

IN THE  
**Supreme Court of the United States**

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DONALD J. TRUMP, PRESIDENT OF THE UNITED STATES,

*Applicant,*

v.

LISA D. COOK, ET AL.,

*Respondents.*

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On Application for a Stay of the Injunction Issued by the United States District  
Court for the District of Columbia

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**BRIEF OF PROFESSOR JANE MANNERS AS *AMICUS CURIAE*  
IN SUPPORT OF RESPONDENTS**

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## **INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Jane Manners is an Associate Professor of Law at Fordham University School of Law. Professor Manners teaches and writes extensively on early American understandings of presidential power, including the evolution of laws governing officer removal. She holds a J.D. and B.A. from Harvard University and a Ph.D. in American history from Princeton University.

Professor Manners submits this brief to provide the Court with a fuller understanding of the distinct historical pedigree of the particular language that Congress deployed in the Federal Reserve Act of 1913 and the Banking Act of 1935.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Members of the Federal Reserve Board of Governors serve for a term of fourteen years, subject only to removal for cause by the President. 12 U.S.C. 242. Congress imposed those removal limitations in 1913 and re-enacted them in 1935 for an important reason: it sought to ensure that the Board of Governors would set the course of the country's monetary policy purely on the Board's best assessment of the economic merits, insulated from the risk of partisan political interference. Congress thus sought to deter the President from trying to remove members of the Board for pretextual reasons when the real reason for removal is a policy disagreement

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<sup>1</sup> Pursuant to Supreme Court Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amicus* and her counsel made a monetary contribution intended to fund the preparation or submission of this brief. This brief does not purport to convey the position of New York University School of Law.

regarding the exercise of the Governors' statutory responsibilities, and to afford avenues of relief in the event a president ever sought to do so.

The approach that Congress adopted to achieve those objectives was not an innovation. To the contrary, laws providing that officials would serve a specified term and could be removed only for cause were commonplace throughout the United States by 1913, when Congress first enacted the tenure protection statute at issue here. Accordingly, American courts—and state courts in particular—construing similar provisions had developed a stable understanding of what those provisions meant, and in particular how they shielded officers from removal. And this Court had acknowledged and ratified that settled understanding well before Congress included those provisions in the Federal Reserve Act of 1913. See *Shurtleff v. United States*, 189 U.S. 311 (1903); *Reagan v. United States*, 182 U.S. 419 (1901). Congress therefore should be presumed to have understood exactly what it was doing when it provided that members of the Board of Governors would serve a fixed term and could be removed only for cause prior to the expiration of their terms. A proper understanding of the contemporary public meaning of the statutory standard at issue here thus confirms that the President's effort to remove Governor Lisa D. Cook was unlawful.

To start, the particular framework that Congress chose to adopt in Section 242—a fixed term of years coupled with for-cause removal—unambiguously guaranteed officeholders the right to notice and an opportunity to be heard before they could be removed from office. American courts in the nineteenth and twentieth centuries often held that statutes providing *either* a fixed term of years or for-cause



removal required notice and an opportunity to be heard. The combination of those terms, as in Section 242, made for an easy case. And the President's responses here—that notice and opportunity were required only if a statute specified *particular* causes for removal, and that Governor Cook in fact received adequate process—are irreconcilable with the established judicial understandings in place when the statute was first enacted in 1913 and re-enacted in substantially the same form in 1935.

In addition, Section 242 incorporated the common-law rule that when a law permitted for-cause removal of an officer serving a fixed term, courts were empowered to review the legal sufficiency of the purported “cause.” Numerous authorities recognized and applied that rule in the century before Section 242's enactment. Those courts appreciated that judicial review of the asserted cause served as an important bulwark against executive capriciousness and overreach. The few cases the President cites in support of a contrary position are wholly inapposite.

Finally, prevailing common-law standards indicate that the purported removal of Governor Cook was not for valid “cause.” Leading common-law decisions concluded that laws permitting removal for cause of a defined-term officer ordinarily could not support removal based on untested allegations of private misconduct—especially when the alleged misconduct occurred before the officer took office. Rather, the asserted “cause” for removal had to reflect a closer nexus to the particular office and corresponding duties at issue. Here, the President purported to remove Governor Cook based on unproven, private, pre-office conduct. At common law, that

justification very likely would not have constituted sufficient cause to remove a fixed-term officer.

## **ARGUMENT**

### **I. Removal Under Section 242 Requires Notice and an Opportunity to Be Heard**

For more than a century, members of the Federal Reserve Board have served for a fixed term of years, subject only to removal for cause by the President. In the Federal Reserve Act of 1913, Congress provided that each member “shall serve for a term of ten years unless sooner removed for cause by the President.” Pub. L. No. 63-43, § 10, 38 Stat. 251, 260. And in the Banking Act of 1935, Congress provided that each member “shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” Pub. L. No. 74-305, § 203, 49 Stat. 684, 704-05. That same language remains in force today: “each member shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President.” 12 U.S.C. 242.

In adopting that tenure structure—a term of years combined with removal only for cause—Congress did not write on a blank slate. Rather, Congress legislated against the backdrop of a long history of judicial decisions, from this Court and state courts of last resort, construing legislation conferring term-of-years tenure to create a “vested legal right” to serve in office, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 162 (1803). Offices held for a term of years were “understood to be inviolable: Without provisions to the contrary in a controlling statute, constitution, or grant of

office, an officer serving for a term of years could not be removed mid-term short of impeachment or other extraordinary measure.” Jane Mannors & Lev Menand, *The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence*, 121 Colum. L. Rev. 1, 18-19 (2021); see *id.* at 20-27. Accordingly, statutory removal provisions were used to define the conditions under which an appointing officer could remove an otherwise unremovable officer. See *id.* at 18.

Indeed, this Court was quite clear in 1901 in *Reagan* and in 1903 in *Shurtleff* that when a statute constrains the grounds on which the removing authority may remove an officer, that statute guarantees the officer notice and an opportunity for a pre-removal hearing to contest the allegations on which removal might be based, *Shurtleff*, 189 U.S. at 314; *Reagan*, 182 U.S. at 425, or some other “opportunity to defend” herself, *Shurtleff*, 189 U.S. at 317. Both *Shurtleff* and *Reagan* involved statutes dealing with federal officers, not employees, and the officer in *Shurtleff* was, like Governor Cook, a principal officer. “[I]f a removal is made without such notice,” this Court explained in *Shurtleff*, “there is a conclusive presumption that the officer was not removed for any of those [permissible] causes.” 189 U.S. at 317.

This Court’s decisions in *Reagan* and *Shurtleff* were premised on (and entirely consistent with) the established understanding of American courts in the nineteenth and early twentieth centuries that statutes combining term-of-years tenure and for-cause removal guaranteed officers a right to pre-removal notice and an opportunity to be heard—an understanding that was also expressed in every leading treatise of the era. As this Court explained, by 1901 it was well settled that “where causes of

removal are specified by Constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential.” *Reagan*, 182 U.S. at 425. Given that “longstanding judicial interpretation,” Congress presumptively intended the tenure provision in Section 242 to “retain its established meaning.” *Lamar, Archer & Cofrin, LLP v. Appling*, 584 U.S. 709, 722 (2018). And under that established meaning, Board members are entitled to notice and an opportunity to be heard.

**A. Section 242 Incorporates a Settled Understanding That Where an Officer Was Tenured for a Term of Years, Removal “For Cause” Required Notice and an Opportunity to Be Heard**

By 1913, when Congress created the Federal Reserve Board and gave its members a term-of-years tenure subject only to removal for cause, statutory removal schemes were ubiquitous. Those schemes varied across two important dimensions: tenure and removal. And the way courts treated statutes with different tenure and removal provisions confirms that Section 242 requires notice and an opportunity to be heard. Where statutes did not specify a fixed term and did not provide expressly for removal, courts generally did not require notice or an opportunity to be heard before removal. But where statutes specified either a fixed term or removal for cause, courts often required notice and opportunity, depending on the particular statutory language at issue. And where statutes specified *both* a fixed term and removal for cause—as Congress did in Section 242—courts were remarkably consistent: such statutes guaranteed officeholders notice and an opportunity to be heard.

1. Courts generally understood statutes that specified neither a fixed term nor any removal authority to allow the appointing officer to remove the non-tenured

appointee “at pleasure, and without notice, charges, or reasons assigned.” Montgomery H. Throop, *A Treatise on the Law Relating to Public Officers* § 354, at 352 (1892). Accordingly, this Court ruled that court clerks appointed under statutes that did not specify tenure or removal authority held their offices “at the discretion” of the appointing district courts, such that bare notice was “amply sufficient” for removal. *In re Hennen*, 38 U.S. (13 Pet.) 230, 259, 261 (1839).

2. Where statutes did not specify a fixed term but *did* authorize removal for cause, courts frequently (though not invariably) held that officers were entitled to pre-removal notice and an opportunity to be heard. As this Court explained, state courts often held that “where an officer may be removed for certain causes, he is entitled to notice and a hearing.” *Shurtleff*, 189 U.S. at 314 (collecting cases). And contemporary legal observers agreed, explaining that the “great burden of authority in both this country and in England is to the effect that removal for cause as well as for cause specified requires notice, charges and a hearing.” Alonzo H. Tuttle, *Removal of Public Officers from Office for Cause, I*, 3 Mich. L. Rev. 290, 297 (1905); accord John F. Dillon, 1 *Commentaries on the Law of Municipal Corporations* § 250, at 333 (4th ed. 1890) (“Dillon I”) (distinguishing “discretionary” removal schemes, under which notice and opportunity to be heard are not required, from schemes “where the appointment is *during good behavior*, or where the removal can only be for certain *specified causes*,” under which notice and opportunity to be heard are required).

In *Reagan*, however, this Court held that territorial commissioners appointed without a fixed term and subject to removal “for causes prescribed by law” were not

entitled to notice or an opportunity to be heard. 182 U.S. at 423-424, 427. Because Congress had not in fact prescribed any causes for removal before the appellant commissioner's removal, the Court faced the prospect that the commissioner might be entitled to the same life tenure protections as a federal judge. *Id.* at 425. Rather than adopt such a construction of the relevant statutes, the Court held that where a statute does not specify that the officer holds office "for life" or "any fixed tenure," and Congress has not specified any causes that would justify removal, "removal is incident to the power of appointment." *Id.* at 424-426.

3. Where statutes authorized appointment for a fixed term but also provided for discretionary removal, courts generally assessed the necessity of notice and an opportunity to be heard by reference to the specific removal language at issue. If the relevant provisions made clear, notwithstanding the term-of-years tenure, that the "office is held at the pleasure of the appointing power," courts typically held that the officer "may be removed without notice or hearing." Floyd R. Mechem, *A Treatise on the Law of Public Offices and Officers* § 454, at 287 (1890); accord Dillon I, *supra*, § 250, at 333 ("Where an officer is appointed during pleasure, or where the power of removal is discretionary, the power to remove may be exercised without notice or hearing." (citation modified)). Thus, the New York Court of Appeals construed a statute authorizing the mayor to remove a fixed-term police commissioner "for any cause deemed sufficient to himself" not to require notice or an opportunity to be heard. *People v. Whitlock*, 92 N.Y. 191, 197-199 (1883).

But where statutes did *not* indicate that the office was held “at pleasure,” the “common law rule” required “notice” where an office was held “for a fixed term.” Throop, *supra*, § 364, at 359. A legislature’s choice to specify “a fixed term” displaced the “general rule” that appointed officers could be removed “at pleasure, and without notice, charges, or reasons assigned.” *Id.* § 354, at 352; see *id.* § 354, at 353 & n.2 (“[I]t is conceded, in all the cases, that where a fixed term is assigned to the office, the appointing power has no absolute power of removal.”). Thus, courts often held that “where the term of office is fixed and the power to remove the incumbent is given with nothing further said, it must be presumed that he can be removed only for cause, which means charges, notice and a hearing.” Tuttle, *supra*, at 293-294. Accordingly, the Michigan Supreme Court held that absent “clear and unequivocal” language granting the power to remove “without notice,” the court presumed “that the legislature intended that every officer appointed for a fixed period should be entitled to hold his office until the expiration of such period unless removed therefrom for cause after a fair trial.” *Hallgrene v. Campbell*, 46 N.W. 381, 383 (Mich. 1890).

4. Consistent with the understanding that fixed tenures and “for cause” provisions each denoted procedural rights, courts construing statutes providing for *both* a fixed term and removal for cause reliably held that removal required notice and an opportunity to be heard. Indeed, it was “settled law in this country” that where an officer’s tenure was “for a definite term, subject to be removed for cause,” the officer could be removed “only upon notice, and after a hearing,” or the removal would be considered “erroneous and void.” Throop, *supra*, § 364, at 360; see *id.* § 364,

at 359 (“So where he is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard.”). Stated otherwise, “where the appointment or election [was] made for a definite term or during good behavior, and the removal [was] to be for cause, it [was] clearly established by the great weight of authority that the power of removal can not, except by clear statutory authority, be exercised without notice and hearing.” Mechem, *supra*, § 454, at 287; accord Dillon I, *supra*, § 250, at 333 & n.3.

Courts around the country recognized that rule. The Pennsylvania Supreme Court held that a statute granting county superintendents three-year terms subject to removal for specified causes required notice and an opportunity to be heard. *Field v. Commonwealth*, 32 Pa. 478, 481, 484-485 (1859). The Michigan Supreme Court held that a trustee of a state institution serving a six-year term subject to removal for specified causes was entitled to “reasonable notice of the time and place when and where an opportunity will be given him for a hearing.” *Dullam v. Willson*, 19 N.W. 112, 112, 119 (Mich. 1884). And other courts agreed. See, e.g., *Townsend v. Kurtz*, 34 A. 1123, 1124 (Md. 1896) (“It must be conceded that, if the appellant could only have been removed for cause, he was entitled to notice, and an opportunity to defend himself; for, unless the statute authorize it, no one appointed for a definite term can be removed for cause without having an opportunity to be heard in his defense.”); *Biggs v. McBride*, 21 P. 878, 879, 881 (Or. 1889) (same); *New Jersey ex rel. Haight v. Love*, 39 N.J.L. 14, 21-22 (N.J. 1876) (same).



Most importantly for present purposes, *this* Court also endorsed the same principle in *Reagan* and *Shurtleff*—which is unsurprising given how well established it was by the time the Court decided those cases. Indeed, in its brief in *Reagan*, the United States conceded that under the “American rule,” “where causes for removal of an officer are specified in a constitution or by statute, or the term of office is for a fixed period, the officer can not be removed unless notice be given him and he be afforded a hearing.” Brief for United States 17, *Reagan v. United States*, 182 U.S. 419 (No. 239). In its opinion, this Court cited that proposition as a settled “rule”: “where causes of removal are specified by constitution or statute, as also where the term of office is for a fixed period, notice and hearing are essential.” *Reagan*, 182 U.S. at 425. And two years later, the Court reaffirmed the point, quoting that same language from *Reagan*. See *Shurtleff*, 189 U.S. at 314.

The statutory scheme governing members of the Federal Reserve, first enacted in 1913, fits squarely within that tradition. Ten years after *Shurtleff*, Congress chose to employ a tenure scheme—a term-of-years office plus removal for cause—encompassed by the “rule” that this Court invoked. In the historical context just described, that choice carries meaning. When Congress “borrows terms of art” from accumulated legal tradition, “it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.” *Morissette v. United States*, 342 U.S. 246, 263 (1952). Stated otherwise, Congress transplanted the “old soil” of similar removal provisions into Section 242.

*Sekhar v. United States*, 570 U.S. 729, 732-733 (2013) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). By doing so, Congress guaranteed Federal Reserve members notice and an opportunity to be heard before removal.

## **B. The President's Contrary Arguments Are Unpersuasive**

To the extent the President engages with that history, he offers three principal responses. First, he asserts that when Congress “intends to impose procedural constraints on removal,” it does so expressly. Reply 6. Second, he argues that notice and an opportunity to be heard are required only where a statute specifies particular causes for removal. Reply 6-8. And third, he insists that Governor Cook in fact received sufficient process. Reply 9. Each of those arguments is refuted by the historical record.

1. The President first argues that because some federal statutes include express “notice-and-hearing requirements,” Section 242 must not require the same procedure. Reply 6. But where an officer is “appointed for a fixed term, and removable only for cause,” that language entitles him to “an opportunity to be heard,” without specifying the particular procedures necessary. Throop, *supra*, § 364, at 359; accord Mechem, *supra*, § 454, at 287 (“opportunity to be heard in his defense”); *Field*, 32 Pa. at 484 (“opportunity \* \* \* to defend himself”); *Townsend*, 34 A. at 1124 (“opportunity to defend himself”); *Biggs*, 21 P. at 881 (“opportunity be given him to be heard in his defense”); *Haight*, 39 N.J.L. at 22 (“opportunity for defence”). Although Congress may provide greater specificity by describing the particular form

that the opportunity to be heard must take—as where Congress granted administrative law judges a “hearing” before the Merit Systems Protection Board, 5 U.S.C. 7521(a)—it hardly follows that members of the Federal Reserve receive no opportunity to be heard whatsoever merely because Congress did not specify the particular procedures that would afford that opportunity. See p. 16, *infra*.

2. Next, the President argues that notice and an opportunity to be heard are required only where a statute “specif[ies] causes for removal.” Reply 6-7. As an initial matter, the concession implicit in that argument—that some statutes require notice and an opportunity to be heard even where they do not say so expressly—severely undermines the President’s first argument, that statutes “impose procedural constraints on removal” only where they “say[] so.” Reply 6.

Even more to the point, the President’s bespoke distinction, under which an officer’s right to notice and opportunity turns solely on whether a statute specifies causes for removal or instead authorizes removal “for cause,” is plainly incorrect. Indeed, the lead cases the President cites for this proposition—*Reagan* and *Shurtleff*—contradict his position, as they identify *another* statutory term that independently requires notice and an opportunity to be heard: a “term of office” for “a fixed period.” *Shurtleff*, 189 U.S. at 314 (quoting *Reagan*, 182 U.S. at 425).<sup>2</sup>

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<sup>2</sup> Moreover, the President is incorrect that the Court in *Reagan* deemed notice and a hearing unnecessary because “the statute at issue required cause without listing specific causes.” Reply 7. The Court deemed notice and opportunity unnecessary because the term of office was not for a fixed period and “causes of removal had [not] been prescribed by law before the removal of [the] appellant.” *Reagan*, 182 U.S. at 427; see pp. 7-8, *supra*.

Rather than engage with those statements—which are fatal to his position—the President simply repeats (Reply 7) the D.C. Circuit’s assertion that a fixed term sets “a ceiling, not a floor, on the length of service.” *Severino v. Biden*, 71 F.4th 1038, 1045 (D.C. Cir. 2023). But, as demonstrated, that was not the established understanding when this Court decided *Reagan* and *Shurtleff*. Instead, it was well established that a fixed term at common law granted the official a right to serve that term, which the legislature could *abrogate* by authorizing removal. See *Manners & Menand*, *supra*, at 18-27.<sup>3</sup> And the President’s argument (Reply 7) that a fixed term “has no bearing on an officer’s entitlement to a hearing” cannot be reconciled with the great mass of authority discussed above. See pp. 8-11, *supra*.

In any event, even setting aside the significance of a fixed term of years, provisions authorizing removal “for cause” were regularly treated as functionally equivalent to those specifying causes for removal, in that each required notice and an opportunity to be heard. See, e.g., *Bd. of St. Comm’rs of Hagerstown v. Williams*, 53 A. 923, 925 (Md. 1903); *Andrews v. Police Bd. of Biddeford*, 46 A. 801, 804 (Me. 1900); *Ham v. Bd. of Police of Bos.*, 7 N.E. 540, 543 (Mass. 1886). Contemporary legal observers recognized that point. See, e.g., Tuttle, *supra*, at 297 (“[R]emoval for cause as well as for cause specified requires notice, charges and a hearing.”); accord Throop, *supra*, § 364, at 359-360. And so too did the Senate Office of Legislative Counsel, which, in a memorandum submitted to this Court in 1926, explained that statutes

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<sup>3</sup> In concluding otherwise, the D.C. Circuit in *Severino* relied on a misreading of this Court’s decision in *Parsons v. United States*, 167 U.S. 324 (1897). See *Manners & Menand*, *supra*, at 24 & n.137.

that “provid[e] for removal ‘for cause’” and statutes that “provide certain specified causes for removal” both required “notice and opportunity to defend before removal.” Amicus Br. of George Wharton Pepper, Appx. A, at 267, *Myers v. United States*, 272 U.S. 52 (1926).

The President also claims support (Reply 7-8 & n.1) for his makeshift rule in state case law, but he misreads the cases he cites, all of which addressed statutes that specified not only causes for removal, but also *procedures* for removal. In *Trimble v. People*, where the statute required the governor to state his cause “in writing,” the court “assume[d] that the lawmaking body was of the opinion that the requirement that the cause of removal should be stated in writing was the only check necessary to prevent an arbitrary and oppressive abuse of the power.” 34 P. 981, 985 (Colo. 1893). And in *In re Carter*, where the statute required the mayor to “give written notice” “to the person removed” and then “notify the common council of his action and the reasons therefor,” the court reasoned that “[i]f a previous notice was necessary, and a hearing of the charges was required, before a removal could be made, it would be absurd to require a subsequent notice to the same effect.” 74 P. 997, 998 (Cal. 1903).<sup>4</sup>

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<sup>4</sup> The President also cites a separate opinion in *City of Hoboken v. Gear*, 27 N.J.L. 265 (N.J. 1859). But there, too, the statute required the mayor to specify his cause in writing, see *id.* at 287 (opinion of Vredenburg, J.), and in any event the court disposed of the case on different grounds, see *id.* at 280-281; see also *Haight*, 39 N.J.L. at 22 (New Jersey Supreme Court subsequently confirming that “for cause” provisions require notice and opportunity to be heard). In addition, the President invokes *Whitlock*, but as explained above, see p. 8, *supra*, the statute in that case gave the mayor authority to remove police commissioners “for any cause deemed sufficient to himself,” such that “his conclusion is final.” 92 N.Y. at 197-198.

Those cases do not suggest that “for cause” removal provisions obviate any need for notice and an opportunity to be heard. Rather, the President’s cases show at most that a legislature may supersede the default notice-and-opportunity rule by limiting the available processes.

3. Finally, the President argues (Reply 9) that Governor Cook received the notice and opportunity she was due because the President waited five days between demanding her resignation (on social media) and purporting to remove her (again, on social media). Although Congress may specify different procedures, see pp. 12-13, *supra*, an opportunity to be heard ordinarily requires at least some *proceeding* to address the charges, with “evidence produced,” *Field*, 32 Pa. at 484, and “testimony” heard, *State ex rel. Att’y Gen. v. Hawkins*, 5 N.E. 228, 245 (Ohio 1886); see also *People ex rel. Mayor of N.Y. v. Nichols*, 79 N.Y. 582, 585 (N.Y. 1880) (“The existence of the assigned cause must be ascertained by the production of proofs.”); *Page v. Harden*, 47 Ky. 648, 672 (1848) (“essentially judicial” proceeding “for the ascertainment of fact and law”); accord *Throop*, *supra*, § 365, at 360-361 (“testimony is to be produced in support of and against the charges”). The President plainly did not provide such an opportunity to be heard, and he has failed to identify any historical support for his contrary position.

## **II. The Purported Removal of Governor Cook Was Not “For Cause” Under Common-Law Standards**

### **A. Removals Under Statutes Like Section 242 Are Judicially Reviewable**

In enacting Section 242, Congress incorporated the default common-law rule—recognized by this Court in *Reagan* and *Shurtleff*, explicated by state courts, and reflected in leading contemporary treatises—that when a legislative provision permitted removal of a defined-term officer for “cause,” courts could review whether the asserted cause was sufficient to justify removal. See *Lamar, Archer & Cofrin, LLP*, 584 U.S. at 722. The President’s contrary position relies on cases that are inapposite or readily distinguishable.

1. Prior to the enactment of Section 242, the prevailing common-law rule governing judicial review of the asserted “cause” for removal of defined-term officers was well settled. Leading authorities explained that “the great burden of authority in this country is to the effect that when an officer has a fixed term and is removable for cause, and, as a result, charges, etc., must be had, the courts have the power to inquire into the charges made and to see if they constitute legal cause for removal.” Tuttle, *supra*, at 300; accord Frank J. Goodnow, *The Writ of Certiorari*, 6 Pol. Sci. Q. 493, 532 (1891) (“The courts have held in a series of cases that, where a statute provides that an officer may be removed from office for cause only, the courts have the right to control the discretion of the removing officer in deciding what is cause.”).

Numerous courts applied that rule, both in cases where removal was authorized for “cause,” and where the permissible grounds for removal were specified

with more granularity. For instance, in *State ex rel. Gill v. Common Council of Watertown*, where the law provided that an officer could be removed for “due cause,” the Wisconsin Supreme Court explained that what constitutes “due cause” is not a “decision \* \* \* within the limits of [the removing authority’s] uncontrolled discretion.” 9 Wis. 254, 260 (1859). After all, “if the authority to determine finally what was ‘due cause,’ were given to the same body vested with the power of removal, the limitation would be entirely defeated, and the power of removal absolute.” *Id.* at 261. The court thus concluded that “[w]hat is ‘due cause’ for the removal of an officer, is a question of law to be determined by the judicial department, and in the absence of any statutory provision as to what should constitute such cause, should be determined with reference to the nature and character of the office and the qualifications requisite to fill it.” *Ibid.*

Other courts similarly concluded that the judiciary was to evaluate the asserted cause for removal when a legislative provision authorized removal of a defined-term officer for cause. See, e.g., *State ex rel. Hart v. Common Council of Duluth*, 55 N.W. 118, 120 (Minn. 1893) (“The sufficiency and reasonableness of the cause of removal are questions for the courts. This has been the settled law ever since *Bagg’s Case*, \* \* \* and we are not aware of any respectable authority to the contrary.”); *Andrews v. King*, 77 Me. 224, 234-235 (1885) (“The removal can not be made, unless the alleged cause in fact exists, and such existence should be ascertained and declared, as the legal basis for the sentence of removal. Such is the immemorial practice in prosecutions in the common law courts.”).



Courts recognized that judicial review of the asserted “cause” served as a bulwark against executive overreach. In *Dullam*, the court explained in assessing whether “the specified causes exist” for removal that, “[u]nless it is the manifest intention of the section under consideration that the proceedings should be ex parte as well as summary,” the “exercise of such power, in such manner, would be too despotic for any attempt at vindication in a country which boasts of the utmost liberty compatible with the safety of the state, and is entirely opposed to the genius of our free institutions.” 19 N.W. at 116; see also, *e.g.*, *Nichols*, 79 N.Y. at 588-589 (when an officer could be removed “only ‘for cause,’” there must be a “proceeding” that is “judicial in its character, and, as a necessary consequence, is subject to review by a writ of certiorari issued by the Supreme Court in the exercise of its superintending power over inferior tribunals and persons exercising judicial functions”).

2. The few cases the President invokes to contend that the “determination of cause is committed to the unreviewable discretion of the President,” App. 20, are inapposite, easily distinguished, or both. To start, some of the President’s cases involved circumstances in which the officer at issue did not serve for a term of years; those cases are wholly inapt. See pp. 6-11, *supra*.

The President’s remaining cases are readily distinguishable. *Gear*, for instance, did not raise “a question \* \* \* whether the assigned cause is sufficient,” and instead involved the legislature’s decision to disband the municipal police force altogether—rather than to remove a particular officer for “cause.” 27 N.J.L. at 287 (opinion of Vredenburgh, J.). In *United States ex rel. Garland v. Oliver*, 17 D.C. 47

(1887), the court expressly stated that “[i]t is not argued \* \* \* that, if the power to remove is in the President, this Court can review his action for the purpose of determining the sufficiency of the causes which induce him to remove an officer.” *Id.* at 56. As already noted, *Trimble* addressed a statute that specified the procedures for and checks (or lack thereof) on removal, see p. 15, *supra*, and at any rate *Trimble* was later singled out as “differ[ing] widely from the other cases,” including subsequent cases in Colorado, Tuttle, *supra*, at 299-300. And in the President’s final case, the distinctive scheme at issue permitted removal that was approved by a vote of “a majority” of the legislature—rendering the “removal” more analogous to an unreviewable impeachment than a true executive removal for “cause.” *New York ex rel. Platt v. Stout*, 19 How. Pr. 171 (N.Y. Sup. Ct. Gen. Term. 1860). In all events, a higher New York court later embraced the majority rule: *Nichols* made clear that a defined-term officer who is removable for cause is entitled to judicial review of the “cause” determination. See 79 N.Y. at 589-590.

**B. Unproven Allegations of Private Misconduct Before Taking Office Did Not Constitute “Cause” for Removal Under Leading Common-Law Decisions**

When Congress enacted Section 242, laws permitting removal for “cause” of an officer serving a fixed term ordinarily did not authorize removal based on unproven allegations of private misconduct, especially when that alleged misconduct occurred before the officer took office. Rather, the “cause” typically had to relate more closely to the particular office at issue. Here, the President purported to remove Governor Cook based on alleged, private, pre-office conduct. Under the prevailing common-law

standard, that justification very likely would not have supported a valid removal for cause.

1. Ample common-law authorities indicate that when a law permitted a defined-term officer to be removed “for cause,” the “cause” had to bear a sufficient connection to the particular office and duties involved. Courts explained that “[t]he phrase ‘for cause’ does not mean the arbitrary will of the appointing power, for that might be the outgrowth of mere whim, caprice, prejudice, or passion, which would, in reality, be no cause at all.” *Williams*, 53 A. at 925; *ibid.* (“[T]he phrase ‘for cause’ must mean some cause affecting or concerning the ability or fitness of the incumbent to perform the duty imposed upon him. \* \* \* Hence [‘for cause’] must be inefficiency, incompetency, or other kindred disqualification.”). In other words, the “power to remove” “for cause” is not “an arbitrary one, to be exercised at pleasure, but only upon just and reasonable grounds, and then not until after notice to the person charged.” *Nichols*, 79 N.Y. at 588.

That protection against capricious removals served an important governance function. A court evaluating whether removal was warranted by “sufficient cause” recognized that “[i]t is all important to good government, and the public interests, that an officer who exercises important judicial functions should be free in thought, and independent in judgment, when he acts in the administration of justice and the enforcement of the law.” *In re Eaves*, 30 F. 21, 23 (C.C.W.D.N.C. 1887). After all, “[t]he course of justice would be impeded, and the efficiency of the commissioner would be greatly impaired, if [the officer’s] freedom of action was restrained by

continual apprehensions of removal from office on account of honest official mistakes and errors of judgment, or by [the removing authority's] caprice, or by the clamor of individuals excited by personal prejudices and hostility.” *Ibid.*

2. Courts applied those principles to conclude that removal based on alleged private conduct before assuming office generally did not constitute sufficient “cause” because the asserted cause was too attenuated from the nature of the office at issue. And the cases that permitted removal based on conduct unrelated to the office usually involved removal for proven serious or “infamous” crimes.

a. It was widely recognized that a defined-term officer’s conduct occurring before he took office generally could not establish “cause” warranting removal. As one treatise explained, “misconduct justifying the removal of an officer cannot, as a general rule, be found in acts or conduct *previous* to his election or appointment.” John F. Dillon, *2 Commentaries on the Law of Municipal Corporations* § 477, at 799-800 (5th ed. 1911).

Judicial decisions are in accord. Consider *Gill*, where the superintendent of schools was removed based on “charges related to his conduct in the office during a prior term, and not to anything done or omitted during the term in which he was removed.” 9 Wis. at 257. The removal statute authorized removal “only ‘for due cause.’” *Id.* at 259. After the court determined that it could evaluate the purported “cause,” it reasoned that “we think it a sufficient answer to [the charges], that they did not relate to anything occurring during that term.” *Id.* at 261. The court noted that “[w]e do not say that in no case could acts done during a prior term, justify a

removal.” *Id.* at 261-262. But because this was not a case in which “during his prior term [the officer] had committed a defalcation, and been guilty of gross frauds in the management of his office,” the court concluded that this was not the rare case in which conduct that occurred before taking office constituted “due cause.” *Id.* at 262.

*Speed v. Common Council of Detroit*, which involved the removal for “cause” of a “duly appointed city counselor and head of the department of law,” is of a piece. 57 N.W. 406, 407 (Mich. 1894). The court explained that “the charges preferred, so far as they relate to the acts of Mr. Speed committed before his appointment to, and induction into, this office, are clearly beyond the jurisdiction of the respondents to determine.” *Ibid.* The court then emphatically stated, “[w]e have been unable to find any authority which justifies a removal for such previous misconduct. The misconduct for which any officer may be removed must be found in his acts and conduct in the office from which his removal is sought, and must constitute a legal cause for his removal, and affect the proper administration of the office.” *Ibid.*; see also *Commonwealth v. Shaver*, 3 Watts & Serg. 338 (Pa. 1842).

b. Other authorities emphasized that more than *allegations* were typically required to constitute “cause” warranting removal of a defined-term officer.

*Nichols* illustrates that principle. There, the police commissioner was appointed for “six years,” and the mayor had the “power to remove [him], but only ‘for cause.’” 79 N.Y. at 588. The court explained that any removal proceedings “must be instituted upon specific charges, sufficient in their nature to warrant the removal, and then, unless admitted, be proven to be true.” *Ibid.* (emphasis added).

That is also why, as explained, see pp. 6-11, *supra*, provisions authorizing for-cause removal required notice and an opportunity to be heard. Because the right to notice before removal “for cause” encompassed testing the alleged “cause,” officers could “cross-examine the witnesses produced to support the charges [and] call others in his defense.” *Nichols*, 79 N.Y. at 588. Thus, “[w]hen the right to remove can be exercised only for specific cause, or for cause generally, the appointing power cannot arbitrarily remove the officer; and where the removal is to be had for cause the power cannot be exercised until the officer has been duly notified, and an opportunity has been given him to be heard in his own defense.” *Williams*, 53 A. at 925.

c. Although courts at times permitted removal of an officer based on conduct that did not relate to the office at issue, those cases usually involved already proven “infamous crimes.”

At common law, the leading rule was that an officer could be removed for one type of conduct with “no immediate relation to his office”: a conviction for a crime “so infamous a nature, as to render the offender unfit to execute any public franchise.” *Rex v. Richardson*, 1 Burr. 517, 538-539, 97 Eng. Rep. 426, 438-439 (K.B. 1758); see *Manners & Menand*, *supra*, at 30 & n.162. To justify removal based on such an “infamous crime,” the offense must have been “established by previous conviction by a jury, according to the law of the land.” *Richardson*, 97 Eng. Rep. at 439.

In keeping with that venerable rule, some state courts in the nineteenth century concluded that when “removal can only be for cause, but the statute does not specify in detail what the causes are,” the requisite “cause” could be based on

“commission of an infamous crime,” in addition to causes such as “a conviction of a misdemeanor and sentence to imprisonment for a term which will prevent the officer from discharging the duties of his office” or an “act of nonfeasance or malfeasance in office.” *Andrews*, 77 Me. at 232; see also, *e.g.*, *Richards v. Town of Clarksburg*, 4 S.E. 774, 779 (W. Va. 1887).

3. In light of the foregoing, it is highly unlikely that the asserted reason for Governor Cook’s removal would constitute sufficient “cause” under leading common-law authorities. The stated reason for Governor Cook’s removal involved unproven, private, pre-office conduct. See App. 7-8. That does not resemble the type of “cause” that state courts deemed sufficient prior to Section 242’s enactment.

To be sure, the decisions from the relevant era are not a monolith that adopted uniform and rigid rules. Here, *amicus* seeks to survey the prevailing standards and reasoning of leading cases from the era. And given those standards, the asserted “cause” for removing Governor Cook—which involves unproven, private, *and* pre-office conduct without a conviction for a serious crime—likely would not have constituted sufficient cause to warrant removal in the years prior to Section 242’s enactment.

## CONCLUSION

The application should be denied.

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