

No. 25-332

IN THE
Supreme Court of the United States

DONALD J. TRUMP, PRESIDENT OF THE
UNITED STATES, ET AL.,

Petitioners,

v.

REBECCA KELLY SLAUGHTER, ET AL.,

Respondents.

**On Writ of Certiorari Before Judgment
to the United States Court of Appeals
for the District of Columbia Circuit**

**BRIEF OF THE AMERICAN ANTITRUST
INSTITUTE AND THE COMMITTEE TO
SUPPORT THE ANTITRUST LAWS AS *AMICI
CURIAE* IN SUPPORT OF RESPONDENTS**

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INTEREST OF *AMICI CURIAE*¹

The American Antitrust Institute (“AAI”) is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* AAI Home Page, <http://www.antitrustinstitute.org> (last visited Nov. 13, 2025).²

The Committee to Support the Antitrust Laws (“COSAL”) is an independent, nonprofit corporation devoted to preventing, remediating, and deterring anticompetitive conduct since its founding in 1986. *See* COSAL, <https://www.cosal.org/mission-history>. COSAL advocates for the enactment, preservation, and enforcement of a strong body of antitrust laws, which it accomplishes through legislative efforts, public policy debates, and by serving as *amicus curiae*. *See About Us*, COSAL, <https://www.cosal.org/mission-history> (last visited Nov. 13, 2025). COSAL is governed by its Board of Directors, which elects

¹ Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part, and no party, party’s counsel, or any other person—other than amici curiae or their counsel—has contributed money that was intended to fund the preparation or submission of this brief.

² Individual views of members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions.

officers who supervise and control its day-to-day operations.

Petitioner’s argument that the Federal Trade Commission’s (“FTC”) statutory removal protections violate the separation of powers overstates the removal power endowed to the President by the Constitution and understates the significance of those protections to the substantive development of sound antitrust law. *Amici* submit this brief to clarify the nature of actual Presidential control over the Commission and the importance of the Commission’s bipartisan, expert structure to the development and execution of sound antitrust law and competition policy.

INTRODUCTION AND SUMMARY OF ARGUMENT

Since the late 1970s, antitrust law has been revolutionized by an institutional commitment to jettisoning politicized decisionmaking and embracing a neutral, balanced application of objective economic principles. This Court substantially revised antitrust doctrine accordingly. William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14(1) J. Econ. Persps. 43, 53 (2000) (citing, *inter alia*, *Cont’l T.V. Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988), *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), and *NCAA v. Bd. of Regents*, 468 U.S. 84 (1984)); see also Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L. Rev. 2405, 2406-07 (2013) (“The promotion of economic welfare as the lodestar of

antitrust laws—to the exclusion of social, political, and protectionist goals—transformed the state of . . . [antitrust] law . . .”).

The Federal Trade Commission, through its in-house adjudicative proceedings, has been an important partner in developing economically rigorous doctrine in exceedingly complex areas while maintaining a sterling record on appeal in federal court. *See, e.g., N. Carolina State Bd. of Dental Exam’rs v. FTC*, 574 U.S. 494 (2015) (state action doctrine); *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013) (liability standard for reverse-payment settlements); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) (state action doctrine); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (same); *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411 (1990) (*Noerr-Pennington* doctrine); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447 (1986) (rule of reason and proof of anticompetitive effects); *see also* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12(4) J. Comp. L. & Econ. 623 (2016).³

³ *See also Impax Lab’ys, Inc. v. FTC*, 994 F.3d 484 (5th Cir. 2021) (reverse payments); *FTC v. AbbVie Inc.*, 976 F.3d 327, 367 (3d Cir. 2020) (sham litigation); *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 363 (5th Cir. 2008) (“quick-look” liability standard); *Ky. Household Goods Carriers Ass’n v. FTC*, 199 F. App’x 410, 410 (6th Cir. 2006) (state-action doctrine); *Telebrands Corp. v. FTC*, 457 F.3d 354, 355 (4th Cir. 2006) (reasonableness of relationship between violation and remedy); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 39 (D.C. 005) (“quick-look” liability standard); *Trans Union Corp. v. FTC*, 245 F.3d 809 (D.C. Cir. 2001) (interpretation of FCRA); *Toys “R” Us v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000) (legal sufficiency of competitive effects evidence).

The most trenchant critiques by modern antitrust law's forebearers, and the lasting reforms they have engendered, are rooted in the principles of independence, balance, and objectivity. *See, e.g.*, Richard Posner, Antitrust Law viii (2d ed. 2001) (noting that our system no longer sanctions “populist, political and ideological” decision-making); Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1704 (1986) (noting that we no longer “grant judges a political power that lacks any semblance of ‘legal’ criteria.”); Robert H. Bork, The Antitrust Paradox: A Policy at War With Itself 76–80 (2d ed. 1993) (arguing that we should not confer a “license for the judge to choose appealing or preferred objectives”).

Petitioner now seeks to dispense with the institutional safeguards that foster those principles by preventing the expertise-based functions of the Commission from becoming subject to political caprice. The Constitution does not obligate the Court to re-cast the Commission in the politicized mold that modern antitrust law fought for decades to escape, and the Court should decline the invitation to do so.

Neither the Vesting Clause nor the Take Care Clause of Article II of the Constitution mandate that the President wield unrestrained power to remove Commissioners at will. Because the plain text of the Constitution does not confer such power on the President, the Court must consider Congress's design of the Commission as a bipartisan, multimember, expert body, and the sound antitrust policy that underlies that design.

Congress's creation of the Commission was rooted in concerns that executive branch enforcement of the Sherman Act was too inconsistent and limited to

protect competition on its own. To supplement and expand on the Executive's efforts and to provide itself and the courts with much-needed balance and expertise on competition issues, Congress adopted a bipartisan, multimember leadership structure for the Commission and insulated its expertise-based work from direct political interference by the Executive.

That is not to say, however, that Congress deprived the Executive of all control over the Commission. To the contrary, the President directly controls the Commission's executive functions through his ability to designate and de-designate the Chair from among the Commissioners, and he can direct its litigation positions and foreign affairs conduct through the Department of Justice ("DOJ") and the Department of State. The President also influences the Commission's policy choices by nominating Commissioners and overseeing the Commission's budget requests and investigative functions.

Congress's design of the Commission is also sound as a matter of competition policy. The Commission's leadership structure serves to protect individual liberties while fostering consistent, unbiased antitrust enforcement, promoting compromise and consensus, minimizing the risk of capture, and contributing to market stability. If the Commission were to lose its independence as an antitrust enforcement body, its ability to police American markets would be undermined, hurting U.S. credibility abroad and harming U.S. businesses operating in foreign markets. Because it would amount to both bad law and bad policy, this Court should decline Petitioner's invitation to read words into Article II that would upend Congress's design.

ARGUMENT

I. The Constitution Does Not Give the President Unchecked Removal Power.

In arguing that the restrictions allowing removal of FTC Commissioners only in instances of “inefficiency, neglect of duty, or malfeasance in office,” 15 U.S.C. § 41, violate the separate of powers, Petitioner contends that “[t]he entire ‘executive Power’ belongs to the President alone.” Pet. Br. at 13 (quoting *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020)). But neither the text of Article II nor its interpretation at the Founding or in the nearly 250 years since compels the conclusion that the President has unchecked removal power over FTC Commissioners.

To begin with, courts and commentators agree that Article II does not explicitly address the question of the President’s removal authority. *See, e.g., Myers v. United States*, 272 U.S. 52, 117 (1926) (noting that the President’s power to select officers to aid “in the execution of the laws” and to remove them was “reasonabl[y] impli[ed]”); Andrea Scoseria Katz, Noah A. Rosenblum & Jane Manners, *Disagreement and Historical Argument or How Not to Think About Removal*, 58 U. Mich. J. L. Reform 555, 562 (2025). To be sure, although Article II enumerates several of the President’s express powers: “to command the armed forces, to receive foreign dignitaries, and so on,” Katz et al., *supra*, at 562 (citing U.S. Const. art. II, §§ 2–3), it is silent on whether—and in what circumstances—the President may remove duly appointed officers.

If anything, the Constitution specifies that Congress—not the President—is responsible for

determining the structure, internal procedures, and responsibilities of agencies required to effectuate the laws. *See* U.S. Const. art. I, § 8, cl. 18 (endowing Congress with the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof”). Likewise, although the President has the power to nominate, “by and with the Advice and Consent of the Senate” “all . . . Officers of the United States, whose Appointments are not herein otherwise provided for,” he may do so only to the extent such positions “shall be established by Law.” U.S. Const. art. II, § 2, cl. 2; *see also* 1 Annals of Cong. 582 (1789) (James Madison noting that Congress gets to “create[] the office, define[] the powers, [and] limit[] its duration”).

In light of the Constitution’s silence on the issue, Petitioner draws on two clauses within Article II to argue that the President has “conclusive and preclusive power to remove executive officers”: The Vesting Clause and the Take Care Clause. Pet. Br. at 13. But those provisions do not ineluctably require the result sought.

The Vesting Clause provides: “The executive Power shall be vested in a President of the United States.” U.S. Const. art. II, § 1, cl. 1. But as this Court previously recognized, such “general constitutional language” does not mandate that all officers “exercising any part of th[e] [executive] power must serve at the pleasure of the President and be removable by him at will.” *Morrison v. Olson*, 487 U.S. 654, 690 n.29 (1988). Indeed, notions of “executive power” from around the time of the Founding suggest that such a power required simply “bringing the

legislated intentions of society into being,” Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1238 (2019), including the legislature’s selection of the means—and limitations thereon—for doing so. Thus, with respect to the removal of government officers, the British Parliament often restricted the King’s ability to remove royal officers during the Founding era without interfering with the King’s executive power. See Daniel D. Birk, *Interrogating the Historical Basis for a Unitary Executive*, 73 Stan. L. Rev. 175, 220–28 (2021). And similarly, many early state constitutions restricted governors’ removal power despite those constitutions containing similar “vesting clauses.” See Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. Pa. J. Const. L. 323, 334–44 (2016).

Petitioner similarly relies on the Take Care Clause, which requires the President to “take Care that the Laws be faithfully executed,” U.S. Const. art. II, § 3, to suggest that the President must have unbridled removal authority, lest “he cannot oversee the faithfulness of the officers who execute [the laws],” Pet. Br. at 13 (quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010)). But that argument ignores that such language was historically used “to limit the discretion of public officials” by imposing near fiduciary duties on them, Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2117–21 (2019), not to confer unqualified authority, see Jack Goldsmith & John F. Manning, *The Protean Take Care Clause*, 164 U. Pa. L. Rev. 1835, 1853–67 (2016); see also Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105

Harv. L. Rev. 1153, 1198 n.221 (1992) (noting the Take Care Clause’s text “suggests an obligation of watchfulness, not a grant of power”). Even if the Take Care Clause’s “imposition of a duty necessarily implies a grant of power sufficient to see the duty fulfilled,” Goldsmith & Manning, *supra*, at 1854, it does not—as Petitioner suggests—require unbounded power to remove officers at will.

In sum, the text of the Constitution does not require that the President be empowered to remove FTC Commissioners at will. In the absence of any constitutional directive to the contrary, the Court should conclude that the statutory removal protections for Commissioners does not violate the separation of powers, reaffirming the reasoning underlying *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935), which still holds true today.

II. If the Court Properly Holds That the Constitution Does Not Require It to Invalidate the FTC Act’s Removal Provisions, It Should Uphold Them.

The FTC Act’s for-cause removal protections are critical to Congress’s design of the Commission as a bipartisan, multimember, expert body that serves Congress and the courts and that supplements prosecution of antitrust violations by the Executive. In striking the right Constitutional balance, Congress gave the President control over the Commission’s executive functions through his ability to delegate and de-delegate the Chair from among the Commissioners and to direct the Commission’s prosecutorial and foreign affairs conduct through the DOJ and the State Department. But it did not give him the power Petitioner seeks: to singlehandedly direct the

Commission’s expert, non-executive functions by removing Commissioners at will. Protecting antitrust agencies’ expertise-based work from direct political pressure protects individual liberties, promotes stable markets, and protects against capture. That is why removal protections are recognized globally as a fundamental tenet of sound institutional design for antitrust agencies. Removing that protection would undermine our country’s expert-based enforcement system to the detriment of consumers and U.S. businesses at home and abroad.

A. Congress Delegated Expertise-Based Functions to a Bipartisan, Multimember Body and Insulated Those Functions from Direct Presidential Control.

The FTC Act (the “Act”) arose out of Congressional dissatisfaction with executive branch enforcement of the Sherman Act and with this Court’s ruling in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), which many saw as usurping the lawmaking role of Congress. See Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1, 3, 12–14, 74–75, 84–85 (2003). To rectify the problem, Congress created a body more directly within its own control that could supplement and expand Executive enforcement of the Sherman Act, including through a uniquely broad substantive mandate. *Id.*

To this end, Congress prohibited “unfair methods of competition” in Section 5 of the Act, charging the Commission with defining and prohibiting behavior that the Sherman Act did not reach but that new learning in law and economics revealed to be harmful

to competition. 15 U.S.C. § 45. Congress directed the Commission to make legislative recommendations to Congress and empowered the Commission to compel production and preparation of business records without reference to a specific infringement of the law. *Id.* § 46(a). And Congress vested governance of the Commission in a bipartisan, multimember body of experts subject to Senate confirmation and for-cause removal protections. *Id.* § 41.

Congress designed the Commission as an expert body that could assist all three branches, charging it with reporting to the President and Congress about alleged antitrust violations, *id.* § 46(d), referring to the Attorney General any evidence of criminal conduct or violation of an antitrust decree, *id.* §§ 46(c), (k)(1), and serving as a master in chancery to advise the courts on possible remedies in antitrust cases brought by the Attorney General, *id.* § 47.

Each of the Commission’s functions is subject to Congressional and Executive oversight, which has expanded along with the Commission’s powers. See Andrew I. Gavil & William E. Kovacic, *A Defense of the “For Cause” Termination Provisions of the Federal Trade Commission Act*, Progressive Policy Institute 9 (July 2025), <https://www.progressivepolicy.org/wp-content/uploads/2025/07/PPI-A-Defense-of-the-For-Cause-Termination-Provisions-of-the-FTC-Act.pdf>; William E. Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, 17 Tulsa L.J. 587 (1982). And it must ultimately answer to the courts. 15 U.S.C. § 45(c); 5 U.S.C. §§ 701–06; *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 195–96 (2023).

Presidents from both political parties have approved the Commission's structure. President Woodrow Wilson played a central part in designing the Commission and signed the Act into law in 1914. Winerman, *supra*, at 4, 51–88, 90–92. In 1938, President Franklin D. Roosevelt signed the Wheeler-Lea Act, expanding the Commission's Section 5 authority to include “unfair or deceptive acts or practices” and subjecting violations of Commission orders to civil penalties. Pub. L. No. 75-447, 52 Stat. 111. In 1975, President Gerald Ford signed the Hart-Scott-Rodino Act, strengthening the Commission's merger enforcement capabilities by requiring premerger filings. Pub. L. No. 94-435, 90 Stat. 1383 (codified as amended at 15 U.S.C. § 18a).

The Commission's bipartisan, multimember leadership structure serves to protect individual liberties. Unlike the single-Director agency, which “concentrates enforcement, rulemaking, and adjudicative power in one individual,” the multimember commission structure guarantees that “no single commissioner . . . can *affirmatively* do much of anything,” which serves to “prevent arbitrary decisionmaking and abuse of power, and to protect individual liberty.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 183 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting). “Before the agency can infringe your liberty in some way—for example, by enforcing a law against you or by issuing a rule that affects your liberty or property—a majority of commissioners must agree.” *Id.*

The bipartisan, multimember leadership structure is also critical to the Commission's status as an expert body that assists Congress and the courts. Then-Judge Kavanaugh expanded on this “simple but

profound” point in *PHH*, explaining that the bipartisan, multimember structure “and its inherent requirement for compromise and consensus” fosters “more deliberative decision making” and minimizes the risk of “capture.” *Id.* at 183–85.

Invalidating the Act’s for-cause removal provision would thwart Congress’s design of an expert-governed Commission. By giving the President unfettered power to fire Commissioners who do not comply with his will, it would contravene Congress’s purpose to supplement and expand Executive-led antitrust enforcement. And it would undermine the deliberative, consensus-based model that serves to protect individual liberties and ensure that the Commission’s work remains valuable to Congress and the courts.

B. Congress Gave the President Direct Control Over the Commission’s Executive Functions and Extensive Control Over Its Other, Non-Expert Functions.

Congress has ensured ample Executive influence over the actions of the Commission by giving the President sole authority to designate or de-designate the Chair from among the Commissioners. 15 U.S.C. § 41. The Chair has complete authority over all “executive and administrative functions of the Commission.” Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 3175 (May 21, 1950). This includes the appointment and supervision of personnel, the distribution of business among such personnel, the use and expenditure of funds, and the supervision and management of the Bureaus and Offices. *See* 16 C.F.R. § 0.8–0.20. Through his sole ability to

designate the Chair, the President controls the executive functions of the Commission and dictates the policy and enforcement direction of the Commission. Gavil & Kovacic, *supra*, at 4, 7.

Subject to Senate confirmation, the President can also nominate and re-nominate Commissioners to staggered terms of seven years, which ensures that each President can affect the Commission's composition. *See Seila Law*, 591 U.S. at 216, 218. This means that, consistent with the Commission's expert role, each President will have the opportunity to affect the Commission's composition while retaining institutional knowledge and avoiding abrupt, destabilizing policy shifts. *See id.*

The President also exerts control over the Commission through the Office of Management and Budget ("OMB"), the Office of Information and Regulatory Affairs ("OIRA"), and the State Department. Pursuant to the Paperwork Reduction Act, 44 U.S.C. §§ 3501–3521, the Commission must get OIRA approval to send an information request to ten or more entities. The Commission also must submit its budget proposal to OMB, which frequently reallocates resources within the proposal and reduces the overall size of the request before submitting it as part of the President's budget request to Congress. Gavil & Kovacic, *supra*, at 8. And Commission employees travelling abroad on official business must obtain clearance from the State Department, which can force them to return to the United States at the President's direction. *Id.*

Through his direction of the DOJ and its Office of the Solicitor General, the President also has the power to direct the Commission's litigation strategy.

The DOJ has the right to intervene in cases being litigated by the Commission and to represent the Commission in appellate litigation,⁴ and the Solicitor General can take litigation positions opposing the Commission and has exclusive authority to represent the Commission before the Supreme Court. 15 U.S.C. § 56.⁵

By focusing solely on the for-cause removal provisions of the Act, Petitioner mischaracterizes the President's direct control over the executive functions of the Commission through his ability to designate and de-designate the Chair. Petitioner also ignores the mechanisms Congress provided for the President to exert influence over the Commission's composition, budget, investigative functions, foreign engagement, and litigation positions.

⁴ For example, the DOJ represented the Commission in litigation challenging the Commission's Non-Compete Clause Rule, which the Commission promulgated under then-Chair Lina Khan. Appellant's Brief, *Ryan v. FTC*, 24-10951, (5th Cir. Jan. 2, 2025), Dkt. No. 41. Following the election of President Trump and his appointment of Chair Andrew Ferguson, the Commission reversed course, and DOJ lawyers abandoned their defense of the Rule in court. Unopposed Motion to Voluntarily Dismiss Appeal, *Ryan v. FTC*, 24-10951, (5th Cir. Sept. 5, 2025), Dkt. No. 226.

⁵ A previous Commissioner has described how the Solicitor General's threats to advocate on behalf of a respondent if it disagrees with a position taken by the Commission has caused the Commission to reconsider litigation strategies. Gavil & Kovacic, *supra*, at 25, n.28.

**C. Eliminating the Commission's
Independence for Expertise-Based
Functions Contravenes a Global
Consensus that the United States
Forged**

There is an international consensus that independent judgement, delegation of authority, and removal protections are critical to the expertise-based functions of an antitrust agency. Org. for Econ. Co-operation and Dev. (“OECD”) Secretariat, *Background Paper on Independence of Competition Authorities—From Designs to Practices* (Nov. 21, 2016), <https://www.oecd.org/en/publications.html> (hereinafter “*Competition Authority Independence*”). The United States is the progenitor of this norm, starting with the passage of the FTC Act in 1914. Congress delegated authority to an expert, bipartisan Commission to ensure the Commission’s complex analyses would be insulated from political pressure. *See supra*, Section II.A. The insulation of the Commission’s expertise-based functions from direct presidential control—which allows it to function as a neutral, expert organization—is especially important given its broad substantive mandate. *See* Transcript of Fed. Trade Comm’n Workshop on Section 5 of the FTC Act as a Competition Statute at 183 (Oct. 17, 2008) (Statement of Abbot (“Tad”) B. Lipsky, Partner, Latham & Watkins) (noting that its substantive mandate is so broad that “the Commission could easily use its authority under Section 5 to wreck the economy legally if it wanted to.”), https://www.ftc.gov/sites/default/files/documents/public_events/section-5-ftc-act-competition-statute/transcript.pdf; *see also* U.S. Chamber of Commerce, Int’l Competition and Pol’y Expert Grp., Report and

Recommendation at 20–21 (Mar. 2017), https://web.archive.org/web/20170607032821/https://www.uschamber.com/sites/default/files/icpeg_recommendations_and_report.pdf (hereinafter “ICPEG Report”) (“Because ‘unfairness’ and other subjective considerations (‘excessive size’ or ‘concentration,’ for example) may be invoked arbitrarily, business planning and investment are undermined. Commercial success may turn on political cronyism, rather than on the ability of a firm to efficiently provide the goods and services consumers desire at a competitive price (the result the consumer welfare approach to antitrust law is designed to foster).”).

Allowing the President to remove Commissioners at will would give him direct control over every statutory provision and regulation the Commission enforces, interprets, or administers.⁶ As this Court

⁶ This includes many highly technical regulations, which can have widespread financial implications for the economy that non-specialists may not understand or even perceive. The Commission’s technical rules governing reporting requirements for premerger notification under the Hart-Scott-Rodino Act, 15 U.S.C. § 18a, are illustrative. Last year, the agency undertook its first major overhaul of the forty-seven-year-old rules, which affect reported transactions with an annual aggregate dollar value in the trillions. *See, e.g.*, Fed. Trade Comm’n & Dep’t of Just., *Hart-Scott-Rodino Annual Report*, Fiscal Year 2024 at 5 (2025) (\$2.1 trillion in fiscal year 2024).

The original Notice of Proposed Rulemaking was published while the two minority seats on the Commission were both temporarily vacant, and it included several provisions that increased the reporting burden, which drew the ire of antitrust specialists representing the business community. However, the FTC’s “built-in monitoring system for interests on both sides,” which “tend[s] to lead to decisions that are not as extreme,” *PHH*, 881 F.3d at 184–185 (Kavanaugh, J., dissenting) (internal citations

has recognized, Congress deliberately gave the FTC a flexible and uniquely broad statutory authority that exceeds the reach of the Sherman Act. *FTC v. Raladam Co.*, 283 U.S. 643, 648, *mod. denied*, 52 S. Ct. 14 (1931). But it did so only upon structuring the agency as a multi-member deliberative body with removal protections. Eliminating the agency's independence would dramatically alter the status quo, ignore a century of history, and render the Commission subservient to the President's will in exercising its unique powers. This flies directly in the face of the global consensus on the importance of safeguards against undue political pressure in competition policy.

The OECD, originally founded under U.S. leadership in 1948 to implement the Marshall Plan, is now the leading global economic policy organization, with practical experience supporting dozens of countries in the formation of politically and economically sound antitrust enforcement regimes. *See Our history*, OECD, <https://www.oecd.org/en/about/history.html> (last visited Nov. 13, 2025); *see, e.g.*, OECD Peer Reviews of Competition Law and Policy: Thailand (2025), <https://www.oecd.org/en/publications.html>; OECD Peer Reviews of Competition Law and Policy: Brazil (2019), <https://www.oecd.org/en/publications.html>; OECD

omitted), facilitated bipartisan compromise. After the two minority seats were filled by Republicans Andrew Ferguson and Melissa Holyoak, the full Commission reached a consensus through negotiation and compromise, agreeing to substantially amend the final rule. Since his appointment as Chair by President Trump, Andrew Ferguson has since rejected entreaties from the business community to renege on the agreement, choosing instead to honor the compromise.

Peer Reviews of Competition Law and Policy in Denmark (2015), <https://www.oecd.org/en/publications.html>. Based on that experience, it has concluded that protections against undue political influence are a necessary feature of sound antitrust enforcement regimes. *See, e.g., Competition Authority Independence, supra*, at 4 (“Agency independence is a prerequisite for the effective enforcement of competition rules.”) According to the OECD, the fundamental hallmarks of independence include delegation of authority to experts and removal protections for senior officials, both of which are features of the Commission as designed by Congress. *Id.* at 23–25 (describing independence index indicators).

As the OECD has explained, at-will removal is a direct threat to sound antitrust enforcement policy. Even if not exercised, the possibility of at-will removal can lead to “prior compliance,” distorting a decisionmaker’s positions to avoid any threat from those with the power to remove. *Id.* at 11. “[T]he mere existence of a threat” also creates the appearance of partiality, which can “substantially weaken the public and business confidence” in the legitimacy of the agency. *Id.*

Agency independence and the limits on removal that protect it are particularly important in the antitrust context. Sound antitrust enforcement requires complex legal and economic assessments. Independent agencies have the capacity to develop those specialized skills in a way elected officials may not. *Id.* at 4 (describing academic literature on delegation of authority). And independent agencies can more easily protect and retain a skilled, non-

partisan staff than an agency that is fully exposed to political control.

Independence also insulates against inconsistency, which is inimical to the long-term economic policy work of competition agencies. Certainly, government priorities in competition enforcement may shift over time. But unchecked inconsistency can open the door to rent seeking and manipulation while decreasing incentives to invest in productive fixed assets. *Id.* at 4. Reducing political uncertainty allows for the pursuit of long-term policy goals, like ensuring competitive markets, that do not fit into election cycles. Indeed, surveys of competition authorities across the world most frequently cited “greater independence” as the factor most likely to help them attain competition law and policy objectives. See OECD, *The Objectives of Competition Law and Policy*, Org. for Econ. Coop. & Dev. J. Competition L. & Pol. (2003), https://www.oecd.org/content/dam/oecd/en/publications/reports/2003/05/oecd-journal-of-competition-law-and-policy_g1gh31ba/clp-v5-1-en.pdf.

The need for a “credible commitment” to independence in expertise-based functions is most acute where agencies protect the economy as a whole. *Competition Authority Independence, supra*, at 5. Markets are built around long-term investments that are vulnerable to rapid shifts in policy. Independence for agencies tasked with protecting a national economic policy is thus even more important than it is for agencies tasked with protecting a social policy. As the OECD has put it, “a lack of commitment by policy makers to competition law and policy has the potential to substantially affect all companies and thereby the functioning of all markets.” *Id.*

The stakes are further raised by the fact that the antitrust laws depend on the broader deterrent effect of an agency's enforcement actions. No matter how well resourced a national competition agency, it will never be able to investigate every potential violation of the antitrust laws across the entire economy. Instead, companies must be able to take lasting direction from the actions, the advocacy, and the policy guidance the agency provides.

The necessary deterrent effect has at least two components. *First*, neutrality is indispensable. Market participants must be persuaded not only that the antitrust agency will adhere to certain unchanging principles but also that it will enforce them "consistently" and "without discrimination." *Id.* at 6. If a company believes it can evade enforcement through political pressure, it will have little incentive to refrain from illegal but potentially profitable conduct.

Second, neutrality is imperiled without independence. The risk of actual or perceived capture is high because antitrust agencies' work "can profoundly affect the position of companies relative to one another in the market." *Id.* For example, an anticompetitive merger that goes unreviewed can give a company monopoly power and the ability to substantially increase prices. On the other hand, discriminatory and unpredictable enforcement can chill investment in procompetitive collaborations if companies fear they might be targeted by an enforcer acting at the behest of a politically favored rival. Such distortions of the market can only be prevented when there is high public confidence that the enforcer is applying economic principles neutrally and independently, without picking winners and losers.

Without a credible commitment to the economic principles that those actions represent, the deterrence value is lost. And inevitably, the stability of the market—which depends on trust in the effective, predictable enforcement of the antitrust laws—is undermined.

For this reason, the actual and perceived independence of antitrust enforcement has an institutional value similar to that of an independent judiciary. “Just as independent courts symbolize the rule of law, so a competition agency symbolizes commitment to the free market.” *Id.* at 7.

D. Abandoning Independence Would Undermine U.S. Credibility Abroad

Invalidating the Act’s for-cause removal protections would do incalculable damage to the United States’s standing as a global model for neutral antitrust enforcement. With the support of major U.S. multinational corporations, leaders of the federal antitrust agencies and the antitrust bar have worked hard to set an example of neutrality and objectivity for the foreign regimes that regulate U.S. businesses operating in their jurisdictions. *See, e.g.,* ICPEG Report at 12 (“U.S. antitrust enforcement agencies should make every effort to set an example in the efficient, impartial and transparent application of competition laws on the basis of sound factual and economic analysis. We are aware, moreover, that how the United States applies our antitrust and trade laws will be reflected back on us by the actions of other countries, and we should strive to conform our own actions to the[se] principles . . .”).

If the Commission’s independence were eliminated, particularly given its uniquely broad

substantive mandate, “the U.S. ‘example’ would change, inviting imitation and encouraging conduct that until now the U.S. has consistently discouraged.” Andrew I. Gavil, *On the Value of Antitrust Diplomacy*, Antitrust Source (Feb. 2017), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/feb17_full_source.pdf. “Doubtless, this would be rightly perceived as hypocrisy if the administration [were] viewed as preaching one approach to antitrust while more broadly practicing another The most likely results would be retrenchment abroad, a loss of credibility, and a diminished role for U.S. antitrust leadership in the world.” *Id.*

The General Electric (“GE”)/Honeywell merger serves as a cautionary tale and a preview of the damage that might result from even the appearance of politicized antitrust enforcement. In 2001, the European Commission (“EC”) blocked the merger of these two U.S. companies despite clearance of the transaction in the United States. The EC’s divergent decision was quickly condemned by U.S. officials, including the head of the DOJ’s Antitrust Division and the Treasury Secretary. Eleanor Fox, *GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence*, in *Antitrust Stories* 331, 343 (Eleanor M. Fox and Daniel A. Crane, eds., 2007). Many accused the EC of politically motivated enforcement, believing its actions were designed to protect European-based Airbus and Rolls-Royce out of concern that the combined GE/Honeywell would be “too competitive.” *Id.* The integrity of the EC process, including the work of the respected head of its competition authority, Mario Monti, came under fire. *Id.* at 342. Although subsequent analysis

revealed the divergence to be a good-faith disagreement rather than a politically motivated abuse of power, significant damage was done. Extensive diplomatic work was necessary to repair the cooperative relationship between the U.S. and the European Union (“EU”), including the development of the joint EU-U.S. Best Practices for Merger Review. *See Best Practices on Cooperation in Merger Investigations*, U.S. Dep’t of Just., Antitrust Div. (updated June 25, 2015), <https://www.justice.gov/atr/best-practices-cooperation-merger-investigations>. The episode spurred a wave of procedural reforms in Europe, as the EC worked to counter perceptions of undue political influence in its merger enforcement. *See, e.g.*, Council Regulation (EC) 139/2004 (The EC Merger Regulation), 2004 O.J. (L 24) 1.

Since then, dialogue, cooperation, and convergence between U.S. and European antitrust authorities have prevented a recurrence, but the experience shows why it is necessary to insulate antitrust policy from politicization to protect against massive disruptions to the economy. *See Fox, GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence, supra*; *see also* Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981).

E. Abandoning Independence Would Facilitate Capture

Although the EC’s decision in GE/Honeywell did not ultimately prove to be an example of agency capture by private interests, that risk remains significant in antitrust enforcement. Given the considerable private interests at stake, antitrust enforcers both in the United States and abroad face

significantly greater risk of industry capture than other foundational market institutions, like central banks. As the OECD has observed, “the effects of monetary policy decisions[] . . . are relatively diffuse” and may not implicate any particular interest group very strongly. *Competition Authority Independence*, *supra*, at 6. But antitrust enforcement, on the other hand, can have very real and costly commercial consequences for individual companies and industries, giving powerful economic actors significant incentives to try to influence its outcomes.⁷

Recognition of this principle gave rise to the passage of the Tunney Act, 15 U.S.C. § 16, a domestic sunshine law designed to prevent capture that applies only to the DOJ, as a single-Director agency, and not the FTC, as a bipartisan, multi-member agency. When the DOJ voluntarily settles antitrust cases with defendants via privately negotiated consent decrees,

⁷ Small businesses have comparatively less power to directly influence antitrust enforcement policy through lobbying efforts. Yet they are often harmed by exclusionary conduct by firms with market power, and they are dependent on open, contestable markets. Small Business Majority, *Scientific Opinion Poll: Small businesses seek a level playing field and chance to compete fairly* (Mar. 30, 2022), <https://smallbusinessmajority.org/sites/default/files/research-reports/full-report-small-businesses-seek-level-playing-field.pdf> (surveying 500 small businesses and reporting that 83% agree that “larger companies have the resources to . . . drown them out with their market power”); Adam M. Golodner, *Antitrust, Innovation, Entrepreneurship and Small Business*, SBA Conference on Industrial Organization (Jan. 21, 2000), <https://www.justice.gov/archives/atr/speech/antitrust-innovation-entrepreneurship-and-small-business> (“[B]y ensuring that markets are open, and that new entrants can compete,” “the antitrust laws protect two freedoms important to small businesses: the freedom to engage in entrepreneurship and the freedom to innovate.”).

the Tunney Act imposes various disclosure obligations, including with respect to lobbying activity. The Tunney Act grew out of an influence-peddling scandal in which a corporate lobbyist promised that her client, the International Telephone and Telegraph Corporation (“I.T.T.”), would make a large campaign contribution to re-elect President Nixon in exchange for the President’s promise to drop a meritorious antitrust case against it. Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, Brennan Center for Justice (Mar. 19, 2014), <https://www.brennancenter.org/our-work/analysis-opinion/itt-affair-and-why-public-financing-matters-political-conventions>. The President ordered the Deputy Assistant Attorney General of the Antitrust Division to drop the case, and the parties negotiated a notoriously weak settlement that looked more like a giveaway than a serious effort to redress anticompetitive effects. If not for the Watergate Tapes, along with a leaked memo obtained by a syndicated Washington Post columnist confirming the quid pro quo, the scandal may never have come to light. *Id.*; see also Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, Wash. Post (Feb. 29, 1972), <https://joanwebstermurder.yolasite.com/resources/wash%20post%202-29-72%20secret%20memo%20bares%20mitchell-itt%20move.pdf>.

The danger of capture, illustrated by but not limited to the overt corruption that gave rise to the Nixon scandal, pervaded the legislative proceedings leading up to the passage of the Tunney Act. Senator John Tunney, for whom the law is named, explained that “[t]he problem is particularly critical where the antitrust laws are concerned because to a considerable extent those laws are viewed as a direct

threat by those who exercise the greatest corporate influence. And because the stakes are high the level of lobbying is equally high.” *Hearings on S. 782 and Related Bills Before the H.R. Subcomm. on Monopolies and Commercial Law of the H. Comm. on the Judiciary*, 93rd Cong. (Sept. 10, 1973), reprinted in 9 Earl W. Kintner, The Legislative History of the Federal Antitrust Laws and Related Statutes 6627 (1984) (statement of Sen. John V. Tunney).⁸

The removal protections that Congress built into the Commission’s structure are necessary both to further effective, impartial antitrust enforcement and to safeguard against private economic incentives that seek to unduly influence or undermine it. A weakening of the Commission’s independence would have global ripple effects that would reverberate back onto U.S. businesses operating abroad, which are regulated by foreign enforcers that would have new license to follow the U.S. example by softening or reversing their own commitments to independent and apolitical enforcement, triggering an unhealthy race to the bottom.

⁸ As if to illustrate the continuing risks of industry capture, a Tunney Act proceeding involving a similar allegation by a Notre Dame Law Professor who served as the second highest ranking official in the DOJ’s Antitrust Division is currently pending. See Motion to Intervene, *United States v. Hewlett Packard Ent.*, No. 5:25-cv-00951-PCP (N.D. Cal. Oct. 14, 2025), Dkt. No. 236. The DOJ stands accused of allowing improper political lobbying to override the informed judgment of neutral antitrust experts. Roger Paul Alford, *The Rule of Law versus The Rule of Lobbyists* (Aug. 19, 2025), <https://ssrn.com/abstract=5396537>.

CONCLUSION

Nothing in the text of the Constitution requires this Court to invalidate the for-cause removal protections in the FTC Act. Those protections are critical to Congress's design of the Commission as a consensus-driven body with broad, expertise-based functions insulated from direct Presidential interference. Because they serve to protect individual liberties, stable decisionmaking, and sound antitrust policy, they also serve as the basis for a broad international consensus on antitrust enforcement principles, and their invalidation would harm U.S. consumers and businesses at home and abroad.

For the foregoing reasons and those set forth in Respondent's brief, the Court should conclude that the statutory removal protections for FTC Commissioners are sound antitrust policy and do not violate the separation of powers.

Respectfully submitted,

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