No. 23-1323

IN THE

Supreme Court of the United States

CONSUMERS' RESEARCH, ET AL.,
Petitioners,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

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

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from the administrative state's depredation. [1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself: jury trial, due process of law, the right to be tried in front of an impartial and independent judge, freedom of speech, the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels, and the right to have executive power exercised only by actors directed by the President, which is at stake in this appeal. Yet these selfsame rights are also very contemporary—and in dire need of renewed vindication—because Congress, federal administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

NCLA is particularly disturbed by government officials not answerable to the President who are

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[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

purportedly authorized by statute to usurp his Article II power to enforce the law. That usurpation is present here, where Congress has authorized the Commissioners of the Consumer Product Safety Commission ("CPSC") to exercise executive powers, including the power to commence litigation. But CPSC Commissioners may not be removed at will by the President. Because they are not subject to his at-will removal, the Commission may not exercise the executive power.

BACKGROUND

CPSC is a United States 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). It is comprised of five Commissioners appointed by the President and confirmed by the Senate. *Id.* § 2053(a). The Commission is empowered to broadly exercise executive powers, including the power to bring civil actions to enforce "laws subject to its jurisdiction." *Id.* § 2076(b)(7)(A). Yet, the Commissioners are not at-will appointees. To the contrary, the President may remove a Commissioner *only* for cause; specifically, "for neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

Petitioners are educational organizations focused on product safety issues. Pet. 10. Pursuant to the Freedom of Information Act ("FOIA"), they made multiple requests from the Commission for information relevant to Petitioners' work. The requests began in March 2021: Several have been responded to, several are pending. App. 62a–64a.

Dissatisfied with the CPSC's responses to their FOIA requests, Petitioners sued. They alleged that the Commission's structure violates Article II of the Constitution and the separation of powers by insulating the Commissioners from presidential removal. They requested a declaratory judgment that the Commission's structure violates the Constitution. Pet. 10.

The Commission moved to dismiss the Complaint. It argued that its structure is identical to that of the FTC (multimember commission with commissioners removable only for cause), and FTC's structure had been upheld as constitutional against an Article II challenge in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). App. 7a.

On March 18, 2022, the district court granted Petitioners' request for declaratory relief holding "that (1) the removal restriction in 15 U.S.C. § 2053(b) violates Article II of the Constitution; (2) P[etitioners] are entitled to declaratory judgment to ensure that future FOIA requests are administered by a Commission accountable to the President…." App. 97a.

Although the district court recognized that it was bound by *Humphrey's Executor*, it concluded that case's applicability was limited to situations where "multimember commissions did not exercise substantial executive power." App. 81a. And because the district court concluded that, unlike the FTC in 1935, "the [CPSC] exercises substantial executive power[,] [it] does not fall within the *Humphrey's Executor* exception." *Id.*

On appeal, a divided panel of the Fifth Circuit reversed. App.1a–30a. The majority viewed itself

bound by *Humphrey's Executor*, even though it noted that the "reasoning [of that case] 'has not withstood the test of time.'" App.17a (quoting *Seila Law LLC v. CFPB*, 591 U.S. 197, 216 n.2 (2020)). *See also* App.23a–24a (criticizing the "oddity" of the current "removal doctrine."). Moreover, the panel majority held that for constitutional purposes, CPSC today is not materially different from the FTC in 1935, so the challenge to the Commission's structure was foreclosed by *Chevron*. Judge Jones dissented. While she too recognized that *Humphrey's Executor* remains binding on lower courts, she concluded that the factual differences between the 1930s-era FTC and the modern CPSC are too great for that precedent to be dispositive for the case at hand. Because, in her view, CPSC exercises core executive functions, it cannot seek shelter under *Humphrey's Executor*'s canopy. App.27a–30a.

Petitioners sought rehearing *en banc*, which the Fifth Circuit denied, eight judges dissenting. App.31a–56a. Judge Willett (who authored the panel opinion), concurred in the denial of rehearing, but urged this Court to grant *certiorari* and "alleviate" the "uncertainty" in the doctrine that presently exists. App.38a–39a. Judge Oldham, joined by seven of his colleagues, dissented from the denial of rehearing,[2] which agreed with and expanded upon Judge Jones's panel-stage dissenting opinion. App. 41a–56a. The upshot is that much like Petitioners and this *amicus*, a majority of the Fifth Circuit agrees that the questions raised in the petition for *certiorari* need to be resolved by this Court.

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[2] Judge Ho joined Judge Oldham's dissenting opinion and also authored a separate dissent. App. 40a–41a.

SUMMARY OF ARGUMENT

Humphrey's Executor was wrong when decided and should be overruled. In the alternative, the Court should limit the holding of *Humphrey's Executor* to its facts—so that an agency's commissioners can enjoy protection from removal only if that agency (unlike CPSC) exercises no executive power and is instead limited to "quasi-legislative" and "quasi-judicial" roles.

The Constitution provides for a robust separation of powers, where each branch is vested with specific functions and conversely is prohibited from taking on the role of the other two branches. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559–60 (1992) ("the Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts."); *SEC v. Jarkesy*, 144 S.Ct. 2117, 2131 (2024) ("[T]he judicial Power of the United States cannot be shared with the other branches.") (internal quotations omitted); *Loper Bright Enters. v. Raimondo*, 144 S.Ct. 2244, 2274 (2024) (Thomas, J., concurring) ("To provide 'practical and real protections for individual liberty,' the Framers drafted a Constitution that divides the legislative, executive, and judicial powers between three branches of Government.") (quoting *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in judgment). "Under our Constitution, the 'executive Power'—all of it—is 'vested in a President.'" *Seila Law*, 591 U.S. at 203 (quoting U.S. Const. art. II, cl. 1). In order to exercise that power, the President must necessarily "rely on subordinate officers for assistance." *Id.* at 204. But because these subordinate officers are entrusted with the *President's* power, rather than any sort of independent power of their own, the President

must retain the ability to supervise such officers. *See United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021) ("The President is 'responsible for the actions of the Executive Branch' and 'cannot delegate that ultimate responsibility or the active obligation to supervise that goes with it.'" (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 496–97 (2010)). It follows that the President must retain the ability to remove those individuals to whom he no longer wishes to delegate his power. *See Trump v. United States*, 603 U.S. ___, ___ (slip op. at 8) (2024) (""The President's power to remove—and thus supervise—those who wield executive power on his behalf,' for instance, 'follows from the text of Article II.'") (quoting 591 U.S. at 204); *Myers v. United States*, 272 U.S. 52 (1926). Thus, to the extent that any agency executes "executive power," its officers must be accountable to the President. *See Arthrex*, 594 U.S. at 17. Even where "[t]he activities of executive officers may 'take legislative and judicial forms, … they are exercises of—indeed, under our constitutional structure they must be exercises of—the executive Power,'" *id.* (quoting *City of Arlington v. FCC*, 569 U.S. 290, 305, n. 4 (2013)), and therefore the "chain of command" must continue to run to the President.[3]

Humphrey's Executor is flatly inconsistent with the Constitution's allocation of *all* "executive Power" to the President. Whether one agrees with the Court's evaluation that the 1930s-era FTC "act[ed] in part

[3] To the extent that Congress establishes a purely advisory body that engages solely in studies and reporting, *see, e.g.*, 42 U.S.C. § 1975a (defining duties of the United States Commission on Civil Rights), officers of such a body need not be answerable to the President. However, the overwhelming majority of agencies are endowed with vastly more power than the U.S. Commission on Civil Rights, and their officers must be supervised by the President.

quasi legislatively and in part quasi judicially," 295 U.S. at 628, or whether that factual determination was mistaken is irrelevant because "[t]he activities of executive officers under our constitutional structure … must be exercises of [] the executive Power," *Arthrex*, 594 U.S. at 17, which is in turn solely vested in the President. *Humphrey's Executor* simply does not fit within this Court's line of precedents on the nature, source, and the proper exercise of "executive Power." Being an "aberrational ruling[]," *Loper Bright*, 144 S.Ct. at 2277 (Gorsuch, J., concurring), it is not entitled to significant weight.

In the alternative, if the Court is unwilling to fully abrogate *Humphrey's Executor* (though it should), it should confine its holding to the facts. In that case, the Court upheld limitations on the President's ability to remove an FTC Commissioner on the basis that "the commission acts in part quasi legislatively and in part quasi judicially … [and] [t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so … as an agency of the legislative or judicial departments of the government." 295 U.S. at 628. However, it is undisputed that CPSC (like myriad other agencies, including, following various amendments to the authorizing statute, the FTC itself today) *does* exercise "executive power in the constitutional sense." *See* App.81a–83a (listing various executive powers of the Commission and noting that the Commission "does not dispute that these are executive powers."). And this fact matters. If *Humphrey's Executor* truly is an "exception" to the general rule, and applicable only under the condition that the protected officer does not exercise "executive Power," then the Court should clarify that CPSC with its quintessentially executive

powers such as initiating enforcement actions in the court of law, finds no refuge in this "exception."

Furthermore, this case presents a good vehicle for this Court to consider the question presented. Because *Humphrey's Executor* announced (an erroneous) constitutional rule, only this Court can correct the error. *See, e.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230, 248 (2019). Although the Court usually prefers addressing issues that have generated disagreement in the lower courts, *see* Sup. Ct. R. 10(a), given this Court's binding precedent, the question of whether Congress can limit the President's authority to remove executive branch officials is unlikely to generate any conflict in the lower courts.

However, when it comes to interpreting the reach of *Humphrey's Executor*, the Fifth Circuit's 9-8 split indicates that lower courts are in need of guidance from this Court.

Additionally, this case is not burdened with any procedural pitfalls that will make the resolution of the question presented difficult, unnecessary, or premature. Instead, the case presents a clean vehicle for this Court to correct *Humphrey's Executor*'s error, or to, at the very least, clarify the scope of that decision.

In order to either overrule *Humphrey's Executor* or to clarify and limit its scope, the Court should grant the petition for *certiorari*.

ARGUMENT

The decision below is wrong for two reasons—one focusing on the Constitution and the other concentrating more on precedent. Whether the Court chooses to reject *Humphrey's Executor* or to follow it, it should reach the same conclusion—CPSC is unconstitutionally structured.

I. *HUMPHREY'S EXECUTOR* MUST BE OVERRULED BECAUSE PERSONS PROTECTED FROM REMOVAL CANNOT EXERCISE EXECUTIVE POWER

It is often said that administrative power resides not only in executive agencies but also in independent agencies. The latter are independent in the sense that their heads are protected from Presidential removal and control. But under the Constitution, the executive power "shall be vested" in the President, which includes the authority to remove subordinates, and this removal authority is essential if executive power is to be accountable. *See, e.g.*, *Seila Law*, 591 U.S. at 238 ("In our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead"); *PCAOB*, 561 U.S. at 483 ("Since 1789, the Constitution has been understood to empower the President to keep … officers accountable —by removing them from office, if necessary."); *Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1114 (D.C. Cir. 2021) (Rao, J., concurring-in-part and dissenting-in-part) ("Article II executive power necessarily includes the power to remove subordinate officers, because anything traditionally considered to be part of the executive power 'remained with the President' unless 'expressly taken away' by the

Constitution." (quoting Letter from James Madison to Thomas Jefferson (June 30, 1789))). Indeed, because of the vast growth in executive power, it is more important now than ever before that such power be accountable through Presidential removal. *See Myers v. United States*, 272 U.S. at 134 ("The imperative reasons requiring an unrestricted power [of the President] to remove the most important of his subordinates in their most important duties must therefore control the interpretation of the Constitution as to all appointed by him.").

A. Removal Is Part of Executive Power and Is Unqualified

Removing subordinates is part of the President's executive power. *See Seila Law*, 591 U.S. at 238; *PCAOB*, 561 U.S. at 483; *Myers*, 272 U.S. at 134. One might think it telling that, although the Constitution has a provision for appointments, it says nothing about removal. It is improbable, however, that the President has no constitutionally established authority to remove subordinates. If the suggestion is that the Founders simply forgot to discuss the question, that is even less credible. In fact, both appointments and removal were part of the Constitution's executive power.

This inclusion of hiring and firing authority within executive power is significant because the Constitution later limits Presidential appointments, but not removals. It thereby leaves the President unlimited in his authority to remove subordinates.

1. Executive Power Includes at Least the Execution of the Law

The President by himself cannot execute the law—so he necessarily must rely on a hierarchy of subordinates, whether officers or employees, to do most of the execution. *See Myers*, 272 U.S. at 117; *Cunningham v. Neagle*, 135 U.S. 1, 63–64 (1890). If such persons are essential for executing the law, then the Constitution "empower[s] the President to keep … these officers accountable—by removing them from office, if necessary." *PCAOB*, 561 U.S. at 483. As the Supreme Court explained, "[i]n our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead." *Seila Law*, 591 U.S. at 238. If the President cannot retain and remove those who execute the law, then he does not have the full scope of law-executing power which is in turn an essential part of his executive powers. Thus, faithfulness to the Vesting Clause of Article II requires the recognition of the President's untrammeled authority to remove executive branch officials.

2. Executive Power More Generally Is the Action, Strength, or Force of the Nation

The "executive Power" is much broader than merely the power to execute the laws. Undoubtedly, it includes the execution of law, but at the Founding it was understood as also including the nation's action, strength, or force. This more expansive foundation reinforces and broadens the conclusion that the President's "executive power" includes the authority to remove subordinates.

An understanding of executive power as the nation's action, strength, or force was a familiar concept at the time of the Founding. For example, Jean-Jacques Rousseau associated executive power with the society's "force," and Thomas Rutherforth defined it as the society's "joint strength." *See* Philip Hamburger, *Delegation or Divesting*, 115 N.W. L. Rev. Online 88, 112 (2020). As Alexander Hamilton understood and explained, the Constitution divides the government's powers into those of "force," "will," and "judgment"—that is, executive force, legislative will, and judicial judgment. The Federalist No. 78, at 523–24 (Alexander Hamilton) (Cooke ed., 1961).

This vision of executive power included law enforcement but also much more. Conceiving of the executive power in this way has the advantage of, for example, explaining the President's power in foreign policy, which cannot easily be understood as mere law enforcement.

That the Constitution adopted this broad vision of executive power is clear from its text—in particular, from the contrast between the President's "executive Power," U.S. Const, art. II, § 1, and his duty to "take Care that the Laws be faithfully executed," *id.* § 3. Article II then frames the President's authority in terms of *executive power*, not merely "executing the law." The latter is merely a component of the former, which on one hand is limited by the requirement that the President "take Care that the Laws be faithfully executed," but also includes the "nation's action, strength, or force."

It further follows that, the more expansive the definition of "executive Power" is, the broader the concomitant authority to remove inferior executive

officials. If the Constitution vests in the President the "nation's action, strength, or force," it follows that he must have sufficient authority to remove people whom he views as undermining that strength or being insufficiently forceful. The second foundation matters not only because it is the more accurate understanding of the President's executive power but also because it clarifies the breadth of the President's removal authority. His law-executing authority (which is part of his executive power) reveals that he can hire and fire subordinates engaged in law enforcement. And his executive power—understood more fully as the nation's action or force—shows that he can hire and fire all sorts of subordinates.[4] *See Collins v. Yellen*, 594 U.S. 220, 256 (2021) ("The President must be able to remove not just officers who disobey his commands but also those he finds negligent and inefficient, those who exercise their discretion in a way that is not intelligent or wise, those who have different views of policy, those who come from a competing political party who is dead set against the President's agenda, and those in whom he has simply lost confidence.") (cleaned up).

3. Whereas the Power of Appointment Is Qualified, the Power of Removal Is Not

Although the President's executive power includes both hiring and firing authority, the Constitution treats them differently. Article II modifies and limits his power in appointments, but it leaves the power over removal untouched.

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[4] To be sure, the President's power to hire Executive Branch officials is limited by the Appointments Clause. U.S. Const. art. II, § 2, cl. 2.

That executive power was unqualified as to removals was spelled out in 1789 by Representative John Vining of Delaware:

> [T]here were no negative words in the Constitution to preclude the president from the exercise of this power, but there was a strong presumption that he was invested with it; because, it was declared, that all executive power should be vested in him, except in cases where it is otherwise qualified; as, for example, he could not fully exercise his executive power in making treaties, unless with the advice and consent of the Senate—the same in appointing to office.

John Vining (May 19, 1789), *in* 10 Documentary History of the First Federal Congress 728 (Charlene Bangs Bickford, *et al.*, eds.) (The Johns Hopkins Univ. Press, 1992).

James Madison was equally emphatic, writing:

> The legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive to be of an executive nature. … The nature of things restrains and confines the legislative and executive authorities in this respect; and hence it is that the constitution stipulates for the

> independence of each branch of the government.

James Madison (June 22, 1789), *in* 11 Documentary History of the First Federal Congress 1032 (Charlene Bangs Bickford, *et al.*, eds.) (The Johns Hopkins Univ. Press, 1992).

Madison rejected the argument that limits on Presidential appointments implied similar limits on removals, writing that although the power of appointment "be qualified in the constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it." *Id.*

The First Congress adopted these views. Thus, in 1789, the first Congress considered a statutory limit on the President's removal authority, in what has since then been referred to as "The Decision of 1789," but refused to adopt one. Yet this label misleads. It suggests that the Constitution had nothing to say on the question and that the President's removal authority was merely a congressional decision—as if removal rests merely on a political precedent. In fact, the Constitution's text establishes the President's removal authority by vesting executive power in him without limiting it in respect to his power to remove subordinates. The 1789 debate is merely further evidence of the decision made in the Constitution.[5]

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[5] As this Court previously wrote, "Since 1789, the Constitution has been understood to empower the President to keep [his] officers accountable—by removing them from office, if necessary." *PCAOB*, 561 U.S. at 483. More accurately, the Court might have said: "Since 1787 …"

In short, at the time of the Founding it was clearly understood that the President's removal power is different from and stands in contrast to his power of appointments. Although both powers are part of the "executive power," the latter was substantially qualified, whereas the former remained absolute and unqualified.

4. The President's Removal Authority Is Confirmed by His Duty "to take Care that the Laws be faithfully executed"

The President's removal authority is reinforced by his duty to "take Care that the Laws be faithfully executed." U.S. Const, art II, § 3. The President of course may and indeed has no choice but to delegate much of his *authority* to carry the laws into execution to subordinates. *See Myers*, 272 U.S. at 117; *Cunningham*, 135 U.S. at 63–64. At the same time, his *duty* "to take Care that the Laws be faithfully executed" is non-delegable, and he remains exclusively responsible for this function of the Government. It therefore follows that the President must have the power to remove individuals who, in his view, do not help him fulfill, or worse yet, undermine his duty of faithful execution of the Nation's laws. The threat of removal is the only way that the President can exercise control over his subordinates and ensure that through *their* action or inaction, *he* does not fail in *his* duty. "[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." *Myers*, 272 U.S. at 164 (quoted in *PCAOB*, 561 U.S. at 492–93; and in *Seila Law*, 591 U.S. at 214).

The exercise of executive power takes many forms. From filing a lawsuit, to conducting administrative proceedings or complying with the FOIA. *Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President … that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed'" (quoting U.S. Const. art. II, § 3); *Seila Law*, 519 U.S. at 216 n.2 (Agency adjudication "must be" an exercise of executive authority.) (quoting *City of Arlington*, 569 U.S. at 304 n.4). The Take Care Clause underlines and confirms that the President's executive power includes a discretionary authority to remove officials who exercise his authority under that Clause.

B. Humphrey's Executor *Needs to Be Reconsidered and Overruled*

The time has come to reconsider and overrule *Humphrey's Executor*, which upheld tenure protections for FTC Commissioners as constitutional. It is important to remember that that case did not dispute the President's executive power to remove Executive Branch subordinates; as the district court noted, App.83a, *Humphrey's Executor* held that the FTC did not exercise "executive power." *See* 295 U.S. at 628 ("[T]he commission acts in part quasi legislatively and in part quasi judicially … [and] [t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so … as an agency of the legislative or judicial departments of the government."). However, it is obvious that the FTC in 1935 exercised "executive power in the constitutional sense." Thus, *Humphrey's Executor* was and is mistaken. *See Seila Law*, 519 U.S. at 216 n.2. Because *Humphrey's Executor* was wrongly

decided as a matter of first principles, and because its holding is inconsistent with cases decided both before and after it, that precedent should be overruled.

II. ALTERNATIVELY, UNDER *HUMPHREY'S EXECUTOR* PROPERLY UNDERSTOOD, CPSC'S STRUCTURE IS UNCONSTITUTIONAL BECAUSE THE AGENCY MAY NOT EXERCISE EXECUTIVE POWER

Although CPSC's action is unlawful because *Humphrey's Executor* should be overruled, even under that precedent properly understood the conclusion is the same—*i.e.*, that CPSC's structure (and therefore the action it took) is unlawful.

A. Humphrey's Executor *Forbids CPSC from Exercising Executive Power*

CPSC's FOIA decisions regarding Petitioners are unlawful under *Humphrey's Executor* because that case held that FTC Commissioners can enjoy tenure protection only because the Commission does not exercise executive power. 295 U.S. at 628.

The Court in *Humphrey's Executor* did not doubt the President's power to terminate the employment of an executive officer. In fact, the Court characterized the President's Article II power to terminate as "exclusive and illimitable." *Id.* at 627. *See also Trump v. United States*, 603 U.S. at ___ (slip op. at 8) (noting that "the President's 'exclusive power of removal in executive agencies' [is within his] 'conclusive and preclusive' constitutional authority.") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638, n.4 (1952) (Jackson, J., concurring)).

In other words, the Court assumed FTC brought enforcement actions only in its own, internal tribunals, not in Article III courts. It thought such internal enforcement could be viewed as derivative of FTC's quasi-legislative and quasi-judicial powers. But it thereby drew a sharp contrast. Whereas FTC enforcement within the agency was not "executive power in the constitutional sense,"[6] FTC enforcement outside the agency, in Article III courts, would be "executive power in the constitutional sense." 295 U.S. at 628.

The district court correctly concluded that "the Commission exercises substantial executive power" in the constitutional sense. The Commission adjudicates administrative cases, and it initiates lawsuits. App. 82a. CPSC does not and cannot claim that it exercises anything other than executive power. *See* App. 83a. Indeed, "[a]t oral argument [in the district court], the Government conceded [that CPSC's authority to, *inter alia*, bring lawsuits] was an executive power." App. 81a–82a.

CPSC cannot have it both ways. Per *Humphrey's Executor*, CPSC's structure of Commissioners not removable by the President would be constitutional only if the Commissioners do not exercise executive power. However, if they do exercise executive power (and they do), *Humphrey's Executor* does not protect them from at-will removal by the President. By its own admission, the Commission concedes that the power it

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[6] As explained in Part I, *ante*, this conclusion was erroneous. Because even where "[t]he activities of executive officers may 'take legislative and judicial' forms, … they are exercises of—indeed, under our constitutional structure they must be exercises of—the executive Power.'" *Arthrex*, 594 U.S. at 17. The FTC in 1935 was, as it is now, exercising "executive Power."

exercises is executive power, and therefore *Humphrey's Executor* offers it no succor. App. 81a–82a; 83a.[7]

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[7] Only two cases other than *Humphrey's Executor* have upheld statutory limits on Presidential removal. *See Morrison v. Olson*, 487 U.S. 654 (1988); *Wiener v. United States*, 357 U.S. 349 (1958). Neither, however, assists CPSC.

Wiener concerned the War Claims Commission, which possessed no executive powers, instead being "established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof." 357 U.S. at 345. Furthermore, as the War Claims Commission was processing claims that were to be paid by the United States and out of the federal treasury, *see* 50 U.S.C. § 4143, the Commission was essentially an Article I tribunal similar to the long-established and long-accepted Court of Claims. *Cf. Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 283 (1855) ("It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just.").

Morrison also offers no help to CPSC's position. That case involved the unique problem of an independent counsel, who was viewed by the Court (correctly or not) as an "inferior officer," in contrast to CPSC Commissioners who are indisputably "principal officers." Thus, the *Morrison* "exception" cannot be relied on here. Additionally, *Morrison* has been so widely and prominently questioned that it is not clear it can *ever* be relied upon—even as to its own facts. *See, e.g.*, *Justice Kagan and Judges Srinivasan and Kethledge Offer Views from the Bench*, 92 Stan. Law. In Brief (2015), https://stanford.io/3qw1UuM ("Kagan called Supreme Court Justice Antonin Scalia's lone dissent in *Morrison* … 'one of the greatest dissents ever written and every year it gets better.'"); *The Future of the Independent Counsel Act: Hearing Before the S. Comm. on Gov't Affairs*, 116th Cong. 243 (1999) (statement of Janet Reno, Att'y Gen. of the United States) ("[T]he Independent Counsel Act is structurally flawed and … [these] flaws cannot be corrected within our constitutional framework."); Richard Samp, *Good-bye, Morrison v. Olson*, Law & Liberty (Sept. 7, 2021), *available at* https://tinyurl.com/32r3zhy2 (arguing that *United States v. Arthrex*, 594 U.S. 1 (2021), *sub silentio* overruled

B. If This Court Chooses to Follow Humphrey's Executor*, Faithful Application of That Precedent Leads to the Same Result*

As Justice Gorsuch recently noted in his concurrence, individual precedents, like *Humphrey's Executor*, sometimes stray from the Constitution, and from a longer line of cases explicating the law, which in turn entitles such precedents to less weight and deference. *See Loper Bright*, 603 U.S. at 2276–2281 (Gorsuch, J., concurring). In those cases, it is altogether proper for this Court to overrule erroneous decisions. *Id.* at 2279–2281 (Gorsuch, J., concurring).

However, in this instance the Court is fortunate that the Constitution—whether applied as properly understood, *see ante* § I, or as applied too abstemiously in *Humphrey's Executor*—leads to the identical conclusion that CPSC is unconstitutionally structured.

Under the Constitution as originally and property understood, the Court should conclude that *Humphrey's Executor* was wrong when decided, because it imperiled the President's constitutional authority to dismiss any other person exercising executive power, thus undermining his duty to "take Care that the Laws be faithfully executed." *See ante*, § I.

But even if the President's authority to dismiss Executive Branch officials can be cabined, under *Humphrey's Executor*, officials shielded from at-will removal cannot exercise executive power. Accordingly,

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Morrison).

CPSC is unconstitutionally structured because it does not fit within the *Humphrey's Executor* "exception."

In short, CPSC's conduct regarding Petitioners is unconstitutional *irrespective* of whether *Humphrey's Executor* is overruled—or remains good law but is *fully* adhered to.

CONCLUSION

The petition for *certiorari* should be granted.

Respectfully submitted,

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