No. 23-1323

IN THE
Supreme Court of the United States

CONSUMERS' RESEARCH ET AL.,
Petitioners,
v.
CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* MANHATTAN INSTITUTE IN SUPPORT OF PETITION FOR CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

The Manhattan Institute for Policy Research ("MI") is a nonpartisan public policy research foundation whose mission is to develop and disseminate ideas that foster greater economic choice and individual responsibility. To that end, MI's constitutional studies program aims to preserve the Constitution's original public meaning, including with regard to the separation of powers. This case interests MI because it implicates a dangerous insulation of administrative authority from democratic accountability.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, the Fifth Circuit concluded that *Humphrey's Executor* governs the removal of executive officers within independent multi-headed agencies like the Consumer Product Safety Commission (CPSC). The Fifth Circuit both overread *Humphrey's Executor* and failed to heed the thrust of this Court's more recent separation of powers jurisprudence. In those recent decisions, the Court has hewed to text and early historical practice in making sense of the Constitution's separation of the legislative, executive, and judicial powers. And the early history of the Republic demonstrates that

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. *Amicus curiae* further affirms that counsel of record for all parties received notice of *amicus curiae*'s intent to file this brief at least 10 days before its due date.

independent executive branch agencies—no matter whether they have one head or multiple ones—are a modern novelty fundamentally at odds with the Framers' conception of a unitary executive branch.

Although the Fifth Circuit majority felt compelled to reach its conclusion based on *stare decisis*, *Humphrey's Executor* does not preclude the conclusion that independent multi-headed agencies have no place in our constitutional order. On the contrary, the *Humphrey's Executor* Court understood the power of the administrative agency at issue in a manner that later cases have squarely rejected. As a result, *Humphrey's Executor*'s faulty reasoning has been overtaken by more recent (and constitutionally sound) doctrinal developments. To the extent that the Fifth Circuit's reading of *Humphrey's Executor* is correct, this case presents the ideal opportunity for this Court to course correct and cabin *Humphrey's Executor* to its facts—which would enshrine a view of the executive power based on the text of Article II and the early historical practice concerning the law of removal. The Court should grant certiorari and reverse.

ARGUMENT

I. Article II's Original Public Meaning and Deeply Rooted Practice Preclude Tenure Protection for Multi-Member Agencies.

This case concerns the scope of the President's "conclusive and preclusive" removal power. *Trump v. United States*, 144 S. Ct. 2312, 2327 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 n. 4 (1952) (Jackson, J., concurring)). In assessing the scope of the removal power, historical practice

cannot upend the Constitution's text. *See New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 36 (2022); *United States v. Rahimi*, 144 S. Ct. 1889, 1912 n.2 (2024) (Kavanaugh, J., concurring). This Court has recognized that "the President's removal power stems from Article II's vesting of the 'executive Power' in the President." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 227 (2020) (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010)). That is, the removal power "follows from the text of Article II." *Id.* at 204.

Although historical practice cannot be used to contradict the text of the Constitution, this Court looks to historical practice to delineate the proper bounds of constitutional authority where the text does not set a defined limit. *See SEC v. Jarkesy*, 144 S. Ct. 2117, 2134 n.2 (2024) (noting that the probative value of historical practice is at its zenith "when it reflects the settled institutional understandings of the branches"); *Bruen*, 597 U.S. at 17 (looking to the nation's "historical tradition" to assess whether certain regulations align with the Second Amendment); *Stern v. Marshall*, 564 U.S. 462, 483–84 (2011) (turning to history when it plays a critical part "in implementing the separation of powers").

Multi-member agencies with for-cause removal protections lack a firm basis in our nation's history and early regulatory tradition. In the Decision of 1789, the First Congress resolved that the Constitution granted the President the singular authority to remove officers at will. *See Myers v. United States*, 272 U.S. 52, 114–115 (1926); *Seila Law*,

591 U.S. at 204 ("The President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, [and] was settled by the First Congress."). And both "the sweep of historic" regulatory practice, *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, 2293 (2024) (Gorsuch, J., concurring), and the text of the Constitution demonstrate that multi-member independent agencies are modern anomalies without Founding-era precedent, *see* The Federalist No. 47, at 300 (James Madison) (H. Lodge ed. 1888) (remarking that the Framers feared "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands," for that "may justly be pronounced the very definition of tyranny").

In fact, multi-member independent agencies were completely unknown to our government for the first full century of early historical practice. "There were quite simply no independent agencies in seventeenth- or eighteenth-century England or North America." Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 Notre Dame L. Rev. 821, 859 (2018). That history sets the backdrop against which any removal restrictions for such agencies must be judged. *See Rahimi*, 144 S. Ct. at 1908 (Gorsuch, J., concurring) ("Routinely, litigants and courts alike must consult history when seeking to discern the meaning and scope of a constitutional provision.").

Even once multi-member agencies first appeared, they were subject to normal presidential removal authority. The first multi-headed independent agency, the Interstate Commerce Commission (ICC),

was created in 1887 to regulate the railroads. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887). Initially, the ICC "was placed in the Department of the Interior and does not appear to have been regarded as independent by either the President or Congress." Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889-1945*, 80 Notre Dame L. Rev. 1, 8 n.32 (2004). The Interior Secretary had full control over the ICC. *See* Marshall J. Breger & Gary J. Edles, *Independent Agencies in the United States: Law, Structure, and Politics* 31–32 (Oxford University Press, 2015).

Indeed, "[i]t is far from clear that [the ICC's] removal provisions in any way precluded the president from removing a member of the ICC simply for disagreements over policy." Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the Second Half-Century*, 26 Harv. J.L. & Pub. Pol'y 667, 797 (2003). "Independence of executive domination seems not to have been thought of and was certainly not discussed" in creating the ICC. Robert E. Cushman, *The Independent Regulatory Commissions* 61 (Octagon Books, reprint, 1972). And Congress removed the ICC from the Interior Department two years later only "because of political expediency and not because of any grand constitutional conception of the proper structure of government." Calabresi & Yoo, *supra*, at 799 n.771. "The intent [behind removing the ICC from the Interior Department] was not to make the ICC independent or vest it with authority to wield power outside the domain of the executive branch." Breger & Edles, *supra*, at 33. In short, the nation's

first "independent" agency was not, in fact, originally independent of the President's historic removal power.

That view shifted as the twentieth century progressed and the ICC was vested with rate-making authority. *See* Hepburn Act, ch. 3591, § 4, 34 Stat. 584, 589 (1906). "[T]he independent commission as an organizational form did not emerge full-blown with the passage of the Interstate Commerce Act. Rather, it evolved over the course of several decades, coming to maturity late in the Progressive Era." Marc Allen Eisner, *Regulatory Politics in Transition* 48 (1993); *see also* Breger & Edles, *supra*, at 36 (describing the development of the ICC) (citing I. L. Sharfman, *The Interstate Commerce Commission: A Study in Administrative Law and Procedure* 454 (1931)). "It was not until many years after the establishment of the ICC that the notion of independence developed." Breger & Edles, *supra*, at 36. And that concept of independence then manifested itself in Progressive Era and New Deal agencies like the Federal Trade Commission (1914) and National Labor Relations Board (1935). The Progressive case for independent agencies envisioned governmental administration marked by "reliance on experts together with independence from the political melee." Breger & Edles, *supra*, at 34. The independent agency "was envisioned as an institution capable of compensating for the shortcomings of the 'political' institutions of American government." Eisner, *supra*, at 44.

Whatever the merits of such a vision of government, it is not the Framers' conception. Their vision, enshrined in Article II of the Constitution, allows "individual executive officials" to "wield

significant authority, but that authority remains subject to the ongoing supervision and control of the elected President." *Seila Law*, 591 U.S. at 224; *Extending Regulatory Review Under Executive Order 12866 to Independent Regulatory Agencies*, 43 Op. O.L.C. 1, 1 (2019) [hereinafter *Extending Regulatory Review*] ("The President's constitutional authority therefore extends to the supervision of all agencies that execute federal law, including so-called 'independent' agencies."). As this Court has explained, "the urge to meet new technological and societal problems with novel governmental structures must be tempered by constitutional restraints that are not known—and were not chosen—for their efficiency or flexibility." *Seila Law*, 591 U.S. at 231.

Even in the modern era, Presidents of all stripes resisted the notion that Congress could restrict their authority to remove heads of multi-member agencies. For instance, Herbert Hoover and Franklin Delano Roosevelt both deemed them unconstitutional. President Hoover argued that vesting all exercises of administrative power under the head of the President is among "the fundamental principles upon which our Government was founded, . . . the principles which have been adhered to in the whole development of our business structure, and . . . the distillation of the common sense of generations." Herbert Hoover, Annual Message to the Congress on the State of the Union, 1929 Pub. Papers 404, 432 (Dec. 3, 1929). And President Roosevelt's Committee on Administrative Management lamented that there are "a dozen agencies which are totally independent—a new and headless 'fourth branch' of the government." The President's Comm. on Admin. Mgmt., *Administrative*

Management In The Government Of The United States 30 (1937). President Roosevelt agreed, as he deemed the agencies a "'fourth branch' of the government for which there is no sanction in the Constitution." Franklin D. Roosevelt, *A Recommendation for Legislation to Reorganize the Executive Branch of the Government* (Jan. 12, 1937), *in* 5 The Public Papers and Addresses of Franklin D. Roosevelt 671 (Samuel I. Rosenman ed., 1941); *see also Extending Regulatory Review*, 43 Op. O.L.C. at 2 (noting that "[e]very President since Nixon has required systematic review of some rulemakings to ensure that federal regulations 'achieve legislative goals effectively and efficiently' and do not 'impose unnecessary burdens'").

That view was hardly limited to the executive branch. Most famously, in *Myers v. United States*, 272 U.S. 52, 122 (1926), this Court held that "the executive power" included "the exclusive power of removal." And in the wake of *Myers*, many members of Congress similarly concluded that this intrusion on presidential authority should end. When establishing the Federal Power Commission (FPC) in 1930, Congress opted to not include any for-cause removal protections for the commission heads. *See* Yoo, Calabresi & Nee, *supra*, at 73. "When asked why the removal provisions first enacted in the Interstate Commerce Act were deleted from the bill, the House sponsor of the [FPC] legislation replied that such a provision was unnecessary because the Supreme Court had already decided [in *Myers*] that the President 'can remove any public official at any time for malfeasance in office.'" *Id.* (internal citation omitted); *see also Extending Regulatory Review*, 43 Op. O.L.C. at 22 ("*Humphrey's*

Executor also rested on an 'outmoded view' of independent agencies as apolitical experts.").

Nor can the concept of constitutional liquidation save the independent agency structure. "A course of deliberate practice might liquidate ambiguous constitutional provisions." *Vidal v. Elster*, 602 U.S. 286, 323 (2024) (Barrett, J., concurring in part). As the Court outlined in *Bruen*, to support liquidation of an indeterminate provision, the practice at issue must date from the "*early days* of the Republic" and must be "*unbroken*." *Bruen*, 597 U.S. at 35–36 (emphasis added). Tenure protections for multi-member agencies enjoy neither requirement. Independent agencies with for-cause removal protections are a novelty within our constitutional tradition. They were unknown for the first century of our Constitution. *See* The Federalist No. 78, at 466 (Alexander Hamilton) (C. Rossiter ed., 1961) (quoting 1 Montesquieu, The Spirit of Laws 181 (10th ed. 1773)); *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (remarking that the Framers recognized that the "ultimate purpose of this separation of powers is to protect the liberty and security of the governed").

And their existence has hardly been "unbroken" even within modern history. In fact, *Myers* was handed down just as multi-headed independent agencies were gaining steam. As discussed above, in the wake of *Myers*, many members of Congress concluded they could *not* continue to impose for-cause removal protections. *See* Yoo, Calabresi & Nee, *supra*, at 73. And the Executive Branch has shared that congressional view. *See Extending Regulatory Review*,

43 Op. O.L.C. at 19–20 n.12 ("Because the removal power is a principal means by which the President carries out the executive power and takes care that the laws be faithfully executed, we do not believe that any restrictions on the President's removal power should be inferred." (citation omitted)).

II. Instead of Extending *Humphrey's Executor*, This Court Should Cabin It.

Humphrey's Executor disregards the Constitution's text and is inconsistent with our early constitutional history. And subsequent doctrinal developments have left *Humphrey's Executor*'s unsupported conception of governmental power on an island, all alone. Therefore, it should be strictly cabined. *See Rahimi*, Slip Op. at 17 (Kavanaugh, J., concurring). This case presents a clean vehicle for doing so.

A. *Humphrey's Executor*'s Doctrinal Underpinnings Have Eroded, Leaving the Precedent on Shaky Ground.

Humphrey's Executor rested on a conception of governmental power that later precedents have repudiated.

The context in which *Humphrey's Executor* was decided is critical on this front. Just nine years earlier, this Court had vindicated the President's power to remove executive officers in *Myers*. Chief Justice Taft's comprehensive majority opinion endeavored to "establish the meaning of the Constitution, in 1789, regarding the presidential removal power." Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cinn. L. Rev. 849, 852 (1989).

The *Humphrey's Executor* Court acknowledged *Myers*—concluding "that further discussion would add little of value to the wealth of material there collected" regarding the original and enduring scope of the President's removal power. *Humphrey's Executor v. United States*, 295 U.S. 602, 626 (1935). But the Court nonetheless upheld the for-cause removal restrictions for Federal Trade Commissioners by "announc[ing] the novel concept of constitutional powers that are neither legislative, nor executive nor judicial, but 'quasi-legislative' and 'quasi-judicial.'" Scalia, *supra*, at 852 (quoting *Humphrey's Executor*, 295 U.S. at 628). The Court contrasted the postmaster whose removal was at issue in *Myers* as "an executive officer restricted to the performance of executive functions," while exalting the Federal Trade Commission (FTC) as "an administrative body." *Humphrey's Executor*, 295 U.S. at 627–28.

In so doing, *Humphrey's Executor* "distinguished *Myers* based on the flawed premise that the FTC exercised 'quasi-legislative' and 'quasi-judicial' power that is not part of 'the executive power vested by the Constitution in the President.'" *Seila Law*, 591 U.S. at 245 n.2 (Thomas, J., concurring in part and dissenting in part) (quoting *Humphrey's Executor*, 295 U.S. at 628); *see also Extending Regulatory Review*, 43 Op. O.L.C. at 13 ("The 'executive Power' vested in the President and his constitutional duty to 'take Care that the Laws be faithfully executed' . . . do not vanish merely because the subordinate charged with executing the law may enjoy tenure or other protections.").

Subsequent decisions confirm that independent agencies execute federal law and are part of the executive branch—not a "headless 'fourth branch' of the Government." President's Comm. on Admin. Mgmt., *supra*, at 36; *see, e.g.*, *City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) ("Agencies make rules . . . and conduct adjudications," but those activities "are exercises of—indeed under our constitutional structure they *must be* exercises of—the 'executive Power.'"); *Free Enterprise Fund*, 561 U.S. at 510–11 (holding that the SEC is an executive "Department[]" under the Appointments Clause); *Morrison v. Olson*, 487 U.S. 654, 690 n.28 ("[I]t is hard to dispute that the powers of the FTC at the time of Humphrey's Executor would at the present time be considered 'executive,' at least to some degree."); *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (recognizing that agency rulemaking is an executive function, not a legislative function); *Buckley v. Valeo*, 424 U.S. 1, 125–28 (1976) (per curiam) (holding that members of the Federal Election Commission are executive officers, not officers of Congress).

Our Constitution conceives of only three forms of power: legislative, executive, and judicial. Administrative agencies cannot exercise legislative or judicial power because the Constitution vests "***[a]ll*** legislative Powers herein granted" in a Congress of the United States, U.S. Const. art. I, § 1 (emphasis added), and "[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress" may establish, *id.* art. III, § 1. The authority of an administrative agency is not legislative or judicial, whether quasi or otherwise.

Instead, the authority of an administrative agency is executive. *See City of Arlington*, 569 U.S. at 305 n.4; *Bowsher v. Synar*, 478 U.S. 714, 732 (1986). Heads of administrative agencies "must remain accountable to the President, whose authority they wield." *Seila Law*, 591 U.S. at 213; *see also Printz v. United States*, 521 U.S. 898, 922 (1997) ("The insistence of the Framers upon unity in the Federal Executive—to ensure both vigor and accountability—is well known."); *In re Aiken County*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring) ("'What Article II did make emphatically clear from start to finish was that the president would be personally responsible for his branch.'" (quoting Akhil Reed Amar, *America's Constitution: A Biography* 197 (2005))); *Extending Regulatory Review*, 43 Op. O.L.C. at 8–9.

Even when agencies "fill[] in and administer[] the details" of a statute through rulemaking and adjudications, as *Humphrey's Executor* put it, they exercise executive power alone. *See Humphrey's Executor*, 295 U.S. at 628; *see City of Arlington*, 569 U.S. at 305 n.4. This Court has thus recently observed that *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 591 U.S. at 216 n.2 (citing *City of Arlington*, 569 U.S. at 305 n.4)

B. At a Minimum, the Court Should Cabin *Humphrey's Executor* to Its Facts.

In recent cases involving the removal power, the Court has vindicated the unity of the executive branch while avoiding the displacement of the exception recognized in *Humphrey's Executor*. Yet *Humphrey's*

Executor finds no support in the original understanding of the Constitution, and so, it will remain a conspicuous outlier in what would otherwise be an unbroken line of this Court's precedents. When dealing with such a beleaguered precedent, this Court sometimes has limited such precedents to their facts—rather than expanding their reasoning to inflict constitutional harm in new settings. Such an option is readily available here.

A prime example is this Court's treatment of *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). There, "the Court broke new ground by holding that a person claiming to be the victim of an unlawful arrest and search could bring a Fourth Amendment claim for damages against the responsible agents even though no federal statute authorized such a claim." *Hernandez v. Mesa*, 589 U.S. 93, 99 (2020). *Bivens* applied existing precedents regarding implied statutory causes of action to the constitutional realm. *Id.* But "[i]n later years, [this Court] came to appreciate more fully the tension between this practice [of implying causes of action] and the Constitution's separation of legislative and judicial power." *Id.* at 100. As a result, "for almost 40 years," the Court "consistently rebuffed requests to add to the claims allowed under *Bivens*." *Id.* at 101–02. Instead, the Court has largely cabined *Bivens* to the action implied 50 years ago. *See id.* at 114 (Thomas, J., concurring).

Similarly, in *Kisor v. Wilkie*, 588 U.S. 558, 563 (2019), the Court "reinforce[d]" the "limits" of the deference doctrine expounded in *Auer v. Robbins*, 519 U. S. 452 (1997), and *Bowles v. Seminole Rock & Sand*

Co., 325 U. S. 410 (1945). *Auer* and *Bowles* instructed courts to "defer to [an] agency's construction of its own regulation." *Kisor*, 588 U.S. at 568. *Auer* justified this doctrine by placing it downstream of *Chevron*. *Auer*, 519 U.S. at 457. But in *Kisor*, members of this Court expressed discomfort with both *Auer* and *Chevron*, characterizing the former as a "wrong turn along the way." *Kisor*, 588 U.S. at 607 (Gorsuch, J., concurring). This Court ruled against the agency in *Kisor*, and the majority "cabined" the "scope" of *Auer* deference by outlining additional factors that courts must consider before applying *Auer* deference. *Kisor*, 588 U.S. at 580.

This case presents the Court with an opportunity to take a similar approach to *Humphrey's Executor*. Because *Humphrey's Executor* expressly declined to interfere with the rule of *Myers* as applied to "executive officer[s]" who perform "executive functions," that rule remains good law. *Humphrey's Executor*, 295 U.S. at 627. Today, as noted above, *all* agency heads are rightly considered "executive officer[s]" who perform "executive functions." All agency assertions of authority "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'" *City of Arlington*, 569 U.S. at 305 n.4 (quoting U.S. Const. art. II, § 1, cl. 1). As a result, this Court can and should hold that *Myers* governs with respect to *all* executive officers (just as *Humphrey's Executor* directed), which now includes *all* administrative agency heads.

C. *Stare Decisis* Would Pose No Obstacle If This Court Wished to Overturn *Humphrey's Executor*.

If this Court instead preferred to overturn *Humphrey's Executor* and its misguided view of the Constitution's separation of powers, there would be solid ground for doing so. That is because *stare decisis* gives way when a precedent's "underpinnings [have been] eroded, by subsequent decisions of this Court." *United States v. Gaudin*, 515 U.S. 506, 521 (1995). Thus, a "later development of . . . constitutional law" can (and often does) serve as a basis for overruling a prior decision. *Alabama v. Smith*, 490 U.S. 794, 803 (1989). And it is clear that "the vision of independence suggested by *Humphrey's Executor* [no longer] accurately describes the current state of the law." *Extending Regulatory Review*, 43 Op. O.L.C. at 22.

This Court in *Loper Bright Enterprises v. Raimondo*, 144 S. Ct. 2244, recently recognized that legal developments may justify parting way with precedent. In *Loper Bright*, although the Court overturned *Chevron* on statutory grounds, the "Nation's judicial tradition" informed the Court's interpretation of 5 U.S.C. § 706. 144 S. Ct. at 2260 n.3. And the Court faulted *Chevron* for requiring much more than the mere "respect" courts have traditionally granted to agency interpretations of law. *Id.* at 2283. As Justice Gorsuch put it in a concurring opinion, *Chevron* was "a grave anomaly when viewed against the sweep of historic judicial practice." *Id.* at 2293 (Gorsuch, J., concurring). *Chevron*'s status as a historical anomaly counseled in favor of overturning it. Indeed, this Court had implicitly recognized

Chevron's anomalous status. *See id.* at 2275 (acknowledging, in the context of overruling *Chevron*, that the Supreme Court had stopped relying on *Chevron* but that lower courts remained bound by it absent an overruling).

The same holds true here. Independent multi-headed agencies have no place in our constitutional order. And this Court has labored in recent years to recenter text and early historical practice when shaping the law of removal. For instance, in *Agostini v. Felton*, 521 U.S. 203 (1997), this Court held, contrary to *Aguilar v. Felton*, 473 U.S. 402 (1985), that a New York City program providing teachers to Catholic schools to offer remedial education to disadvantaged students did not violate the Establishment Clause. *Agostini*, 521 U.S. at 234–36. Although "the general principles [the Court] use[d] to evaluate whether government aid violates the Establishment Clause ha[d] not changed since *Aguilar* was decided," *id.* at 222, this Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" had since shifted, *id.* at 223. If that shift was reason enough to part ways with precedent, then *Humphrey's Executor* must meet the same fate. In the decades since it was decided, *Humphrey's Executor*'s "way of looking" at administrative agencies and their relationship to the President has been "overrule[d]." *Guar. Tr. Co. of N.Y. v. York*, 326 U.S. 99, 101 (1945). This Court should expressly say as much.

Indeed, this Court has repeatedly overruled precedents that are out of step with related case law and subsequent doctrinal developments. *See, e.g.*,

Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 281 (2022) (noting that *Casey* "can[not] be understood and applied in a consistent and predictable manner"); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) ("But *Whitney* has been thoroughly discredited by later decisions."); *Malloy v. Hogan*, 378 U.S. 1, 9 (1964) (reasoning that the recent precedent of *Mapp v. Ohio* had "necessarily repudiated" the earlier precedent of *Twining v. New Jersey*).

The other *stare decisis* factors—*i.e.*, quality of reasoning, workability, and reliance—do not offer *Humphrey's Executor* any protection. *See Dobbs*, 597 U.S. at 268; *Franchise Tax Bd. of California v. Hyatt*, 587 U.S. 230, 248 (2019). *Humphrey's Executor* rested on a "gravely mistaken" conception of administrative power, one unmoored from constitutional text and history. *Ramos*, 590 U.S. at 106. In an opinion consisting of "fourteen quick pages" issued less than a month after oral argument, Scalia, *supra*, at 851, *Humphrey's Executor* expressed the patently incorrect view that, because the FTC was "created by Congress to carry into effect legislative policies . . . [s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive," *Humphrey's Executor*, 295 U.S. at 628. Executing legislative policies is the quintessential function of the executive branch.

A body who carries out that function not only can but *must* be characterized as an arm or eye of the chief executive. "The vesting of the executive power in the President was essentially a grant of the power to execute the laws." *Myers*, 272 U.S. at 117; *see also* The Federalist No. 75, at 503 (Alexander Hamilton) (J. Cooke ed. 1961) (framing "the execution of the laws"

as "the function[] of the executive magistrate"). Indeed, "[f]or almost a century prior to the Constitution's ratification, an array of some of the most prominent political theorists of the era declared that the executive power was the power to execute the laws." Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. Ill. L. Rev. 701, 752. Thus, *Humphrey's Executor* stands "on exceptionally weak ground[]." *Dobbs*, 597 U.S. at 270.

Nor has *Humphrey's Executor*'s artificial dividing line between quasi-legislative and quasi-judicial power, on one hand, and pure executive power, on the other hand, proved workable. On the contrary, it cannot "be understood and applied in a consistent and predictable manner." *Dobbs*, 597 U.S. at 281. This Court is not in the habit of trafficking in concepts of power, like quasi-legislative and quasi-judicial power, that are alien to our constitutional order and history. That such a flawed conception of power has not been relied upon in subsequent decisions of this Court illustrates its methodological flaw and lack of workability. Instead, when this Court explains how the removal power relates to the separation of powers, it typically just puts *Humphrey's Executor* to the side. *See, e.g.*, *Seila Law*, 591 U.S. at 218–20.

There are no reliance interests that warrant keeping *Humphrey's Executor* on the books. Those most reliant on *Humphrey's Executor* are the heads of independent agencies. But "the convenience of government officials" has never "count[ed] in the balance of *stare decisis*." *Kisor*, 588 U.S. at 629 (Gorsuch, J., concurring in the judgment). The time has come to reconsider the flawed and

unconstitutional framework of *Humphrey's Executor*, and this case presents a vehicle to do so.

CONCLUSION

For the foregoing reasons, and those stated by the Petitioners, *amicus curiae* respectfully urges this Court to grant the petition for certiorari and to reverse.

Respectfully submitted,

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