APPENDIX

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-40328

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

versus

CONSUMER PRODUCT SAFETY COMMISSION,
Defendant—Appellant.

Appeal from the United States
District Court for the Eastern
District of Texas
USDC No. 6:21-CV-256

Before JONES, DENNIS, and WILLETT, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

The Supreme Court in recent years has taken a keen interest in administrative law—the law that governs the government—reexamining foundational

notions of federal regulatory power.[1] In its current Term, for example, the Court is revisiting so-called *Chevron* deference, the 40-year-old doctrine under which courts defer to agency interpretations of ambiguous laws.[2]

Today's case may also attract the Court's interest. It tees up one of the fiercest (and oldest) fights in administrative law: the *Humphrey's Executor* "exception" to the general "rule" that lets a president remove subordinates at will.[3] In this 1935 New Deal-era precedent, which detractors say dilutes the president's constitutional power over the executive branch, the Supreme Court upheld restrictions on the president's authority to remove commissioners of so-called "independent" agencies—those headed by officers who may only be removed for specified causes.[4]

The *Humphrey's* exception traditionally "has applied only to multi-member bodies of experts."[5] Sitting en banc, we recently described the exception like this: Congress's decision "limiting the President to 'for cause' removal is not sufficient to trigger a

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[1] *See, e.g.*, *West Virginia v. Envtl. Prot. Agency*, 142 S. Ct. 2587, 2599 (2022) (major-questions doctrine); *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (non-delegation doctrine); *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2049 (2018) (Appointments Clause).

[2] *Loper Bright Enterprises, Inc. v. Raimondo*, 45 F.4th 359, 363 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023).

[3] *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2206 (2020).

[4] See *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

[5] *Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc) ("*Collins II*"), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021)).

separation-of-powers violation."[6] Instead, for-cause removal creates a separation-of-powers problem only if it "combine[s]" with "other independence-promoting mechanisms" that "work[] together" to "excessively insulate" an independent agency from presidential control.[7]

The plaintiffs in this case argue that the Supreme Court recently upended this framework in *Seila Law*.[8] In their view, that 2020 decision held that for-cause removal *always* creates a separation-of-powers violation—at least if the agency at issue exercises substantial executive power (which nearly all agencies do). This is so, the plaintiffs argue, even if for-cause removal is the *only* structural feature insulating an agency from total presidential control. We do not read *Seila Law* so broadly. On the contrary, and as in *Free Enterprise Fund*,[9] the Supreme Court in *Seila Law* left the *Humphrey's Executor* exception "in place."[10]

The Consumer Product Safety Commission is an independent agency whose members the President may remove only for cause. Although the Commission wields what we would today regard as substantial executive power, in every other respect it is structurally identical to the agency that the Supreme Court deemed constitutional in *Humphrey's*. Yet the

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[6] *Collins v. Mnuchin*, 896 F.3d 640, 667 (5th Cir. 2018) ("*Collins I*"), *as reinstated by Collins II*, 938 F.3d at 588 (citation omitted).

[7] Id. at 666–67.

[8] 140 S. Ct. 2183.

[9] *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

[10] *Seila Law*, 140 S. Ct. at 2198.

district court concluded that the Commission's structure is unconstitutional under *Seila Law*. We disagree. The Supreme Court expressly "d[id] not revisit *Humphrey's Executor* or any other precedent" in *Seila Law*.[11]

As middle-management circuit judges, we must follow binding precedent, even if that precedent strikes us as out of step with prevailing Supreme Court sentiment. The logic of *Humphrey's* may have been overtaken, but the decision has not been overruled—at least not yet. Until that happens, *Humphrey's* controls. Accordingly, we REVERSE and REMAND.

I

Congress created the Consumer Product Safety Commission to "protect the public against unreasonable risks of injury associated with consumer products."[12] The Commission has five members, each of whom the President must appoint and the Senate must confirm.[13] The members serve staggered, seven-year terms. No more than three of them can "be affiliated with the same political party."[14] Structurally, these features make the Commission a mirror image of the Federal Trade Commission (FTC), an agency whose institutional design the Supreme Court considered in *Humphrey's Executor v. United States*.[15] The agencies are twins in another respect,

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[11] *Id.* at 2206.

[12] 15 U.S.C. 2053(a).

[13] *Id.* § 2053(a).

[14] *Id.* § 2053(c).

[15] 295 U.S. 602, 619-20 (1935).

too: The President may remove a member of the Commission only for "neglect of duty or malfeasance in office"—that is, only for *cause*.[16]

The Commission has the statutory authority to promulgate safety standards and to ban hazardous products.[17] It also has power to launch administrative proceedings, issue legal and equitable relief, and commence civil actions in federal court.[18] And like other agencies, the Commission must respond to requests for information (and requests for fee waivers) under the Freedom of Information Act (FOIA).[19] The Commission recently issued a rule amending its FOIA regulations—increasing the per-page fee for paper copies by $0.05, and getting rid of duplication fees for electronic copies.[20]

By Two is a limited partnership that focuses on educational consulting. It has submitted more than 50 FOIA requests to the Commission, and it plans to submit more. It has also asked the Commission for fee waivers under FOIA, and it plans to ask for fee waivers again. In early 2021, Commission staffers denied several of By Two's requests for information relating to safety standards for bouncer seats, infant walkers, toddler carriers, and highchairs. Around the same time, staffers also denied By Two's requests for fee waivers for information related to drop-side cribs.

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[16] 15 U.S.C. § 2053(a).

[17] 15 U.S.C. §§ 2056(a), 2057.

[18] U.S.C. §§ 2064, 2076, 2069(a)–(b), 2071(a).

[19] 5 U.S.C. §§ 552(a)(4)(A), 552(e)(1)(L).

[20] *See* Fees for Production of Records, 86 Fed. Reg. 7499, 7500 (Jan. 29, 2021) (to be codified at 16 C.F.R. pt. 1015).

By Two appealed those decisions within the Commission, but the appeals changed nothing.[21]

By Two sued the Commission and asserted three "claims." It styled the first count as "violation of the separation of powers," arguing that "the [C]ommission's structure violates Article II of the U.S. Constitution" because the Commission's members "are removable by the President only "for [cause]." By Two's second count, under the Administrative Procedure Act (APA), argued that the Commission's recent FOIA rule "must be set aside because it was promulgated by an unconstitutionally structured agency." Building on the first two counts, By Two argued in its third count (under FOIA itself) that "[t]he Commission is wrongfully withholding agency records to which [By Two is] entitled by relying upon and enforcing an invalid FOIA rule promulgated by an unconstitutionally structured agency." The upshot is that By Two asserted the same legal theory three times: once each under the Constitution, the APA, and FOIA. By Two argues that this single theory and these three claims entitle it to, among other things, "[a] declaration that the Commission's structure violates Article II of the Constitution," "[a]n order setting aside the Commission's FOIA rule," and "[a]n order setting aside the Commission's denial of Plaintiffs' FOIA requests, including the denial of fee waivers."

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[21] Plaintiff–Appellant Consumers' Research submitted similar requests and received similar responses (albeit concerning different information). Because Consumers' Research and By Two are similarly situated, the rest of this opinion refers to the Plaintiffs–Appellants collectively as "By Two."

A few weeks after it filed suit, By Two moved for "partial summary judgment granting declaratory relief [under Rule 56(a)]" and for "partial final judgment [under Rule 54(b)]"—but only as to Count 1. The Commission opposed the motion, and it moved to dismiss the complaint for lack of standing, for failure to state a claim, and because the Commission and the FTC have the same structure under *Humphrey's*.

The district court denied the Commission's motion and granted partial summary judgment for By Two.[22] It held: "(1) the removal restriction in 15 U.S.C. § 2053(b) violates Article II of the Constitution; (2) [By Two is] entitled to declaratory judgment to ensure that future FOIA requests are administered by a Commission accountable to the President; and (3) a partial final judgment as to Count 1 is proper under Rule 54(b)."[23] The district court's opinion reasoned that, unlike the FTC in 1935, "the Commission exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception."[24] The court then certified the order as a final judgment under Rule 54(b). This appeal followed.

II

The standards of review are well settled. We review summary judgment de novo, "applying the same standards as the district court."[25] "A party is entitled to summary judgment 'if the movant shows that there

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[22] *Consumers' Rsch. v. Consumer* Prod. *Safety Comm'n*, 592 F. Supp. 3d 568, 591 (E.D. Tex. 2022).

[23] *Id.*

[24] *Id. at* 583–84.

[25] *Texas v. United States*, 50 F.4th 498, 521 (5th Cir. 2022).

is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'"[26] Likewise, "[w]hether the district court completely disposed of a claim [under Rule 54(b)] is a question we review de novo."[27]

III

First, jurisdiction.[28] The Commission argues that this crucial element is doubly lacking. We disagree. By Two's separation-of-powers claim is distinct from its APA and FOIA claims (under Rule 54(b)), and By Two has standing to assert its constitutional claim (under Article III).

A

"When an action presents more than one *claim* for relief . . . the court may direct entry of a final judgment as to one or more, but fewer than all, *claims* . . . ."[29] Rule 54(b)'s requirements are "jurisdictional" on appeal.[30]

The Commission argues that the district court's judgment under Rule 54(b) is invalid because By Two's complaint does not present separate claims for relief, but instead consists of a single claim phrased three

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[26] *Golden Glow Tanning Salon, Inc. v. City of Columbus*, 52 F.4th 974, *977* (5th Cir. 2022) (quoting FED. R. CIV. P. 56); *see id.* (addressing constitutionality); *Texas State LULAC v. Elfant*, 52 F.4th 248, 252 (5th Cir. 2022) (addressing standing).

[27] *Tetra Techs., Inc. v. Cont'l Ins. Co.*, 755 F.3d 222, 228 (5th Cir. 2014).

[28] *See, e.g.*, *Arulnanthy v. Garland*, 17 F.4th 586, 592 (5th Cir. 2021).

[29] FED. R. CIV. P. 54(b) (emphases added).

[30] *Tetra Techs.*, 755 F.3d at 228.

different ways. But a legal claim is distinct from a legal theory. While a cognizable claim is what opens the courthouse door, a good theory is what lets the plaintiff emerge a victor. We have previously recognized that a "plaintiff with Article III standing can maintain a direct *claim* against government action that violates the separation of powers."[31] Whether or not By Two has "standing" (more on that next), its constitutional "claim" is a separate cause of action. The separation-of-powers claim is thus a sufficient basis for the declaratory relief that the district court entered.[32]

The standalone constitutional claim (Count 1) is distinct from the APA claim (Count 2) and the FOIA claim (Count 3), just as those statutory claims are themselves distinct. Even without an "articulable standard" for discerning one claim from another in more complicated cases—for example, those involving multiple theories of damages—we have no trouble

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[31] *Collins II*, 938 F.3d at 587 (affirming viability of "shareholders' constitutional *claim*" (emphasis added)); *see id.* at 587 n.227 (holding that courts have "jurisdiction over declaratory judgment action[s] alleging violation[s] of separation of powers"); *see also Free Enter. Fund*, 561 U.S. at 491 n.2 (2010) (citing *Ex parte Young*, 209 U.S. 123, 149 (1908)); *LaRoque v. Holder*, 650 F.3d 777, 792 (D.C. Cir. 2011) ("*Free Enterprise* . . . recognized a nonstatutory cause of action for . . . declaratory and injunctive relief against the Public Company Accounting Oversight Board on the grounds that the statute creating the Board violated the Appointments Clause and impermissibly encroached on the President's authority to remove Executive Branch officials.").

[32] *Collins II*, 938 F.3d at 587.

concluding that the "claim" at issue is distinct enough for Rule 54(b).[33]

B

The Commission next argues that By Two lacks standing. Wrong again. "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each *claim* that they press and for each *form of relief* that they seek."[34] As By Two's complaint and briefing show, there is only one claim at issue, and only one form of relief: "a declaratory judgment that the removal restriction for [the Commission's members] violates Article II of the Constitution." To have standing to assert this claim, By Two "must show (i) that [it] suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the [Commission]; and (iii) that the injury would likely be redressed by judicial relief."[35] We take each element in turn.

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[33] A similar scenario arose in *Texas v. United States*, 945 F.3d 355, 373 n.11 (5th Cir. 2019). There, the district court entered a final judgment on one claim under Rule 54(b) declaring the Affordable Care Act's individual mandate unconstitutional. *See Texas v. United States*, 352 F. Supp. 3d 665, 669–71 (N.D. Tex. 2018). But the district court's judgment did not reach a separate APA claim—even though that claim itself "presuppose[d]" that the individual mandate was unconstitutional. *Id.* at 671. Still, the district court held the claims were "related but distinct." *Id.* We agreed. *See Texas*, 945 F.3d at 373 n.11 (concluding that the "final judgment is only partial because it addresses only" Count 1 and because "[t]he district court has not yet ruled on the other counts").

[34] *TransUnion* LLC *v. Ramirez*, 141 S. Ct. 2190, 2208 (2021) (emphases added).

[35] *Id.* at 2203.

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"To establish injury in fact, a plaintiff must show that [it] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" [36] We have also held that "being compelled to participate in an invalid administrative process" can constitute an injury in fact.[37] At least two of our sister circuits have interpreted that holding to mean that "deprivation of a procedural right designed to protect a concrete interest is sufficient to establish standing." [38] We agree that this interpretation is analytically correct, because standing always requires a "concrete interest."[39] Applying that framework here, By Two has standing. It asserts the right to be free "from the threat of being subject to a regulatory scheme and governmental action lacking Article II oversight." [40] And even beyond that right, which belongs to all citizens, By Two has a concrete interest in the information and the fee waivers that it requested (and plans to request again) from the Commission.

The separation-of-powers violation *plus* By Two's concrete interest combine to satisfy the "injury" element of standing. By recognizing that this

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[36] *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

[37] *Texas v.* United *States*, 497 F.3d 491, 496–97 (5th Cir. 2007).

[38] *New Mexico v. Dep't of Interior*, 854 F.3d 1207, 1218 (10th Cir. 2017); *Delaware Dep't of Nat. Res. & Env't Control v. FERC*, 558 F.3d 575, 579 (D.C. Cir. 2009) (similar).

[39] *See id.*

[40] *Consumers' Rsch.*, 592 F. Supp. 3d at 579.

combination creates an injury, we tread no further than the Supreme Court's separation-of-powers cases have already ventured. For instance, in *Free Enterprise Fund*, the accounting firm had a concrete interest in the case because "[t]he Board inspected the firm, released a report critical of its auditing procedures, and began a formal investigation." [41] Likewise, in *Seila Law*, the plaintiff had a concrete interest because the agency had "issued a civil investigative demand" and had "directed [the plaintiff] to comply with the demand."[42] And in *Collins v. Yellen*, the plaintiffs had a "pocketbook injury" that was "a prototypical form of injury in fact."[43] All of these cases involved a plaintiff who alleged both a separation-of-powers violation *and* possessed a concrete interest in seeing the violation corrected. So too here.

To see why both a violation and a concrete interest are required in this context, it helps to consider why neither would be sufficient in isolation.

Without the concrete-interest requirement, Article III standing would transform from a threshold that bars some claims against the government to a welcome mat that plaintiffs barely acknowledge on their way into the federal courthouse. That is so for at least two reasons. First, discarding the concrete-interest requirement would be a quick lesson in how trivially easy it is to flavor ordinary statutory claims with a separation-of-powers mix-in. Second, every American is subject to a great many regulations.

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[41] 561 U.S. at 487.

[42] 140 S. Ct. 2183, 2194 (2020).

[43] 141 S. Ct. at 1779.

Perhaps too many. But merely being subject to those regulations, in the abstract, does not create an injury. If it were otherwise, then it is hard to see how standing to sue for separation-of-powers violations would be absent in any of the following hypotheticals (which we take as classic examples of a missing injury):

- The Federal Communications Commission (FCC) issues licenses to amateur radio operators. The agency thus regulates all citizens (by forbidding them from operating a ham radio without a license). Even if Bob has no interest in purchasing and operating a ham radio, does he have standing to sue?
- The National Science Foundation (NSF) gives research grants. Grantees are subject to the agency's supervision. If a researcher receives a grant and proposes to spend the money appropriately, does she have standing based on the injury that she sustains merely by being "subject to" agency oversight?
- The Small Business Association (SBA) issues loans. Sometimes it defers payment obligations. If a business owner had a loan that was deferred, would he have standing to sue based on the theory that the deferral decision issued from an agency that he believes lacks Article II oversight?

Without some separate concrete interest in the *outcome* of an allegedly unconstitutional process, the answer for abstract objections to perceived over-regulation must come from the political realm—not the judicial branch.

On the other hand, without the separate ingredient of a separation-of-powers violation, then a plaintiff

asserting a structural-constitutional claim would often run aground on the "traceability" and "redressability" elements of standing. This case shows as much. By Two suffered an injury when the Commission withheld the information and denied the fee waivers. But 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. That's why both ingredients are necessary: a separation-of-powers violation *plus* a concrete interest. Here, both are present. By Two has therefore alleged a legally cognizable injury.

2

So defined, By Two's injury is also traceable to the separation-of-powers violation that it alleges. "[A] litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a 'counterfactual world' in which the Government had acted with constitutional authority."[44] Rather, to determine traceability "[i]n the specific context of the President's removal power," the Supreme Court has "found it sufficient that the challenger 'sustains injury' from an executive act that allegedly exceeds the official's authority."[45] The Commission responds that traceability is absent because By Two *chose* to file the requests. But the Supreme Court has rejected that style of argument, holding instead that "an injury resulting from the

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[44] *Seila Law*, 140 S. Ct. at 2196 (alteration adopted) (quoting *Free Enter. Fund*, 561 U.S. at 512 n.12).

[45] *Id.*

application . . . of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred."[46] Because By Two has sustained an injury, traceability poses no obstacle.

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Redressability follows. In a suit seeking to vindicate the President's removal power, when both injury and traceability are present, the plaintiff "[is] entitled to declaratory relief sufficient to ensure that the . . . requirements and . . . standards to which [it is] subject will be enforced only by a constitutional agency accountable to the Executive."[47] In other words, "when . . . a [removal] provision violates the separation of powers," the violation "inflicts a 'here-and-now' injury . . . that can be remedied by a court."[48] That is exactly what happened here: By Two asked for (and received) a judgment declaring that "the Commission's structure violates Article II of the Constitution." That declaration directly redresses the separation-of-powers injury that By Two alleges.[49]

Because By Two has alleged an injury-in-fact that is traceable to the Commission's unconstitutional structure and that is redressable by a favorable decision from this court, it has established its

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[46] *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022) (collecting cases).

[47] *Free Enter. Fund*, 561 U.S. at 513.

[48] *Seila Law*, 140 S. *Ct.* at 2196 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

[49] *See id.*

Article III standing to assert the separation-of-powers violation as an independent claim.

IV

On the merits, we cannot agree that the Commission's structure violates the prevailing iteration of the removal doctrine as the Supreme Court has articulated it.

This is not to say that the doctrine is clear. And perhaps clarity will remain a mere aspiration so long as the doctrine's foundation includes a decision proclaiming that the FTC "exercises no part of the executive power."[50] Still, the Supreme Court, while it has limited *Humphrey's*, has not yet overruled it. Nor, of course, can we.[51] Instead, our role in the judicial architecture requires us only to map—not adjust—the borders of the so-called "*Humphrey's Executor* exception."[52] As best we can gather, the Supreme Court has not yet limited that decision to the FTC alone. Rather, so far as we can tell, the exception still protects any "traditional independent agency headed by a multimember board"—and thus still protects the Commission.[53]

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[50] *Humphrey's Ex'r*, 295 U.S. at 628.

[51] *See Illumina, Inc. v. Federal Trade Comm'n*, 88 F.4th 1036, 1047 (5th Cir. 2023) ("[W]hether the FTC's authority has changed so fundamentally as to render *Humphrey's Executor* no longer binding is for the Supreme Court, not us, to answer." (citing *Lefebure v. D'Aquila*, 15 F.4th 650, 660 (5th Cir. 2021)).

[52] *Seila Law*, 140 S. Ct. at 2198.

[53] *Id.* at 2193; *see id.* at 2192 (similar), 2211 (opinion of ROBERTS, C.J.) (suggesting that Congress could "remedy" a constitutionally "defect[ive]" single-member agency by "converting [it] into a multimember agency").

Whatever else it may be, the Commission's structure is not a "historical anomaly," is not a recent "innovation," and is not lacking at least some "foothold in history or tradition."[54] For those reasons, too, we conclude that the Supreme Court's still-on-the-books precedent supports the Commission's structure. If it were otherwise, then the FCC, the NSF, the SBA, and dozens of other agencies would all be unconstitutionally structured. The Supreme Court has not yet directly embraced that conclusion. Even so, By Two's contrary arguments do not rely on any single premise that we can confidently label faulty. This impasse arises because the holding of *Humphrey's* is still "in place" even though its reasoning "has not withstood the test of time."[55] Resolving that dilemma is beyond our authority. The holding from *Humphrey's* controls, the holding authorizes the Commission's structure, and the holding requires us to reverse the district court's judgment.

A

The *Humphrey's Executor* exception "permitted 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."[56] *Free Enterprise Fund* left that exception "in place," and *Seila Law* did the same—the Court there even noted that it did not "revisit *Humphrey's Executor* or

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[54] *Id.* at 2202.

[55] *Id.* at 2198, 2198 n.2.

[56] *Id.* at 2199.

any other precedent."[57] So, while the Court has more than once "declined to extend" *Humphrey's*, the exception itself has persevered, apparently in stasis.[58]

"[T]he contours of the *Humphrey's Executor* exception depend upon the *characteristics* of the agency before the Court."[59] In *Humphrey's*, the Court "identified several organizational features that helped explain its characterization of the FTC as *non-executive*,"[60]—

> Composed of five members—no more than three from the same political party—the Board was designed to be "non-partisan" and to "act with entire impartiality." The FTC's duties were "neither political nor executive," but instead called for "the trained judgment of a body of experts" "informed by experience." And the Commissioners' staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a "complete change" in leadership "at any one time."[61]

The parties here agree that the Commission shares each of these characteristics, save one: By Two says that the Commission *does* exercise executive power and thus falls outside the *Humphrey's* exception. This argument requires us to consider the role of "executive power" in the Supreme Court's removal doctrine. But

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[57] *Id.* at 2198, 2206.

[58] *Id.* at 2198.

[59] *Id.* (emphasis added).

[60] *Id.* (emphasis added).

[61] *Id.* at 2198–99.

to do that is to board a train of thought that seems almost predestined for incoherence.

To start, *Humphrey's* distinguished an agency's "executive power in the constitutional sense" from its "discharge and effectuation of its quasi legislative or quasi judicial power." But our court has since recognized that *Seila Law* "cast[] doubt on the existence of wholly non-executive, quasi-legislative or quasi-judicial agency powers altogether." [62] If *Humphrey's* descriptions are no longer apt, what words replace them? Was everything the FTC did in 1935 part of its "executive power," or rather part of its "executive function," or does the correct description lie somewhere in between? The answers do not leap forward. Still, under any modern conception, the Commission unquestionably *does* exercise executive power.

Even so, it is hard to tell *how much* of that power is required before an agency loses protection under the *Humphrey's* exception. Does the agency lose protection if it exercises "*any* executive power"?[63] Or can the agency claim the exception so long as it "do[es] not wield *substantial* executive power"?[64] Or should we instead be looking for "*significant* executive power"? [65] All three descriptions come from *Seila*

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[62] *Jarkesy v. Sec. & Exch. Comm'n*, 34 F.4th 446, 465 n.19 (5th Cir. 2022) *cert. granted, SEC v. Jarkesy*, No. 22-859, 2023 WL 4278448 (U.S. June 30, 2023).

[63] *Seila Law,* 140 S. Ct. at 2199 (emphasis added).

[64] *Id.* at 2200 (emphasis added).

[65] *Id.* at 2201 (emphasis added).

Law.[66] Nor did the Court use "substantial" and "significant" merely as examples of an agency that exercises "any" executive power. Just the opposite: The Court described the *exception itself* as an exception "*for* multimember expert agencies that do not wield substantial executive power."[67] In any event, we agree with By Two that the Commission's power is substantial.

Having concluded that the Commission exercises substantial executive power (in the modern sense), we must next consider whether that characteristic—standing alone—removes the Commission from the *Humphrey's* exception. We conclude that it does not, for three reasons.

First, unlike the agencies at issue in *Seila Law* and *Free Enterprise Fund*, the Commission's structure does not require us to confront a historically unprecedented situation. "Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it."[68] In other words, historical pedigree matters. By Two does not argue that the Commission lacks historical precedent. Quite the opposite. "[A]lthough nearly identical language governs the removal of some two-dozen multimember independent

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[66] In a similar vein, our recent decision in *Jarkesy v. SEC* used *Seila Law's* "any executive power" quote, but we also referred to "substantial executive functions" and to "sufficiently important executive functions." 34 F.4th at 464 n.19.

[67] *Seila Law*, 140 S. Ct. at 2199–200 (emphasis added).

[68] *Id*. at 2201 (alterations adopted) (internal quotation marks omitted) (citing *Free Enterprise Fund*, 561 U.S. at 505).

agencies,"[69] By Two's counsel could identify at oral argument only two that would survive its theory unscathed: "the U.S. Sentencing Commission, and the U.S. Commission on Civil Rights."[70] By Two emphasizes that this case is only about the Commission. But the Supreme Court has told us to decide the case by comparing *this* Commission to others. Doing that shows that the Commission has history on its side. It is a prototypical "traditional independent agency, run by a multimember board."[71] As such, we must count history in the Commission's favor, even though the Commission exercises substantial executive power.

Second, the Commission does not share the defining feature that the Supreme Court in *Seila Law* relied on to hold the CFPB unconstitutional. There, the Court said that "[t]he CFPB's *single-Director* structure contravenes [the Constitution's] carefully calibrated system by vesting significant governmental power in the hands of a *single individual* accountable to no one."[72] But here, of course, the Commission has a multimember board. It is true that the CFPB Director also exercised substantial executive power and that such power was a predicate for the Court's holding. But we understand the holding itself as applying only to agencies whose leadership rests solely with a single individual. Remember: *Seila Law* expressly "d[id] not

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[69] *Id.* at 2206.

[70] See https://www.ca5.uscourts.gov/OralArgRecordings/22/22-40328_3-6-2023.mp3 (at 22:25).

[71] *Seila Law*, 140 S. Ct. at 2192.

[72] *Id.* at 2203 (emphases added).

revisit *Humphrey's Executor*."[73] Indeed, the Supreme Court noted that "the contours of the *Humphrey's Executor* exception depend upon the characteristics of the agency before the Court."[74] If the exception applied *only* to the FTC, this statement would make little sense. Thus, we view *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.[75]

Third, the Commission also does not have any of the features that combined to make the CFPB's structure "even more problematic" in *Seila Law*.[76] Unlike the CFPB, the Commissioners' staggered appointment schedule means that each President *does* "have an[] opportunity to shape [the Commission's] leadership and thereby influence its activities."[77] Further, the Commission *does not* "recei[ve] funds outside the appropriations process."[78] Thus, the President *can* "influence" the Commission's activities via the budgetary process.[79] Accordingly, we cannot conclude that the Commission "is an innovation with no foothold in history or tradition."[80]

In other words, the Commission fits squarely within what our en banc court described just a few years ago

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[73] *Id.* at 2206.

[74] *Id.* at 2198.

[75] *Id.* at 2202.

[76] *Id.* at 2204.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2202.

as "the recognized exception for independent agencies" whose leadership consists of a "multi-member bod[y] of experts."[81] *Seila Law* did not upend that exception, but rather "found 'compelling reasons not to extend [it] to the novel context of an independent agency led by a single Director.'" [82] Because the Commission's structure is not novel, *Seila Law* does not apply. That dooms By Two's argument. Our en banc court has already held that for-cause protection is "not sufficient to trigger a separation-of-powers violation."[83] Rather, for-cause removal violates the constitution only when it "combine[s]" with "other independence-promoting mechanisms" that "work[] together" to "excessively insulate" an agency from the President's control.[84] Yet By Two has not even attempted to identify any such additional "mechanisms," and its attacks on the Commission's structure therefore fail.[85]

B

By Two argues that our analysis should have ended above, when we concluded that the Commission wields substantial executive power. Our view of *Seila Law* is not so thin. Rather, as we see it, By Two's argument—although free from any logical error—gives too much weight to the words "substantial executive power" but not enough weight to the separate factors that we just discussed. If that is a strange conclusion, the oddity

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[81] *Collins II*, 938 F.3d at 587–88.

[82] *Collins v. Yellen*, 141 S. Ct. at 1783 (quoting *Seila Law*, 140 S. Ct. at 2199).

[83] *Collins I*, 896 F.3d at 667.

[84] *Id.* at 666–67.

[85] *Id.* at 667.

follows, respectfully, from the Supreme Court's removal doctrine, not from our application of it.[86]

Seila Law "cast[] doubt" on the constitutionality of agencies like the Commission.[87] But the Supreme Court's "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."[88] Indeed, the Supreme Court has repeatedly warned that "lower court[s] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."[89] "This is true even if the lower court thinks the precedent is in tension with some other line of decisions."[90] Under these rules, *Humphrey's* still protects the Commission.

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[86] As JUDGE JONES correctly observes, "The Supreme Court has created uncertainty that only it can ultimately alleviate." *Post*, at 1. A panel of this court also recently agreed that "although the FTC's powers may have changed since *Humphrey's Executor* was decided, the question of whether the FTC's authority has changed so fundamentally as to render *Humphrey's Excecutor* no longer binding is for the Supreme Court, not us, to answer." *Illumina*, 88 F.4th at 1047 (5th Cir. 2023). If precedent compels us to uphold the constitutionality of the FTC's removal restrictions today, even when that agency's "powers may have changed since" 1935, precedent also compels us to uphold the removal restrictions of a structurally identical agency.

[87] *Jarkesy*, 34 F.4th at 465 n.19.

[88] *Bosse v. Oklahoma*, 580 U.S. 1, 3 (2016) (quoting *Hohn v. United States*, 524 U.S. 236, 252–253 (1998)).

[89] *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023) (quoting *Rodriguez de Quijas v. Shearson/ Am. Express, Inc.*, 490 U.S. 477, 484 (1989)).

[90] *Id.*

V

We agree with the panel decision that recently distilled the relevant portion of *Seila Law* to a simple rule: "[P]rincipal officers may retain for-cause protection when they act as part of an expert board."[91] The distillate was dicta, and therefore non-binding, but it is also accurate. *Seila Law* referred a few times to "a traditional independent agency, run [or "headed"] by a multimember board."[92] These references were neither approving nor condemning.[93] In making them, the Court expressly "d[id] not revisit *Humphrey's Executor* or any other precedent."[94] Instead, the Court confirmed only that "the constitutionality of the CFPB Director's insulation from removal cannot be settled by *Humphrey's Executor* or *Morrison [v. Olson]* alone."[95] But here, *Humphrey's* does settle the question. Only the Supreme Court has power to reconsider that New Deal-era precedent—perhaps reaffirming it, overruling it, or narrowing it—and at least so far, it hasn't.

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[91] *Jarkesy*, 34 F.4th at 463.

[92] *Seila Law*, 140 S. Ct. at 2192, 93.

[93] Part IV of the *Seila Law* opinion does impliedly approve the Commission's structure, arguing that "Congress [could] pursu[e] alternative responses to the [separation-of-powers] problem—for example, converting the CFPB into a multimember agency." *Id.* at 2211. We cannot accept that CHIEF JUSTICE ROBERTS would direct Congress to pursue a plainly unconstitutional "response[]." But in this portion of the opinion, he was writing only for himself and two other Justices. *See id.* at 2187–90.

[94] *Seila Law*, 140 S. Ct. at 2199.

[95] *Id.* at 2201.

We REVERSE the district court's judgment and REMAND for further proceedings.

EDITH H. JONES, *Circuit Judge*, concurring in part and dissenting in part:

I am pleased to concur in the sections of Judge Willett's opinion that uphold our appellate jurisdiction and plaintiffs' standing to sue. With some trepidation, in recognition of his careful exegesis of *Seila Law* as it applies to this case, I respectfully dissent. The Supreme Court has created uncertainty that only it can ultimately alleviate.

To be sure, the general rule is that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989). Naturally, though, one decision does not overrule another if "two precedents sit comfortably side by side." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 137, 143 S. Ct. 2028, 2038 (2023).

The rule established in *Humphrey's Executor* is directly on point here. But contrary to what Judge Willett suggests, if this court holds that the CPSC violates the separation-of-powers, it will disturb neither the rule nor the holding of *Humphrey's Executor*.

Facts are called facts for a reason. The facts in *Humphrey's Executor* have never changed. In *Seila Law*, *the Court translated* those facts for modern eyes. The Court explained:

> Rightly or wrongly, the Court viewed the FTC (as it existed in 1935) as exercising "no part of the

> executive power." [*Humphrey's Executor*], at 628, 55 S. Ct. 869. Instead, it was "an administrative body" that performed "specified duties as a legislative or as a judicial aid." *Ibid.* It acted "as a legislative agency" in "making investigations and reports" to Congress and "as an agency of the judiciary" in making recommendations to courts as a master in chancery. *Ibid.* "To the extent that [the FTC] exercise[d] any executive *function*[,] as distinguished from executive power in the constitutional sense," it did so only in the discharge of its "quasi-legislative or quasi-judicial powers." *Ibid.* (emphasis added).

Seila Law LLC v. CFPB, 591 U.S. ---, 140 S. Ct. 2183, 2198 (2020). With that translation, the *Humphrey's Executor* exception makes more sense. It "permitted 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." *Id.* at 2199 (emphasis added).

In 1935, the FTC satisfied the Court's test for insulation from at-will removal because it did not exercise any executive power. No doubt the FTC has evolved significantly over time. Justice Thomas noted that "*Humphrey's Executor* does not even satisfy its own exception." *Id.* at 2218 (Thomas, J., concurring in part). That precise question is not before this court.

But unlike the 1935 FTC, the CPSC does exercise executive power. Different facts often mean different results. The CPSC is not limited to duties as a legislative or judicial aid such as "making investigations and reports" to Congress or "making

recommendations to courts as a master in chancery." *Id.* at 2198. Rather, it promulgates regulations, adjudicates various matters, imposes heavy penalties for violations of its charging statutes, and commences civil actions in federal court seeking injunctive relief and monetary penalties. Plainly, these are all executive powers. *See Bowsher v. Synar*, 478 U.S. 714, 733, 106 S. Ct. 3181, 3191 (1986) (Regulating is an exercise of executive power); *City of Arlington*, 569 U.S. 290, 304 n.4, 133 S. Ct. 1863, 1873 n.4 (quoting Art. II, § 1, cl. 1) (Adjudications "take 'legislative' and 'judicial' forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"); *Seila Law*, 140 S. Ct. at 2200 (The power to seek "daunting monetary penalties . . . on behalf of the United States in federal court" is a "quintessentially executive power not considered in *Humphrey's Executor*.").

Judge Willett writes that holding the CPSC's structure violates the separation-of-powers would "adjust the borders" of the *Humphrey's Executor* exception. But applying law to a new set of facts does not adjust a legal rule's borders. Indeed, a decision holding the CPSC's structure unconstitutional would sit comfortably side-by-side with *Humphrey's Executor*. If anything, Judge Willett's writing *expands* the borders of *Humphrey's Executor* by extending the rule from agencies that *do not* exercise executive power to those that *do*.

Judge Willett's opinion makes two final points. First, "it is hard to tell how much of that [executive] power is required before an agency loses protection under the *Humphrey's* exception." He notes that sometimes the Supreme Court mentions "substantial",

"significant", and "any" when describing "executive power" in *Humphrey's Executor*. But it is best to go to the primary source. *Humphrey's Executor* itself described the FTC as "exercis[ing] *no part of* the executive power vested by the Constitution in the President." *Humphrey's Executor*, 295 U.S. 602, 628, 55 S. Ct. 869, 874 (emphasis added). Either way, Judge Willett acknowledges that the CPSC exercises substantial power. Second, Judge Willett argues, essentially, that the CPSC's multimember structure alone permits for-cause removal. That cannot be the case if the *Humphrey's Executor* rule requires multi-member agencies also not exercise executive power.

To faithfully adhere to the rule set forth in *Humphrey's Executor*, I think that CPSC members' for-cause removal protection violates the constitutional separation-of-powers so long as they also exercise executive power. I respectfully dissent.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 22-40328

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

versus

CONSUMER PRODUCT SAFETY COMMISSION,
Defendant—Appellant.

Appeal from the United States
District Court for the Eastern
District of Texas
USDC No. 6:21-CV-256

ON PETITION FOR REHEARING EN BANC

Before JONES, DENNIS, and WILLETT, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R. 35 I.O.P.), the petition for panel rehearing is DENIED. The petition for rehearing en banc is DENIED because, at the request of one of its members, the court was polled,

and a majority did not vote in favor of rehearing (FED. R. APP. P. 35 and 5TH CIR. R. 35).

In the en banc poll, eight judges voted in favor of rehearing (Jones, Smith, Elrod, Ho, Duncan, Engelhardt, Oldham, and Wilson), and nine voted against rehearing (Richman, Stewart, Southwick, Haynes, Graves, Higginson, Willett, Douglas, and Ramirez).

DON R. WILLETT, *Circuit Judge*, concurring in the denial of rehearing en banc:

Our Founding generation was fixated on splitting up power—so much so that that our Constitution enshrines a belt-and-suspenders approach, allocating federal power not just *among* branches but also *within* branches. This seismic case highlights a tension wrought by this dual-division design. And, like most constitutional disputes, it tees up the fateful "who decides?" question.

Using friction to combat faction, our Constitution, the oldest written national constitution on Earth,[1] splits federal power horizontally: "Madisonian architecture infused with Newtonian genius—three separate branches locked in synchronous orbit by competing interests."[2] And with federal *judicial* power, the Framers went a step further, marrying *inter*-branch division with *intra*-branch division. This case ostensibly is about Article II, which vests executive power in "a President of the United States of America."[3] But this case decisionally is about Article III, which vests "judicial Power" in "one supreme Court" and then downward to "such inferior courts as the Congress may from time to time ordain and establish."[4]

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[1] *Fun Facts*, NATIONAL CONSTITUTION CENTER, available at https://constitutioncenter.org/media/files/funfacts.pdf.

[2] *Collins v. Mnuchin*, 938 F.3d 553, 562 (5th Cir. 2019) (en banc).

[3] U.S. CONST. art. II, § 1, cl. 1.

[4] U.S. CONST. art. III, § 1.

Lower-court judges must honor both structural dictates, of course. We must restrain the unconstitutional dilution of executive power on the one hand and respect the decisions of the Supreme Court on the other. But what if these power-dividing dictates collide? As "middle-management circuit judges," [5] our paramount loyalty is to the Constitution—more precisely, to the Constitution as the Supreme Court interprets it.[6] The New Deal-era precedent that lets Congress restrict the President's ability to remove members of multiheaded agencies, what we now shorthand as *Humphrey's Executor*,[7] is still on the books. Indeed, the Supreme Court has twice declined to overrule it, going out of its way to declare—recently and conspicuously—that it would "not revisit" the decision but leave it "in place."[8]

I believe we must follow suit, even if we think *Humphrey's Executor* was wrongly decided as an original matter and even if we think it is "out of step with prevailing Supreme Court sentiment." [9] That vertical limitation on our judicial power, compelled by the structure of Article III and the doctrine of stare decisis, means we are not at liberty to get ahead of our

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[5] *Consumers' Rsch. v. Consumer Product Safety Comm'n*, 91 F.4th 342, 346 (5th Cir. 2024).

[6] *Cf. post*, at 11 (OLDHAM, J., dissenting) ("[T]he panel majority could not really reconcile the Commission's structure with the Constitution as interpreted by the Supreme Court.").

[7] 295 U.S. 602 (1935).

[8] *Seila L. LLC v. Consumer Fin. Protection Bur.*, 140 S. Ct. 2183, 2206 (2020); *Free Enter. Fund v. Public Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010).

[9] *Consumers' Rsch.*, 91 F.4th at 356.

skis and precipitately shrink a Supreme Court decision's precedential scope.[10]

Thus, when we are confronted with a constitutional challenge against an agency (the CPSC) that everyone agrees is structurally identical to the one in *Humphrey's Executor* (the FTC), we cannot break new constitutional ground.[11] Granted, a *lot* has changed since that 1935 decision. We no longer indulge the fiction that the FTC wields merely quasi-legislative and quasi-judicial power.[12] And we can forthrightly acknowledge that the FTC of today wields vastly more *executive* power than it did when the Supreme Court first considered its constitutionality during FDR's first term.[13] But, as our court declared barely four months ago, "whether the FTC's authority has changed so fundamentally as to render *Humphrey's Executor* no longer binding is for the Supreme Court, not us, to

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[10] Nor can we, by the same token, "distort," "stretch," or "halfheartedly invoke" precedent. *Post*, at 11 (OLDHAM, J., dissenting). Fortunately, none of us is doing any of those things. What may be manifesting instead is a reasonable, good-faith disagreement on how to apply nearly, *nearly*, zombified precedent.

[11] *See Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018) ("The law of precedent teaches that like cases should generally be treated alike.")

[12] *Seila Law*, 140 S. Ct. at 2198 n.2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time.").

[13] *Id*. at 2218 (THOMAS, J., concurring in part) ("*Humphrey's Executor* does not even satisfy its own exception."); *see also Consumers' Rsch.*, 91 F.4th at 357 (JONES, J., dissenting) ("No doubt the FTC has evolved significantly over time.").

answer."[14] Our judicial task, then, does not suddenly change once we have a structurally identical agency with a different name almost a century later.[15] *Humphrey's Executor* has been overtaken, but it has not been overturned—not yet at least.[16]

JUDGE OLDHAM'S scholarly dissent expresses eminently reasonable disagreement, and as with the arguments made by the challengers in this case, I find myself mostly nodding in agreement. Our narrow disagreement, it seems, distills to one issue: how to read the Supreme Court's 2020 decision in *Seila Law*. As I explained at greater length in the panel opinion, *Seila Law* does not change the calculus here, because even though the CPSC can be said to exercise substantial executive power, its structure is not historically unprecedented, and, crucially, it does not have the defining single-director feature that the Supreme Court so emphatically emphasized in distinguishing *Humphrey's Executor*.[17] Indeed, as we

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[14] *Illumina v. Fed. Trade Comm'n*, 88 F.4th 1036, 1047 (5th Cir. 2023).

[15] *See Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

[16] *See Seila Law*, 140 S. Ct. at 2211–12 (THOMAS, J., concurring in part) ("The Court concludes that it is not strictly necessary for us to overrule that decision. But with today's decision, the Court has repudiated almost every aspect of Humphrey's Executor.").

[17] *Seila Law*, 140 S. Ct. at 2201 ("Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." (alterations

recently held en banc, it is only when these mechanisms combine to "excessively insulate" the independent agency from presidential control that we have a separation-of-powers problem.[18]

I write, however, not to rehash what was already written in the panel opinion. As its author, I think it speaks for itself. I write instead to say this: Despite today's en banc denial, the panel opinion need not be the last word. Our "strange conclusion," as I have said, "follows, respectfully, from the Supreme Court's removal doctrine, not from our application of it."[19] And though 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 uncertainty that only it can ultimately alleviate."[20]

Until then, we must apply precedent dutifully—but we need not do so quietly. Count me among those skeptical of *Humphrey's Executor*, which seems nigh impossible to square with the Supreme Court's current separation-of-powers sentiment. Even so, sentiment is not precedent. And while an en banc petition cannot

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adopted) (citation omitted)); *id.* at 2192 ("While we need not and do not revisit our prior decisions in allowing certain limitations on the President's removal power, there are compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director.").

[18] *Collins v. Mnuchin*, 896 F.3d 640, 666–67 (5th Cir. 2018), *as reinstated by Collins v. Mnuchin*, 938 F.3d 553, 587 (5th Cir. 2019) (en banc), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021).

[19] *Consumers' Rsch.*, 91 F.4th at 355.

[20] *Id.* at 356 (JONES, J., dissenting).

push reset on *Humphrey's Executor*, a certiorari petition can.

And this cert petition writes itself.

JAMES C. HO, *Circuit Judge*, dissenting from denial of rehearing en banc:

I agree with my dissenting colleagues that "[t]he Constitution vests the President with the power to remove *principal executive officers*." *Post*, at _ (emphasis added). Accordingly, I join my colleagues in concluding that any statutory provision that restricts the President's power to remove principal executive officers is unconstitutional under Article II.

I write separately to briefly reprise a previous observation I've made about Executive Branch employees more broadly. Under current statutory law, "[o]nly a tiny percentage of Executive Branch employees are subject to Presidential removal. The overwhelming majority of federal employees, by contrast, are protected against Presidential removal by civil service Zlaws." *Feds for Med. Freedom v. Biden*, 63 F.4th 366, 390 (5th Cir. 2023) (en banc) (Ho, J., concurring). So "the President actually controls surprisingly little of the Executive Branch." *Id.* "[W]e should consider whether laws that limit the President's power to remove Executive Branch employees are consistent with the vesting of executive power exclusively in the President." *Id.* at 391.

There is no accountability to the people when so much of our government is so deeply insulated from those we elect. Restoring our democracy requires regaining control of the bureaucracy. "The right to vote means nothing if we . . . allow the real work of lawmaking to be exercised by . . . agency bureaucrats, rather than by elected officials accountable to the American voter." *Texas v. Rettig*, 993 F.3d 408, 410-11 (5th Cir. 2021) (Ho, J., dissenting from denial of

rehearing en banc) (citing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 369, 374-75 (2014)). And we elect the leadership of the Executive Branch for the exact same reason—to ensure accountability to the American voter.

Because the court today declines to take even this modest step to restore democratic accountability to our federal bureaucracy, I must dissent.

ANDREW S. OLDHAM, *Circuit Judge*, joined by JONES, SMITH, ELROD, HO, DUNCAN, ENGELHARDT, and WILSON, *Circuit Judges*, dissenting from the denial of rehearing en banc:

The Constitution vests the President with the power to remove principal executive officers. The Supreme Court has explained Congress may restrict that power *only* for "multimember expert agencies that do not wield substantial executive power." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2199 (2020). A divided panel of this court found the principal officers in charge of the Consumer Product Safety Commission wield "substantial" executive power, but it nevertheless held Congress may grant those officers for-cause removal protections. *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 353, 356 (5th Cir. 2024). The panel majority justified its holding by explaining inferior courts have no authority to "adjust [the] borders" of Supreme Court precedent. *Id.* at 352. I agree with that premise. But respectfully, it demonstrates the panel majority's error. The Supreme Court's precedents make clear the Commission's statutory for-cause removal protections violate the Constitution, so I would grant the petition for rehearing en banc.

I.

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President.'" *Seila L.*, 140 S. Ct. at 2191 (quoting U.S. CONST. art. II, cl. 1). At the founding, the executive Power was understood to encompass the power to remove executive officers, which means the Constitution vested the President with the power of removal. Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1763-82 (2023). And because the Constitution nowhere grants Congress the authority to strip that power from the President, the President's removal power was originally understood to be nondefeasible. *Id.* at 1789; *see also Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010) ("Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary.").

That makes sense. No single person could run the executive branch alone, so "the Framers expected that the President would rely on subordinate officers for assistance." *Seila L.*, 140 S. Ct. 2191. While those officers may assist the President in carrying out his constitutionally assigned duties, it remains "*his* responsibility to take care that the laws be faithfully executed." *Free Enter. Fund*, 561 U.S. at 493 (emphasis in original). As the Supreme Court has explained, "the buck stops with the President." *Ibid.* But if the President lacked the power to remove his subordinates, he "could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 502. Indeed, Congress could "transform the executive branch into a

perpetual and unaccountable bureaucratic machine." Bamzai & Prakash, *The Executive Power of Removal*, *supra* at 1762.

So the Supreme Court has long "recognized the President's prerogative to remove executive officials." *Seila L.*, 140 S. Ct. at 2197. In *Myers v. United States*, the Court held the Constitution vests the President with the exclusive power to remove the postmaster general. 272 U.S. 52, 176 (1925). The reason, the Court explained, is that "Article II 'grants to the President' the 'general administrative control of those executing the laws, including the power of appointment *and removal* of executive officers.'" *Seila L.*, 140 S. Ct. at 2197 (emphasis in original) (quoting *Myers*, 272 U.S. at 163-164). Then, in *Free Enterprise Fund*, the Court held Congress could not insulate an executive branch official with two layers of for-cause removal protection. 561 U.S. at 483. In doing so, the Court "reiterated the President's [] removal power" as articulated in *Myers*. *Seila L.*, 140 S. Ct. at 2198. Thus, there is no doubt as to "the general rule that the President possesses 'the authority to remove those who assist him in carrying out his duties.'" *Ibid.* (quoting *Free Enterprise Fund*, 561 U.S. at 513-14).

In *Seila Law*, the Supreme Court explained it has recognized just two exceptions to the general rule established in *Myers*. *See id.* at 2199-00. First, Congress may restrict the President's power to remove *inferior* officers so long as the restrictions do not "impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988). Second, Congress may restrict the President's power to remove members of a "multimember expert agenc[y] that do[es] not wield

substantial executive power." *Seila L.*, 140 S. Ct. at 2199-200; *see Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

"These two exceptions"—the *Morrison* exception and the *Humphrey's* exception—"represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila L.*, 140 S. Ct. at 2199-00. And in light of the compelling historical and structural evidence that the President's removal power was originally understood to be unrestrictable, the Court has twice declined to extend either exception to any "new situation." *Seila L.*, 140 S. Ct. at 2201 (quoting *Free Enterprise Fund*, 561 U.S. at 483). The upshot is that the exceptions are not to be extended—a statutory restriction on the President's power to remove an executive branch officer is constitutional only if it is encompassed by either the *Morrison* exception or the *Humphrey's* exception. *See id*. at 2200-01.

II.

Consumers' Research and By Two sued the Consumer Product Safety Commission ("the Commission"). They claim the Commission's structure is unconstitutional because the President may remove the Commission's members only "for neglect of duty or malfeasance in office but for no other cause." 15 U.S.C. § 2053(a).

The plaintiffs are correct. Congress through § 2053(a) clearly purported to restrict the President's removal power. And neither of the recognized exceptions to that otherwise unrestrictable power applies. The *Morrison* exception is plainly irrelevant

because the Commissioners report to none but the President. They are accordingly principal, not inferior, officers. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1980 (2021) ("'Whether one is an "inferior" officer depends on whether he has a superior' other than the President.") (quoting *Edmond v. United States*, 520 U.S. 651, 662 (1997)).

The *Humphrey's* exception is similarly inapposite. That is because—as the panel majority recognized—"the Commission exercises substantial executive power." *Consumers' Rsch.*, 91 F.4th at 354. The Commission's power is executive because that is the only kind of power an agency (like the Commission) can exercise under our Constitution. *See City of Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013) ("[U]nder our constitutional structure [agency actions] must be exercises of [] the 'executive Power.'" (citation omitted)); *Seila L.*, 140 S. Ct. at 2216 (same); *Morrison*, 487 U.S. at 690 n.28 (similar). That proposition is so obvious that the government does not even contest it. ROA.634.

The Commission's power is also substantial. The Supreme Court has never devised a test for substantiality, but it has laid down some markers. For example, in *Seila Law* the Court described the Consumer Financial Protection Bureau as "vested with significant executive power." 140 S. Ct. at 2201.[1]

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[1] The panel majority emphasized that the Court described the CFPB's power as "significant" while describing the *Humphrey's* exception as limited to agencies whose power is "substantial." *Consumers' Rsch.*, 91 F.4th at 353. But significant and substantial are synonyms, so there is no reason to presume the

It did so because the CFPB "dictate[s] and enforce[s] policy for a vital segment of the economy affecting millions of Americans." *Id.* at 2204. And the CFPB has potent tools to pursue its objectives: broad discretion to make rules, sweeping investigatory and enforcement powers, and extensive adjudicatory authority. *Id.* at 2193.

All that is true of the Commission. Like the CFPB, the Commission "dictate[s] and enforce[s] policy for a vital segment of the economy affecting millions of Americans." *Seila L.*, 140 S. Ct. at 2204. In fact, it has jurisdiction over "more than $1.6 trillion in consumer products sold each year." CONSUMER PRODUCT SAFETY COMMISSION, *Strategic Plan 2023-2026* at 1, https://perma.cc/64FK-J5CM (last accessed February 26, 2024). And like the CFPB, the Commission has potent tools:

- The Commission has broad rulemaking discretion. It has near-unconstrained power to "promulgate consumer product safety standards." 15 U.S.C. § 2056(a); *see Finnbin, LLC v. CPSC*, 45 F.4th 127, 134 (D.C. Cir. 2022). It may even "ban[]" products outright when it deems them "hazardous." 15 U.S.C. § 2057. And its pronouncements have the force of law. *See id.* § 2068(a)(1) ("It shall be unlawful for any person to sell, offer for sale, manufacture for sale, distribute in commerce, or import . . . any consumer product, or other product or substance" regulated by the Commission "that is not in conformity with" the

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Court's terminological variation is significant (or substantial). *See Substantial*, MERRIAM-WEBSTER THESAURUS (online ed.).

Commission's "consumer product safety . . . rule[s], regulation[s], standard[s], or ban[s].").

- The Commission has sweeping investigatory and enforcement powers. It may inspect "any factory, warehouse, or establishment in which consumer products are manufactured or held." 15 U.S.C. § 2065(a). It may define recordkeeping requirements. *Id.* § 2065(b). It may inspect the records of companies subject to its jurisdiction on demand. *Ibid.* It may condition the sale of any consumer product in the United States on compliance with its inspection and recordkeeping requirements. *See id.* § 2065(d). And most importantly, it may file enforcement suits in federal court seeking injunctive relief, *id.* § 2071(a), and civil penalties of up to $100,000 per violation, with a cap at $15 million for a "related series of violations," *id.* §§ 2069(a)-(b), 2076(b)(7)(A).
- The Commission has adjudicatory authority. It may conduct a hearing to determine whether a product distributed in commerce presents a hazard, after which it may order a manufacturer, distributor, or retailer to (among other things) cease distribution of a product. *Id.* § 2064(c).

It thus appears Congress vested the Commission with power that is analogous to the CFPB's. It stands to reason that if the CFPB's power is substantial, the Commission's is too. The panel majority acknowledged as much. *See Consumers' Rsch.*, 91 F.4th at 353 ("[T]he Commission's power is substantial."). That means the Commission's power is both executive and substantial, which means the

Commission is not encompassed by the *Humphrey's* exception to the President's general power of removal. *See Seila L.*, 140 S. Ct. at 2000 (explaining the *Humphrey's* exception applies only to "multimember expert agencies that *do not wield substantial executive power*") (emphasis added). There is no other exception for the Commission's removal protections to shelter under, so those protections violate Article II of the Constitution.

III.

The panel majority accepted the argument that the Commission's removal protections violate Article II as "free from any logical error." *Consumers' Rsch.*, 91 F.4th at 355. So instead of quibbling over deduction, the panel majority instead contended the argument proceeds from a mistaken premise.[2] In the panel majority's view, the *Humphrey's* exception applies to more than just "multimember expert agencies that do not wield substantial executive power." *Seila L.*, 140 S. Ct. at 2199. It applies to "any traditional independent agency headed by a multimember board." *Consumers' Rsch.*, 91 F.4th at 352 (citation and internal quotation marks omitted).

The problem with the panel majority's argument is that the *Humphrey's* exception simply does not sweep in all traditional independent agencies headed by multimember boards. That is for the obvious reason that the Supreme Court said it does not less than four years ago. *See Seila L.*, 140 S. Ct. at 2199 (explaining the *Humphrey's* exception applies only "to

[2] The panel majority did so even as it admitted the argument does "not rely on any single premise that [it could] confidently label faulty." *Id.* at 352.

multimember expert agencies that do not wield substantial executive power"); *see also id*. at 2211 (Thomas, J., concurring in part and dissenting in part) ("Because the Court takes a step in the right direction by limiting *Humphrey's Executor* to multimember expert agencies that *do not wield substantial executive power*, I join Parts I, II, and III of its opinion." (emphasis in original) (internal citation and quotation marks omitted)).

The panel majority resisted this conclusion on three grounds, but none is persuasive. First, the panel majority asserted the Court in *Seila Law* did not mean what it said about the narrowness of the *Humphrey's* exception. To prove it, the panel majority plucked an irrelevant clause from the facts section and presented it as evidence that the Court actually thinks the *Humphrey's* exception is quite broad. *Consumers' Rsch.*, 91 F.4th at 352 ("[S]o far as we can tell, the exception still protects any 'traditional independent agency headed by a multimember board.'") (quoting *Seila L.*, 140 S. Ct. at 2193). But in context, the clause supplies no support for the panel majority's position because it is not part of a legally significant statement. It is a mere description of the way Congress designed the CFPB. *See Seila L.*, 140 S. Ct. at 2193 ("Congress's design for the CFPB differed from the proposals of Professor Warren and the Obama administration in one critical respect. Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director."). An argument that depends on mischaracterized dicta is not a very compelling argument.

Second, the panel majority noted that the Court in *Seila Law* did not "revisit *Humphrey's Executor* or any other precedent." *Consumers' Rsch.*, 91 F.4th at 352 (quoting *Seila L.*, 140 S. Ct. at 2198). And the panel majority asserted (without support) that *Humphrey's Executor* held Congress may restrict the President's power to remove the members of any traditional independent agency headed by a multimember board. In the panel majority's view, anything the Supreme Court might have said about *Humphrey's Executor* in *Seila Law* is accordingly irrelevant; *Humphrey's Executor* binds this court because the Supreme Court has not (yet) overruled or narrowed it. *Consumers' Rsch.*, 91 F.4th at 356.

But it is entirely beside the point that *Humphrey's Executor* is still on the books because the holding of that case is nowhere near as broad as the panel majority claimed. *Humphrey's Executor* made no generalizations about independent agencies. Rather, the Court explained its holding "depend[ed] upon the character" of the 1935 FTC—especially on the fact that the FTC was a "quasi legislative and quasi judicial bod[y]" that exercised executive power only "in the discharge and effectuation of its quasi legislative or quasi judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* at 628, 630. And to be doubly clear about the limited nature of its decision, the Court explained:

> To the extent that, between the decision in the *Myers* Case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we

> leave such cases as may fall within it for future consideration and determination as they may arise.

Id. at 632. In other words, the Court did not take a position on the question of whether Congress could restrict the President's authority to remove executive branch officers that wield more executive power than the 1935 FTC. That is why the Supreme Court *in Seila Law* summarized the holding of *Humphrey's Executor* like this: "*Humphrey's Executor* permitted 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*." *Seila L.*, 140 S. Ct. at 2199 (emphasis added).

Rightly understood, the fact-bound holding of *Humphrey's Executor* does not encompass the Commission's removal protections. Most obviously, that is because the Commission has "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 L.*, 140 S. Ct. at 2200. So *Humphrey's Executor* does not "settle" this case. *Consumers' Rsch.*, 91 F.4th at 356. In holding otherwise, the panel majority apparently misread the Court's opinion. Worse, it ignored the Court's very recent explanation of what was actually decided in that case.

Third, the panel majority explained that if it was not bound by *Humphrey's Executor*, it was nonetheless bound by our decision in *Collins v. Mnuchin*. *See Consumers' Rsch.*, 91 F.4th at 355 (citing *Collins*, 896

F.3d 640, 645 (5th Cir. 2018), *as reinstated by Collins v. Mnuchin*, 938 F.3d 553, 588 (5th Cir. 2019) (en banc), *aff'd in part, vacated in part, rev'd in part sub nom. Collins v. Yellen*, 141 S. Ct. 1761 (2021)). There, we held that for-cause removal protection alone is "not sufficient to trigger a separation-of-powers violation." *Id.* at 667. Rather, we explained that "for-cause removal violates the constitution only when it combines with other independence-promoting mechanisms that work together to excessively insulate an agency from the President's control." *Consumers' Rsch.*, 91 F.4th at 355 (quotation omitted) (quoting *Collins*, 896 F.3d at 666–67).

But *Collins* is irrelevant because the framework it established was unequivocally undermined by *Seila Law*. As explained above, the Supreme Court in that case made clear the general rule is that the President has "unrestrictable power . . . to remove [] executive officers." *Myers*, 295 U.S. at 632. There are just two exceptions—the *Morrison* exception and the *Humphrey's* exception. Neither exception licenses inferior courts to bless restrictions on the President's removal power based on their own freewheeling assessment of an agency's insulation from presidential control.[3] So to the extent the panel majority deemed the Commissions' removal protections constitutional based on the Commission's lack of "independence-promoting mechanisms," *Consumers' Rsch.* 91 F.4th at 355 (quoting *Collins*, 896 F.3d at 667), the panel majority contravened *Myers*.

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[3] If *Collins* somehow precluded the panel majority from giving effect to the Supreme Court's decision in *Seila Law*, that is all the more reason to grant the petition for rehearing en banc.

In sum, the panel majority could not really reconcile the Commission's structure with the Constitution as interpreted by the Supreme Court. But it apparently could not believe the Court meant what it said just four years ago. So the panel majority distorted *Seila Law*, then stretched the holding of *Humphrey's Executor*, then halfheartedly invoked an irrelevant decision of this court, all to protect the Commissioners from the President's constitutional power to remove them from office.

IV.

Even if the panel majority correctly interpreted the Supreme Court's precedents, it was still wrong in this case. The panel majority distilled from the Court's precedents that for-cause removal protections are constitutional for "any *traditional* independent agency headed by a multimember board." *Consumers' Rsch.*, 91 F.4th at 352 (emphasis added; citation and quotation omitted). That means on the panel majority's telling, for-cause removal protections for agency heads are constitutional only if two things are true: First, the agency is run by a multimember body. Second, the agency is "traditional."

The panel majority said virtually nothing about the second prong of the test it distilled from the Supreme Court's precedents—that the agency be traditional. In fact, it appears the panel majority assumed an agency is traditional if it is multimember. *See id.* at 354 ("[T]he Commission has history on its side. It is a prototypical traditional independent agency, run by a multimember board." (quotation omitted)). But if that is true, the requirement that an agency be traditional is entirely superfluous. It would do just as well to say

for-cause removal protections are constitutional for all multimember independent agencies. And that would prove too much because the Court in *Seila Law* made clear the removal inquiry is more nuanced than that. *See* 140 S. Ct. at 2200 (explaining the CFPB's removal protections are unconstitutional for two independent reasons: the CFPB is headed by a single director, and the CFPB is "hardly a mere legislative or judicial aid"). So to the extent the panel majority's test has support in Supreme Court precedent, the "traditional" prong must do some work.

The Supreme Court has never explained what makes an agency traditional—perhaps because its recent removal jurisprudence has focused on the substantiality of an agency's power rather than its historical pedigree. *See* Part I, *supra*. But in evaluating the traditional-ness of an agency, one might reasonably start by comparing it with pioneering agencies like the Federal Trade Commission (at issue in *Humphrey's Executor*) and the Federal Reserve.

The FTC and the Fed are "traditional" in the sense that they are longstanding; both predate the New Deal by decades. *See* FEDERAL TRADE COMMISSION, *Our History*, https://perma.cc/2UTF-7AA7 (Federal Trade Commission created in 1914); BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *Federal Reserve Act*, https://perma.cc/LQ6T-8P3E (Federal Reserve System created in 1913). Moreover, the FTC is traditional in the sense that the Supreme Court has held its structure is constitutional. *See Humphrey's Executor*, 295 U.S. 602. And the Fed is traditional in the sense that it looks like the kind of "administrative body" described by the *Humphrey's Executor* Court. 295 U.S.

at 628. That is because the Fed's most important responsibility is administration of the money supply. *See* 12 U.S.C. § 225a. And unlike law enforcement, administration of the money supply is not an executive function—so the Fed's independence does not offend the traditional principle that all executive power is vested in the President. *See Morrison v. Olson*, 487 U.S. 654, 691 (1988) (noting "law enforcement functions" are traditionally executive).

The Commission shares none of these characteristics. First, it does not predate the New Deal. It was created in 1972, more than half a century after the FTC and the Fed. CONSUMER PRODUCT SAFETY COMMISSION, *Who We Are – What We Do for You*, https://perma.cc/A3JZ-UPWU. Second, the Supreme Court has never held that the Commission's structure is constitutional. Third, the Commission's principal responsibility is to enforce consumer protection laws, which is (obviously) a law enforcement function. And the Commission has powers even the *Humphrey's Executor* Court would have considered executive—namely "the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court." *Seila L.*, 140 S. Ct. at 2200; *see* 15 U.S.C. § 2069(a)-(b), *id.* § 2076(b)(7)(A). It thus appears the Commission is not "traditional," which means it fails to satisfy even the contrived test the panel majority distills from the Supreme Court's removal cases.

* * *

The panel majority was doubtless correct that inferior courts must follow binding Supreme Court precedent. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3,

20 (1997) ("[I]t is [the Supreme Court's] prerogative alone to overrule one of its precedents."). But that truism accomplishes little because 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. In my view, the Court's precedents say the President has unrestrictable power to remove principal officers unless those officers are part of a traditional multimember expert agency that does not wield substantial executive power. That means the Commission's removal protections are unconstitutional. And even if I am wrong—even if the Court's precedents mean what the panel majority said they mean—the Commission's removal protections are still unconstitutional because the Commission is not "traditional." I respectfully dissent from our court's refusal to reconsider these questions en banc.

APPENDIX C

United States Court of Appeals for the Fifth Circuit

No. 24-40317

CONSUMERS' RESEARCH; BY TWO, L.P.,

Plaintiffs—Appellants,

versus

CONSUMER PRODUCT SAFETY COMMISSION,

Defendant—Appellee.

Appeal from the United States
District Court for the Eastern
District of Texas
USDC No. 6:21-CV-256

UNPUBLISHED ORDER

Before ELROD, HAYNES, and DOUGLAS, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellants' motion for summary affirmance is GRANTED.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CONSUMERS' RESEARCH, and BY TWO LP,	)	
Plaintiffs,	)	
v.	)	Case No. 6:21-cv-256-JDK
CONSUMER PRODUCT SAFETY COMMISSION,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

The Constitution vests all power—and responsibility—to execute the law in a single President. Because this monumental responsibility is too great for any one person, the President must delegate power to subordinate officers. For a century, the Supreme Court has recognized that this ability to delegate executive power implies a right to remove subordinates for any reason to ensure that "the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the

community." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 498 (2010) (quoting 1 Annals of Cong. 499 (1789) (J. Madison)).

Here, Plaintiffs challenge a restriction on the President's power to remove members of the Consumer Product Safety Commission. Plaintiffs argue that the restriction is unconstitutional because the Commission exercises substantial executive power without proper presidential oversight. For the reasons discussed below, the Court agrees. Accordingly, Plaintiffs' Motion for Partial Summary Judgment as to Count I (Docket No. 14) is **GRANTED**. The Government's Motion to Dismiss (Docket No. 24) is **DENIED** in part. Additionally, finding no just reason for delay, the Court **GRANTS** Plaintiffs' request for entry of a partial final judgment under Federal Rule of Civil Procedure 54(b).

I.

A.

Plaintiffs are two educational organizations focused on product safety issues. Consumers' Research is a 501(c)(3) nonprofit organization that researches and publishes reports on policies, products, and services relevant to consumers. Docket No. 1 ¶ 10. Plaintiff By Two LP ("By Two") is a limited partnership that also researches consumer products. Docket No. 1 ¶ 11. The limited partnership is comprised of parents of young children who research children's products regulated by the Commission. *Id.*

B.

Defendant, the Consumer Product Safety Commission ("the Commission" or "CPSC"), is a federal agency charged with "protect[ing] the public

against unreasonable risks of injury associated with consumer products." 15 U.S.C. §§ 2051(b)(1), 2053(a). The Commission consists of five commissioners, each appointed by the President with the advice and consent of the Senate. *Id.* § 2053(a). Each commissioner serves a seven-year term. *Id.* § 2053(B)(1). No more than three commissioners may be members of the same political party, and only an individual with a "background and expertise in areas related to consumer products and protection of the public from risks to safety" is qualified to serve as a commissioner. *Id.* § 2053(a), (c). Before the expiration of a seven-year term, the President may remove a commissioner "for neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

Congress gave the Commission broad executive powers to regulate consumer products. The Commission may promulgate binding regulations, initiate civil enforcement actions in district court, and conduct administrative adjudications. *Id.* § 2056(a) (authorizing the Commission to "promulgate consumer product safety standards"); *id.* § 2076(b)(7)(A) (authorizing the Commission to bring civil actions to enforce "laws subject to its jurisdiction"); *id.* § 2076(a) ("The Commission may . . . conduct any hearing or other inquiry necessary or appropriate to its functions.").

C.

Both Plaintiffs frequently request information relevant to their research and work from the Commission under the Freedom of Information Act ("FOIA"). Docket No. 1 ¶ 10–11.

"[T]he basic purpose of the Freedom of Information Act [is] 'to open agency action to the light of public scrutiny.'" *Dep't of Air Force v. Rose*, 425 U.S. 352, 372 (1976). The Act mandates that every federal agency "shall make [requested] records promptly available to any person" who makes a proper request. *See* 5 U.S.C. § 552(a)(3)(A). [1] Every agency must promulgate regulations "specifying the schedule of fees applicable to the processing of requests under" FOIA and "establishing procedures and guidelines for determining when such fees should be waived or reduced." *Id.* § 552(a)(4)(A)(i). FOIA mandates that agencies provide fee waivers "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government." *Id.* § 552(a)(4)(A)(iii).

FOIA requests filed with the Commission are initially reviewed by FOIA officers, and denials are reviewed on administrative appeal by the Commission's General Counsel. 16 C.F.R. §§ 1015.4, .7. After exhausting administrative remedies, requesters may challenge an agency's denial of records in district court. 5 U.S.C. § 552(a)(4)(B); *see also id.* § 552(a)(6)(A), (a)(6)(C)(i).

Pursuant to FOIA, the Commission adopted a rule ("the Final Rule") updating the fee schedule for CPSC FOIA requests in January 2021. *See* Fees for Production of Records, 86 Fed. Reg. 7499-01, 7499 (Jan. 29, 2021) (to be codified at 16 C.F.R. pt. 1015). The Final Rule increased the fees the Commission charges

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[1] FOIA provides certain exemptions from disclosure, none of which is relevant in this case. *See* 5 U.S.C. § 552(b).

to duplicate, search for, and review requested documents. *See id.* at 7500–01. The Final Rule took effect on March 1, 2021. *Id.* at 7499.

D.

This case challenges the Commission's structure when it promulgated the Final Rule and as it processes Plaintiffs' FOIA requests. Plaintiffs' claims are based on a series of FOIA requests they each filed with the Commission after the adoption of the Final Rule, as well as additional requests Plaintiffs expect to file in the future.

Requests 277 and 278. On March 1, 2021, Plaintiff By Two filed FOIA Request 277 seeking records related to Bassettbaby Drop-Side Cribs and Request 278 seeking records related to Angel Line Longwood Forest Drop-Side Cribs. Docket No. 14-1, Exs. E, H. By Two included public interest fee waiver requests with both FOIA requests. *Id.* The Commission's FOIA officer denied the requests for fee waivers. *Id.*, Exs. F, J. In interim response letters dated September 22, 2021—after Plaintiffs filed both their complaint and partial motion for summary judgment and two days before the Government filed its motion to dismiss—the Chief FOIA officer informed By Two that, although the Commission had "not granted a public interest fee waiver," the Commission would not assess FOIA-request fees since the Commission had failed to respond within the twenty-day deadline. Docket No. 1, Exs. 13, 14.

Request 324. On March 22, 2021, By Two filed a FOIA request for several documents regarding American Society for Testing and Materials ("ASTM") voluntary safety standards and requested a public

interest fee waiver. Docket No. 14-1, Ex. K. In response, the Commission did not provide any documents, but directed By Two to ASTM's website as a possible source of the requested documents. *Id.*, Ex. L. On administrative appeal, the Commission's General Counsel determined that the request was partially moot because the ASTM records could be obtained through third-party sources, but also partially remanded the request to determine whether the Commission possessed any records not otherwise publicly available and if "responsive records may be released." *Id.*, Ex. N at 3. In a December 2, 2021 letter, after the parties had completed briefing on the pending motions, the Commission provided By Two physical copies of responsive ASTM records. Docket No. 35-2, Ex. 2.

Request 330. On March 23, 2021, Plaintiff Consumers' Research filed a FOIA request for several ASTM documents and requested a public interest fee waiver. Docket No. 14-1, Ex. A. As with By Two's Request 324, the Commission provided no documents, but directed Consumers' Research to ASTM's website. *Id.*, Ex. B. On administrative appeal, the Commission's General Counsel remanded the request to the FOIA officers with instructions to search for the documents and "determine whether these records may be released." *Id.*, Ex. D at 7–8. The Commission sent Consumers' Research a letter on December 2 stating that it could not locate any responsive records. Docket No. 35-1, Ex. 1.

Recent Requests. Both Plaintiffs plead that they are frequent FOIA requesters and will "submit additional FOIA requests and requests for fee waivers to the Commission in the future." Docket No. 1 ¶¶ 10–11.

Between the filing of this lawsuit and Plaintiffs' motion for summary judgment, each Plaintiff has filed three additional FOIA requests. *See* Docket No. 14-1, Exs. R–T, O–Q. In response to the Government's motion to dismiss, Plaintiffs supplemented the record with seventeen pending requests filed between March 1, 2021, and October 18, 2021. *See* Docket No. 29-1, Exs. OO–EEE.

E.

Having exhausted their administrative appeals, Plaintiffs filed this suit on July 2, 2021. Docket No. 1. Plaintiffs allege informational injury and imminent financial injury due to the increased fee schedule to obtain documents responsive to pending requests "and to obtain the documents they will request in the future." *Id.* ¶ 52; *see also id.* ¶ 51. Plaintiffs also seek to have their FOIA requests processed by a Commission properly structured under Article II of the U.S. Constitution. *See id.* ¶ 54.

Specifically, Plaintiffs plead three claims for relief. Under Count I, Plaintiffs seek to have the Court declare that the Commission's structure violates Article II and the separation of powers by insulating the commissioners from presidential removal. *Id.* ¶ 57–63. Under Count II, Plaintiffs ask the Court to set aside the Final Rule as contrary to a constitutional right under the Administrative Procedure Act. *Id.* ¶ 64–67. Finally, under Count III, Plaintiffs ask the Court to enjoin the Commission from enforcing the Final Rule or withholding documents pursuant to § 552(a)(4)(B) of the Freedom of Information Act, on the grounds that the Commission's actions are unlawful under Article II. *Id.* ¶¶ 68–78.

Plaintiffs now move for partial summary judgment as to Count I. Docket No. 14. Plaintiffs argue that whether Article II prevents the removal restriction on the commissioners is a purely legal question fit for review without further factual development and is a prerequisite finding to the claims in Counts II and III. *Id.* at 28–29. The Government filed a combined response and motion to dismiss. Docket No. 24. The Government does not argue that any material fact dispute precludes partial summary judgment, but instead contends that Plaintiffs are wrong on the law. The Government also moves to dismiss all three Counts for lack of subject matter jurisdiction and for failure to state a claim. *Id.* The Court heard oral argument on the motions on December 15, 2021. Docket No. 38.

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317 323–25 (1986). Under Rule 12(b), dismissal is proper for "lack of subject-matter jurisdiction" and "failure to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(1), (6). For the reasons discussed below, the Court **GRANTS** Plaintiffs' motion for partial summary judgment and **DENIES** in part the Government's motion to dismiss.

II.

The Government argues that Plaintiffs lack standing because they "have not suffered any concrete

injury." Docket No. 24 at 10. The Government also contends that Plaintiffs' claims are moot because the Commission has produced some of the requested records. Docket No. 35 at 2. As explained below, the Court concludes that Plaintiffs have alleged several distinct injuries and that Plaintiffs' claims are not moot.

A.

"[A]n essential and unchanging part of the case-or-controversy requirement of Article III" is that the plaintiff has standing. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992). Article III standing requires a plaintiff to show that: (1) he "has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) "the injury is fairly traceable to the challenged action of the defendant"; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *El Paso Cnty. v. Trump*, 982 F.3d 332, 337 (5th Cir. 2020) (quoting *Friends of the Earth, Inc. v. Laidlaw Env't. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). "The party invoking federal jurisdiction bears the burden of establishing these elements," and "each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan*, 504 U.S. at 561. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice." *Id.*

Here, Plaintiffs allege several distinct injuries, each of which satisfies Article III standing.

First, Plaintiffs allege informational injuries resulting from the Commission's withholding of documents to which Plaintiffs claim entitlement under FOIA. Docket No. 1 ¶ 51. As the Government concedes, Plaintiffs had standing when they filed the complaint to challenge the initial decision to deny their ASTM requests. *See* Docket No. 24 at 17 n.7. Further, although the Commission has since produced some of those records, the Government concedes that it has yet to release documents responsive to Requests 277 and 278. *See* Docket No. 37 at 2. "The agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III." *Maloney v. Murphy*, 984 F.3d 50, 59 (D.C. Cir. 2020); *see also Ctr. for Biological Diversity, Inc. v. BP Am. Prod. Co.*, 704 F.3d 413, 429 (5th Cir. 2013) ("This is the kind of concrete informational injury that the statute was designed to redress.").

Second, Plaintiffs allege the increased fees under the Final Rule cause financial injury. Docket No. 1 ¶ 52. The Final Rule raised the fee for print duplications from $0.10 per page to $0.15 per page. Fees for Production of Records, 86 Fed. Reg. 7499-01, 7500 (Jan. 29, 2021) (to be codified at 16 C.F.R. pt. 1015); *see also* 16 C.F.R. § 1015.9(e)(1). And it increased search and review fees from rates between $3.00–$4.90 per quarter-hour to rates between $10.31–$15.11 per quarter-hour, to be adjusted annually. 86 Fed. Reg. at 7500–01; 16 C.F.R. § 1015.9(e)(2)–(3); *see also* UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, *FOIA Fees*, https://www.cpsc.gov/Newsroom/FOIA/FOIA-Fees. "[T]hat sort of pocketbook injury is a prototypical form

of injury in fact." *Collins v. Yellen*, 141 S. Ct. 1761, 1779 (2021); *see also McGowan v. Maryland*, 366 U.S. 420, 424, 430–31 (1961) (holding plaintiffs had standing to challenge a $5.00 fine). The Government claims "Plaintiffs did not plead any injury from the imposition of search and review fees." Docket No. 31 at 2 n.2 (citing Docket No. 1 ¶ 52). But the complaint cites 16 C.F.R. § 1015.9(e)(2) and (3) as injurious alongside § 1015.9(e)(1). Docket No. 1 ¶ 52; *see also id.* ¶ 31.

The Government also argues that Plaintiffs have not "been assessed increased fees under the Final Rule." Docket No. 24 at 11. But it is undisputed that at the time of filing, the Commission's FOIA officer had denied By Two's request for fee waivers and both Plaintiffs' requests for ASTM documents. Docket No. 1 ¶¶ 36, 39–43; *see also* Docket No. 24 at 17 n.7 (conceding standing to challenge initial decisions). The Commission's initial denial of fee waivers created an immediate threat of paying the fees. And the Commission's initial denial of the requests for ASTM documents forced Plaintiffs to choose between going without the information or paying third parties for the documents at higher rates. Docket No. 1 ¶¶ 36, 39–43; *see also, e.g.*, Docket No. 14-1, Ex. V. Thus, when Plaintiffs filed the complaint, their injury was "certainly impending." *See McCardell v. HUD*, 794 F.3d 510, 519 (5th Cir. 2015) (finding injury to be certainly impending when "the chain-of-events framework . . . involves few[] steps and no 'unfounded assumptions.'"); *Loa-Herrera v. Trominski*, 231 F.3d 984, 987 (5th Cir. 2000) ("In identifying an injury that

confers standing, courts look exclusively to the time of filing.").[2]

Plaintiffs also repeatedly allege they suffer an ongoing injury by facing future liability for the increased FOIA fees. The complaint is replete with details alleging that Plaintiffs have an established history of filing FOIA requests with the Commission and have specific plans to do so again in the future. *See, e.g.*, Docket No. 1 ¶¶ 10–11, 52 (alleging "imminent financial injury" from the increased cost "to obtain the documents they will request in the future"). Indeed, as the summary judgment record indicates, Plaintiffs have filed additional FOIA requests with the Commission since this suit began. *See* Docket No. 14-1, Exs. O–T. Far from being "'some day' intentions," Plaintiffs' habitually engaging in the regulated conduct at issue in this case demonstrates the concrete plans necessary to establish an injury in fact. *See Ghedi v. Mayorkas*, 16 F.4th 456, 465 (5th Cir. 2021) (quoting *Lujan*, 504 U.S. at 564).

Third, Plaintiffs allege an ongoing constitutional injury by pleading that they remain subject to regulations promulgated by an unconstitutionally structured agency. Docket No. 29 at 7–8; Docket No. 1 ¶¶ 1–3, 10–12, 26–34. The Supreme Court has held that parties alleging such injury have standing to

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[2] The Government's argument that Plaintiffs should be required to pay the increased fees before challenging the legality of the Final Rule, Docket No. 31 at 4, rests on a line of cases evaluating *ripeness* for purposes of a FOIA policy-or-practice challenge. *See, e.g.*, *Media Access Project v. F.C.C.*, 883 F.2d 1063, 1070 (D.C. Cir. 1989) (holding challenge "not ripe for review."). The Government's motion to dismiss nowhere argues that this case is unripe for judicial review. *See* Docket No. 24 at 10–11.

challenge removal restrictions "because when such a provision violates the separation of powers it inflicts a 'here-and-now' injury on affected third parties that can be remedied by a court." *Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

Further, "'there is ordinarily little question' that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated." *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (quoting *Lujan*, 504 U.S. 561–62). "Whether someone is in fact an object of a regulation is a flexible inquiry rooted in common sense." *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 265 (5th Cir. 2015). Here, in promulgating the Final Rule, the Commission acted directly on Plaintiffs' statutory entitlement to obtain information and claim fee waivers now and in the future. *See* 16 C.F.R. § 1015.9(e); *see also id.* § 1015.9(g)(1)(iv). Subjecting Plaintiffs to such regulation in the alleged absence of Article II oversight directly injures Plaintiffs. *See Cochran v. SEC*, 20 F.4th 194, 209 (5th Cir. 2021) (recognizing a standalone injury creating a right to seek "redress for the injury of having to appear before" a constitutionally suspect agency).

The Government's myriad objections to this constitutional injury ignore the fact that Plaintiffs allege they are frequently subject to the Final Rule. A regulated party may object to the existence of a regulation that may otherwise be a generalized grievance. *See Contender Farms*, 779 F.3d at 264–65 (noting that subjects of regulations generally have standing to challenge the rule or statute). Further, the

fact that Plaintiffs choose to subject themselves to FOIA regulations is immaterial because, as explained above, FOIA requests are a common and habitual part of Plaintiffs' business models. *See id.* at 266 ("[Plaintiffs] suggest that they could neither earn a living nor compete recreationally without participating in these events."); *cf. Cochran*, 20 F.4th at 209–10 ("Cochran challenges the entire legitimacy of her proceedings, not simply the cost and annoyance."). Accordingly, Plaintiffs have alleged a constitutional injury from the threat of being subject to a regulatory scheme and governmental action lacking Article II oversight. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 513 (2010) (recognizing petitioner's right to be regulated only by "a constitutional agency accountable to the Executive").

* * *

In sum, the Court finds that Plaintiffs have pleaded a concrete and imminent injury in fact and that the summary judgment record establishes that this injury is ongoing. Further, Plaintiffs have demonstrated the injuries caused by processing FOIA requests under the Final Rule are traceable to the Commission's conduct and that the Court can redress these injuries with a declaration that the removal restriction is unconstitutional or by setting aside the Final Rule. *See* Docket No. 1 ¶¶ 53–54; Docket No. 29 at 8–10.[3] Plaintiffs therefore have standing.

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[3] The Government also argues that, to obtain relief, Plaintiffs must show that the Commission's actions are traceable directly to the removal restriction in § 2053(a). *See* Docket No. 24 at 11–17. But the Government correctly frames this requirement as

B.

In notices filed post briefing, the Government contends that its release of records responsive to Requests 324 and 330 moots the case. *See* Docket No. 35.[4] Typically, a FOIA request becomes moot once it is resolved. *Payne Enterprises, Inc. v. United States*, 837 F.2d 486, 490–91 (D.C. Cir. 1988). Here, however, Plaintiffs' claims are not limited to Requests 324 and 330. Plaintiffs also challenge the Commission's Final Rule and plead ongoing injuries based on pending and future FOIA requests. *See* Docket No. 1 ¶¶ 10–11, 52. The release of specific records therefore does not moot the case. *See Payne Enterprises*, 837 F.2d at 491 (holding that a release of documents "will not moot a

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implicating the Plaintiffs' ability to state a claim on which relief may be granted, not the traceability element of standing. *See Collins*, 141 S. Ct. at 1788 n.24 ("What we said about standing in *Seila Law* should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction."). To show traceability for purposes of standing, "the relevant inquiry is whether the plaintiffs' injury can be traced to 'allegedly unlawful conduct' of the defendant, not to the provision of law that is challenged." *Id.* at 1779 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). Plaintiffs easily meet this requirement, and the Court addresses below whether Plaintiffs have stated a claim to which they are entitled to relief.

[4] The Government does not claim the Commission has produced documents responsive to Requests 277 and 278, but merely that the Commission has approved the requests and that the proper course is to allow the Commission more time to review the records. *See* Docket No. 37 at 2. Far from mooting the case, this development would at most justify an amended scheduling order. *See, e.g.*, *Huddleston v. FBI*, 2021 WL 327510, at *3 (E.D. Tex. Feb. 1, 2021) (denying motion to stay but extending scheduling order deadlines).

claim that an agency *policy or practice* will impair the party's lawful access to information in the future").

III.

Plaintiffs contend that the removal restriction in 15 U.S.C. § 2053(a) is unconstitutional because the commissioners are executive officers wielding substantial executive power. Docket No. 14 at 11–26. The Government contends that the Supreme Court has "uniformly affirmed" that removal restrictions on multimember agencies like the Commission are constitutional. *See* Docket No. 24 at 17.

As explained below, the Court holds that the restriction on the President's power to remove the commissioners violates Article II.

A.

Article II states: "The executive Power shall be vested in a President," who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; *id.*, § 3. Unlike Article I, which vests the legislative power in a multibody Congress, Article II vests in a single President not "*some of* the executive power, but *all of* the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting); *see also Seila Law*, 140 S. Ct. at 2191 ("[T]he 'executive Power'—all of it—is 'vested in a President.'"). Of course, "it would be impossible for one man to perform all the great business of the State," so "the Constitution assumes" the President will delegate much of his responsibility to officers under his command. *Seila Law*, 140 S. Ct. at 2197 (cleaned up) (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

These officers "must remain accountable to the President, whose authority they wield." *Id.* As the first Congress recognized: "If any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Id.* (cleaned up) (quoting 1 Annals of Cong. 463 (1789)). "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund*, 561 U.S. at 483. Indeed, without the power to remove inferior officers in whom the President has lost faith, it would be "impossible for the President to take care that the laws be faithfully executed." *Seila Law*, 140 S. Ct. at 2198 (cleaned up) (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)).

Limiting the President's removal power insulates executive officers from accountability—both to the President and the governed. If the removal power is restricted, the President "can neither ensure that the laws are faithfully executed, nor be held responsible for [executive officers'] breach of faith." *Free Enter. Fund*, 561 U.S. at 496. Such officers "would be immune from Presidential oversight, even as they exercised power in the people's name." *Id.* at 497. They would also be unaccountable to the people, who "do not vote for the 'Officers of the United States.'" *Id.* at 497–98 (quoting U.S. CONST. art. II, § 2, cl. 2). "That is why the Framers sought to ensure that 'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" *Id.*

at 498 (quoting 1 Annals of Cong., at 499 (J. Madison)); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2413 (2019) (opinion of Kagan, J.) ("[A]gencies . . . have political accountability, because they are subject to the supervision of the President, who in turn answers to the public.").

This fundamental first principle is as critical today as it was in 1789. The Supreme Court has rejected the argument that "the times demand" limiting the President's removal power "in the interest of enhancing independence from politics in regulatory bodies." *See Seila Law*, 140 S. Ct. at 2206 n.11; *id.* at 2226 (Kagan, J., dissenting in part and concurring in judgment with respect to severability). "If anything, the growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, *heightens* the concern that it may slip from the Executive's control, and thus from that of the people." *Id.* at 2206 n.11 (majority opinion) (cleaned up) (quoting *Free Enter. Fund*, 561 U.S. at 499). Thus, the "general rule" is that "the President possesses 'the authority to remove those who assist him in carrying out his duties.'" *Id.* at 2198 (quoting *Free Enter. Fund*, 561 U.S. at 513–14).

Indeed, "the President's removal power is the rule, not the exception." *Id.* at 2206. And the exceptions are narrow and limited—with the Supreme Court recognizing only two. *Id.* at 2199–200. One, stated in *Morrison v. Olson*, 489 U.S. 654 (1988), allows removal restrictions on "inferior officers with limited duties and no policymaking or administrative authority." *Id.* The other, recognized in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), allows removal restrictions on members of "multimember expert

agencies that do not wield substantial executive power." *Id.* "These two exceptions . . . 'represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President's removal power.'" *Id.* (quoting *PHH Corp. v. CFBP*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

The parties agree that the *Morrison* exception is inapplicable. Here, the commissioners shielded from removal by 15 U.S.C. § 2053(a) are principal, rather than inferior, officers under the Appointments Clause, and hold significant policymaking and administrative authority. *See Free Enter. Fund*, 561 U.S. at 510–11 (citing *Freytag v. Comm'r*, 501 U.S. 868, 915 (1991) (Scalia, J., concurring in part and concurring in judgment)); *see also, e.g.*, 15 U.S.C. § 2051(b).

This case therefore turns on the *Humphrey's Executor* exception.

B.

Plaintiffs argue that *Humphrey's Executor* does not apply here because the Commission exercises substantial executive power, unlike the agency in that case. Docket No. 14 at 20. The Government counters that the exception applies to any multimember, nonpartisan structure regardless of function and power. Docket No. 24 at 18–22. Based on nearly a century of precedent, the Court holds that the *Humphrey's Executor* exception does not apply to the Commission.

1.

Humphrey's Executor involved the Federal Trade Commission ("FTC"), a commission of five members appointed by the President with the advice and

consent of the Senate. 295 U.S. at 619–20. By statute, no more than three of the commissioners could be members of the same political party. *See id*. And each member's term was staggered to ensure new vacancies for the President to fill each presidential term. *See id*. at 620. Congress created the commission as a "body of experts who shall gain experience by length of service; a body which shall be independent of executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Id*. at 625–26. Accordingly, the President could remove commissioners only "for inefficiency, neglect of duty, or malfeasance in office." *Id*. at 620.

The Supreme Court upheld the removal restriction. The Court reasoned that the FTC "is an administrative body created by Congress to carry into effect legislative policies embodied in the statute . . . and to perform other specified duties as a legislative or as a judicial aid." *Id*. at 628. "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive." *Id*. In performing its statutory duties, the FTC "acts in part quasi legislatively and quasi judicially." *Id*. The commission "acts as a legislative agency" when it investigates and reports to Congress, and "it acts as an agency of the judiciary" when it serves as a master in chancery under court procedures. *Id*.

The Court also distinguished the FTC from the postmaster at issue in *Myers v. United States*, 272 U.S. 52 (1926), in which the Court had held that the President's removal power could not be restricted. *See Humphrey's Executor*, 295 at 627–28. The postmaster in *Myers* was "an executive officer restricted to the

performance of executive functions," "charged with no duty at all related to either the legislative or judicial power"—and was therefore "so essentially unlike the [FTC]" that *Myers* was inapplicable. *Id.* at 627. "[S]uch an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive." *Id.* The FTC, in contrast, was "created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Id.* at 630.

Since 1935, the Supreme Court has upheld removal restrictions under the *Humphrey's Executor* exception only once—for the almost purely adjudicatory War Claims Commission established after the Second World War. *See Wiener v. United States*, 357 U.S. 349, 354–55 (1958) ("The Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof."). Instead, the Court has repeatedly refused to apply the exception to various bodies exercising executive power.

In *Free Enterprise Fund*, the Court held that *Humphrey's Executor* could not save restrictions on removing officers who "determine[] the policy and enforce[] the laws of the United States." 561 U.S. at 484. *Free Enterprise Fund* involved the Public Company Accounting Oversight Board, a board of five members appointed to staggered five-year terms by the Securities and Exchange Commission. *See id.* Congress "created the Board as a private 'nonprofit corporation,'" empowered it to enforce securities laws, and placed it under the SEC's oversight. *Id.* at 484–86. By statute, the SEC could not "remove Board

members at will, but only 'for good cause shown.'" *Id.* at 486. The Court held that this "arrangement [was] contrary to Article II's vesting of the executive power in the President." *Id.* at 496. Unlike *Humphrey's Executor*, which did not involve an executive officer, the Board members were "Officers of the United States" executing significant executive authority. *See id.* at 486, 493. And the governing statute "not only protects Board members from removal except for good cause, but [it] withdraws from the President any decision on whether that good cause exists." *Id.* at 495. "That [removal] decision is vested instead in . . . the [SEC] Commissioners—none of whom is subject to the President's direct control." *Id.* at 496.

A decade later, the Court in *Seila Law* again refused to extend the *Humphrey's Executor* exception—this time to "an independent agency led by a single Director and vested with significant executive power." 140 S. Ct. at 2201. The agency was the Consumer Financial Protection Bureau, a regulatory agency tasked with implementing and enforcing consumer protection laws, conducting investigations, prosecuting civil actions in federal court, and exercising adjudicatory authority. *See id.* at 2193. Rather than creating "a traditional independent agency headed by a multimember board or commission," however, Congress placed the Bureau under the leadership of a single Director. *Id.* The Director is appointed by the President for a term of five years but may be removed only for "inefficiency, neglect of duty, or malfeasance in office." *Id.*

In holding this removal restriction unconstitutional, the Court distinguished the Bureau from the FTC in *Humphrey's Executor*. Unlike the FTC, the Bureau "is

led by a single Director who cannot be described as a 'body of experts' and cannot be considered 'non-partisan.'" *Id.* at 2200. FTC commissioners, moreover, served staggered terms "prevent[ing] complete turnovers in agency leadership," while the Director's five-year term would "guarantee abrupt shifts in agency leadership and with it the loss of accumulated expertise." *Id.* Further, the Director "is hardly a mere legislative or judicial aid," but rather, "possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy." *Id.* The Director may "unilaterally issue final decisions . . . in administrative adjudications" and exercises "a quintessentially executive power"—enforcing monetary penalties—that was "not considered in *Humphrey's Executor*." *Id.* Lingering on this last point, the Court emphasized that whether the 1935 FTC possessed other "latent powers" was irrelevant: "what matters is the set of powers the Court considered as the basis for its decision." *Id.* at 2200 n.4.

Finally, last year the Court held in *Collins v. Yellen*, that *Humphrey's Executor* did not save a removal restriction on the Director of the Federal Housing Finance Agency ("FHFA"). 141 S. Ct. at 1770. "*Seila Law* is all but dispositive." *Id.* at 1783. Like the Bureau in *Seila Law*, the FHFA is tasked with "broad investigative and enforcement authority" and may hold hearings, issue subpoenas, remove or suspend corporate officers, issue cease-and-desist orders, and bring civil actions in federal court. *Id.* at 1772. Also like the Bureau, the FHFA "is an agency led by a single Director," and the statute "restricts the

President's removal power." *Id*. at 1784. The removal restriction was thus unconstitutional, even if the FHFA exercised less executive power than the Director of the Bureau in *Seila Law*. *See id.* at 1785 ("Courts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies, and we do not think that the constitutionality of removal restrictions hinges on such an inquiry.").

In sum, the Supreme Court has applied the *Humphrey's Executor* exception only twice—in *Humphrey's Executor* and *Wiener*, where the multimember commissions did not exercise substantial executive power.

2.

Turning to this case, the Court concludes that the Commission exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception.

Similar to the Bureau in *Seila Law*, the Commission "may promulgate consumer product safety standards" affecting a wide range of consumer products on the market. 15 U.S.C. § 2056(a); *Seila Law*, 140 S. Ct. at 2200 (noting the Bureau's "authority to promulgate binding rules fleshing out 19 federal statutes."). And just as the Bureau had the power to regulate certain practices across a segment of the U.S. economy, the Commission has the authority to "promulgate a rule" banning products nationwide as "hazardous." 15 U.S.C. § 2057; *see also* 140 S. Ct. at 2200 (noting a broad power to issue "prohibition on unfair and deceptive practices in a major segment of the U.S. economy"). At oral argument, the Government

conceded this authority was an executive power. *See* Docket No. 41 at 55:10–13.

The Commission also holds the power to "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *See* 140 S. Ct. at 2200. Indeed, the Commission "by one or more of its members" may "conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." 15 U.S.C. § 2076(a); *see also* 16 C.F.R. § 1025.1 (establishing rules for adjudication). And as the Supreme Court said in *Seila Law*, agency adjudication in this form "*must be*" an exercise of executive authority. 140 S. Ct. at 2198 n.2 (quoting *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013)).

Finally, the Commission holds the "quintessentially executive power not considered in *Humphrey's Executor*" to file suit in federal court "to seek daunting monetary penalties against private parties" as a means of enforcement. *Seila Law*, 140 S. Ct. at 2200; *see also* 15 U.S.C. § 2076(b)(7)(A) (authorizing the Commission to initiate and prosecute civil actions). Each violation of the Commission's rules carries "a civil penalty not to exceed $100,000," up to a total of $15 million for all related violations, with the ability to adjust for inflation. 15 U.S.C. § 2069(a)(1); (a)(3)(A). The Commission may also bring actions for injunctive enforcement in district court. *Id.* § 2071(a). And the Commission can initiate and prosecute criminal actions "with the concurrence of the Attorney General." *Id.* § 2076(b)(7)(B). Finally, the Commission has the power to issue subpoenas, *see id.* § 2076(b)(3), an additional executive power recognized in *Collins*. *See* 141 S. Ct. at 1786.

The Government does not dispute that these are executive powers. Rather, the Government argues that the 1935 FTC may have exercised similar powers. *See* Docket No. 24 at 24–25. This argument was raised by the dissenting Justices in *Seila Law* and rejected by a majority of the Court. *See* 140 U.S. at 2200 n.4; *id.* at 2239 n.10 (Kagan, J., dissenting in part and concurring in judgment with respect to severability). Here, the Court must consider "the set of powers the [Supreme] Court considered as the basis for its decision" in *Humphrey's Executor*, and "not any latent powers that the agency may have had not alluded to by the Court." *Id.* at 2200 n.4 (majority opinion).

The Court thus concludes that the Commission exercises substantial executive power, and *Humphrey's Executor* does not apply.

3.

The Government argues that the removal restriction in § 2053(a) is nonetheless constitutional because the Commission's "structure is in all material respects identical to the FTC's structure the Supreme Court unanimously upheld in *Humphrey's Executor*." Docket No. 24 at 18. The Government contends that this "structure"—with five members serving staggered seven-year terms—is a "Congressionally crafted and constitutionally permissible" expert agency whose officers may be removed by the President only for good cause. *Id*. at 19. The Government, however, ignores a significant basis of the Supreme Court's holding in *Humphrey's Executor*—that the FTC exercised "no part of the executive power." 295 U.S. at 628.

To be sure, *Humphrey's Executor* discussed the multimember structure of the FTC in addressing the

removal restriction. 295 U.S. at 624–26. But the Court later explained in *Seila Law* that identifying these "organizational features . . . helped explain its characterization of the FTC as non-executive." 140 S. Ct. at 2198; *see id.* at 2199 (noting that these features demonstrated that the FTC's duties "were neither political nor executive" (quoting *Humphrey's Executor*, 295 U.S. at 624)). The fact that an agency is structured as a nonpartisan "body of experts" is a necessary *indication* that the agency does not wield executive power. *See Humphrey's Executor*, 295 U.S. at 628. But nowhere did the Court state that all multimember commissions with similar attributes may be protected from presidential removal—regardless of their authority and function. To the contrary, the Court expressly left "for future consideration and determination" whether removal restrictions could be placed on officers who occupied the "field of doubt" between "purely executive officers" and those who filled "an office such as that here involved." *Id.* at 632; *accord Seila Law*, 140 S. Ct. at 2199 ("The Court acknowledged that between purely executive officers on the one hand, and officers that closely resembled the FTC Commissioners on the other, there existed 'a field of doubt' that the Court left 'for future consideration.'").

The Government also attempts to distinguish *Seila Law* and *Collins* as cases involving agencies "led by a single Director," not multimember commissions. Docket No. 24 at 22–23 (quoting *Collins*, 141 S. Ct. at 1784). According to the Government, the Supreme Court in *Seila Law* indicated that Congress could have imposed the removal restriction in that case simply by "converting the [Bureau] into a multimember agency."

Id. at 21 (emphasis removed) (quoting *Seila Law*, 140 S. Ct. at 2211). But that is not what the Court said. Rather, in addressing severability, the Court noted in dictum that one remedy to the removal-restriction problem "may be" "converting the CFPB into a multimember agency." *Seila Law*, 140 S. Ct. at 2211. The Court did not hold that Congress could create multimember agencies wielding substantial executive power and then restrict the President's power to remove their members. *See id*.

Rather, in each of the removal cases discussed above, the Supreme Court relied on first principles. Article II vests the executive power in the President, who must "take Care that the Laws be faithfully executed." *See, e.g.*, *Humphrey's Executor*, 295 U.S. at 627 (citing the "illimitable power of removal by the Chief Executive."); *Free Enter. Fund*, 561 U.S. at 492 (citing the Take Care Clause); *Seila Law*, 140 S. Ct. at 2197 (same). The President cannot effectively fulfill that duty when Congress restricts his removal power. *Myers*, 272 U.S. at 164 ("[T]o hold otherwise would make it impossible for the President, in case of political or other difference with the Senate or Congress, to take care that the laws be faithfully executed."); *Free Enter. Fund*, 561 U.S. at 492 (same); *Seila Law*, 140 S. Ct. at 2197 (same). Thus, an unrestricted removal power is "the general rule." *Seila Law*, 140 S. Ct. at 2198; *see also Free Enter. Fund,* 561 U.S. at 513–14. And the *Humphrey's Executor* exception applies only to multimember commissions that do not exercise substantial executive authority—and thus do not interfere with the President's duty to "take care that the laws be faithfully executed." *See*

Humphrey's Executor, 295 U.S. at 628; *Wiener*, 357 U.S. at 354–55.

The Government also argues that the Commission and other "similarly structured agencies …. are longstanding and accepted pillars of American governance." Docket No. 24 at 17. But Article II of the Constitution demands that agencies exercising executive authority be fully accountable to the President, and the Constitution remains the supreme law of the land. *See* U.S. CONST. art. II, § 1, cl. 1; *id.*, § 3; *id.* art. VI § 2; *see also I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."). Indeed, as the Supreme Court explained in rejecting a similar argument, "[w]hile no one doubts Congress's power to create a vast and varied federal bureaucracy, the expansion of that bureaucracy into new territories that the Framers could scarcely have imagined only sharpens our duty to ensure that the Executive Branch is overseen by a President accountable to the people." *Seila Law*, 140 S. Ct. at 2207 (cleaned up) (quoting *Free Enter. Fund*, 561 U.S. at 499).

* * *

"The President's removal power is the rule, not the exception." *Seila Law*, 140 S. Ct. at 2206; *see also Free Enter. Fund*, 561 U.S. at 483; *Myers*, 272 U.S. at 164. The Court may uphold a restriction on that removal power in only two limited situations. *See Seila Law*, 140 S. Ct. at 2199–200; *see also Morrison*, 487 U.S. at 691; *Humphrey's Executor*, 295 U.S. at 632. Neither is present here. Accordingly, the Court holds that the

restriction on presidential removal established by 15 U.S.C. § 2053(a) violates Article II of the U.S. Constitution.

IV.

The Court now turns to the remedy. Plaintiffs seek a declaratory judgment that the removal restriction in 15 U.S.C. § 2053(a) violates Article II of the Constitution. Docket No. 1, Prayer for Relief ¶¶ 1–2; *see also* Docket No. 14 at 29. The Government argues that Plaintiffs are not entitled to this relief because (1) they cannot show that the removal restriction caused them harm and (2) a declaratory judgment is improper here. Docket No. 24 at 11–17, 28–32. As explained below, the Government's arguments fail.

A.

Citing *Collins v. Yellen*, the Government contends that Plaintiffs may not "obtain relief for their alleged injuries" unless they identify a "plausible nexus" between the removal restriction in § 2053(a) and the decisions regarding their FOIA requests and the adoption of the Final Rule. *See* Docket No. 24 at 11–13 (citing *Collins*, 141 S. Ct. at 1789). But *Collins* applies to requests for retrospective relief, not the purely prospective relief Plaintiffs seek in Count I here.

In *Collins*, plaintiff shareholders of Fannie Mae and Freddie Mac sought to rescind a stock purchasing agreement (known as the third amendment) between the Federal Housing Finance Agency ("FHFA") and the Department of Treasury. 141 S. Ct. at 1772–75. The shareholders argued that recission of the third amendment would also require the disgorgement of dividend payments worth billions of dollars. *Id.* By the time the case reached the Supreme Court, however,

the third amendment had been repealed. *Id.* at 1779–80. "And because the shareholders no longer ha[d] a live claim for prospective relief, the only remaining remedial question concern[ed] retrospective relief." *Id.* at 1787 (citation omitted). The Court held that the shareholders were not entitled to such retrospective relief without demonstrating that the removal restriction "inflict[ed] compensable harm"—by, for example, preventing the President from removing a Director who supervised the implementation of the third amendment. *Id.* at 1787–89.[5]

Collins does not address requests for prospective relief. Instead, *Free Enterprise Fund* governs. In that case, the Supreme Court squarely held that plaintiffs challenging removal restrictions could obtain declaratory relief *without* demonstrating the restrictions inflicted "compensable harm" or identifying a "plausible nexus" between the restrictions and the challenged action. *See* 561 U.S. at 513; *see also id.* at 491 n.2. The Court stated: "[Petitioners] are entitled to declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." *Id.* at 513. This type of equitable relief "has long been recognized as the proper means for preventing entities from acting

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[5] The Supreme Court remanded *Collins* to the Fifth Circuit to determine if the shareholders suffered such harm. The Fifth Circuit, in turn, remanded to the district court "for further proceedings consistent with the Supreme Court's decision." *Collins v. Yellen*, No. 17-20364, 2022 WL 628645, at *1 (5th Cir. Mar. 4, 2022).

unconstitutionally." *Id.* at 491 n.2 (quoting *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001)).

Indeed, the Fifth Circuit held in *Cochran v. SEC* that *Collins* does not apply to plaintiffs seeking prospective relief. *See* 20 F.4th at 210 n.16 ("*Collins* does not impact our conclusion in this case because Cochran does not seek to 'void' the acts of any SEC official. Rather, she seeks an administrative adjudication untainted by separation-of-powers violations.").

Accordingly, the Court denies the Government's motion to dismiss the claims seeking prospective relief.[6]

B.

Next, the Government argues that Plaintiffs are not entitled to a declaratory judgment because they lack a "private cause of action" and because the "requested declaratory relief would not remedy [Plaintiffs'] injuries." Docket No. 24 at 28–32. The Court disagrees on both points.

1.

The Declaratory Judgment Act provides that "any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking

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[6] The Government moves to dismiss Plaintiffs' entire complaint, including Counts II and III, which also seek retrospective relief. *See* Docket No. 24 at 11. The Court declines to address this argument at this time because (1) Plaintiffs have moved for partial summary judgment only on Count I and the request for prospective declaratory relief and (2) the Fifth Circuit has yet to clarify the requirements for obtaining retrospective relief post-*Collins*.

such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). Of course, "the law makes clear that—although the Declaratory Judgment Act provides a *remedy* different from an injunction—it does not provide an additional cause of action with respect to the underlying claim." *Okpalobi v. Foster*, 244 F.3d 405, 423 n.31 (5th Cir. 2001) (en banc). Here, Plaintiffs seek a declaratory judgment on Count I, which alleges "an implied private right of action directly under the Constitution to challenge governmental action under" *Free Enterprise Fund* and separation-of-powers principles. Docket No. 1, Count I, ¶ 57 (quoting *Free Enter. Fund*, 561 U.S. at 491 n.2).

As noted above, *Free Enterprise Fund* held that plaintiffs challenging the removal restriction on Public Company Accounting Oversight Board members were entitled to a declaratory judgment to ensure that "the reporting requirements and auditing standards to which they are subject will be enforced only by a constitutional agency accountable to the Executive." 561 U.S. at 513. There, as here, the Government argued that the plaintiffs lacked a private right of action to challenge a removal restriction under "the Appointments Clause or separation-of-powers principles." *Id.* at 491 n.2. The Supreme Court rejected the argument, holding that it has long recognized a right of action to challenge unconstitutional governmental action and that there was "no reason" why "an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim." *Id.*

The Government argues that the right of action recognized in *Free Enterprise Fund* is available only to plaintiffs facing a civil or criminal enforcement

action.[7] Docket No. 24 at 29–30. But *Free Enterprise Fund* is not so limited. Rather, the Court held that the right of action extends generally to those challenging "governmental action under . . . separation-of-powers principles." 561 U.S. at 491 n.2; *see also Collins v. Mnuchin*, 938 F.3d 553, 587 & n.227 (5th Cir. 2019 (en banc) ("A plaintiff with Article III standing can maintain a direct claim against government action that violates the separation of powers.") (citing *Free Enter. Fund*, 561 U.S. at 487–91), *aff'd in part and vacated and rev'd in part on other grounds*, 141 S. Ct. 1761; *LaRoque v. Holder*, 650 F.3d 777, 792–93 (D.C. Cir. 2011) (holding that a plaintiff not directly subject to an enforcement proceeding could bring a constitutional challenge under *Free Enterprise Fund*). And here, Plaintiffs are challenging the Commission's actions implementing and enforcing FOIA and processing their FOIA requests—under "Article II of the U.S. Constitution" and "Separation of Powers." Docket No. 1, Count I.

Article II, moreover, does not distinguish between "enforcement" authority and other types of executive

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[7] The Government also argues that the Court should be "hesitant" to find new implied causes of action, especially when the APA and FOIA provide a remedy for Plaintiffs' injuries. Docket No. 24 at 30. But this cause of action is not new. *See Free Enter. Fund*, 561 U.S. at 491 n.2; *see also Green Valley Special Util. Dist. v. City of Schertz*, 969 F.3d 460, 496–97 (5th Cir. 2020) (Oldham, J., concurring) ("[I]n more recent years, the Court has reaffirmed this cause of action as accepted fact."); *cf. Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) ("These concerns [about creating a cause of action] are even more pronounced when the judicial inquiry comes in the context of a claim seeking money damages rather than a claim seeking injunctive or other equitable relief.").

power exercised by the President. *See* U.S. CONST. art. II, § 1, cl. 1. Rather, "[i]nterpreting a law enacted by Congress to implement the legislative mandate"—similar to the power challenged here—"is the very essence of 'execution' of the law." *Bowsher*, 478 U.S. at 732–33. All forms of executive power require presidential oversight, and in all cases, unaccountable executive power unlawfully infringes on the rights of those subject to executive action. *See Collins*, 141 S. Ct. at 1784. As the Supreme Court held in *Collins*, "[t]hese purposes [for presidential removal] are implicated whenever an agency does important work, and nothing about the size or role of the FHFA convinces us that its Director should be treated differently from the Director of the CFPB." *Id.*

Finally, the type of harm faced by the plaintiffs in *Free Enterprise Fund* is no different from the type of harm alleged by Plaintiffs here. Both groups of plaintiffs are subject to governmental action by executive officials who are not properly accountable to the President. *See Free Enter. Fund*, 561 U.S. at 485. In *Free Enterprise Fund*, the plaintiffs were firms whose right to operate an accounting business was subject to the Board's regulations and decisions governing the accounting industry. *See id.* at 488. Plaintiffs here are organizations whose right to obtain information through FOIA—a right essential to their operations—is subject to the Commission's regulations and decisions governing FOIA requests. *See* Docket No. 14-1, Exs. O–T.[8] Both groups have a right to

[8] Here, since Plaintiffs rely "'heavily and frequently on FOIA' to conduct work that is 'essential to the performance of certain of their primary institutional activities,'" the Commission's FOIA regulations affect the Plaintiffs' "'daily conduct and decision-

ensure that these regulations and decisions are issued by officials who answer to the President. *See Free Enter. Fund*, 561 U.S. at 513; *see also Collins*, 141 S. Ct. at 1780; *cf. Bond v. United States*, 564 U.S. 211, 223 (2011) ("If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object.").

Accordingly, Plaintiffs have alleged a private right of action entitling them to declaratory relief.

2.

The Government also argues that declaratory relief "would not remedy [Plaintiffs'] injuries" because it would not "vacate the Final Rule" or "undo any decision of the FOIA Office." Docket No. 24 at 31. But Plaintiffs seek prospective relief from the Commission's ongoing processing of their FOIA requests without proper presidential oversight. *See* Docket No. 1 ¶ 54; *see also supra* Sections II.A, IV.B.1. A declaration stating that the removal restriction in 15 U.S.C. § 2053(a) is unconstitutional would "ensure that [the Commission's actions] to which [Plaintiffs] are subject will be enforced only by a constitutional

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making.'" *See Payne Enterprises*, 837 F.2d at 494 (quoting *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 93 (D.C. Cir. 1986)). This is significant because the right to information under FOIA is a statutory right of the Plaintiffs. *See Maloney*, 984 F.3d at 59 ("The agency's failure to provide information to which the Requesters are statutorily entitled is a quintessential form of concrete and particularized injury within the meaning of Article III."); *Ctr. for Biological Diversity, Inc.*, 704 F.3d at 429–30 (same). Thus, by regulating and processing FOIA requests, the Commission's regulatory power is acting directly on the rights of the Plaintiffs without Article II oversight.

agency accountable to the Executive." *Free Enter. Fund*, 561 U.S. at 513. The declaration would clarify the President's power under Article II to remove commissioners at will. *See id.* And it would remove any commissioner's self-perceived job security that might cause him to resist presidential oversight. *See Bowsher*, 478 U.S. at 728 n.5 (noting that officers' "presumed desire to avoid removal" creates "subservience" to a branch of government (quoting *Synar v. United States*, 626 F. Supp. 1374, 1392 (D.D.C. 1986) (per curiam))).

* * *

The Court therefore holds that Plaintiffs are entitled to a declaratory judgment that the removal restriction in 15 U.S.C. § 2053(a) violates Article II of the Constitution.

V.

Plaintiffs request a partial final judgment on the declaratory relief sought in Count I to "tee up the constitutional removal question for immediate appeal." Docket No. 14 at 26.

Federal Rule of Civil Procedure 54(b) provides that, "[w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." FED. R. CIV. P. 54(b). Thus, the Court must determine (1) whether there is "more than one claim for relief" and (2) whether there is any "just reason for delay." *Samaad v. City of Dallas*,

940 F.2d 925, 930 (5th Cir. 1991), *abrogated on other grounds by Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 728 (2010).

The parties do not dispute that Count I is an independent claim and that declaring the removal restriction unconstitutional is an "ultimate disposition" of that claim. *Briargrove Shopping Ctr. Joint Venture v. Pilgrim Enters., Inc.*, 170 F.3d 536, 539 (5th Cir. 1999); *Texas v. United States*, 352 F. Supp. 3d 665, 671 (N.D. Tex. 2018), *aff'd in part, vacated in part on other grounds, remanded*, 945 F.3d 355 (5th Cir. 2019), *as revised* (Dec. 20, 2019), *as revised* (Jan. 9, 2020), *rev'd and remanded sub nom. California v. Texas*, 141 S. Ct. 2104 (2021). Indeed, Count I seeks declaratory relief under Article II of the Constitution, whereas Counts II and III seek to set aside the Final Rule and the FOIA determinations under the APA and FOIA, respectively. And the declaratory judgment sought by Plaintiffs on Count I fully remedies their ongoing constitutional injury. *See Free Enter. Fund*, 561 U.S. at 513.

There is also no just reason for delay. In making that determination, the Court considers both "judicial administrative interests as well as the equities involved." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980). This includes balancing the "danger of hardship or injustice through delay, which would be alleviated by immediate appeal," with the benefit of "avoiding piecemeal appeals." *Eldredge v. Martin Marietta Corp.*, 207 F.3d 737, 740 (5th Cir. 2000) (cleaned up) (quoting *PYCA Indus., Inc. v. Harrison Cnty. Waste Water Mgmt. Dist.*, 81 F.3d 1412, 1421 (5th Cir. 1996)). Here, all three Counts assert that the removal restriction in 15 U.S.C. § 2053(a) is unconstitutional. But Counts II and III require

addressing additional complex and novel questions about the appropriate relief. *See* Docket No. 1 ¶¶ 67, 77–78 (seeking to have the Final Rule and the Commission's decisions to deny Plaintiffs' FOIA requests "set aside"); *see also supra* note 6.

By entering final judgment on Count I, the Court allows the parties to immediately appeal the constitutional question and potentially avoid the time and resources necessary to address Counts II and III. *See, e.g.*, 10 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2659 (4th ed. 2014) ("[A]n early appeal may avoid the need for further proceedings in the district court or may ease significantly the difficulty and complexity of conducting the trial of the unadjudicated claims, thereby supporting immediate review. This may be true, for example, if the appeal will allow the court to rule on some novel or complex issue that will recur in the trial court." (footnotes omitted)). In fact, the Government does not dispute this point, arguing instead that Plaintiffs' claims may be mooted as the Commission processes their FOIA requests. Docket No. 24 at 32–33. But Plaintiffs have demonstrated they are repeat-FOIA requesters and will continue to suffer ongoing injury until a declaratory judgment is entered. *See supra* Section II.B.

Accordingly, Plaintiffs' motion for partial final judgment as to Count I is **GRANTED**.

VI.

In light of the foregoing, the Court resolves the pending motions as follows:

The Government's Motion to Dismiss (Docket No. 24) is **DENIED** in part. The motion is denied to the extent

it seeks dismissal of the complaint for lack of standing, failure to state a meritorious separation-of-powers claim, and failure to state a claim for relief for Count I under *Collins v. Yellen*. The Court reserves ruling on whether Plaintiffs have stated a claim for retrospective relief under *Collins*, which they seek under Counts II and III only. Other than this issue relating to Counts II and III, the Court's ruling resolves the remainder of the motion.

Plaintiffs' Motion for Partial Summary Judgment as to Count I and Entry of Partial Final Judgment Under Rule 54(b) (Docket No. 14) is **GRANTED**. The Court holds that (1) the removal restriction in 15 U.S.C. § 2053(b) violates Article II of the Constitution; (2) Plaintiffs are entitled to declaratory judgment to ensure that future FOIA requests are administered by a Commission accountable to the President; and (3) a partial final judgment as to Count I is proper under Rule 54(b).

Finally, the Court sets this matter for a telephonic status conference. Information will be provided in a separate order.

So **ORDERED** and **SIGNED** this **18th** day of **March, 2022**.

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS TYLER DIVISION

CONSUMERS' RESEARCH, and BY TWO LP,	§	
Plaintiffs,	§	
	§	Case No. 6:21-cv-256-JDK
v.	§	
CONSUMER PRODUCT SAFETY COMMISSION,	§	
Defendant.	§	

RULE 54(B) FINAL JUDGMENT AS TO COUNT I

In light of this Court's Memorandum Opinion and Order (Docket No. 44), and for the reasons stated therein, the Court hereby enters **PARTIAL FINAL JUDGMENT** as to Count I in favor of Plaintiffs Consumers' Research and By Two LP and against Defendant Consumer Product Safety Commission as follows:

The Court **DECREES** that the challenged language in 15 U.S.C. § 2053(a)—"Any member of the Commission may be removed by the President for

neglect of duty or malfeasance in office but for no other cause"—is contrary to Article II, § 1, cl. 1 of the U.S. Constitution, which states that the "executive Power shall be vested in a President of the United States of America."

The Clerk of Court is directed to enter this judgment as a partial final judgment pursuant to Federal Rule of Civil Procedure 54(b).

So **ORDERED** and **SIGNED** this 18th day of March, 2022.

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

CONSUMERS' RESEARCH, and BY TWO LP,

Plaintiffs,

v.

CONSUMER PRODUCT SAFETY COMMISSION,

Defendant.

Civil Action No. 6:21-cv-256-JDK

FINAL JUDGMENT

In light of the Fifth Circuit's decision in this case, and for the reasons stated therein, the Court hereby enters **FINAL JUDGMENT** on all counts in favor of Defendant Consumer Product Safety Commission and against Plaintiffs.

The Clerk of Court is directed to enter this judgment and close this case.

So **ORDERED** and **SIGNED** this **29th** day of **April, 2024.**

JEREMY D. KERNODLE
UNITED STATES DISTRICT JUDGE