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 FOR THE STATE OF LOUISIANA AND 15 OTHER STATES AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae States of Louisiana, Alabama, Arkansas, Idaho, Indiana, Iowa, Kentucky, Mississippi, Missouri, Montana, Nebraska, North Dakota, South Carolina, Tennessee, Utah, and West Virginia have a profound interest in preserving the separation of powers and guarding against federal government overreach. To advance that interest, each State is presently litigating challenges to unlawful agency action, including actions by unlawfully structured agencies.

This case squarely implicates that interest. The for-cause removal restriction enjoyed by Commissioners of the Consumer Product Safety Commission shields them (and the President) from the political accountability required in our constitutional system. And that has unique consequences for States in particular. For one, the Commission regulates consumer safety: a domain traditionally governed by state tort law. In addition, some independent agencies (*e.g.*, the Equal Employment Opportunity Commission) directly regulate States. In both respects, therefore, States have a direct interest in politically accountable independent agencies and a politically accountable President. They thus submit this brief to underscore the importance of the issue presented and urge the Court to grant the petition for writ of certiorari.

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[1] Pursuant to Rule 37.2, on July 8, 2024, counsel for *amicus* State of Louisiana provided the parties' counsel with notice of its intention to file this brief. Prior to his current employment, counsel of record for *amicus* State of Louisiana represented Petitioners as private counsel in the litigation below.

INTRODUCTION AND SUMMARY OF ARGUMENT

From "airborne beach umbrellas,"[2] to memory foam mattresses,[3] to "fire extinguisher balls,"[4] there is no product in American society that can escape the regulatory grasp of the Consumer Product Safety Commission (CPSC).

In 2023, Americans were forcefully reminded of that power when CPSC set its sights on one of the most sacred kitchen appliances: the gas stove. That memorable stretch in American history began when Commissioner Richard Trumka Jr. tipped CPSC's hand by telling a reporter that "a ban on gas stoves is on the table amid rising concern about harmful indoor air pollutants emitted by the appliances."[5]

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[2] *Beware! Airborne Beach Umbrellas Can Kill*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, https://tinyurl.com/5m22fu38.

[3] *CPSC Warns Consumers to Immediately Stop Using Classic Brands Holdings 10-inch Cool Gel Memory Foam Mattresses Due to Fire Hazard*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (August 24, 2023), https://tinyurl.com/594jvbpx.

[4] *CPSC Warns Consumers to Immediately Stop Using Fire Extinguisher Balls Due to Failure to Extinguish Fires and Risk of Serious Injury or Death; Sold on Amazon.com*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (June 1, 2023), https://tinyurl.com/2xhzk7dv.

[5] Ari Natter, *U.S. Safety Agency Eyes Ban on Gas Stoves As Health Concerns Mount*, TIME (Jan. 9, 2023), https://tinyurl.com/hyxwc9jd.

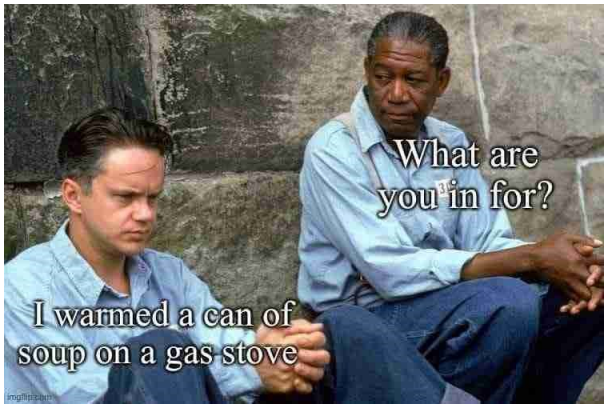
Fiery outrage ensued. Texans replaced the cannon on their "Come and Take It" flag with a gas stove:[6]

Floridians added a gas stove to their "Let Us Alone" flag:[7]

[6] *Collection of Ban GAS STOVE MEMES*, GUIDE FOR GEEK MOMS (Oct. 3, 2023) (*GAS STOVE MEMES*), https://tinyurl.com/2um5tnu5.

[7] Ron DeSantis (@GovRonDeSantis), X.COM (Jan. 12, 2013 9:19 AM), https://tinyurl.com/5fj59nyz.

Others turned to the movies for inspiration:[8]



And late night show hosts showed no mercy. "F**k you! I will see you in hell. You can have my gas range when you pry it from my hot, sizzling hams," said Stephen Colbert.[9]

In the wake of Trumka's announcement, CPSC scrambled to contain the damage. "This is going to be ALL HANDS ON DECK for the foreseeable future," CPSC's communications director internally warned the agency.[10] Trumka reversed himself on Twitter: "To be clear, CPSC isn't coming for anyone's gas stoves."[11] And CPSC Chairman Alexander Hoehn-Saric released a statement assuring Americans that he himself was

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[8] *GAS STOVE MEMES*, *supra* n.6.

[9] *Stephen Colbert Slams Government Agency Considering Ban on Gas Stoves*, FOX NEWS (Jan. 12, 2023), https://tinyurl.com/57fhm686.

[10] Nick Penzenstadler, *Is the government coming for your gas stove? Here's how the controversy first got cooking*, USA Today (May 30, 2023), https://tinyurl.com/3njvcukr.

[11] Richard Trumka Jr. (@TrumkaCPSC), X.COM (Jan. 9, 2023, 2:54 PM), https://tinyurl.com/3ytymweu.

"not looking to ban gas stoves and the CPSC has no proceeding to do so."[12]

But what about the White House? "Don't look at us," they said. In a press briefing, the Press Secretary emphasized that CPSC Commissioners "are independent" and, "as far as I'm aware, we're not in touch with them on this particular issue."[13] The President, she continued, "does not support banning gas stoves."[14] And—to underscore the key talking point—she reminded the press that CPSC "is independent" and "I would refer you to the [CPSC]."[15] So far as the White House was concerned, it was not politically accountable for the actions of the CPSC Commissioners. And of course, the unelected Commissioners themselves are not politically accountable. That is why this case is so important.

In our constitutional system, "the Framers made the President the most democratic and politically accountable official in Government." *Seila Law LLC v. CFPB*, 591 U.S. 197, 224 (2020). That "political accountability is enhanced by the solitary nature of the Executive Branch" in which "[t]he President cannot

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[12] Alexander Hoehn-Saric, *Statement of Chair Alexander Hoehn-Saric Regarding Gas Stoves*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Jan. 11, 2023), https://tinyurl.com/54hbav2b.

[13] Karine Jean-Pierre, Press Briefing by Press Secretary Karine Jean-Pierre, THE WHITE HOUSE (Jan. 11, 2023, 2:26 PM), https://tinyurl.com/bp8jsmb9.

[14] *Id.*

[15] *Id.*

delegate ultimate responsibility or the active obligation to supervise that goes with it." *Id.* "The buck stops with the President"—always. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 493 (2010).

The gas-stove debacle, however, illustrates that the President operates in an accountability-free world where so-called "independent" agencies are involved. That is because *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), "stalks" this Court's Article II jurisprudence "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried," *cf. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment). And under *Humphrey's*, independent agencies can run riot shielded by for-cause removal protections, while Presidents can disclaim political liability for the conduct (or misconduct) of such agencies.

Humphrey's has been dormant for decades. In fact, the Court recently confined that 90-year-old precedent to its facts, observing that the *Humphrey's* Court itself was confused about the facts and law. *See Seila Law*, 591 U.S. at 216 n.2, 219 n.4. And yet, in cases like this, *Humphrey's* scurries from its grave in the dark of night to scare self-described "middle-management circuit judges," Pet.App.4a, into expanding *Humphrey's*—even those who "mostly nod[] in agreement" that this is error, Pet.App.37a (Willett, J., concurring in the denial of rehearing en banc). *Compare Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2269 (2024) ("*Chevron* remains on the books. So litigants

must continue to wrestle with it, and lower courts—bound by even our crumbling precedents—understandably continue to apply it." (citation omitted)).

There is no good reason to keep telling ghost stories about *Humphrey's*. The Court should either overrule *Humphrey's* or, at the least, explain that its Article II exception for independent agencies does not extend to agencies like CPSC, which undisputedly wield substantial executive power.

That straightforward application of more-recent cases like *Seila Law* is especially warranted here given the unique dangers that independent agencies present to States. CPSC, for example, operates in a consumer-safety domain that traditionally belonged to state tort law. In addition to displacing state law, moreover, some independent agencies directly regulate States themselves. As just one example, the Equal Employment Opportunity Commission (EEOC) recently promulgated a rule intended to force employers, including States, to accommodate their employees' purely elective abortions—even though numerous States' laws and policies are directly to the contrary.

From gas stoves to abortion, independent agencies are deeply involved in every facet and debate of American life. They must be accountable to the President for their actions. And the President, in turn, must be accountable to the American people for the agencies' actions. The Court should grant the petition for writ of certiorari and reverse.

ARGUMENT

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law*, 591 U.S. at 203. As a corollary, "the Constitution gives the President 'the authority to remove those who assist him in carrying out his duties.'" *Id.* at 204. Indeed, "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* (quoting *Free Enter. Fund*, 561 U.S. at 514).

In *Humphrey's*, the Court recognized a "limited" exception to this rule by permitting for-cause removal restrictions on officers of a multi-member independent agency that "was said not to exercise any executive power." *Id.* at 216. But *Humphrey's* "reaffirmed the core [principle] that the President has 'unrestrictable power … to remove purely executive officers.'" *Id.* at 217. Thus, for example, an agency that "possesses the authority to promulgate binding rules"; "unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications"; or "seek daunting monetary penalties" lies far beyond the "outermost constitutional limit[]" set by *Humphrey's*. *Id.* at 218–19 (quoting *PHH Corp. v. CFPB*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J., dissenting)).

Under these basic principles, this is an easy case. CPSC enjoys "near-unconstrained power" to regulate

consumer products. Pet.App.46a (Oldham, J., dissenting). It wields "sweeping investigatory and enforcement powers," including its ability to seek hundreds of thousands of dollars in civil penalties. *Id.* at 47a. And it "has adjudicatory authority" permitting the agency to effectively stop "distribution of a product." *Id.* In other words, CPSC is everything the 1935 Federal Trade Commission (imagined by *Humphrey's*) was not. *Cf. Seila Law*, 591 U.S. at 216 n.2 ("The [*Humphrey's*] Court's conclusion that the FTC did not exercise executive power has not withstood the test of time."); *id.* at 250 (Thomas, J., concurring in part and dissenting in part) ("*Humphrey's Executor* does not even satisfy its own exception."). *Humphrey's* thus does not save CPSC's for-cause removal restriction.

That the Fifth Circuit nonetheless believed this is *not* an easy case illustrates the need for this Court's intervention. The Court could (and should) simply put an end to *Humphrey's*. "[T]here is no doubt that *Humphrey's Executor* … authorize[s] a significant intrusion on the President's Article II authority to exercise the executive power and take care that the laws be faithfully executed." *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 696 (D.C. Cir. 2008) (Kavanaugh, J., dissenting). Moreover, "it is not clear what is left of *Humphrey's Executor*'s rationale" in light of this Court's subsequent decisions, *Seila Law*, 591 U.S. at 250 (Thomas, J., concurring in part and dissenting in part), including the recognition in *Seila Law* that *Humphrey's* was likely wrong when it was decided. At the very least, the Court should—as it has done in past

cases—"hold the line and not allow encroachments on the President's removal power beyond what *Humphrey's Executor* … already permit[s]." *Free Enter. Fund*, 537 F.3d at 698 (Kavanaugh, J., dissenting). Either way, this Court's review and reversal are in order.

Now to *amici* States. They submit this brief not to replough the merits but to provide important context about CPSC and other independent agencies that bear directly on States. CPSC, for instance, enjoys a regulatory domain that traditionally belonged to state tort law. And other independent agencies directly regulate States. Because of these intrusions on State sovereignty, it is especially important for States and their citizens that such agencies be politically accountable and, in turn, that the President be politically accountable for the agencies. Because the Fifth Circuit's decision prevents such accountability, the States urge the Court to grant certiorari and reverse.

A. An Unaccountable CPSC Is Especially Offensive To State Sovereignty.

Start with CPSC—an independent federal agency protected by for-cause removal restrictions that has supplanted States' traditional prerogative in regulating consumer safety. CPSC began as a counterproductive experiment in federal regulation, and now it has ballooned into a regulatory agency with the ability to touch virtually every product in American society with reckless abandon.

1. For much of the Nation's history, States supervised consumer safety. American "[c]ourts had always

recognized that manufacturers had a duty in tort." Alexandra D. Lahav, *A Revisionist History of Products Liability*, 122 Mich. L. Rev. 509, 556 (2023). And "[o]ver the nineteenth century," in particular, state "courts built a set of rules for mass-produced products as those products emerged as part of a growing national economy: first medicines in the 1850s and 1860s, then canned meat, clothing, furnishings, and finally machines." *Id.* at 557 (footnotes omitted). "As mass markets developed and producers and sellers were separated by chains of commerce, liability followed." *Id.* Liability rules varied, but virtually all "[n]ineteenth-century American courts agreed that manufacturers who sold goods far and wide in the emerging industrial economy had an obligation to consumers to produce safe products." *Id.* at 559; *see also id.* at 555 ("state tort law protected people's ability to sue for products that injured them").

As consumer products expanded and evolved, so too did state law in concerted efforts to better protect consumers. Since the mid-twentieth century, "almost every court that ha[d] considered the question ha[d] expanded the doctrine of strict liability to cover all defective products." *Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 919 (5th Cir. 1964) (recounting the changing landscape). That evolution "parallel[ed] the expansion in scope of the manufacturer's liability for negligence that took place after *MacPherson*." *Id.* at 920. State common law was thus delivering on the truism that state "'regulation can be as effectively exerted through

an award of damages as through some form of preventive relief.'" *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 521 (1992).

2. But things changed in 1972 with the Consumer Protection Safety Act (CPSA), which created CPSC. The CPSA charged CPSC with product safety, and preempted all state product-safety rules "unless such requirements [were] identical to the requirements of the Federal standard." Consumer Product Safety Act, Pub. L. No. 92-573, § 26, 86 Stat. 1207, 1227 (1972) (codified at 15 U.S.C. § 2075). But subsequent developments suggested that the whole enterprise was a mistake.

First, CPSC was counterproductive for years. Although the CPSA essentially voided all state product-safety rules, CPSC initially neglected to issue federal ones to protect consumers. "In its first five years, [] CPSC issued only one safety standard—for swimming pool slides." Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 Tex. L. Rev. 15, 71 (2010). And after ten years, CPSC had only seven safety standards to show for itself. *Id.* In fact, CPSC was such a disaster that the Office of Management and Budget thought about recommending its dissolution to President Carter—and did relay that recommendation to President Reagan. *Id.*

Second, and relatedly, States were powerless to protect their own citizens from consumer-safety risks. Along with being "forbidden from establishing or continuing requirements 'unless such requirements

[were] identical to the requirements of the Federal standard,'" "states were not authorized to enforce the CPSA." *Id.* at 70. The upshot was that the CPSA actually "allowed dangerous products to remain on the market long after state AGs had identified them." *Id.* And all States could do was plead with CPSC (with limited, delayed success) to take action. *See* Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 Yale L. & Pol'y Rev. 165, 181–84, 194–95 (2010) (collecting examples).[16]

Third, courts across the country amplified these issues by giving the CPSA, and CPSC's corresponding rules, broad preemptive effect. *See* Martin A. Kotler, *Tort Reform and Implied Conflict Preemption*, 44 J. Marshall L. Rev. 827, 865 n.183 (2011). The Eighth Circuit, for example, declared that the CPSA's preamble expressed "the intent of Congress to preempt" any and all "state safety standards or regulations that are

[16] *See*, *e.g.*, Enhancing the Safety of Our Toys: Lead Paint, the Consumer Product Safety Commission, and Toy Safety Standards: Hearing Before Subcomm. of the S. Comm. on Appropriations, 110th Cong. 6–8 (2007) (statement of Lisa Madigan, Att'y Gen., State of Illinois) (Illinois seeking CPSC recall of Magnetix toys for six years); *see also*, *e.g.*, 154 Cong. Rec. S1505 (daily ed. Mar. 4, 2008) (statement of Sen. Pryor) ("Right now, what we have to do is rely on the Justice Department or we have to rely on CPSC employees to turn around and try to enforce those out in the various States. … It is hurting enforcement.").

not identical to the federal standard"—including "common law tort actions that would have the effect of creating a state standard." *Moe v. MTD Prod., Inc.*, 73 F.3d 179, 182 (8th Cir. 1995); *but see Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063, 1071 (9th Cir. 2000) ("state common-law warning requirement does not conflict with the federal safety standards or the overall scheme of the CPSA"). And where courts split on the preemptive effect of the CPSA and its regulations, the result was even greater confusion and market costs. *Compare, e.g.*, *BIC Pen Corp. v. Carter*, 251 S.W.3d 500, 507 (Tex. 2008) (CPSC regulation impliedly preempted common law design defect claim of child-resistant disposable lighter), *and Frith v. BIC Corp.*, 863 So. 2d 960, 967 (Miss. 2004) (similar), *with Colon ex rel. Molina v. BIC USA, Inc.*, 136 F. Supp. 2d 196, 208 (S.D.N.Y. 2000) (no preemption for similar state-law claim), *and Cummins v. BIC USA, Inc.*, 628 F. Supp. 2d 737, 742 (W.D. Ky. 2009) (same).

Given these glaring problems, many rightly questioned whether CPSC was worth saving, including its later-Chair. *See* Robert S. Adler, From "Model Agency" to Basket Case—Can the Consumer Product Safety Commission Be Redeemed?, 41 Admin. L. Rev. 61, 65–66 (1989); Robert S. Alder R., Cajolery or Command: Are Education Compaigns an Adequate Substitute for Regulation?, 1 Yale J. on Reg. 159, 193 (1984) ("We believe millions of taxpayer dollars are spent annually on education campaigns that produce no tangible benefits.").

3. In 2008, Congress tried to solve the CPSA's problems by passing the Consumer Product Safety Improvement Act of 2008 (CPSIA)—the current statutory regime governing CPSC. Pub. L. No. 110-314, 122 Stat. 3016 (2008).

Relevant here, State attorneys general initially applauded the CPSIA because it purported to restore State involvement in consumer safety. *See* Nat'l Ass'n of Attorneys Gen., Letter from State Attorneys General to members of the House Comm. on Energy and Com. (May 28, 2008), https://tinyurl.com/2uk4pe48. In particular, the CPSIA authorizes State attorneys general—like any private citizen—to sue to enjoin the sale of products that violate CPSC's rules. *See* 15 U.S.C. § 2073(b); *see* Frank Leone & Bruce J. Berger, *The Consumer Product Safety Improvement Act, Its Implementation and Its Liability Implications*, 76 Def. Couns. J. 300, 310 (2009) (describing the provision). But life under the CPSIA has proven to be more of the same, in large part because the same constraints on State authority remain, including preemption problems.

All the while, CPSC's footprint has dramatically increased. CPSC itself claims to "regulate[] thousands of consumer products"—so many, CPSC complains, "[o]ften, it is easier to say what we don't regulate."[17] And that includes everything "from coffee makers, to

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[17] *Regulations, Laws & Standards*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, https://tinyurl.com/4ykxm8ed.

toys, to lawn mowers, to fireworks."[18] CPSC's methods of regulation also vary, including not only traditional rules but also voluntary standards and advisory opinions on subjects such as pet turtles and wolf-hybrid dogs. (CPSC originally believed "pet turtles are consumer products and subject to regulation by the Commission,"[19] but later reversed course when someone asked about wolf-hybrid dogs—only then did CPSC acknowledge "Congress did not intend pets or other living animals, as such, to be **consumer products**[.]"[20])

CPSC's enforcement, too, has exploded. As one example, just last November, CSPC and the Department of Justice boasted their first-ever criminal convictions of corporate executives for failure to submit a report of a defective or dangerous product in a timely fashion. *See* Press Release, U.S. Dep't of Just., Two Corporate Executives Convicted in First-Ever Criminal Prosecution for Failure to Report Under Consumer Product Safety Act (Nov. 17, 2023), https://tinyurl.com/bdfacpyp. Prosecutors also obtained a $91 million penalty from the companies. *Id.* And that is just the tip of the iceberg: Alongside a series of multi-million-dollar settlements over space heaters, air conditioners, and

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[18] *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, U.S. CONSUMER PRODUCT SAFETY COMMISSION, https://tinyurl.com/ymnnvfb3.

[19] *Pet Turtles*, Op. No. 78, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Jan. 29, 1974), https://tinyurl.com/2vrej95y.

[20] *Wolf-Hybrid Dogs*, Op. No. 311, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Apr. 16, 1990), https://tinyurl.com/5n7zvd7w.

treadmills, CPSC has promised to continue to use "every tool at our disposal," including "significant civil and potentially criminal penalties," to advance CPSC's agenda.[21]

4. CPSC's rocky existence—from initially abdicating its role almost entirely to its current insatiable desire to touch every product in American life—is reason enough to be concerned that CPSC is sufficiently accountable, both to the President and to the public. And that concern is particularly heightened here given that CPSC is operating in a regulatory space that otherwise belonged to States and their common law.

In a world without CPSC, state common law alone (and perhaps statutory law, as well) would supply the safety standards that govern consumer products. That law, by its very nature, would be developed by politically accountable State officials—whether a governor, a legislator, or a judge either elected or appointed by a politically accountable official. The resulting standards would thus be subject to public praise and criticism. And if the relevant officials were not responsive,

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[21] *See* Alexander Hoehn-Saric, *Statement of Chair Alex Hoehn-Saric Regarding Vote to Approve $7.5M Settlement Agreement with Vornado Air, LLC*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (July 7, 2022), https://tinyurl.com/3n3nbzdz; Peter A. Feldman, *Statement of Commissioner Peter A. Feldman on Guilty Verdicts Against Gree Executives*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Nov. 17, 2023), https://tinyurl.com/2xfw9unv; Richard Trumka Jr., *Statement of Commissioner Richard Trumka on $19.065 Million Penalty Against Peloton for Corporate Misconduct Surrounding Lethal Defect*, U.S. CONSUMER PRODUCT SAFETY COMMISSION (Jan. 5, 2023), https://tinyurl.com/2p9psprh.

the people could respond through democratic means to hold the officials accountable.

But this is a world with CPSC—and no such political accountability exists by virtue of the for-cause removal restriction on CPSC Commissioners. When CPSC undertakes monumentally misguided projects (like a gas-stove ban), the American public can protest, but ultimately it is CPSC that holds the hammer. CPSC can back down as it did on gas stoves. Or, as illustrated by EEOC's story below, CPSC can simply dig in its heels because it has nothing to lose. Either way, the American public is entirely at the mercy of an unaccountable independent agency. That is all the reason in the world to grant certiorari and reverse.

B. Unchecked Independent Agencies That Directly Regulate States Present Special Danger To State Sovereignty.

For other independent agencies, moreover, their impact on States is even more direct because States are regulated entities. A particularly timely—and concerning—example is EEOC's recent attempt to foist abortion accommodations on all employers, including States.[22] Never mind State sovereignty and this Court's recognition that States have "legitimate interests" in "regulating abortion," *Dobbs v. Jackson*

[22] The prevailing view in the caselaw—held by EEOC—is that EEOC's enabling statute constrains the President from removing EEOC Commissioners, except for cause. *See*, *e.g.*, *Lewis v. Carter*, 436 F. Supp. 958, 961 (D.D.C. 1977); 42 U.S.C. § 2000e-4(a). The State Plaintiffs in the parallel litigation have preserved challenges to EEOC's unconstitutional structure.

Women's Health Org., 597 U.S. 215, 301 (2022). And yet, EEOC's position—*in the ongoing abortion litigation*—is that any challenge to its structure is foreclosed by the Fifth Circuit's decision *in this case*. This, too, underscores the need for the Court's review in this case.

1. This story begins with the Pregnant Workers Fairness Act of 2022 (PWFA or Act), 42 U.S.C. §§ 2000gg-1 *et seq*. As the Act's name suggests, Congress passed the PWFA to ensure that pregnant women receive reasonable and fair accommodations in the workplace that promote healthy pregnancies and protect the unborn. The Act was a remarkable display of true bipartisanship as Senators Bill Cassidy and Bob Casey locked arms to make the Act a reality.[23] And that across-the-aisle support was reflected among the Act's supporters themselves: Planned Parenthood voted aye, as did the pro-life U.S. Conference of Catholic Bishops. *See* 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022) (statement of Sen. Bob Casey).

The Act accomplishes its aim in simple terms. It requires virtually all employers to accommodate any "known limitation[s] … related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" of a qualified employee. 42 U.S.C. § 2000gg-1. The PWFA defines "known limitation" as a "physical or mental condition related to, affected by,

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[23] Bob Casey, *Casey, Cassidy Introduce Bipartisan Pregnant Workers Fairness Act, Propose Protections Against Workplace Discrimination* (Apr. 29, 2021), https://tinyurl.com/4jz68pcb.

or arising out of pregnancy, childbirth, or related medical conditions." *Id.* § 2000gg(4). And the PWFA makes it unlawful for covered employers to discriminate against qualified employees, including by refusing to provide reasonable accommodations. *Id.* § 2000gg-1.

It was widely understood, moreover, that the accommodations required under the PWFA would be "commonsense … to ensure a healthy pregnancy and a healthy baby."[24] Senator Patty Murray underscored that "[n]o one should be forced to decide between a healthy pregnancy and staying on the job."[25]

What does the PWFA say about abortion? Exactly nothing. That is unsurprising given that the PWFA was intended to ensure a *healthy* pregnancy and a *healthy* baby. Abortion—especially purely elective abortion—is thus antithetical to the PWFA. And that's not all: Senator Casey expressly allayed any concerns about abortion by confirming on the Senate floor that, under the PWFA, EEOC "could not—could not—issue any regulation that requires abortion leave." 168 Cong. Rec. S10081 (daily ed. Dec. 22, 2022).

2. But EEOC would not be deterred. By a one-vote margin, EEOC voted on April 19, 2024, to publish a final rule that requires employers to accommodate

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[24] Bob Casey, *Casey, Cassidy Introduce Bipartisan Pregnant Workers Fairness Act, Propose Protections Against Workplace Discrimination* (Apr. 29, 2021), https://tinyurl.com/4jz68pcb.

[25] *Senate HELP Committee Advances Bipartisan Bills to Improve Suicide Prevention, Protect Pregnant Workers, and Support People with Disabilities*, S. Comm. on Health, Educ., Labor, & Pensions (Aug. 3, 2021), https://tinyurl.com/9dv9vax5.

their employees' purely elective abortions. *See EEOC, Implementation of Pregnant Workers Fairness Act*, 89 Fed. Reg. 29,096, 29,104 (Apr. 19, 2024) (Final Rule). To put it bluntly, the Final Rule is an affront to common sense and the English language.

According to the Final Rule, "related medical conditions" (which require reasonable accommodations under the PWFA) are "medical conditions that relate to pregnancy or childbirth." 89 Fed. Reg. 29,191. So far, so good. But then the Final Rule says that "[t]here are some medical conditions where the relation to pregnancy will be readily apparent"—including "having or choosing not to have an abortion." *Id.* What? A purely elective abortion is not a medical *condition*; it is "a medical *procedure*," *Dobbs*, 597 U.S. at 236 (emphasis added). And there is no serious textual argument otherwise.

3. Because States are employers subject to the PWFA and EEOC's Final Rule, Louisiana and Tennessee are leading parallel litigation on behalf of multi-State coalitions to challenge the Final Rule's abortion-accommodation mandate.

The Final Rule was quickly enjoined in the Western District of Louisiana. *See Louisiana v. EEOC*, __ F. Supp. 3d __, 2024 WL 3034006 (W.D. La. June 17, 2024). Indeed, the *Louisiana* court did not think EEOC was even in the ballpark of legitimate rulemaking. "Plaintiffs clearly have the stronger position," the court reasoned, because a purely elective abortion is "better described as a medical 'procedure,' as Plaintiffs

suggest." *Id.* at *9. "EEOC's arguments to the contrary amount to little more than semantic gymnastics." *Id.*

And in fact, the court saw the issue "as even more straightforward": "If Congress had intended to mandate that employers accommodate elective abortions under the PWFA, it would have spoken clearly when enacting the statute, particularly given the enormous social, religious, and political importance of the abortion issue in our nation at this time (and, indeed, over the past 50 years)." *Id.* EEOC protested that abortion does not present a major question implicating the major-questions doctrine. "[D]isingenuous," the court ruled. *Id.* Since *Roe*, "abortion has been one of the most important social, religious, and political issues of our time and is a major issue in every federal election." *Id.*

The upshot was that "EEOC must point to 'clear congressional authorization' to extend the PWFA to impose an abortion accommodation mandate on public and private employers." *Id.* Yet "[n]ot only is the EEOC unable to point to any language in the PWFA empowering it to mandate the accommodation of elective abortions, [] there can be little doubt in today's political environment that any version of the PWFA that included an abortion accommodation requirement would have failed to pass Congress." *Id.* And that doomed EEOC's abortion-accommodation mandate at the preliminary-injunction stage.

4. EEOC's brazen attempt to commandeer the PWFA for abortion-related purposes is notable here because it strikes at the heart of State sovereignty.

As the *Louisiana* court recognized, "states have an interest in 'the exercise of sovereign power over individuals and entities within the relevant jurisdiction,'" including the power to create and enforce laws and policies. 2024 WL 3034006, at *4. In fact, "the people of both Mississippi and Louisiana, through the democratic process, have unambiguously expressed their opposition to purely elective abortions by passing laws prohibiting the same"—opposition that is reflected in the States' own employment "policies." *Id.* at *5, *11. "And the Supreme Court has confirmed that the states are free to regulate abortion in accordance with the democratic process." *Id.* at *5 (citing *Dobbs*, 597 U.S. at 292).

Because EEOC's abortion-accommodation mandate "forces" the States "to provide (and fund) accommodations for elective abortions that directly conflict with the States' own laws and policies," therefore, the *Louisiana* court easily concluded that the mandate "is destructive of state sovereignty." *Id.* at *11 (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985)). The States' laws and policies are "antithetical to the directives of the abortion accommodation mandate." *Id.* As a result, the States were "likely to succeed on their claims that the abortion accommodation mandate violates the principles of federalism and encroaches on state sovereignty." *Id.*

Worst of all, EEOC was able to perpetrate this attack on State sovereignty—regarding one of the most difficult legal and moral debates of our time—with virtually no risk of political accountability. Indeed,

EEOC's position in the *Louisiana* litigation is that its structure is untouchable under the Fifth Circuit's decision in this case. Moreover, in requiring abortion accommodations, EEOC countermanded this Court's own directive that "the authority to regulate abortion must be returned to *the people* and their *elected* representatives." *Dobbs*, 597 U.S. at 292 (emphases added). These are the true colors of an unelected, independent federal agency blindly pursuing a political agenda with nothing to lose. And this should serve as a warning that *Humphrey's* has very real downstream consequences for Americans and the sovereign States.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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