No. 24-3174

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FEDERAL TRADE COMMISSION,
Plaintiff-Appellee,

—v.—

WALMART INC.,
Defendant-Appellant

On Appeal from the United States District Court for
the Northern District of Illinois, No. 1:22-cv-03372
The Honorable Manish S. Shah, District Judge

BRIEF OF *AMICUS CURIAE* PROFESSOR CHAD SQUITIERI IN SUPPORT OF APPELLANT AND REVERSAL

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February 19, 2025

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-3174

Short Caption: Federal Trade Commission v. Walmart Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Amicus Curiae Professor Chad Squitieri

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
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(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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Attorney's Signature: /s/ Michael Huerta Date: 02/19/2025

Attorney's Printed Name: Michael Huerta

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INTEREST OF AMICUS CURIAE[1]

Chad Squitieri is an Assistant Professor of Law at Catholic University of America's Columbus School of law. There, he serves as the Director of the Separation of Powers Institute and as a Managing Director of the Center for the Constitution and the Catholic Intellectual Tradition.[2] He has an interest in the sound development of separation-of-powers jurisprudence, including judicial decisions relating to the nature of federal executive power. He teaches administrative law, and his scholarship focuses on the constitutional separation of powers and administrative law.

Amicus has a unique background and perspective to offer the Court here. As an originalist law professor who previously worked on appellate litigation and served as a Special Assistant to a member of the President's Cabinet, *Amicus* can offer unique insight concerning the relationship between originalist scholarship and the practicalities of litigating before federal courts bound by Supreme Court precedent. *Amicus's* scholarly publications concerning the relationship between the President and administrative agencies include: (1) *Bringing the Antiquities Act into the Modern Age*, 32 Geo. Mason L. Rev. F. 27 (2025); (2) *Treating the Administrative as Law: Responding to the "Judicial Aggrandizement" Critique*, 110 Cornell L. Rev. Online 1

[1] This brief has not been authored, in whole or in part, by counsel to any party in this appeal. No person has contributed money that was intended to fund preparation or submission of this brief. All parties have consented to the filing of this brief.

[2] Professor Squitieri serves as an amicus in his personal capacity only. His institutional affiliation is provided for identification purposes.

(2024); (3) *Administrative Virtues,* 76 Admin. L. Rev. 599 (2024); and (4) *"Recommend … Measures": A Textualist Reformulation of the Major Questions Doctrine,* 85 Baylor L. Rev. 706 (2023).

INTRODUCTION

In 1935, the Supreme Court held that the Constitution permitted Congress to grant for-cause removal protection to commissioners of the Federal Trade Commission. *See Humphrey's Executor v. United States*, 295 U.S. 602 (1935). That decision is inconsistent with the original understanding of the Constitution. The Supreme Court may soon say as much. But until that happens, *Humphrey's* remains binding Supreme Court precedent that this Court must follow.

To say that this Court must follow *Humphrey's*, though, is not to say that this Court must extend that mistaken precedent to new settings. To the contrary, a court faced with a constitutionally mistaken decision—such as *Humphrey's*—has a duty to confine the mistaken precedent to the fullest extent permissible. That is what this Court should do here.

Because today's FTC is exercising powers far beyond those wielded by the FTC of 1935, this Court should not extend *Humphrey's* to cover the exercise of executive power at hand in this case. From there, this Court should reverse. Without *Humphrey's*, nothing justifies the FTC's exercise of executive power without Presidential superintendence. And although the full contours of awarding a proper remedy are beyond the scope of this brief, this Court should hesitate before crafting a remedy that would require inquiring too deeply into the mind of a hypothetical Congress—like purporting to "strike down" statutory removal provisions once ruled constitutional by the Supreme Court. This Court can instead offer a more tailored (and less speculative) remedy by analyzing the statutory authority for the FTC's case,

concluding that statutory authority to be constitutionally invalid, and dismissing this particular exercise of that unconstitutional authority.

ARGUMENT

I. *Humphrey's* conflicts with the Constitution's original public meaning.

In 1914, Congress created the Federal Trade Commission. Federal Trade Commission Act, Pub. L. 63-203, 38 Stat. 717 (1914) (codified at 15 U.S.C. § 41 *et seq.*). Congress tasked it with policing unfair competitive practices affecting interstate commerce. § 41. The FTC would be governed by five "commissioners." *Id.* Each commissioner would serve a term of seven years. *Id.* And the President could remove commissioners only for "inefficiency, neglect of duty, or malfeasance in office." *Id.*

By coupling a "for-cause" limitation on the President's authority with executive power, Congress departed from a traditional understanding of the President's removal power. "After very long debates" in the first Congress, the "opinion prevailed, as most consonant to the text of the Constitution," that the removal power "remained with the President." Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 Documentary History of the First Federal Congress 893 (2004). "The traditional view of" of the Decision of 1789, "held by James Madison, Alexander Hamilton, and William Howard Taft, is that because the Foreign Affairs Act conveyed no removal authority, but rather discussed what would happen when the President removed, the Act presumed that the Constitution granted the President a removal power." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1021 (2006).

But the Supreme Court broke from that traditional understanding in 1935 when it decided *Humphrey's Executor*. There, it held that because the FTC was "wholly disconnected from the executive department," Congress's removal protections did not cause "an unconstitutional interference with the executive power of the President." 295 U.S. at 626, 630.

That decision was wrong. For nearly four decades, the Court has "repudiated almost every aspect" of it and left its foundations "nonexistent." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 239, 248 (2020) (Thomas, J., concurring in part and dissenting in part). And now even the executive branch refuses to defend it. *See* Letter from Sarah Harris, Acting Solicitor Gen., to Richard Durbin, U.S. Sen. (Feb. 12, 2025), https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf.[3] For good reason. *Humphrey's* clashes with the text, history, and tradition of the Constitution—including the separation-of-powers principles that the Constitution enshrines.

A. *Humphrey's* undermines the original meaning of executive power.

The *Humphrey's* Court based its conclusion on one overarching descriptive point: The FTC's role was "neither political nor executive, but predominantly quasi judicial and quasi legislative." *Humphrey's*, 295 U.S. at 624. The Court conceded that if the agency *were* executive in nature, then its rationale would fail. "The fundamental necessity of maintaining each of the three general departments of government

[3] *See also* @AFergusonFTC, X (Feb. 14, 2025, 9:38 AM) ("Humphrey's Executor should be overruled."), https://x.com/AFergusonFTC/status/1890410377395003753.

entirely free from the control or coercive influence" of "either of the others," it reasoned, "is hardly open to serious question." *Id.* at 629. But the Court held the FTC commissioners "exercise[d] no part of the executive power vested by the Constitution in the President." *Id.* at 628. So it concluded that undisputed principles of separation of powers need not apply. *Id.* The FTC was "wholly disconnected from the executive department." *Id.* at 630. It thus could not "be characterized" as "executive." *Id.* at 628.

Even if it were possible for any executive-branch agency to be "wholly disconnected" from the executive branch, that characterization ignores the FTC's nature. The FTC Act empowered the FTC to prevent entities "from using unfair methods of competition in commerce" by issuing cease-and-desist orders and enforcing them in court. *Id.* at 620 (citing 15 U.S.C. § 45). And *Humphrey's* itself described the FTC as a "body created by Congress to carry into effect legislative policies embodied in the statute." *Id.* at 628. In other words, Congress gave the FTC "the power to execute the law[]." *Myers v. United States*, 272 U.S. 51, 117 (1926). That power is unmistakably executive. *See id.*[4]

So "*Humphrey's Executor* does not even satisfy its own exception" to the general rule allowing the President at-will removal of executive officers. *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part and dissenting in part). All lawful executive

[4] *See also Seila Law*, 591 U.S. at 216 n.2 ("The Court's conclusion [in *Humphrey's*] that the FTC did not exercise executive power has not withstood the test of time."); Michael W. McConnell, The President Who Would Not Be King 168 (2020) (noting that *Humphrey's* description of the FTC's role recited "the very definition of an executive function").

power is the President's—"alone." *Id.* at 213. Article II provides that "[t]he executive Power shall be vested in a President of the United States" who "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1, 3. 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). And the Article II "vesting" and "take care" clauses have long been understood to require that the President enjoy the power to freely remove officers in the executive branch.[5]

As James Madison said to the First Congress, if "any power" is executive, "it is the power of appointing, overseeing, and controlling those who execute the laws." 1 Annals of Cong. 463 (1789). And if "the duty to see the laws faithfully executed be required at the hands of the" President, then "he should have that species of power which is necessary to accomplish that end." *Id.* at 496.

That power is the power to remove. Without it, the President is robbed of his most effective tool to ensure the "buck stops" with him, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 493 (2010), because when "an officer is appointed, it is only the authority that can *remove* him, and not the authority that *appointed* him, that he must fear," *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)

[5] At least one prominent scholar has suggested that the nature of the removal power might depend on which of these clauses gives rise to it. If arising from the Vesting Clause, then the removal power "must extend to all officers and officials in the government." McConnell, *supra* note 3, at 165. But if arising from the Take Care Clause, then the "President's need for unfettered removal authority arguably extends only to officers with significant discretionary power." *Id.* That distinction makes no difference with respect to FTC commissioners. They were hardly limited to the exercise of ministerial, rather than discretionary, power.

(quotation omitted) (emphasis added). Plus, with no removal power, "the President could not be held fully accountable for discharging his own responsibilities." *Free Enter. Fund*, 561 U.S. at 514. And the government would be "impervious to democratic change." Michael W. McConnell, The President Who Would Not Be King 167 (2020).

B. *Humphrey's* eviscerates constitutional structure.

Besides *Humphrey's* dubious description of the FTC, the Court's opinion erred for a more fundamental reason. Its rationale recognized a "*de facto* fourth branch of Government," *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring in part and dissenting in part)—a democratically unaccountable branch of administrative agencies brimming with unelected federal bureaucrats. That is nowhere permitted in our Nation's constitutional structure.

The Constitution sets out three branches of government. Three. It vests in each distinct powers: legislative, executive, and judicial. *See* U.S. Const. art. I, § 1; art. II, § 1, cl. 1; art. III, § 1.[6] "No political truth is … of greater intrinsic value" than the need for such distinct separation of powers. The Federalist No. 47 (James Madison). That is how "[a]mbition … counteract[s] ambition." The Federalist No. 51 (James Madison). As Justice Scalia put it, "the real key to ... the distinctiveness of America is the structure of our government." Scalia on Separation of Powers, CSPAN, (Oct. 5,

[6] *See also* Chad Squitieri, *Treating the Administrative as Law: Responding to the "Judicial Aggrandizement" Critique*, 110 Cornell L. Rev. Online 1, 23-24 (2024) (comparing the American and English contexts and referring to "the [United States] Constitution's unique creation of three coequal powers").

2011), https://www.c-span.org/clip/senate-committee/user-clip-scalia-on-separation-of-powers/4464175, at 2:20-2:29.

The FTC as imagined by *Humphrey's* makes no effort to comply with this tripartite separation of governmental power. Instead, the Court portrayed a blended entity falling outside the Constitution's tripartite structure. The FTC was a "quasi judicial and quasi legislative" body, the Court said, "called upon to exercise the trained judgment of a body of experts." 295 U.S. at 624. But it was "independent of executive authority" and "free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625-26. If the Constitution did allow such an agency, then one might conclude that FTC commissioners must be shielded from removal to accomplish what "Congress sought to realize." *Id.* at 626.

But thankfully, the Constitution does *not* permit any agency like that. "[H]andwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial,'" *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part and dissenting in part), might have sounded nice to those who felt "the administrative process springs from the inadequacy of a simple tripartite form of government to deal with modern problems," James M. Landis, The Administrative Process 1 (1938). But such phrases undermine the careful way the Constitution separates and vests federal power. The Constitution's separation-of-powers principles cannot tolerate freewheeling agencies that "straddle multiple branches of Government" and thus do not answer fully to the People's elected representatives. *Seila Law*, 591 U.S. at 247

(Thomas, J., concurring in part and dissenting in part). The Constitution vests an enumerated set of "legislative Powers" in Congress, U.S. Const. art. I, § 1, and the "judicial Power of the United States" in "one supreme Court" (and other inferior Article III courts), U.S. Const. art. III, § 1. Neither of these powers may be freely delegated to other actors. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (legislative power); *Stern v. Marshall*, 564 U.S. 462, 485 (2011) (judicial power).[7]

The novel theory of "quasi" power observable in *Humphrey's* no longer carries persuasive weight. *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring in part and dissenting in part). And its "conclusion that the FTC did not exercise executive power has not withstood the test of time." *Id.* at 216 n.2. Agencies regularly regulate and adjudicate. But Congress's inability to freely delegate its own legislative powers, let alone the federal judiciary's judicial power, means that "under our constitutional structure," such agency actions—whatever their form—"*must be* exercises of[] the 'executive Power.'" *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).[8] Otherwise agencies would not fit into the Constitution's tripartite scheme.

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[7] *See also* Br. of Amicus Chad Squitieri, *FCC v. Consumers' Rsch. et al.*, No. 24-354 (U.S. Feb. 18, 2025), at 1 ("The Constitution's nondelegation principle," which "should be enforced differently" for different powers, "is grounded in the conception of enumerated power.").

[8] *See also* Chad Squitieri, *Is the Administrative State a "Faithful Development?,"* Law & Liberty (Jan. 9, 2023), https://lawliberty.org/is-the-administrative-state-a-faithful-development/ ("Administrative agencies, which fall within the executive branch if they are to fall anywhere at all, are thus poorly fed when they devour the legislative and judicial powers belonging to Congress and the judiciary.").

So when federal legislation brings administrative agencies into existence, Congress cannot "shift[] executive power to a *de facto* fourth branch of Government," *Seila Law*, 591 U.S. at 240 (Thomas, J., concurring in part and dissenting in part). Instead, Congress may work with the President to enact legislation creating agencies that "are staffed with administrators who exercise executive power on behalf of the President." Chad Squitieri, *"Recommend ... Measures": A Textualist Reformulation of the Major Questions Doctrine*, 75 Baylor L. Rev. 706, 747 (2023).

Nor may Congress shift such executive power to an entity that is "independent of" the President's authority. *Humphrey's*, 295 U.S. at 625. The Constitution concentrates all the power of the executive branch in a single President of the United States. As Madison put it, "the weight of the legislative authority requires that it should be thus divided," while "the weakness of the executive may require" that "it should be fortified." The Federalist No. 51. Indeed, the "Framers deemed an energetic executive essential to 'the protection of the community against foreign attacks,' 'the steady administration of the laws,' 'the protection of property,' and 'the security of liberty.'" *Seila Law*, 591 U.S. at 223-24 (quoting The Federalist No. 70 (Alexander Hamilton)). So "they chose not to bog the Executive down with the 'habitual feebleness and dilatoriness' that comes with a 'diversity of views and opinions.'" *Id.* at 224. Instead, "they gave [him] the '[d]ecision, activity, secrecy, and dispatch' that 'characterise the proceedings of one man.'" *Id.* (quoting The Federalist No. 70).

"The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable

to the people through regular elections." *Id.* at 224. Within the executive branch, "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President." 1 Annals of Cong. 499 (1789). That way, with executive responsibility in one place, the American public can "determine on whom the blame" should "fall." The Federalist No. 70.

These principles—constitutional text, first principles, governmental structure, and democratic accountability—are largely missing from *Humphrey's* analysis. Instead, *Humphrey's* purports to recognize a new and illegitimate fourth branch of government that comprises "expert" administrative agencies exercising non-existent "quasi" powers free from Presidential oversight. Whatever the theoretical benefits of such a branch, our Nation need not countenance its antidemocratic nature. "One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Free Enter. Fund*, 561 U.S. at 499. As then-Professor Kagan once explained, the "agencies whose heads the President may not remove at will" reduced the President to acting "not as the commander, but as a simple petitioner of the administrative state." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2273, 2308-09 (2001). "Any other approach often would have proved futile (and therefore embarrassing)." *Id.* at 2309. That, in short, is the fault throughout *Humphrey's*. It embraces a vast bureaucracy that can only be housed within the executive branch. But it reduces the President to a mere "cajoler-in-chief," *Free Enter. Fund.*, 561 U.S. at 502, of the branch that should be answering to him (and him to the People).

At bottom, the heads of independent agencies, like the FTC commissioners in *Humphrey's*, are "neither elected by the people nor supervised in their day-to-day activities by the elected President." *In re Aiken Cnty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). If the President does not control them, neither do "We the People," whose Constitution vests all federal executive power in a single President held accountable to the People by election.

II. *Humphrey's* does not settle this case.

Despite its flaws, *Humphrey's* remains binding on this Court. Three points:

1. Federal judges are "faithful agents of" the sovereign People's Constitution. *West Virginia v. EPA*, 597 U.S. 697, 736 (2022) (Gorsch, J., concurring) (quoting Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B. U. L. Rev. 109, 169 (2010)). As faithful agents, federal judges should decide "every case faithful to the text and original understanding of the Constitution, to the maximum extent permitted by a faithful reading of binding precedent." *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting). So courts "should tread carefully before extending" a precedent when, as here, "little available evidence suggests that" it "is correct as an original matter." *Garza v. Idaho*, 586 U.S. 232, 259 (2019) (Thomas, J., dissenting). In those cases, courts "should resolve questions about the scope of" precedent "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), *rev'd in part and aff'd in part*, 561 U.S. 477.

Simply put, judges, on every level, "always have a duty to interpret the Constitution in light of its text, structure, and original understanding." *Parker v.*

Cnty. of Riverside, 78 F.4th 1109, 1116 (9th Cir. 2023) (Nelson, J., concurring) (quotations omitted). When "a faithful reading of precedent shows it is not directly controlling," constitutional considerations favor "confining the precedent, rather than extending it." *NLRB. v. Int'l Ass'n of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local 229, AFL-CIO*, 974 F.3d 1106, 1117 (9th Cir. 2020) (Bumatay, J., dissenting from denial of rehearing en banc).[9]

This Court, then, should follow *Humphrey's* as binding. But it should extend *Humphrey's* no further.

2. The "FTC as it existed at the time of *Humphrey's*" is used as "a yardstick for measuring the constitutional significance of an agency's executive power." *Collins v. Yellen*, 594 U.S. 220, 287 (2021) (Sotomayor, J., concurring in part and dissenting in part). And the 2025 FTC is very different from the 1935 FTC at issue in *Humphrey's*.

In the near century since its inception, the FTC has changed. A lot. Most notably, Congress substantially expanded the FTC's powers through the 1970s. *See* Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973); Pub. L. No. 93-637, §§ 205-206, 88 Stat. 2183, 2200-02 (1975). When it did, things went a bit off the rails. *See West Virginia*, 597 U.S. at 741 (Gorsuch, J., concurring) (referring to "the explosive growth of the administrative state since 1970").

[9] *See also Preterm-Cleveland v. McCloud*, 994 F.3d 512, 543 (6th Cir. 2021) (Bush, J., concurring) ("When no holding of the Supreme Court can decide a question, as in the case before us, our duty to interpret the Constitution in light of its text, structure, and original understanding takes precedence." (quotations omitted)).

First, Congress authorized the FTC to "bring suit in a district court of the United States to enjoin" an act or practice that violates "any provision of law enforced by the Federal Trade Commission." 15 U.S.C. § 53(b). Second, Congress authorized the FTC to "commence a civil action to recover a civil penalty in a district court of the United States" related to unfair methods of competition and unfair or deceptive trade practices. § 45. This economic enforcement power maxed out at $10,000 per violation. § 45(m)(1)(A). But the FTC could treat "each day of continuance ... as a separate violation," § 45(m)(1)(C). Finally, Congress authorized the FTC to file suit—in federal *or state court*—to seek the "rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice." §§ 57b(a)-(b). This enforcement power included seeking "a permanent injunction." § 53(b).[10] Altogether, through the 1970s, the FTC gained remarkable enforcement powers as shown below:

[10] The 1935 FTC's power to initiate federal-court actions was limited to enforcing cease-and-desist orders. Only if "the order [was] disobeyed, [could] the commission [] apply to the appropriate Circuit Court of Appeals for its enforcement." *Humphrey's*, 295 U.S. at 620–21. That meant any "adverse consequences" would "come from the courts, not the commission" because the respondent "violated that court order." Peter C. Ward, *Restitution for Consumers Under the Federal Trade Com'n Act: Good Intentions or Congressional Intentions?*, 4 Am. U. Law Rev. 1139, 1147–48 (1992). Ultimately, the post-1935 additional powers meant the FTC no longer had to wait for violations of cease-and-desist orders before taking action in federal court.

	FTC of 1935	FTC of 2025
The power to seek civil penalties.	No	Yes
The power to seek injunctions in state or federal court.	No	Yes
The power to bring suits in federal court to enjoin certain acts or practices.	No	Yes
The power to seek rescission or reformation of contracts in state or federal court.	No	Yes
The power to seek the refund of money or return of property in state or federal court.	No	Yes
The power to seek the payment of damages in state or federal court.	No	Yes

These post-1935 powers—still exerted by the FTC today—are hardly "mere legislative or judicial aid[s.]" *Seila Law*, 591 U.S. at 218. They involve a "discrete aspect of the executive power—namely, the executive branch's traditional discretion over whether to take enforcement actions against violators of federal law." *United States v. Texas*, 599 U.S. 670, 684 (2023). That discretion includes, among other things, "the Executive's Article II authority to decide 'how to prioritize and how aggressively to pursue legal actions against defendants who violate the law.'" *Id.* at 671 (quoting *TransUnion LLC v. Ramirez*, 594 U.S. 413, 429 (2021)). And it involves basic Article II "enforcement authority," like "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court." *Seila Law*, 591 U.S. at 219.

3. The combination of the FTC's post-1935 powers and the FTC commissioners' removal protection is unconstitutional. Any remedy must thus address the combination. Although the full contours of the remedial question are beyond the scope of this brief, the Court should consider five points in fashioning such a remedy.

First, judges should be circumspect about their ability to "rewrite the law" as part of a severability analysis. *Barr v. Am. Ass'n of Political Consultants, Inc.*, 591 U.S. 610, 652 (2020) (Gorsuch, J., concurring in part and dissenting in part).

Second, and relatedly, "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *N.J. Thoroughbred Horsemen's Ass'n v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 488 (2018) (Thomas, J., concurring). Both points would counsel in favor of this Court refusing to give legal effect to—that is, dismissing—the unconstitutional exercise of executive power before the Court here.

Third, even accepting modern severability doctrine, the Court should be cautious before inquiring into Congress's "hypothetical intent" about which provisions of an unconstitutional law should be severed, especially because "it seems unlikely that the enacting Congress had any intent on this question." *Id.* at 490 (Thomas, J., concurring). This is doubly so for textualist jurists, who recognize that different legislators in Congress might have had different intents—or no relevant intent at all—for this question. *See Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

Fourth, we know that Congress—at least at one point—approved of an FTC with removal protections, but more limited executive powers. That is the FTC from *Humphrey's*. And so if the Court is going to inquire into Congress's hypothetical intent, that real-world data point should play a large role.

Fifth, any remedy should respect that, as to its 1935 powers, *Humphrey's* remains binding. Thus, the ultimate remedy should not remove the FTC's for-cause protections when the Supreme Court has approved of them as applied to the FTC of 1935. Revisiting that decision is only for the Supreme Court.

CONCLUSION

The Court should reverse.

February 19, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief contains 4,099 words and thus complies with the length limitations contained in Seventh Circuit Rule 29.

This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a) and Circuit Rule 32(b) because it has been prepared in a proportionally spaced typeface using Microsoft Word, version 2412, in 12-point Century Schoolbook font.

Dated: February 19, 2025

/s/ Jason Hilborn
Jason Hilborn

CERTIFICATE OF SERVICE

I certify that on February 19, 2025, I electronically filed the foregoing with the Clerk of Court via CM/ECF, thereby effecting service upon all parties.

Dated: February 19, 2025

/s/ Jason Hilborn
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