No. 23-1323

In The

Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION.,

Respondent.

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

BRIEF OF THE CENTER FOR AMERICAN LIBERTY AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF INTEREST[1]

The Center for American Liberty (CAL) is a 501(c)(3) nonprofit law firm dedicated to protecting civil liberties and enforcing constitutional limitations on government power. CAL has represented litigants in courts across the country and has an interest in preserving the separation of powers as a bulwark protecting individual liberty.

INTRODUCTION

Humphrey's Executor[2] is akin to a vestigial tail of administrative law. Its "logic . . . may have been overtaken," App'x at 4a, and its "reasoning 'has not withstood the test of time,'" App'x at 17a, but it nevertheless lingers on the books. This case provides an opportunity for this Court to clarify the continuing viability of *Humphrey's Executor*, particularly as applied to multimember "independent" federal agencies.

Doing so is necessary. Despite recognizing an irreconcilable inconsistency between *Humphrey's Executor* and more recent decisions, particularly *Seila*

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[1] Consistent with Rule 37, the Center for American Liberty provided notice to counsel of record for all parties of their intention to file this brief at least ten days prior to the deadline to file this brief. No counsel for a party authored this brief in whole or part; no counsel or party contributed money intended to fund the preparation or submission of this brief; and no person other than amicus or its counsel contributed money intended to fund its preparation or submission.

[2] *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

Law v. CFPB, 591 U.S. 197 (2020), and *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Fifth Circuit believed that the cold hand of *Humphrey's Executor* "controls" this case. App'x at 4a. This leads to one of three conclusions:

- *Humphrey's Executor* is wrong and should be explicitly overturned;
- The Fifth Circuit misunderstood the continuing import of *Humphrey's Executor*; or
- The Fifth Circuit misunderstood this Court's recent removal cases.

All three possibilities call upon this Court for resolution.

Providing clarity is a matter of great national importance in this case. Government of the people, by the people, for the people, where sovereignty resides in "we the people," requires democratic accountability. Democratic accountability depends on the ability of elected officials—particularly the President—to supervise and, if necessary, remove agency heads. The fact that Consumer Product Safety Commission (the "Commission" or the "CPSC") is a "bipartisan," "multimember" agency is immaterial and, indeed, only serves to further shield it from democratic accountability.

Concerns about the proper exercise of executive power are not mere academic exercises. The CPSC exercises tremendous authority, impacting the lives of

every American. And it can and does so irrespective of, and, indeed, in opposition to, the wishes of the President.

This Court was not required to address the continuing impact of *Humphrey's Executor* in either *Seila Law* or *Free Enterprise Fund*. But as a result, a black cloud hangs over *Humphrey's Executor*. This Court can and should either dissipate that cloud or overrule *Humphrey's Executor*.

SUMMARY OF THE ARGUMENT

The Fifth Circuit misread *Humphrey's Executor* to create a "multimember board" exception to the President's exclusive authority to exercise the executive power of the United States.

The Constitution allocates the whole, undivided executive power of the United States to the President. At the time of the founding, the executive power was understood to include the power to remove principal officers. Similarly, the executive power encompassed authority to implement the law. Authority to implement the law necessarily includes the authority to remove principal officers.

The presence of a multimember board is immaterial to the constitutional question of who can exercise the executive power. Thus, the Fifth Circuit got the critical analysis in this case precisely backwards. The key question is not whether the relevant agency is a multimember board, but rather, whether it exercises executive power.

Clarifying this analytical framework is a matter of national importance. Presidential removal authority is a critical component of ensuring democratic accountability. This is particularly true with respect to the Commission, which exercises significant authority over thousands of consumer products worth trillions of dollars and has sought to exercise authority contrary to the wishes of the President and his administration.

Accordingly, this Court should grant the Petition for Certiorari.

ARGUMENT

I. The Fifth Circuit Erred by Reading a "Multimember Board" Exception into Article II's Grant of Executive Power

The original meaning of Article II bars Congress from entrusting federal agencies with substantial executive power while nonetheless shielding agency heads from at-will removal.

The Fifth Circuit found that "under any modern conception, the Commission unquestionably *does* exercise executive power." App'x at 19a. Yet the court concluded "that characteristic—standing alone"—does not "remove[] the Commission from the *Humphrey's* exception" based on three characteristics. App'x at 20a. These "characteristics," at their core, boil down the fact that the CPSC is a multimember body of purported experts. *See* App'x at 22a-23a ("In other words, the Commission fits squarely within what our en banc court described just a few years ago as 'the

recognized exception for independent agencies' whose leadership consists of a 'multi-member bod[y] of experts.'" (quoting *Collins v. Mnuchin*, 938 F.3d 553, 587–88 (5th Cir. 2019))).

This exception finds no support in the text, history, and purpose of Article II. The President has a duty to ensure the laws be faithfully executed and is vested with the whole of the executive power. Congress can no more divest the President of this authority in favor of a committee than it can in favor of an individual. Both unconstitutionally intrude on the authority of the President.

This Court has previously used loose language in describing *Humphrey's Executor*. For example, in *Seila Law*, this Court characterized *Humphrey's Executor* as "h[olding] that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause," before later characterizing the *Humphrey's Executor* "exception" as applying to "multimember expert agencies that *do not wield substantial executive power*[.]" *Seila Law*, 591 U.S. at 204, 218 (emphasis added). Thus, it is important for this Court to clarify that it is the exercise of executive power that matters, not the structure of the agency.

II. The Executive Power Includes the Power to Remove Principal Officers

a. The Power to Remove Principal Officers is Part of the Executive Power

Article II provides that "*[t]he* executive Power shall be vested in a President of the United States of America." U.S. Const., art. II, § 1, cl. 1 (emphasis added). As scholars Aditya Bamzai and Saikrishna Prakash observe, "[e]arly American lawyers understood the phrase 'executive power' to contain a conceptual core, such that the vesting of 'executive power' implicitly conferred certain authorities." Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 Harv. L. Rev. 1756, 1764 (2023). Among these powers is the power to remove principal officers.

At the Convention, early discussion to designate in the Constitution what we now consider the President's cabinet made clear many delegates understood "that executive officers . . . served at the Chief Executive's sole discretion." Bamzai & Prakash, *supra*, at 1770–71 (noting the secretaries who would have comprised the proposed council would serve during the President's "pleasure," which meant the secretaries were mere agents who could be removed at-will by their principal, the President).

State constitutions similarly "associated removal with the Executive." *Id.* at 1769. Some states—such as South Carolina, Delaware, New York, and Maryland—"explicitly referenced removal" as part and parcel of the executive power. *Id.* Other

states—such as Pennsylvania and Virginia—"incorporated a removal power through grants of executive power." *Id* at 1769–70.

Early post-ratification history similarly indicates that the power of removal was part of the executive power.

Perhaps the best evidence that the original public meaning of the Constitution included the presidential power to remove executive officers comes from the citizenry's early efforts to exercise the First Amendment right to petition the federal government for redress of grievances. *See United States v. Rahimi*, No. 22-915, 2024 WL 3074728, at *20 (U.S. June 21, 2024) (Kavanaugh, J., concurring) (explaining the Court often "looks to the understandings of the American people from the pertinent ratification era" to discern original meaning because, while those "understandings do not necessarily determine meaning," "they may be strong evidence of" contemporary meaning). The public understood the President had the power to remove executive officers, as it was common during early administrations for people to write letters to the President requesting he remove particular officers. Bamzai & Prakash, *supra*, at 1780–81, nn.186–187 (collecting examples).

In the summer of 1789, Congress was setting up the first executive departments. As part of that process, it addressed the issues of whether the President's removal power was an executive power and whether it could be limited by Congress. James Madison and other representatives argued the

removal power was a part of the executive power. One member noted that the Constitution "places all executive power in the hands of the President . . .; but the circumscribed powers of human nature in one man, demand the aid of others." 1 Annals of Cong. 492 (1789) (Gales ed., 1834) (statement of Fisher Ames). Thus, the President cannot handle all the "minutiae" and "must therefore have assistants. But in order that he may be responsible to his country, he must have a choice in selecting his assistants, a control over them, with power to remove them when he finds the qualifications which induced their appointment cease to exist." *Id*. As a corollary, Madison noted that "if any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." *Id.* at 481 (statement of James Madison). In the view of Madison and his compatriots, the "[C]onstitution affirm[ed] that the Executive power shall be vested in the President" and that power included removal. *Id.*

After five days of debate, the House passed a bill that confirmed the President's removal power was inherent in Article II and not dependent on an act of Congress. *See id.* at 601 (providing "whenever the said principal officer shall be removed from office by the President" the department's clerk would maintain records). The bill passed 30 to 18 in the House and 10 to 10 in the Senate—Vice President John Adams provided the tie breaking vote. *See id.* at 602–03; Legislative Histories, 4 *The Documentary History of the First Federal Congress of the United States of America, 1789-1791*, at 696, 697 n.4 (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

In addition, early Presidents recognized that they had constitutional power to remove executive officers.

For example, when issuing commissions to Article III judges, President Washington specified their tenure as "during . . . good behavior." Bamzai & Prakash, *supra*, at 1777 (collecting examples). In marked contrast, the commissions he issued to executive officers specified they served at "the pleasure of the President of the United States for the time being." *Id.* at 1777–78 (collecting examples). And when some twenty officials stoked the displeasure of the President, he removed them from office. *Id.*

President Adams also issued "at pleasure" executive commissions and removed over two dozen officers; President Jefferson similarly issued "at pleasure" executive commissions and famously wielded the power aggressively, removing over one hundred officers during his tenure. *Id.* at 1780.

By 1839, the Supreme Court asserted it was the "settled and well understood construction of the Constitution, that the power of removal was vested in the President alone . . . although the appointment of the officer was by the President and Senate." *In re Hennen*, 38 U.S. 230, 259 (1839); *see also Myers v. United States*, 272 U.S. 52, 163 (1926) ("Summing up, then, the facts as to acquiescence by all branches of the government in the legislative decision of 1789 as to executive officers, whether superior or inferior, we find that from 1789 until 1863, a period of 74 years, there was no act of Congress, no executive act, and no

decision of this court at variance with the declaration of the First Congress; but there was, as we have seen, clear affirmative recognition of it by each branch of the government.").

In short, the power of removal was understood at the time of the founding to be part and parcel of the executive power.

b. The Executive Power Includes the Duty to Implement the Law

The executive power also inherently contains a duty to implement the law.

In his *Commentaries*, Blackstone explains the executive power by laying out the powers of the king. 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *245–68 (1st ed. 1765–69). Blackstone's view of "the executive power of the laws" included prosecution, proclamations binding subjects and subordinate officers as to how the laws would be executed (what we today would call promulgating regulations), and appointing officers to assist executing the laws. *Id* at *257. He further noted "the public . . . has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offences against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offences and breaches of the peace, being the person injured in the eye of the law." *Id*. at *258–59.

Similarly, Alexander Hamilton stated: "'The objects of executive power are of three kinds, to make treaties with foreign nations, to make war and peace, to execute and interpret the laws.'" Bamzai & Prakash, *supra*, at 1766 (quoting *Remarks on an Act Granting to Congress Certain Imposts and Duties* (Feb. 15, 1787), *in* 4 THE PAPERS OF ALEXANDER HAMILTON, at 75 (Harold C. Syrett ed., 1962)).

Thus, when Article II imposes a duty to "take Care that the Laws be faithfully executed," it is describing how the President is to exercise executive power, not setting forth a separate, freestanding obligation. *See* U.S. Const., art. II, § 3.

c. The Power to Remove Principal Officers is a Necessary Precondition to Exercising the Executive Power to Implement the Law

The removal power is fundamental to the President's ability to exercise the executive power and fulfill his duty to faithfully execute the laws. *See Free Enter. Fund*, 561 U.S. at 483 ("Article II vests '[t]he executive Power . . . in a President of the United States of America,' who must 'take Care that the laws be faithfully executed.'").

Prior to ratification, the Antifederalists, who were concerned about the scope of presidential power, "recognized that one man was best situated 'to superintend the execution of laws with discernment and decision, with promptitude and uniformity.'" Bamzai & Prakash, *supra*, at 1773 (quoting Letters from the Federal Farmer (No. 14), *in* 2 THE COMPLETE

ANTI-FEDERALIST at 310 (Herbert J. Storing ed., 1981)). To fulfill that superintendent role, the President must have the credible threat of removal to ensure his agents faithfully execute the laws. *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) ("Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." (cleaned up)).

After ratification, during the removal debates of 1789, Madison argued that "there is another part of the constitution" that "favor[ed] the construction [he] put upon it; the President is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." 1 Annals of Cong. 516 (1789) (Gales ed., 1834) (statement of James Madison). And the removal power was critical to "superintending and seeing that the laws are faithfully executed." *Id.* at 519.

The President "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them." *Free Enter. Fund*, 561 U.S. at 484. Accordingly, principal executive officers "must be the President's alter ego in the matters of that department where the President is required by law to exercise authority." *Myers*, 272 U.S. at 133. Thus, the President's "'power to remove—and thus supervise—those who wield executive power on his behalf'" directly "'follows from the text of Article

II.'" *Trump v. United States*, No. 23-939, 2024 WL 3237603, at *9 (U.S. July 1, 2024) (quoting *Seila Law*, 591 U.S. at 204).

d. The Presence of a Multimember Board is Immaterial to the Constitutional Allocation of Executive Power

"The entire 'executive Power' belongs to the President alone." *Selia Law*, 591 U.S. at 213; *see also Free Enter. Fund*, 561 U.S. at 496–97 ("Article II 'makes a single President responsible for the actions of the Executive Branch.'" (quoting *Clinton v. Jones*, 520 U.S. 681, 712–713 (1997) (Breyer, J., concurring in judgment))).

The import of this provision is evident in comparison with Article I's vesting of certain legislative authorities in Congress. Article I delegates "all legislative powers *herein granted*" to Congress. U.S. Const., art. I, § 1 (emphasis added). Congress thus does not have the entirety of the legislative power, but rather only the limited grants of enumerated legislative powers provided in the Constitution.

Chief Justice Taft recognized the significance of this textual variation: "The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where

limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended." *Myers*, 272 U.S. at 128.

There is no multimember board exception to Article II. As this Court recently restated, when the President acts pursuant to his powers directly derived from the Constitution, his authority in that sphere is "sometimes 'conclusive and preclusive.'" *Trump*, 2024 WL 3237603, at *9 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)). In such instances, the President's exclusive control of the issue "'disabl[es] the Congress from acting upon the subject.'" *Id.* (quoting *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring)). The President's power to remove principal executive officers "fit[s] that description." *Id.* (citing *Seila Law*, 591 U.S. at 204).

Thus, the Fifth Circuit got the critical analysis in this case exactly backwards. The key question is not whether the relevant agency is a multimember board, but rather whether it exercises executive power. As set forth in both the Petition for Certiorari and the Fifth Circuit's opinion, the Commission plainly exercises executive power. The Fifth Circuit thus erred in its analysis and application of this Court's precedents.

III. Clarifying the Reach of *Humphrey's Executor* is Important Because it Implicates Basic Democratic Accountability

The question presented in this case is not merely of academic interest. Instead, it implicates the basic methods of democratic accountability our government depends upon for legitimacy.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund*, 561 U.S. at 499. And it is the Constitution "that makes the President accountable to the people for executing the laws[.]" *Id.* at 513. That accountability mechanism includes the power to remove executive officers, because "[t]he diffusion of power carries with it a diffusion of accountability," and insulated exercises of the executive power "subvert[] . . . the public's ability to pass judgment on" its elected representatives. *Id.* at 497–98.

Indeed, "[w]ithout a clear and effective chain of command, the public cannot 'determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.'" *Id.* at 498 (2010) (quoting THE FEDERALIST NO. 70, at 476 (J. Cooke ed., 1961) (Alexander Hamilton)). Without the removal power, therefore, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Free Enter. Fund*, 561 U.S. at 514. Article II therefore "ensures that those who exercise the power of the

United States are accountable to the President, who himself is accountable to the people." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 63 (2015) (Alito, J., concurring).

Put differently, "[t]he resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections." *Seila Law*, 591 U.S. at 224.

The Fifth Circuit's application of *Humphrey's Executor* undermines this fundamental democratic principle. It provides Congress a road map to circumvent Article II by merely creating agencies led by multimember boards, accountable to no one. This is not and cannot be correct. Rectifying this misapprehension of this Court's precedents is important to ensure that the Constitution's democratic safeguards function as designed by the framers.

IV. Concerns About Democratic Accountability are Particularly Salient for the CPSC

The Chief Justice previously observed "[t]he 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." *Free Enter. Fund*, 561 U.S. at 499. The CPSC is a paradigmatic example of these concerns brought to life.

First, the CPSC exercises "vast power" that "touches almost every aspect of daily life." The CPSC characterizes its own "mission" as "vast." *2023 Annual Report to the President and Congress* at 4, CPSC (Jan. 24, 2024), https://perma.cc/C9PH-HEQU. Indeed, CPSC itself claims "a massive workload with jurisdiction over roughly 15,000 product types,"[3] ranging from children's toys to chain saws and football equipment to fireworks. *See 2023 Annual Report to the President and Congress* at 13–26, CPSC (Jan. 24, 2024), https://perma.cc/C9PH-HEQU (listing product categories). Together, these products "represent[] $1.6 trillion in consumption." *GAO-21-56: Consumer Product Safety Commission: Actions Needed to Improve Processes for Addressing Product Defect Cases* at 1, U.S. Government Accountability Office (Nov. 19, 2020), https://perma.cc/EE6C-PX4X.

Second, the CPSC can and has exercised its authority contrary to the express direction of the President.

The debate over banning gas stoves illustrates this problem. In October 2022, the CPSC directed its staff to prepare a request for information "to seek public input on hazards associated with gas stoves and proposed solutions to those hazards." Trumka Amendment 3A: Address Hazards Associated with Gas Stoves (Oct. 26, 2022), https://perma.cc/WKB6-DMYX.

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[3] *Letter from Acting Chairman Robert Adler to Chairwoman Rosa DeLauro* (Mar. 1, 2021), https://perma.cc/S535-G4LH.

In January 2023, the CPSC Commissioner who sponsored this direction gave an interview referencing gas stoves, stating "[a]ny option is on the table. Products that can't be made safe can be banned." Ari Natter, *US Safety Agency to Consider Ban on Gas Stoves Amid Health Fears* (Jan. 9, 2023), https://perma.cc/BP32-R2H9.

In response to public outcry, the Biden Administration immediately stated that "[t]he President does not support banning gas stoves." *Press Briefing by Press Secretary Karine Jean-Pierre,* The White House (Jan. 11, 2023), https://perma.cc/7QP6-VFNB.

Despite these reassurances, the CPSC proceeded to issue its request for information concerning regulating gas stoves on March 7, 2023. CPSC, *Request for Information: Chronic Hazards Associated with Gas Ranges and Proposed Solutions*, 2023 Fed. Reg. 14150 (Mar. 7, 2023). While the CPSC has sought to distinguish its efforts from a "ban,"[4] a plain reading of the Commission's actions suggest that they are inconsistent with the President's stated policy.

Even if the CPSC as a whole does not act to ban gas stoves, it does not follow that its principal officers will act consistent with administration policy. Individual CPSC Commissioners have previously used their official positions to jawbone retailers to "stop

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[4] *See Statement of Chair Alexander Hoehn-Saric Regarding Gas Stoves* (Jan. 11, 2023), https://perma.cc/HRM4-XAA3.

sales" of disfavored consumer products, even before the issuance of formal regulatory requirements. *See* Rich Trumpka, Jr., *Beware: Weighted Infant Swaddles and Blankets are Unsafe for Sleep; Retailers Should Consider Stopping Sales* (Apr. 15, 2024), https://perma.cc/6HQW-935W. These actions have real-world consequences, including inducing retailers to immediately stop the sale of disfavored products. *See Notice of Request to Preserve All Documents and Electronically Stored Information as Defined by Federal Rule of Civil Procedure 34 Regarding Dreamland Baby Co.*, New Civil Liberties Alliance (May 9, 2024), https://perma.cc/J7YR-PEV5.

In other instances, the CPSC has disregarded requests from executive branch agencies under the control of the President. For example, the CPSC ignored requests from the Small Business Administration to delay the effective date of standards for operating cords on custom-made window coverings—a decision that was deemed arbitrary by the D.C. Circuit. *See Window Covering Manufacturers Association v. CPSC*, 82 F.4th 1273 (D.C. Cir. 2023).

The CPSC has vast regulatory authority. Both it and its individual Commissioners can and do exercise this authority independent of the President and, in some cases, contrary to the expressed view of the President or his administration. Thus, it is important for this Court to determine whether the CPSC's appointment and removal structure comports with Article II of the Constitution.

CONCLUSION

The Court should grant the petition and hold the for-cause restriction on the President's authority to remove Commissioners of the CPSC violates Article II and separation of powers principles.

Respectfully Submitted,

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