

No. 22-40328

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Texas
No. 6:21-cv-256 (Hon. Jeremy D. Kernodle)

**UNOPPOSED MOTION OF THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT OF REHEARING EN BANC**

Jordan L. Von Bokern
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 701-8330
akupfer@mayerbrown.com

*Counsel for Amicus Curiae the Chamber of Commerce
of the United States of America*

CERTIFICATE OF INTERESTED PERSONS

Consumers' Research; By Two, L.P. v. Consumer Product Safety Commission, No. 22-40328

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Plaintiffs-Appellees Consumers' Research and By Two, L.P.
- Defendant-Appellant Consumer Product Safety Commission.
- *Amicus Curiae* Chamber of Commerce of the United States of America (Chamber), a non-profit, tax-exempt organization incorporated in the District of Columbia, which has no parent corporation. No publicly held company has 10% or greater ownership in the Chamber.
- The following law firms and counsel have participated in the case, either in the district court or on appeal:
 - For Appellees Consumers' Research and By Two, L.P., Donald F. McGahn II, Brett A. Shumate, John M. Gore, Anthony J. Dick, Brinton Lucas, Charles E.T. Roberts, and Joshua T. Hoyt of Jones Day;

- For Appellant Consumer Product Safety Commission, Brian M. Boynton, Christopher R. Hall, Chetan A. Patil, Rebecca Cutri-Kohart, James W. Harlow, Mark R. Freeman, Mark B. Stern, Joshua M. Salzman, Daniel Aguilar, and Amanda L. Mundel of the U.S. Department of Justice;
- For *Amicus Curiae* Washington Legal Foundation, John M. Masslon and Cory L. Andrews of the Washington Legal Foundation;
- For *Amicus Curiae* The New Civil Liberties Alliance, Gregory Dolin, Mark Chenoweth, Philip Hamburger, and Brian Rosner of the New Civil Liberties Alliance;
- For *Amicus Curiae* Chamber of Commerce of the United States of America, Jordan L. Von Bokern and Tyler S. Badgley of the Chamber, and Andrew J. Pincus and Avi M. Kupfer of Mayer Brown LLP;
- For *Amicus Curiae* Separation of Powers Clinic, Jennifer L. Mascott and R. Trent McCotter of the Separation of Powers Clinic;
- For *Amicus Curiae* Pacific Legal Foundation, Luke A. Wake of the Pacific Legal Foundation;

- For *Amicus Curiae* Texas Public Policy Foundation, Robert Henneke, Matthew Miller, and Nate Curtisi of the Texas Public Policy Foundation.

/s/ Andrew J. Pincus

Andrew J. Pincus

Attorney of record for Amicus Curiae Chamber of Commerce of the United States of America

Pursuant to Federal Rule of Civil Procedure 29(b), the Chamber of Commerce of the United States of America (Chamber) respectfully requests leave to file the accompanying *amicus* brief in support of rehearing en banc.

In support of this motion, the Chamber states as follows:

1. The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

2. Businesses are subject to regulations promulgated by, and are defendants in administrative adjudications and judicial actions brought by, the Consumer Product Safety Commission (CPSC) and other federal agencies. The Chamber therefore has a strong interest in the issue presented in the rehearing petition: whether the power of the CPSC to affect the interests of those businesses by issuing rules, presiding over administrative

proceedings, and initiating judicial actions is vested in officials whose appointment and tenure accords with the requirements of the Constitution.

3. The *amicus* brief that the Chamber seeks leave to file is appropriate and relevant because it may assist the Court in evaluating the petition for rehearing en banc. The *amicus* brief provides additional perspective—drawn from the experience and concerns of the Chamber’s many members—regarding the importance of these issues and the need for rehearing.

4. The Chamber previously filed a brief as *amicus curiae* when this case was considered on the merits by the panel.

5. The Chamber therefore respectfully requests that the Court grant leave for the Chamber to file the accompanying brief as *amicus curiae* in support of the petition for rehearing en banc in this appeal.

6. Counsel for the Chamber has contacted counsel for the parties, which do not oppose this motion.

February 13, 2024

Jordan L. Von Bokern
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Respectfully submitted,

/s/ Andrew J. Pincus

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 701-8330
akupfer@mayerbrown.com

*Counsel for Amicus Curiae the Chamber of Commerce
of the United States of America*

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 27(d). Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the motion contains 347 words and was prepared using Microsoft Word and produced in Century Schoolbook in a size equivalent to 14 points.

/s/ Andrew J. Pincus

Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that on February 13, 2024, I electronically filed the original of the foregoing motion with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Andrew J. Pincus

Andrew J. Pincus

No. 22-40328

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Defendant-Appellant.

On Appeal from the United States District Court
For the Eastern District of Texas
No. 6:21-cv-256 (Hon. Jeremy D. Kernodle)

**BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE
OF THE UNITED STATES OF AMERICA IN SUPPORT OF
REHEARING EN BANC**

Jordan L. Von Bokern
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 701-8330
akupfer@mayerbrown.com

*Counsel for Amicus Curiae the Chamber of Commerce
of the United States of America*

CERTIFICATE OF INTERESTED PERSONS

Consumers' Research; By Two, L.P. v. Consumer Product Safety Commission, No. 22-40328

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

- Plaintiffs-Appellees Consumers' Research and By Two, L.P.
- Defendant-Appellant Consumer Product Safety Commission.
- *Amicus Curiae* Chamber of Commerce of the United States of America (Chamber), a non-profit, tax-exempt organization incorporated in the District of Columbia, which has no parent corporation. No publicly held company has 10% or greater ownership in the Chamber.
- The following law firms and counsel have participated in the case, either in the district court or on appeal:
 - For Appellees Consumers' Research and By Two, L.P., Donald F. McGahn II, Brett A. Shumate, John M. Gore, Anthony J. Dick, Brinton Lucas, Charles E.T. Roberts, and Joshua T. Hoyt of Jones Day;

- For Appellant Consumer Product Safety Commission, Brian M. Boynton, Christopher R. Hall, Chetan A. Patil, Rebecca Cutri-Kohart, James W. Harlow, Mark R. Freeman, Mark B. Stern, Joshua M. Salzman, Daniel Aguilar, and Amanda L. Mundel of the U.S. Department of Justice;
- For *Amicus Curiae* Washington Legal Foundation, John M. Masslon and Cory L. Andrews of the Washington Legal Foundation;
- For *Amicus Curiae* The New Civil Liberties Alliance, Gregory Dolin, Mark Chenoweth, Philip Hamburger, and Brian Rosner of the New Civil Liberties Alliance;
- For *Amicus Curiae* Chamber of Commerce of the United States of America, Jordan L. Von Bokern and Tyler S. Badgley of the Chamber, and Andrew J. Pincus and Avi M. Kupfer of Mayer Brown LLP;
- For *Amicus Curiae* Separation of Powers Clinic, Jennifer L. Mascott and R. Trent McCotter of the Separation of Powers Clinic;
- For *Amicus Curiae* Pacific Legal Foundation, Luke A. Wake of the Pacific Legal Foundation;

- For *Amicus Curiae* Texas Public Policy Foundation, Robert Henneke, Matthew Miller, and Nate Curtisi of the Texas Public Policy Foundation.

/s/ Andrew J. Pincus

Andrew J. Pincus

Attorney of record for Amicus Curiae Chamber of Commerce of the United States of America

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
THE PANEL’S HOLDING ON FOR-CAUSE REMOVAL RE- STRICTIONS WARRANTS EN BANC REVIEW.....	4
A. Vindicating The President’s Power To Remove Officers Exercising Executive Authority Is Essential To The Proper Functioning Of Our Democracy.....	4
B. <i>Humphrey’s Executor</i> Does Not Bar This Court From De- termining That The CPSC Commissioner Removal Re- striction Violates Article II.....	6
C. The CPSC Commissioner Removal Restriction Violates The Constitution.	9
D. The Issue Is Extremely Important.	12
CONCLUSION	14

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Collins v. Mnuchin</i> , 938 F.3d 553 (5th Cir. 2019)	10
<i>Collins v. Yellen</i> , 141 S. Ct. 1761 (2021)	10
<i>Free Enter. Fund v. PCAOB</i> , 561 U.S. 477 (2010)	4, 5
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	2, 7, 8, 10
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	4
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020)	2, 4, 5, 7-11
<i>Wiener v. United States</i> , 357 U.S. 349 (1958)	7
 Statutes	
15 U.S.C. § 2053(a)	9
15 U.S.C. § 2056(a)	12
15 U.S.C. § 2057	12
15 U.S.C. § 2064(g)	12
15 U.S.C. § 2069(a)(1)	12
15 U.S.C. § 2071(a)	12
15 U.S.C. § 2076(b)(7)	12
29 U.S.C. § 153(a)	13
42 U.S.C. § 7171(b)(1)	13

TABLE OF AUTHORITIES
(continued)

Other Authorities

1 Annals of Cong. (Joseph Gales ed. 1834)4
16 C.F.R. Part 1118.....12
16 C.F.R. § 1025.11(a)12
16 C.F.R. § 1025.5512
Fed. R. App. P. 29(a)(4)(E)1

INTEREST OF *AMICUS CURIAE*¹

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

Businesses are subject to regulations promulgated by, and are defendants in administrative adjudications and judicial actions brought by, the Consumer Product Safety Commission (CPSC) and other federal agencies. The Chamber therefore has a strong interest in ensuring that the power of federal agencies, such as the CPSC, to affect the interests of those businesses by issuing rules, presiding over administrative proceedings, and

¹ No counsel for a party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. See Fed. R. App. P. 29(a)(4)(E).

initiating judicial actions is vested in officials whose appointment and tenure accords with the requirements of the Constitution.

SUMMARY OF ARGUMENT

The Constitution protects the President's ability to control executive officers who wield Article II authority by endowing the President with plenary power to direct their execution of the laws, including the power to remove them from office. The President, in turn, is accountable to the People for his officials' exercise of executive authority.

The Supreme Court has recognized only two narrow circumstances in which Congress may limit the President's removal power, one concerning inferior officers that does not apply here and a second, recognized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), restricting the President's ability to remove principal officers of multimember expert agencies that do not wield substantial executive power.

The panel majority erred in holding that *Humphrey's Executor* precludes lower courts from applying the analysis in that opinion to officials of independent agencies. This Court therefore is required to undertake the analysis laid out in *Humphrey's Executor* and subsequent decisions—in particular, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)—to determine

whether the CPSC qualifies as an agency that does not wield substantial executive power.

Removal restrictions for CPSC commissioners violate the Constitution because, as the panel recognized, the CPSC wields substantial executive power. The panel majority erred by expanding its inquiry to “separate factors” not part of the *Humphrey’s Executor* exception. In so doing, the panel ignored the Supreme Court’s recent instruction in *Seila Law*, that *Humphrey’s Executor* applies only to multimember expert agencies that do not exercise substantial executive power.

Whether *Humphrey’s Executor* bars lower courts from assessing the constitutionality of removal restrictions for members of multi-member commissions that head federal agencies is an extremely important question. Numerous potentially-affected agencies exercise broad authority over the national economy. The en banc Court therefore should reconsider the panel majority’s determination, and hold that the removal restriction on CPSC commissioners violates the Constitution.

ARGUMENT

THE PANEL'S HOLDING ON FOR-CAUSE REMOVAL RESTRICTIONS WARRANTS EN BANC REVIEW.

A. Vindicating The President's Power To Remove Officers Exercising Executive Authority Is Essential To The Proper Functioning Of Our Democracy.

Article II “grants . . . the executive power of the government” “to the President,” who must “take care that the laws be faithfully executed.” *Myers v. United States*, 272 U.S. 52, 163-64 (1926). The subordinate officers who wield authority on the President’s behalf “must remain accountable to” him so that he may exercise that constitutional responsibility. *Seila*, 140 S. Ct. at 2197. Article II for that reason provides the President with “the power of appointing, overseeing, and controlling” the officers “who execute the laws” on his behalf. *Id.* (quoting 1 Annals of Cong. 481 (Joseph Gales ed. 1834) (James Madison)).

Only through that chain of command can the President be “held fully accountable” to the People “for discharging his own responsibilities.” *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 514 (2010). Indeed, the extensive governmental power exercised by the “vast and varied federal bureaucracy” amplifies the need to “ensure that the Executive Branch is overseen by a President accountable to the people.” *Seila*, 140 S. Ct. at 2207.

The President’s oversight power “generally includes the ability to remove executive officials.” *Seila*, 140 S. Ct. at 2197. The “power of removing those [officers] for whom [the President] cannot continue to be responsible” because he does not approve of their actions is “essential to the execution of the laws by” the President. *Id.* at 2198 (quoting *Myers*, 272 U.S. at 117). “Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Free Enter. Fund*, 561 U.S. at 514.

Plenary power to remove executive officers accordingly is “the rule, not the exception.” *Seila*, 140 S. Ct. at 2206. Indeed, the Supreme Court has recognized only “two exceptions to the President’s unrestricted removal power.” *Id.* at 2198. Under the first exception, Congress may place for-cause limitations on the ability of principal officers to remove inferior officers who have “limited duties and no policymaking or administrative authority.” *Id.* at 2200. Second, Congress may, under certain circumstances, place for-cause limitations on the power of the President to remove the principal officers of “multimember expert agencies that do not wield substantial executive power.” *Id.* at 2199-2200. The second exception was first “recogniz[ed]” in *Humphrey’s Executor*. *Id.* at 2199.

Because the CPSC does not dispute the district court’s determination that its commissioners qualify as principal executive officers, only the *Humphrey’s Executor* exception to the President’s removal power is even potentially applicable here.

B. *Humphrey’s Executor* Does Not Bar This Court From Determining That The CPSC Commissioner Removal Restriction Violates Article II.

The panel majority’s holding—that this Court cannot rule for the plaintiffs unless the Supreme Court overrules *Humphrey’s Executor*, Op.14, 20-21—rests on a fundamental misunderstanding of the scope of that precedent. As the dissent explained (Op.25), *Humphrey’s Executor* does not bar a lower court from determining whether that decision’s rationale—as explicated by the Supreme Court in *Seila Law*—invalidates removal restrictions applicable to officers at other agencies.

The majority focused on the wrong question by asking whether *Humphrey’s Executor* “remain[s] binding precedent” or has “been overruled” by a subsequent Supreme Court decision. Op.3, Op.20-21. There is no doubt that the decision, which addressed the Federal Trade Commission (FTC) as the Court perceived it in 1935, has not been overruled. But nothing in *Humphrey’s Executor* precludes a lower court from applying the standard set forth in that opinion to officials of other agencies. In performing that

analysis, the lower court must take account of the Supreme Court's more recent explanation of its prior holding.

Seila Law explained that the *Humphrey's Executor* Court's analysis "viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" 140 S. Ct. at 2198 (quoting *Humphrey's*, 295 U.S. at 628); see *Wiener v. United States*, 357 U.S. 349, 353 (1958) (noting that Court's "sharp line of cleavage" between executive and non-executive functions). Instead, the FTC performed "specified duties as a legislative or as a judicial aid." *Humphrey's*, 295 U.S. at 628. As a "legislative agency," it "ma[de] investigations and reports thereon for the information of Congress," and as a "judicial agency," it made recommendations to courts. *Id.* Any action the FTC undertook under the "direct[ion]" of the President was "collateral to" those "main" functions. *Id.* at 628 n.1.

Seila Law emphasized that *Humphrey's Executor's* analysis, and the Court's conclusion, was tied to that opinion's description of the FTC's powers. "Because the Court limited its holding 'to officers of the kind here under consideration,' . . . the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court"—and "[r]ightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power'" but only "perform[ing] 'specified

duties as a legislative or as a judicial aid.” 140 S. Ct. at 2198 (quoting *Humphrey’s*, 295 U.S. at 628, 632).

The *Seila Law* Court concluded that “*Humphrey’s Executor* permitted Congress to give for-cause removal protections to a multimember body of experts . . . that performed legislative and judicial functions and was said not to exercise any executive power.” 140 S. Ct. at 2199; *see also id.* at 2217 (Thomas, J., concurring in part and dissenting in part) (“[T]oday, the Court rightfully limits *Humphrey’s Executor* to ‘multimember expert agencies that do not wield substantial executive power.’”).

The panel majority erred by interpreting *Seila Law* to hold that “the [*Humphrey’s Executor*] exception still protects any ‘traditional independent agency headed by a multimember board.’” Op.14. It cited (Op.14 n.53) an unexplained phrase in the three-Justice concurrence addressing the severability issue and comments in the Court’s background description of the evolution of the Consumer Financial Protection Bureau (CFPB)—but ignored the Court’s detailed discussion of *Humphrey’s Executor*, discussed above.

The panel here therefore was free to assess “the characteristics of” the CPSC in order to determine—based on *Seila Law*’s explanation of *Humphrey’s Executor*—whether the CPSC qualifies as an “agenc[y] that do[es] not wield substantial executive power.” *Seila*, 140 S. Ct. at 2199-2200.

C. The CPSC Commissioner Removal Restriction Violates The Constitution.

CPSC commissioners may be removed by the President for “neglect of duty or malfeasance in office but for no other cause.” 15 U.S.C. § 2053(a).

Even the panel majority recognized that CPSC commissioners “exercise[] substantial executive power.” Op.17; *see also* Op.24 (Jones, J., concurring in part and dissenting in part). For that reason, the *Humphrey’s Executor* exception does not apply.

The majority emphasized that the CPSC is a “traditional independent agency headed by a multimember board.” Op.14. But the *Humphrey’s Executor* exception applies only if the “multimember expert agenc[y]” at issue also “do[es] not wield substantial executive power.” *Seila*, 140 S. Ct. at 2199-2200. For that reason, as the dissent explained, holding that CPSC commissioners are subject to the President’s removal authority “will disturb neither the rule nor the holding of *Humphrey’s Executor*.” Op.23.

The panel resisted that conclusion based on its view that the CPSC is “structurally identical” to the FTC. Op.20 n.86; *see* Op.19 (describing the CPSC and the FTC as “identical . . . in every respect other than their name”). But *Seila Law* held it irrelevant that the 1935 FTC may have had “broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey’s* Court appreciated.” 140 S. Ct. at 2200 n.4. *see id.* at 2198 n.2.

“[W]hat matters is the set of powers the Court considered as the basis for its decision,” *id.* at 2200 n.4, and those powers were said to include “no part of the executive power,” *id.* at 2198 (quoting *Humphrey’s*, 295 U.S. at 628). That is not true of the CPSC.

Nor was the panel constrained by the en banc Court’s discussion of *Humphrey’s Executor* in *Collins v. Mnuchin*, 938 F.3d 553, 587-88 (5th Cir. 2019) (reinstating removal analysis in panel opinion, *Collins v. Mnuchin*, 896 F.3d 640, 659-75 (5th Cir. 2018)), *aff’d in part, vacated in part, rev’d in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021). *Seila Law* subsequently clarified that the *Humphrey’s Executor* exception applies only to multimember expert agencies that do not wield substantial executive power. 140 S. Ct. at 2199-2200.

The panel also relied on two “separate factors” to uphold the CPSC commissioners’ for-cause removal protections. Op.20; *see* Op.17-19. Each is irrelevant.

First, the panel stated that multimember commissions like the CPSC do not “lack[] historical precedent.” Op.17. But *Seila Law* emphasized the lack of “historical precedent” for an “agency with a structure like that of the CFPB” in determining whether the Supreme Court should “extend” the *Humphrey’s Executor* exception to a “new situation” involving a single-

director agency. 140 S. Ct. at 2201. The mere fact that the CPSC resembles the FTC provides no basis for lower courts to extend *Humphrey's Executor* to an agency that all agree is exercising very substantial executive power.²

Second, the panel erred in relying on its conclusion (Op.19) that the President has more influence over decisions of the CPSC than those of the CFPB because CPSC commissioners are appointed on a staggered schedule and the CPSC is funded through the appropriations process. The fact that the *Seila Law* Court considered the CFPB's different features when it "declined to extend Congress's authority to limit the President's removal power to" that agency's director, 140 S. Ct. at 2211, was not an invitation for lower courts to compare degrees of presidential oversight in determining whether a removal protection fits within the *Humphrey's Executor* exception.

Because the panel's holding impermissibly dilutes the President's control over officials who indisputably exercise significant executive power, the panel's erroneous expansion of the *Humphrey's Executor* exception warrants correction.

² As the Chamber noted in its panel-stage *amicus* brief (at 19 n.2), the CPSC is not comparable to an institution like the Federal Reserve Board that "historically enjoyed some insulation from the President" and therefore could "claim a special historical status." *Seila*, 140 S. Ct. at 2202 n.8.

D. The Issue Is Extremely Important.

Whether *Humphrey's Executor* bars lower courts from assessing the permissibility under Article II of restrictions on removal of officials is a very important question. The potentially-affected agencies exercise broad regulatory and adjudicatory authority over wide swaths of the economy—impacting hundreds of thousands of businesses, large and small, and a huge number of individuals.

The CPSC, for example, has sweeping authority to issue performance requirements for consumer products and ban products that it determines to be hazardous. *See* 15 U.S.C. §§ 2056(a), 2057. It also has the power to investigate product safety incidents—including by issuing subpoenas and taking testimony—and issue nationwide product recalls. *Id.* §§ 2064(d)(1), 2076(a)-(b); 16 C.F.R. Part 1118. And the CPSC may, in response to alleged violations of consumer product laws, commence and render final decisions in administrative proceedings or initiate civil actions in federal court, which could result in injunctions and substantial monetary penalties. 15 U.S.C. §§ 2064(g), 2069(a)(1), 2071(a), 2076(b)(7); 16 C.F.R. §§ 1025.11(a), 1025.55.

Other federal agencies that wield substantial executive power and are headed by officials insulated from Presidential control by removal restrictions exercise similarly expansive authority—including the Federal

Energy Regulatory Commission, 42 U.S.C. § 7171(b)(1), and the National Labor Relations Board, 29 U.S.C. § 153(a), among others.

Under the panel majority’s view, lower courts are disabled from holding that any of those removal restrictions violates Article II—even though the agencies “wield substantial executive authority”—until the Supreme Court overrules *Humphrey’s Executor*. If permitted to stand, that ruling will disable the President from exercising his constitutional authority over a significant segment of the federal government—and insulate those exercises of authority from the accountability to the People that the Constitution demands. The en banc Court therefore should reconsider the panel’s determination and hold that *Humphrey’s Executor* leaves lower courts free to analyze and determine whether removal restrictions applicable to the heads of other federal agencies violate the Constitution.

CONCLUSION

The Court should grant rehearing en banc.

February 13, 2024

Jordan L. Von Bokern
Tyler S. Badgley
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

Respectfully submitted,

/s/ Andrew J. Pincus

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3220
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 701-8330
akupfer@mayerbrown.com

*Counsel for Amicus Curiae the Chamber of Commerce
of the United States of America*

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 29 and Fifth Circuit Rule 29.3. Excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f) and Fifth Circuit Rule 32.2, the brief contains 2565 words and was prepared using Microsoft Word and produced in Century Schoolbook in a size equivalent to 14 points.

/s/ Andrew J. Pincus

Andrew J. Pincus

CERTIFICATE OF SERVICE

I certify that on February 13, 2024, I electronically filed the original of the foregoing motion with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Andrew J. Pincus

Andrew J. Pincus