No. 24A966

IN THE SUPREME COURT OF THE UNITED STATES

DONALD J. TRUMP, ET AL., *Applicants*,
v.
GWYNN A. WILCOX, *Respondent.*

SCOTT BESSENT, ET AL., *Applicants*,
v.
CATHY A. HARRIS, *Respondent.*

BRIEF OF AMERICA FIRST LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPLICATION TO STAY

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IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

Amicus America First Legal Foundation ("AFL") is a nonprofit organization dedicated to promoting the rule of law in the United States and defending individual rights guaranteed under the Constitution. AFL promotes good governance by advocating greater electoral accountability of federal agencies. *See Oversight*, America First Legal Foundation, https://perma.cc/L2TL-BGHZ.

AFL believes that presidential control over all agencies that execute federal law is essential to achieving these aims and is mandated by Article II of the Constitution. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203–04 (2020).

SUMMARY OF THE ARGUMENT

This Court held last year that "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress." *Trump v. United States*, 603 U.S. 593, 621 (2024). The district courts here disagreed, bemoaning President Trump's terminations of Respondents as a "power grab" that "fundamentally misapprehends the role [of the President] under Article II of the U.S. Constitution." App.144a, 145a. But a more appropriate description would be that President Trump seeks to vindicate Article II's mandate that the President be fully accountable for ensuring the laws be faithfully executed.

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

This Court has long recognized this constitutional imperative and thus has held that the President has the authority to remove Executive Branch principal officers at will, subject to a narrow exception recognized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). This Court has cabined *Humphrey's Executor* to its facts as presented in the opinion, meaning *Humphrey's Executor* applies only to the Court's understanding of how the Federal Trade Commission operated in 1935, i.e., as exercising no part of the executive power, regardless of how the FTC *actually* operated. Accordingly, it may be that "little to nothing is left of the *Humphrey*'s exception to the general rule that the President may freely remove his subordinates." *Severino v. Biden*, 71 F.4th 1038, 1050 (D.C. Cir. 2023) (Walker, J., concurring).

That narrow exception does not apply to members of the National Labor Relations Board or the Merit Systems Protection Board because they both exercise significant executive power, unlike how this Court described the 1935 FTC. The lower courts should have applied the strong default presumption that Article II authorized the President to fire Respondents at will.

Applicants accordingly have a strong likelihood of success on the merits. The Court should grant their stay application.

ARGUMENT

I. The Strong Default Rule Under Article II: The President Can Remove Principal Officers At Will.

There is no dispute that members of the NLRB and MSPB are principal officers, nominated by the President and confirmed by the Senate. App.13. Respondents are therefore in the heartland of executive officials over whom Article II

provides a strong presumption of removability at will by the President to ensure that he retains accountability for the faithful execution of the laws under a clear chain of command.

"Our Constitution was adopted to enable the people to govern themselves" and "requires that a President chosen by the entire Nation oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). Under Article II, "the 'executive Power'—*all of it*—is 'vested in a President,'" *Seila Law LLC v. CFPB*, 591 U.S. 197, 203 (2020) (emphasis added), and he must "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 1, cl. 1; *id.* § 3.

These provisions "grant[] to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (emphasis added). "[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Free Enter.*, 561 U.S. at 492. Because the President cannot conduct all executive business alone, he must rely on "executive officers" to assist with that duty. *Id.* at 483. And "[s]ince 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Id.*

"Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 514. Wielding executive power without full accountability to the President would "pose a significant threat to individual liberty and to the constitutional system of separation

of powers and checks and balances." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting).

Thus, "[i]f there is any point in which the separation of the legislative and executive powers ought to be maintained with great caution, it is that which relates to officers and offices." *Myers*, 272 U.S. at 116. As this Court summarized just last year, "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress." *Trump*, 603 U.S. at 621.

If anything, that principle applies even more strongly at the beginning of a new Administration. "New Presidents *always* inherit thousands of Executive Branch officials whom they did not select. It is the power to supervise—and, if need be, remove—subordinate officials that allows a new President to shape his administration and respond to the electoral will that propelled him to office." *Collins v. Yellen*, 594 U.S. 220, 277–78 (2021) (Gorsuch, J., concurring in part). Otherwise, there would be "wholly unaccountable government agent[s]" who "assert[] the power to make decisions affecting individual lives, liberty, and property," yet are not accountable to "those who govern." *Id.* at 278.

Article II thus establishes the strong default rule that the President can remove principal officers at will. As explained next, this Court has recognized an extraordinarily narrow exception, but it does not apply here.

II. The *Humphrey's Executor* Exception Does Not Apply Where an Agency Exercises Substantial Executive Powers.

In *Humphrey's Executor*, this Court established a narrow exception to the President's removal power over principal officers for those who serve on "a

multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power," a descriptor the Court applied to the Federal Trade Commission as it was understood to operate in 1935 when *Humphrey's Executor* was issued. *Seila Law*, 591 U.S. at 216.

The only fair reading of *Seila Law* is that an agency must satisfy each requirement to fall within *Humphrey's Executor*. If an agency is not headed by a multi-member panel of experts, or is not balanced along partisan lines, or does not perform legislative and judicial functions, or—as most critical here—*does* exercise executive power, then it is ineligible for the *Humphrey's Executor* exception.

In its *en banc* order, the D.C. Circuit appeared to assume that merely being a "multimember" body automatically triggered *Humphrey's Executor*'s exception. App.3a. The district judges did the same. App.150a ("a multimember group of experts who lead an independent federal office"); App.152a ("independent, multimember boards"); App.155a ("multimember boards or commissions"); App.160a ("multimember boards or commissions"); App.191a ("*Humphrey's Executor* thus remains alive and well, and it dictates the outcome here. The MSPB is a traditional independent agency headed by a multimember board or commission, and as such Congress may grant the Board's members for-cause removal protections." (cleaned up).

This overwhelming focus on the structure of the NLRB and MSPB was misplaced. If an agency's multimember structure alone permits for-cause removal, then it makes no sense that the *Humphrey's Executor* rule *also* requires that multi-

member agencies not exercise executive power. If the 1935 FTC's multi-member and balanced structure were alone sufficient, there would have been no need to discuss executive power at all in *Humphrey's Executor*, let alone issue a holding that the agency must not possess such power.

Further, it makes little sense to focus on the structure of an agency at the expense of its executive power, given that the *Humphrey's Executor* line of cases is focused on how removal protections interfere with the President's Article II powers to oversee the Executive Branch in the execution of federal laws. *See* U.S. Const. art. II, § 1, cl. 1; *id.* § 3; *Seila Law*, 591 U.S. at 202–04, 213–14, 217–18. Of all the requirements needed to invoke *Humphrey's Executor*, the most important is that the agency *not* possess executive power.

But, as explained next, the NLRB and MSPB wield significant executive powers, exceeding those the FTC was described as possessing in *Humphrey's Executor*. Accordingly, the NLRB and MSPB fall outside the narrow exception for agencies whose heads can retain protection from at-will removal by the President.

III. The NLRB's and MSPB's Executive Powers Greatly Exceed Those the 1935 FTC Was Understood to Possess in *Humphrey's Executor*.

As noted, the *en banc* D.C. Circuit and the district court considered the nature of the NLRB's and MSPB's powers almost as an afterthought. That was error.

A. This Court's Understanding of the FTC's Powers in *Humphrey's Executor*.

In issuing its 1935 decision in *Humphrey's Executor*, this Court described the FTC as largely an advisory body preparing reports and conducting investigations for

the benefit of Congress. *See* 295 U.S. at 628. The brief of Samuel F. Rathbun, who was Humphrey's executor, cited statistics showing that nearly half of the FTC's entire expenditures over the prior eight years had been on "investigations undertaken as such an agent of Congress in aid of legislation." Br. for Samuel F. Rathbun, Ex'r at 46 & n.21, *Humphrey's Executor*, 295 U.S. 602 (Mar. 19, 1935) ($4,036,470 spent on such legislative work, out of $9,627,407 total). And the brief of the United States, while arguing that *Myers* should control, still acknowledged the FTC's primary actions were investigating and issuing "[r]eports to Congress on special topics." Br. for United States at 24, *Humphrey's Executor*, 295 U.S. 602 (Apr. 6, 1935).

The Department of Justice had long held the view that the early FTC was more akin to a legislative committee than an executive agency. A 1925 Attorney General Opinion had stated, "A main purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation," to the point that "the Commission was sometimes likened to a Committee of Congress." *Powers and Duties of the Fed. Trade Comm'n in the Conduct of Investigations*, 34 Op. Att'y Gen. 553, 557–58 (1925).

The government's brief in *Humphrey's Executor* further acknowledged that the 1935 FTC could not even directly "execute its orders," Br. for United States at 25, *Humphrey's Executor*, and the Executor's brief noted that the FTC sometimes served as a chancery master appointed by a federal court, Br. for Rathbun at 43, *Humphrey's Executor*.

In ultimately holding that the FTC did not wield executive power, the Court's opinion in *Humphrey's Executor* relied on the same characteristics of the FTC that the parties had emphasized, i.e., its legislative and judicial functions. *See* 295 U.S. at 628. And this Court later held in *Seila Law* that the holding in *Humphrey's Executor* was directly premised on the fact that "the Court viewed the FTC (as it existed in 1935) as exercising '*no part of the executive power*.'" *Seila Law*, 591 U.S. at 215 (emphasis added).

It was not until later—in 1938—that Congress first enacted legislation to provide the FTC with a limited right to sue in federal court, and those suits were limited to seeking preliminary injunctions against certain practices pending agency adjudication. *See* Pub. L. No. 75-447, § 4, 52 Stat. 111, 115 (1938). In the 1970s, Congress first provided the FTC with the significant litigation powers it now possesses. *See* Pub. L. No. 93-637, §§ 205–06, 88 Stat. 2183, 2200–02 (1975); Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973).

The modern FTC itself would not satisfy the *Humphrey's Executor* exception. As demonstrated next, the NLRB's and MSPB's executive powers likewise far exceed those the 1935 FTC was deemed to possess in *Humphrey's Executor*.

B. The NLRB and MSPB Possess Significant Executive Powers Beyond Those Ascribed to the 1935 FTC.

Under a correct reading of *Seila Law* and *Humphrey's Executor*, the NLRB's and MSPB's removal protections are unconstitutional if the agencies wield significant executive power. They do.

NLRB. The district court listed core executive power after core executive power—while nonetheless declining to recognize the NLRB wields significant executive powers and therefore does not fall within the narrow *Humphrey's Executor* exception.

The district court acknowledged the NLRB may:

- "[S]eek temporary injunctive relief in federal district court while [a labor] dispute is pending at the NLRB." App.146a.
- Issue "a cease-and-desist order to halt unfair labor practices or an order requiring reinstatement of terminated employees," including with backpay. App.147a
- "[S]eek enforcement in a federal court of appeals." *Id.*
- "[P]romulgate rules and regulations to carry out its statutory duties." *Id.*

Each of these represents a core executive power that exceeds whatever comparable authority (if any) the *Humphrey's Executor* Court ascribed to the 1935 FTC.

Start with filing lawsuits in court: *Seila Law* held that pursuing actions "against private parties on behalf of the United States in federal court" is a "quintessentially executive power" that was "not considered in *Humphrey's Executor*" because the FTC lacked that power at the time. 591 U.S. at 219. The district court here apparently disagreed about whether the 1935 FTC possessed similar litigation powers, App.156a, but this Court has already held that the 1935 FTC can be

recognized *only* as having the very narrow litigation power to "mak[e] recommendations to courts as a master in chancery." *Seila Law*, 591 U.S. at 215. "A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts th[is] responsibility[.]" *Buckley v. Valeo*, 424 U.S. 1, 138 (1976); *see TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021) ("[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch."). Accordingly, the NLRB's authority to initiate lawsuits is an executive power and exceeds whatever analogous powers this Court has been willing to ascribe to the 1935 FTC.

Turning next to finding violations of the law and ordering relief like reinstatement and back pay: again, *Seila Law* held that agency enforcement actions for violations of regulations "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *Seila Law*, 591 U.S. at 216 n.2 (emphasis in original); *see id.* at 219 (carrying out "administrative adjudications" that "award[] legal and equitable relief" is an "executive power"). That is all the more true when that action affects a "major segment of the U.S. economy," *id.* at 208, such as labor relations. The district court acknowledged the 1935 FTC could merely issue cease-and-desist orders, but apparently without authority to impose monetary remedies like the NLRB can. App.156a. Again, that makes the NLRB more executive than the 1935 FTC.

Moving to the NLRB's rulemaking power: this Court has held that an agency "empowered to issue a 'regulation or order' … clearly exercises executive power."

Collins, 594 U.S. at 254. By contrast, the 1935 FTC as recognized in *Humphrey's Executor* could only "mak[e] reports and recommendations to Congress," not "promulgate binding rules." *Seila Law*, 591 U.S. at 218. The district court below appears to believe the 1935 FTC possessed more rulemaking powers than were mentioned in *Humphrey's Executor* itself (as confirmed by the district court's citation to a statute, rather than to the opinion in *Humphrey's Executor* itself, App.156a, but that was irrelevant because this Court has instructed lower courts not to consider any such unstated powers: "Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court." *Seila Law*, 591 U.S. at 219 n.4.

In sum, the NLRB's most potent powers are undoubtedly executive in nature and exceed any similar powers the 1935 FTC was recognized to possess in *Humphrey's Executor*. That means the narrow exception against at-will removal does not apply to NLRB members.

The district court appears to have discounted the NLRB's executive powers by claiming they are overseen by the NLRB General Counsel. App.157a. But in *Seila Law*, the Court repeatedly emphasized "[t]he FTC's duties," rather than those of the individual FTC Commissioners. *Seila Law*, 591 U.S. at 215–16. Moreover, the board members exercise control over the General Counsel; for example, he cannot bring an action in court seeking to enjoin an unfair labor action unless the board provides the

necessary authorization. *See* 29 U.S.C. § 160(j). In any event, several of the powers that even the district court acknowledged reside with NLRB board members are still core executive powers not analogous to the 1935 FTC as described in *Humphrey's Executor*, such as rulemaking and adjudications that involve monetary relief, as explained above.

Accordingly, even on the district court's own findings, *Humphrey's Executor* does not apply to the NLRB.

MSPB. Many of the same justifications apply to the MSPB, which (like the NLRB) adjudicates disputes, this time between federal employees and their agencies, 5 U.S.C. § 1204(a)(1), and also those brought by the Office of Special Counsel, *id.* § 1215(a). Even a single MSPB member can, at the request of the Special Counsel, stay any personnel action for 45 days. *Id.* § 1214(b). Similar to the NLRB's power to issue rules, the MSPB can invalidate rules issued by the Office of Personnel Management. *Id.* § 1204(f). As with the NLRB, these are all executive powers. *See, e.g.*, *Collins*, 594 U.S. at 254.

But like in the NLRB case, the district court here focused myopically on how the MSPB is supposedly a "multimember expert agenc[y]," App.190a; *see* App.191a, and when the court finally turned to the matter of executive power, it oddly concluded that the MSPB's focus on adjudicating matters within the executive branch somehow rendered it *less* executive in nature, App.192a. One would think that an agency focused on the operation of the executive branch would, well, be deemed to wield significant executive power. But the district court declined to follow its own logic.

* * *

Even assuming the Court wishes to retain the narrow *Humphrey's Executor* exception, it simply does not apply to Respondents.

IV. *Humphrey's Executor* Must Be Interpreted in Light of Article II Principles.

Although the Court need not do so to resolve this case, there is good reason to read *Humphrey's Executor* narrowly: Courts have a duty to interpret that opinion in light of the strong default rule of removability of principal officers. *See* Part I, *supra*. "We should resolve questions about the scope of [Supreme Court] precedents in light of and in the direction of the constitutional text and constitutional history." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). That is significant here because *Humphrey's Executor* is "inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and with prior precedents," *id.* at 696, and its foundations and rationale have been "repudiated [in] almost every aspect," *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part). Accordingly, "the foundation for *Humphrey's Executor* is not just shaky. It is nonexistent." *Id.* at 248. This militates strongly in favor of declining to apply that opinion at all beyond its narrow facts.

This is no academic dispute. By allowing the executive power to be wielded by someone not fully accountable to the elected Commander in Chief, "*Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Id.* at 239. It means the President "could not be held

fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enter.*, 561 U.S. at 514. For that reason, so-called independent agencies "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

In other words, even if there were a doubt about how to apply the *Humphrey's Executor* exception here, that just means the Constitution's default rule should apply: "the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress." *Trump*, 603 U.S. at 621. The *en banc* D.C. Circuit thus got it backwards when it presumed the default rule was non-removability.

* * *

Applicants are likely to prevail on the merits, and the Court should grant a stay.

CONCLUSION

The Court should grant the Application.

April 10, 2025

Respectfully submitted,

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