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 *AMICUS CURIAE* THE CLAREMONT INSTITUTE'S CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

JOHN C. EASTMAN
Counsel of Record
ALEXANDER HABERBUSH
Constitutional Counsel Group
444 W. Ocean Blvd., Suite 1403
Long Beach, CA 90802
(562) 435-9062
jeastman@ccg1776.com

Counsel for Amicus Curiae The Claremont Institute's Center for Constitutional Jurisprudence

QUESTIONS PRESENTED

1. Whether *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), should be overruled.

2. Whether the FTC, as currently authorized, is unconstitutional because it exercises legislative powers in violation of the non-delegation doctrine rooted in Article I, judicial powers in violation of separation of powers principles and contrary to Article III, and executive powers without the supervising authority of the President in violation of Article II.

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence is the public interest law arm of the Claremont Institute, whose stated mission is to restore the principles of the American founding to their rightful and preeminent authority in our national life. This includes the principle at issue in this case that "The executive Power shall be vested in a President of the United States." U.S. Const. Art. II, § 1. The Center has previously participated on behalf of a party or as *amicus curiae* in a number of cases before this Court addressing similar separation of powers issues, including *Seila Law LLC v. Consumer Fin. Prot. Bureau,* 591 U.S. 197 (2020); *Gundy v. United States*, 588 U.S. 128 (2019); *Berninger v. F.C.C.*, 586 U.S. 994 (2018) (Mem); *U.S. Dep't of Trans. v. Ass'n of American Railroads*; 575 U.S. 43 (2015); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92 (2015); *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014); *Peri & Sons Farms v. Rivera*, 573 U.S. 916 (2014); and *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012).

SUMMARY OF ARGUMENT

The Federal Trade Commission is an "independent" executive agency which exercises significant executive power, yet its Commissioners are, by statute, removable by the President only for cause. 15 U.S.C. § 41. Although a for-cause removal provision is particularly problematic in the context of a single-headed

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae, its members, or its counsel made a monetary contribution to fund the preparation and submission of this brief.

agency such as the Consumer Financial Protection Board, *see Seila Law*, for-cause removal provisions in multi-member agencies exercising executive powers are also constitutionally untenable. In both cases, the agencies exercise executive power without being directly answerable to the President, in violation of the Constitution's mandate that "*the* executive Power shall be vested in a President of the United States." U.S. Const. Art. II, § 1 (emphasis added).

Humphrey's Executor, decided at the height of an era in which this Court's solicitude for separation of powers and other structural provisions of the Constitution was at its nadir, can be distinguished because the decision rested in part on the Court's description of the FTC's functions that existed at the time as quasi-legislative and quasi-judicial—functions that have now been greatly expanded to include clearly executive powers.

But the case was wrongly decided even on the line it drew between quasi-legislative and quasi-judicial powers, on the one hand, and executive powers, on the other, because even as it existed in 1935, the FTC exercised significant functions that can only be described as executive in nature.

Moreover, even assuming that the FTC at the time only exercised quasi-legislative and quasi-judicial functions, the *Humphrey's Executor* decision would still be a constitutional aberration that should be overruled. An agency exercising legislative authority that is itself not subject to control by Congress runs afoul of the non-delegation doctrine. And an administrative agency also exercising judicial authority runs afoul of separation of powers principles. This Court

should therefore overrule *Humphrey's Executor* on these separation of powers grounds as well.

ARGUMENT

I. The Constitution's Assignment of "The Executive Power" to the President Prohibits the Federal Trade Commission Act's Restriction on the President's Removal Authority.

Article II grants the President of the United States "*the* Executive power." U.S. Const. Art. II, § 1 (emphasis added). As Justice Scalia noted in his persuasive (and historically vindicated) dissent in *Morrison v. Olson*, "this does not mean some of the executive power, but all of the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Article II also imposes on the President the duty to "take Care that the Laws be faithfully executed." U.S. Const. Art. II, § 3.

Because a President obviously cannot carry out the entire business of the executive branch himself, he must be able "select those who [are] to act for him under his direction in the execution of the laws" if he is to be able to exercise his constitutional authority and fulfill his constitutional duty. *Myers v. United States*, 272 U.S. 52, 117 (1926). As James Madison noted in the First Congress, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). Just as important as the appointment of officers who will aid in his execution of the law, therefore, is the ability of the President to remove agents who are no longer acting in accord with his views.

Although the President's removal power is not *expressly* stated in the Constitution, it is clearly implied, as a President cannot "faithfully execute the laws" if his appointees or, as will often be the case with the statute at issue here, the appointees of a previous President, become defiant and insubordinate. The Framers therefore intended the President to have removal power because that power is necessary to "to keep officers accountable." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). This removal authority allows the President to hold his subordinates accountable. Denying the President this oversight authority would create the potential that a "subordinate could ignore the President's supervision and direction without fear, and the President could do nothing about it." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 168 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

Congress's attempt to limit the President's removal authority of members of the FTC is contrary to this basic constitutional command, undermining the President's ability to "take care that the Laws be faithfully executed." U.S. Const. Art. II, § 3. Members of the FTC are insulated from presidential control in a couple of significant ways. First, FTC Commissioners have staggered seven-year terms, and they may even continue to serve beyond that "until a successor has been appointed and qualified," allowing service by some who were never appointed by the sitting President and the tenure of all to extend well beyond the four-year term of the President who appointed him. 15 U.S.C. § 41. Second, Commissioners may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." *Id.* These limi-

tations on the President's ability to remove FTC Commissioners produce an agency that exercises a significant amount of the President's executive power without the accountability that the vesting of "*the* executive Power" in the nationally elected President was intended to create.

The Court has reaffirmed that for-cause removal protection for the single head of an agency exercising substantial executive power violates Article II. *Collins v. Yellen*, 594 U.S. 220, 249-51 (2021); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020). In *Collins*, the Court applied *Seila Law* to the FHFA and held that insulating its single Director from at-will removal unconstitutionally strips the President of the control Article II requires. *Collins*, 141 S. Ct. at 1783–86. That conclusion applies *a fortiori* to an agency like the FTC, which executes the laws through investigations, administrative adjudications culminating in binding cease-and-desist orders, and enforcement actions in Article III courts. See 15 U.S.C. §§ 45(b)–(c), 45(l)–(m), 57a.

Collins further makes clear that a removal defect is not harmless by default; relief turns on whether the unconstitutional restriction caused harm, and the Court remanded for that determination. Id. at 1787–89.That circumvention of presidential authority is exacerbated by the fact that the FTC can issue regulations defining "unfair or deceptive actions" in commerce that have the force of law for any person under its very broad jurisdiction, 15 U.S.C. § 57a; investigate potential violations of those regulations, 15 U.S.C. § 46(a); issue an order to show cause at a hearing before the Commission itself (and not a court) against any "person, partnership, or corporation" it has "reason to

believe" has used "any unfair method of competition or unfair or deceptive act or practice" in violation of those regulations, 15 U.S.C. § 45(b); and issue its own cease and desist orders if it "shall be of the opinion that the method of competition or the act or practice in question is prohibited" by the statute (as interpreted via its own regulations) without seeking enforcement from a court (although the entities subject to such orders may file a petition for review by a U.S. Court of Appeals), 15 U.S.C. §§45(b), (c). Violations of such cease and desist orders trigger substantial civil penalties, which can be enforced by a civil action initiated either by the Attorney General or the FTC itself. 15 U.S.C. §§ 45(l), (m).

The actions undertaken by such statutory authority are clearly executive in nature, and cannot be sustained under this Court's prior decision in *Myers*.

II. *Humphrey's Executor* Is Distinguishable, But Also Wrongly Decided And Should Be Overruled.

This Court previously upheld the for-cause removal restriction on the President's authority with respect to FTC Commissioners in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), of course—the decision that is widely recognized as paving the way for the administrative state. *See*, *e.g.*, Daniel A. Crane, "Debunking Humphrey's Executor," 83 Geo. Wash. L. Rev. 1835, 1835 (2016). Distinguishing the holding in *Myers*, which had less than a decade earlier upheld the President's authority to remove executive officers, this Court focused on what it called the "quasi-legislative" and "quasi-judicial" powers exercised by the FTC rather than executive powers. *Humphrey's Executor*, 295 U.S. at 624, 628. It was therefore permissible, the

Court held, for Congress to create an agency whose independence from the President (via fixed terms and a for-cause removal provision) would allow it to utilize its expertise in a "nonpartisan" manner. *Id.* at 624, 632. "[T]he *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers," the Court held, because "[w]hether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office." *Id.* at 631-32.

Whether any of the powers exercised by the FTC in 1935 are properly described as "executive" (and, as described below, they are), there is no doubt that the additional powers that have subsequently been delegated to the FTC are executive in nature. As correctly noted in the Government's opening brief, the FTC now exercises extensive core executive powers, including the filing of enforcement actions seeking monetary penalties and injunctions. *See* 15 U.S.C. §§ 45(m)(1)(A), 53(b), and 57b. So even if the quasi-legislative/quasi-judicial rule from *Humphrey's Executor* remains good law, the FTC as currently constituted no longer fits that model. *Humphrey's Executor* is therefore distinguishable on its own terms.[2]

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[2] To be sure, *Morrison v. Olson*, 487 U.S. 654 (1988), eviscerated the line drawn by the *Humphrey's Executor* court between quasi-legislative and quasi-judicial functions, on the one hand, and executive functions, on the other. But that case ostensibly involved, as the Court held, an "inferior" officer, not principle officers such are at issue here. Moreover, the majority opinion in the case has not withstood the test of time. As one prominent scholar noted, "In anything but the most nominal sense, *Morrison* is probably no longer good law. Indeed, the best understanding is that it has

Recent decisions also reject agency claims to sweeping, implied remedial powers untethered to clear congressional commands. *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341, 1347–50 (2021). *AMG Capital* held that § 13(b) does not authorize retrospective monetary relief, underscoring that the FTC's self-conception as a roving lawgiver-prosecutor-adjudicator had outstripped its statutory footing. *Id.* at 1349–50. That narrowing refutes the premise of *Humphrey's Executor* that the FTC's powers are merely "quasi-" anything; as constituted and used today, those powers are legislative, executive, and judicial in the fullest sense.

But more fundamentally, the powers *originally* assigned to the FTC also included executive power, namely, the ability to enforce the prohibition on unfair trade practices by the issuance of cease and desist orders that the FTC could enforce in court. That is an executive function, not a legislative or judicial function, but the Court simply sidestepped that fact. That the President could remove FTC Commissioners only for cause despite their exercise of some executive power should alone, under *Myers*, have been treated as a violation of Article II's assignment of "*the* Executive Power" to the President.

But there are other constitutional problems with the Court's ruling as well. *Humphrey's Executor* has been undermined by more recent decisions of this Court. Its reliance on the "quasi-legislative" functions

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long since become anticanonical." Adrian Vermeule, "*Morrison v. Olson* Is Bad Law," Lawfare (June 9, 2017), available at https://www.lawfareblog.com/morrison-v-olson-bad-law.

assigned to the Federal Trade Commission is incompatible with a majority of this Court's renewed focus on the non-delegation doctrine, which requires that the core decisions of legislating be made by the Congress, not by unaccountable agencies to which Congress purports to delegate its lawmaking authority. *See Gundy v. United States*, 588 U.S. 128, 135 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting) ("Congress may not 'delegate ... powers which are strictly and exclusively legislative'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825))); *Gundy*, 588 U.S. at 148-49 (Alito, J., conc. in judgment) (noting that "[t]he Constitution confers on Congress certain 'legislative [p]owers, Art. I, § 1, and does not permit Congress to delegate them to another branch of government," and adding that he would "support" an effort to revive the non-delegation "[i]f a majority of this Court were willing to do so); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari) (noting that "Justice Gorsuch's scholarly analysis of the Constitution's nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases"). The statute's delegation of power to the FTC "to prevent persons, partnerships, or corporations … from using unfair methods of competition" can hardly be said to provide a sufficiently intelligible principle to pass non-delegation muster.

The *Humphrey's Executor* Court's reliance on the "quasi-judicial" functions of the FTC is likewise incompatible with this Court's renewed focus on the Constitution's separation of powers. As Justice Gorsuch noted in his *Gundy* dissent:

> In Article I, the Constitution entrusted all of the federal government's legislative power to Congress. In Article II, it assigned the executive power to the President. And in Article III, it gave independent judges the task of applying the laws to cases and controversies.

Gundy, 588 U.S. at 152-53 (Gorsuch, J., dissenting, joined by Roberts, CJ, and Thomas, J.).It is therefore as problematic for an executive agency to exercise judicial power as it is for it to exercise legislative power.

Indeed, after several members of this Court called into question judicial doctrines that gave deference to executive agency interpretations of statutes or its own regulations because they "effect[] a transfer of the judicial power [to say what the law is] to an executive agency," *see, e.g.*, *Perez*, 575 U.S. at 112, 119 (Thomas, J., concurring in judgment); *Pereira v. Sessions*, 585 U.S. 198, 220 (2018) (Kennedy, J., concurring); *id.* at 221 (Alito, J., dissenting), this Court finally interred *Chevron*[3] deference two terms ago in *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024). As Justice Thomas noted in concurrence, judicial deference to an administrative agency's interpretation of law violated not just the Administrative Procedures Act, but the Constitution's separation of powers as well, by curbing the judicial power afforded to courts but also, and simultaneously, by expanding agencies' executive power beyond constitutional limits. *Id.* at 414 (Thomas, J., concurring).

If an executive agency exercising the judiciary's interpretative authority is constitutionally problematic,

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[3] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

then it is necessarily constitutionally problematic for it to exercise judicial power (even if called quasi-judicial power) to adjudicate cases or controversies by issuing cease and desist order in response to its own orders to show cause.

The Court has already made clear that Congress cannot avoid Article III by relabeling adjudication. *Stern v. Marshall*, 564 U.S. 462, 494–502 (2011). And because those who preside over such proceedings wield "significant authority," they are "Officers" whose appointment and supervision must satisfy Article II. *Lucia v. SEC*, 585 U.S. 237, 245 (2018). The FTC's scheme (prosecution and adjudication housed within an "independent" body insulated from presidential control) violates both Articles II and III. *Stern*, 564 U.S. at 502–03; *Lucia*, 585 U.S. at 251.

Humphrey's Executor did not address either of these problems when basing its decision on the fact that the agency exercised quasi-legislative and quasi-judicial powers. Neither did it address the Founders grave concern about the consolidation of such powers in a single body. The Constitution's core doctrine of separation of powers should not have been dispensed with so cavalierly, *sub silentio*. But with the expanded powers that the FTC has been given since the ruling in *Humphrey's Executor,* the case now is even worse than it was then, for the FTC now has authority to exercise all three powers of government—legislative, judicial, and executive. Our Constitution provides for separation of powers precisely to prevent that consolidation of power, for as James Madison noted in Federalist 47, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands,

whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, p. 301 (J. Madison).

III. The FTC's In-House Adjudication Confirms the Constitutional Defect: Article III and the Appointments Clause Forbid This Consolidation of Power.

This Court has rejected efforts to relabel exercises of the judicial power as "quasi-judicial" and thus outside Article III. *Stern*, 564 U.S. at 484–503. *Stern* holds that Congress may not assign the final adjudication of private-rights disputes to non-Article III decisionmakers merely by affixing functionalist labels. *Id.* at 494–502. The FTC's issuance of cease-and-desist orders and the imposition of penalties after agency-run proceedings replicate the very consolidation *Stern* condemns. *Id.* at 494–95, 502–03. That defect is compounded by the Appointments Clause problem identified in *Lucia*: adjudicators who exercise significant authority under federal law are "Officers" whose appointment and supervision must conform to Article II's accountability requirements. *Lucia,* 585 U.S. at 251. The Constitution does not tolerate "independent" adjudicators who both prosecute and decide enforcement actions while insulated from presidential control. *Id*.

CONCLUSION

For the above reasons, this Court should find that the for-cause restriction on the President's ability to remove an FTC Commissioner is unconstitutional and, more fundamentally, that the exercise of legisla-

tive (or quasi-legislative) and judicial (or quasi-judicial) powers by the FTC, in addition to executive powers, is itself a violation of core separation of powers principles.

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Respectfully submitted,

JOHN C. EASTMAN
Counsel of Record
ALEXANDER HABERBUSH
Constitutional Counsel Group
444 W. Ocean Blvd., Suite 1403
Long Beach, CA 90802
(562) 435-3456
jeastman@ccg1776.com

Counsel for Amicus Curiae The Claremont Institute's Center for Constitutional Jurisprudence