No. 22-40328

In the United States Court of Appeals for the Fifth Circuit

CONSUMERS' RESEARCH; BY TWO, L.P.,
Plaintiffs-Appellees,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas, Tyler Division, No. 6:21-cv-256-JDK

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLEES

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October 7, 2022

UNOPPOSED MOTION FOR LEAVE TO FILE BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

Pursuant to Rule 29.1 of the Rules of this Court, the New Civil Liberties Alliance ("NCLA") respectfully moves for leave to file the attached brief as *amicus curiae* in support of Plaintiffs-Appellees. Counsel either consent to or do not oppose the motion.

NCLA is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.

NCLA has appeared before numerous courts in cases involving the protection of core constitutional rights: jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, and the right to have all executive power directed by an accountable President—the principle at issue in this appeal. U.S. Const. art. II; *see, e.g.*, *Seila Law L.L.C. v. CFPB*, 140 S. Ct. 2183, 2211 (2020) ("In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead.").

NCLA believes that, because of the restrictions limiting the

President's ability to remove Consumer Product Safety Commission ("CPSC") Commissioners, the CPSC's assertion of executive power against Plaintiff-Appellees usurps the President's executive power and his fundamental constitutional obligation to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. NCLA believes it can provide the Court with a perspective not shared by any of the parties.

For the foregoing reasons, NCLA requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this motion complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because this brief was prepared in 14-point Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. *See* Fed. R. App. P. 27(d)(1)(E); 5th Cir. R. 27.4. This motion complies with the type-volume limitation of Rule 27(d)(2) because it contains 270 words, excluding the parts exempted under Rule 32(f).

/s/ Gregory Dolin
Gregory Dolin

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, an electronic copy of the foregoing motion for leave to file a brief *amici curiae* was filed with the Clerk of Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF filing system and that service will be accomplished using the appellate CM/ECF system.

/s/ Gregory Dolin
Gregory Dolin

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels, and the right to have executive power exercised only by actors directed by the President, which is at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by government officials not answerable to the President who are purportedly authorized by statute to usurp his Article II power to enforce the law. That usurpation is present here, where Congress has authorized the Commissioners of the Consumer Product Safety Commission ("CPSC") to exercise executive powers, including the power to commence litigation. But CPSC Commissioners may not be removed at will by the President. Because they are not subject to his at-will removal, the Commission may not exercise the executive power.

STATEMENT OF THE CASE

CPSC is a United States agency charged with "protect[ing] the public against unreasonable risks of injury associated with consumer

products." 15 U.S.C. §§ 2051(b)(1), 2053(a). It is comprised of five Commissioners appointed by the President and confirmed by the Senate. *Id.* § 2053(a). The Commission is empowered to broadly exercise executive powers, including the power to bring civil actions to enforce "laws subject to its jurisdiction." *Id.* § 2076(b)(7)(a). The Commissioners are not at-will appointees. The President may only remove a Commissioner for cause; specifically, "for neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

Plaintiffs are educational organizations focused on product safety issues. ROA.613. Pursuant to the Freedom of Information Act ("FOIA"), they made multiple requests from the Commission for information relevant to Plaintiffs' work. The requests began in March 2021: Several have been responded to, several are pending. ROA.617.

Dissatisfied with the CPSC's responses to their FOIA requests, Plaintiffs sued. They alleged that the Commission's structure violates Article II of the Constitution and the separation of powers by insulating the Commissioners from presidential removal. They requested a declaratory judgment that the Commission's structure violates the Constitution. ROA. 617-18.

The Commission moved to dismiss the Complaint. It argued that its structure is identical to that of the FTC (multimember Commission, and Commissioners removable only for cause), and FTC's structure had been upheld as constitutional against an Article II challenge in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). ROA.629.

On March 18, 2022, the district court granted Plaintiffs' request for declaratory relief: "The Court holds that (1) the removal restriction in U.S.C. § 2053(b) violates Article II of the Constitution; (2) Plaintiffs are entitled to declaratory judgment to ensure that future FOIA requests are administered by a Commission accountable to the President…." ROA.649.

The district court acknowledged that there was a "*Humphrey's Executor* exception" to the general rule of unrestricted Presidential power to remove executive officers. ROA.629. However, according to the district court's analysis, the Supreme Court had applied the *Humphrey's Executor* exception only where, as with the FTC in 1935, "the multimember commissions did not exercise substantial executive power." ROA.634. The district court held that, unlike the FTC in 1935, "the

Commission exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception." *Id*.

CPSC has appealed. It argues that the district court misreads *Humphrey's Executor*. In CPSC's view, *Humphrey's* permits Congress to restrict the President's power to remove Commissioners who are members of multi-member bodies of experts. Appellant's Brief, at 29.

ARGUMENT

CPSC's argument against the district court's conclusion—"the Commission exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception"—is wrong for two reasons—one focusing on the Constitution and the other concentrating more on precedent. To be precise, the Court should simultaneously reject *Humphrey's Executor* and follow it.[2]

I. *HUMPHREY'S EXECUTOR* WILL NEED TO BE RECONSIDERED: CPSC'S ACTION AGAINST PLAINTIFFS IS UNCONSTITUTIONAL BECAUSE EXECUTIVE POWER CANNOT BE EXERCISED BY PERSONS PROTECTED FROM REMOVAL

It is often said that administrative power resides not only in executive agencies but also in independent agencies. The latter are independent in the sense that their heads are protected from Presidential removal and control. But under the Constitution, the executive power "shall be vested" in the President, which includes the authority to remove subordinates, and this removal authority is essential if executive power is to be accountable. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2211 ("In our

[2] This brief does not address any other issue presented in the Appeal.

constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead"); *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep … officers accountable—by removing them from office, if necessary."); *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring-in-part and dissenting-in-part) ("Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power 'remained with the President' unless 'expressly taken away' by the Constitution." (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789))). Indeed, because of the vast growth in executive power, it is more important now than ever before that such power be accountable through Presidential removal. *See Myers v. United States*, 272 U.S. 52, 134 (1926) ("The imperative reasons requiring an unrestricted power [of the President] to remove the most important of his subordinates in their most important duties must therefore control the interpretation of the Constitution as to all appointed by him.").

Although this brief will eventually ask this court to follow *Humphrey's Executor* by holding CPSC's exercise of executive power unconstitutional, it begins by pointing out that the barriers to removal upheld by that case were themselves unconstitutional. In other words, CPSC's conduct regarding Plaintiffs is unconstitutional *both* because *Humphrey's* must be rejected and because it must be followed.

Because this court does not have the power to, on its own authority, overrule *Humphrey's*, *see State Oil v. Kahn*, 522 U.S. 3, 20 (1997) ("[I]t is this Court's prerogative alone to overrule one of its precedents."), it must rely on it in a way that is likely to be upheld.

A. Removal Is Part of Executive Power and Is Unqualified

Removal of subordinates is part of the President's executive power. *See Seila Law*, 140 S. Ct. at 2211; *Free Ent. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 134. One might think it telling that, although the Constitution has a provision for appointments, it says nothing about removal. It is improbable, however, that the President has no constitutionally established authority to remove subordinates. And if the suggestion is that the Founders simply forgot to discuss the question, that is even less credible. In fact, both appointments and removal were

part of the Constitution's executive power.

This inclusion of hiring and firing authority within executive power is significant because the Constitution later limits Presidential appointments, but not removals. It thereby leaves the President unlimited in his authority to remove subordinates.

1. Executive Power Includes at Least the Execution of the Law

The President by himself cannot execute the law—so he necessarily must rely on a hierarchy of subordinates, whether officers or employees, to do most of the execution. *See Myers*, 272 U.S. at 117; *Cunningham v. Neagle*, 135 U.S. 1, 63-64 (1890). If such persons are essential for executing the law, then the Constitution "empower[s] the President to keep … [these] officers accountable—by removing them from office, if necessary." *Free Ent. Fund*, 561 U.S. at 483. As the Supreme Court explained, "[i]n our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead." *Seila Law*, 140 S. Ct. at 2211. If the President cannot retain and remove those who execute the law, then he does not have the full scope of law-executing

power which is in turn an essential part of his executive powers. Thus, faithfulness to the Vesting Clause of Article II requires the recognition of the President's untrammeled authority to remove executive branch officials.

2. Executive Power More Generally Is the Action, Strength, or Force of the Nation

The "executive power" is much broader than merely the power to execute the laws. Undoubtedly, it includes the execution of law, but at the Founding it was understood as also including the nation's action, strength, or force. This more expansive foundation reinforces and broadens the conclusion that the President's "executive power" includes the authority to remove subordinates.

An understanding of executive power as the nation's action, strength, or force was a familiar concept at the time of the Founding. For example, Jean-Jacques Rousseau associated executive power with the society's "force," and Thomas Rutherforth defined it as the society's "joint strength." *See* Philip Hamburger, *Delegation or Divesting*, 115 N.W. L. Rev. Online 88, 112 (2020). As Alexander Hamilton understood and explained, the Constitution divides the government's powers into those

of "force," "will," and "judgment"—that is, executive force, legislative will, and judicial judgment. Alexander Hamilton, Federalist No. 78, in The Federalist, 523–24.

This vision of executive power included law enforcement but also much more. Conceiving of the executive power in this way has the advantage of, for example, explaining the President's power in foreign policy, which cannot easily be understood as mere law enforcement.

That the Constitution adopted this broad vision of executive power is clear from its text—in particular, from the contrast between the President's "executive Power," U.S. Const, art. II, §1, and his duty to "take Care that the Laws be faithfully executed," *id.*, § 3. Article II then frames the President's authority in terms of *executive power*, not merely "executing the law." The latter is merely a component of the former, which on one hand is limited by the requirement that the President "take Care that the Laws be faithfully executed," but also includes the "nation's action, strength, or force."

It further follows that the more expansive the definition of "executive power" is, the broader the concomitant authority to remove inferior executive officials. If the Constitution vests in the President the

"nation's action, strength, or force," it follows that he must have sufficient authority to remove people whom he views as undermining that strength or being insufficiently forceful. The second foundation matters not only because it is the more accurate understanding of the President's executive power but also because it clarifies the breadth of the President's removal authority. His law-executing authority (which is part of his executive power) reveals that he can hire and fire subordinates engaged in law enforcement. And his executive power—understood more fully as the nation's action or force—shows that he can hire and fire of all sorts of subordinates.[3] *See Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.") (cleaned up).

[3] To be sure, the President's power to hire Executive Branch officials is limited by the Appointments Clause. U.S. Const. art. II, § 2, cl. 2.

3. Whereas the Power of Appointment Is Qualified, the Power of Removal Is Not

Although the President's executive power includes both hiring and firing authority, the Constitution treats them differently. Article II modifies and limits his power in appointments, but it leaves the power over removal untouched.

That executive power was unqualified as to removals was spelled out in 1789 by Representative John Vining of Delaware:

> [T]here were no negative words in the Constitution to preclude the president from the exercise of this power, but there was a strong presumption that he was invested with it; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

John Vining (May 19, 1789), *in* 10 Documentary History of the First Federal Congress 728 (Charlene Bangs Bickford, *et al.*, eds.) (The Johns Hopkins Univ. Press, 1992).

James Madison was equally emphatic, writing:

> The legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with

> designating the man to fill the office. That I conceive to be of an executive nature. . .. The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the constitution stipulates for the independence of each branch of the government.

James Madison (June 22, 1789), *in* 11 Documentary History of the First Federal Congress 1032 (Charlene Bangs Bickford, *et al.*, eds.) (The Johns Hopkins Univ. Press, 1992). Madison rejected the argument that limits on Presidential appointments implied similar limits on removals, writing that although the power of appointment "be qualified in the constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." *Id.*

The First Congress adopted these views. Thus, in 1789, when the first Congress considered a statutory limit on the President's removal authority it, in what has since then been referred to as "The Decision of 1789," refused to adopt it. But this label is misleading. It suggests that the Constitution had nothing to say on the question and that the President's removal authority was merely a congressional decision—as if removal rests merely on a political precedent. In fact, the Constitution's text establishes the president's removal authority by vesting executive

power in him without limiting it in respect to his o power to remove subordinates. The 1789 debate is merely further evidence of the decision made in the Constitution.[4]

In short, at the time of the Founding it was clearly understood that the President's removal power is different from and stands in contrast to his power of appointments. Although both powers are part of the "executive power," the latter was substantially qualified, whereas the former remained absolute and unqualified.

4. The President's Removal Authority Is Confirmed by His Duty "to take Care that the Laws be faithfully executed"

The President's removal authority is reinforced by his duty to "take Care that the Laws be faithfully executed." U.S. Const, art II, § 3. The President of course may, and indeed has no choice but to delegate much of his *authority* to carry the laws into execution to subordinates. *See Myers*, 272 U.S. at 117; *Cunningham*, 135 U.S. at 63-64. At the same

[4] According to the Supreme Court, "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *Free Ent. Fund*, 561 U.S. at 483 . More accurately, the Court might have said: "Since 1787…".

time, his *duty* "to take Care that the Laws be faithfully executed" is non-delegable, and he remains exclusively responsible for this function of the Government. It therefore follows that the President must have the power to remove individuals who, in his view, do not help him fulfill, or worse yet, undermine his duty of faithful execution of the Nation's laws. The threat of removal is the only way that the President can exercise control over his subordinates and ensure that through *their* action or inaction, *he* does not fail in *his* duty. "[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed." *Myers*, 272 U.S. at 164 (quoted in *Free Ent. Fund*, 561 U.S. at 492; and in *Seila Law*, 140 S. Ct. at 2197).

The exercise of executive power takes many forms. From filing a lawsuit, to conducting administrative proceedings or complying with the FOIA. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. Const. art. II, § 3); *Seila Law*, 140 S. Ct. at 2198 n.2 ("[A]gency adjudication 'must be' an exercise of executive

authority" (quoting *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013))). The Take Care Clause underlines and confirms that the President's executive power includes a discretionary authority to remove officials who exercise his authority under that Clause.

B. Humphrey's Executor Needs to Be Reconsidered

It ultimately will be necessary to reconsider the holding of *Humphrey's Executor*, which upheld the constitutionality of the FTC Commissioners' tenure protections. It is important to remember that *Humphrey's* did not dispute the President's executive power to remove Executive Branch subordinates; as the court below noted, ROA.630, *Humphrey's* held that the FTC did not exercise "executive power." *See* 295 U.S. at 628 ("[T]he commission acts in part quasi legislatively and in part quasi judicially … [and] [t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so … as an agency of the legislative or judicial departments of the government."). However, it is obvious that the FTC in 1935 exercised "executive power in the constitutional sense." Thus, *Humphrey's Executor* was and is mistaken. *See Seila Law*, 140 S. Ct. at 2198 n.2. Therefore, it will ultimately have to be overruled.

II. IF, AS CPSC ARGUES, *HUMPHREY'S EXECUTOR* MUST BE FOLLOWED, CPSC'S CONDUCT REGARDING PLAINTIFFS IS UNCONSTITUTIONAL BECAUSE *HUMPHREY'S* BARS THE AGENCY FROM EXERCISING EXECUTIVE POWER

Although CPSC's action is unlawful because *Humphrey's* should be overruled, even if this court follows *Humphrey's* to the letter, it must still reach the same conclusion—i.e., that CPSC's action is unlawful. And this court can modestly follow *Humphrey's* by holding as much—confident that even if the Supreme Court rejects that precedent, this court's judgment will be upheld.

A. Humphrey's Executor Forbids the CPSC from Exercising Executive Power

CPSC's FOIA decisions regarding Plaintiffs are unlawful under *Humphrey's Executor* because that case held that FTC Commissioners can enjoy tenure protection only because the Commission does not exercise executive power. 295 U.S. at 628.

The Court in *Humphrey's* did not doubt the President's power to terminate the employment of an executive officer. In fact, the Court characterized the President's Article II power to terminate as "exclusive and illimitable." *Id.* at 627.

In other words, the Court assumed that the FTC brought enforcement actions only in its own, internal adjudications, not in Article III courts. It thought such internal enforcement could be viewed as derivative of FTC's quasi-legislative and quasi-judicial powers. But it thereby drew a sharp contrast. Whereas FTC enforcement within the agency was not "executive power in the constitutional sense," FTC enforcement outside the agency, in Article III courts, would be "executive power in the constitutional sense." *Id*. at 628.

The court below correctly concluded that "the Commission exercises substantial executive power" in the constitutional sense. The Commission adjudicates administrative cases and it initiates lawsuits. ROA.634, 636. "At oral argument, the Government conceded this authority was an executive power." *Id*. CPSC does not and cannot claim that it exercises anything other than executive power.

CPSC cannot have it both ways. Per *Humphrey's Executor*, the CPSC's structure of Commissioners not removable by the President would be constitutional only if the Commissioners did not exercise executive power. If they did exercise executive power, *Humphrey's Executor* does not protect them from at-will removal by the President. By

its own admission, the Commission concedes that the power it exercises is executive power. Memorandum Opinion and Order, ROA at 636.[5]

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[5] Only two cases other than *Humphrey's Executor* have upheld statutory limits on Presidential removal. *See Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958). Neither, however, assists the CPSC.

Wiener concerned the War Claims Commission, which possessed no executive powers, instead being "established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof." 357 U.S. at 345-55. Furthermore, as the War Claims Commission was processing claims that were to be paid by the United States and out of the federal treasury, *see* 50 U.S.C. § 4143, the Commission was essentially an Article I tribunal similar to the long-established and long-accepted Court of Claims. *Cf. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1855) ("It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just.").

Morrison also offers no help to CPSC's position. That case involved the unique problem of an independent counsel, who was viewed by the Court (correctly or not) as an "inferior officer," in contrast to CPSC Commissioners who are indisputably "principal officers." Thus, the *Morrison* "exception" cannot be relied on here. Additionally, *Morrison* has been so widely and prominently questioned that it is not clear it can *ever* be relied upon—even as to its own facts. *See, e.g.*, *Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, 92 Stan. Law. In Brief (2015), https://stanford.io/3qw1UuM ("Kagan called Supreme Court Justice Antonin Scalia's lone dissent in *Morrison* … 'one of the greatest dissents ever written and every year it gets better.'"); *The Future of the Independent Counsel Act: Hearing Before the S. Comm. on Gov't Affairs*, 116th Cong. 243 (1999) (statement of Janet Reno, Att'y Gen. of the United States) ("[T]he Independent Counsel Act is structurally flawed and … [these] flaws cannot be corrected within our

B. This Court Has a Duty to Follow Precedent Faithfully

This court must follow both the Constitution and Supreme Court precedent. Although precedents, such as *Humphrey's Executor*, sometimes stray from the Constitution, in this instance the court is fortunate that the Constitution whether applied as properly understood, *see ante* § I, or as applied too abstemiously in *Humphrey's*, leads to the same conclusion—the CPSC is unconstitutionally structured.

This court therefore should follow both the Constitution and the precedent, resting its decision on the latter.

First, in following the Constitution, it should note that *Humphrey's* is probably mistaken, because the President enjoys constitutional authority to dismiss any other person exercising executive power. *See ante*, § I.

Second, in following precedent, this court should hold that under *Humphrey's Executor*, the CPSC cannot exercise executive power because its Commissioners are shielded from executive removal.

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constitutional framework.").

CONCLUSION

Because the CPSC Commissioners exercise executive power and are not removable at will by the President, the Commission is structured unconstitutionally. The district court's grant of declaratory relief on Count I should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 4,035 words. This brief also complies with the typeface and type-style requirements of the Federal Rule of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Gregory Dolin
Gregory Dolin

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

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