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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The Government does not dispute that the CPSC is one of the most powerful agencies in existence today, wielding robust executive authority over much of American life. Nor does it deny that—as with so many other independent agencies—the President lacks meaningful control over how the Commission functions. And the Government makes no real effort to explain how this unaccountable structure somehow squares with Article II, or this Court's recent admonition that the heads of multimember agencies charged with "substantial executive power" must be removable at will. *Seila Law LLC v. CFPB*, 591 U.S. 197, 218 (2020).

Instead, the Government's principal argument is that petitioners lack standing—a theory that *zero* of the 18 judges below thought had an ounce of merit. For good reason. Petitioners' theory of standing is well trodden: Whenever the CPSC adjudicates their FOIA requests, petitioners are subjected to a proceeding administered by an unconstitutionally insulated agency. This Court has long held such a proceeding inflicts a "here-and-now" injury. And that holds for FOIA as anywhere else.

The Government has no genuine answer to this, so it pivots quickly from the law. Its main point is that there is a mismatch between the "magnitude" of the question presented and its dismissive view of the facts of this case. BIO.10. But it is awfully odd to say that this Court should ignore the unlawful action before it, because a *more consequential* unlawful action may be on the way—especially since stopping or unwinding the latter (*e.g.*, a major rule or enforcement action) would risk far worse disruption.

Regardless, the Government's atmospheric appeal is meritless. Sure, how the CPSC handles FOIA requests is not something that typically reaches the Oval Office. But it matters to petitioners—organizations that have been filing FOIA requests for years (far before this suit) and who depend on them for their work. And they want what Article II promises: An accountable Executive from root to branch; from the massive to the mundane.

That promise has been vitiated across far too much of the Executive Branch for far too long. It is past time for this Court to act. And this case is an excellent vehicle to do so. The problem for this Court is not that this small case turns on a big idea; it is that the modern Executive Branch is not accountable to the President. As for what matters, the answer is clear.

ARGUMENT

I. PETITIONERS HAVE STANDING.

The Government leads with Article III, not Article II. But its attempt to conjure a standing problem falters.

a. Petitioners' standing is straightforward: They are being subjected to proceedings administered by an agency unconstitutionally insulated from the President.

Petitioners have a statutory right to seek information from the CPSC under the Freedom of Information Act. They have exercised this right for years, making over 50 requests to the CPSC for information and related fee waivers. And they will continue to do so. When that happens, the CPSC will process and adjudicate those requests, following rules and procedures it alone made.

That suffices for standing. Every time the CPSC adjudicates one of petitioners' FOIA requests, they suffer a "here-and-now injury" directly traceable to the

unaccountable actions that make up the CPSC's "unconstitutionally structured decisionmaking process." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 192 (2023). And this injury would be redressed by a declaratory judgment holding the agency's removal protection unlawful, restoring presidential accountability. *See Free Enter. Fund v. PCAOB*, 561 U.S. 477, 513 (2010).

Petitioners thus have a clear answer to the "What's it to you?" question: They want their statutory rights adjudicated by a constitutionally structured agency; and they suffer an Article III injury every time that does not happen (no different from if they were seeking a permit or benefit from an unlawfully tenured official). *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379 (2024). Moreover—and as the Government fails to understand (BIO.15)—that here-and-now injury occurs "irrespective of [the process's] outcome, or of other decisions made within it." *Axon*, 598 U.S. at 192.

In short, petitioners have standing because when an American is subjected to an agency process outside the bounds of Article II, he can challenge that process under Article III. *Seila Law*, 591 U.S. at 212. Indeed, having to put a decision before an "unconstitutionally structured [agency] is exactly the kind of here-and-now injury that … can be remedied by a court." *Axon*, 598 U.S. at 210 (Gorsuch, J., concurring in judgment).

b. Since the Government cannot dispute standing under Article III's traditional three-part test, it adds a fourth: To bring a removal challenge, it says, a party must not only be injured, but injured by an exercise of *substantial* executive power—*i.e.*, the sort of executive power that makes the agency unconstitutionally insulated in the first place.

Not so. There is no major-harm-doctrine limiting removal challenges; Article III does not give insulated agencies free rein to visit minor constitutional injuries.

1. For starters, this Court rejected this argument in *Seila Law*. That case arose out of a civil investigative demand (essentially, a subpoena) issued to a law firm. This Court had no trouble holding Seila Law had standing to challenge that CID on removal grounds, because being subject to a CID issued by an unlawfully insulated agency "inflicts a here-and-now injury … that can be remedied by a court." 591 U.S. at 211-12.

Critically—and contrary to the Government's theory (BIO.11)—the power to issue a CID is very much *not* a "substantial" executive power. *Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976). Rather, it is an "investigative" power, of the type that "Congress might delegate to one of its own committees." *Id.* at 137. And it is *not* the sort of power that made the CFPB's structure constitutionally infirm. *Seila Law*, 591 U.S. at 218-19.

But it did not matter that Seila Law was not directly affected by the use of substantial executive power; what mattered is that Seila Law was subject to *an* exercise of executive power by an agency that was unlawfully insulated from presidential control. In that situation, *any* exercise of executive power "violates the separation of powers." *Id.* at 212. And whenever an American is on the receiving end of that violation, that creates a "here-and-now injury … that can be remedied by a court." *Id.* That is why this Court has "long permitted private parties aggrieved by *an official's exercise of executive power*"—any exercise, substantial or small—"to challenge the official's authority to wield that power while insulated from removal." *Id.* (emphasis added).

That makes sense. The Article II removal question is binary: It is concerned with the *aggregate* of an agency's authority; once the line is crossed, *any* exercise of executive power by the agency is unlawful. This Court has never suggested an unconstitutionally insulated agency's powers can be disentangled, such that it is wielding them *lawfully* at some point (for small stuff) while *unlawfully* at others (for bigger ticket items). Instead, "any aggrieved party" subjected to executive power wielded by an unlawfully insulated agency has standing to challenge it—period. *Collins v. Yellen*, 594 U.S. 220, 245 (2021).

2. The Government nonetheless argues petitioners lack a "personal stake" in the question presented because their injuries do not directly stem from an exercise of the CPSC's regulatory or enforcement powers. BIO.11, 13. That is a non sequitur.

Petitioners obviously have a personal stake in whether the CPSC's adjudications of their FOIA requests are unlawful. And on petitioners' view of the law, they are subjected to unlawful executive action every time the CPSC adjudicates one of their FOIA requests. *That* is all Article III requires.

The Government ignores the key difference between *whether* a party is injured by an unlawful act, and *why* the act is unlawful. What matters for standing is "whether the plaintiffs' injury can be traced to allegedly unlawful conduct of the defendant"—here, the CPSC's unlawful FOIA adjudications. *Collins*, 594 U.S. at 243. A plaintiff is *not* required to trace its injury directly to the "provision of law that is challenged" (here, the unlawful combination of the CPSC's removal restriction and its regulatory and enforcement authorities). *Id.*

Take a quick example: Imagine a business subject to regulations issued pursuant to a statute that violated the Tenth Amendment. That business would have a "personal stake" in the lawfulness of those rules, with standing to challenge them. And that is so even though that business is not a State, and thus did not personally suffer the constitutional violation that rendered those downstream regulations unlawful. *Cf. Bond v. United States*, 564 U.S. 211, 219-20, 226 (2011).

Or suppose someone in the same position as petitioners brought the same suit, but on the *broader* theory that *every* official in the Executive Branch must be removable at-will—*i.e.*, *anyone* exercising *any* executive power at *any* time. On the Government's account, *that* individual would have standing: He would be directly affected by an executive act that on his "theory" would violate Article II. BIO.9. But the same is true here. If two parties suffer the same injury, traceable to the same conduct, and redressable by the same relief, they both have standing—Article III takes the plaintiff's legal theory as true, so standing cannot turn on any differences in *legal arguments* for why the same conduct is unlawful.

3. Related, the Government suggests petitioners' injury is less concrete because they chose "to ask the Commission for documents." BIO.2, 9-10, 12-13, 16. But this Court has rejected that theory, as "an injury resulting from the application … of an unlawful enactment remains fairly traceable to such application, even if the injury could be described in some sense as willingly incurred." *FEC v. Cruz*, 596 U.S. 289, 297 (2022). Americans who *seek* a statutory entitlement from the government are promised an accountable executive no less than those *subject* to enforcement.

c. The Government's final few points are meritless.

First, the Government says petitioners "conceded" FOIA adjudications could be done by independent agencies. BIO.9, 13. Yes—but only if they do not otherwise exercise substantial executive power.

Second, the Government argues petitioners lack standing to challenge the *Commissioners'* removal restrictions, because they deal with CPSC *staff*. BIO.15. But the same was true in *Seila Law*: The law firm dealt with CFPB staff—the CID was not signed by the Director himself. That rightly made no difference, since insulated power is no less problematic when delegated.

Third, the Government warns that petitioners cannot have standing, lest any American could bring a "separation-of-powers" challenge based on a mere "intention" to use FOIA. BIO.10. That is a strawman: Petitioners have sent over "50 FOIA requests" to the CPSC with "plans to submit more," and "FOIA requests are a common … part of [their] business." Pet.App.5a, 71a. In any event, so what? Any American aggrieved by unlawful executive action can challenge it. *Collins*, 594 U.S. at 245; *see FEC v. Akins*, 524 U.S. 11, 24 (1998). That is a virtue of our system, not a vice.

II. THE CPSC IS UNLAWFULLY INSULATED.

On the merits, the Government embraces the same maximalist view of *Humphrey's Executor* adopted by the majority below—and thus reaffirms the clean legal question before the Court: Whether *Humphrey's* blesses tenure protections for *any* "traditional independent agency headed by a multimember board or commission" (BIO.19), or *only* those that do not "wield substantial executive power" (*Seila Law*, 591 U.S. at 218). The correct answer is the one this Court already provided.

a. The key defect with the Government's position is that it rests entirely on a reading of *Humphrey's* that this Court expressly rejected in *Seila Law*. On its view, multimember structure is all that matters. But if that were so, *Seila Law* could have been a fraction as long.

The Government is wrong. Like all of this Court's Article II precedents, *Seila Law* focused on what really matters here: "Power." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting). In clarifying the *Humphrey's* exception, this Court carefully detailed the powers exercised by the 1934 FTC. *Seila Law*, 591 U.S. at 215-16. It then defined the scope of the exception by reference to that authority, reaching only those entities that exercise "powers" comparable to those "considered" in *Humphrey's* itself. *Id.* at 216, 219 n.4.

These were not stray asides. In explaining *why* the *Humphrey's* exception did not apply to the CFPB, this Court did not just focus on structure. It explained how the CFPB wielded "quintessentially executive power[s]" that were "not considered in *Humphrey's Executor*." *Id.* at 219. This Court thus demonstrated how the CFPB failed *both* requirements of *Humphrey's*: It was neither multimember, nor without substantial executive power. While either would be sufficient, neither is irrelevant.

The Government has no explanation for any of this. If structure were all that mattered, this Court would not have needed more than a line to distinguish the single-headed CFPB. What's more, the Government offers no rationale for how *Humphrey's* could be read to bless agencies—such as the Commission—who wield the sort of executive powers this Court did not even "consider[]" (let alone approve) in *Humphrey's*. *Id.* at 219 n.4. By *Humphrey's* own terms, it says nothing

about agencies that go beyond the modest powers of the 1934 FTC, leaving open a large "field of doubt." *Id.* at 217-18 (quoting *Humphrey's*, 295 U.S. at 632).

Seila Law thus provided a faithful interpretation of what *Humphrey's* actually said: Article II may tolerate insulated multimember agencies, so long as they do not "wield substantial executive power." *Id.* at 218.

b. The Government's secondary points are baseless.

First, the Government raises a passing claim that the CPSC has three historical analogs. BIO.17-18. But again, the 1934 FTC did not wield substantial executive power. Cruz Br. 6-7. Nor did the ICC—whose independence was also uncertain for its early years. Manhattan Inst. Br. 5-6. And as the Government admits, the Federal Reserve does not "exercise any executive function." BIO.14; *see* Chamber Br. 11 n.2.

Second, the Government frames the CPSC as part of a longstanding practice. BIO.20. But independent agencies were completely unknown to this country for its first 150 years, and were mired in controversy once they arrived. Manhattan Inst. Br. 4, 7-10. To this day, they remain steeped in constitutional doubt. Pet.28-29 & n.3. That is not a "consistent and longstanding" practice, *United States v. Rahimi*, 144 S. Ct. 1889, 1916 (2024) (Kavanaugh, J., concurring), let alone one that could override the first fifteen words of Article II.

Third, the Government points to a clause from *Seila Law*'s severability analysis. BIO.23. But in context, the plurality was plainly floating a CFPB restructuring as *part* of fixing "the problem"—not as a total "response[]." 591 U.S. at 237. The Court did not become suddenly agnostic to agency power in the final part of its opinion.

III. THIS IS AN EXCELLENT VEHICLE.

The Government agrees the CPSC wields substantial executive power. It also accepts that its Commissioners are shielded by for-cause removal protections. And it concedes that nothing about this case would reach agencies such as the Federal Reserve. Put together, that checks all of the key boxes for an excellent vehicle for this Court to reaffirm the bounds of *Humphrey's*.

The Government's rejoinders do not work.

First, the Government cautions that this Court will need to deal with its (wrong) standing argument, before reaching the merits. BIO.23. But *Free Enterprise*, *Seila Law*, and *Collins* likewise involved similar threshold jurisdictional questions (and all in a splitless posture). This Court had no trouble clearing those hurdles then; it would have no trouble stepping over this one now.

Second, the Government offers a Goldilocks critique: This petition is simultaneously too small (see next), and not big enough—because petitioners fail to ask that *Humphrey's* be overruled. But petitioners have no problem with *Humphrey's*, properly read; their beef is with its misreading. Petitioners only asked for what they need: for the Court to reaffirm that it meant what it said in *Seila Law*. That is not a "grave step," BIO.24; it is a copy-and-paste job. Regardless, petitioners *did* ask for *Humphrey's* to be expressly limited to its facts if necessary (Pet.27)—which would effectively overrule it—as that would also provide them complete relief.

Third, the Government bemoans it would "disserve" Article III "principle[s]" to resolve this issue in a case with these stakes. *Id.* But if modest stakes doomed removal cases, this Court's jurisprudence would be rather barren. *E.g.*, *Wiener v. United States*, 357 U.S.

349, 350-51 (1958) (suit for backpay against defunct War Claims Commission—but granted "because it present[ed] a variant" of the *Humphrey's* question); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 618-19 (1935) (suit by estate for backpay); *Myers v. United States*, 272 U.S. 52, 107-08 (1926) (same); *United States v. Perkins*, 116 U.S. 483, 483 (1886) ($100 in salary).

Indeed, this Court has rightly never imposed such an artificial demand. Article III charges this Court with resolving cases and controversies; there is no amount-in-controversy requirement for constitutional wrongs. And here, petitioners satisfy what Article III actually requires: Consumers' Research has worked on consumer protection issues since 1929; FOIA requests are an integral part of petitioners' mission; and they are entitled to have those requests adjudicated by a constitutionally structured agency. To be sure, such FOIA compliance is not the stuff of presidential legacy. But it is important to the parties before this Court; and for FOIA as elsewhere, the buck still stops at the top.

In truth, the only real disservice going on is that the President "lacks day-to-day control over large swaths" of the "Executive Branch." *In re Aiken Cnty.*, 645 F.3d 428, 442 (D.C. Cir. 2011) (Kavanaugh, J., concurring). And the only way for this Court to fall short of what Article III requires would be to *avoid* this case, all in service of *allowing* this Article II vandalism to persist.

CONCLUSION

The petition should be granted.

September 9, 2024

Respectfully submitted,

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