No. 23-1323

In the Supreme Court of the United States

CONSUMERS' RESEARCH ET AL.,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Regulations:

Page(s)

Statutes and Regualtions – continued:

Other Authorities:

INTEREST OF THE *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.

The Chamber has a strong interest in the question presented, which brings before the Court a fundamental issue about the accountability of federal agencies. 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 an 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 initiating judicial actions is vested in officials whose appointment and tenure accord with the requirements of the Constitution.

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[1] Pursuant to Rule 37.2(a) of the Rules of this Court, *amicus curiae* timely provided notice of intent to file this brief to all parties. No counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curia*e, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution protects the President's ability to supervise executive officers who wield Article II authority by endowing the President with plenary power to direct those officials' 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.

This 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 divided court below erred in holding that *Humphrey's Executor* provides blanket protection for restrictions on the removal of members of multimember commissions that head federal agencies—even when those agencies exercise substantial executive power. That decision is wrong: the lower court should have utilized the "substantial executive power" standard—as laid out in *Humphrey's Executor* and subsequent decisions, in particular, *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020)—to determine whether the CPSC qualifies for exemption from the President's removal power.

The en banc court of appeals divided sharply on whether to rehear the case. Nine judges were content to let stand the panel's holding that *Humphrey's Executor* "protects any 'traditional independent agency headed by a multimember board.'" Pet. App. 16a

(quoting *Seila Law*, 591 U.S. at 207). Eight judges viewed *Humphrey's Executor* as "nowhere near [so] broad" as to circumscribe the President's "unrestrictable power to remove principal officers [who] wield substantial executive power." Pet. App. 51a, 56a (Oldham, J., dissenting from the denial of rehearing en banc).

But the authors of the majority and the dissenting panel opinions agreed that "[t]he Supreme Court has created uncertainly that only it can ultimately alleviate." Pet. App. 27a (Jones, J., concurring in part and dissenting in part); Pet. App. 38a (Willet, J., concurring in denial of rehearing en banc) ("Although I disagreed with Judge Jones when we heard this case as a panel, I agree completely with her overarching point: 'The Supreme Court has created uncertainly that only it can ultimately alleviate.'"). Indeed, the panel majority and the panel and en banc dissents each rested its conclusion on interpretations of *Seila Law*. This Court's review is urgently needed to resolve those sharply conflicting views of the Court's own decision.

On the merits, this Court's precedents permit only one conclusion: 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 this Court's 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 applying the substantial executive power stand-

ard to assess the constitutionality of removal restrictions for members of multimember commissions that head federal agencies is an extremely important question. Numerous agencies headed by such commissions exercise broad authority over the national economy. This Court's review is essential to confirm that *Humphrey's Executor* turned on the Court's conclusion that the Federal Trade Commission (FTC) did not exercise substantial executive authority—and to ensure that the President has the power to supervise the work of the officers who execute the law on his behalf.

ARGUMENT

THE COURT OF APPEALS' DECISION UPHOLDING FOR-CAUSE REMOVAL RESTRICTIONS REQUIRES 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*, 591 U.S. at 213.

The Constitution for that reason provides the President with "the power of appointing, overseeing, and controlling" the officers "who execute the laws" on his behalf. *Ibid.* (quoting 1 Annals of Cong. 481 (1789) (Joseph Gales ed. 1834) (James Madison)). "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.* at 224 (quoting 1 Annals of Cong. 499 (James Madison)).

Only through that "clear and effective 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, 498, 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*, 591 U.S. at 231-32.

The President's oversight power "generally includes the ability to remove executive officials." *Seila*, 591 U.S. at 213. 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 214 (quoting *Myers*, 272 U.S. at 117); see *Myers*, 272 U.S. at 122 (describing the "exclusive power of removal" as a "necessity" of "the executive power"). "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enter.*, 561 U.S. at 514.

Plenary power to remove executive officers accordingly is "the rule, not the exception." *Seila*, 591 U.S. at 228; see *id.* at 214-15. Indeed, this Court has recognized only "two exceptions to the President's unrestricted removal power." *Id.* at 215. 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 218.

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." *Ibid.* The second exception was first "recogniz[ed]" in *Humphrey's Executor*. *Id.* at 217.

Those two exceptions demarcate the "outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Id.* at 218 (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)); see *id.* at 238 (declining to "extend" those exceptions "to a new situation"); *Free Enter.*, 561 U.S. at 483 (same).

Because the CPSC does not dispute 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. See Pet. App. 44a-45a (en banc dissent).

B. The Court Of Appeals Erred In Extending *Humphrey's Executor* To The CPSC.

The panel majority's holding—that the restrictions on removal of CPSC commissioners must be upheld unless this Court overrules *Humphrey's Executor*, Pet. App. 16a & 24a-25a—rests on a fundamental misunderstanding of the scope of that precedent. As both the panel dissent and the eight-judge dissent from denial of en banc rehearing explained, *Humphrey's Executor* does not bar a lower court from determining whether that decision's rationale—as explicated by this Court in *Seila Law*—invalidates removal restrictions applicable to officers at other agencies. Pet. App. 29a (panel dissent) & 50a-51a (en banc dissent).

The majority focused on the wrong question by asking whether *Humphrey's Executor* "remain[s] binding precedent" or has "been overruled" by a subsequent decision of this Court. Pet. App. 4a & 24a. There is no doubt that the decision, which addressed the 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 assess restrictions on removal of officials of other agencies. Of course, in performing that analysis, the lower court must take account of this Court's more recent explanation of its *Humphrey's Executor* 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.'" 591 U.S. at 215 (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). The Court determined, rather, that 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 an "agency of the judiciary," it made recommendations to courts. *Ibid.* Any action the FTC undertook under the "direct[ion]" of the President was "collateral to" those "main" functions. *Id.* at 628.

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.'" 591 U.S. at 215 (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." 591 U.S. at 216; see *id.* at 248 (Thomas, J., concurring in part and dissenting in part) ("[T]oday, the Court rightfully limits *Humphrey's Executor* to 'multi-member expert agencies that do not wield substantial executive power.'").

The panel majority below erred by interpreting *Seila Law* to hold that "the [*Humphrey's Executor*] exception still protects any 'traditional independent agency headed by a multimember board.'" Pet. App. 16a. It cited (Pet. App. 16a n.53) an unexplained phrase in the three-Justice concurrence addressing the severability issue and cherry-picked statements from 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 court of appeals should have recognized that it was obligated 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*, 591 U.S. at 218.

C. The CPSC Commissioner Removal Restriction Violates The Constitution.

Congress tightly restricted the President's authority to remove CPSC commissioners, providing that they may be removed for "neglect of duty or malfeasance in office but for no other cause." 15 U.S.C. § 2053(a). That limitation violates Article II.

Even the panel majority recognized that CPSC commissioners "exercise[] substantial executive power." Pet. App. 20a; see also Pet. App. 28a-29a (panel dissent). Indeed, the CPSC served as the "model[]" for the CFPB, whose exercise of "quintessentially executive power" led this Court to hold that *Humphrey's Executor* was inapplicable to its director. *Seila*, 591 U.S. at 205, 219. The *Humphrey's Executor* exception therefore does "not encompass[]" CPSC commissioners. Pet. App. 48a.

The majority emphasized that the CPSC is a "traditional independent agency headed by a multimember board." Pet. App. 16a. 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*, 591 U.S. at 218. For that reason, as the dissents 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*." Pet. App. 27a (panel dissent); see Pet. App. 50a (en banc dissent) ("[I]t is entirely beside the point that *Humphrey's Executor* is still on the books.").

The panel resisted that conclusion based on its view that the CPSC is "structurally identical" to the FTC. Pet. App. 24a n.86; see also Pet. App. 22a (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." 591 U.S. at 219 n.4; see *id.* at 216 n.2. "[W]hat matters is the set of powers the Court considered as the basis for its decision," *id.* at 219 n.4, and those powers were said to include "no part of the executive power," *id.* at 215 (quoting *Humphrey's*, 295 U.S. at 628).

Here, the majority below—and the CPSC—agree that the agency exercises executive power. It "has the authority to bring the coercive power of the state to bear on millions of * * * businesses." *Seila Law*, 591 U.S. at 219; see pp. 13-14, *infra*.

The panel also relied on two "separate factors" to uphold the CPSC commissioners' for-cause removal protections. Pet. App. 23a; see also Pet. App. 20a-22a. Each is irrelevant.

First, the panel stated that multimember commissions like the CPSC do not "lack[] historical precedent." Pet. App. 20a; see also Pet. App. 37a (en banc denial concurrence). 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. 591 U.S. at 220. 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. Pet. App. 29a (panel

dissent) & 44a (en banc dissent); see also Pet. App. 19a (panel opinion).[2]

Second, the panel erred in relying on its conclusion (Pet. App. 22a) 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, 591 U.S. at 238, 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. If an agency exercises substantial executive power, the President's removal authority must be plenary.

The panel majority's contrary holding 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." *Free Enter.*, 561 U.S. at 498. The court of appeals' erroneous expansion of

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[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*, 591 U.S. at 222 n.8; see Allan H. Meltzer, *A History of the Federal Reserve, Volume 1: 1913-1951* 737 (2003) (discussing the Federal Reserve Board's "well established" independence); see also Pet. App. 54a-55a (en banc dissent) (distinguishing the Federal Reserve Board on the ground that its principal responsibility is "administration of the money supply," which "is not an executive function").

the *Humphrey's Executor* exception therefore demands correction by this Court.

D. The Question Presented Is Extremely Important.

The panel disagreed on the meaning of *Humphrey's Executor*—and the en banc court was closely divided 9-8 on whether to reconsider the majority's holding that *Humphrey's Executor* allows Congress to "restrict the President's power to remove the members of any traditional independent agency headed by a multimember board." Pet. App. 50a (en banc dissent).

But the authors of the majority and dissenting opinions agreed on the urgent need for this Court to address the issue. Pet. App. 27a (panel dissent) ("The Supreme Court has created uncertainty that only it can ultimately alleviate."); Pet. App. 38a (en banc denial concurrence) ("agree[ing] completely" that "[t]he Supreme Court * * * can * * * alleviate" the "uncertainty").

That is particularly true because the conflicting decisions below rest entirely on conflicting interpretations of this Court's holding in *Seila Law*. The panel majority "view[ed] *Seila Law*'s holding as reaching only 'single-Director' agencies—not agencies that are identical to the FTC in every respect other than their name." Pet. App. 22a. The panel and en banc dissents concluded that *Seila Law* limited the *Humphrey's Executor* exception to "'permit[] Congress to give for-cause removal protections 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.'" Pet. App. 28a (quoting *Seila Law*, 591 U.S. at 216); see also Pet. App. 48a (en banc dissent) (stating that *Seila Law* "explain[s] that

the *Humphrey's Executor* exception applies only 'to multimember expert agencies that do not wield substantial executive power'" (quoting *Seila Law*, 591 U.S. at 218)).

Thus, "all agree that we're bound by *Humphrey's Executor*, *Myers*, *Seila Law*, &c. The dispute is how those binding authorities apply to this case." Pet. App. 56a (en banc dissent). As Judge Willet put it, "while an en banc petition cannot" resolve the conflicting interpretations of this Court's precedents, "a certiorari petition can. And this cert petition writes itself." Pet. App. 38a-39a.

Whether *Humphrey's Executor* bars lower courts from assessing the permissibility under Article II of restrictions on the President's removal of officials of every agency headed by a multimember commission is an extremely important question. And it is likely to arise in every case challenging those agencies' actions—whether issuance of a rule, or an adjudicatory decision, or some other agency action. *See, e.g.*, *Window Covering Mfrs. Ass'n v. CPSC*, 82 F.4th 1273, 1293 (D.C. Cir. 2023) (declining to reach this question when vacating a CPSC rule based on "other flaws"). Only this Court can conclusively resolve the question—and it should do so now to pretermit unnecessary litigation in the lower courts.

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 prod-

ucts 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.

The CPSC operates these "potent tools," Pet. App. 46a, without accountability to the President brought about by the "fear" of removal. *Seila*, 591 U.S. at 213-14 (quoting *Bowsher v. Synar*, 478 U.S. 714, 726 (1986)).

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. At each of these agencies, the "buck * * * stop[s] somewhere" besides the President, who is not "held fully accountable for discharging" his duties. *Free Enter.*, 561 U.S. at 514.

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"—unless this Court overrules *Humphrey's Executor*. As the dis-

sent emphasized, that approach erroneously "*expands*" the *Humphrey's Executor* exception into an ossified and broadly applicable rule. Pet. App. 29a.

If permitted to stand, the panel majority's 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.

This Court should grant certiorari to correct the court of appeals' unwarranted expansion of *Humphrey's Executor* and hold that lower courts remain free to determine that removal restrictions applicable to the heads of other federal agencies violate the Constitution when those officials exercise substantial executive power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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