No. 23-1323

IN THE
Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,

Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF U.S. SENATOR TED CRUZ, REPRESENTATIVE DARRELL ISSA, AND NINE OTHER MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are United States Senator Ted Cruz, Representative Darrell Issa, and 9 other members of Congress. The full list of *amici* appears below. They include members of the Senate and House Committees on the Judiciary; the Senate Committee on Commerce, Science, and Transportation; and the House Committee on Energy and Commerce.

Federal officials and members of the legislative branch have a strong interest in upholding the separation of powers. In particular, they want to ensure that the laws they enact will be implemented and enforced by an executive branch that is accountable to the President and thereby responsive to the political process.

The following is the full list of *amici*:

United States Senate

Ted Cruz

Marsha Blackburn
Ted Budd
Joni Ernst
Michael S. Lee
Cynthia M. Lummis

United States House of Representatives

Darrell Issa

Jeff Duncan
Lance Gooden
Jay Obernolte
John Rose

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[1] No counsel for any party has authored this brief in whole or in part, and no entity or person made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

The Court should grant review because the decision below dramatically expanded the otherwise narrow *Humphrey's Executor* exception. This Court held in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), that officers of the United States cannot possess executive power *and* enjoy statutory protections from at-will removal by the President. *See* Part I, *infra*. There is no dispute that the Consumer Product Safety Commissioners ("CPSC") checks both of those boxes. *See* Part II, *infra*. That should have made it an easy case to declare the removal protections invalid. Instead, the decision below greenlit an agency that wields substantial rulemaking and civil penalty powers while being led by commissioners not fully accountable to the political process.

This Court should reverse the decision below, which goes against this Court's precedent, as eight judges argued in dissent from the order denying rehearing *en banc*.

If the *Humphrey's Executor* exception does somehow encompass the CPSC, however, this Court should overrule the remnants of *Humphrey's Executor* as contrary to the text and structure of Article II. *See* Part III, *infra*. "Our Constitution was adopted to enable the people to govern themselves," and "requires that a President chosen by the entire Nation oversee the execution of the laws." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499 (2010). But so-called independent agencies are free

from "dependence on the people," who provide the "primary control on the government." *Id.* at 501. Accordingly, these agencies represent a direct threat to our constitutional order.

As the decision below demonstrates, there is no benefit in requiring lower courts to attempt to apply a doctrine that exists in name only. The Court should return to its pre-*Humphrey's Executor* precedent, which holds that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (emphasis added); *see Trump v. United States*, 144 S. Ct. 2312, 2335 (2024) ("As we have explained, the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress.").

ARGUMENT

I. The *Humphrey's Executor* Exception Does Not Apply Where an Agency Exercises Substantial Executive Powers.

This Court has held that Article II's vesting of executive power in the President, who must "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 1, cl. 1; *id.* § 3, provides the President with the power to remove most principal executive officers at will, *see Seila Law*, 591 U.S. at 202–04, 213–14, 217–18; *Myers*, 272 U.S. at 163–64 (1926); *Free Enter.*, 561 U.S. at 492 ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who

execute the laws."); Jennifer Mascott & John F. Duffy, *Executive Decisions After* Arthrex, 2021 Sup. Ct. Rev. 225, 226 (2022) (discussing the Court's recent application of the constitutional mandate that presidential and senior officers supervise executive decisional authority).

The Court has also held that *Humphrey's Executor* established a narrow exception to that principle for "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power," a descriptor the Court applied to the Federal Trade Commission as it was understood to operate in 1935 when *Humphrey's Executor* was issued. *Seila Law*, 591 U.S. at 216; *see* Part II.A, *infra*.

The only fair reading of *Seila Law* is that an agency must satisfy each requirement to fall within *Humphrey's Executor*. If an agency is not headed by a multi-member panel of experts, or is not balanced along partisan lines, or does not perform legislative and judicial functions, or—as most critical here—*does* exercise executive power, then it is ineligible for the *Humphrey's Executor* exception.

The majority panel opinion below nonetheless held that an agency *can* retain removal protections even when it exercises "substantial" executive power, Pet.App.19a–20a, as long as the agency's "structure is not novel," Pet.App.23a. Far from following *Humphrey's Executor*, that conclusion significantly expands it.

As Judge Jones explained in dissent below, if an agency's "multimember structure alone permits for-

cause removal," then it makes no sense that the *Humphrey's Executor* rule *also* "requires [that] multi-member agencies also not exercise executive power." Pet.App.30a (Jones, J., concurring in part and dissenting in part). If the 1935 FTC's multi-member and balanced structure were alone sufficient, there would have been no need to discuss executive power at all in *Humphrey's Executor*, let alone issue a holding that the agency must not possess such power.

Further, it makes little sense to say that the presence (*vel non*) of substantial executive power is irrelevant, given that the *Humphrey's Executor* line of cases is focused on how removal protections interfere with the President's Article II powers to oversee the Executive Branch. *See* U.S. Const. art. II, § 1, cl. 1; *id.* § 3; *Seila Law*, 591 U.S. at 202–04, 213–14, 217–18. Of all the requirements needed to invoke *Humphrey's Executor*, arguably the most important is that the agency not possess executive power. Yet that is the one requirement the majority opinion below determined could be entirely discarded.

As explained next, the CPSC's executive powers far exceed those the FTC was understood to possess at the time *Humphrey's Executor* issued. Accordingly, the CPSC easily falls outside *Humphrey's Executor*'s narrow exception for agencies whose heads can constitutionally enjoy protections from at-will removal by the President.

II. The CPSC Does Not Fall Within the Narrow *Humphrey's Executor* Exception.

A. This Court's Understanding of the FTC's Powers in *Humphrey's Executor*.

In issuing its 1935 decision in *Humphrey's Executor*, this Court described the FTC as largely an advisory body preparing reports and conducting investigations for the benefit of Congress. *See* 295 U.S. at 628. The brief of Samuel F. Rathbun, who was Humphrey's executor, cited statistics showing that nearly half of the FTC's entire expenditures over the prior eight years had been on "investigations undertaken as such an agent of Congress in aid of legislation." Br. for Samuel F. Rathbun, Ex'r at 46 & n.21, *Humphrey's Executor*, 295 U.S. 602 (Mar. 19, 1935) ($4,036,470 spent on such legislative work, out of $9,627,407 total). And the brief of the United States, while arguing that *Myers* should control, still acknowledged the FTC's primary actions were investigating and issuing "[r]eports to Congress on special topics." Br. for United States at 24, *Humphrey's Executor*, 295 U.S. 602 (Apr. 6, 1935).

The Department of Justice had long held the view that the early FTC was more akin to a legislative committee than an executive agency. A 1925 Attorney General Opinion had stated, "A main purpose of the Federal Trade Commission Act was to enable Congress, through the Trade Commission, to obtain full information concerning conditions in industry to aid it in its duty of enacting legislation," to the point that "the Commission was sometimes likened to a

Committee of Congress." *Powers and Duties of the Fed. Trade Comm'n in the Conduct of Investigations*, 34 Op. Att'y Gen. 553, 557–58 (1925).

The government's brief in *Humphrey's Executor* further acknowledged that the 1935 FTC could not even directly "execute its orders," Br. for United States at 25, *Humphrey's Executor*, and the Executor's brief noted that the FTC sometimes served as a chancery master appointed by a federal court, Br. for Rathbun at 43, *Humphrey's Executor*.

In ultimately holding that the FTC did not wield executive power, the Court's opinion in *Humphrey's Executor* relied on the same characteristics of the FTC that the parties had emphasized, i.e., its legislative and judicial functions. *See* 295 U.S. at 628. And this Court later held in *Seila Law* that the holding in *Humphrey's Executor* was directly premised on the fact that "the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" *Seila Law*, 591 U.S. at 215.

It was not until 1938 that Congress first enacted legislation to provide the FTC with a limited right to sue in federal court, and those suits were limited to seeking preliminary injunctions against certain practices pending agency adjudication. *See* Pub. L. No. 75-447, § 4, 52 Stat. 111, 115 (1938). In the 1970s, Congress first provided the FTC with the significant litigation powers it now possesses. *See* Pub. L. No. 93-637, §§ 205–06, 88 Stat. 2183, 2200–02 (1975); Pub. L. No. 93-153, § 408(f), 87 Stat. 576, 592 (1973).

B. The CPSC's Executive Powers Greatly Exceed Those of the 1935 FTC.

The CPSC was first created in 1972, and its Commissioners have possessed express statutory protections from at-will removal since that time. *See* 15 U.S.C. § 2053(a) (permitting removal only "for neglect of duty or malfeasance in office but for no other cause"); Consumer Product Safety Act, Pub. L. No. 92-573, § 4, 86 Stat. 1207, 1210 (1972).

Under a correct reading of *Seila Law* and *Humphrey's Executor*, those removal protections are constitutional only if the CPSC does not wield executive power. The panel majority below correctly concluded that the CPSC exercises "substantial" executive power. Pet.App.20a.

Indeed, the statutory authorities assigned to the CPSC suggest that it wields significantly more power than the 1935 FTC was understood to exercise, and those additional powers have executive character. The Consumer Product Safety Act empowers the CPSC to issue binding regulations, bring civil suits seeking substantial monetary penalties and injunctions, and bring administrative proceedings likewise seeking monetary penalties.

In particular, 15 U.S.C. § 2056 authorizes the CPSC to "promulgate consumer product safety standards," 15 U.S.C. § 2056(a), and § 2057 extends that authority to issuing "ban[s]" of certain products, *id.* § 2057.

Sections 2069 and 2076 authorize the CPSC to file civil suits in federal court seeking damages for violations of CPSC regulations, with penalties of up to $100,000 per violation and a cap of $15 million for a "related series of violations." *Id.* §§ 2069(a)(1), 2076(b)(7)(A). Under those provisions, penalties can quickly reach daunting figures. Further, section 2071 authorizes the CPSC to pursue injunctive relief in federal court to "[r]estrain any violation" of CPSC rules. *Id.* § 2071(a).

Sections 2064 and 2076 authorize the CPSC to bring administrative enforcement actions, *see id.* §§ 2064, 2076(a), and the CPSC has not been shy about doing so. According to the CPSC's own figures, it has imposed over $215 million in civil penalties just since 2015, with numerous seven- and eight-figure penalties in specific cases.[2]

The CPSC's significant powers are ones this Court has indicated are *executive* in nature. For example, *Seila Law* held that "seek[ing] daunting monetary penalties against private parties on behalf of the United States in federal court" is a "quintessentially executive power" that was "not considered in *Humphrey's Executor*" because the FTC lacked that power at the time. 591 U.S. at 219. Similarly, in *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the Court held that "the choice of how to prioritize and how aggressively to pursue legal actions against

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[2] *See* CPSC, *Civil and Criminal Penalties*, https://www.cpsc.gov/Business--Manufacturing/Civil-and-Criminal-Penalties (under "Penalty type," select "Civil," then under "Search type," select "FiscalYear") (last visited July 12, 2024).

defendants who violate the law falls within the discretion of the Executive Branch," *id.* at 429; *see 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 th[is] responsibility[.]"). And the Court has held that an agency "empowered to issue a 'regulation or order' … clearly exercises executive power." *Collins v. Yellen*, 594 U.S. 220, 254 (2021); *see also Seila Law*, 591 U.S. at 216 n.2 (agency enforcement actions for violations of regulations "are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power'") (emphasis in original).

These are all "substantial executive power[s]" wielded by the CPSC but not by the 1935 FTC. *Seila Law*, 591 U.S. at 218.

Because the CPSC undoubtedly wields such powers, the court below should have held that the narrow *Humphrey's Executor* exception to at-will Presidential removal of principal executive officers does not apply here. By concluding otherwise, the panel majority allowed a hybrid agency that even *Humphrey's Executor* itself would have found unconstitutional: an agency that exercises substantial executive power yet retains protections from removal by the President.

If that holding stands, Congress could presumably create multi-member agencies that exercise the most quintessential of executive powers, such as criminal prosecution, and then provide those members with robust removal protections, thereby depriving the

President from exercising necessary oversight over the execution of the laws. That cannot be reconciled with Article II, *Humphrey's Executor*, or *Seila Law*.

This Court should grant review and reverse the decision below.

III. Alternatively, the Court Should Overrule the Remnants of *Humphrey's Executor*.

If the CPSC is nonetheless found to fall within the *Humphrey's Executor* exception, this Court should overrule "what is left" of that decision, which is inconsistent with the text and structure of the Constitution and creates unnecessary confusion among the lower courts. *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part); *see* Pet.App.16a ("[P]erhaps clarity will remain a mere aspiration" given *Humphrey's Executor*'s premise that "the [1935] FTC 'exercise[d] no part of the executive power.'").

A. *Humphrey's Executor* Is a Dangerous Deviation from the Text and Structure of the Constitution.

As explained above, *see* Part I.A, *supra*, Article II "vest[s]" "[t]he executive Power"—all of it—in a single President, U.S. Const. art. II, § 1, cl. 1, who must "take Care that the Laws be faithfully executed," *id.* § 3. A "clear and effective chain of command" ensures that the President can carry out that constitutional obligation, including via termination if necessary. *Free Enter.*, 561 U.S. at 483, 498.

But *Humphrey's Executor* contradicts that important requirement by allowing other individuals

to exercise executive power without being fully accountable to the President. The decision, even in its narrowed form, is "inconsistent with the text of the Constitution, with the understanding of the text that largely prevailed from 1789 through 1935, and with prior precedents." *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 696 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

This is no academic dispute. By allowing the executive power to be wielded by someone not fully accountable to the elected Commander in Chief, "*Humphrey's Executor* poses a direct threat to our constitutional structure and, as a result, the liberty of the American people." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part). It means the President "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else," i.e., with unaccountable CPSC Commissioners. *Free Enter.*, 561 U.S. at 514.

So-called independent agencies thus "pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp. v. CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). The Court should ensure the political accountability the Constitution mandates—and overrule *Humphrey's Executor*'s remnants.

B. *Humphrey's Executor* Is Causing Needless Confusion.

Humphrey's Executor is not just wrong and dangerous, although that would be more than

sufficient to overrule it. It is also yielding admittedly illogical results. As the majority panel decision below put it, *Humphrey's Executor* requires lower courts "to board a train of thought that seems almost predestined for incoherence." Pet.App.19a.

The decision below demonstrates the problem with keeping *Humphrey's Executor* in a state of purgatory, neither fully overruled nor fully endorsed. When analyzing challenges to the structure and powers of particular agencies, a lower court must try to apply this Court's "obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part and dissenting in part). The courts also must ponder whether the agency can be characterized as exercising "executive power," or "executive function," or something "in between." Pet.App.19a. And whatever the label, the court may also need to determine whether that power (or function) is best labeled as "executive" or instead as "*significant[ly]* executive." Pet.App.19a–20a.

The result of these word puzzles is a muddled decision that attempted to apply *Humphrey's Executor*, but ended up drastically "expand[ing]" it. Pet.App.29a (Jones, J., concurring in part and dissenting in part) (emphasis omitted).

The majority even recognized the oddity of rejecting Petitioners' challenge even though it was "free from any logical error." Pet.App.23a. The panel chalked up this "strange" and "odd[]" conclusion to "the Supreme Court's removal doctrine" itself. Pet.App.23a–24a.

It should come as no surprise that the lower courts would struggle when applying a decision that nominally remains on the books but whose foundations and rationale have been "repudiated [in] almost every aspect." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part). The Court should now repudiate it in *every* respect.

* * *

"[T]he foundation for *Humphrey's Executor* is not just shaky. It is nonexistent." *Seila Law*, 591 U.S. at 248 (Thomas, J., concurring in part and dissenting in part). Far from being a harmless relic, the remnants of that decision are having pernicious consequences in the lower courts' jurisprudence, as the decision below demonstrates.

The Petition presents an ideal vehicle for the Court to return to its pre-*Humphrey's Executor* jurisprudence, which held that Article II "grants to the President" the "general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers." *Myers*, 272 U.S. at 163–64 (emphasis added); *see Trump*, 144 S. Ct. at 2335 ("As we have explained, the President's power to remove 'executive officers of the United States whom he has appointed' may not be regulated by Congress.").

CONCLUSION

For the foregoing reasons, *amici* urge the Court to grant the Petition and reverse.

Respectfully submitted,

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