No. 22-1071

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION,
Petitioner,

v.

KC TRANSPORT, INC. AND
FEDERAL MINE SAFETY HEALTH REVIEW COMMISSION,
Respondents.

On Petition for Review of a Decision of the
Federal Mine Safety and Health Review Commission

BRIEF OF AMICI CURIAE STATE OF WEST VIRGINIA AND 19 OTHER STATES IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*

The *amici* States here have a strong interest in the federal separation of powers, as it protects our States' sovereignty and our citizens' liberty. *See Bond v. United States*, 564 U.S. 211, 222 (2011). Before the Constitution, the States enjoyed "absolute and unlimited sovereignty within their respective boundaries." *Respublica v. Cobbett*, 3 U.S. 467, 473 (Pa. 1798). When the federal branches creep outside their established lanes, they almost always do so at the expense of state power. *See* Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1324 (2001). And state interests aside, maintaining a vigorous federalism is crucial to maintaining the liberties of individual Americans—our citizens. *LaRoque v. Holder*, 650 F.3d 777, 791-92 (D.C. Cir. 2011). *Amici* thus write to urge the Court to protect these interests fundamental to American democracy.

INTRODUCTION

Harry Truman famously said that "[t]he buck stops" with the President. *In re Sealed case*, 838 F.2d 476, 489 (D.C. Cir. 1988). Article II agrees—the President wields *all* executive power in our system. Inviting the courts to settle a disagreement between two of the President's subordinates over implementing the law usurps that authority.

Yet here, two executive agencies have come to court to settle a fight over the statutory definition of a "mine"—with one of these "expert" agencies claiming West Virginia trucks are mines. When two executive-branch officials squabble over implementation questions like this one, the President can usually make a final decision and, if necessary, remove the official who refuses to comply. But *Humphrey's Executor* invited the judiciary to intrude into this process by greenlighting Congress to create positions wielding executive power unto themselves. These "independent agencies" are largely untouchable by the President, becoming a veritable fourth branch of government. But that outcome perverts Article II's Vesting Clause and Take Care Clause. And it undermines core democratic accountability concerns.

No wonder, then, that the Supreme Court has thoroughly undermined *Humphrey's Executor*'s foundations. This Court, too, should treat *Humphrey's Executor* as bad law and effectively overturned. If it doesn't, the Court should at least recognize that *Humphrey's Executor* is so seriously flawed that it must be strictly limited to its facts.

The judicial branch weighing in on purely intra-executive disputes about statutory implementation grossly violates Article II. The Court should say so.

SUMMARY OF THE ARGUMENT

Letting courts intrude into an intra-Executive Branch dispute violates Article II because that provision vests all executive power in the President—granting him the exclusive responsibility to ensure the Executive Branch faithfully executes the laws. Without power over personnel, the President loses the ability to fulfill these constitutional duties. *Humphrey's Executor* obscured that when it allowed Congress to create so-called independent agencies with well-nigh unremovable leadership. But the Court need not worry about *Humphrey's Executor* for a few reasons. More recent Supreme Court cases—like *Free Enterprise Fund*, *Seila Law*, *Trump v. United States*, and others—at a minimum call its holding into question.

Humphrey's Executor violates the Vesting Clause and Take Clare Clause—and it flatly contravenes the unitary theory of the executive, which is the only way to make sense of Article II. Independent agencies also violate crucial principles of democratic accountability—insulating bureaucrats from the ballot box. The Supreme Court is poised to formalize what has already effectively happened and declare *Humphrey's Executor* overturned. And it has already limited *Humphrey's Executor* to two narrow factual scenarios—inferior officers and officers wielding no executive power. Those scenarios

don't describe this case, and the Court shouldn't stretch *Humphrey's Executor* to apply here.

ARGUMENT

This intra-branch dispute conflicts with Article II of the Constitution. *See* ECF 2097876 at 1 (Question 2).

Our system of government recognizes three kinds of governmental power, vesting each in one of the three branches: the legislative power in Congress, the judicial power in the Supreme Court, and "[t]he executive power … in a President of the United States of America." U.S. CONST. art. II, § 1. So "the executive power—all of it—is vested in a President." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 203 (2020) (cleaned up). The President's core responsibility is to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 3.

The executive power includes "the power of appointing, overseeing, and controlling those who execute the laws"—a power that "is in its nature" utterly "Executive." 1 Annals of Cong. 463 (1789) (J. Madison). Accordingly, for the Republic's first 150 years, the Supreme Court recognized the President's "unrestricted removal power." *Seila Law*, 591 U.S. at 215. In *Myers v. United States*, for instance, the Court declared that the President's "selection of

administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible." 272 U.S. 52, 117 (1926). Indeed, Article II is "emphatically clear from start to finish … that the president would be personally responsible for his branch." AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 197 (2005); *accord Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 496-97 (2010) ("Article II makes a single President responsible for the actions of the Executive Branch.").

Once we view Question 2 through that lens, it becomes straightforward. Ultimately, Question 2 asks whether the executive speaks with two voices—the President and someone else—or, more specifically, whether Congress is allowed to set up a rival center of executive power opposed to the President's exercise of executive power. The Constitution responds with a resounding "No." Article II's vesting of all executive power in the President "creates a unitary executive," not a fractured system with many sources or deposits of executive power. *U.S. Postal Serv. v. Postal Regul. Comm'n*, 963 F.3d 137, 143 (D.C. Cir. 2020) (Rao, J., concurring). So only the President has the power to "resolve a purely Article II dispute." *Id.* at 144. Inviting the Judicial Branch to resolve an intra-executive branch dispute over how to implement

the law is like inviting the Executive Branch in to settle a disagreement between the United States Administrative Office of Courts and a local district's clerk over how to properly transfer a case between districts. "This litigation" therefore "stands in tension with Article II of the Constitution." *Id.* at 143.

To be sure, the Supreme Court muddied these originally clear waters in 1935 when it held in *Humphrey's Executor* that Congress can create a "so-called independent agency" existing outside the President's control. *SEC v. FLRA*, 568 F.3d 990, 997 (D.C. Cir. 2009) (Kavanaugh, J., concurring). Because FTC commissioners exercise quasi-legislative and quasi-judicial functions, it said, Congress could lawfully make them removable only "for cause." *Humphrey's Executor v. United States*, 295 U.S. 602, 623 (1935). Independent agencies are therefore "independent" because the President's power to remove their heads is limited—almost entirely insulating them from Presidential control. *Id.* at 625.

But *Humphrey's Executor*'s distorted Article II, and that distortion is directly responsible for the confusion in cases like this one. Here, the Federal Mine Safety and Health Administration defined certain West Virginia trucks miles away from mining operations as "mines" under the Federal Mine Safety

and Health Act. This adventuresome reinterpretation spurred a disagreement between the MSHA's boss (the Secretary of Labor) and the Federal Mine Safety & Health Review Commission over the definition of a "mine." Under Article II's original design, the President would settle the dispute between the Commission and Secretary, speaking as the Executive Branch's final voice on how to interpret "mine" in the Mine Act.* And if a subordinate in the Executive Branch refused to obey, he could remove them.

Yet after *Humphrey's Executor*, Congress said the President could remove the Commission's members only "for inefficiency, neglect of duty, or malfeasance in office." 30 U.S.C. § 823(b)(1)(B). Reading "mine" differently from the Secretary doesn't meet that standard, so the Commissioners (and its FMSHA) are free to continue interpreting and implementing the Mine Act contrary to the Secretary. *Id.* § 823(b)(2). *Humphrey's Executor* means the President can't resolve this disagreement, forcing courts to wade into this intra-executive dispute (and violate the separation of powers along the way).

* As it happens, the States agree with the Commission's reading of the statute here. But while the States think the President *should* reject the notion that trucks are mines, the relevant point for present purposes is that he *can't* make his own independent choice about what reading of the statute is the right one. The President must enlist the power of the courts to check one of his own subordinates. The Constitution does not support that backwards system—even when it happens to stumble into the right reading of a given statute.

Humphrey's Executor's shouldn't dissuade the Court from holding that settling intra-executive branch disputes violates Article II for two reasons.

I. *Humphrey's Executor* is bad law.

Because *Humphrey's Executor* flagrantly contravenes Article II and early separation-of-powers cases like *Myers*, members of the Court have in recent years repeatedly questioned *Humphrey's Executor*'s legal foundation. For good reason.

In *Trump v. United States*, for example, Chief Justice Roberts (speaking for the Court) explained that the President's ability to authoritatively direct the Executive Branch flows from the strong powers he holds when acting within his purview—powers the Constitution directly gives. 603 U.S. 593, 607 (2024). When the President lawfully "exercises such [constitutionally granted] authority," he may act contrary to Congress's desires, and the federal courts cannot control his discretion. *Id.* In short, "Congress cannot act on, and courts cannot examine, the President's actions on subjects within his conclusive and preclusive constitutional authority." *Id.* at 609 (cleaned up). These strong powers cohere with the Framers' goal to "provid[e] the President with maximum ability to deal fearlessly and impartially with the duties of his office." *Id.* at 611 (cleaned up). Applying

these same principles 15 years prior, then-Judge Kavanaugh assumed "that the President of the United States controls the Executive Branch and would be able to direct the interpretation of law and exercise of discretion by all agencies in the Executive Branch." *In re Aiken Cnty.*, 645 F.3d 428, 439 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

Yet "*Humphrey's Executor* [] approved the creation of independent agencies—independent, that is, from presidential control and thus from democratic accountability." *Aiken Cnty.*, 645 F.3d at 441. Justices Thomas and Gorsuch unambiguously reject *Humphrey's Executor* because it "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 and dissenting in part, joined by Gorsuch, J.). Contrary to *Humphrey's Executor*, the Constitution doesn't allow for executive agencies that wield anything but executive power. *Id.* at 247. Echoing this, Justice Scalia said it invented the "novel principle"—"devoid of textual or historical precedent"—that Executive Branch officials possess Article I or Article III power. *Morrison v. Olson*, 487 U.S. 654, 726 (2020) (Scalia, J., dissenting).

These critiques are correct. The Constitution makes no room for the independent agencies that *Humphrey's Executor* greenlights. *See U.S. Postal*

Serv., 963 F.3d at 143 (Rao, J., concurring). *Humphrey's Executor* is based on the fictitious premise that Congress can create agencies that "exercise[] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628.

But that premise is false. An agency is, by definition, executive—immutably so. Its executive nature is unalterable because it flows from the first principles basic to our tripartite system of government (the threefold division of powers). Neither Congress nor the courts can make an agency "legislative" or "judicial" by relabeling it. As Justice Thomas put it, "[n]o such powers or agencies exist" because Congress cannot "create agencies that straddle multiple branches of Government." *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring and dissenting in part). Even when agencies "make rules" and "conduct adjudications" (as they have always done in this country) "they are [still] exercises of—indeed, under our constitutional structure they *must* be exercises of—the executive power." *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013).

Courts recognize the President's absolute power over the Executive Branch in many contexts. *See, e.g.*, *In re Aiken Cnty.*, 725 F.3d 255, 263 (D.C. Cir. 2013) ("The President may decline to prosecute … because of the

President's own constitutional concerns about a law *or* because of policy objections to the law."). The Reception Clause, for example, strongly echoes a unitary executive theory in its description of the Presidents' foreign powers. *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 28 (2015) (saying only the President can "recognize foreign states"). Plus, Congress does not have the power to delegate its legislative authority, and "Congress … cannot authorize the use of judicial power by officers acting outside the bounds of Article III." *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring and dissenting in part) (citing *Stern v. Marshall*, 564 U.S. 462, 484 (2011)). So it's constitutionally impossible for agencies to wield "considerable executive power without Presidential oversight." *Id.* at 240. Yet that's precisely what so-called independent agencies do. Calling these parts of the administrative state a "*de facto* fourth branch of Government" is a tacit admission they are alien to our tripartite constitutional structure. *Id.*

Humphrey's Executor also runs afoul of the Take Care Clause, which says the President—not executive actors broadly—has the responsibility to "take Care that the Laws be faithfully executed." U.S. CONST. art II, § 3. Without plenary removal power, the President cannot meet that obligation. The Supreme Court affirmed this doctrine in *Free Enterprise Fund*, when it

held unconstitutional a dual layer of protection for SEC officers. 561 U.S. at 477. The President's "ability to execute the laws," it said, is "impaired" when he cannot "hold[] his subordinates accountable for their conduct." *Id.* at 496. Insulating executive staff and officials from presidential power "violates the basic principle that the President cannot delegate ultimate responsibility or the active obligation to supervise that goes with it, because Article II makes a single President responsible for the actions of the Executive Branch." *Id.* at 496-97 (cleaned up) (citing *Clinton*, 520 U.S. at 712-13 (Breyer, J., concurring in judgment)). But there's nothing special about *Free Enterprise*'s double-removal protection; its logic invalidates single-layer removal protection given to Executive officers, too.

Finally, independent agencies fundamentally violate our republic's principles of democratic accountability. When the people ceded some of their States' sovereignty in forming the federal government, they understood the Constitution delicately balanced liberty interests and an "energetic Executive" with the freedom to enforce the law. *Seila Law*, 591 U.S. at 223-24. But Americans had suffered much under the British monarchy, so they remained wary of power consolidation. To resolve that tension, the Executive

Branch was made "the most democratic and politically accountable" branch of the federal government. *Id.* at 224.

Independent agencies violate these sacrosanct principles of accountability. Without the power to remove, the President can't control his subordinates, and the Executive Branch isn't fully accountable to the people at the ballot box—a devastating change in our governmental structure. *See In re Aiken Cnty.*, 645 F.3d at 439-40 (Kavanaugh, J., concurring) ("The Framers were particularly cognizant, moreover, of the link between accountability of officials in the Legislative and Executive Branches and individual liberty."). The fears of States at the Founding become real by consolidating power in the hands of bureaucrats who are not democratically accountable to the people and to the States. *See* THE FEDERALIST No. 70, at 472, 479 ("[I]t is far more safe there should be a *single* object for the jealousy and watchfulness of the people." (emphasis added)). When bureaucrats take actions contrary to the will of the people, it is much more difficult for Americans to hold them responsible. Without a "clear and effective chain of command" from the elected President, these actions taken by independent agencies lack "legitimacy and accountability to the public." *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (cleaned up).

So where does that leave us, given that *Humphrey's Executor* hasn't been *explicitly* overruled? *See Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part) (noting how the Supreme Court seems poised to expressly "repudiate what is left of this erroneous precedent."); *see also* Order, *Harris v. Bessent*, No. 25-5037 (D.C. Cir. Apr. 7, 2025) (non-precedential). At the very least, this Court need not mechanistically apply *Humphrey's Executor* in every "independent agency" case. This Court should instead be sensitive to the direction the Supreme Court is going, drawing back from the constitutionally aberrant assumptions and premises of *Humphrey's Executor*. *See also Ramos v. Louisiana*, 590 U.S. 83, 121 (2020) (Kavanaugh, J., concurring in part) (including "the precedent's consistency and coherence with previous or subsequent decisions" as a factor for the Supreme Court to consider when deciding whether to overrule its own decisions).

The Court could go further, as there's a good argument that the case has already been "implicitly overruled." *Asher v. Texas*, 128 U.S. 129, 131-32 (1888) ("We [] supposed that a later decision in conflict with prior ones had the effect to overrule them, whether mentioned and commented on or not."); *see* 18 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 134.05[6], at 134-46 (3d

ed. 2008) ("Although a lower court is bound by a prior decision of a higher court until that decision is overruled, there are circumstances in which a prior decision will be overruled implicitly" and "[a] lower court is not bound to follow a decision that has been overruled."). After all, the Court's case law, individual justices, scholars, and others have all flagged serious issues with the case.

II. The Court should not extend *Humphrey's Executor* to these facts.

Even if the Court disagrees with what the Supreme Court, its justices, and others have effectively said about *Humphrey's Executor*'s being bad law, it should read it extremely narrowly and not apply it to the facts of this case. *See Seila Law*, 591 U.S. at 218 (refusing to extend *Humphrey's Executor* beyond its facts); *Collins v. Yellen*, 594 U.S. 220, 254-58 (2021) (holding a restriction on removal of a director of an agency to be unconstitutional and likewise refusing to extend *Humphrey's Executor*).

Humphrey's Executor's holding has been significantly limited to two fact-intensive categories that do not apply to the Commission. *See Severino v. Biden*, 71 F. 4th 1038, 1050 (D.C. Cir. 2023) (Walker, J., concurring) ("[L]ittle to nothing is left of the *Humphrey's* exception to the general rule that the President may freely remove his subordinates.").

The first category—"inferior officers with limited duties and no policymaking or administrative authority"—does not apply. *Seila Law*, 591 U.S. at 218. The Commission's members are not inferior officers. Instead, the Commission makes the final decision on mine-related administrative matters within the Executive Branch. *See* 30 U.S.C. § 823. These members are "appointed by the President by and with the advice and consent of the Senate." *Id.* § 823(a). So they should be removable at will. *Cf. Myers*, 272 U.S. at 176 (holding an inferior executive officer appointed by the President by and with the advice and consent of the Senate was subject to the President's absolute removal authority). This category has only ever applied to a naval-cadet engineer and an independent counsel. *Seila Law*, 591 U.S. at 217 (citing *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988)). The Court shouldn't extend it to the Commission here.

The other *Humphrey's Executor* category does not apply here, either. *Humphrey's Executor* said Congress could legitimately isolate the FTC from at-will presidential removal because it constituted a politically balanced "body of experts" wielding only legislative and judicial power (and little to no executive power). *Seila Law*, 591 U.S. at 216. But this Commission exercises significant executive power. For instance, the Commission selects personnel

like administrative law judges through appointment just like the President does. 30 U.S.C. § 823(d)(1). The Commission has final review of ALJ orders applying and implementing statutes, but entirely at its own discretion—and with an eye toward policy. *Id.* § 823(d)(2)(A)(i). So the Commission's decisions—from appointing ALJs to final review of ALJ decisions to policy considerations—significantly affect the way many statutes are enforced and implemented. That's serious executive power—not the minimal to nonexistent executive power *Humphrey's Executor* envisioned. Lastly, the Commission is not a "body of experts" on an issue like statutory interpretation. "Where the only dispute relates to the meaning of the statutory term[,] the controversy presents issues on which courts, and not administrators[,] are relatively more expert." *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (cleaned up).

Altogether, *Humphrey*'s *Executor* should not be exhumed for this case's sake.

CONCLUSION

This Court should dismiss the Secretary's petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(g) of the Federal Rules of Appellate Procedure, this brief contains 3,475 words, excluding the parts of the document exempted by Rule 32(f), and complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), as required by Rule 27(d)(1)(E), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point CenturyExpd BT font.

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