No. 24A-790

In the Supreme Court of the United States

SCOTT BESSENT, Secretary of the Treasury, et al.,
Applicants,

v.

HAMPTON DELLINGER,
Respondent.

BRIEF OF *AMICI CURIAE* FLORIDA AND 19 OTHER STATES IN SUPPORT OF THE SECRETARY'S APPLICATION TO VACATE THE ORDER OF THE UNITED STATES DISTRICT COURT

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INTEREST OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Attorney General of Florida, on behalf of the State of Florida and 19 other States, listed below at page 26, respectfully submits this brief as *amici curiae* in support of the applicant, the Secretary of the Treasury.

The States ceded sovereign authority to the federal government when they joined the union on the understanding that the power of the federal government was limited, that this power would be divided among multiple branches of government, and that the States and their citizens would be able to hold federal officials democratically accountable for their exercise of that power. Yet when it comes to independent agencies, none of that is true. Federal power is instead consolidated in a select few accountable to no one. And that naturally leads to the expansion of that power.

Amici have an interest in ensuring that federal officials exercise their power—power that flows from the States themselves—within constitutional limits. After all, "[s]eparation-of-powers principles" do not just "protect each branch of government from incursion by the others"; they "protect the individual" and state sovereignty as well. *Bond v. United*

States, 564 U.S. 211, 222 (2011). The issue here—and the separation-of-powers principles involved in resolving it—go to the heart of the federalist bargain struck by the Framers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Respondent Hampton Dellinger challenges President Trump's authority to remove him from his presidentially appointed position as Special Counsel. But as head of the Office of Special Counsel, respondent exercises significant investigative and prosecutorial authority within the executive branch and is answerable to no one except the President. Because he is a principal officer exercising executive power on behalf of the President, the Constitution requires that he be removable at the will of the President.

That bedrock principle safeguards state sovereignty. When the States surrendered some of their sovereign power to the federal government upon joining the union, they never would have imagined unaccountable officials wielding that power independent of anyone who must answer to the people or the States for its exercise. That was not what the Constitution promised them. Yet when it comes to independent agencies and tenure-protected executive officers, that is precisely what the States

get. When independent agencies and tenure-protected officers wield executive power outside the purview of a democratically elected President, it not only usurps the President's authority, it strikes at the core of the compact the States agreed to at the Founding. And state sovereignty and individual liberty suffer.

Nor can courts grant the relief that respondent seeks. Just as Congress may not restrain the President's removal power over executive officials, courts may not order an executive official's reinstatement. That limit on equity dates to the Founding and runs throughout this Court's precedents. The rule ensures effective governance, respects state sovereignty, and yields reasoned jurisprudence. The Court should reaffirm what it held over a century ago: "[A] court of equity has no jurisdiction over the appointment and removal of public officers," be they state or federal. *In re Sawyer*, 124 U.S. 200, 212 (1888).

ARGUMENT

The Court should grant the Secretary's application. Core separation-of-powers principles, bolstered by long historical understanding, require that the President have the authority to remove executive branch officials. That limitation on Congress's power indirectly preserves state

sovereignty by ensuring that "independent agencies" are politically accountable should they attempt to intrude in state affairs. And as the Secretary correctly argues, a federal court would in any event lack the authority to reinstate respondent to his post.

I. The President's power to remove executive officers is absolute, and at a minimum extends to the head of the Office of Special Counsel.

"'[T]he 'executive Power'—all of it—is 'vested in a President, who must 'take Care that the Laws be faithfully executed.'" *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203 (2020) (quoting U.S. Const. art. II, § 1, cl. 1; *id.* § 3). And "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) (J. Madison). That necessarily includes the authority to remove executive officers. Indeed, "lesser officers must remain accountable to the President," for it is his "authority they wield." *Seila Law*, 591 U.S. at 213. Without the power to remove, the President lacks the ability to compel compliance with his directives, *id.* at 213–14, and thus to fulfill his oath to execute the law, U.S. Const. art. II, § 3.

Given the "necessity of an energetic executive," *The Federalist* No. 70, at 472 (Hamilton) (Jacob E. Cooke, ed., 1961), and the legislative branch's historic tendency to "draw[] all power into its impetuous vortex," *The Federalist* No. 48, at 333 (Madison) (Jacob E. Cooke, ed., 1961), it is vital that the President's authority to direct and supervise the executive branch in the performance of its functions be protected from legislative encroachment. As a result, this Court has recognized only two exceptions to the President's otherwise "exclusive and illimitable power of removal." *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627 (1935); *see also Seila Law*, 591 U.S. at 215 (referring to the President's "unrestricted removal power"). Neither exception covers the Special Counsel, and the Court can resolve this case on that basis alone. At any rate, both exceptions are based on flawed rationales and are due to be overruled.

The first exception is for certain inferior officers, and it has been applied to only two officers: a naval cadet-engineer, *United States v. Perkins*, 116 U.S. 483 (1886), and the independent counsel, *Morrison v. Olson*, 487 U.S. 654 (1988). In *Morrison*, for example, the Court held that Congress could insulate the independent counsel from at-will removal because that removal protection did not "impede the President's ability

to perform his constitutional duty." 487 U.S. at 691. To the contrary, the Court reasoned, the independent counsel was "an inferior officer under the Appointments Clause, with limited jurisdiction and tenure and lacking policymaking or significant administrative authority." *Id.* Thus, while recognizing that the "functions performed by the independent counsel are 'executive'" in a "sense," the Court did not believe that the power to control those functions was "so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President." *Id.* at 691–92.

That narrow exception—representing the "outermost constitutional limit[]" on the President's removal power, *Seila Law*, 591 U.S. at 218—does not apply here. Rather, the Special Counsel is a principal officer appointed by the President with the advice and consent of the Senate.[1] The Special Counsel is therefore covered by this Court's decisions in *Seila Law*, *Collins v. Yellen*, 594 U.S. 220 (2021), and *Myers v. United States*,

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[1] Respondent cannot fairly assert that the Special Counsel is an inferior officer, as the Special Counsel does not have a superior other than the President—the chief criterion this Court has recognized for determining whether an Officer of the United States is principal or inferior. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 13 (2021); *Edmond v. United States*, 520 U.S. 651, 662–63 (1997).

272 U.S. 52 (1926). In *Seila Law* and *Collins*, this Court held that a single principal officer serving as the head of an executive agency could not be tenure-protected. In *Myers*, this Court held that even an *inferior* officer appointed by the President with the advice and consent of the Senate (a postmaster first class supervised by the Postmaster General) was subject to the plenary removal authority of the President.

Even if the Special Counsel were analogous in some respects to the independent counsel (due to their both possessing some prosecutorial functions), the continuing legitimacy of *Morrison* is questionable. As Justice Scalia pointed out his dissent in *Morrison*, "[t]he case is over" when one acknowledges that a statute "reduces the amount of control or supervision" that the President has over "the prosecutorial function." 487 U.S. at 708 (Scalia, J., dissenting) (quoting 487 U.S. at 695). "It is not for us to determine, and we have never presumed to determine, how much of the purely executive powers of government must be within the full control of the President." *Id.* at 709. Rather, "[t]he Constitution prescribes that they *all* are." *Id.*

That accords with constitutional history. The President's removal power was "discussed extensively in Congress when the first executive

departments were created," *Seila Law*, 591 U.S. at 214, and the "view that 'prevailed'" in the "First Congress[]" was that the President had the "power to oversee executive officers through removal," *id.* (quoting a case quoting Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 *Documentary History of the First Federal Congress* 893 (2004)). Not *some* executive officials, but *all* of them. If this Court ever has occasion to revisit *Morrison*, it should heed Justice Scalia's dissent and overrule that decision.

The second exception, recognized in *Humphrey's Executor* and later in *Wiener v. United States*, 357 U.S. 349, 356 (1958), is for "a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [i]s said not to exercise any executive power." *Seila Law*, 591 U.S. at 216. Those cases reasoned that "quasi-judicial" and "quasi-legislative" bodies do not implicate the President's "unrestrictable power . . . to remove purely executive officers." *Id.* at 217. That exception likewise has no application here. The Office of Special Counsel is "headed by the Special Counsel," 5 U.S.C. § 1211(a), who is obviously a single officer, not a multi-member body. And even if it were somehow applicable, *Humphrey's Executor* is even more ripe for

overruling than *Morrison*. "The decision in *Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring, joined by Gorsuch, J.); *see also PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) ("Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances."). The time is right for this Court to "repudiate what is left of this erroneous precedent." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring).

Humphrey's Executor is the foundation for the modern ill known as the "independent agency." In *Humphrey's Executor*, the Court entertained the fiction that such agencies "exercise[] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628. We now know, however, that independent agencies have exercised "considerable executive power without Presidential oversight." *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring). The Special Counsel is a notable example. He enforces a host of statutes, including the Civil Service

Reform Act and various anti-discrimination laws, *see* 5 U.S.C. § 1216, by initiating disciplinary actions against federal employees and prosecuting complaints of prohibited personnel practices before the Merit Systems Protection Board, *see, e.g.*, *id.* §§ 1215–1216. To aid in this enforcement, he is empowered to "investigate" complaints, *id.* § 1212, by "issu[ing] subpoenas" and "order[ing] the taking of depositions," *id.* § 1212(b)(2). He may also appoint "the legal, administrative, and support personnel necessary to perform the functions of the Special Counsel," *id.* § 1212(d)(1), and he "may prescribe such regulations as may be necessary to perform the functions of the Special Counsel," *id.* § 1212(e). All of these functions are quintessentially executive, subject to the President's authority to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. Yet Congress has purported to circumscribe the President's power to remove the Special Counsel: "The Special Counsel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1211(b).

Humphrey's Executor was also wrong to recognize a class of officers—"a *de facto* fourth branch of Government," *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring)—that acts "in part quasi-legislatively and

in part quasi-judicially." 295 U.S. at 628. *Humphrey's Executor* did so based on reasoning "devoid of textual or historical precedent for the novel principle it set forth." *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting). If an officer exercises "quasi-legislative" power, that officer belongs in the legislative branch. If, on the other hand, an officer exercises "quasi-adjudicative" power, that officer belongs in the judicial branch. It could hardly be otherwise, since Congress "lacks the authority to delegate its legislative power." *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring) (citing *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001)). Congress also "cannot authorize the use of judicial power by officers acting outside of the bounds of Article III." *Id.* (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)).[2]

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[2] There are exceptions, of course, as part of the checks and balances of government. For example, the Constitution gives the President a limited role in the legislative process (e.g., to "recommend to [Congress] such Measures as he shall judge necessary and expedient," U.S. Const. art. II, § 3; and to decide whether to "approve" an act of Congress upon presentment, U.S. Const. art. I, § 7, cl. 2). An executive officer might assist the President in performing these duties. But these explicit textual exceptions merely prove the rule that no implicit exceptions for "quasi-legislative" or "quasi-adjudicative" functions exist.

Not surprisingly, *Humphrey's Executor* has seen its already shaky foundations eroded over the years. In *Morrison*, this Court sidestepped *Humphrey's Executor*'s reliance "on the terms 'quasi-legislative' and 'quasi-judicial,'" instead grounding its endorsement of tenure protection for the independent counsel on the conclusion that tenure protection did not "unduly trammel[] on executive authority." 487 U.S. at 689, 691. The decision similarly avoided scrutiny in *Free Enterprise Fund v. Public Company Accounting Oversight Board*, in part because the parties there "agree[d] that the Commissioners [of the Securities and Exchange Commission] cannot themselves be removed by the President except under the *Humphrey's Executor* standard of 'inefficiency, neglect of duty, or malfeasance in office.'" 561 U.S. 477, 487 (2010) (quoting *Humphrey's Ex'r*, 295 U.S. at 620). But the majority opinion in *Free Enterprise Fund* is replete with reminders that allowing officers to "execute the laws" without plenary presidential supervision "is contrary to Article II's vesting of the executive power in the President"—a principle squarely in conflict with *Humphrey's Executor*. 561 U.S. at 496. And most recently, in *Seila Law* and again in *Collins*, this Court took particular care not to widen the application of *Humphrey's Executor* beyond its essential facts.

For all these reasons, respondent is not entitled to the removal protections set forth in 5 U.S.C. § 1211(b), and that statute should be held unconstitutional. And though the Court need not do so to grant the Secretary's application to vacate the district court's order of reinstatement, the Court should hold, in an appropriate case, that *Morrison* and *Humphrey's Executor* are no longer good law. Those cases should not serve as precedent for further encroachment on the President's power of removal by the legislative branch.

II. By threatening the separation of powers, "independent" executive officers and agencies in turn threaten state sovereignty.

Whether Congress may shield executive officials from presidential oversight has grave ramifications for *amici* States. Before joining the union, "the several States had absolute and unlimited sovereignty within their respective boundaries." *Respublica v. Cobbett*, 3 U.S. 467, 473 (Pa. 1798). By entering a compact under the Constitution, the States "surrendered" some of that sovereignty to the United States. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 435 (1793) (Iredell, J., dissenting). But "in every instance where [their] sovereignty ha[d] not been delegated to the United States, [the States remained] completely sovereign." *Id.* The result was a

"system of government" that "differ[ed], in form and spirit, from all other governments, that ha[d] [t]heretofore existed in the world"—a carefully calibrated balance of power between States and the federal government. *Respublica*, 3 U.S. at 473. "[T]he United States ha[s] no claim to any authority but such as the States have surrendered to [it]." *Chisholm*, 2 U.S. at 435 (Iredell, J., dissenting).

When ceding that sovereign power, the States ensured that it would be divided among distinct branches of the federal government. They "viewed the principle of the separation of powers as the central guarantee of a just government." *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 870 (1991). To protect their sovereignty and preserve individual liberty, the founding States "scrupulously avoid[ed] concentrating power in the hands of any single individual." *Seila Law*, 591 U.S. at 223. The one exception was the executive branch. Because an "energetic executive" is "essential" to perform that branch's "unique responsibilities," the Framers decided to "fortif[y]" that power in "one man." *Id.* at 223–24. To mitigate their concerns over power consolidation, they made the executive branch "the most democratic and politically accountable" in the federal government. *Id.* at 224. Only the President and Vice President are

"elected by the entire Nation." *Id.* And because of the nature of the electoral college, they are not just elected by the People, but also by the States. This carefully calibrated "allocation of powers"—essential to the compact the States agreed to upon joining the union—protects "libert[y]" and state "sovereignty." *Bond*, 564 U.S. at 221.

Independent agencies threaten that compact. *See, e,g.*, *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring) (observing that cases like *Humphrey's Executor* "laid the foundation for a fundamental departure from our constitutional structure"). They combine the founding States' worst fears: the consolidation of power in one or a few democratically unaccountable people. *See* 591 U.S. at 222–24. Without "a politically accountable officer [to] take responsibility" for the exercise of executive power, "the public [and the States] can only wonder 'on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall." *Arthrex*, 594 U.S at 16 (quoting *The Federalist* No. 70, at 476 (A. Hamilton) (Jacob E. Cooke, ed., 1961)). By eviscerating the "clear and effective chain of command down from the President, on whom all people vote," the actions of independent agencies are

deprived of "legitimacy and accountability to the public" and the States. *Id.* at 11 (internal quotation marks omitted).

One need not search long for an egregious example. Just last year, the Federal Trade Commission ("FTC") banned noncompete clauses in employment contracts nationwide. Non-Compete Clause Rule, 89 Fed. Reg. 38,342 (May 7, 2024). In "the most extraordinary assertion of authority in the Commission's history," a few unaccountable commissioners "prohibit[ed] a business practice that has been lawful for centuries" and "invalidate[d] thirty million existing contracts." Fed. Trade Comm'n, *Dissenting Statement of Commissioner Andrew N. Ferguson* 1 (June 28, 2024), https://tinyurl.com/3j8dxrtx. And they did so even though "[c]ommercial agreements traditionally are the domain of state law." *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 262 (1979). Nor did the FTC care that 46 states had exercised their sovereign authority to permit noncompete agreements in some form. *See* Ferguson Dissent at 14. But because of the FTC's independence, the States have no one to hold to account for that dramatic intrusion on their sovereignty.[3] The FTC wields

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[3] The FTC's authority to promulgate the non-compete rule is being tested in several pending cases. *See Ryan, LLC v. FTC*, No. 3:24-cv-986,

extraordinary authority to usurp state sovereignty with no political accountability. That is not the sovereign power the States ceded the federal government when they joined the union.

III. Federal courts lack equitable authority to reinstate public officials.

Not only is respondent wrong on the merits, he is wrong on the remedy. Federal courts may not reinstate public officers absent an act of Congress. *See, e.g.*, 42 U.S.C. § 2000e-5(g) (authorizing courts to "reinstate[]" employees who suffer discrimination). Respondent has cited no such act. Nor is Congress's silence surprising—orders reinstating public officials hamper effective governance, invade state sovereignty, and beget rushed jurisprudence.

A. Respondent seeks relief the courts cannot grant. He requests the equitable remedy of reinstatement to his role as head of the Office of Special Counsel. *See* DE1 at 13–14, *Dellinger v. Bessent*, No. 1:25-cv-385 (D.D.C.). Yet the only equitable remedies that a federal court may grant are those that were "traditionally accorded by courts of equity." *Grupo*

2024 WL 3879954 (N.D. Tex. Aug. 20, 2024), *appeal docketed*, No. 24-10951 (5th Cir. Oct. 18, 2024); *Props. of the Vills., Inc. v. FTC*, No. 5:24-cv-316, 2024 WL 3870380 (M.D. Fla. Aug. 15, 2024), *appeal docketed*, No. 24-13102 (11th Cir. Sept. 24, 2024).

Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999). And history teaches that "[a] court of equity has no jurisdiction over the appointment and removal of public officers." *Walton v. House of Representatives of Okla.*, 265 U.S. 487, 490 (1924); *see Sawyer*, 124 U.S. at 210 ("It is equally well settled that a court of equity has no jurisdiction over the appointment and removal of public officers[.]").

That rule flows from English common law. Recognizing the critical "distinction between judicial and political power," English courts historically would not wield equity to vindicate a litigant's "political right[]" to office. *Georgia v. Stanton*, 73 U.S. (6 Wall.) 50, 71, 76 & n.20 (1867) (collecting cases); *see Sawyer*, 124 U.S. at 212 (collecting cases, including *Att'y Gen. v. Earl of Clarendon*, 17 Ves. Jr. 491, 498, 34 Eng. Rep. 190, 193 (Ch. 1810)). In *Earl of Clarendon*, for instance, the English Court of Chancery declined to remove public-school officers on the ground that they lacked necessary legal qualifications. 17 Ves. Jr. at 493, 34 Eng. Rep. at 191. According to that court, a court of equity "has no jurisdiction with regard either to the election or the [removal] of" officers. *Id.* at 498, 34 Eng. Rep. at 193. Contemporary English cases tracked that reasoning. *See also* Joseph Story, *Commentaries on Equity Pleadings and the*

Incidents Thereof §§ 467–70 (2d ed. 1840) (explaining that traditional equity courts would not adjudicate rights of a "political nature" and citing examples); Seth Davis, *Empire in Equity*, 97 Notre Dame L. Rev. 1985, 2011–12 (2022).[4]

American courts imported that principle after the Framing. In the early 19th century, courts nationwide denied that equity chancellors could afford a removed official relief, even when the official's ouster was illegal and unauthorized. *Tappan v. Gray*, 9 Paige Ch. 506, 508–09 (Ch. Ct. N.Y. 1842); *see also Hagner*, 7 Watts & Serg. at 105; *Sawyer*, 124 U.S.

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[4] Although *Earl of Clarendon* and some other cases cited in *Sawyer* involved corporate officers, those legal entities were historically treated more like governments and public entities. Colonial governments, for instance, were created through corporate charters, with "shareholders" acting like modern-day voters and voting for corporate boards that looked like modern-day state and local governments. Nikolas Bowie, *Why the Constitution Was Written Down*, 71 Stan. L. Rev. 1397, 1416–21 (2018); *see also* Letter from John Adams to the Inhabitants of the Colony of Massachusetts-Bay, April 1775, https://founders.archives.gov/documents/Adams/06-02-02-0072-0015. And as the Pennsylvania Supreme Court noted in *Hagner v. Heyberger*, limits on equitable jurisdiction that applied to "private corporations" apply "*à fortiori*" to "the case of a public officer of a municipal character." 7 Watts & Serg. 104, 105 (Penn. 1844); *see also* W.S. Holdsworth, *English Corporation Law in the 16th and 17th Centuries*, 31 Yale L.J. 382, 383–84 (1922) (noting that for both public and private corporations, "creation by and subordination to the state are the only terms upon which the existence of large associations of men can be safely allowed to lead an active life").

at 212 (collecting cases). *Hagner* is emblematic. In that case, the Supreme Court of Pennsylvania declined to enjoin a defendant from unlawfully acting as a school director because it possessed no more power than "an English court of chancery." *Hagner*, 7 Watts & Serg. at 106–07. Because chancery courts traditionally "would not sustain the injunction proceeding to try the election or [removal] of corporators of any description," Pennsylvania's high court held that it could not either. *Id.* Other courts took a similar tact throughout Reconstruction.[5]

This Court later confirmed that historical equitable constraint in *Sawyer*. There, a locally elected officer sought an injunction from a federal court barring local officials from removing him. 124 U.S. at 201. After the local officials were held in contempt of that injunction, the Court issued a writ of habeas corpus to vacate their convictions because the

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[5] *See, e.g.*, *Cochran v. McCleary*, 22 Iowa 75, 91 (1867) ("The right to a public office or franchise cannot, as the authorities above cited show, be determined in equity."); *Sheridan v. Colvin*, 78 Ill. 237, 247 (1875) ("A court of equity is not a proper tribunal for determining disputed questions concerning the appointment of public officers, or their right to hold office[.]"); *Delahanty v. Warner*, 75 Ill. 185, 186 (1874) (court of chancery had no power to restrain local officials from removing the superintendent of streets from his post); *Beebe v. Robinson*, 52 Ala. 66, 73 (1875) (similar); *Taylor v. Kercheval*, 82 F. 497, 499 (C.C.D. Ind. 1897) (similar); *State ex rel. McCaffery v. Aloe*, 54 S.W. 494, 496 (Mo. 1899) (similar).

injunction was issued without jurisdiction. The Court explained that a federal court in equity "has no jurisdiction . . . over the appointment and removal of public officials." *Id.* at 210. And a wall of contemporary treatises echoed that understanding.[6] As one 19th-century commentator put it, "[n]o principle of the law of injunctions, and perhaps no doctrine of equity jurisprudence, is more definitely fixed or more clearly established than that courts of equity will not interfere by injunction to determine questions concerning the appointment of public officers or their title to office." 2 High, *Law of Injunctions* § 1312.

This Court has doubled down on that rule. A decade after *Sawyer*, the Court reiterated that equity courts may "not, by injunction, restrain an executive officer from making a wrongful removal of a subordinate appointee, nor restrain the appointment of another." *White v. Berry*, 171 U.S. 366, 377 (1898). The Court restated the point in *Walton*: While federal courts are "*particularly* . . . without jurisdiction over the

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[6] *See* 2 James L. High, *Treatise on the Law of Injunctions* § 1312 (2d ed. 1880); 1 Howard Clifford Joyce, *A Treatise on the Law Relating to Injunctions* § 55 (1909); 4 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* § 1760 (4th ed. 1918); 2 Eugene McQuillin, *A Treatise on the Law of Municipal Corporations* § 582 (1911).

appointment and removal of state officers," they no more possess "jurisdiction over the appointment and removal of [other] public officers." 265 U.S. at 490 (emphasis added). And it repeated the principle in *Baker v. Carr*—"federal equity power [may] not be exercised to enjoin a state proceeding to remove a public officer." 369 U.S. 186, 231 (1962); *see also Fineran v. Bailey*, 2 F.2d 363, 363 (5th Cir. 1924) ("It is well settled by the decisions of the Supreme Court that a District Court of the United States has no jurisdiction over the appointment and removal of public officers.").

In contrast, there is no established historical tradition of equity courts reinstalling officials, at least not without express statutory authorization. "No English case has been found of a bill for an injunction to restrain the appointment or removal of a municipal officer." *Sawyer*, 124 U.S. at 212. Aside from the outlier case identified in the Government's application, *see Berry v. Reagan*, No. 83-3182, 1983 WL 538, at *2 (D.D.C. Nov. 14, 1983), we know of no case in which a federal court has ordered the reinstatement respondent seeks.[7] The lack of historical pedigree for

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[7] The only other arguable candidate we have found is *Bond v. Floyd*, in which this Court held that the Georgia legislature violated the First Amendment in refusing to seat a newly elected member for engaging in anti-Vietnam War speech while the member-elect was a private citizen.

reinstatement suggests that it "was unknown to traditional equity practice," *Grupo Mexicano*, 527 U.S. at 327, and divorced from the "jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)," *id.* at 318–19.

B. Tradition is often grounded in common sense. Here, there are at least three reasons why courts should not wade into the messy business of reinstatement.

First, reinstatement hampers effective governance. Like a grain of sand in a gear, forcing the sovereign to retain an official it believes is unfit threatens to halt the levers of government and risks intra-office "chaos." *Nixon v. United States*, 506 U.S. 224, 236 (1993) (questioning what relief a federal court could grant a judge who had been impeached and removed from office); *Abbott v. Thetford*, 529 F.2d 695, 708 (5th Cir.

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385 U.S. 116, 137 (1966). But *Bond v. Floyd* did not grapple with the limits on the federal courts' remedial authority discussed by *Walton* or *Sawyer*. *See id.* At most, *Bond v. Floyd* represents an implicit "drive-by" ruling that carries "no precedential effect." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998). The issue of the equitable authority of the federal courts "merely lurk[ed] in the record," so the holding of *Bond v. Floyd* cannot "be considered as having . . . constitute[d] precedent[]" on the question. *Webster v. Fall*, 266 U.S. 507, 511 (1925).

1976) (Gewin, J., dissenting) (arguing that reinstating a state judicial employee would impair the court's judicial functions), *majority vacated and dissent adopted upon reh'g en banc*, 534 F.2d 1101 (5th Cir. 1976).

Second, reinstatement invades state sovereignty. "The authority of the people of the States to determine" their state officers "goes beyond an area traditionally regulated by the States; it is a decision of the most fundamental sort for a sovereign entity" that lies at "the heart of representative government." *Gregory v. Ashcroft*, 501 U.S. 452, 460, 463 (1991). The historical limit on federal reinstatement power preserves "the scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts." *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 349 (1951).

Finally, reinstatement encourages rushed jurisprudence. When officials believe that reinstatement lies just behind the courthouse door, they will often seek emergency injunctive relief. *See, e.g.*, *Warren v. DeSantis*, No. 4:22-cv-302 (N.D. Fla.) (in which a district judge ordered an extraordinarily compressed trial schedule of just over three months in a case posing many complex issues of constitutional significance). Those fast-paced proceedings "tend to force judges into making rushed, high-

stakes, low-information decisions" on constitutional issues of immense importance. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (mem.) (Gorsuch, J., concurring). Were this Court to clarify that reinstatement is unavailable, there would be no need to rush a ruling, leaving courts with enough time to thoroughly consider the legal questions presented.

CONCLUSION

The Court should grant the Secretary's application to vacate the order of the district court.

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