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* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLEES AND AFFIRMANCE

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) 263-3000
apincus@mayerbrown.com

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
akupfer@mayerbrown.com

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

CERTIFICATE OF INTERESTED PERSONS

No. 22-40328, *Consumers' Research v. CPSC*

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* Washington Legal Foundation.
- *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 Plaintiffs-Appellees, Donald F. McGahn II, Brett A. Shumate, John M. Gore, Anthony J. Dick, Brinton Lucas,

Joseph P. Falvey, and Jorge Benjamin Aguiñaga of Jones Day;

- For Defendant-Appellant, Brian M. Boynton, Christopher R. Hall, Chetan A. Patil, Rebecca Cutri-Kohart, James W. Harlow, Mark B. Stern, Joshua M. Saltzman, Daniel Aguilar, and Amanda L. Mundell of the U.S. Department of Justice;
- For *Amicus Curiae* Washington Legal Foundation, John M. Masslon II and Cory L. Andrews of the Washington Legal Foundation;
- 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.

/s/ *Andrew J. Pincus*
Andrew J. Pincus

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

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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 three 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). The Chamber therefore has a strong interest in ensuring that the power of the CPSC to affect the interests of those businesses by issuing rules, presiding

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[1] No counsel for any 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). All parties have consented to the filing of this brief.

over administrative proceedings, and initiating judicial actions is vested in officials whose appointment and tenure accords with the requirements of the Constitution. Where, as here, the exercise of substantial authority under the laws of the United States impacts the rights and interests of companies subject to the CPSC's regulations and enforcement decisions, the Constitution requires that those officials be fully accountable to the President elected by the People.

STATEMENT OF ISSUE

Whether statutory for-cause removal protection for CPSC Commissioners violates the separation of powers.

SUMMARY OF ARGUMENT

This case presents fundamental questions about the Constitution's structural protections—in particular, the President's ability to supervise CPSC Commissioners who wield significant Article II authority. These Commissioners promulgate regulations establishing nationwide safety standards and product bans. They decide administrative enforcement actions in which companies and individuals have their rights and interests adjudicated. And they initiate civil enforcement actions in federal court.

That significant authority confirms the importance of ensuring that Commissioners are overseen in the clear and politically accountable manner that the Constitution requires for all federal "officers" who wield considerable executive power. But Commissioners are insulated from presidential control by statutory tenure protection that bars removal absent a showing of "neglect of duty or malfeasance in office."

That for-cause limitation on the removal of CPSC commissioners is similar to the restriction that the Supreme Court invalidated in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020)—because it diffused accountability in a manner that violates the Appointments Clause. The Court explained that the Framers conferred on the President plenary power to direct his subordinates in the execution of the laws, including the power to remove them from office—and made the President accountable to the People for his exercise of that authority. Limits on the President's oversight of the unelected officers who assist his faithful execution of the laws frustrate the public's ability to hold the Executive to account.

For that reason, the President generally must be able to remove constitutional officers—a category that includes officials exercising significant authority pursuant to the laws of the United States. The Su-

preme Court has recognized only two narrow exceptions to that rule. The first exception, which concerns removal protections for inferior officers, does not apply to the principal officers at issue here. The second exception restricts the power of the President to remove the principal officers of multimember expert agencies that do not wield substantial executive power.

After undertaking a detailed and close examination of the specific powers wielded by the CPSC, the district court correctly held that the second exception cannot save the statutory restriction on removal of CPSC Commissioners. While Commissioners are principal officers who head a multimember agency, they wield substantial executive power, enforcing federal consumer product law by promulgating regulations and exercising enforcement authority by filing lawsuits in court and instituting and deciding administrative proceedings. The for-cause removal protection impermissibly dilutes the President's control over CPSC Commissioners, subverting his ability to ensure the faithful execution of those laws.

Because the CPSC's Commissioners are executive officers subject to unconstitutional removal protections, the district court's grant of partial summary judgment should be affirmed.

ARGUMENT

THE FOR-CAUSE RESTRICTION ON THE REMOVAL OF CPSC COMMISSIONERS VIOLATES THE CONSTITUTION.

The Constitution specifies that the "executive Power shall be vested in a President of the United States of America," who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3. Yet the Framers recognized that it would be impossible for the President, acting alone, to "perform all the great business of the State." *Seila L. LLC v. CFPB*, 140 S. Ct. 2183, 2197 (2020) (quoting 30 *Writings of George Washington* 334 (J. Fitzpatrick ed. 1939)).

The Appointments Clause, Art. II, § 2, cl. 2, identifies two categories of "lesser executive officers" who assist the President in discharging the executive power. *Seila*, 140 S. Ct. at 2197; *see also Myers v. United States*, 272 U.S. 52, 117 (1926) (The President "execute[s] the laws" with "the assistance of subordinates."); *United States v. Germain*, 99 U.S. 508, 510 (1878) ("[A]ll persons who can be said to hold an office under the government about to be established under the Constitution

were intended to be included within one or the other of these modes of appointment.").

The President has exclusive power to "nominate, and by and with the Advice and Consent of the Senate, . . . appoint" the first category—principal "Officers of the United States." U.S. Const. art. II., § 2, cl. 2. The Appointments Clause also identifies "inferior Officers," *id.*, "whose work is directed and supervised at some level by" the principal officers, *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 510 (2010) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)). Congress may vest the appointment of inferior officers "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II., § 2, cl. 2.

Supreme Court precedent makes clear that CPSC Commissioners are principal officers. And as the district court correctly held, that precedent also establishes that for-cause restrictions on the removal of Commissioners violate the Constitution. The decision below should be affirmed.

A. Executive Officers Must Be Removable At Will By The President, With Two Narrow Exceptions.

1. Article II "grants . . . the executive power of the government" "to the *President*," who must "take care that the laws be faithfully executed." *Myers*, 272 U.S. at 163-64 (emphasis added). The subordinate constitutional officers who wield authority on the President's behalf accordingly "must remain accountable to" him so that he may exercise his constitutional responsibility. *Seila*, 140 S. Ct. at 2197.

Article II therefore provides the President with "the power of appointing, overseeing, and controlling" the officers "who execute the laws" on his behalf. *Seila*, 140 S. Ct. at 2197 (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*, 561 U.S. at 514; *see also DOT v. Ass'n of Am. Railroads*, 575 U.S. 43, 63 (2015) (Alito, J., concurring).

The President's oversight power "generally includes the ability to remove executive officials." *Seila*, 140 S. Ct. at 2197*; see also Free Enter. Fund*, 561 U.S. at 492 (detailing the history of this "settled and well

understood construction of the Constitution"); *Myers*, 272 U.S. at 122 (describing the "exclusive power of removal" as a "necessity" of "the executive power").

2. The "power of removing those [officers] for whom [the President] cannot continue to be responsible" because he does not approve of their actions—like the power to appoint officers in the first place—is "essential to the execution of the laws by" the President. *Seila*, 140 S. Ct. at 2198 (quoting *Myers*, 272 U.S. at 117). Once officers are appointed, "it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'" *Seila*, 140 S. Ct. at 2197 (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)). "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.

That political accountability is essential to the constitutional plan. The Supreme Court explained in *Seila Law* that, in contrast to the Constitution's division of Legislative power, the Framers conferred the entire Executive power on one person—the President—in order to avoid "the 'habitual feebleness and dilatoriness' that comes with a 'diversity of

views and opinions.'" 140 S. Ct. at 2203 (quoting The Federalist No. 70, at 476 (J. Cooke ed. 1961) (Alexander Hamilton)).

"To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation. And the President's political accountability is enhanced by the solitary nature of the Executive Branch, which provides 'a single object for the jealousy and watchfulness of the people.'" *Seila*, 140 S. Ct. at 2203 (quoting The Federalist No. 70, at 479).

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. Federal agencies typically exercise broad regulatory authority to "dictate and enforce policy for . . . vital segment[s] of the economy affecting millions of Americans." *Id.* at 2204. "Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law." *Bowsher*, 478 U.S. at 733.

Often these agencies also are empowered to "bring the coercive power of the state to bear on millions of private citizens and businesses . . . through administrative adjudications and civil actions." *Seila*, 140 S. Ct. at 2200-01. That "enforcement authority" is "a quintessentially executive power." *Id.* at 2200.

Insulating officials exercising such authority from control by the President disrupts the "constitutional strategy," *Seila*, 140 S. Ct. at 2203, for ensuring democratic accountability for the exercise of Executive authority. The President would be able to disavow responsibility for these officials' actions, pointing to his inability to remove them—leaving the People unable to hold the President, or anyone else, responsible for the agencies' actions.

It is therefore critical to the constitutional plan that "individual executive officials" who wield "significant authority" remain "subject to the ongoing supervision and control of the elected President." *Seila*, 140 S. Ct. at 2203. "Through the President's oversight, 'the chain of dependence [is] preserved,' so that 'the lowest officers, the middle grade, and the highest' all 'depend, as they ought, on the President, and the Presi-

dent on the community.'" *Id.* at 2203 (quoting 1 *Annals of Cong.* 499 (1789) (James Madison)).

3. The President's power to remove executive officers is, for the reasons just discussed, "the rule, not the exception." *Seila*, 140 S. Ct. at 2206. The Supreme Court has upheld only two narrow restrictions on the President's power to remove constitutional officers. First, 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, and potentially relevant to CPSC Commissioners, 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. Those two exceptions demarcate the "outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 2200 (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

The second exception, for members of multimember expert agencies who do not wield substantial executive power, was initially recog-

nized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). At issue in *Humphrey's Executor* was a for-cause removal protection for the commissioners of the Federal Trade Commission (FTC). Because the decision upholding that protection was limited to "officers of the kind [t]here under consideration," *id.* at 632, "the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency" at issue. *Seila*, 140 S. Ct. at 2198.

The *Humphrey's Executor* Court "viewed the FTC (as it existed in 1935) as exercising 'no part of the executive power.'" *Seila*, 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.* n.1.

The *Humphrey's Executor* exception to the President's unrestricted removal power, the Supreme Court has subsequently explained, applies in very narrow circumstances. The for-cause removal protection upheld in that case applied to "a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise any executive power." *Seila*, 140 S. Ct. at 2199.

4. The CPSC cites (Br. 26-27) several separate opinions in which Justices indicated that removal restrictions on multi-member commissions "have been generally regarded as lawful." *Morrison v. Olson*, 487 U.S. 654, 724 (1988) (Scalia, J., dissenting). But none of those cases involved principal officers exercising executive authority. They involved the appointment and removal of inferior officers, *Freytag v. Commissioner*, 501 U.S. 868, 877-92 (1991) (Tax Court special trial judges); *Morrison*, 487 U.S. at 685-93 (independent counsel), and the removal of officials who did not exercise executive authority, *Wiener*, 357 U.S. at 354-55 (War Claims Commission). In addition, those statements all predated the Court's decision in *Seila Law* which specifically addressed the issue and limited *Humphrey's Executor*. *See* pp. 11-13, *supra*.

B. The General Constitutional Rule Requiring Plenary Presidential Removal Authority Applies To CPSC Commissioners.

The for-cause limitation on the President's ability to remove CPSC Commissioners does not fall within either exception to the general separation-of-powers principle barring restrictions on the President's authority to remove executive officers. The CPSC's counterarguments are squarely precluded by Supreme Court precedent.

1. Under the challenged statutory scheme, CPSC Commissioners are nominated by the President and confirmed by the Senate, and serve staggered seven-year terms. 15 U.S.C. § 2053(a)-(b). Commissioners may be removed by the President for "neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

The district court correctly determined that CPSC Commissioners qualify as principal executive officers, rather than inferior officers. ROA.612. Indeed, the CPSC does not dispute that characterization. Br. 11. For that reason, only the *Humphrey's Executor* exception to the President's removal power is even potentially applicable here.

But the district court correctly determined that the *Humphrey's Executor* exception does not apply because the CPSC "exercises substantial executive power." ROA.633; *see* ROA.629-39.

First and foremost, CPSC Commissioners wield executive power by issuing regulations. The CPSC's rulemaking authority primarily stems from the Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972). The Act gives the CPSC "broad authority to promulgate 'performance requirements' for consumer products," *Finnbin, LLC v. CPSC*, 45 F.4th 127, 134 (D.C. Cir. 2022) (quoting 15 U.S.C. § 2056(a)), and the power to ban "hazardous product[s]," 15 U.S.C. § 2057. Other statutes provide the CPSC with comparable authority to regulate a variety of consumer products. *See, e.g.*, *id.* § 1194(c) (flammability standards for fabric); *id.* § 1262(f) (hazardous substance bans); *id.* § 1472(a) (packaging standards for household substances).

CPSC regulations are "binding rules" that "flesh[] out" those statutes, *Seila*, 140 S. Ct. at 2200, a power that the Supreme Court has characterized as "the very essence of 'execution' of the law," *Collins v. Yellen*, 141 S. Ct. 1761, 1785 (2021).

CPSC Commissioners also exert executive authority when they investigate product safety incidents and issue product recalls. In the course of investigating, the CPSC has power to issue subpoenas and take testimony, 15 U.S.C. § 2076(a)-(b); 16 C.F.R. Part 1118, which are exercises of "significant authority pursuant to the laws of the United States," *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)). The CPSC may issue orders requiring manufacturers, distributors, and retailors to repair and replace products, and to refund consumers. 15 U.S.C. § 2064(d)(1).

Furthermore, in response to violations of consumer product law, the CPSC may commence, and ultimately render final decisions in, administrative adjudicative proceedings that could result in civil penalties of up to $17,150,000 per related series of violations. 15 U.S.C. § 2069(a)(1); 16 C.F.R. §§ 1025.11(a), 1025.55; 86 Fed. Reg. 68,244 (Dec. 1, 2021). Those adjudicative actions "bring the coercive power of the state to bear on millions of private citizens and businesses." *Seila*, 140 S. Ct. at 2200; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019) ("[E]ven when agency activities take . . . 'judicial' forms, they continue to be ex-

ercises of the executive Power." (quotation marks and alterations omitted)).

To remedy violations of federal consumer product law, the CPSC may commence civil actions in federal court. In civil suits, the CPSC may seek injunctive relief and monetary penalties. 15 U.S.C. §§ 2064(g), 2071(a), 2076(b)(7); *see id.* § 2069. The CPSC's power to seek "daunting monetary penalties . . . on behalf of the United States in federal court" is a "quintessentially executive power not considered in *Humphrey's Executor*." *Seila*, 140 S. Ct. at 2200.

The CPSC contends that the district court, by acknowledging these indicia of executive authority, ignored the Supreme Court's warning that courts are not well-suited to "weigh the relative importance of the regulatory and enforcement authority of disparate agencies." Br. 34 (quoting *Collins*, 141 S. Ct. at 1785). But the district court did not compare the CPSC's executive authority to that of other federal agencies, and in fact, the district court quoted the warning from *Collins* invoked by the CPSC. *See* ROA.634. Rather, the district court followed the mode of analysis embraced by the Supreme Court in *Seila Law*, 140 S. Ct. at 2200-01, for determining whether the *Humphrey's Executor* exception

applies. And it held the *Humphrey's Executor* exception inapplicable based on its assessment of the substantial and varied categories of executive power that the CPSC exercises. ROA.634-36.

2. The CPSC is also wrong in asserting (Br. 25-35) that Supreme Court precedents foreclose the district court's holding.

To begin with, the CPSC mischaracterizes the district court decision. The court did not "limit the holding of *Humphrey's Executor*," CPSC Br. 29, but rather held that CPSC Commissioners do not fit within that exception. The "general rule" is that the President has the power to remove executive officers. *Seila*, 140 S. Ct. at 2198. *Humphrey's Executor* announced one of "two exceptions" to that general rule. *Id.* That exception does not apply broadly to all "multi-member regulatory agencies," as the CPSC asserts. Br. 27-28. Rather, it encompasses only "multimember expert agencies that do not wield substantial executive power." *Seila*, 140 S. Ct. at 2199-2200; *see id.* at 2211 (Thomas, J., concurring in part and dissenting in part) (emphasizing this distinction).

The district court correctly determined that the *Humphrey's Executor* exception is inapplicable here: Although the CPSC is a "multimember expert agency," its Commissioners exercise "substantial executive

power." ROA.634-36. Indeed, the CPSC does not dispute that characterization of its authority. This Court should not "extend" *Humphrey's Executor* to that "new situation." *Seila*, 140 S. Ct. at 2201.[2]

The CPSC states that the 1935 FTC (the agency at issue in *Humphrey's Executor*) "also had . . . substantial executive power."

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[2] Even were the Court inclined to extend *Humphrey's Executor*, there is no "historical precedent" to support doing so here. *Seila*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 505). 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." *Id.* at 2202 n.8; *see id.* at 2232-33 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part) (discussing the history of the Federal Reserve Board).

That independence was "well established in the first twenty years" of the Federal Reserve Board's existence. Allan H. Meltzer, *A History of the Federal Reserve, Volume 1: 1913-1951* 737 (2003); *see generally* Allan H. Meltzer, *A History of the Federal Reserve, Volume 2, Book 2, 1970-1986* 1223 (2009) (discussing the presidential "tradition of not interfering in Federal Reserve decisions"). The Board's independence is a "critical part of the institutionalization of a low-inflation policy" that prevents administrations from financing deficits by printing money or allocating credit to favored groups. *A History of the Federal Reserve, Volume 2, Book 2, 1970-1986* 1252; *see also Regulatory Restructuring: Balancing the Independence of the Federal Reserve in Monetary Policy with Systemic Risk Regulation: Hearing Before the Subcomm. on Domestic Monetary Pol'y and Tech. of the H. Comm. on Fin. Servs.*, 111th Cong. 59 (2009) (statement of Donald L. Kohn, Vice Chairman, Federal Reserve Board) (discussing historical examples of "non-independent central banks being forced to finance large government budget deficits").

Br. 33. But the Supreme Court has held that it is irrelevant that the 1935 FTC may have had "broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated." *Seila*, 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).

The CPSC cites several other Supreme Court opinions in support of its contention that the *Humphrey's Executor* exception encompasses all multi-member expert agencies—but all are inapposite. *Free Enterprise* noted that the exception applies to "independent agencies run by principal officers" in "certain circumstances." 561 U.S. at 483; *see id.* at 493 (the exception applies to "certain independent agencies"). But *Free Enterprise* had no occasion to address what those "circumstances" might be. The Court opined only on the "modest" question of the constitutionality of "two layers of for-cause tenure" protection. *Id.* at 501.

Ten years later, in *Seila Law*, the Court more fully explained that the *Humphrey's Executor* exception insulates from the President's removal authority "expert agencies that do not wield substantial execu-

tive power." 140 S. Ct. at 2199-2200. The Court then held that the for-cause removal protection for the CFPB Director, who exerts considerable "executive power," does not fit within the *Humphrey's Executor* exception. *Id.* at 2200.

The CPSC focuses (Br. 34) on dicta from *Seila Law* stating that there "may be . . . alternative [statutory] responses" that Congress can pursue to fix the defect in the CFPB's structure, including "converting the CFPB into a multimember agency." 140 S. Ct. at 2211. But the Court did not affirmatively hold that a multimember CFPB wielding substantial executive power would automatically pass muster. The Court was simply noting that Congress, unlike federal courts, can "rewrite" statutes to correct constitutional defects.

The CPSC does not, and cannot, explain why a multi-member commission cures the separation-of-powers concerns recognized in *Seila Law*. Neither single agency heads nor multi-member agency commissioners with removal protection are "elected by the people []or meaningfully controlled (through the threat of removal) by someone who is." *Seila*, 140 S. Ct. at 2203. Just as a President could be "saddled with a holdover [CFPB] Director from a competing political party," *id.* at 2204,

so too a President could, due to the CPSC's staggered system for appointments to seven-year terms, be deprived of the opportunity to appoint a majority of Commissioners. In either scenario, the for-cause removal protection "reduce[s] the Chief Magistrate to [the role of] cajoler-in-chief," *Free Enter. Fund*, 561 U.S. at 502, who cannot exercise "meaningful supervision" of the agencies' regulations, adjudications, and enforcement priorities, *Seila*, 140 S. Ct. at 2203.

The CPSC argues (Br. 28) that the President may be able to exercise more authority over multimember commissions with tenure protection than he could with respect to the single agency director at issue in *Seila Law*. Even if that were true—and Justice Kagan expressed skepticism in her *Seila Law* dissent[3]—any reduction in accountability to the President violates the Constitution's structure.

The restriction on removal of CPSC Commissioners impermissibly dilutes the President's control over officials who indisputably exercise

[3] "A multimember structure reduces accountability to the President because it's harder for him to oversee, to influence—or to remove, if necessary—a group of five or more commissioners than a single director. . . . Where presidential control is the object, better to have one than many." 140 S. Ct. at 2243 (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

significant executive power, subverting both his "ability to ensure that the laws are faithfully executed" as well as "the public's ability to pass judgment on his efforts." *Free Enter. Fund*, 561 U.S. at 498. For that reason, the removal restrictions violate the Constitution.[4]

[4] The CPSC argues at length (Br. 29-34) that the district court failed to apply binding Supreme Court precedent. That is incorrect. As discussed in the text above, the district court properly recognized that the Supreme Court's decision in *Seila Law* sets forth the authoritative interpretation of *Humphrey's Executor*—holding that the *Humphrey's Executor* exception is limited to removal restrictions on "multimember expert agencies that do not wield substantial executive power." 140 S. Ct. at 2199-2200. And the district court faithfully applied that standard to CPSC Commissioners.

Similarly misplaced is the CPSC's reliance on then-Judge Kavanaugh's concurrence relating to the Nuclear Regulatory Commission. Br. 31 (citing *In re Aiken County*, 645 F.3d 428, 442 (D.C. Cir. 2011). That opinion predated the Supreme Court's decision in *Seila Law* and therefore could not take account of the Supreme Court's authoritative interpretation of its own prior ruling in *Humphrey's Executor*.

CONCLUSION

The district court's grant of partial summary judgment should be affirmed.

October 7, 2022

Respectfully submitted,

/s/ *Andrew J. Pincus*

Andrew J. Pincus
MAYER BROWN LLP
1999 K Street, N.W.
Washington, DC 20006
(202) 263-3000
apincus@mayerbrown.com

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

Avi M. Kupfer
MAYER BROWN LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600
akupfer@mayerbrown.com

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

CERTIFICATE OF SERVICE

I certify that on October 7, 2022, I served a copy of the foregoing on all counsel of record by CM/ECF.

/s/ *Andrew J. Pincus*
Andrew J. Pincus

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume, typeface, and type-style requirements of Federal Rule of Appellate Procedure 29(a)(5), 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 4428 words and was prepared using Microsoft Word and produced in Century Schoolbook 14-point font.

/s/ *Andrew J. Pincus*
Andrew J. Pincus