

**[ORAL ARGUMENT NOT YET SCHEDULED]**

No. 22-1300

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

WINDOW COVERING MANUFACTURERS ASSOCIATION,  
*Petitioner,*

*v.*

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,  
*Respondent.*

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

**BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE  
OF THE UNITED STATES OF AMERICA  
SUPPORTING PETITIONER**

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to D.C. Cir. R. 28(a)(1), the undersigned counsel for *amicus curiae* certifies the following:

**(A) Parties and Amici.**

The National Association of Manufacturers and New Civil Liberties Alliance have stated their intention to participate as *amici curiae* in this Court. All other parties and *amici* appearing in this Court are listed in the Brief for Petitioner.

**(B) Ruling Under Review.**

References to the rulings at issue appear in the Brief for Petitioner.

**(C) Related Cases.**

This case was not previously before this Court or any other court. Counsel for *amicus curiae* is unaware of any related cases within the meaning of D.C. Cir. R. 28(a)(1)(C).

/s/ Brett A. Shumate  
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## CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit organization organized under the laws of the District of Columbia. It has no parent corporation, and no publicly held company owns ten percent or more of its stock.

*/s/ Brett A. Shumate*

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**RULE 29(d) CERTIFICATION**

Pursuant to D.C. Cir. R. 29(d), *amicus* certifies that a separate brief is necessary because *amicus*, the Chamber of Commerce of the United States of America, has a unique perspective and expertise on issues raised in this appeal, and seeks to address only those issues for which that perspective and expertise is most relevant. *Amicus* believes that a separate brief is required to offer this unique perspective and expertise.

/s/ Brett A. Shumate  
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## GLOSSARY

APA	Administrative Procedure Act
Association	Window Covering Manufacturers Association
Chamber	Chamber of Commerce of the United States of America
CFPB	Consumer Financial Protection Bureau
CPSA	Consumer Product Safety Act
CPSC or Commission	Consumer Product Safety Commission
FTC	Federal Trade Commission

## INTEREST OF *AMICUS CURIAE*<sup>1</sup>

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 or the Commission). The Chamber therefore has a strong interest in ensuring

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<sup>1</sup> 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.

that the Commission complies with Congress's command not to issue mandatory safety standards when voluntary safety standards are working. When federal agencies override voluntary standards, as CPSC did here, businesses are saddled with unnecessary regulations imposing burdensome compliance costs.

The Chamber also has a strong interest in ensuring that the Commission's exercise of its power to affect the interests of businesses by issuing rules, presiding over administrative proceedings, and initiating judicial actions is vested in officials whose appointment and tenure accord with the requirements of the Constitution. Where, as here, the exercise of rulemaking authority under the Consumer Product Safety Act (CPSA) impacts the rights and interests of companies subject to CPSC's regulations, the Constitution requires that those officials be fully accountable to the President elected by the People.

## **SUMMARY OF ARGUMENT**

I. CPSC's new rule for custom window coverings exceeds the agency's authority under the CPSA and is arbitrary and capricious under the Administrative Procedure Act (APA). The CPSA requires CPSC to refrain from imposing mandatory safety standards and instead to rely

upon voluntary safety standards as long as they adequately reduce the risk of consumer injury. Under the APA, agency rulemaking is unlawful if it is inconsistent with governing statutes. 5 U.S.C. § 706(2)(C). By overriding the Window Covering Manufacturers Association's (the Association) voluntary safety standard, however, CPSC violated the CPSA and the APA's requirement of reasoned decisionmaking.

For over 40 years, CPSC has been subject to one of the most stringent rulemaking schemes in the U.S. Code. That scheme reflects Congress's explicit policy preference for adaptive, collaborative, voluntary standards over inflexible federal rules. That policy has worked for decades, including specifically in the context of window coverings, to enhance both consumer safety and value. And it fits comfortably within Congress's broader policy of preferring voluntary standards for both public and private regulatory uses.

Lately, however, the Commission has begun rushing out mandatory rules in defiance of Congress's careful design, without the requisite deference to voluntary standards. CPSC's new rule for window coverings is therefore unlawful for at least two reasons: First, it is not in accordance with law under the APA because it violates the CPSA's clear requirement

that mandatory standards not be imposed when voluntary standards are working. And second, it constitutes arbitrary and capricious decisionmaking by failing to adequately consider the Association's update to its voluntary standard, which is at the very least an important factor that the agency was required to consider.

II. This case also presents fundamental questions about the Constitution's structural protections—in particular, the President's ability to control subordinate officers who wield substantial executive power. CPSC Commissioners promulgate regulations setting nationwide safety standards like the window covering rule at issue here. They decide administrative enforcement actions in which companies and individuals have their rights and interests adjudicated. And they initiate enforcement actions in federal court.

The Commissioners' significant executive authority underscores the importance of ensuring that they are accountable to the President as the Constitution requires. But they are insulated from presidential control by statutory tenure protection that bars their removal absent "neglect of duty or malfeasance in office." 15 U.S.C. § 2053(a).

In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court explained that Article II of the Constitution empowers the President to control his subordinates in the Executive Branch, including the power to remove them at will. Limiting the President's removal power not only frustrates his ability to faithfully execute the laws, but also frustrates the public's ability to hold the Executive Branch accountable.

The Supreme Court has recognized only two narrow exceptions to the President's removal power. First, Congress may limit the removal of inferior officers who have "limited duties and no policymaking or administrative authority." *Id.* at 2200. And second, Congress may sometimes limit removal for "multimember expert agencies that do not wield substantial executive power." *Id.* at 2199-200. But that marks the "outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 2200.

Neither exception applies here because the Commissioners are not inferior officers, and they clearly wield substantial executive power. They enforce a sweeping array of federal laws by, among other things, filing suits in court seeking to impose monetary penalties on defendants. Restricting the removal of the Commissioners is thus a clear violation of



Article II, as it improperly subverts the President's constitutional power to control the Executive Branch.

## ARGUMENT

### I. THE COMMISSION'S MANDATORY NEW RULE UNLAWFULLY OVERRIDES VOLUNTARY STANDARDS.

In the CPSA, Congress strictly limited the Commission's authority to issue mandatory rules if voluntary industry safety standards would adequately reduce the risk of injury. *See* 15 U.S.C. §§ 2056(b)(1); 2058(f)(3). As this Court has explained, CPSC "must stay its hand if a voluntary standard adopted by a private group adequately reduces the relevant product risks and will likely achieve substantial compliance." *Finnbin, LLC v. CPSC*, 45 F.4th 127, 131 (D.C. Cir. 2022) (citing 15 U.S.C. § 2056(b)(1)). This Congressional preference for voluntary standards makes sense, because such standards are effective and serve important policy objectives.

CPSC's new rule for window coverings exceeds the agency's authority because it overrides the Window Covering Manufacturers Association's voluntary standard, 15 U.S.C. § 2056(b)(1), and therefore violates the APA, 5 U.S.C. § 706(2)(C). The new rule is also arbitrary and

capricious because it fails to adequately consider the Association's updates to that standard.

**A. Congress Directed The Commission To Defer To Voluntary Industry Standards Over Mandatory Ones.**

1. In 1981, Congress “mandate[d] that the Commission give preference to voluntary standards, as opposed to promulgating mandatory standards,” if certain criteria are met. CPSC, *Commission Participation and Commission Employee Involvement in Voluntary Standards Activities*, 81 Fed. Reg. 5,369, 5,370 (Feb. 2, 2016) (citing 15 U.S.C. § 2056(b); see 16 C.F.R. §§ 1031.2, 1031.3 (similar). Specifically, “[t]he Commission shall rely upon voluntary consumer product safety standards,” rather than issue a mandatory standard, “whenever compliance with such voluntary standards would eliminate or adequately reduce the risk of injury addressed” by the voluntary standards, if “it is likely that there will be substantial compliance with such voluntary standards.” 15 U.S.C. § 2056(b)(1).

CPSC cannot issue a mandatory safety standard unless existing voluntary standards fail to meet specific criteria established by Congress. *Id.* § 2058(f)(3)(D) (setting forth relevant statutory criteria in detail). Indeed, as one former Commissioner lamented, “since 1981 [the agency]

has labored under what is, by many accounts, the most burdensome and detailed set of cost-benefit procedures in the federal government. Included in these procedures are requirements for elaborate preliminary regulatory analyses followed by even more elaborate final analyses, with cost-benefit findings even required for those regulatory alternatives not chosen.” Robert S. Adler, *Somebody Always Pays*, CPSC Acting Chairman Adler’s Blog (Jul. 7, 2015), <https://tinyurl.com/2vxc34sz>.

Congress’s scheme also enlists CPSC in developing and improving voluntary standards, in cooperation with industry stakeholders. *See* 15 U.S.C. § 2054(a)(4) (requiring that the Commission “assist public and private organizations or groups of manufacturers, administratively and technically, in the development of product safety standards and test methods”).

Further, CPSC must halt consideration of a proposed mandatory standard if a sufficient voluntary standard is issued. *Id.* § 2058(b). Thus, as the Commission recently admitted, the agency’s “general authority to promulgate safety standards is cabined” when voluntary standards are

in play. Br. for Resp. at 2-3, *Finnbin*, 45 F.4th 127 (No. 21-1180), 2022 WL 326414, at \*2-3 (“Statutory Background”).<sup>2</sup>

2. Few courts have had occasion to enforce this preference for voluntary standards—likely because CPSC only recently began to rush out a slew of mandatory new rules in defiance of the CPSA’s scheme. Indeed, between its establishment in 1972 and 2018, CPSC promulgated “approximately 40 mandatory safety rules and product bans” (combined), less than one per year. Carpenter, *supra* Note 2, at 10. And “[m]ost of these rules were implemented prior to the 1981 amendments that generally required the Commission to defer to voluntary safety standards.” *Id.* By contrast, in 2022 alone, CPSC promulgated five mandatory final rules and proposed three others. *Performance Budget Request to Congress: Fiscal Year 2023*, *supra* Note 2, at 29. It also

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<sup>2</sup> See also CPSC, *Performance Budget Request to Congress: Fiscal Year 2023* 12 (Mar. 28, 2022), <https://tinyurl.com/2p82bd5u> (“In many cases, the CPSC’s statutory authority requires the agency to rely on voluntary standards, rather than promulgate mandatory regulations....”); David H. Carpenter, Cong. Rsch. Serv., R45174, *The CPSA: A Legal Analysis* 1 (Apr. 24, 2018) (“[I]n most instances, the CPSA requires the Commission to defer to ‘voluntary consumer product safety standards’ that are predominately drafted and developed by private industry.”).

announced plans to promulgate six mandatory final rules and propose three others in 2023 alone. *Id.* This rapid acceleration in the velocity of agency rulemaking flouts Congress’s carefully calibrated scheme.

Courts that have addressed the issue have recognized the rigor the CPSA requires. For example, this Court recently observed that CPSC “must stay its hand” in the face of a voluntary standard. *Finnbin, LLC*, 45 F.4th at 131. A Tenth Circuit panel including then-Judge Gorsuch vacated a CPSC rule, noting that the “prerequisite factual findings, which are compulsory under the [Act], [were] incomplete and inadequately explained.” *Zen Magnets, LLC v. CPSC*, 841 F.3d 1141, 1144 (10th Cir. 2016). That was so even though that regulation did not implicate a voluntary standard. *Id.* at 1147 & n.7. The Second Circuit also observed that the Act’s procedural requirements “are stricter than those contained in [the APA],” even before the 1981 amendments heightened the agency’s burden in accounting for voluntary standards. *Toy Mfrs. of Am., Inc. v. CPSC*, 630 F.2d 70, 75 n.8 (2d Cir. 1980).

**B. Congress’s Preference For Voluntary Standards Makes Sense.**

Although the CPSA’s procedural requirements stand out for their rigor, the Act is hardly alone among federal authorities recognizing the

value of voluntary industry standards and preferring those standards to mandatory ones. That is because voluntary standards are efficient and effective means of enhancing both consumer safety and value through cooperation between public and private stakeholders.

1. The CPSA's preference for voluntary standards bears a strong resemblance to several other federal statutes. For example, the Federal Hazardous Substances Act and the Flammable Fabrics Act also instruct the Commission to defer to voluntary standards over mandatory rules. 15 U.S.C. §§ 1262(g)(2), 1193(h)(2). The Occupational Health and Safety Act raises that agency's burden to explain why any mandatory rule that "differs substantially from an existing national consensus standard" would "better effectuate the purposes" of that Act over the national consensus standard. 29 U.S.C. § 655(b)(8). Examples of other Congressional instructions to adopt or prefer voluntary standards abound. *E.g.*, 6 U.S.C. § 321m(b)(2)(B) (emergency management and preparedness); 15 U.S.C. § 278h-1(c) (artificial intelligence); 15 U.S.C. § 2234 (firefighter health and safety); 15 U.S.C. § 7464(c)(2) (identity management); 20 U.S.C. § 1018b(c) (student aid delivery); 42 U.S.C.

§ 300i-2(f)(2) (community water systems); 43 U.S.C. § 2806(b)(2) (geospatial data); 47 U.S.C. § 1006(a)(2) (telecommunications).

Congress even required that “all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments,” unless it would be “inconsistent with applicable law or otherwise impractical.” National Technology Transfer & Advancement Act of 1995, Pub. L. 104-113, § 12(d), 110 Stat. 775, 783 (codified at 15 U.S.C. § 272 note). Congress concluded that consensus standards “are developed with great care and expertise in an open, democratic manner which makes U.S. voluntary standards the envy of the world.... These groups are better equipped than the Government to understand all points of view and to keep up with the state of the art in technical standards.” 142 Cong. Rec. H1266 (daily ed. Feb. 27, 1996) (Statement of Rep. Brown).

Agencies have “continue[d] to look overwhelmingly to the private sector to fulfill government needs rather than creating new government-unique standards.” National Institute of Standards & Technology, *Eighth*

*Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment 1* (2005), <https://tinyurl.com/mrx6vt39>. This cooperation helps “reduce costs and regulatory burden, provide incentives and opportunities that encourage growth of U.S. enterprises, [and] realize benefits from public-private collaboration in standards setting.” National Institute of Standards & Technology, *Twenty-Fifth Annual Report on Federal Agency Use of Voluntary Consensus Standards and Conformity Assessment 1* (2023), <https://tinyurl.com/5x4kc8r9>.

Even before Congress codified this preference for voluntary standards, the Executive Branch had long recognized that it is “more efficient[] and effective[]” for regulators to use voluntary standards created through a consensus process by private organizations with “expertise” in an industry, than it is for the government to formulate its own top-down standard for an industry. Admin. Conf. of the U.S., *Miscellaneous Amendments*, 44 Fed. Reg. 1,357, 1,357 (Jan. 5, 1979); see OMB, *Issuance of Circular No. A-119, “Federal Participation in the Development and Use of Voluntary Standards,”* 47 Fed. Reg. 49,496 (Nov. 1, 1982).



2. The vast majority of private associations involved in promulgating voluntary standards are professional, trade, and other groups that develop guidelines not to make a profit, but rather to provide useful information to members, outside industry participants, government entities, and the public. *See Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 296 (5th Cir. 1988) (noting that these associations' activities save "buyers the trouble of investigating products themselves and the risk of trying untested products"); *see also* U.S. Gov't Accountability Off., GAO-12-582, *CPSC: A More Active Role in Voluntary Standards Development Should Be Considered* 4-5 (2012), <https://tinyurl.com/y5s5r659> (discussing "standards development organizations" and their exhaustive processes for developing voluntary standards).

These activities have contributed significantly to the public good. Indeed, so vital is the role of private associations that federal, state, and local governments increasingly look to the standards promulgated by private associations for adoption into law. *See, e.g., CCC Info. Servs., Inc. v. MacLean Hunter Mkt. Reps., Inc.*, 44 F.3d 61, 74 n.30 (2d Cir. 1994) (noting "the increasing trend toward state and federal adoptions of model

codes”); *Bldg. Offs. & Code Adm’rs v. Code Tech., Inc.*, 628 F.2d 730, 732 (1st Cir. 1980) (noting that voluntary safety standards are “used throughout the United States and Canada by state and local jurisdictions”). These private standard-setting activities play a prominent role in promoting the public health and welfare, the importance of which cannot be overstated: private associations’ specialized knowledge, resources, and relationships to industry make them uniquely well-suited to promulgate and enforce standards designed to ensure the delivery of high-quality, safe goods to the public.

As the Association explains, it has worked for decades on seven revisions of an exhaustive voluntary standard for window coverings. *See* Pet’r Br. 7-10. That cooperative, iterative work between the Association, the American National Standards Institute, industry, government, and the public has significantly enhanced safety and value for consumers. CPSC’s hasty reversal threatens that progress.

### **C. The Commission’s Override Of The Association’s Voluntary Standard Is Unlawful.**

The Association ably explains why CPSC’s new window covering rule is unlawful, but a few points warrant emphasis.

1. CPSC cannot substitute its judgment for Congress's statutory preference of voluntary safety standards over mandatory ones. It is well-established that "[a]gencies are therefore 'bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of those purposes.'" *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006).

Here, the means imposed by Congress require the Commission to yield to the Association's voluntary standard. 15 U.S.C. § 2056(b)(1). CPSC agrees "that custom window coverings substantially comply with" the Association's voluntary standard. CPSC, *Safety Standard for Operating Cords on Custom Window Coverings*, 87 Fed. Reg. 73,144, 73,145, 73,170, 73,194 (Nov. 28, 2022). Although the Commission concluded that the Association's 2018 standard "does not adequately address the risk of injury associated with operating cords on custom window coverings," *id.* at 73,145, 73,155, 73,171, the Association recently updated its 2018 standard to impose "requirements for operating cords on custom window coverings," *id.* at 73,155, 73,165; *see also* Pet'r Br. 8-10.

In refusing to wait for the Association to finalize the update to its voluntary standard, 87 Fed. Reg. at 73,165, the Commission seeks to elevate its own preference for mandatory rules above Congress's preference for voluntary standards. "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam). Vacating CPSC's new rule is necessary to give effect to Congress's command that the agency yield to the Association's voluntary standard.

2. At the very least, CPSC acted arbitrarily and capriciously because it did not adequately consider the Association's updates to its 2018 voluntary standard. By refusing to "rely on" the Association's updates to its 2018 voluntary standard, 87 Fed. Reg. at 73,165, the Commission "failed to consider an important aspect of the problem" (*i.e.*, whether updates to the 2018 voluntary standard would adequately reduce injuries and preclude mandatory rulemaking), *Motor Vehicle*

*Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

One of the important factors that the Commission must consider in any rulemaking is whether industry intends “to modify or develop a voluntary consumer product safety standard to address the risk of injury,” 15 U.S.C. § 2058(a)(6). For certain products, Congress even instructed that voluntary standards not yet in effect (sometimes expected years into the future) must be considered and deferred to. *E.g., id.* §§ 2056c(c), 2056d(b)(3). And in all events, CPSC must consider less “burdensome” alternatives to any mandatory rule, which logically includes updated voluntary standards. *Id.* § 2058(f)(3)(F). Moreover, Commission regulations explicitly permit it to “defer the initiation of a mandatory rulemaking proceeding and request the voluntary standards organization to revise the standard to address the identified inadequacies expeditiously.” 16 C.F.R. § 1031.4(a)(4).

Despite the statutory and regulatory direction to prefer voluntary standards, CPSC failed to adequately consider the Association’s updates to its 2018 voluntary standard before issuing the final rule. As the Association explains, those revisions to its voluntary standard address

the risks of injury from custom window coverings. Pet'r Br. 10, 26-28. Indeed, the Commission acknowledged that the Association's 2022 update "includes safety improvements" over the 2018 standard, 87 Fed. Reg. at 73,165, but nowhere in the final rule did CPSC adequately explain why these improvements would not sufficiently address the risks of injury from custom window coverings.

Although the Commission acknowledged the Association's effort to update its 2018 voluntary standard, *id.*, CPSC's explanation for refusing to consider the update was inadequate. Crucially, CPSC *must* consider less "burdensome" alternatives to a mandatory rule—which includes voluntary safety standards. 15 U.S.C. § 2058(f)(3)(F). Although the agency nodded to its staff's concerns about the update, 87 Fed. Reg. at 73,165-68, 73,171, the Act directs CPSC itself to make specific findings about the need for mandatory rulemaking, 15 U.S.C. § 2058(f)(3). The agency failed to make any findings that the Association's updated standard was inadequate. That "ostrich-like approach flies in the face" of reasoned decisionmaking. *Env't Def. Fund v. FERC*, 2 F.4th 953, 975 (D.C. Cir. 2021).

The final rule thus shirks CPSC's statutory obligation to yield to voluntary safety standards and reverses the agency's historical cooperation with private industry associations, to the detriment of consumers and industry alike. To ensure that the Commission stays within the bounds of its statutory authority and complies with its duty to engage in reasoned decisionmaking, the final rule should be vacated.

## **II. THE COMMISSION'S REMOVAL RESTRICTION VIOLATES ARTICLE II OF THE CONSTITUTION.**

The Commission's unlawful promulgation of the rule is especially egregious here in light of the unconstitutional statutory removal restriction that insulates the Commissioners from political accountability. Article II of the Constitution requires the executive power to be vested in the President, who is accountable to the people through the ballot box. As a general rule, the President has inherent authority to remove subordinate officers at will, to ensure a full measure of accountability for the Executive Branch.

The Supreme Court has held that principal officers may not be insulated from removal if they wield substantial executive power. CPSC clearly does so, as it has robust authority to enforce federal law and issue new rules with the force and effect of law. The statutory removal

restriction that insulates the Commissioners from presidential control and accountability is thus unconstitutional.

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

Article II vests the entirety of “the executive power” in “the President,” who must “take care that the laws be faithfully executed.” *Myers v. United States*, 272 U.S. 52, 163-64 (1926). To ensure that the Executive Branch remains accountable to the President, and ultimately to the voters, Article II also endows the President with “the power of appointing, overseeing, and controlling” the subordinate officers “who execute the laws” on his behalf. *Seila Law LLC*, 140 S. Ct. at 2197 (quoting 1 *Annals of Cong.* 481 (1789) (Joseph Gales ed., 1834) (James Madison)). The power to control executive officials, in turn, “includes the ability to remove” them. *Id.* Otherwise, the President would have no way to ensure that executive officials obey his commands. He “could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Id.* at 2191.

1. The Supreme Court has long recognized that the removal power is “essential to the execution of the laws by” the President. *Id.* 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.'" *Id.* at 2197 (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

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." *Id.* at 2207. Federal agencies 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 ... through administrative adjudications and civil actions." *Seila Law*, 140 S. Ct. at 2200-01. That "enforcement authority" is "a quintessentially executive power." *Id.* at 2200.

Insulating officials who wield executive authority from control by the President disrupts the "constitutional strategy" for ensuring democratic accountability for the exercise of Executive authority. *Id.* at 2203. 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.” *Id.* “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 President on the community.’” *Id.* (quoting 1 *Annals of Cong.* 499 (James Madison)).

2. The President’s power to remove executive officers is, for the reasons just discussed, “the rule, not the exception.” *Id.* at 2206. The Supreme Court has recognized only two narrow exceptions to the President’s power to remove subordinate officers. *First*, Congress may restrict 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 here, Congress may, under certain circumstances, limit the power of the President to remove the principal officers of “multimember expert agencies that do not wield

substantial executive power.” *Id.* at 2199-200. Those two exceptions demarcate the “outermost constitutional limits of permissible congressional restrictions on the President’s removal power.” *Id.* at 2200.

The second exception, for members of multimember expert agencies who do not wield substantial executive power, was initially recognized 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). Critically, the *Humphrey’s Executor* Court “viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’” *Seila Law*, 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 department[],” 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.

As the Supreme Court has since explained, the *Humphrey's Executor* exception applies only to a very limited subset of multimember agencies—those “that do not wield substantial executive power.” *Seila Law*, 140 S. Ct. at 2199-200. “Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’” *Id.* at 2198. And for purposes of determining the scope of the *Humphrey's Executor* exception, “what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court.” *Id.* at 2200 n.4.

**B. The Commission Does Not Fit Within Either Exception, And The Removal Restriction Is Thus Unconstitutional.**

The Commission is unconstitutional as it does not fall within either exception to the President's removal power. The Commissioners are not “inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2200. And while the agency is a “multimember” body, it does not fit within the *Humphrey's Executor* exception because it exercises “substantial executive power.” *Id.* at 2199-200.

At the outset, it is undeniable that Commissioners “are principal, rather than inferior, officers ... and hold significant policymaking and administrative authority.” *Consumers’ Rsch. v. CPSC*, 592 F. Supp. 3d 568, 581 (E.D. Tex. 2022), *appeal pending*, No. 22-40328 (5th Cir.). The government has never even tried to argue otherwise.

Accordingly, the *Humphrey’s Executor* exception is the only one that could even potentially apply here. Contrary to the agency’s suggestion, however, “the Commission exercises substantial executive power and therefore does not fall within the *Humphrey’s Executor* exception,” *Consumers’ Rsch.*, 592 F. Supp. 3d at 583-84.

First, the Commission wields substantial executive power because it has robust “enforcement authority,” which “includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey’s Executor*.” *Seila Law*, 140 S. Ct. at 2200. Specifically, it can bring suits seeking injunctive relief and civil penalties of up to \$100,000 per violation, and up to \$17,150,000 for a series of violations. *See* 15 U.S.C. §§ 2069, 2071, 2076(b)(7). Thus, as even the government agrees, “the CPSC’s main responsibilities include” its “law-

enforcement functions,” John C. Yoo, *President’s Authority To Remove the Chairman of the CPSC*, 25 Op. O.L.C. 171, 173 (2001)—a classic example of “executive power,” *Buckley v. Valeo*, 424 U.S. 1, 139 (1976).

Second, Commissioners also wield executive power by issuing administrative regulations like the new window covering rule challenged in this case. The agency’s rulemaking authority primarily stems from CPSA, Pub. L. No. 92-573, 86 Stat. 1207 (1972), which gives the Commission “broad authority to promulgate ‘performance requirements’ for consumer products,” *Finnbin, LLC*, 45 F.4th at 134 (quoting 15 U.S.C. § 2056(a)), and the power to ban “hazardous product[s],” 15 U.S.C. § 2057. Other statutes provide the agency 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 Law*, 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). Indeed, “[a]t oral argument [in

*Consumers' Research*], the Government conceded this authority was an executive power.” *Consumers' Rsch.*, 592 F. Supp. 3d at 584.

Third, Commissioners also exert substantial executive authority when they investigate product safety incidents and issue product recalls. In the course of investigating, CPSC has power to issue subpoenas and take testimony, 15 U.S.C. § 2076(a)-(b); 16 C.F.R. pt. 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*, 424 U.S. at 126). The Commission may issue orders requiring manufacturers, distributors, and retailers to repair and replace products, and to refund consumers. 15 U.S.C. § 2064(d)(1).

Fourth, in response to violations of consumer product law, the Commission 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. *Id.* § 2069(a)(1); 16 C.F.R. §§ 1025.11(a), 1025.55; CPSC, *Civil Penalties; Notice of Adjusted Maximum Amounts*, 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 Law*, 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 exercises of the executive Power.” (quotation marks and alterations omitted)). Thus, “as the Supreme Court said in *Seila Law*, agency adjudication in this form ‘*must be*’ an exercise of executive authority.” *Consumers’ Rsch.*, 592 F. Supp. 3d at 584 (quoting *Seila Law*, 140 S. Ct. at 2198 n.2).

For all of these reasons, CPSC plainly “exercises substantial executive power,” and thus “*Humphrey’s Executor* does not apply.” *Id.*

### **C. The Government’s Contrary Arguments Lack Merit.**

The Commission has argued in another case challenging CPSC’s structure—and suggested in its stay briefing here—that Supreme Court precedents foreclose lower courts from “limit[ing] the holding of *Humphrey’s Executor*” by holding that it does not cover the Commission. See Br. for Appellant at 29, *Consumers’ Rsch. v. CPSC*, No. 22-40328 (5th Cir. Aug. 31, 2022) (“*Consumers’ Rsch.* CPSC Br.”). That mischaracterizes the Supreme Court’s precedents.

To begin with, this Court would not be “limiting” the holding of *Humphrey’s Executor* by simply holding that the Commission does not fit



within the exception recognized in that case. The “general rule” is that the President has the power to remove executive officers. *Seila Law*, 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. Rather, it encompasses only “multimember expert agencies that *do not wield substantial executive power.*” *Seila Law*, 140 S. Ct. at 2199-200 (emphasis added); *see id.* at 2211 (Thomas, J., concurring in part and dissenting in part) (emphasizing this precondition of the exception). Although CPSC is a multimember agency, its Commissioners exercise “substantial executive power.” *Consumers’ Rsch.*, 592 F. Supp. 3d at 583-84. Thus, the question here is not whether to limit *Humphrey’s Executor* in any way, but instead whether a removal restriction should be allowed in a “new situation” that *Humphrey’s Executor* did not consider. *Seila Law*, 140 S. Ct. at 2201.<sup>3</sup>

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<sup>3</sup> Even if the Court were inclined to extend *Humphrey’s Executor*, there is no “historical precedent” to support doing so here. *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)). 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

The Commission has argued that the 1935 FTC (the agency at issue in *Humphrey's Executor*) “also had ... ‘substantial executive power.’” *Consumers' Rsch.* CPSC Br. at 33. But as noted above, 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 Law*, 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

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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). That independence was “well established in the first twenty years” of the Federal Reserve’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. Meltzer, *A History of the Federal Reserve, Volume 2, Book 2, 1970-1986, supra*, at 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”).

part of the executive power,” *id.* at 2198 (quoting *Humphrey’s*, 295 U.S. at 628).

In any event, the government itself has recognized that the 1935 FTC considered in *Humphrey’s Executor* was meaningfully different from agencies such as CPSC that have the core executive power of enforcing the law by filing lawsuits seeking penalties in court. As the Solicitor General told the Supreme Court just a few years ago in *Seila Law*, “the FTC in 1935” lacked “the ability to bring enforcement suits in federal court seeking retrospective relief”—a power that “cannot possibly be regarded’ as anything other than an exercise of the executive power and duty vested solely in the President.” U.S. Br. 32, *Seila Law*, 140 S. Ct. 2183 (No. 19-7), 2019 WL 6727094. The Supreme Court agreed, emphasizing that “the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court” is “a quintessentially executive power not considered in *Humphrey’s Executor*.” 140 S. Ct. at 2200.

The Commission’s reliance on other Supreme Court opinions in support of its contention that the *Humphrey’s Executor* exception encompasses all multi-member expert agencies is misplaced. *Free*

*Enterprise Fund v. Public Co. Accounting Oversight Board* noted that the exception applies to “independent agencies run by principal officers” in “certain circumstances.” 561 U.S. 477, 483 (2010); *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 *Humphrey’s Executor* applies only to “expert agencies that do not wield substantial executive power.” 140 S. Ct. at 2199-200. The Court then struck down removal protection for the CFPB Director, who did wield considerable “executive power.” *Id.* at 2200.

The Commission likewise cites 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.” *Consumers’ Rsch.* CPSC Br. at 28 (quoting *Seila Law*, 140 S. Ct. at 2211). But the Court did not hold that a multimember CFPB wielding substantial executive power would

automatically pass muster. The Court was simply noting that Congress, unlike courts, can “rewrite” statutes to correct constitutional defects.

The Commission cannot explain why an unaccountable executive agency would be any worse if it had multiple heads instead of a single head. The fundamental problem is the lack of control and accountability to a President “elected by the people.” *Seila Law*, 140 S. Ct. at 2203. No matter how many unremovable heads there are, the President is hobbled in his ability to exercise “meaningful supervision” of the agency. *Id.* Just as a President could be “saddled with a holdover [CFPB] Director from a competing political party,” *id.* at 2204, so too he could be saddled with a hostile CPSC due to the Commissioners’ staggered terms. Either way, the Chief Executive would be reduced to the role of “cajoler-in-chief,” *Free Enter. Fund*, 561 U.S. at 502.

The restriction on removal of Commissioners impermissibly dilutes the President’s control over officials who indisputably exercise 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.” *Id.* at 498. For that reason, the removal restrictions violate the Constitution.

## CONCLUSION

For these reasons, the final rule should be vacated.

Dated: February 7, 2023

Respectfully submitted,

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/s/ Brett A. Shumate  
Brett A. Shumate

**CERTIFICATE OF SERVICE**

The undersigned certifies that, on this 7th day of February 2023, a true and correct copy of the foregoing was served via the Electronic Case Filing (ECF), which will send notice of such filing to all registered users of the CM/ECF system.

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Brett A. Shumate