

No. 23-1323

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IN THE  
**Supreme Court of the United States**

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CONSUMERS' RESEARCH, *et al.*,

*Petitioners,*

*v.*

CONSUMER PRODUCT SAFETY COMMISSION,

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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**BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL  
FOUNDATION IN SUPPORT OF PETITIONERS**

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**STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

*Amicus Curiae* Landmark Legal Foundation (“Landmark”) is a national public-interest law firm committed to preserving the principles of limited government, separation of powers, federalism, originalist construction of the Constitution, and individual rights. Landmark previously submitted an amicus brief in *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020) to call for the overturning of *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

Landmark urges this Court to grant the petition for certiorari.

**INTRODUCTION AND SUMMARY  
OF ARGUMENT**

This case is about whether the exception to the President’s broad removal authority created by *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), applies when an independent agency wields substantial Executive Branch power.

*Humphrey’s Executor* allowed the blending of governmental powers within a single agency and the exercise of executive power that is beyond direct

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1. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for *Amicus Curiae* provided timely notice to counsel for all parties of its intention to file this brief.

presidential control, despite a longstanding consensus that this violates the separation of powers. Almost a century later, the current federal government is enormous and unrecognizable by comparison. “The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). The consequences of *Humphrey’s Executor*—a federal bureaucracy insulated from presidential control—have been detrimental to political accountability and individual liberty.

In recent years, Congress created independent agencies that were even more constitutionally dubious than the Federal Trade Commission, such as the doubly insulated Public Company Accounting Oversight Board and the Consumer Financial Protection Bureau, Federal Housing Finance Agency, both led by a single director. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020); *Collins v. Yellen*, 141 S. Ct. 1761 (2021). As the Court scrutinized these novel administrative agencies, it attempted to confine the holding in *Humphrey’s Executor* to its facts to leave it standing. But the framework underpinning *Humphrey’s Executor* persists and clouds the Court’s rulings. The Court’s focus on factors like multimember or single-director structure, levels of executive power, and historical novelty in these recent cases has been inconsistent. That has caused confusion that only this Court can address.



In this case, the Fifth Circuit Court of Appeals upheld a for-cause removal restriction on the Consumer Product Safety Commission's leadership under 15 U.S.C. § 2053(a) even though it agreed the executive power the CPSC wields is "substantial." Pet. App. 3a, 20a, 21a, 23a. That conflicts with *Humphrey's Executor* which stated that to the extent the FTC engaged in any executive function, not "executive power in the constitutional sense," it did so in discharge of quasi-legislative or quasi-judicial powers. *Humphrey's Executor*, 295 U.S. at 628.

The Court should correct the course it has taken since *Humphrey's Executor* and return to first principles: "The executive Power shall be vested in a President of the United States." Art. II, § 1, cl. 1. "[T]his does not mean *some* of the executive power, but *all* of the executive power." *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Even though it has been repeatedly narrowed, what remains of *Humphrey's Executor* should be explicitly overruled.

The *Humphrey's Executor* Court justified the FTC's removal protection by arguing that the FTC was a body of nonpartisan experts engaging in neither political nor executive duties, but quasi-judicial and quasi-legislative ones. The practical experience of the FTC shows that Justice Sutherland's characterizations in *Humphrey's Executor* of the power wielded by the agency and the type of agency leadership are no longer accurate, assuming they had even been so in 1935. The CPSC similarly fails these factors within *Humphrey's Executor*. The CPSC is not led by nonpolitical experts. Its current commissioners are all lawyers who have worked as congressional staff. And these commissioners wield executive power. As a result,

they should be directly accountable to the President. The Court should make clear that the exercise of *any* executive power beyond presidential control violates the separation of powers.

The Court should therefore grant the petition for certiorari to overturn both the opinion below and *Humphrey's Executor* and reinstate the proper separation of powers under the Constitution.

## ARGUMENT

### **I. The Fifth Circuit's opinion below conflicts with this Court's precedents and the Constitution's separation of powers.**

The CPSC was established as an “independent regulatory commission” in 1972. 15 U.S.C. § 2053 (a). The President may remove commissioners “for neglect of duty or malfeasance in office but for no other cause.” *Id.* The circuit court determined that the CPSC exercised substantial executive power, but “in every other respect it is structurally identical to the agency that the Supreme Court deemed constitutional in *Humphrey's*.” Pet. App. 3a. Judge Willett, writing for the circuit court, lamented that “it is hard to tell *how much* of that [executive] power is required before an agency loses protection under the *Humphrey's* exception.” Pet. App. 19a. Guided by recent Supreme Court precedent, he concluded that because the CPSC 1) is not “a historically unprecedented situation,” unlike the agencies at issue in *Seila Law* and *Free Ent. Fund*, Pet. App. 20a; 2) is governed by a multimember board, not a single director like the Consumer Financial Protection Bureau in *Seila Law*, Pet. App. 21a-22a; and

3) does not have CFPB's other troubling features that provided insulation from oversight, such as funding and term length, the CPSC does fall within the *Humphrey's Executor* exception. Pet. App. 23a.

“*Humphrey's Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases.” *Seila Law*, 592 U.S. at 246 (Thomas, J., concurring in part, dissenting in part). Yet under *Humphrey's Executor* reasoning, the FTC only exercised executive functions, not power. If this reasoning is taken at face value, CPSC does not fall within the *Humphrey's Executor* exception because the Commission exercises *substantial* executive power. The CPSC violates the exception and the separation of powers. Bringing the CPSC under *Humphrey's Executor* protection would broaden an already discredited exception.

## **II. The CPSC is not led by the type of apolitical experts envisioned by *Humphrey's Executor*.**

The FTC was conceived with a vision common to the Progressive Era of apolitical, technical bureaucrats holding the reins of power—government administration as science. See, e.g., Woodrow Wilson, *The Study of Administration*, 2 Pol. Sci. Q. 197, 197, 210 (1887). According to Justice Sutherland, “The commission is to be non-partisan; and it must...act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive.” *Humphrey's Executor*, 295 U.S. at 624. Furthermore, “its members are called upon to exercise the trained judgment of a body of experts ‘appointed by

law and informed by experience.” Id. (citing *Ill. Cent. R.R. Co. v. Interstate Com. Comm’n*, 206 U.S. 441, 454 (1907); *Standard Oil Co. v. United States*, 283 U.S. 235, 238-39 (1931)).

The fact that even the modern FTC fails the multi-prong justification provides further evidence that *Humphrey’s Executor* has outlived its usefulness. See Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 *Geo. Wash. L. Rev.* 1835 (2015). Professor Crane argues that rather than being apolitical, the FTC “has become the creature of Congress,” subject to political pressure. Id. at 1856. In terms of the Commission’s expertise, he claims it does not surpass the Justice Department’s Antitrust Division. Id. at 1858-59. And rather than quasi-legislative and quasi-judicial, the FTC’s character “has increasingly become that of a conventional law enforcement department.” Id. at 1863.

The CPSC also fails Justice Sutherland’s justification. The Commission was given explicitly executive powers. And under the *Humphrey’s Executor* framework, the commissioners should be apolitical experts. Following this logic, the enabling statute directs the President to “consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission.” 15 U.S.C. § 2053(a). But the commissioners themselves do not resemble apolitical consumer safety experts. While all current commissioners may be dedicated public servants, they share similar educational backgrounds and prior service as congressional staff, which are inherently

partisan positions. Not one of them appears to have physical or life science backgrounds, which presumably would assist them in their supervision of the Commission's work, but all have law degrees.

- Chairman Alexander Hoehn-Saric (B.A., political science, University of Chicago and J.D., UCLA Law School) previously served as Chief Counsel for Communications and Consumer Protection with the U.S. House of Representatives Committee on Energy & Commerce, serving as the chief legal advisor to Chairman Pallone. Consumer Prod. Safety Comm'n, *Alexander Hoehn-Saric*, Chair, <https://www.cpsc.gov/About-CPSC/Chairman/Alexander-Hoehn-Saric> (last visited July 16, 2024).
- Commissioner Richard Trumka, Jr. (B.S., industrial and labor relations, Cornell University and J.D., Georgetown University Law Center) served as general counsel and staff director of the Economic and Consumer Policy Subcommittee of the House Committee on Oversight and Reform. Consumer Prod. Safety Comm'n, *Richard Trumka*, Commissioners, <https://www.cpsc.gov/About-CPSC/Commissioner/Richard-Trumka> (last visited July 16, 2024); Neil Cote, *Richard Trumka Jr.* — *U.S. House Committee on Oversight and Reform, Economic and Consumer Policy Subcommittee*, Vanguard Law Magazine (Mar. 10, 2021), <https://tinyurl.com/3wetc368>.

- Commissioner Peter Feldman (B.A., Spanish and geography, Colgate University and J.D., American University's Washington College of Law) served as senior counsel to the United States Senate Committee on Commerce, Science, and Transportation and worked for Senator Mike DeWine. Consumer Prod. Safety Comm'n, *Peter A. Feldman*, Commissioners, <https://www.cpsc.gov/About-CPSC/Commissioner/Peter-A-Feldman> (last visited July 16, 2024); Michael Blanding, *To Serve and Protect*, Colgate Magazine (Feb. 6, 2019), <https://tinyurl.com/yc4mrrjb>.
- Commissioner Mary T. Boyle (B.A., English, Georgetown University and J.D., University of Virginia School of Law) worked for Congressman Stephen J. Solarz and for the Asia and Pacific Subcommittee of the House Foreign Affairs Committee. Consumer Prod. Safety Comm'n, *Mary T. Boyle*, Commissioners, <https://www.cpsc.gov/About-CPSC/Commissioner/Mary-T-Boyle> (last visited July 16, 2024).
- Commissioner Douglas Dziak (B.A., economics and English, and M.A., economics, Ohio University, J.D. from the College of William and Mary Law School) worked for Senators Michael B. Enzi and George V. Voinovich. Consumer Prod. Safety Comm'n, *Douglas Dziak*, Commissioners, <https://www.cpsc.gov/About-CPSC/Commissioner/Douglas-Dziak> (last visited July 16, 2024).

Prior commissioners and officials at the CPSC have noted the lack of expertise among the commissioners. Robert S. Adler, *From “Model Agency” to Basket Case – Can the Consumer Product Safety Commission be Redeemed?*, 41 Admin. L. Rev. 61, 84 (1989). As part of a study published in 1987, the GAO interviewed former chairmen and executive directors. *Id.* There was a consensus among these former officials that “CPSC Commissioners often do not understand the technical issues that the staff has to deal with in its work.” They also found that the “Commissioners tend to ‘micromanage’ the day-to-day operations of the agency,” and that the “Commission’s decisions are not prompt.” *Id.*

### **III. *Humphrey’s Executor* should be overturned.**

The separation of powers is “essential to the preservation of liberty,” according to James Madison. The Federalist No. 51, in Vol. 2, *The Debate on the Constitution*, 163, 165 (The Library of America, 1993). He explained that “the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other.” *Id.* The purpose of divided government was to “[diffuse] power the better to secure liberty.” *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)).

Not only was executive power vested in one branch in Art. II, it was granted to a single person. This was a point of contention at the Constitutional Convention, where James Wilson was the chief proponent for a “single magistrate” as opposed to multiple administrators. *The Constitution of the United States of America: Analysis*

*and Interpretation: Analysis of Cases Decided by the Supreme Court of the United States to June 28, 2012*, 455-56 (Kenneth R. Thomas & Larry M. Eig eds., Centennial ed. 2013).

Independent agencies are an attempt to resurrect an idea that was rejected at the Constitutional Convention—a multi-headed Executive Branch. They are “wholly accountable neither to the President nor to Congress.” Michael Uhlmann, A Note on Administrative Agencies, in *The Heritage Guide to the Constitution*, 278 (David F. Forte & Matthew Spalding, ed. 2d ed. 2014). They are “specifically designed *not* to have the quality . . . of being subject to the exercise of political oversight and sharing the President’s accountability to the people.” *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 916 (1991) (Scalia, J., concurring in part) (internal quotation marks and alteration omitted).

The Court should grant certiorari in this case and take this opportunity to overturn *Humphrey’s Executor*. Three recent cases, *Free Enter. Fund*, *Seila Law* and *Collins*, have narrowed the scope of *Humphrey’s Executor* significantly. But its framework persists and clouds the Court’s rulings.

For example, in *Seila Law*, the Court stated that the exercise of executive power placed an agency outside of the umbrella of *Humphrey’s Executor*. However, the *Seila Law* Court prefaced the phrase “executive power” differently in the span of just five pages: 1) “*Humphrey’s Executor* permitted . . . for-cause removal protections to a . . . body of experts . . . that . . . was said not to exercise *any* executive power,” *Seila Law*, 592 U.S. at 216 (emphasis



added); 2) “These two exceptions—one for multimember expert agencies that do not wield *substantial* executive power,” *Id.* at 218 (emphasis added); 3) “The question instead is whether to extend those precedents to a ‘new situation’ before us . . . an independent agency . . . vested with *significant* executive power.” *Id.* at 220 (emphasis added). This may explain the circuit court’s confusion over the amount of executive power necessary to put an agency outside the umbrella of *Humphrey’s Executor*. *Pet. App.* 19a. *Humphrey’s Executor* itself seems to suggest that any executive power would do so. See *Humphrey’s Executor*, 295 U.S. at 630.

*Collins*, the most recent decision from this Court on the issue of removal power, did not even mention *Seila Law*’s language regarding “executive power.” Justice Sotomayor noted in dissent: “On three separate occasions, *Seila Law* stated that its holding applied to single-director independent agencies with ‘significant executive power. . . .’ Remarkably those words appear nowhere in today’s decision. Instead, the Court appears to take the position that exercising essentially any executive power whatsoever is enough.” *Collins*, 141 S. Ct. at 1808 (quoting *Seila Law*, 591 U.S. at 199). When addressing the contention that the Federal Housing Finance Agency exercised less authority than *Seila Law*’s CFPB, the Court simply stated “the nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head.” *Collins*, 141 S. Ct. at 1784. The FHFA exercised *some* level of executive power, but as Justice Kagan pointed out in her concurrence, the majority in *Collins* seemed more interested in the FHFA’s structure as a key feature for the constitutionality of removal restrictions. Justice Kagan observed:

Without even mentioning *Seila Law*'s "significant executive power" framing, the majority announces that, actually, "the constitutionality of removal restrictions" does not "hinge[]" on "the nature and breadth of an agency's authority." Any "agency led by a single Director," no matter how much executive power it wields, now becomes subject to the requirement of at-will removal.

*Collins*, 141 S. Ct. at 1801 (quoting *ante* at 1785, 1783).

For its part, the Fifth Circuit reasoned that executive power, no matter how significant, was not a sufficient condition to strike down a removal restriction. Too much emphasis was placed on *Seila Law*'s use of "substantial executive power" while the other factors were ignored. Here, they argued, the CPSC did not have the same unprecedented, unconstitutional structural features as the CFPB, namely a single director of an agency funded outside the appropriations process. See *Seila Law*, 592 U.S. at 354-55. Therefore, the court below held that the CPSC's removal restrictions did not violate the Constitution.

Is there a threshold level of power that places an agency outside the *Humphrey's Executor* exception? Or is simply any power enough to do so? Or is the level of executive power exercised by an agency not sufficient by itself? Should more attention be given to the agency's structure instead of the type of power it exercises? The Court's recent precedents do not provide total clarity on these points.

The Court's repeated repudiations of *Humphrey's Executor* reasoning only further muddies the waters. The Court in *Humphrey's Executor* held removal protections were permissible when the agency in question exercises no executive power. Yet, on multiple occasions in the past few decades, members of the Court have pointed out that the FTC *did* exercise executive power and should not have been classified as being outside of the Executive Branch. See *Bowsher v. Synar*, 478 U.S. 714, 761 n.3 (1986) (White, J., dissenting) (arguing that the FTC's powers in 1935 were executive); *Morrison v. Olson*, 487 U.S. 654, 689-90 n.28 (1988) (Rehnquist, C.J.) (quoting Justice White in *Bowsher*); *Seila Law*, 592 U.S. at 249-51 (Thomas, J., concurring in part, dissenting in part) (arguing that the FTC would not meet its own requirement of exercising no executive power); *Seila Law*, 592 U.S. at 286 n.10 (Kagan, J., concurring in part, dissenting in part) (noting that the FTC exercised executive powers in 1935). If these positions on the FTC are correct, then *Humphrey's Executor* was wrong from the start. The Court should no longer use this exception to inform its removal restriction decisions.

Overturing *Humphrey's Executor* provides the court with the most expedient way to solve these issues, and this case provides the Court with a perfect vehicle to do so. The CFPB in *Seila Law* and the FHFA in *Collins* involved single directors whose tenure precluded certain Presidents from ever influencing these agencies. By contrast, both the FTC in *Humphrey's Executor* and the CPSC in this case have a multimember, nonpartisan board with staggered term limits, so that each President can influence their memberships. Unlike the FHFA and the CFPB, which had very little historical precedent

for their structure, the CPSC resembles the FTC and many other well-established, multimember independent executive agencies, such as the SEC and the Interstate Commerce Commission. This case is also unlike *Free Enterprise*, which involved dual removal restrictions and a free-floating board within the SEC. There is only one level of removal restrictions for the CPSC, just as there was for the FTC in *Humphrey's Executor*. The only way the CPSC and the FTC can be seriously distinguished is the amount of executive power they exercise. This is no obstacle to overturning *Humphrey's Executor*, however, because that factor ultimately should not matter. The Court held that the FTC's removal restrictions were permitted because the agency exercised *no* executive power.

This Court should also overturn *Humphrey's Executor* to curtail the growth of an unaccountable bureaucracy. Justice Robert Jackson suggested the rise of administrative agencies “probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts. . . . They also have begun to have important consequences on personal rights.” *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (citations omitted). He continued, “They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories. . . .” *Id.* This fourth branch has continued to grow. “By one count, across all subject matter areas, 48 agencies have heads (and below them hundreds more inferior officials) removable only for cause. . . . Independent agencies are everywhere.” *Seila Law*, 591 U.S. at 276 (Kagan, J., concurring in part, dissenting in part). Although Justice Kagan was defending independent

agencies, in fact, this statement should be read as a warning. “Continued reliance on *Humphrey’s Executor* to justify the existence of independent agencies creates a serious ongoing threat to our Government’s design. Leaving these unconstitutional agencies in place does not enhance this Court’s legitimacy; it subverts political accountability and threatens individual liberty.” *Seila Law*, 591 U.S. at 251 (Thomas J., concurring in part, dissenting in part).

Overturing *Humphrey’s Executor* would not drastically upset the federal government. *Free Enterprise* and *Seila Law* have already shown that agencies can continue to operate effectively after the unconstitutional removal protections are struck down.

Congress has described many agencies as “independent” without imposing any restriction on the President’s power to remove the agency’s leadership. This is true. . . . of the Peace Corps, the Defense Nuclear Facilities Safety Board, the Commodity Futures Trading Commission, the Farm Credit Administration, the National Credit Union Administration, and the Railroad Retirement Board.

*Collins*, 141 S. Ct. at 1782-83 (citations omitted).

“[T]he Court has repudiated almost every aspect of *Humphrey’s Executor*.” *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part, dissenting in part). Thus, rather than issue another agency-specific decision that may create more confusion as to what remains of the *Humphrey’s Executor* precedent, the Court should overturn *Humphrey’s Executor*.

**CONCLUSION**

The petition for certiorari should be granted.

Respectfully submitted,

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