No. 22-9578

In the United States Court of Appeals for the Tenth Circuit

MAGNETSAFETY.ORG, HOBBY MANUFACTURERS ASS'N, AND NATIONAL RETAIL HOBBY STORES ASS'N, INC.,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

On Petition for Review of Final Action of the Consumer Product Safety Commission

PETITIONERS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no pending related cases. This Court has previously vacated a predecessor rule, *see Safety Standard for Magnet Sets*, 79 Fed. Reg. 59,962 (Oct. 3, 2014), promulgated by the Respondent for being promulgated contrary to the requirements of the Consumer Product Safety Act. *See Zen Magnets, LLC v. CPSC*, 841 F.3d 1141 (10th Cir. 2016) (Gorsuch, Ebel, and Bacharach, JJ.). The presently challenged rule was promulgated in part in response to that opinion.

/s/ Gregory Dolin
Gregory Dolin

CORPORATE DISCLOSURE STATEMENT

As required by Fed. R. App. P. 26.1 and 10th Cir. R. 26.1, Petitioners filed a Disclosure Statement (10th Cir. Form 4) on December 19, 2022. *See* ECF 9. The information previously disclosed remains current.

/s/ Gregory Dolin
Gregory Dolin

GLOSSARY

CPSA	Consumer Product Safety Act
CPSC	Consumer Product Safety Commission
FTC	Federal Trade Commission
HMA	Hobby Manufacturers Association
NEISS	National Electronic Injury Surveillance System
NRHSA	National Retail Hobby Stores Association
SBA	Small Business Administration

STATEMENT OF JURISDICTION

On September 21, 2022, pursuant to 15 U.S.C. § 2056(a), the Consumer Product Safety Commission ("CPSC" or the "Commission") promulgated a final rule entitled *Safety Standard for Magnets*, 87 Fed. Reg. 57,756 (Sept. 21, 2022) ("Rule" or "Final Rule").[1] This rule is a final agency action. Under 15 U.S.C. § 2060(a) and (c) and 28 U.S.C. § 2112(a) and (c), the Tenth Circuit has subject matter jurisdiction to review the agency's action. Petitioners are parties adversely affected by the Final Rule. Magnet Safety Organization ("Magnetsafety"), established to promote safe use of magnets, is incorporated in Colorado, which is within the geographic jurisdiction of the Tenth Circuit. 28 U.S.C. § 41. The organization submitted comments to CPSC during its consideration of the *Safety Standard for Magnets*. *See* 87 Fed. Reg. at 57,773.

Petitioners Hobby Manufacturers Association and National Retail Hobby Stores Association have standing to pursue this action on behalf of their members, many of which are manufacturers, importers, or

[1] As the Commission has not yet filed the entire administrative record with the Court, *see* 10th Cir. R. 17.1, the Petitioners will refer to the citations either in the Federal Register, or to the extent not in the Federal Register, by name and date of the document.

retailers of magnets subject to the Rule. Because Petitioners' members are "'object[s]' of the challenged regulation," there is "little question" that the requirements of Article III standing are satisfied. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561-62 (1992). Protecting their membership from invalid governmental regulation is germane to petitioners' purpose, *see, e.g.*, *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 111 (D.C. Cir. 1990), and the petitioners and a number of their members have worked to develop voluntary safety standards for the magnets that are subject to the present Rule. *See* 87 Fed. Reg. at 57,773.

STATEMENT OF THE ISSUES

1. Whether the Final Rule violates the Consumer Product Safety Act ("CPSA" or "Act") because it:
    a. adopts a safety standard broader than reasonably necessary to reduce an unreasonable risk of injury, in violation of 15 U.S.C. § 2058(f)(3)(A);
    b. impermissibly disregards effective voluntary industry standards that are less burdensome than CPSC's standard, in violation of Subsection 2058(f)(3)(D); and

c. imposes costs on regulated businesses and consumers that far outweigh the Rule's projected benefits, in violation of Subsection 2058(f)(3)(E).

2. Whether the Final Rule is invalid because CPSC Commissioners' for-cause removal protections violate Article II of the Constitution.

STATEMENT OF THE CASE

A. The Parties

Petitioner Magnetsafety is "a 501c(3) nonprofit, which exists to promote the safe usage of high-powered magnets among consumers and educators, through research, public outreach, and content creation." Magnetsafety.org, https://www.magnetsafety.org/. It submitted comments to CPSC during the Commission's consideration of the *Safety Standard for Magnets*. *See* 87 Fed. Reg. at 57,773.

Petitioner Hobby Manufacturers Association ("HMA") is a non-profit association dedicated to manufacturers, distributors, importers, publishers, producers, and suppliers for model hobby products and related accessories for the hobby industry. The HMA serves its many members by introducing products to the public via social media, print

distribution and through consumer-facing and trade-facing websites. HMA submitted comments to CPSC during the rulemaking process. *Id.*

Petitioner National Retail Hobby Stores Association ("NRHSA") is an organization of retail hobby stores, with approximately 300 members in the USA and Canada, that acts as a link between manufacturers, distributors, and retailers. *Who We Are*, Nat'l Retail Hobby Stores Ass'n, https://www.nrhsa.org/Who-We-Are.

Respondent CPSC is "[a]n independent regulatory commission … consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate." 15 U.S.C. § 2053(a). Commissioners "may be removed by the President for neglect of duty or malfeasance in office but for no other cause." *Id.* The Commission is vested with authority to, *inter alia*, "promulgate consumer product safety standards." *Id.* § 2056(a).

B. Statutory Requirements for Mandatory Safety Rules

CPSC's authority to regulate consumer products is subject to a statutory condition precedent. Prior to adopting a mandatory standard, the Commission must conclude that compliance with any existing voluntary standards adopted by the relevant industry "is not likely to

result in the elimination or adequate reduction of [unreasonable] risk of injury." *Id.* § 2058(f)(3)(D)(i). Additionally, prior to issuing any regulation, the Commission must conclude "that the rule imposes the *least burdensome* requirement which prevents or adequately reduces the risk of injury …." *Id.* § 2058(f)(3)(F) (emphasis added). Finally, CPSC must conduct a "rigorous cost-benefit analysis" to justify the rule. *Finnbin, LLC v. CPSC*, 45 F.4th 127, 131 (D.C. Cir. 2022) (discussing 15 U.S.C. § 2058(f)(3)(E)). In other words, CPSC may only regulate when it reaches a conclusion, supported by substantial evidence, that "the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation imposes upon manufacturers and consumers." *Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1147 (10th Cir. 2016).

C. Voluntary Standards in the Magnet Industry

As CPSC itself acknowledged, there are at least four domestic voluntary standards and two international standards governing the magnets in question. *See* 87 Fed. Reg. at 57,765.

Standard ASTM F963–17 which applies to "objects designed, manufactured, or marketed as playthings for children under 14 years

old," and "specifies that toys may not contain a loose as-received 'hazardous magnet.'"[2] *Id.* The prohibition exempts "'magnetic/electrical experimental sets' intended for children 8 years and older," but requires that such sets "be labeled with a warning that addresses the magnet ingestion hazard." *Id.*

Standard ASTM F2923–20, prohibits "jewelry designed or intended primarily for use by children 12 years old or younger" from having a hazardous magnet or hazardous magnetic component. Excepted from prohibition are "earrings, brooches, necklaces, or bracelets" intended for children 8 years old and older; however, those products must contain an appropriate warning. *Id.* at 57,766.

Standard ASTM F2999–19 applies to "adult jewelry," *i.e.*, jewelry designed to be used by consumers above 12 years of age. This standard requires that the products subject to it contain a warning label which states that the product contains small swallowable parts and mentions

[2] All referenced voluntary standards define "hazardous magnet" "as a magnet that is a small object (*i.e.*, fits entirely within a small parts cylinder specified in the standard) and has a flux index of 50 kG^2 mm^2 or more." 87 Fed. Reg at 57,765-67.

"internal interactions" that could occur should such parts be swallowed or inhaled. *Id.* at 57,767.

Standard ASTM F3458–21 "consists of marketing, packaging, labeling, and instructional requirements for magnet sets intended for users 14 years and older." *Id.* While this standard does not prohibit "small, powerful magnets from being used in magnet sets," it does prohibit "manufacturers from knowingly marketing or selling magnet sets intended for users 14 years and older to children under 14 years old." *Id.* This standard also requires that such magnet sets include warnings which "[a]t a minimum, … must address the hazard associated with magnet ingestions, direct users to keep the product away from children, and provide information about medical attention." *Id.* Similar information must also be included in the instruction manual.[3] *Id.*

[3] Standard ASTM 3458-21, dealing with magnet sets, includes requirements that are quite similar to those found to be adequate in a proposed rule regulating button batteries, *see Safety Standard and Notification Requirements for Button Cell or Coin Batteries and Consumer Products Containing Such Batteries*, 88 Fed. Reg. 8,692 (Feb. 9, 2023), a product category associated with more and more serious injuries than magnets. On-package and point-of-sale warnings, various packaging requirements and other requirements are deemed by the agency preliminarily to be adequate to address the much more serious

Finally, the standard requires all covered magnet sets "be sold with or in a permanent storage container [designed] to verify that all the magnets have been returned to the container." The container must also "include means of restricting the ability [of younger children] to open" it.[4] *Id.*

The magnets in question are also subject to two international voluntary standards. Standards EN 71–1: 2014 and ISO 8124–1:2018 are similar to Standard ASTM F963–17 in that all apply to "products intended for use in play by children under 14 years old" and require that any magnets in such toys be too large to be swallowed, or alternatively, have a flux index less than 50 kG^2 mm^2. *Id.* at 57,769.

According to CPSC's own data, prior to the promulgation of the present rule, there were approximately 2,300 annual cases of "ED-treated ingestions of magnets annually." *Id.* at 57,759-60. Per CPSC, this represents an increase of approximately 1,000 magnet ingestions per

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risk presented by button batteries but are deemed to be inadequate to address the risk associated with small magnets. This contradictory result also supports the argument that CPSC's conclusory statements do not comply with the statute. The warning requirements in this standard far exceed those required for tobacco, trampolines, and chainsaws.

[4] The packaging requirements of F3458-21 are similar to the child resistant packaging requirements of pharmaceuticals and marijuana.

year as compared to the three years (2014 through 2016) when an outright ban was in effect. *Id.* at 57,791. At first glance, these seem to be fairly large numbers; however, perspective is important. For example, according to the National Poison Data System, there are about 3,500 annual ingestions of "button" batteries—a far more dangerous event given that the battery can cause a release of a chemical that can cause fatal tissue burns. Nat'l Capital Poison Ctr., Button Battery Ingestion Statistics, https://bit.ly/40JW3lf; *see also* Meghan Holohan, *Her Daughter Swallowed a Button Battery and Died. Now This Mom Is Taking Action*, Today (Dec. 14, 2021, 4:38 PM), https://on.today.com/43wlYjf.

The difference between incidence of injury associated with button batteries and magnets subject to the present rule illustrates the high level of success that voluntary standards have had. Nonetheless, some in the industry have petitioned for rulemaking to provide additional warnings and instructions on the use of these magnets.[5]

[5] For example, Shihan Qu, formerly of Zen Magnets and now the Director of Magnetsafety, not only submitted comments while the Rule was under consideration, but actively petitioned for rulemaking seeking adoption of performance standards as well as warnings and instructional requirements. *See Petition Requesting Rulemaking on Magnet Sets*, 82

In evaluating the need for a mandatory rule, CPSC explained why none of the standards provided sufficient protection against dangers inherent in high-powered magnet sets. *See* 87 Fed. Reg. at 57,765-69. Though (as discussed in more detail below, *see* Parts I.A-I.D) the conclusions and logic are unconvincing, at least CPSC attempted to set forth its reasoning. Still, that reasoning was flawed in that a voluntary standard addressing a particular product was deemed to be ineffective because it did not address other products outside the scope of the standard. However, when it came time to consider the various voluntary standards *together*, to see whether they suffice when *all* of them are applied to the subject magnets, the Commission engaged in no analysis whatsoever, writing instead that "[f]or the same reasons that no existing standard is individually adequate, the standards collectively fail to adequately reduce the magnet ingestion hazard." *Id.* at 57,769.

D. The New Rule

The success of the voluntary standards is illustrated by the fact that the number of injuries sustained by minors as a result of exposure to

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Fed. Reg. 46,740 (Oct. 6, 2017). The petition was withdrawn once CPSC promulgated the present Rule banning the subject-matter magnets..

high-powered magnets is both qualitatively and quantitatively *lower* than the number of injuries sustained as a result of exposure to similarly sized but more dangerous button batteries. Despite that success, CPSC decided to push forward with a mandatory rule. The Rule promulgated by the Commission applies to "magnet products that are designed, marketed, or intended to be used for entertainment, (including children's jewelry), mental stimulation, stress relief, or a combination of these purposes, and that contain one or more loose or separable magnets." 87 Fed. Reg. at 57,756. Exempted from the Rule are "magnet products sold and/or distributed solely to school educators, researchers, professionals, and/or commercial or industrial users exclusively for educational, research, professional, commercial, and/or industrial purposes," as well as "toys subject to the ASTM F963 Toy Standard." *Id.* at 57,756.

The Rule was promulgated without any significant effort on CPSC's part to demand recalls or limit importation of dangerous products. A simple search of Amazon purveyors reveals dozens, if not hundreds, of magnets for sale that do not meet the voluntary safety standards.[6]

[6] Petitioners' continuously compile the search results of websites

Instead of addressing that problem using well-established procedures for unsafe products, CPSC banned *all* consumer products containing separable magnets. In doing so, it both grossly overestimated the costs and underestimated the benefits of keeping these products on the market.

STANDARD OF REVIEW

All rules the Commission adopts are subject to judicial review under a stricter standard than usually applies to review of administrative actions. *See Forester v. CPSC*, 559 F.2d 774, 789 n.22 (D.C. Cir. 1977). Under the Act, a rule issued by CPSC "shall not be affirmed unless the Commission's findings" are "supported by substantial evidence on the record taken as a whole." 15 U.S.C. § 2060(c). "Because constitutional questions arising in a challenge to agency action … 'fall expressly within the domain of the courts,' [this Court] review[s] *de novo* whether agency action violated [petitioner's] constitutional rights." *Copar Pumice Co. v. Tidwell*, 603 F.3d 780, 802 (10th Cir. 2010) (quoting *Darden v. Peters*, 488 F.3d 277, 283–84 (4th Cir. 2007)).

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and companies that sell such products. These results can be accessed here: https://bit.ly/420qUv4 ; https://bit.ly/3V9sEA3.

SUMMARY OF ARGUMENT

This Court should vacate the Rule under review because it was promulgated in violation of the statutory provision by an agency whose very existence, as currently constituted, contravenes the Constitution.

In adopting the Rule, the Commission repeated the same errors that caused this Court to set aside the previous version of the magnet ban. Much like in 2014, the Commission failed to account for "a known and significant change or trend in the data." *Zen Magnets*, 841 F.3d at 1149. The Commission relied on the fact that following this Court's *vacatur* of the 2014 Rule, the number of magnet ingestions increased by about 1,000 per year. From that purported trend, the Commission deduced that the absence of a rule banning high-powered magnets caused the increase. However, the Commission ignored the fact that ingestions of *all* small items drastically increased between 2018 and 2021. This larger trend, which cannot be attributed to the absence of a ban on high-powered magnets, was not addressed by CPSC. Second, "the Commission's injury findings arise[] from the imprecision of the injury report narratives." *Id.* at 1151. The Commission relied on data that did not differentiate between the types of magnets ingested. In limiting the

application of the rule only to magnets with flux index greater than 50 kG^2 mm^2, CPSC implicitly acknowledges that less powerful magnets do not present a significant danger if ingested. Yet, the data CPSC relied on in promulgating the Rule does not differentiate between "high-powered" magnets and other kind of magnets. Thus, the Commission has provided no evidence that following *vacatur* of the 2014 Rule, there was a statistically significant increase in the ingestion of *high-powered* magnets. Similarly, the Commission focused on magnet ingestion rather than *multiple* magnet ingestion. However, magnets (unlike, for example button batteries) are only dangerous if more than one is ingested, because only in those circumstances can "internal magnet interaction lead[] to pressure necrosis" and other injuries. 87 Fed. Reg. at 57,758-65.

Not only did the Commission fail to properly consider the cost of injuries, it also failed to properly consider the benefit that high-powered magnets provide. The Commission itself freely admits, *see id.* at 57,781-84, that it is at best guessing at the benefits consumers obtain from using magnets. Such guesses are insufficient to satisfy the CPSA, which requires the Commission to conduct a rigorous cost-benefit analysis, rather than rely on pure guesswork. *See* 15 U.S.C. § 2058(f)(3)(E).

The Rule is also invalid because the Commissioners promulgating it were unconstitutionally insulated from presidential oversight. CPSC Commissioners are principal officers who exercise substantial executive power by promulgating rules, bringing administrative enforcement actions, and commencing civil suits. They wield immense power.

Under the CPSA, the President may remove the Commissioners only for cause. Such a restriction on the President's ability to terminate executive officers at will violates the separation of powers. *See Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020). CPSC Commissioners are not inferior officers with narrowly defined duties, and they are not members of an expert agency that does not wield substantial executive power. The CPSA vests them with immense power over the nation's economy. They can, upon proper findings, shut down businesses and even entire industries. Because Commissioners exercise significant executive power, they "must be removable by the President at will," *id.* at 2192. Given that they are not so removable, the Commission is unconstitutionally structured and lacks legal authority to act. Accordingly, this Court should vacate the Rule so that Petitioners are not subject to requirements promulgated by an unconstitutionally structured agency.

ARGUMENT

I. THE COMMISSION'S FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

As in 2014, the Commission failed to "reasonably satisfy the criteria necessary to support the ultimate statutory finding." *Aqua Slide 'N' Dive Corp. v. CPSC*, 569 F.2d 831, 838 (5th Cir. 1978). In order to satisfy the statutory criteria, the Commission "must take into account" and weigh not only the facts that support its conclusion, but also those that detract from it. *Norris v. NLRB*, 417 F.3d 1161, 1168 (10th Cir. 2005). The Commission failed to follow these requirements.

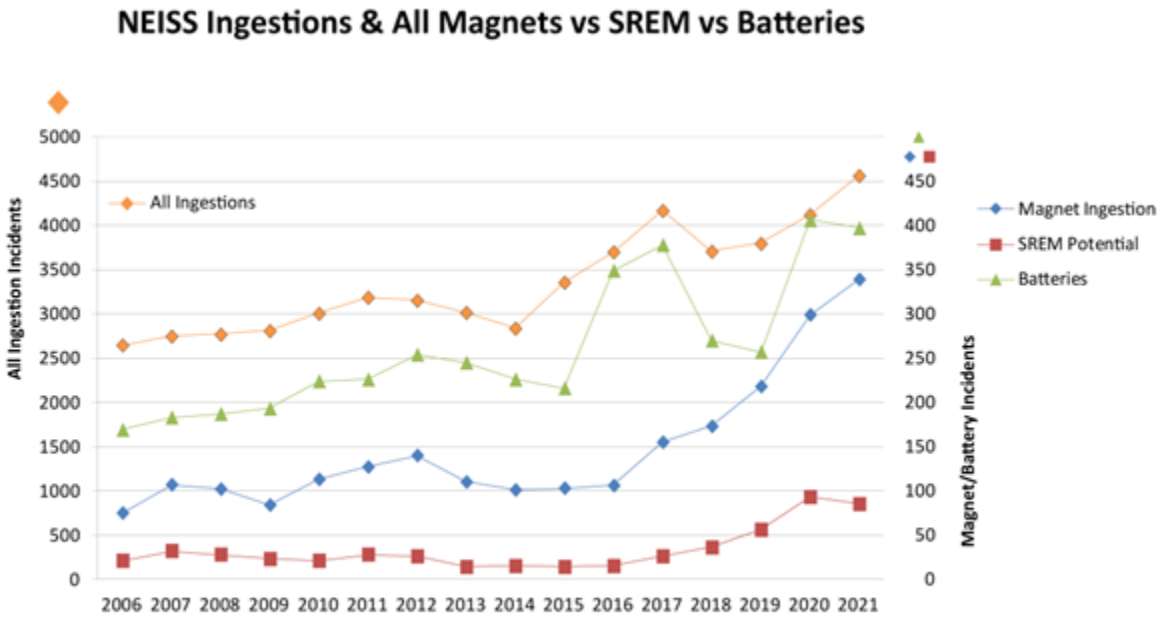
A. The Commission Failed to Disaggregate Increases in Magnet Ingestion from the Overall Increase in Ingestion of Small Items

The key basis for CPSC's adoption of the Rule is its finding that the number of magnet ingestions increased by 1,000 cases per year following this Court's *vacatur* of the 2014 Rule. *See* 87 Fed. Reg. at 57,760 (noting that "magnet ingestion rates before, during, and after the vacated 2014 magnet sets rule show that a significant portion of magnet ingestion cases involved magnet sets" and concluding that "the significant decline in incidents during that time the rule was in effect, and the significant increase in incidents after that rule was vacated, strongly suggest that

many magnet ingestion incidents involve magnet sets"). The Commission's reasoning is a classic example of the *post hoc ergo propter hoc* logical fallacy. Because such reasoning is fallacious, courts have held that "research [that] is based on correlation, not evidence of causation" is insufficient to show that "substantial evidence" supports a finding of harm. *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 964 (9th Cir. 2009), *aff'd sub nom. Brown v. Ent. Merchants Ass'n*, 564 U.S. 786 (2011).

In reaching its conclusion, the Commission relied on data provided by the National Electronic Injury Surveillance System ("NEISS"). 87 Fed. Reg. at 57,759. Petitioners do not dispute that the data shows that following this Court's *vacatur* of the 2014 Rule, the annual number of magnet ingestions increased as compared to the years when the 2014 rule was in effect. The problem with relying on this data is that other items, which were never subject to the 2014 Rule, also became more commonly ingested following this Court's decision in *Zen Magnets*. This increase is found in the NEISS data itself and is reported by leading practitioners. *See, e.g.*, Claire McCarthy, *Young Children Are Swallowing Objects Twice as Often as Before*, Harv. Health Blog (May 14, 2019),

https://bit.ly/41weP0S.



The graph is derived from the NEISS data.
SREM=Spherical Rare Earth Magnet

Thus, if one were to content oneself with a correlation analysis, one could conclude that the *Zen Magnets* decision is responsible for an increase in children swallowing not just magnets but all manner of small items, because all ingestions increased following that decision. Of course, mere correlation doesn't remotely prove or even suggest that the 2014 Rule reduced ingestion of non-magnet items, any more than the correlation with increased stock prices during the relevant time period would prove that rising prices caused increased ingestion of small items. The Commission admits that as a result of its enforcement actions

beginning mid-2012, "most firms ceased selling the magnet sets," 79 Fed. Reg. at 59,987, well before the applicability of the 2014 Rule. And since the absence of the 2014 Rule cannot account for the general increase in the ingestion of small items, it follows that, contrary to CPSC's claim, re-instituting the Rule (albeit under a new guise) would not necessarily provide any tangible benefits. To put it another way, it is likely that the increase in the ingestion of magnets that occurred between 2018 and 2021 was caused, at least in part, by whatever factor caused the increase in ingestion of other small items. Since that factor is not addressed by the Rule, it follows that the Rule will have *little or no predictable measurable effect* on the number of ingested magnets.[7] If so, it also follows that the Rule will provide *little or no benefit* in terms of reducing injuries, yet the Rule will impose significant costs on consumers, distributors and manufacturers of high-powered magnets.

The failure to account for the overall trend of children ingesting

[7] CPSC does not claim that adoption of the Rule will eliminate injuries from swallowed magnets. After all, as CPSC concedes, even during the years when the more stringent 2014 Rule was in force, there were still nearly 1,500 annual cases of magnet ingestion. *See* 87 Fed. Reg. at 57,759-60.

small items is inconsistent with the Commission's obligation to take into account "a known and significant change or trend in the data," or at the very least "explain" why it is not doing so. *Zen Magnets*, 841 F.3d at 1149. To be sure, the Commission is not required to rule out all possible alternative explanations for a particular trend in injuries, *see*, *e.g.*, *McKenzie Eng'g Co. v. NLRB*, 182 F.3d 622, 628 (8th Cir. 1999) (noting that an agency can reject alternative explanations), but at the same time the Commission cannot simply assert, *ipse dixit*, that a particular event that correlates with the trend in injuries is the one that is responsible for the trend, *see, e.g.*, *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011) ("Reasoned decisionmaking requires an agency to 'examine the relevant data and articulate a satisfactory explanation for its action[s].'") (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). As the Supreme Court explained, "an agency rule [is] arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Applying this warning, the D.C. Circuit set aside an EPA emission standard because the EPA failed to consider sources of pollution other than those subject to the challenged rule. *Portland Cement*, 665 F.3d at 186-88. The

same logic must apply here. CPSC—which is subject to a more exacting standard of review than what EPA must meet, *see Forester*, 559 F.2d at 789 n.22—could not lawfully ignore and leave without explanation alternative causes of increased ingestion of magnets when promulgating the Rule. The fact that it did so necessarily means that the Rule fails to comply with the CPSA requirements and therefore must be set aside.

B. The Commission Failed to Segregate Single-Magnet Ingestion Events from Multiple-Magnet Ingestion Events in Evaluating Both the Costs and the Benefits of the Rule

The entire basis for the Commission's action against the subject magnets is the fact that "threats posed by hazardous magnet ingestion include pressure necrosis, volvulus, bowel obstruction, bleeding, fistulae, ischemia, inflammation, perforation, peritonitis, sepsis, ileus, ulceration, aspiration, and death, among others." 87 Fed. Reg. at 57,790. As the Commission recognizes, these "can result from magnets attracting to each other through internal body tissue, or a single magnet attracting to a ferromagnetic object." *Id.* Put differently, the risk from magnets *qua* magnets exists as a result not of their size, but of their attractive forces and materializes only when those attractive forces actually attract another magnet or "ferromagnetic object." In contrast, when no second

object is attracted, the dangers from swallowing magnets are no greater than dangers from swallowing any other object like a paper clip or a coin. Thus, to make sense, the Rule has to be based on the frequency of multiple-magnet ingestions and cases where a magnet is ingested together with another "ferromagnetic object." The Commission, however, did not focus on such cases.

To the contrary, the Commission relied on the *total* number of magnet ingestions to justify the Rule and to calculate the Rule's costs and benefits. Imagine, however, a scenario where *all* ingestions were of a single magnet. In such a circumstance, the Rule would provide no benefit whatsoever (while imposing significant costs) because swallowing single magnets would not result in any more harm than swallowing other items. (And young children will always find small items to put in their mouths and noses). The Commission's own data suggests that at least one-third of ingestions were of a single-magnet variety. *See, e.g.*, Leah K. Middelberg *et al.*, *High-Powered Magnet Exposures in Children: A Multi-Center Cohort Study*, 149 Pediatrics 26, 28 (2022), *cited in* 87 Fed. Reg. at 57,759.

Extrapolating these data (much like the Commission itself did) to

the total number of magnet ingestions would mean that about one-third of such ingestions do not present any danger above and beyond dangers associated with general swallowing of foreign bodies. Accordingly, the Commission's calculations of the Rule's benefits must be discounted by at least one-third. That the Commission did not undertake such a discounting makes its calculations of the Rule's benefits largely worthless.

Second, the Commission treated all medical interventions following an ingestion of a magnet (or multiple magnets) as caused by the particular qualities that these magnets possess. But that is self-evidently wrong. It doesn't take a sophisticated analysis to conclude with a high degree of confidence that parents are likely to visit an Emergency Department or an Urgent Care Center whenever they observe their child swallow *any* foreign body. Indeed, parents are likely to seek medical attention even *on suspicion* that there was a foreign body ingestion. *See* Jacquelyn R. Sink *et al.*, *Predictors of Foreign Body Aspiration in Children*, 155 Pediatric Otolaryngology 501 (2016) (noting that in a third of the cases where a foreign body aspiration was suspected, endoscopic findings were negative). This means that costs associated with things

like diagnostic imaging are not likely to be reduced following the adoption of the Rule because parents will *always* bring a child in *whenever* the child has swallowed *any* object (or even when parents merely *suspect* that he has). These costs are not at all associated with any particular danger that high-powered magnets present, but rather they are associated with parents' legitimate and understandable concerns over children swallowing any item that is not meant to be swallowed, whether or not there are any *actual* dangers from such an ingestion.

The fact that over one-half of magnet ingestion incidents resolved spontaneously (*i.e.*, without the need for medical intervention), *see* Middelberg, *supra* at 29, suggests that a large portion of the costs that CPSC has attributed to the dangers of high-powered magnets were actually incurred for no reason at all.[8] Thus, these expenses are not a reliable metric for weighing costs or benefits of the Rule.

[8] Petitioners cannot estimate what percentage of the costs are attributable not to the dangers of magnets but merely to parental fears and concerns. Petitioners will, however, concede that cases where medical intervention beyond mere imaging becomes necessary are likely more expensive than ones that involve solely diagnostic tests and eventual spontaneous resolution.

Next, the Commission failed to differentiate between high-powered magnets and other kinds of magnets. By promulgating the challenged Rule, the Commission acknowledges that magnets with a flux index less than 50 kG^2 mm^2 do not pose "unreasonable risk" of injury. However, in conducting its search of the NEISS database to quantify the number of ingested magnets, the Commission did not differentiate between magnets with high flux index and those with a low one. To be sure, the Commission did attempt to narrow its search criteria as compared to the efforts preceding the promulgation of the 2014 Rule. Nevertheless, its current efforts still fall short. The Petitioners recognize that it may well be impossible for the reporting physicians to differentiate "high-powered" magnet from magnets of other varieties, and that such limitations on data collection cannot stand in the way of appropriate regulatory steps. *See, e.g.*, *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("We recognize that scientific uncertainty generally calls for deference to agency expertise."). But when the collected data cover more than the phenomenon of interest, CPSC must, when evaluating the costs and benefits of any rule take the overbreadth into account and adjust its calculations accordingly. *See Southland Mower Co. v. CPSC*,

619 F.2d 499, 510 (5th Cir. 1980) ("Without reliable evidence of the likely number of injuries that would be addressed by application of the [rule], we are unable to agree that this provision is reasonably necessary to reduce or prevent an unreasonable risk of injury."). Yet, CPSC assigned all ingestions of magnets from "magnet sets," "jewelry," *etc*., as having all been ingestions of "high-powered" magnets, and therefore concluded that all costs associated with such ingestions are attributable to these types of magnets. This error undermines any confidence in CPSC's statutorily mandated analysis.

Finally, even for patients that did require endoscopic or surgical intervention, the data is not clear whether the intervention was required *because of* the interaction between several magnets (or a magnet and another "ferromagnetic object" (*i.e.*, as a result of unique dangers posed by magnets)). For example, if endoscopy was needed because an aggregation of multiple magnets into a larger object in turn prevented the natural passage of the ingested items, such a procedure could be attributed to the danger of magnets *qua* magnets. On the other hand, if, for example, endoscopy was necessary because of some anatomical abnormality in a child's esophagus, then the magnets' peculiar features

would not have contributed to the necessity for medical intervention (which would have been required no matter what the child may have swallowed).

In short, absent more granularity, it is impossible to say with any level of confidence that the benefit analysis adopted by the Commission reflects the true state of affairs. Under the CPSA, the Commission may only issue regulations when "the benefits expected from [a] rule bear a reasonable relationship to its costs." 15 U.S.C. § 2058(f)(3)(E). But this weighing cannot occur if the benefits are improperly calculated because they take into account matters that do not flow and therefore are not "expected from [a] rule." As this Court held in *Zen Magnets*, mere "possibility" that the rule would benefit the public is not enough. 841 F.3d at 1151-52. While some degree of uncertainty is permissible, *id.*, pure guesswork is not. Given that the Commission did not bother separating single-magnet ingestion episodes from multiple-magnet ingestion episodes, as well as episodes that required medical intervention from episodes that resulted in mere diagnostic studies, its conclusion as to the benefits of the rule is pure guesswork—a showing insufficient to meet CPSA requirements.

C. *The Commission Failed to Take into Account Reduced Enforcement Efforts*

As this Court recognized in *Zen Magnets*, enforcement of applicable and pre-existing toy safety standards resulted in a significant decrease in injuries. *Id.* at 1148-49. A similarly robust enforcement effort today would likely achieve similar results. Yet, it appears that the Commission is not relying on its traditional enforcement levers. For example, in 2014, CPSC recalled Buckyballs. *See Buckyballs and Buckycubes Recall Frequently Asked Questions*, CPSC (Sept. 30, 2015), https://bit.ly/3UXgIBj. Since that date, it has been "unlawful for any person to sell, offer for sale, or distribute in commerce any Buckyballs or Buckycubes." *Id.* Yet, it appears that Buckyballs imitation products are freely available from dozens of websites. *See* Appendix A. So, despite the Commission's assurances that it "conducted 20 recalls involving 25 firms/retailers, and totaling approximately 13,832,901 recalled units, including craft kits, desk toys, magnet sets, pencil cases, games, bicycle helmets, maps, and children's products among others," 87 Fed. Reg. at 57,773, it does not appear that it is doing much to intercept items at the border that are unlawful to sell here. *See* 15 U.S.C. § 2066(a)(4).

The Commission touts that it served a Notice of Violation on a number of firms but in the same breath acknowledges that it never followed up on these notices and did not attempt any further enforcement actions. *See* Informational Briefing Package Regarding Magnet Sets, Tab G, at 117-19 (June 3, 2020). However, if it is "expected" (and indeed shown by prior experience) that "injuries associated with ingestion of magnets from magnet sets … decline[]" as enforcement of safety standards is stepped up, *Zen Magnets*, 814 F.3d at 1148, then it follows that a decrease in enforcement activity would result in an increase in injuries. The Commission, however, failed to address its own decrease in enforcement as a likely (indeed most likely) cause of increase in injuries.

This failure is fatal to the legality of the challenged Rule. The CPSA only permits the agency to promulgate rules when such rules are "reasonably *necessary* to eliminate or reduce an unreasonable risk of injury associated with such product." 15 U.S.C. § 2058(f)(3)(A) (emphasis added). But a rule is *not* "necessary" when there exist "means of achieving the objective of the [rule] while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices." *Id*. § 2058(f)(1)(D). Because more muscular

enforcement of existing standards is likely to achieve the objectives of the rule—and indeed had previously achieved them, *see Zen Magnets*, 841 F.3d at 1148-49—it necessarily means that the Rule was not "reasonably necessary" to reduce the risk of magnet ingestion.

D. CPSC's Estimation of the Costs of the Rule Is Mere Guesswork

When seeking to regulate consumer products, CPSC must undertake "a balancing test like that familiar in tort law: The regulation may issue if the severity of the injury that may result from the product, factored by the likelihood of the injury, offsets the harm the regulation imposes upon manufacturers and consumers." *Zen Magnets*, 841 F.3d at 1147 (quoting *Southland Mower*, 619 F.2d at 508–09). In other words, the Commission must reasonably estimate the economic losses that will result following the adoption of any proposed rule.

In promulgating the challenged Rule, the Commission freely admitted that it does not have any data about the consumer or producer surplus that exists as a result of the transactions involving magnet sets. *See* 87 Fed. Reg. at 57,781-84. But as this Court already stated, "conjecture is not a substitute for substantial evidence." *Zen Magnets*, 841 F.3 at 1152 (quoting *Vera-Villegas v. I.N.S.*, 330 F.3d 1222, 1231 (9th

Cir. 2003)). The sales and pricing data is fundamental to calculating societal benefits of the products, and thus the cost of the rule. Instead of working with American firms prior to the 2014 Rule, the Commission destroyed its own ability to conduct the required cost-benefit analysis, and weakened its enforcement ability, as a result of its own stubborn prohibition-only magnet safety strategy.

Moreover, as in 2014, the Commission "failed to address an entire aspect of magnet sets' utility—namely, the public's need for the sets as scientific and mathematics education and research tools—and the rule's probable effect on magnet sets' availability and usefulness for those purposes." *Id.* at 1153. True enough, unlike the 2014 Rule, the presently challenged Rule excludes from its scope "products sold and/or distributed solely to school educators, researchers, professionals, and/or commercial or industrial users exclusively for educational, research, professional, commercial, and/or industrial purposes." 87 Fed. Reg. at 57,790. However, this ignores the basic fact that individual users may wish to buy these sets for "for educational, research, [and] professional" purposes. For example, these sets are useful in modeling structures of complex molecules such as DNA or proteins. *See Zen Magnets*, 841 F.3d

at 1153 n.15. These models can be useful not just to "school educators" who can work with them during in-class instruction, but also for students and parents as various chemical and biologic concepts are studied at home. (Indeed, with the increased demand for home schooling, *see* Carolyn Thompson, *As U.S. Schools Reopen, Many Families Continue to Opt for Homeschooling*, PBS (Apr. 14, 2022, 3:07 PM), https://to.pbs.org/41RNG8h, millions of students may only be able to build these types of molecular models if they have the ability to purchase sets for home use).

CPSC, however, completely ignored the possibility that individual Americans may engage in educational and research activities in their own homes and not only within the four walls of a recognized institution. "Without that information, the Court cannot accurately gauge the full costs of the safety standard." *Zen Magnets*, 841 F.3d at 1153. Because, as in 2014, "the Commission [was] required to advance some explanation that allows a reviewing court to evaluate whether the cost of the lost utility is in fact outweighed by the benefits of the rule," *id.*, and because, as in 2014, "the Commission abdicated that responsibility by failing to assess the demand for and usefulness of magnet sets as research and

teaching tools," *id.*, this Court should also act as it did when considering the 2014 Rule and vacate the latest iteration of the ban on magnet sets.

E. CPSC Failed to Give Due Weight to Voluntary Standards

Prior to promulgating any rule, CPSC is statutorily required to consider any voluntary standard and determine whether reliance on such a standard "would eliminate or adequately reduce the risk of injury" identified in the Notice of Proposed Rulemaking. 15 U.S.C. § 2058(b)(1). The Commission is obligated to consider each voluntary standard individually as well "in combination with any other standard submitted to the Commission." *Id.* If "compliance with any standard … is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice, and it is likely that there will be substantial compliance with such standard, the Commission" may not promulgate a rule of its own creation. *Id.* § 2058(b)(2). The Commission may not promulgate a rule unless it affirmatively finds that "compliance with [a] voluntary consumer product safety standard is not likely to result in the elimination or adequate reduction of such risk of injury; or it is unlikely that there will be substantial compliance with" such a standard. *Id.* § 2058(f)(3)(D). Whenever "the Commission's prerequisite factual

findings, which are compulsory under the Consumer Product Safety Act, 15 U.S.C. § 2051 et seq., are incomplete and inadequately explained," the Court must vacate any rule promulgated by the Commission, *Zen Magnets*, 814 F.3d at 1144.

Here, in concluding that the various voluntary safety standards acting in combination were inadequate to reduce the risk posed by the high-powered magnets, the Commission's explanation was perfunctory at best. The Commission simply asserted that "the standards collectively fail to adequately reduce the magnet ingestion hazard" "[f]or the same reasons than no existing standard is individually adequate." 87 Fed. Reg. at 57,7769-70. According to the Commission, because "each standard contains critical inadequacies with regard to protecting against ingestion hazards associated with the particular products that are covered," it follows that all standards in combination are also inadequate. But such a syllogism is self-evidently erroneous. *Id.* For example, no one would dispute that a seatbelt or an airbag alone is inadequate protection in certain collisions. But the *combination* of a seatbelt with an airbag does provide sufficient protection in many of the accidents where each one acting alone would not. If a combination of safety features still doesn't

address an unreasonable risk of injury, it is not "[f]or the same reasons than no existing standard is individually adequate."

CPSC's "explanation" is the very opposite of "adequate." "Mere conclusory statements … are simply inadequate to support a finding of significant risk" of injury. *Am. Fed'n of Lab. & Cong. of Indus. Orgs. v. OSHA*, 965 F.2d 962, 976 (11th Cir. 1992). Here, the Commission simply asserted that various safety standards, in combination, do not provide any more safety protection than any standard acting alone. No explanation for such an implausible conclusion was provided. Absent such an explanation, CPSC cannot be viewed as having complied with the statutory requirements for the promulgation of this rule. Accordingly, the rule must be vacated.

F. The Final Rule Is Arbitrary Because It Is Under-Inclusive

The Final Rule arbitrarily excludes from its coverage some sources of high-powered magnets and includes others even though the incidence of injury from both sources is virtually indistinguishable. According to CPSC's own data, high-powered magnets from jewelry are responsible for 19 percent of all injuries. *See* 87 Fed. Reg. at 57,761, Table 1. At the same time, injuries from similar magnets that are parts of

"home/kitchen" products constitute 16 percent of the total. *Id.* Despite similar injury rates, the Final Rule prohibits the sale of magnetic jewelry, but excludes "home/kitchen" magnets. *See Id.* at 57,756. No explanation is given for such inconsistent treatment. The classification adopted by CPSC fails the requirement that all governmental classifications "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). While the Commission is not required to operate with "mathematical nicety," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), it is at the very least required to *explain* the distinctions it draws, *see State Farm*, 463 U.S. at 43. Because the Commission failed to provide even a rudimentary explanation, the action it took in promulgating the rule was arbitrary and capricious. *Id.*

II. *HUMPHREY'S EXECUTOR* NEEDS TO BE RECONSIDERED: CPSC'S STRUCTURE IS UNCONSTITUTIONAL BECAUSE IT PROTECTS OFFICERS FROM REMOVAL WHO EXERCISE EXECUTIVE POWER

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 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.") (opinion by Chief Justice and former President Taft).

Although this brief asks this court to follow *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), 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 Article II's Vesting Clause 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.[9] *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

[9] 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.

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. 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.[10]

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

[10] 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.

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 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 U.S. Const. art. II). 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 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 plebiscites. 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.* Yet, CPSC defies presidential policy preferences with

some regularity.

Two recently promulgated rules serve as a good example. *See Safety Standard for Operating Cords on Custom Window Coverings*, 87 Fed. Reg. 73,144 (Nov. 28, 2022); *Safety Standard for Clothing Storage Units*, 87 Fed. Reg. 72,598 (Nov. 25, 2022). In both of those instances, the Small Business Administration ("SBA")—an agency that is directly responsible to the politically accountable President because it is run by an Administrator who is removable at will—opposed CPSC's action. *See* 87 Fed. Reg. at 73,179; 87 Fed. Reg. at 72,654. Yet, CPSC both times ignored the presidential policy choice, which represents the very definition of a lack of political accountability.

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 her position. The ability of the President to dismiss the Administrator is the most potent tool to ensure that SBA hews closely to the President's preferred policy. In the above-referenced cases, although President Biden did not personally sign SBA's letters to CPSC,

because he does exercise direct control over SBA, it is safe to assume that that agency's opposition to CPSC's proposals was the Administration's official policy. If the President makes an incorrect choice which results in an increased risk of injury to the members of the public, 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 correctly estimates that the harm to the industry is not outweighed by the marginal reduction in the likelihood of injury, then the voters will have an opportunity to reward such far-sightedness.

When CPSC ignores the President's preferred policy choice and instead substitutes its own, it means that 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.* In such situations, the Commission "reach[es] substantive policy decisions … that do not coincide with what the politically accountable branches of government [wished to] have done," *id.* and as a result, it not only undermines 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 (dubious) fact 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 FTC even 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.

III. FOLLOWING *HUMPHREY'S EXECUTOR* STILL BARS CPSC FROM EXERCISING EXECUTIVE POWER, SO ITS PROMULGATING THE CHALLENGED RULE IS UNCONSTITUTIONAL

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. Hence, 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. CPSC, 592 F. Supp. 3d 568, 584 (E.D. Tex. 2022), *appeal docketed*, No. 22-40328 (5th Cir. *argued* Mar. 6, 2023).

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").

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. Thus, if they *do* exercise executive power, *Humphrey's Executor* does not protect them from at-will removal by the President.[11]

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[11] 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 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

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* Part II.A, or as applied too abstemiously in *Humphrey's*, leads to the same conclusion—CPSC is unconstitutionally structured.

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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 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)).

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

CONCLUSION

Because 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.

In the alternative, the challenged Rule should be vacated because in promulgating it, the Commission failed to comply with the requirements of the CPSA.

POSITION REGARDING ORAL ARGUMENT

Because this case raises significant statutory and constitutional issues, and because the decisional process would be aided by oral argument, Petitioners respectfully request that the Court calendar the matter for argument.

Respectfully submitted,

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Dated: April 27, 2023

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 11,628 words. This brief also complies with the typeface and type-style requirements of the Federal Rules 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 April 27, 2023, 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/ Gregory Dolin
Gregory Dolin

APPENDIX A

Buckyballs-216pcs 5mm Magnetic Balls

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