shape the agency's leadership and agenda.

3. Concentration of Power in a Single Person

The third consideration behind *Seila Law* was the CFPB's consolidation of power in "a unilateral actor insulated from Presidential control" with "no colleagues to persuade." 591 U.S. at 204, 225. According to the Court, this configuration has "no place in our constitutional structure," which, except for the presidency, "scrupulously avoids concentrating power in the hands of any single individual." *Id.* at 222-23.

In contrast, the FLRA's "multimember body of experts," *id.* at 216, fosters the deliberation and compromise that ensures it "administer[s] the Federal labor-management program" in a manner that is both "independent" and "neutral." 124 Cong. Rec. 25721 (1978).

II. Established Practice Confirms the Validity of Multimember Independent Agencies.

A. Multimember Independent Agencies Are Firmly Established as a Traditional Feature of Government.

The flip side of the Supreme Court's suspicion of novel government structures is that "'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta*, 488 U.S. at 401 (quoting *Youngstown*, 343 U.S. at 610 (Frankfurter, J., concurring)). The Court thus "put[s] significant weight upon historical practice" in separation-of-powers cases. *Zivotofsky*, 576 U.S. at 23 (citation omitted). "[W]here there is ambiguity or doubt" about constitutional meaning, "subsequent practical construction is entitled to the greatest weight." *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). Judges "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached . . . . even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Noel Canning*, 573 U.S. at 526, 525; *see id.* at 528-29 (relying on history of intra-session recess appointments that began after the Civil War).

Congress began establishing multimember expert agencies with leaders removable for cause nearly 150 years ago. *See* ICC Act, § 11, 24 Stat. at 383; *see also* Act of Mar. 2, 1889, ch. 382, §§ 7-8, 25 Stat. 855, 861-62. The ICC had investigative and enforcement authority over the monumentally important railroad

industry, including the power to issue cease-and-desist orders, require payment of reparations, and enforce its orders in court. *See* ICC Act, §§ 12-16, 20, 24 Stat. at 382-85, 386-87; *cf.* Appellants Br. 16 (objecting to similar FLRA powers).

Congress later empowered the ICC to issue regulations setting railroad rates and prescribing "fair" and "reasonable" practices, *see* Act of June 29, 1906, ch. 3591, § 4, 34 Stat. 584, 589, cementing 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). Thereafter, Congress established "a multitude of new agencies . . . using the ICC as their prototype," including the Federal Reserve Board (1913), Federal Trade Commission (1914), Federal Radio Commission (1927), Federal Power Commission (1930), Securities and Exchange Commission (1934), Federal Communications Commission (1934), National Labor Relations Board (1935), Bituminous Coal Commission (1935), and Federal Maritime Commission (1936). *Id.* at 1116.

This long pedigree of multimember independent agencies is all but dispositive of their legitimacy. Since 1887, countless presidents and Congresses have participated in establishing them, funding them, and nominating and confirming their leaders. "A legislative practice . . . marked by the movement of a steady stream for a century and a half of time" indicates "the presence of

unassailable ground for the constitutionality of the practice." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327-28 (1936).

B. Multimember Independent Agencies Have Long Exercised Significant Executive Power.

For all this time, independent agencies have wielded executive power, as that concept is now understood. While the Court initially described some of their powers as "quasi-legislative or quasi-judicial," *Seila Law*, 591 U.S. at 216 (quotation marks omitted), it has more recently characterized enforcement, rulemaking, and adjudications as "exercises of . . . the 'executive Power,'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013). Regardless of the label used in 1935, however, the FTC exercised executive power from its inception that is comparable to that of independent agencies like the FLRA today.

Defendants argue that this long-established exercise of executive power by independent agencies should be ignored because it supposedly was "not alluded to by the Court" in *Humphrey's Executor*. Appellants Br. 15 (quoting *Seila Law*, 591 U.S. at 219 n.4). But that argument has two major flaws.

First, the *Humphrey's Executor* Court *did* consider the FTC's broad enforcement powers. It described how the FTC could charge private parties with "using unfair methods of competition in commerce," adjudicate those charges in hearings, issue cease-and-desist orders, and go to court to enforce those orders. *See Humphrey's Ex'r*, 295 U.S. at 620-21 (quoting An Act to Create a Federal

Trade Commission, ch. 311, § 5, 38 Stat. 717, 719-20 (1914)). Referencing those powers, the Court concluded that "[i]n administering the provisions of the statute in respect of 'unfair methods of competition,' that is to say, in filling in and administering the details embodied by that general standard, the commission acts in part quasi legislatively and in part quasi judicially." *Id.* at 628.

The Court thus fully considered the FTC's powers that today would be considered "executive." And the Court was aware of how its decision would affect agencies with similar powers, including agencies with formidable rulemaking authority. Indeed, the Court explicitly stated that its holding would preserve not only the FTC's removal protections but also those shielding the leaders of "the Interstate Commerce Commission," holding that "illimitable power of removal is not possessed by the President in respect of officers *of the character of those just named*." *Id.* at 629 (emphasis added).

"At its core," therefore, "the *Humphrey's Executor* case raised the question whether Article II permitted independent agencies," and it "upheld the[ir] constitutionality." *PHH Corp. v. CFPB*, 881 F.3d 75, 169-70 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

There is a second problem with Defendants' effort to downplay the FTC's 1935 powers. Regardless of what today's lawyers think of *Humphrey's Executor*'s precedential scope, its practical effect over the next 90 years was to ensconce

multimember independent agencies as an indelible feature of the federal government—an essential part of the "working arrangements that the elected branches of Government themselves have reached." *Noel Canning*, 573 U.S. at 526. Less than two months after the decision, Congress established the FLRA's private-sector analog, the National Labor Relations Board, on a similar model. *See* National Labor Relations Act, ch. 372, 49 Stat. 449 (1935). And ever since then, "independent agencies have played a significant role in the U.S. Government," with "extraordinary authority over vast swaths of American economic and social life." *PHH Corp.*, 881 F.3d at 170 (Kavanaugh, J., dissenting); *see id.* at 173 (listing 25 multimember independent agencies that have "exercise[ed] substantial executive authority").

By the 1980s, it had been accepted for half a century that "the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies." *Morrison*, 487 U.S. at 687 (quoting *Humphrey's Ex'r*, 295 U.S. at 630). The Court's new acknowledgment that independent agencies wield "executive" power did not change that result. *Id.* at 689 n.28. Instead, "removal restrictions have been generally regarded as lawful for so-called 'independent regulatory agencies.'" *Id.* at 724-25 (Scalia, J., dissenting).

Two decades later, the Court again confirmed the validity of removal protections for multimember bodies. Article II was satisfied when the members of

the Public Company Accounting Oversight Board were shielded from removal by "a single level of good-cause tenure." *Free Enter. Fund*, 561 U.S. at 509. And *Seila Law* explained that Congress could cure the CFPB's constitutional defect by "converting [it] into a multimember agency." 591 U.S. at 237 (Roberts, C.J.).

Thus, for nearly a century, an unbroken line of decisions has approved a governmental structure pioneered another half-century earlier. This "practical exposition" of the Constitution is, by now, "too strong and obstinate to be shaken." *Stuart v. Laird*, 5 U.S. 299, 309 (1803).

III. Constitutional Text and History Further Underscore the Legitimacy of Multimember Independent Agencies.

In addition to precedent and established practice, the Constitution's text and history support multimember independent agencies. Presidential removal authority reflects the development of established practice rather than original public meaning at the Founding, and there has never been an established practice of *illimitable* presidential removal power. Indeed, the President's removal authority exemplifies the principle that "differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter [the Constitution]," for which "a regular course of practice" will "liquidate & settle the meaning." *Noel Canning*, 573 U.S. at 525 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819)). Presidential removal authority arose from this process of constitutional liquidation just as the later qualification of that authority for expert regulatory

bodies did. Both doctrines reflect a "practical construction" of the Constitution that settled an original "ambiguity." *McPherson*, 146 U.S. at 27.

A. Removal Authority Was Uncertain at the Founding.

Apart from Congress's power to impeach, the Constitution "is silent with respect to the power of removal." *Hennen*, 38 U.S. at 258. While it gives presidents "the executive Power" and a duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 1, cl. 1; *id.* § 3, it gives Congress the power to establish "Officers" and "Departments" "by Law," *id.* § 2, cl. 2, and to enact laws necessary and proper for "carrying into Execution" both its own powers and those of the President: "all" powers vested "in the Government of the United States," *id.* art. I, § 8, cl. 18.

Removal authority "was not discussed in the Constitutional Convention." *Myers*, 272 U.S. at 109-10. But the Framers declined to adopt a portion of the Virginia Plan that would have named specific department heads in the Constitution to serve "during pleasure." 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911). Instead, the Framers empowered Congress to structure the government's departments and offices, a power that the delegates understood to fall within the Necessary and Proper Clause. *Id.* at 345.

Just as important as the deliberations in Philadelphia is what the ratifying public understood about the Constitution. *See N.Y. State Rifle & Pistol Ass'n, Inc.*

v. Bruen, 597 U.S. 1, 28 (2022) (the Constitution's "meaning is fixed according to the understandings of those who ratified it"). Anyone who heeded the *Federalist Papers* would have read that "[t]he tenure of the ministerial offices generally will be a subject of legal regulation," *The Federalist No. 39*, at 242 (Clinton Rossiter ed., 1961) (Madison), and that "[t]he consent of that body [the Senate] would be necessary to displace as well as to appoint," *The 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.* 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, which might prove fatal to the personal independence, and freedom of opinion of public officers, as well as to the public liberties of the country." 3 Joseph Story, *Commentaries on the Constitution of the United States* 390 (1833).

Although Madison and (arguably) Hamilton later expressed different views, that only underscores that presidential removal authority was a post-ratification development resting on practical construction, not on original public meaning. *See* 1 James Kent, *Commentaries on American Law* 288 (1826) (explaining that Senate involvement in removals "was the construction given to the constitution while it was pending for ratification"); Story, *supra*, at 393 (noting that exclusive

presidential removal authority "never appears to have been avowed by any of its friends" before ratification).

The ratifying public, moreover, had no reason to assume that "executive power" necessarily included removal authority. Removal was not "an inherent attribute of the 'executive power' as it was understood in England," where Parliament "exercised significant control over the tenure of officers appointed to execute the laws, including officers appointed by the King." Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 182, 220 (2021). Although *Myers* asserts "that the king's powers in fact included the power to remove executive officials," it "contains nothing to support that point," or even to show "that the phrase 'the executive Power' referred to the king's powers." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 860 (1989).

Nor was removal authority an inherent attribute of executive power in America. For "in state and colonial governments at the time of the Constitutional Convention, power to make . . . removals had sometimes been lodged in the Legislatures or in the courts." *Myers*, 272 U.S. at 118; *see* 1 Annals of Cong. 534 (1789) (Rep. White) ("Each State has an Executive Magistrate; but look at his powers, and I believe it will not be found that he has in any one, of necessity, the right of . . . removing officers."); *id.* at 392 (Rep. Smith) (noting that in many

states "the chief Executive Magistrate appoints to office, but cannot remove"). Although *Myers* asserts that these arrangements "really" represented a "vesting [of] part of the executive power in another branch of the government," 272 U.S. at 118, it cites nothing to show that this was the contemporary understanding.

B. The President's Removal Authority Arose from Established Practice, Not Original Public Meaning.

Because of the Constitution's indeterminacy, removal authority generated "a great diversity of opinion . . . in the early history of this government." *Hennen*, 38 U.S. at 259. Debate arose in the first Congress about whether to specify that the Secretary of Foreign Affairs would be "removable by the President." 1 Annals of Cong. 385 (1789). That language raised the question of whether the Constitution gave the President inherent removal authority, without the need for congressional authorization. Some representatives answered yes, but others disagreed, citing *The Federalist* and arguing that removals required "the advice and consent of the Senate." *Id.* at 396 (Rep. Gerry). Still others, originally including Madison, *id.* at 389, believed that because of the Constitution's silence, Congress could assign removal power wherever it wanted. *Id.* at 392 (Rep. Lawrence). After lengthy debate, no view carried a majority. David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 195-201 (1995); *see* Edward S. Corwin, *Tenure of Office and the*

Removal Power Under the Constitution, 27 Colum. L. Rev. 353, 361 (1927) (the three camps remained "fairly equal").

Given these divided views, the "decision of 1789" resulted from parliamentary maneuvering, not a consensus on presidential authority. Representative Egbert Benson moved to amend the bill "so as to imply the power of removal to be in the President," without specifying whether the source of this power was statutory or constitutional. 1 Annals of Cong. 600-01 (1789); *see id.* (providing for circumstances when the Secretary "shall be removed from office by the President"). He hoped this "would succeed in reconciling both sides," *id.*, and Madison agreed that the new language created "an implication that the Legislature has the power of granting the power of removal," *id.* at 604. All who favored presidential removal voted for this proposal, "whether they thought that Article II settled the question or left the matter to Congress." Currie, *supra*, at 201. When Benson then proposed deleting the original language that sparked the debate, a "different majority" approved that motion, which "prevailed only because [it was] joined by a substantial number of members who had opposed presidential removal altogether." *Id.*; *see* 1 Annals of Cong. 600-08 (1789). In the Senate, the bill deadlocked on the question of presidential removal, requiring a vice-presidential tiebreaker. *Myers*, 272 U.S. at 115.

By obliquely signaling that presidents could remove the Secretary, without specifying whether this power was statutory or constitutional, the decision of 1789 "left presidential removal to shadowy implication." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1052 (2006).

Over time, however, this episode came to be viewed as a "practical construction" of the Constitution whereby removal vested inherently and exclusively in the President. *Hennen*, 38 U.S. at 259. The shift was not immediate. A similar fight broke out over the Treasury Secretary, whose statutory responsibilities "made him in part an agent of Congress." Currie, *supra*, at 202. Only after an impasse between House and Senate did the Senate yield to the same removal language, again by a tiebreaking vote. *See* James Hart, *The American Presidency in Action: 1789*, at 217 (1948). Notwithstanding the decision of 1789, Madison maintained that "a modification might take place" for officers whose duties had "a judiciary quality as well as executive," who perhaps "should not hold [their] office at the pleasure of the executive," although Madison himself favored giving removal authority to the president. 1 Annals of Cong. 638, 636 (1789).

During the next few decades, presidents increasingly removed officers without explicit statutory authority to do so. *Myers*, 272 U.S. at 150. By the 1820s, therefore, James Kent wrote that despite Founding-era disagreement about presidential removal, 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.

Joseph Story also attributed the entrenchment of presidential removal to "general acquiescence and silence." Story, *supra*, at 395. Expressing strong doubts about the decision of 1789's correctness, he continued: "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.* "If there has been any aberration from the true constitutional exposition of the power of removal," therefore, "it will 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 that "the decision of 1789 . . . was erroneous," before conceding that it "has been *established by practice*, and recognized by subsequent laws, as the settled construction of the Constitution." Speech on the Appointing and Removing Power (Feb. 16, 1835), *in* 4 *Works of Daniel Webster* 179, 198 (1851) (emphasis added).

As late as the 1850s, individual Justices took the position that exclusive presidential removal authority went against "the true construction of the constitution," but nonetheless acknowledged that "this power of removal 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).

In short, the existence of presidential removal authority was "a subject much disputed" at the Founding, *Hennen*, 38 U.S. at 259, and was ultimately "settled," *id.*, only through "acquiescense and long practice," *Myers*, 272 U.S. at 152.

C. Multimember Independent Agencies Do Not Conflict with the President's Established Removal Authority.

During the period when presidential removal authority was established, the question of whether Congress may limit the President's *reasons* for removal was never tested. Congress found no reason to do so, until industrialization generated a need for oversight bodies that could accumulate collective expertise "informed by experience." *Ill. Cent. R.R. Co. v. ICC*, 206 U.S. 441, 454 (1907). Nothing in the settled practice that followed the decision of 1789 conflicted with this later development. Instead, early practice established only that presidents have constitutional removal authority "independently of congressional provision, and without the consent of the Senate." *Myers*, 272 U.S. at 115; Kent, *supra*, at 288.

"[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. Instead, "the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power." *Hennen*, 38 U.S. at 259. This was the "real

point which was considered and decided." *Myers*, 272 U.S. at 119. During the whole debate, only three representatives ever suggested "that the constitutional power of removal is *illimitable*." Hart, *supra*, at 206. 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.

Accordingly, Story later wrote that it remained "speculative" whether Congress could create offices with tenure "not subject to the exercise of this power of removal," Story, *supra*, at 389-90, and Kent described the decision of 1789 as covering officers "whose term of duration is not specially declared," Kent, *supra*, at 289. When Congress gave officers fixed terms, it always 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, 88. That choice "implies that where the term of an officer was fixed by Congress the power of removal must be provided for specifically or did not exist." Corwin, *supra*, at 377. While Story suggested that blocking removals entirely would conflict with the decision of 1789, neither he nor other authorities addressed the more modest possibility of limiting removals to specific causes.

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), required presidents to communicate "reasons" for removals, Act of June 3, 1864, ch. 106, § 1, 13 Stat. 99, 100 (Comptroller of the Currency), called for court-martials, Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92 (military officers), and allowed removal only for specific causes, ICC Act, § 11, 24 Stat. at 383. In response to conflicts with President Andrew Johnson, Congress also required Senate consent to remove department heads. Act of Mar. 2, 1867, ch. 154, § 1, 14 Stat. 430, 430. After presidents of all stripes objected to this requirement, *see Myers*, 272 U.S. at 168, Congress repealed it in 1887—within a month of creating the ICC and its good-cause removal limit. *See* Act of Mar. 3, 1887, ch. 353, 24 Stat. 500.

Thus, while requiring Senate consent for removals was criticized as infringing on established presidential authority, other limits on removal were not. Just a year before the ICC's creation, the Supreme Court acknowledged it was an open question "[w]hether or not congress can restrict the power of removal . . . of those officers who are appointed by the president by and with the advice and consent of the senate." *United States v. Perkins*, 116 U.S. 483, 484 (1886). And a decade later, it remained unresolved whether presidents could "remove officials during the term for which they were appointed, and notwithstanding the existence

of a statute prohibiting such removal." *Parsons v. United States*, 167 U.S. 324, 334 (1897).

When *Myers* finally gave judicial imprimatur to the decision of 1789, it confirmed that presidents have inherent removal authority that may not be subjected to Senate approval. That restriction would make it "impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." 272 U.S. at 164; *accord* 1 Annals of Cong. 516 (1789) (Rep. Madison) ("I do not see how the President can take care that the laws be faithfully executed" if an executive officer's removal depends on "a distinct body.").

Certain "expressions" in *Myers*'s dicta have broader implications than this, but "the narrow point actually decided was only that the President had power to remove a postmaster of the first class, without the advice and consent of the Senate." *Humphrey's Ex'r*, 295 U.S. at 626. Any broader comments were "beyond the point involved and, therefore, do not come within the rule of stare decisis." *Id.*

Thus, when the Supreme Court addressed the question of good-cause tenure for expert regulatory bodies—a phenomenon by then already 50 years old—it correctly held that such tenure did not conflict with *Myers*, the sources on which *Myers* relied, or the decision of 1789. *Id.* at 630. That holding has prevailed ever

since. *See Free Enter. Fund*, 561 U.S. at 509 (curing constitutional defect by subjecting multimember body to "a single level of good-cause tenure"); *Seila Law*, 591 U.S. at 237 (Roberts, C.J.) (inviting Congress to preserve removal limits by "converting the CFPB into a multimember agency").

In sum, nothing in the Constitution's original meaning undermines the removal conditions that President Trump unlawfully disregarded in this case. Like presidential removal authority itself, those conditions reflect a long-established "practice of the government" that settled what was once "a doubtful question." *McCulloch*, 17 U.S. at 401. A limitless removal power, by contrast, "would transform the established practice of the political branches." *Mazars*, 591 U.S. at 867 (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,445 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 10th day of October, 2025.

/s/ Brianne J. Gorod
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 2025, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: October 10, 2025

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