

In The
Supreme Court of the United States

SCOTT BESSENT, SECRETARY OF THE TREASURY, ET AL.,

Applicants,

v.

HAMPTON DELLINGER, SPECIAL COUNSEL OF THE OFFICE OF SPECIAL COUNSEL.

On Application for Stay Pending Appeal to Chief Justice John Roberts

**BRIEF OF AMICI CURIAE LAW PROFESSORS REGARDING THE
GOVERNMENT'S "APPLICATION TO VACATE THE ORDER ISSUED BY
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA AND REQUEST FOR AN ADMINISTRATIVE STAY"**

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I. INTERESTS OF THE AMICI¹

Amici are law professors with financial-regulation experience who have published extensive research on that subject. Here they urge that, however the Court rules on the Government's emergency stay application, the Court should make it clear that its order does not undermine the independence of the Federal Reserve System. Were the Court's order to send a message that the Fed's independence is in doubt, it could disrupt markets or invite the removal or demotion of Fed officials in ways that might not be easily reversed.

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¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* represent that they authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

of *Principles of Financial Regulation* (2016), which addresses the challenges facing regulators of financial institutions and markets in an interconnected and evolving global financial system. Before becoming an academic, Professor Gordon served as an attorney for the U.S. Department of the Treasury in Washington, D.C.

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Lev Menand is an associate professor of law at Columbia Law School, where he teaches financial institutions and administrative law. He has written extensively on money and banking, including a book, *The Fed Unbound: Central Banking in a Time of Crisis* (2022). Professor Menand served as senior adviser to the deputy secretary of the Treasury from 2015 to 2016, and as senior adviser to the assistant secretary for Financial Institutions from 2014 to 2015. He was previously an economist at the Federal Reserve Bank of New York, where he helped to develop econometric models for the Federal Reserve System's first Comprehensive Capital Assessment and Review. While at the New York Fed, Menand was seconded to the Financial Stability Oversight Council, where he helped to prepare the Council's first financial-stability report.

II. INTRODUCTION AND SUMMARY OF ARGUMENT²

Amici law professors write to urge that, however the Court rules on the Government's emergency stay application, the Court should make it clear that its order does not undermine the independence of the Federal Reserve System. Amici caution that granting emergency relief in this case otherwise could have much broader and highly undesirable implications and consequences for the economy.

Amici emphasize three circumstances that they believe merit the Court's consideration.

First, there is a widespread and not wholly unfounded perception that the Court may in the near future reconsider *Humphrey's Executor*,³ the 1935 decision that affirmed the constitutionality of statutes providing for term-tenured agency heads whom the President can remove only "for cause," often specified as inefficiency, neglect of duty, or malfeasance in office. *Humphrey's Executor* involved President Roosevelt's removal of a commissioner of the Federal Trade Commission, a multimember agency primarily engaged in investigations and adjudications.

The perception that *Humphrey's Executor* now occupies a precarious position has been fueled by the Court's decisions invalidating statutes that limited the President's power to remove the directors of agencies led by individuals (as opposed to agencies

² Throughout this brief, unless otherwise indicated, emphases were added to quotations, while internal citations, footnotes, brackets, ellipses, and the like were omitted from them.

³ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

led by multimember commissions).⁴ Indeed, the Court’s 2020 *Seila Law* opinion cast doubt on *Humphrey’s Executor* when it observed that the factual assumptions underlying its holding have “not withstood the test of time.”⁵ And that pall of doubt spread to the Fed itself when the Court remarked that the Fed is “funded outside the appropriations process through bank assessments,” an observation spotlighting the Fed’s independence from one common form of congressional oversight.⁶ Still, the Court has taken care so far to avoid opining directly on the Fed’s constitutionality, even noting (though not endorsing) the argument that the central bank may “claim a special historical status.”⁷

Despite the Court’s circumspection, the perception that *Humphrey’s Executor*—and thus the Federal Reserve’s independence—may be hanging by a thread acquired new plausibility just a few days ago when the Acting Solicitor General sent Senator Richard J. Durbin a letter informing him that the Department of Justice “will no longer defend the constitutionality” of “certain for-cause removal provisions that apply to members of multi-member regulatory commissions” and that, “[t]o the extent

⁴ See *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020) (invalidating statutory restriction on president’s removal of Director of Consumer Financial Protection Bureau); *Collins v. Yellen*, 594 U.S. 220 (2021) (same re: Director of Federal Housing Finance Agency).

⁵ *Seila Law*, 591 U.S. at 216 n.2.

⁶ *Id.* at 207.

⁷ *Id.* at 222 n.8.

that *Humphrey's Executor* requires otherwise, the Department intends to urge the Supreme Court to overrule that decision[.]”⁸

The Government's Application to this Court reiterates the letter's message and further states that, even if *Humphrey's Executor* is **not** overruled, the “exception” that it creates to the rule of unconstrained presidential removal power “does not apply to multimember agencies that exercise substantial executive power, for instance by promulgating binding rules or issuing final decisions in administrative adjudications.”⁹

The Government's letter and Application avoid mentioning the Board of the Federal Reserve System by name despite its potentially being one of the “multi-member regulatory commissions” whose constitutionality the Government will no longer defend (the Board promulgates binding rules, for instance—including in the routine conduct of monetary policy). But if the Government's newly asserted position were to prevail—that is, if the Court were to overrule *Humphrey's Executor* and on that basis invalidate statutory removal protections for traditional multimember independent agencies—the [Federal Reserve] Board would obviously be among the many agencies

⁸ Letter from Sarah M. Harris to Hon. Richard J. Durbin (Feb. 12, 2025), <https://fingfx.thomsonreuters.com/gfx/legaldocs/movawxboava/2025.02.12-OUT-Durbin-530D.pdf>.

⁹ Application at p. 17 n.5.

whose constitutionality would be under a cloud.” Daniel K. Tarullo, *The Federal Reserve and the Constitution*, 97 S. CAL. L. REV. 1, 45 (2024). Legal observers know this, and so do the markets.

Second, economists agree, and have demonstrated empirically, that there is a critical relationship between economic vibrancy and “central-bank independence”—a topic so important that it has earned its own acronym: *CBI*. Doubts about the Fed’s constitutional viability and independence may not only roil markets but trigger knock-on effects that are hard to predict and may prove equally hard to contain.

The functioning of the Federal Reserve is essential to the stability of the American economy. Concerns (warranted or unwarranted) that its operations could be disrupted could foster financial and political instability and cause lasting harm. Indeed, public belief in the Fed’s independence from political forces is crucial to the Fed’s effectiveness in combating inflation. “[I]f the public *believes* that the central bank is free from interference and that the law [governing the bank] is unlikely to change swiftly and without debate, it will also lower inflationary expectations, leading to price stability above and beyond the control of the money supply.” Cristina Bodea & Raymond Hicks, *Price Stability and Central Bank Independence: Discipline, Credibility, and Democratic Institutions*, 69 INT’L ORGS. 35, 38 (2015) [hereinafter *Stability and Independence*].

And **third**, legal observers, the public at large, and even members of the Court itself have come to view at least some of the Court’s so-called “shadow-docket” rulings

as presaging the ultimate outcome of its merits rulings.¹⁰ With the Government now publicly abandoning its defense of multimember independent agencies similar to the Fed, the public may view *any* shadow-docket ruling touching on presidential removal powers as a portent of the Fed’s eventual fate.

Amici do not write to persuade the Court that any particular view of *Humphrey’s Executor* or of the Fed’s independence is correct, or to weigh in on the merits of Mr. Dellinger’s case, or even to opine on the merits of the Government’s stay application. Rather, we merely suggest that any order be drafted to avoid the instability that might follow if the public and political actors construe a grant of emergency relief in this case as foreshadowing a diminution of Fed independence.

III. ARGUMENT

A. Economists agree that central-bank independence (CBI) is critical to an advanced economy.

Economists agree that an advanced economy requires a central bank with a measure of independence from executive interference. Modern economies depend on long-term investments, and long-term investments depend in turn upon expectations that

¹⁰ See *Louisiana v. Am. Rivers*, 142 S. Ct. 1347, 1349 (2022) (Kagan, J., dissenting, joined by Roberts, C.J. and by Breyer & Sotomayor, JJ.) (observing that the Court’s grant of an emergency stay “signal[led] its view of the merits, even though the applicants . . . failed to make the irreparable harm showing we have traditionally required. That renders the Court’s emergency docket not for emergencies at all. The docket becomes only another place for merits determinations—except made without full briefing and argument.”); Kristen E. Parnigoni, Note, *Shades of Scrutiny: Standards for Emergency Relief in the Shadow Docket Era*, 63 B.C. L. REV. 2743, 2748 n.23 (2022) (“Commentators attribute . . . growing news coverage on the shadow docket to the public’s increasing concern about the shadow docket’s emerging influence . . . in controversial . . . matters.”).

prices will remain stable and that the money supply will expand in line with the economy's needs. When price stability is lost, long-term investment becomes more expensive, growth slows—and those adverse effects are hard to reverse.

To generate the necessary expectations that monetary elasticity will be appropriate over the long term, nations have long relied on independent institutions. This innovation dates to the Bank of England Act in 1694, following the Glorious Revolution, which repudiated the Crown's involvement in monetary affairs and arguably launched modern financial capitalism and the industrial revolution.

In modern times, central-bank independence (CBI) is widely understood to be the antidote to a dilemma that economists have dubbed the “time-inconsistency problem.” That problem is “born of the fact that central bank policies operate over a [long time frame],” but “[a] non-independent central bank can face pressures to quickly goose the economy for political reasons.”¹¹

To put it in more straightforward terms: The time period that elected politicians worry about when considering monetary policy is the time between the present and the next election, while central bankers, by contrast, harbor much longer-term concerns about maintaining appropriate rates of monetary expansion. Elected politicians

¹¹ Council of Economic Advisors, *The Importance of Central Bank Independence* (May 22, 2024), <https://bidenwhitehouse.archives.gov/cea/written-materials/2024/05/22/the-importance-of-central-bank-independence/#:~:text=A%20central%20bank's%20credibility%20is, long%2Dterm%2C%20anchored%20expectations> [hereinafter *Importance of CBI*].

therefore have an incentive to “juice” the economy before elections so that the economy is running hot. Excessive monetary stimulation before elections, or even the perception that it might take place, can trigger harmful inflation.¹²

The cure for the time-inconsistency problem is to lengthen the decision-making horizon of central bankers by shielding them from certain forms of outside pressure. “Research, theory, and evidence all reveal that a central bank’s ability to carry out monetary policy without political interference is a critical component of its ability to control inflation. Because this result is widely understood, nearly all advanced economies and many developing countries are now governed by independent central banks whose governing bodies decide monetary policy without political input, approval, or fear of reprisal.”¹³

But the correlation between CBI and low inflation exists “only in the presence of multiple constitutional checks and balances.”¹⁴ “Delegation of monetary policy to an

¹² *Stability and Independence* at 38.

¹³ *Importance of CBI*; see also Alex Cukierman, Steven B. Webb & Bilin Neyapti, *Measuring the Independence of Central Banks and Its Effect on Policy Outcomes*, 6 WORLD BANK ECON. REV. 353, 375–76 (1992) (concluding that a central bank’s “legal independence is systematically and inversely related to inflation in industrial . . . countries”); Ana Carolina Garriga & Cesar M. Rodriguez, *Central Bank Independence and Inflation Volatility in Developing Countries*, 78 ECON. ANALYSIS 1320, 1320 (2023) (finding that CBI not only “has been linked with lower levels of inflation in developed and developing countries” but also is “directly and unconditionally associated with . . . reduction of [inflation] volatility,” defined as “the prospect that the market’s psychology switches abruptly from fears of inflation to concerns about deflation, and back again”).

¹⁴ *Stability and Independence* at 37.

independent central bank in democracies allows the bank to actually behave in a conservative fashion that is reflected directly in lower rates of money supply growth. That is, the central bank can increase interest rates or target the exchange rate or money supply to ensure, most prominently, price stability, regardless of short-term government pressure.”¹⁵

Moreover, CBI plays a critical role in setting public expectations about future inflation, thus keeping inflation low. “[I]f the public believes that the central bank is free from interference and that the law [governing the bank] is unlikely to change swiftly and without debate, it will also lower inflationary expectations, leading to price stability above and beyond the control of the money supply.”¹⁶

CBI is a system of interdependent protections. Withdrawing even one critical element can bring that system crashing down. Two elements are especially important: the term tenure of the Governors, which can be abrogated only for cause; and the term tenure of the Chair, which cannot be abrogated—that is, the Chair cannot be demoted, only removed for cause from the Board entirely. If either of these critical foundations is compromised, Fed independence is in trouble. For example: The Fed Chair enjoys extensive power over policy. If the Chair can be demoted, the President will have gained a tool that functionally ends Fed independence; markets are likely to react; and any other CBI protections may be rendered illusory.¹⁷

¹⁵ *Id.*

¹⁶ *Id.* at 38.

¹⁷ See Tobias Adrian, Ashraf Khan & Lev Menand, *A New Measure of Central Bank*

Central-bank independence is at least as important here, in the world's largest economy, as it is in any other nation. An infamous case of CBI breakdown in this country involved President Nixon's pressuring of Fed Chairman Arthur Burns to pursue an expansionary monetary policy in the run-up to the 1972 presidential election.¹⁸ That policy helped Nixon get reelected, but it also "helped to trigger an extremely costly inflationary boom-bust cycle" that took a decade to resolve.¹⁹

In short, CBI is critical to the economy and depends on building and maintaining democratic checks and balances that insulate the central bank from inappropriate forms of political influence. Any hint that the United States is abandoning its commitment to CBI could shake confidence in the American economy.

Independence, IMF WORKING PAPER WP/24/35 at p. 13 (Feb. 2024), <https://www.imf.org/en/Publications/WP/Issues/2024/02/23/A-New-Measure-of-Central-Bank-Independence-545270> (discussing interdependence of CBI protections—e.g., if a central bank's chief can be removed at will by the executive, the chief's term of office "does not matter much at all," and if the chief's term of office is one year, strong removal protections are "not particularly valuable"—and proposing a new measure of CBI that "do[es] not credit central bank laws that appear to offer central bank officials decisional independence in some ways but contain loopholes that render the independence generated by those features illusory.").

¹⁸ Burton A. Abrams, *How Richard Nixon Pressured Arthur Burns: Evidence from the Nixon Tapes*, 20 J. ECON. PERSPECTIVES 177, 178 (2006).

¹⁹ *Id.* at 187.

B. The Court should take no action that markets and political actors could interpret as presaging an abandonment of CBI in the United States.

The Court has signaled its awareness that the Federal Reserve is an agency whose independence may warrant special solicitude. The Court’s most recent decisions constraining Congress’s ability to limit the President’s removal power have carefully avoided touching on the Fed—indeed, the Court has noted (without endorsing) the argument that the central bank may “claim a special historical status.” *Seila Law*, 591 U.S. at 222 n.8.²⁰ As discussed below, that history is complex, as is the Fed’s structure. Accordingly, in this case, the Court should avoid taking any action that could signal its view of the constitutional basis for the Fed’s independence.

History: Recent scholarship has shown that the first Congress, many of whose members helped draft the Constitution, saw no constitutional impediment to empowering a variety of boards and commissions whose members could *not* be terminated at will by the President. For example, the first Congress created a Sinking Fund Commission to repay the national debt through open-market purchases of U.S. securities.²¹ Its members included Alexander Hamilton, Thomas Jefferson, John Jay, and Edmund Randolph; and the President had no power to replace or remove several of

²⁰ See also *PHH Corp. v. Consumer Fin. Protection. Bureau*, 881 F.3d 75, 192 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (referring to the Fed Chair as “an historical anomaly . . . due to the Federal Reserve’s special functions in setting monetary policy and stabilizing the financial markets”).

²¹ Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 34 (2020) [hereinafter Originalist Argument].

them.²² Likewise, Hamilton's plan for the first National Bank provided for "removal of a Director by the Stockholders"—but not by the President.²³

Structure and functions: The Federal Reserve System includes the Federal Open Market Committee (FOMC), which regulates the money supply through open-market purchases. A majority of the FOMC (seven members) are members of the Fed's Board of Governors, whom the President appoints to staggered 14-year terms and whom the President can remove only "for cause."²⁴ Five members of the FOMC are presidents of regional Federal Reserve Banks who are appointed to their position by the boards of directors of their regional banks, subject to the approval of the Board of Governors, who may also remove them at will.²⁵ The FOMC's critical monetary functions have been characterized as *legislative* in character—not executive—because they carry out Congress's Article I, section 8 power to regulate the value of money.

²² *Id.* at 3–4.

²³ Alexander Hamilton, *Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank)*, Nat'l Archives Founders Online, <https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003#ARHN-01-07-02-0229-0003-fn-0152-ptr>.

²⁴ *Originalist Argument* at 9.

²⁵ *Id.* at 10–11.

IV. CONCLUSION

For all the reasons stated above, any order issued by the Court should avoid creating any inference concerning the President's power to remove members of the Federal Reserve Board or to demote the Fed Chair.

Respectfully submitted,

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