ORAL ARGUMENT NOT YET SCHEDULED
No. 22-1300

In the United States Court of Appeals for the District of Columbia Circuit

WINDOW COVERING MANUFACTURERS ASSOCIATION,
Petitioner,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

On Petition for Review of a Final Rule of the
United States Consumer Product Safety Commission

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PETITIONER

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CERTIFICATE OF PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

A. Parties and Amici. All parties appearing before the Consumer Product Safety Commission ("CPSC") and in this Court appear in the Brief for Petitioner. It is our understanding that two additional *amici* intend to file briefs in support of Petitioner.

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Petitioner.

C. Related Cases. An accurate statement regarding related cases appears in the Brief for Petitioner.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel states that *amicus curiae* New Civil Liberties Alliance is a nonprofit organization under the laws of the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

/s/ John J. Vecchione
John J. Vecchione

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this brief.* NCLA filed its notice of its intent to participate in this case as amicus curiae on February 3, 2023. Pursuant to Circuit Rule 29(d), NCLA certifies that a separate brief is necessary to provide an in-depth constitutional analysis of "independent agencies" that will affect not only the presently challenged regulation, but the ability of CPSC and other similarly structured agencies to continue exercising the executive power of the United States.

* 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. *See* Fed. R. App. P. 29(c)(5).

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CPSC	Consumer Product Safety Commission
FTC	Federal Trade Commission
NCLA	New Civil Liberties Alliance
SBA	Small Business Administration

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. 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 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.

NCLA aims to defend civil liberties—primarily by reasserting 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" or "Commission") 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, period.

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).

Petitioner is an organization that "represents the interests of the window covering industry manufacturers, fabricators and assemblers." *See* Window Covering Mfrs. Ass'n, https://wcmanet.com/. Its members are "are committed to providing safe products for consumers," and to that end have adopted and several times revised "a voluntary standard to reduce the safety risks from window coverings, especially to children." Pet. Br. at 7 (citing A725-27; A156-57).[1]

On November 28, 2022, CPSC promulgated a new rule entitled "Safety Standard for Operating Cords on Custom Window Coverings." 87 Fed. Reg. 73,144 (Nov. 28, 2022). The rule is directed at "custom window coverings" rather than stock product—an extraordinarily popular product with, according to Commission's own estimates, over 220 million such products being in residential use in the United States, *id.* at 73,149, with an additional 80 million products in commercial use, *see* A67. In evaluating these products, the Commission "determined that custom

[1] "A" refer to the addendum to Petitioner's stay motion.

window coverings with accessible operating cords longer than 8 inches pose an unreasonable risk of strangulation to children 8 years old and younger," 87 Fed. Reg. at 73,144, and as a result of this determination required either elimination or substantial changes to the most popular designs of custom window coverings. The scale of the required changes is evident from the fact that "[n]o major manufacturer currently makes a corded custom window covering that complies with the Rule." Pet. Br. at 14.

The rule was set to go into effect six months after promulgation. This portion of the rule was opposed by the Small Business Administration ("SBA")—an Executive Branch agency led by a Senate-confirmed, Cabinet-level official serving at the pleasure of the President. *See* 87 Fed. Reg. at 73,179, 73,185 (discussing SBA's comments on the proposed rule). CPSC enacted the rule despite SBA's stated opposition.

Petitioner challenged the rule on several grounds including (a) CPSC's failure to comply with the Consumer Product Safety Act, 15 U.S.C. § 2051 *et seq*., and (b) the Commission's unconstitutional structure. On January 10, 2023, this Court granted Petitioner's motion for stay pending review and set an expedited briefing schedule.

ARGUMENT

Petitioner's argument that the "*Humphrey's Executor* exception does not apply because CPSC Commissioners exercise 'substantial executive power' without meaningful supervision," Pet. Br. at 51 (quoting *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020)), is correct for two separate 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—for now.[2]

I. *HUMPHREY'S EXECUTOR* WILL NEED TO BE RECONSIDERED: CPSC'S STRUCTURE 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 independent agencies, which 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

[2] This brief does not address any other issue presented in the Petition for Review.

is to be accountable. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2211 ("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"); *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)). Vast growth in executive power makes it more important 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 asks this court to follow *Humphrey's Executor* by holding CPSC's exercise of executive power unconstitutional, it also points out that the barriers to removal upheld by that case were themselves unconstitutional. In other words, CPSC's conduct regarding Petitioner 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 Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 134. One might think it probative that the Constitution has a provision for appointments, but it says nothing about removal. It is improbable, however, that the President lacks constitutional authority to remove subordinates. If the suggestion is that the Founders simply forgot to discuss the question, that is even less

credible. Both appointments and removal, in fact, 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 Enter. 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. The Federalist No. 78 (Alexander Hamilton).

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 hiring and firing authority, the Constitution treats them differently. Article II modifies and limits appointments power but leaves his removal power 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 a misnomer. It misleadingly 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 power

to remove subordinates. The 1789 debate is merely further evidence of the decision already 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 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

[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 Enter. Fund*, 561 U.S. at 483. "Since *1787* …" would be even more accurate.

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 Enter. 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. *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. It Is Constitutionally Intolerable for an Executive Branch Agency to Defy Presidential Policy Preferences

The Constitution vests all executive power in a single person. U.S. Const. art. II, § 3. "Every executive official is merely exercising the President's power, and it is ultimately the President's personal responsibility to 'take Care that the Laws be faithfully executed.'" Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 Stan. L. Rev. 1005, 1038 (2011) (quoting *id.*). While the Constitution permits and expects the President to delegate his authority to subordinates (*see, e.g.*, 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939); *Free Enter. Fund*, 561 U.S. at 492), our founding document structured the executive power in such a way as to maintain "the requisite responsibility and harmony in the Executive Department," Letter from James Madison to Thomas Jefferson (June 30, 1789), *in* 16 Documentary History of the First Federal Congress 893 (Charlene Bangs Bickford & Kenneth R. Bowling eds.) (The Johns Hopkins Univ. Press, 2004). The only way to ensure such "responsibility and harmony" is to ensure that the party

actually accountable to the nation's voters serves as an ultimate decisionmaker. It is for this reason that then-Judge Kavanaugh wrote in *SEC v. Fed. Lab. Rels. Auth.*, a system that "pit[s] two agencies in the Executive Branch against one another" is a "constitutional oddity." 568 F.3d 990, 996 (D.C. Cir. 2009) (Kavanaugh, J., concurring). That's putting it rather mildly. A situation where the only person who is actually vested with the "Executive Power" is unable to resolve a dispute between two Executive Branch agencies is not a merely a "constitutional oddity," but a direct affront to the Constitution as properly construed.

As our Founding Fathers wrote more than two centuries ago, "Governments [which] are instituted among Men[] deriv[e] their just powers from the consent of the governed." Declaration of Independence, ¶2; *see also* U.S. Const. pmbl.. "[T]he true principle of a republic is, that the people should choose whom they please to govern them." *Powell v. McCormack*, 395 U.S. 486, 540-41 (1969) (quoting 2 Debates on the Federal Constitution 257 (J. Elliot ed. 1876)). This means that statutes derive their political legitimacy from "the fact that in a democracy the people may vote out politicians whose acts displease them[] and elect new representatives who promise change." *David B. v. McDonald*, 116 F.3d

1146, 1150 (7th Cir. 1997). Regulatory actions are in no less need of political legitimacy than statutes are. Much like statutes, these actions derive their legitimacy from the legitimacy conferred upon the President by the results of quadrennial plebiscite. In contrast, "[r]egulatory 'failure' … occurs when an agency has not done what elected officials would have done had they exercised the power conferred on them by virtue of their ultimate political responsibility." Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 Yale L.J. 1395, 1399 (1975). In other words, an agency fails both politically and more importantly constitutionally when it "reach[es] substantive policy decisions (including decisions not to act) that do not coincide with what the politically accountable branches of government would have done if they had possessed the time, the information, and the will to make such decisions." *Id.* This is precisely what happened here.

The SBA is an agency that is directly responsible to the politically accountable President because it is run by an Administrator who is removable at will. When the President, who is attuned to the needs of the electorate because either he, or his political compatriot will, at any given time, be just a few months away from facing the public's judgment,

is displeased with the actions of the SBA Administrator, he will dismiss the Administrator from his position. The ability of the President to dismiss the Administrator is the most potent tool to ensure that the SBA hews closely to the President's preferred policy. In the present case, although President Biden did not personally sign SBA's letters to the CPSC, because he does exercise direct control over the SBA, it is safe to assume that the opposition to the six-month implementation window and certain other aspects of the Rule is the Administration's official policy. If the President made an incorrect choice and as a result of a delay in implementing the Rule more children will be injured (as the CPSC suspects), then the voters will have an opportunity to hold the President accountable for such callousness at the next election. On the other hand, if the President is correct that the harm to the industry is not outweighed by the marginal improvement to the likelihood of injury, then the voters will have an opportunity to reward such far-sightedness.

CPSC, however, ignored the President's preferred policy choice and instead substituted its own. CPSC "has not done what elected officials would have done had they exercised the power conferred on them by virtue of their ultimate political responsibility." Cutler & Johnson,

supra. The Commission "reach[ed] substantive policy decisions … that do not coincide with what the politically accountable branches of government [wished to] have done," *id.* and as a result, not only undermined the President's ability to "take Care that the Laws be faithfully executed," but the public's ability to render judgment on the President's decisions.

The Constitution, which is wholly predicated on the ability of "We the People" to give assent to, and render political judgment about, the laws that are to govern us, cannot tolerate a system where such abilities are withdrawn from the citizenry. An agency like CPSC whose very structure ensures that its policy determinations are insulated from Presidential, and therefore popular review, cannot exist within our Constitutional structure.

C. 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 Federal Trade Commission ("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; to the

contrary, *Humphrey's* was predicated on the fact that the FTC did not exercise "executive power." *See* 295 U.S. 602,628 (1935) ("[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 *HUMPHREY'S EXECUTOR* MUST BE FOLLOWED, CPSC'S ACTIONS IN PROMULGATING CHALLENGED RULE ARE 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 promulgation of the rule in question is unlawful under *Humphrey's Executor* because that case held that FTC Commissioners can enjoy tenure protection only because the FTC 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 Commission exercises substantial executive power in the constitutional sense.

> Similar to the [Consumer Financial Protection] Bureau in *Seila Law*, the Commission "may promulgate consumer product safety standards" affecting a wide range of consumer products on the market. 15 U.S.C. § 2056(a); *Seila Law*, 140 S. Ct. at 2200 (noting the Bureau's "authority to promulgate binding rules fleshing out 19 federal statutes."). And just as the Bureau had the power to regulate certain practices across a segment of the U.S. economy, the Commission has the authority to "promulgate a rule" banning products nationwide as "hazardous." 15 U.S.C. § 2057; *see also* 140 S. Ct. at 2200 (noting a broad power to issue "prohibition on unfair and deceptive practices in a major segment of the U.S. economy"). …
>
> The Commission also holds the power to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *See* 140 S. Ct. at 2200. Indeed, the Commission "by one or more of its members" may "conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." 15 U.S.C. § 2076(a); see also 16 C.F.R. § 1025.1 (establishing rules for adjudication). …
>
> Finally, the Commission holds the "quintessentially executive power not considered in *Humphrey's Executor*" to file suit in federal court "to seek daunting monetary penalties against private parties" as a means of enforcement. *Seila Law*, 140 S. Ct. at 2200; *see also* 15 U.S.C. § 2076(b)(7)(A) (authorizing the Commission to initiate and prosecute civil actions). Each violation of the

> Commission's rules carries "a civil penalty not to exceed $100,000," up to a total of $15 million for all related violations, with the ability to adjust for inflation. 15 U.S.C. § 2069(a)(1); (a)(3)(A). The Commission may also bring actions for injunctive enforcement in district court. *Id.* § 2071(a). And the Commission can initiate and prosecute criminal actions "with the concurrence of the Attorney General." *Id.* § 2076(b)(7)(B). Finally, the Commission has the power to issue subpoenas, see *id.* § 2076(b)(3), an additional executive power recognized in *Collins*. *See* 141 S. Ct. at 1786.

Consumers' Rsch. v. Consumer Prod. Safety Comm'n, 592 F. Supp. 3d 568, 584 (E.D. Tex. 2022), *appeal filed*, No. 22-40328 (5th Cir. May 18, 2022).[5]

Given the powers it possesses, CPSC cannot claim that it exercises anything other than executive power. And because CPSC cannot dispute that the powers it holds are "executive" it does not do so. *See, e.g.*, *id.* (noting that "[t]he Government does not dispute that [Commission possesses] executive powers").

[5] NCLA filed an *amicus* brief in the Fifth Circuit in support of the District Court for the Eastern District of Texas' judgment finding CPSC's structure unconstitutional. *See* Brief *Amicus Curiae* of the New Civil Liberties Alliance in Support of Plaintiffs-Appellees, *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, No. 22-40328 (5th Cir. Oct. 7, 2022), ECF 58.

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 do exercise executive power, *Humphrey's Executor* does not protect them from at-will removal by the President.[6]

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[6] 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

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.

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 constitutional framework."). *See also* Richard Samp, *Good-Bye Morrison*, Law & Liberty (Sept. 7, 2021), https://bit.ly/3YrIMx5 (arguing that the Supreme Court *sub silentio* overruled *Morrison* in *United States v. Arthrex*, 141 S.Ct. 1970 (2021)).

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.

CONCLUSION

Because the CPSC Commissioners exercise executive power and are not removable at will by the President, the Commission is structured unconstitutionally. Because an unconstitutionally structured body cannot wield any powers until the structural defect is rectified, the challenged rule should be vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 5,384 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/ John J. Vecchione
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CERTIFICATE OF SERVICE

I hereby certify that on February 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.

/s/ John J. Vecchione
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