No. 23-1323

In the Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL., PETITIONERS

v.

CONSUMER PRODUCT SAFETY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioners' submission of Freedom of Information Act requests to the Consumer Product Safety Commission gives them Article III standing to challenge the statute specifying that the President may remove members of the Commission only for cause.

2. Whether the Commission's for-cause removal protection violates the Constitution.

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OPINIONS BELOW

The petition for a writ of certiorari seeks review of two court of appeals decisions entered in the same case. The case was initially appealed as No. 22-40328. In that appeal, the opinion of the court of appeals (Pet. App. 1a-30a) is reported at 91 F.4th 342. The order denying rehearing en banc (Pet. App. 31a-56a) is reported at 98 F.4th 646. The order of the district court (Pet. App. 58a-97a) is reported at 592 F. Supp. 3d 568.

After that initial appeal, the case was remanded and subsequently appealed as No. 24-40317. In that appeal, the order of the court of appeals (Pet. App. 57a) is unreported but is available at 2024 WL 3064726. The judgment of the district court (Pet. App. 100a) is also unreported.

JURISDICTION

The judgment of the court of appeals in No. 22-40328 was entered on January 17, 2024. A petition for rehearing en banc was denied on April 16, 2024 (Pet. App. 31a-32a). The judgment of the court of appeals in No. 24-40317 was entered on May 21, 2024. The petition for a writ of certiorari was filed on June 14, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case is about the submission of requests under the Freedom of Information Act (FOIA), 5 U.S.C. 552, to the Consumer Product Safety Commission (Commission). Petitioners are advocacy organizations that are not subject to the Commission's regulatory, enforcement, or adjudicatory authority, but that sometimes invoke FOIA to ask the Commission for documents. The district court held that those requests give petitioners Article III standing to challenge the for-cause removal protection afforded to Commission members by statute. Relying on that holding, the court entered a partial final judgment declaring that the removal restriction violates the constitutional separation of powers. Pet. App. 58a-97a, 98a. The Fifth Circuit reversed and remanded. *Id.* at 1a-30a. The district court then entered judgment for the Commission. *Id.* at 100a. The Fifth Circuit summarily affirmed. *Id.* at 57a.

1. Congress created the Commission in 1972 to address findings that 20 million Americans "were injured each year in the home as a result of accidents connected with consumer products," and "that industry self-regulation, the common law, existing federal programs, and state and local agencies were inadequate to protect the public from this excessive hazard." Antonin Scalia

& Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. Rev. 899, 900-901 (1973); see 15 U.S.C. 2051 (findings).

The Commission collects and publishes data on how consumer products can cause harm and how to prevent that harm. 15 U.S.C. 2054, 2055a, and 2056. The Commission has authority to "promulgate consumer product safety standards" to "prevent or reduce an unreasonable risk of injury." 15 U.S.C. 2056(a). Like many other regulatory agencies, the Commission can also seek civil penalties for violations of the laws it administers, 15 U.S.C. 2069, and file injunctive actions in district court, 15 U.S.C. 2071. The agency is headed by five Commissioners who are appointed by the President to seven-year terms based on "their background and expertise in areas related to consumer products and protection of the public from risks to safety." 15 U.S.C. 2053(a); see 15 U.S.C. 2053(b). During their terms, the Commissioners may be removed by the President only "for neglect of duty or malfeasance in office." 15 U.S.C. 2053(a).

Like all federal agencies, the Commission is subject to FOIA. 5 U.S.C. 552(a); see 5 U.S.C. 551(1). Among other things, FOIA allows "any person" to file a request seeking agency records. 5 U.S.C. 552(a)(3)(A). FOIA requests submitted to the Commission are initially reviewed by FOIA specialists, who conduct searches for records and make determinations on the withholding of records under FOIA's exemptions. 16 C.F.R. 1015.4-1015.6. The Commission's General Counsel reviews appeals from those determinations. 16 C.F.R. 1015.7. After exhausting those administrative remedies, requesters may challenge the denial of record requests in district court. 5 U.S.C. 552(a)(4)(B), (6)(A), and (C)(i).

In 1987, the Commission established procedures to govern the agency staff's responses to FOIA requests, including the "fees applicable to the processing of requests" and "when such fees should be waived or reduced." 5 U.S.C. 552(a)(4)(A)(i) (requiring agencies to establish such procedures and fees); see 52 Fed. Reg. 28,977 (Aug. 5, 1987). The Commission adopted a fee schedule that set a 10¢ per-page duplication fee for paper documents, 52 Fed. Reg. at 28,979, and also adopted regulations governing the factors for the staff to use to make determinations on requests for fee waivers, see *id.* at 28,979-28,980; 16 C.F.R. 1015.9(g).

In 2020, the Commission proposed an update to its FOIA fee regulation to ensure compliance with the FOIA Improvement Act of 2016, Pub. L. No. 114-185, 130 Stat. 538, and the Office of Management and Budget's *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 Fed. Reg. 10,012 (Mar. 27, 1987). See 85 Fed. Reg. 21,118, 21,118 (Apr. 16, 2020). Agencies' FOIA fees must "conform to the guidelines" set by the Office of Management and Budget, "which shall provide for a uniform schedule of fees for all agencies." 5 U.S.C. 552(a)(4)(A)(i). As relevant here, the Commission proposed increasing the per-page duplication fee for paper copies from 10¢ to 15¢ and eliminating existing duplication fees for electronic copies. 85 Fed. Reg. at 21,119. The Commission did not propose any amendment to the factors it uses to make determinations on fee waiver requests. See *id.* at 21,120. The Commission received only two comments on the proposed rule, neither of which objected to the proposed fee or discussed the agency's fee-waiver considerations. Petitioners did not comment on the proposed rule.

The Commission published a final rule adopting the proposed changes. 86 Fed. Reg. 7499, 7500 (Jan. 29, 2021) (FOIA Fee Rule). The final rule was authorized by a unanimous vote of the Commissioners and took effect on March 1, 2021. See Commission, *Record of Commission Action* (Dec. 15, 2020), https://perma.cc/A3XZ-23CQ; 86 Fed. Reg. at 7499.

2. Petitioners Consumers' Research and By Two, L.P. allege that they are "educational organizations." Pet. App. 59a. They do not make, sell, or distribute consumer products and are neither regulated by the Commission nor subject to any potential Commission enforcement action.

Petitioners submitted FOIA requests to the Commission related to certain brands of drop-side cribs and, separately, voluntary safety standards established by the American Society for Testing and Materials. C.A. ROA 23-27. Petitioners also asked the Commission to waive fees for their requests. *Ibid.* As to the safety standards, the Commission's staff initially responded that they could not produce the requested documents because the documents contained copyrighted material. *Id.* at 24, 27. As to the drop-side cribs, the Commission's staff explained that they needed more time to process the request. *Id.* at 434, 437. The staff initially denied petitioners' requests for fee waivers, *id.* at 24-26, but ultimately did not assess petitioners any fees, *id.* at 123-124, 434-438. Petitioners filed an administrative appeal, and the Commission's acting General Counsel directed a further search for responsive records. *Id.* at 28-30, 425-432, 616-617.

After completing that search, Commission staff informed petitioners that they had "located responsive records" and obtained permission from "the copyright

holder of these records" to provide petitioners with physical copies. C.A. ROA 587. The staff also provided petitioners with all responsive, non-exempt records relating to their drop-side crib requests, *id.* at 655-657, and explained that the staff was unable to find any responsive records for the remaining requests, *id.* at 584. Again, the Commission staff did not charge petitioners any fees. *Id.* at 434-438, 580-588.

3. While the Commission staff was conducting the additional search directed by the acting General Counsel, petitioners filed this suit in the United States District Court for the Eastern District of Texas. C.A. ROA 11. Petitioners sought (1) a declaratory judgment that the statutory restriction on the removal of the Commissioners violates Article II of the Constitution, *id.* at 35-37, 41; (2) an "order setting aside" the FOIA Fee Rule, solely on the theory that the Commissioners' removal restrictions are unconstitutional, *id.* at 38-39, 41; and (3) an "order compelling the Commission to process" their FOIA requests and applications for fee waivers, also solely on the theory that the Commissioners' removal restrictions are unconstitutional, *id.* at 39-41.

Invoking Federal Rule of Civil Procedure 54(b), the district court entered partial final judgment for petitioners on the first count of the complaint. Pet. App. 58a-97a. The court concluded that petitioners had standing because of the higher per-page fees established in the FOIA Fee Rule; the Commission staff's initial withholding of some documents requested by petitioners on copyright grounds; and the staff's initial denial of petitioners' request for a fee waiver. See *id.* at 66a-71a. Turning to the merits, the court recognized that this Court had upheld a restriction on the President's power to remove a member of the Federal Trade

Commission in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Pet. App. 76a. The court declared, however, that "*Humphrey's Executor* does not apply" to the Consumer Product Safety Commission because it "exercises substantial executive power." *Ibid.* The court entered a partial final judgment declaring that the Commissioners' removal restrictions are unconstitutional; it did not address petitioners' other requests for relief. *Id.* at 96a-97a.

4. A divided panel of the Fifth Circuit reversed. Pet. App. 1a-30a.

a. The Fifth Circuit agreed with the district court that petitioners have Article III standing to seek declaratory relief. Pet. App. 10a-16a. The court stated that petitioners "assert[] the right to be free 'from the threat of being subject to a regulatory scheme and governmental action lacking Article II oversight,'" and also have "a concrete interest in the information and fee waivers that [they] requested (and plan[] to request again) from the Commission." *Id.* at 11a (citation omitted). The court acknowledged that "it is not obvious that those informational and monetary injuries are traceable to the Commission's structure or that a declaration about the Commission's structure would redress them." *Id.* at 14a. But the court nonetheless held that petitioners had standing, invoking the principle that a person has standing to challenge a restriction on the President's authority to remove an official if "the challenger 'sustains injury' from an executive act that allegedly exceeds the official's authority." *Ibid.* (quoting *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. 197, 211 (2020)).

b. On the merits, the Fifth Circuit rejected the district court's attempt to distinguish this Court's decision

in *Humphrey's Executor*. Pet. App. 16a-26a. The court acknowledged that *Humphrey's Executor* reflects an exception to the general rule of at-will presidential removal for principal officers and that this Court has declined to extend that exception to novel agency structures. *Id.* at 17a-18a. But the Fifth Circuit explained that this Court has never questioned the continued application of *Humphrey's Executor* to "traditional independent agenc[ies] headed by a multimember board." *Id.* at 16a (quoting *Seila Law*, 591 U.S. at 207). And the court emphasized that the Commission falls squarely within that category; indeed, it is a "mirror image of the Federal Trade Commission," the agency at issue in *Humphrey's Executor* itself. *Id.* at 4a; see *id.* at 36a.

The Fifth Circuit also rejected petitioners' assertion that this Court's decision in *Seila Law* had rendered *Humphrey's Executor* inapplicable to any agency that "exercises substantial executive power (which nearly all agencies do)." Pet. App. 3a. In *Seila Law*, the Court confronted "a historically unprecedented situation"—an independent regulatory agency headed by a single director rather than a multimember commission. *Id.* at 20a. The Commission, in contrast, "is a prototypical 'traditional independent agency, run by a multimember board.'" *Id.* at 21a (quoting *Seila Law*, 591 U.S. at 205-206). Unlike the novel single-director structure the Court deemed invalid in *Seila Law*, therefore, "the Commission's structure is not a 'historical anomaly'" or "a recent 'innovation.'" *Id.* at 17a (quoting *Seila Law*, 591 U.S. at 222). To the contrary, the Fifth Circuit noted that accepting petitioners' arguments would mean that "dozens of other agencies"—some of which date back more than a century—"would all be unconstitutionally structured." *Ibid.*

c. Judge Jones dissented from the merits holding and would have held that Congress cannot restrict the President's authority to remove the heads of any multi-member agency that "exercise[s] any executive power." Pet. App. 28a.

5. The Fifth Circuit denied a petition for rehearing en banc. Pet. App. 31a-56a. Judge Willett filed an opinion concurring in the denial of rehearing. *Id.* at 34a-39a. Judge Oldham filed a dissent joined by seven other judges. *Id.* at 41a-56a. Judge Ho joined Judge Oldham's dissent and wrote separately to argue that restrictions on the removal of inferior officers and civil-servant employees violate Article II. *Id.* at 40a-41a.

6. On remand, the district court entered final judgment for the Commission on all counts. Pet. App. 100a. Petitioners appealed and requested summary affirmance, which the Fifth Circuit granted. *Id.* at 57a.

ARGUMENT

Petitioners ask this Court to grant certiorari and hold that Congress violated the Constitution by conferring for-cause removal protection on the members of the Consumer Product Safety Commission—and every other independent agency that exercises "substantial executive power" (Pet. 13). The Court should deny the petition for three reasons.

First, petitioners lack Article III standing. They are not regulated by the Commission and thus face no potential exercise of "substantial executive power" that, on petitioners' theory, can be exercised only by officers subject to at-will removal. To the contrary, petitioners have conceded the constitutionality of removal protection for officers who oversee the same sorts of FOIA determinations at issue here. And allowing petitioners to pursue their challenge would allow anyone to challenge

any removal restriction—or, for that matter, any other asserted separation-of-powers problem—simply by declaring an intention to file FOIA requests. That would make a mockery of Article III.

Second, the Fifth Circuit's decision does not conflict with any decision of this Court or another court of appeals. The Fifth Circuit correctly held that the Commissioners' removal restriction is constitutional under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Limits on the removal of the heads of multimember regulatory agencies have been a feature of our system of government for as long as such agencies have existed. And in the 90 years since *Humphrey's Executor*, Congress has repeatedly relied on the Court's decision by creating the Commission and many other agencies modeled on the structure this Court upheld. Petitioners offer no sound reason to upset that understanding at this late date.

Third, this case would not be an appropriate vehicle for revisiting *Humphrey's Executor* in any event. Petitioners conspicuously decline to ask the Court to overrule *Humphrey's Executor* and do not mention stare decisis. And even if petitioners had Article III standing, this highly artificial suit would at minimum be an exceptionally poor vehicle for deciding a constitutional question of this magnitude.

1. "Article III of the Constitution confines the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Food & Drug Administration* v. *Alliance for Hippocratic Medicine*, 602 U.S. 367, 378 (2024). Federal courts thus may not "opine on legal issues in response to citizens who might 'roam the country in search of governmental wrongdoing.'" *Id.* at 379 (citation omitted). "For a plaintiff to get in the federal courthouse door,"

Article III insists that the plaintiff "cannot be a mere bystander, but instead must have a 'personal stake' in the dispute." *Ibid.* (citation omitted). Specifically, the plaintiff must establish "an injury that is 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Murthy* v. *Missouri*, 144 S. Ct. 1972, 1986 (2024) (citation omitted). This Court has "also stressed that the alleged injury must be legally and judicially cognizable." *United States* v. *Texas*, 599 U.S. 670, 676 (2023) (citation omitted). Petitioners cannot satisfy those bedrock requirements of Article III.

a. This Court's recent decisions addressing removal restrictions have all involved officers who exercised substantial executive power over the challengers themselves. In *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the members of the Public Company Accounting Oversight Board (PCAOB) could "regulate every detail" of the plaintiff accounting firm's practice and had opened a formal investigation into the firm. *Id.* at 485. In *Seila Law LLC* v. *Consumer Financial Protection Bureau*, 591 U.S. 197 (2020), the Director of the Consumer Financial Protection Bureau had directed the plaintiff "to produce information and documents related to its business." *Id.* at 208. In *Collins* v. *Yellen*, 594 U.S. 220 (2021), the Federal Housing Finance Agency had "transferred the value of [the plaintiffs'] property rights in Fannie Mae and Freddie Mac" to the Treasury. *Id.* at 243. And in *Axon Enterprise, Inc.* v. *Federal Trade Commission*, 598 U.S. 175 (2023), each challenger was a "respondent in an administrative enforcement action" before one of the administrative law judges whose statutory removal protection was at issue. *Id.* at 180.

The challengers in those cases had standing because they "'sustain[ed] injury' from an executive act that allegedly exceed[ed] the official's authority"—*i.e.*, an executive act that the challengers claimed could not constitutionally be taken by an officer insulated from "the President's removal power." *Seila Law*, 591 U.S. at 211 (citation omitted); see, *e.g.*, *Collins*, 594 U.S. at 242-243. In other words, this Court held that being subject to regulatory or enforcement action by officers covered by an allegedly improper removal restriction inflicted a "'here-and-now' injury" cognizable under Article III. *Seila Law*, 591 U.S. at 212 (citation omitted); see *Free Enterprise*, 561 U.S. at 513.

This case is entirely different. Petitioners are not subject to *any* regulatory or enforcement action—let alone an exercise of "substantial executive power," *Seila Law*, 591 U.S. at 218—by the officers whose removal protections they seek to challenge. Petitioners emphasize the Commission's power to "'promulgate consumer product safety standards,'" "file enforcement suits that seek civil penalties," and "sue in federal court for injunctive relief to 'restrain any violation' of its rules." Pet. 7 (quoting 15 U.S.C. 2056(a), 2071(a)(1)) (brackets omitted). But none of those powers has anything to do with petitioners: Petitioners do not manufacture products subject to the Commission's jurisdiction, and thus need neither comply with the Commission's product-safety regulations nor fear its enforcement actions.

Accordingly, although petitioners maintain (*e.g.*, Pet. 17) that adopting product-safety regulations or bringing enforcement actions "exceeds the [Commissioners'] authority" while the Commissioners are protected from at-will removal, petitioners themselves do not "'sustain[] injury' from [those] executive act[s]." *Seila Law*,

591 U.S. at 211 (citation omitted). Petitioners therefore lack any "'personal stake' in the dispute" about whether the Commissioners may engage in those regulatory and enforcement activities while insulated from at-will removal. *Alliance for Hippocratic Medicine*, 602 U.S. at 379 (citation omitted).

b. Instead, petitioners' only interactions with the Commission involve FOIA requests. But petitioners do not even attempt to argue that the relevant actions—setting FOIA fees, considering requests for fee waivers, and producing responsive documents—are the sort of "executive act[s]" that implicate their constitutional claim. *Seila Law*, 591 U.S. at 211. Petitioners' discussion of the Commission's "broad powers" (Pet. 7) does not even mention FOIA. And although petitioners recite the phrase "substantial executive power" more than 30 times in the petition's 35 pages (Pet. 3-5, 11-19, 23-24, 26-27, 30, 32-33), they never suggest that adopting a 5¢-per-page fee increase for photocopies, considering requests for waivers of that fee, or responding to FOIA requests are instances of "substantial executive power" that can only be entrusted to officers removable at will by the President.

Indeed, petitioners have effectively conceded the opposite. Petitioners acknowledged below that even on their view, members of the United States Commission on Civil Rights need not be removable at will by the President because they do not exercise substantial executive power. See Pet. App. 21a; C.A. Oral Arg. at 27:13-27:56, https://www.ca5.uscourts.gov/OralArgRecordings/22/22-40328_3-6-2023.mp3. Yet the Commission on Civil Rights has established FOIA policies—including per-page reproduction fees and the opportunity to seek waivers of those fees—that are substantially similar to

the ones at issue here. See 67 Fed. Reg. 70,482, 70,493 (Nov. 22, 2002). Similarly, petitioners state in this Court that the Governors of the Federal Reserve System need not be subject to at-will removal by the President because the Federal Reserve "does not exercise any 'executive function.'" Pet. 32 (citation omitted); see Pet. 21. But the Federal Reserve, too, has established FOIA policies substantially similar to those implicated in this case. See 86 Fed. Reg. 18,423, 18,429-18,431 (Apr. 9, 2021). If setting FOIA fees, authorizing fee waivers, and responding to FOIA requests do not qualify as exercises of substantial executive power when undertaken by the Commission on Civil Rights or the Federal Reserve, then those acts do not qualify as exercises of substantial executive power when undertaken by the Consumer Product Safety Commission either.

c. Because "standing is not dispensed in gross," this Court has emphasized that "plaintiffs must demonstrate standing for each claim that they press" and "for each form of relief that they seek." *Murthy*, 144 S. Ct. at 1988 (citation omitted). Focusing on petitioners' specific claims and requested relief provides still more reason to conclude that they lack Article III standing.

In this Court, petitioners focus on their "primary claim" seeking the relief initially granted by the district court: A forward-looking declaratory judgment of the sort this Court directed in *Free Enterprise*. Pet. 31. There, "declaratory relief" reflecting the Court's holding that the challenged removal restriction was invalid "ensure[d] that the reporting requirements and auditing standards to which [the challengers] are subject will be enforced only by a constitutional agency accountable to the Executive." *Free Enterprise*, 561 U.S. at 513. In

other words, forward-looking declaratory relief redressed the challengers' "'here-and-now' injury" from being subject to ongoing regulation and enforcement by officers improperly insulated from removal. *Ibid.* (citation omitted).

Petitioners' plans to submit FOIA requests and seek associated fee waivers do not create any such injury. If those requests are granted (as their past requests have been, see pp. 5-7, *supra*), then petitioners will not suffer any injury whatsoever. Even if some of those requests are denied in whole or in part, those decisions will be made not by the Commissioners—the officers subject to the assertedly invalid removal restriction—but rather by Commission staff. 16 C.F.R. 1015.4-1015.7, 1015.9. And as discussed above, petitioners have not attempted to demonstrate that the resolution of such FOIA requests involve exercises of "substantial executive power" that can only be undertaken by officers removable at will by the President. See pp. 13-14, *supra*.

In the lower courts, petitioners also sought vacatur of the Commission's FOIA Fee Rule and relief with respect to their past FOIA requests. But petitioners have not been charged fees under the rule here, nor have they shown that they are likely to be charged such fees in the future. And the specific FOIA requests at issue here have now been granted, mooting any claim for relief as to those requests. See pp. 5-6, *supra*.[1]

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[1] Even if petitioners could establish standing, their claims challenging the FOIA Fee Rule and the resolution of their past FOIA requests would face another fatal obstacle: A plaintiff invoking an allegedly improper removal restriction to seek relief from a past agency action must show that the "unconstitutional removal provision inflicted harm"—that is, that the President's inability to remove the relevant officers caused the agency to do something to the

In short, petitioners' mere submission of FOIA requests to the Commission does not give them Article III standing to challenge the Commissioners' removal protection. Otherwise, *any* individual or entity could manufacture standing to litigate *any* separation-of-powers issue against *any* agency simply by asserting an intent to make FOIA requests—an option available "to any person." 5 U.S.C. 552(a)(3)(A). "This Court has 'never accepted such a boundless theory of standing.'" *Murthy*, 144 S. Ct. at 1996 (citation omitted).

d. The Fifth Circuit recognized that petitioners were required to show that they had "'sustain[ed] injury' from an executive act that allegedly exceeds the official's authority." Pet. App. 14a (quoting *Seila Law*, 591 U.S. at 211). But the Fifth Circuit neither specified the act by the Commissioners that satisfied that standard nor explained how any of the possibilities could qualify as an exercise of the sort of "substantial executive power" that petitioners contend can be performed only by officers removable at will. This Court should not take up a weighty constitutional question at the behest of "mere bystander[s]" seeking to vindicate an "ideological[] or policy objection" rather than to protect their own concrete interests. *Alliance for Hippocratic Medicine*, 602 U.S. at 379, 381.

2. Even if petitioners had standing, they have offered no sound reason for this Court to grant certiorari in order to revisit the established understanding that

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plaintiff that it would not otherwise have done. *Collins*, 594 U.S. at 260; see *id.* at 275 (Kagan, J., concurring in part and concurring in the judgment). Petitioners have no plausible claim that the Commissioners' protection from at-will removal affected their decision to issue the FOIA Fee Rule or the Commission staff's actions on petitioners' routine FOIA requests.

Humphrey's Executor allows Congress to confer removal protection on the heads of traditional multimember regulatory agencies like the Commission.

a. Except for impeachment, the Constitution does not expressly address the removal of executive officers. See *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839). But "[t]he President's removal power has long been confirmed by history and precedent." *Seila Law*, 591 U.S. at 214. "It was discussed extensively in Congress when the first executive departments were created in 1789," and "[t]he view that prevailed, as most consonant to the text of the Constitution and to the requisite responsibility and harmony in the Executive Department, was that the executive power included a power to oversee executive officers through removal." *Ibid.* (citation and internal quotation marks omitted). Long historical practice has cemented that "decision of 1789," *id.* at 231, as an authoritative "practical construction of the Constitution" by the political Branches, *Hennen*, 38 U.S. (13 Pet.) at 259. This Court's precedents likewise firmly establish "the President's general removal power," which generally includes the authority to remove principal officers at will. *Seila Law*, 591 U.S. at 215; see *id.* at 215-217; *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926).

b. History and precedent, however, have also established an exception to the general rule of at-will removal, applicable to multimember regulatory agencies. The first such agency was created in 1887, when Congress passed and President Cleveland signed the Interstate Commerce Act, ch. 104, 24 Stat. 379, which established the Interstate Commerce Commission. From the beginning, members of the Commission could be removed only "for inefficiency, neglect of duty, or malfea-

sance in office." § 11, 24 Stat. 383. In 1913, when Congress established the Federal Reserve Board, it provided that Board members may be "removed for cause." Federal Reserve Act, ch. 6, § 10, 38 Stat. 260-261. And in 1914, Congress created the Federal Trade Commission and specified that its members could be removed "for inefficiency, neglect of duty, or malfeasance in office." Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717-718.

In *Humphrey's Executor*, this Court unanimously upheld the removal restriction applicable to members of the Federal Trade Commission. 295 U.S. at 631-632. The Court concluded that the President's "illimitable power of removal" did not extend to the Federal Trade Commission, which the Court described as a "quasi-legislative or quasi-judicial" agency. *Id.* at 629. Instead, the Court reasoned that Congress's authority to create such an agency "includes, as an appropriate incident, power to fix the period during which [its members] shall continue in office, and to forbid their removal except for cause in the meantime." *Ibid.* And in *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court reaffirmed *Humphrey's Executor* and applied it to hold that the President could remove a member of the War Claims Commission only for cause. *Id.* at 356.

More recently, this Court has recognized that *Humphrey's Executor's* "quasi-legislative" and "quasi-judicial" terminology "has not withstood the test of time" because the Federal Trade Commission and other independent agencies exercise executive power. *Seila Law*, 591 U.S. at 216 n.2. The Court has also "declined to extend" the exception recognized in *Humphrey's Executor* to novel agency structures "with no foothold in history or tradition," such as an agency headed by a single

director or one protected by two layers of removal restrictions rather than one. *Id.* at 215, 222; see *Free Enterprise Fund*, 561 U.S. at 483-484. But the Court has not questioned the continued application of *Humphrey's Executor* to "a traditional independent agency headed by a multimember board or commission." *Seila Law*, 591 U.S. at 207.[2]

Similarly, the Executive Branch has sometimes resisted extensions of *Humphrey's Executor* that would have made novel incursions on the President's removal authority. But the United States has not asked this Court to disturb its application to traditional independent commissions. In *Free Enterprise*, the government disclaimed any request to "overrule *Humphrey's Executor*," explaining that "[i]n the seven decades since that decision, 'independent' agencies ha[d] become an accepted part of American government." U.S. Br. at 43 n.16, *Free Enterprise*, *supra* (No. 08-861). And in *Seila Law*, the government suggested that *Humphrey's Executor* should be "narrowed or overruled" if and "to the extent" it were construed to apply to single-headed agencies, but declined to join the private petitioner in urging that the decision be overruled outright. U.S. Br. at 44-45, *Seila Law*, *supra* (No. 19-7).

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[2] Several of petitioner's amici point to this Court's statement in *Trump* v. *United States*, 144 S. Ct. 2312 (2024), that "Congress lacks authority to control the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed.'" *Id.* at 2328 (quoting *Myers*, 272 U.S. at 106, 176). See, *e.g.*, Sen. Ted Cruz et al. Amicus Br. 14; Americans for Prosperity Amicus Br. 7. But the Court there recognized that the President's removal power is subject to "two exceptions," 144 S. Ct. at 2328 (quoting *Seila Law*, 591 U.S. at 215), and had no occasion to address the scope of the exception for multimember commissions.

Congress, for its part, has repeatedly relied on *Humphrey's Executor* by creating multimember agencies headed by officers protected from removal at will.[3] Congress has also afforded tenure protections to executive branch adjudicators, including the members of the Court of Appeals for the Armed Forces, 10 U.S.C. 942(c), the Court of Appeals for Veterans Claims, 38 U.S.C. 7253(f), the Court of Federal Claims, 28 U.S.C. 171(a), 176(a), and the Tax Court, 26 U.S.C. 7443(f).

That "[l]ong settled and established practice" is itself entitled to "great weight in a proper interpretation of constitutional provisions." *Chiafalo* v. *Washington*, 591 U.S. 578, 592-593 (2020) (citation omitted). "As James Madison wrote, 'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases.'" *Id.* at 593 (citation omitted). And that remains true "even when that practice began after the founding era." *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014). Here, therefore, "longstanding congressional practice" both "reflects and reinforces this Court's precedents," *Moore* v. *United States*, 144

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[3] See, *e.g.*, 42 U.S.C. 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. 1975(e) (Commission on Civil Rights); 42 U.S.C. 7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. 7104(b) (Federal Labor Relations Authority); 46 U.S.C. 46101(b)(3) (Federal Maritime Commission); 5 U.S.C. 1202(d) (Merit Systems Protection Board); 30 U.S.C. 823(b)(1) (Mine Safety and Heath Review Commission); 29 U.S.C. 153(a) (National Labor Relations Board); 45 U.S.C. 154 (National Mediation Board); 49 U.S.C. 1111(c) (National Transportation Safety Board); 42 U.S.C. 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. 661(b) (Occupational Safety and Health Review Commission); 39 U.S.C. 502(a) (Postal Regulatory Commission); 49 U.S.C. 1301(b)(3) (Surface Transportation Board); 39 U.S.C. 202(a)(1) (United States Postal Service Board of Governors).

S. Ct. 1680, 1692 (2024), upholding removal restrictions for the heads of traditional multimember regulatory agencies like the Commission.

c. Presumably in an effort to avoid the powerful *stare decisis* principles that would stand in the way of overruling a nearly century-old precedent on which Congress has repeatedly relied, petitioners insist (Pet. 27) that they are not asking this Court "to revisit *Humphrey's Executor*." Instead, they assert (*ibid.*) that *Humphrey's Executor* does not apply to any multimember agency that "exercises substantial executive power" —by which they appear to mean any power to regulate primary conduct, conduct adjudications, or bring enforcement actions. As petitioners conceded below, accepting their position would invalidate not just the removal restriction that applies to the Commission, but also those applicable to virtually every other agency with a similar structure—including the Federal Trade Commission, the agency at issue in *Humphrey's Executor* itself. Pet. App. 21a-22a.

That is not a tenable reading of this Court's precedent. For nearly a century, *Humphrey's Executor* has been understood to hold that Congress may constitutionally provide removal restrictions "for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission," and—as particularly relevant here—"the Consumer Product Safety Commission." *Morrison* v. *Olson*, 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting) (citation omitted); see *id.* at 692 n.31 (majority op.) (citing the Commission's removal restriction with approval).

This Court has repeatedly recognized that *Humphrey's Executor* stands for the proposition that Congress

can "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enterprise*, 561 U.S. at 483; see, *e.g.*, *Bowsher* v. *Synar*, 478 U.S. 714, 724-725 & n.4 (1986); *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976) (per curiam). The Court's decision in *Free Enterprise*, for example, rested on the express understanding that "the Commissioners [of the Securities and Exchange Commission] cannot themselves be removed by the President except under the *Humphrey's Executor* standard." 561 U.S. at 487. That premise was essential to the Court's holding that the PCAOB's protection from removal by the Commission was an invalid "second level of tenure protection" on top of the Commission's own removal restriction. *Id.* at 496. And even those who have criticized *Humphrey's Executor* as a matter of first principles have recognized that it "approved the creation of 'independent' agencies" like the Commission. *In re Aiken County*, 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

In arguing otherwise, petitioners principally rely on this Court's decision in *Seila Law*, emphasizing the Court's statement that *Humphrey's Executor* characterized the Federal Trade Commission as a quasi-legislative or quasi-judicial body that did not "wield substantial executive power." 591 U.S. at 218. But petitioners err in treating that statement as effectively overruling *Humphrey's Executor* or limiting it to the rare agencies that would not today be recognized as exercising substantial executive power. To the contrary, the Court emphasized, again and again, that the Consumer Financial Protection Bureau "deviate[d] from the structure of nearly every other independent administrative agency in our history" because it is not led by

"a board with multiple members." *Id.* at 203; see, *e.g.*, *id.* at 207, 220. All of that analysis would have been unnecessary if the Bureau's mere exercise of substantial executive power were sufficient to invalidate its removal restriction.

Even more to the point, seven Justices agreed in *Seila Law* that Congress could preserve removal protections for the Consumer Financial Protection Bureau by "converting [it] into a multimember agency." 591 U.S. at 237 (plurality op.); see *id.* at 298 (Kagan, J., concurring in part and dissenting in part). That makes perfect sense if the *Humphrey's Executor* exception authorizes removal restrictions for traditional multimember regulatory agencies. But it makes no sense on petitioners' view, because the Bureau undoubtedly "wields significant executive power." *Id.* at 204 (majority opinion); see *id.* at 205-207 (cataloguing the Bureau's authorities). Petitioners cannot plausibly maintain that the closing pages of the plurality opinion invited Congress to adopt a structure that the preceding pages of the same opinion had just declared unconstitutional—yet that is the central premise of the petition.

3. Even if this Court were inclined to revisit *Humphrey's Executor*, this case would be an exceptionally poor vehicle in which to do it.

First, as already discussed, see pp. 10-16, *supra*, petitioners lack standing to challenge the Commission's removal protection because they are not subject to any exercise of the Commission's regulatory, adjudicatory, or enforcement authority. This Court would have to begin with that jurisdictional defect, which should prevent the Court from even reaching the merits. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998). And at a minimum, the presence of a

threshold question about Article III jurisdiction would complicate the Court's review.

Second, even if petitioners' intention to file FOIA requests were somehow sufficient to satisfy Article III, that is at best a threadbare and attenuated personal stake in the important constitutional question petitioners ask the Court to decide. The Court recently reaffirmed that courts should resolve legal questions "not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Alliance for Hippocratic Medicine*, 602 U.S. at 379 (citation omitted). It would disserve that principle to allow petitioners to leverage a 5¢ increase in photocopying fees into a vehicle for seeking to effectively overrule a 90-year-old precedent and invalidate dozens of federal statutes.

Third, petitioners have not acknowledged the gravity of their request. They ask the Court to invalidate dozens of statutes enacted in reliance on *Humphrey's Executor* and to reject the principle that decision has long been understood to embody. But rather than asking the Court to overrule *Humphrey's Executor* and attempting to make the showing this Court demands before reversing a precedent, petitioners try to sidestep stare decisis by asking this Court to reimagine the *Humphrey's Executor* exception, or perhaps to "limit[] that decision to its precise facts" (Pet. 27). The Court should not revisit an important constitutional precedent at the behest of a party that does not acknowledge and attempt to satisfy the demanding standard for such a grave step.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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