[ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2023]

No. 22-1300

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WINDOW COVERING MANUFACTURERS ASSOCIATION,

Petitioner,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,

Respondent.

On Petition for Review of a Final Rule of the
United States Consumer Product Safety Commission

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *amicus curiae* represents that counsel for all parties have been sent notice of the filing of this brief. All parties consent to *amicus curiae*'s participation.[1]

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and to protect the rights and freedoms that our nation's charter guarantees. Because of CAC's focus on constitutional text and history, it is able to provide a unique perspective on the developing understanding of the president's removal authority from the Founding era to the present.

[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for *amicus curiae* Constitutional Accountability Center and any other *amici* who had not yet entered an appearance in this case as of the filing of the Brief for Respondent, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Petitioner and Brief for Respondent.

II. RULING UNDER REVIEW

Reference to the ruling under review appears in the Brief for Petitioner.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Petitioner and Brief for Respondent.

Dated: March 9, 2023

/s/ Brianne J. Gorod
Brianne J. Gorod

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GLOSSARY

CFPB	Consumer Financial Protection Bureau
CPSC	Consumer Product Safety Commission
FHFA	Federal Housing Finance Agency
FTC	Federal Trade Commission
ICC	Interstate Commerce Commission
SEC	Securities and Exchange Commission

INTEREST OF *AMICUS CURIAE*

Constitutional Accountability Center is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and accordingly has an interest in this case.

INTRODUCTION

Congress has been creating multimember independent agencies for most of the nation's history—they have been part of the executive branch for longer than the light bulb.[2] Nearly a century of Supreme Court precedent has affirmed the constitutional legitimacy of these traditional independent agencies. And relying on that unbroken line of cases, Congress has established dozens of regulatory boards and commissions wielding substantial executive power whose leaders are removable only for cause.

In *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court addressed "a new situation, never before confronted by the Court," involving the

[2] *Compare* An Act to Regulate Commerce, ch. 104, § 11, 24 Stat. 379, 383 (1887) (establishing Interstate Commerce Commission), *with* White House Historical Association, *When was electricity first installed at the White House?*, https://www.whitehousehistory.org/questions/in-what-year-was-electricity-installed-in-the-white-house (electricity installed at White House and State, War, and Navy Building in 1891).

"almost wholly unprecedented" creation of an independent agency led "by a single individual." *Id.* at 2211, 2201, 2197. Making clear that it was not "revisit[ing] our prior decisions allowing certain limitations on the President's removal power," the Court found "compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director." *Id.* at 2192.

Seila Law's holding rested on three features of single-director independent agencies that it concluded distinguish them from "a traditional independent agency, run by a multimember board." *Id.* First, the Court explained, such agencies are "an innovation with no foothold in history or tradition." *Id.* at 2202. The Court's approval of removal protections for multimember boards was not "a freestanding invitation for Congress to impose additional restrictions on the President's removal authority" or to make other "innovative intrusions on Article II." *Id.* at 2206, 2205. Second, the Court found that a single-director leadership structure poses a greater "impediment to the President's oversight of the Executive Branch," because it "forecloses certain indirect methods of Presidential control" and would deprive some presidents of "any opportunity to shape [the agency's] leadership and thereby influence its activities." *Id.* at 2198, 2204. Third, unlike "a multimember board with a diverse set of viewpoints and experiences," the Court concluded that a single director with "no colleagues to persuade" impermissibly "clashes with

constitutional structure by concentrating power in a unilateral actor." *Id.* at 2192, 2204 (quotation marks omitted).

The Court has been unmistakably clear that it "did not revisit [its] prior decisions" in *Seila Law* but merely declined "to extend those precedents to the novel context of an independent agency led by a single Director." *Collins v. Yellen*, 141 S. Ct. 1761, 1783 (2021) (quotation marks omitted). Nevertheless, Petitioner contends that the opinion revolutionized the long-settled understanding of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld "expert agencies led by a *group* of principal officers removable by the President only for good cause," *Seila Law*, 140 S. Ct. at 2192, by demanding removal at will for all "principal officers who exercise substantial executive power," Pet. Br. 19, even if they exercise that power "as members of a board or commission," *Seila Law*, 140 S. Ct. at 2201.

Seila Law belies that interpretation, repeatedly emphasizing that it reaches only the "new configuration" of "an independent agency that wields significant executive power *and is run by a single individual*." 140 S. Ct. at 2192 (emphasis added); *see, e.g.*, *id.* at 2211 ("principal officers who, *acting alone*, wield significant executive power" (emphasis added)). But even if *Seila Law* were not so definitive on this point, Petitioner's claim would be foreclosed by established

practice, which has long settled the constitutional legitimacy of multimember independent agencies.

In separation-of-powers cases, the courts place "significant weight upon historical practice," *Zivotofsky v. Kerry*, 576 U.S. 1, 23 (2015) (quotation marks omitted), because it embodies "the compromises and working arrangements that the elected branches of Government themselves have reached," *NLRB v. Noel Canning*, 573 U.S. 513, 526 (2014). That is so "even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id.* at 525.

As noted above, Congress has been assigning regulatory authority to multimember independent agencies for nearly 150 years. These bodies have wielded substantial executive power for generations. And during that time, the Supreme Court has repeatedly and consistently affirmed their constitutionality, right up to its recognition in *Seila Law* that Congress could amend the constitutional defects of the Consumer Financial Protection Bureau by "converting the CFPB into a multimember agency." 140 S. Ct. at 2211. In reliance on that precedent, Congress has chosen the multimember agency structure as a means of addressing a range of complex topics for which the accumulation of expertise and the avoidance of abrupt policy changes are crucial—such as ensuring the safety of consumer products. Thus, even if the legitimacy of multimember independent

agencies were suddenly up for debate, as Petitioner claims, this long-established practice is sufficient to resolve that debate.

The Consumer Product Safety Commission cannot be distinguished from the host of other multimember independent agencies across the federal government. All of these agencies wield the Constitution's "executive Power," *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (quoting U.S. Const. art. II, § 1, cl. 1), as that concept is understood today. And there is no "clear standard," *Collins*, 141 S. Ct. at 1784, by which to pick and choose which of these agencies wields "substantial" power, Pet. Br. 19. As the Court recently underscored, the legitimacy of removal restrictions does not hinge on a subjective inquiry into "the relative importance of the regulatory and enforcement authority of disparate agencies." *Collins*, 141 S. Ct. at 1785.

Multimember independent agencies like the CPSC are also fully consonant with the Constitution's original meaning. The constitutional text, silent on removal, fails to specify the exact boundary between the president's executive power and Congress's authority to shape the federal government. The early consensus that presidents have inherent removal authority was coupled with a recognition that legislation could limit this authority, an option Congress began exercising in the nineteenth century. And as the Supreme Court has consistently

acknowledged, conditioning removal on good cause is a permissible limit in the context of multimember expert bodies.

In *Seila Law*, as in *Free Enterprise Fund v. PCAOB*, 561 U.S. 477 (2010), the Supreme Court drew a line in the sand, reaffirming "the importance of removal as a tool of supervision," *id.* at 499, and prohibiting "additional restrictions on the President's removal authority" that have "no foothold in history or tradition," *Seila Law*, 140 S. Ct. at 2206, 2202. It did not license lower courts to strike down a longstanding agency structure that the Supreme Court has repeatedly and consistently upheld—that of "a traditional independent agency headed by a multimember board or commission." *Id.* at 2193.

ARGUMENT

I. *Seila Law* Did Not Call into Question the Legitimacy of Multimember Independent Agencies.

A. *Seila Law* Addressed Only the Innovation of an Independent Agency Led by a Single Director.

The Supreme Court could hardly have been clearer in *Seila Law*: "We hold that the CFPB's leadership *by a single individual* removable only for inefficiency, neglect, or malfeasance violates the separation of powers." 140 S. Ct. at 2197 (emphasis added). "Instead of placing the agency under the leadership of a board with multiple members," Congress "deviated from the structure of nearly every other independent administrative agency in our history," and "provided that the

CFPB would be led by a single Director." *Id.* at 2191. "The question before us," the Court said, "is whether *this arrangement* violates the Constitution's separation of powers." *Id.* (emphasis added).

According to the Court, the president's Article II authority "generally includes the ability to remove executive officials," but there are "exceptions" to this rule. *Id.* at 2197, 2192. One exception was first recognized in *Humphrey's Executor*, which "held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause." *Seila Law*, 140 S. Ct. at 2192 (emphasis in original).

In *Seila Law*, the Court was "asked to extend these precedents to a new configuration: an independent agency that wields significant executive power *and is run by a single individual*." *Id.* (emphasis added). The Court declined that invitation because it concluded that there were "compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director." *Id.* That arrangement, it said, "lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.*

In refusing to broaden its precedent to cover single-director independent agencies, the Court was clear that "we need not and do not revisit our prior decisions allowing certain limitations on the President's removal power." *Id.*

Rather, just as in *Free Enterprise Fund*, the question instead was "whether to extend those precedents to the 'new situation' before us," *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 483), which contained a "novel impediment" to presidential authority, *id.* at 2198; *see id.* at 2211 ("A decade ago, we declined to extend Congress's authority to limit the President's removal power to a new situation, never before confronted by the Court. We do the same today."); *cf. Free Enter. Fund*, 561 U.S. at 483 (declining "to reexamine any . . . precedents").

In short, *Seila Law* was crystal clear that it targeted only the new phenomenon of removal protections for agency heads who serve individually rather than as part of a multimember body: "While we have previously upheld limits on the President's removal authority in certain contexts, we decline to do so when it comes to principal officers who, *acting alone*, wield significant executive power." 140 S. Ct. at 2211 (emphasis added).

If any room for doubt remained, *Collins v. Yellen* eliminated it. In that challenge to the single-director Federal Housing Finance Agency, the Court concluded that "[a] straightforward application of our reasoning in *Seila Law* dictates the result." 141 S. Ct. at 1784. In *Seila Law*, the Court explained, "[w]e did not revisit our prior decisions allowing certain limitations on the President's removal power, but we found compelling reasons not to extend those precedents to

the novel context of an independent agency led by a single Director." *Id.* at 1783 (quotation marks omitted).

Collins specifically rejected an argument that the validity of removal limits turns on "the nature and breadth of an agency's authority," which the Court explained "is not dispositive." *Id.* at 1784. The Court's "straightforward" application of *Seila Law* was simple: "The FHFA (like the CFPB) is an agency led by a single Director, and the Recovery Act (like the Dodd-Frank Act) restricts the President's removal power." *Id.*

B. *Seila Law* Rested on Three Features Unique to Single-Director Independent Agencies.

After concluding that precedent did not resolve the legitimacy of removal protection for agency leaders who serve alone, *Seila Law* discussed three aspects of single-director leadership that it concluded made removal limits untenable in that context. None of those concerns applies here.

1. Historical Anomaly

First and foremost, *Seila Law* stressed that "[t]he CFPB's single-Director structure is an innovation with no foothold in history or tradition." *Seila Law*, 140 S. Ct. at 2202. Indeed, that structure was "almost wholly unprecedented." *Id.* at 2201. In "only a handful of isolated incidents" had Congress elsewhere "provided good-cause tenure to principal officers who wield power alone rather than as members of a board or commission." *Id.* at 2201 (quotation marks omitted). And

nearly all of those "isolated examples," as the Court discussed at length, were also "comparatively recent and controversial." *Id.* at 2202. All told, the "lack of historical precedent" for the Bureau's single-director structure indicated a "severe constitutional problem." *Id.* at 2201 (quoting *Free Enter. Fund*, 561 U.S. at 505).

Seila Law was not the first time the Court articulated a suspicion of novelty. "Lack of historical precedent can indicate a constitutional infirmity," the Court has written, because novelty "is often the consequence of past constitutional doubts." *Virginia Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 260 (2011). Skepticism toward "novel governmental structures," *Seila Law*, 140 S. Ct. at 2207, thus reflects a more general principle the modern Court has applied in multiple contexts: "Legislative novelty is not necessarily fatal . . . . But sometimes the most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012) (quotation marks omitted)).

Applying this "antinovelty doctrine," the Court often presumes, as in *Seila Law*, that "a law without historical precedent is constitutionally suspect." Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 Harv. L. Rev. 2109, 2139 (2015). Congress's "prolonged reticence" to assert a type of authority, in other words, creates an "inference" that this authority is "constitutionally proscribed." *Plaut v. Spendthrift*

Farm, Inc., 514 U.S. 211, 230 (1995); *see* Leah M. Litman, *Debunking Antinovelty*, 66 Duke L.J. 1407, 1411-12 (2017) ("Every Justice on the Supreme Court has joined an opinion promoting the idea that legislative novelty is evidence of a constitutional defect.").

Unlike the "historical anomaly," *Seila Law*, 140 S. Ct. at 2202, of the CFPB's single-director leadership, there is nothing remotely novel about the Consumer Product Safety Commission. Instead, it has the quintessential structure of a multimember independent regulatory agency. *Compare* An Act to Regulate Commerce, ch. 104, § 11, 24 Stat. 379, 383 (1887) (establishing the ICC with a bipartisan structure of five Commissioners, serving six-year terms, removable for cause), *with* 15 U.S.C. § 2053(a), (b)(1), (c) (establishing the CPSC with a bipartisan structure of five Commissioners, serving seven-year terms, removable for cause).

Indeed, as *Seila Law* recounts, the initial academic proposal for what later because the CFPB was "modeled after the multimember Consumer Product Safety Commission," and the Obama administration's outline for the agency likewise "envisioned a traditional independent agency, run by a multimember board with a 'diverse set of viewpoints and experiences.'" *Seila Law*, 140 S. Ct. at 2192 (quoting Dep't of Treasury, *Financial Regulatory Reform: A New Foundation* 55 (2009)). But "Congress's design for the CFPB differed from [these] proposals . . .

in one critical respect." *Id.* at 2193 (emphasis added). "Rather than create a traditional independent agency headed by a multimember board or commission, Congress elected to place the CFPB under the leadership of a single Director." *Id.*

That critical difference was why the Court concluded that precedents like *Humphrey's Executor* could not justify the CFPB's "innovative intrusions on Article II." *Id.* at 2205. While emphasizing that it was "not revisit[ing] *Humphrey's Executor* or any other precedent," the Court refused "to extend those precedents to the novel context of an independent agency led by a single Director." *Id.* at 2206, 2192.

2. Greater Encroachment on Presidential Oversight

The Court also concluded that a removal protection intrudes on presidential authority over the executive branch more in the context of a single-director agency than it does in the context of a traditional, multimember agency. By establishing the CFPB director as "a unilateral actor insulated from Presidential control," Congress introduced a "novel impediment to the President's oversight of the Executive Branch." *Seila Law*, 140 S. Ct. at 2192, 2198.

In *Seila Law*, the CFPB's defenders argued that a single-director independent agency is equally accountable to the president as a multimember agency. *See, e.g.*, Br. for Court-Appointed *Amicus Curiae* 44-46 (Jan. 15, 2020) (No. 19-7). But the Court firmly rejected that argument, holding that the "unique

structure" of the single-director Bureau "forecloses certain indirect methods of Presidential control" that are available to influence multimember bodies. *Seila Law*, 140 S. Ct. at 2204.

"Because the CFPB is headed by a single Director with a five-year term," the Court explained, a president could spend much of her term unable to remove a director holding diametrically opposed views. Regardless of her own policy agenda, therefore, a president might well "enter office only to find herself saddled with a holdover Director from a competing political party who is dead set *against* that agenda." *Id.* "To make matters worse," the Court elaborated, "the agency's single-Director structure means the President will not have the opportunity to appoint any other leaders—such as a chair or fellow members of a Commission or Board—who can serve as a check on the Director's authority and help bring the agency in line with the President's preferred policies." *Id.* Indeed, the Court noted, "some Presidents may not have any opportunity to shape its leadership and thereby influence its activities. A President elected in 2020 would likely not appoint a CFPB Director until 2023, and a President elected in 2028 may *never* appoint one." *Id.*

None of this applies to the CPSC. With five commissioners serving staggered terms, regular vacancies allow every president to shape the agency's leadership and agenda through new appointments. *See* 15 U.S.C. § 2053(a), (b).

Moreover, the president selects the agency's chairman, *id.* § 2053(a), who holds unique sway over the CPSC's work as its "principal executive officer," exercising "all of the executive and administrative functions of the Commission," including "the appointment and supervision of personnel" and "the use and expenditure of funds," *id.* § 2053(f); *see id.* § 2053(g).

By the same token, the staggered nature of the commissioners' seven-year terms, along with the requirement of bipartisan representation, *id.* § 2053(c), prevents "abrupt shifts in agency leadership," *Seila Law*, 140 S. Ct. at 2200. And, of course, the president may fire any commissioners who do not faithfully execute their responsibilities. 15 U.S.C. § 2053(a).

Unlike the single-director leadership that concerned the Court in *Seila Law*, the CPSC's familiar structure contains no "innovative intrusions on Article II." *Seila Law*, 140 S. Ct. at 2205.

3. Concentration of Power in a Single Person

The third feature of the CFPB's structure on which *Seila Law* rested was its consolidation of power in "a unilateral actor insulated from Presidential control." 140 S. Ct. at 2192. According to the Court, this configuration simply had "no place in our constitutional structure." *Id.* at 2201. With "the sole exception of the Presidency, that structure scrupulously avoids concentrating power in the hands of any single individual." *Id.* at 2202.

As *Seila Law* explained, the Framers made the executive branch "unique in our constitutional structure" by vesting power in a single person. *Id.* at 2203. They balanced that choice by making the president "the most democratic and politically accountable official in Government" and by placing other executive officers under his "supervision and control." *Id.* This "constitutional strategy," in a nutshell, was to "divide power everywhere except for the Presidency, and render the President directly accountable to the people." *Id.*

"The CFPB's single-Director structure," however, "contravene[d] this carefully calibrated system by vesting significant governmental power in the hands of a single individual," who was "neither elected by the people nor meaningfully controlled (through the threat of removal) by someone who is." *Id.* Yet he or she could "unilaterally" wield a range of enforcement and adjudicatory authorities "[w]ith no colleagues to persuade." *Id.* at 2203-04.

The Court found this arrangement a far cry from the "multimember body of experts, balanced along partisan lines" that it previously had approved. *Id.* at 2199. Indeed, the FTC discussed in *Humphrey's Executor* was an entirely different animal: "Composed of five members—no more than three from the same political party—the Board was designed to be 'non-partisan' and to 'act with entire impartiality.'" *Id.* at 2198-99 (quoting *Humphrey's Ex'r*, 295 U.S. at 624). Its duties "called for 'the trained judgment of a body of experts'" to be "'informed by

experience,'" while its "staggered, seven-year terms enabled the agency to accumulate technical expertise and avoid a 'complete change' in leadership 'at any one time.'" *Id.* at 2199 (quoting *Humphrey's Ex'r*, 295 U.S. at 624).

In marked contrast, the CFPB director had no "peers" to share his wide portfolio of authority or to temper his decisions. *Id.* at 2191. The Court held that "*this arrangement* violates the Constitution's separation of powers," *id.* (emphasis added), because it "clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control." *Id.* at 2192. Such wholesale consolidation of authority in a single person was at odds, the Court concluded, with the Framers' recognition that "structural protections against abuse of power were critical to preserving liberty." *Id.* at 2202 (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)). But "a traditional independent agency, run by a multimember board with a diverse set of viewpoints and experiences," *id.* at 2192 (quotation marks omitted), does not present the same risks.

II. Established Practice Places the Validity of Multimember Independent Agencies Beyond Doubt.

As discussed above, *Seila Law* confined itself to "the novel context of an independent agency led by a single Director." 140 S. Ct. at 2192. Petitioner, however, reads it much more broadly. Ignoring most of the opinion, Petitioner characterizes *Seila Law* as establishing a revolutionary new proposition—that all principal officers exercising "substantial executive power" must be removable at

will, Pet. Br. 19, even if they serve in "a traditional independent agency headed by a multimember board or commission," *Seila Law*, 140 S. Ct. at 2193. In Petitioner's view, *Seila Law*'s discussion of *Humphrey's Executor* functionally overruled that decision.

That is precisely what the Justices said they were *not* doing, both in *Seila Law* and in *Free Enterprise Fund*. *See Seila Law*, 140 S. Ct. at 2206 ("we do not revisit *Humphrey's Executor* or any other precedent"); *Free Enter. Fund*, 561 U.S. at 483, 501 (declining "to reexamine any of these precedents" or "to take issue with for-cause limitations in general"). *Seila Law* rejected the validity of "an independent agency that wields significant executive power *and is run by a single individual*." 140 S. Ct. at 2192 (emphasis added). Petitioner would have this Court simply lop off part of that statement. So too for similar passages throughout the opinion. *E.g.*, *id.* at 2211 ("principal officers who, *acting alone*, wield significant executive power" (emphasis added)); *id.* at 2201 ("an independent agency *led by a single Director* and vested with significant executive power" (emphasis added)).

Even if one overlooked everything in *Seila Law* that refutes Petitioner's thesis (plus everything in *Collins* and *Free Enterprise Fund*), the notion that *Seila Law* called into question a type of removal limit that has existed since the

nineteenth century would be deeply implausible. Established practice has long settled the constitutional legitimacy of multimember independent agencies.

The flip side of the Court's suspicion of "novel governmental structures," *Seila Law*, 140 S. Ct. at 2207, is that "'traditional ways of conducting government . . . give meaning' to the Constitution," *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)). For that reason, the Court "put[s] significant weight upon historical practice" in "separation-of-powers cases." *Zivotofsky*, 576 U.S. at 23 (quotation marks omitted); *see The Pocket Veto Case*, 279 U.S. 655, 689 (1929) ("established practice is a consideration of great weight in a proper interpretation of constitutional provisions of this character"). This deferential approach is rooted in the separation of powers and the limited role of the courts, which "must hesitate to upset the compromises and working arrangements that the elected branches of Government themselves have reached." *Noel Canning*, 573 U.S. at 526.

Established practice is a crucial consideration "even when the nature or longevity of that practice is subject to dispute, and even when that practice began after the founding era." *Id.* at 525; *see id.* at 528-29 (relying on history of intra-session recess appointments that began after the Civil War); *United States v. Midwest Oil Co.*, 236 U.S. 459, 473 (1915) ("in determining . . . the existence of a

power, weight shall be given to the usage itself, even when the validity of the practice is the subject of investigation"). As James Madison wrote, it "was foreseen at the birth of the Constitution, that difficulties and differences of opinion might occasionally arise in expounding terms & phrases necessarily used in such a charter . . . and that it might require a regular course of practice to liquidate & settle the meaning of some of them." *Noel Canning*, 573 U.S. at 525 (quoting Letter from James Madison to Spencer Roane (Sept. 2, 1819)).

Supreme Court decisions "have continually confirmed Madison's view." *Id.*; *e.g.*, *McPherson v. Blacker*, 146 U.S. 1, 27 (1892) ("where there is ambiguity or doubt, or where two views may well be entertained" in constitutional interpretation, "subsequent practical construction is entitled to the greatest weight"); *McCulloch v. Maryland*, 17 U.S. 316, 401 (1819) ("a doubtful question" concerning the separation of powers "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice"); *Stuart v. Laird*, 5 U.S. 299, 309 (1803) ("practice and acquiescence" can "fix[] the construction" of constitutional provisions and "afford[] an irresistible answer" to contrary arguments).

Congress has been assigning regulatory authority to independent, multimember agencies for a majority of the nation's history, beginning nearly 150 years ago with the Interstate Commerce Commission. *See* An Act to Regulate

Commerce, § 11, 24 Stat. at 383 (establishing commission with leaders removable "for inefficiency, neglect of duty, or malfeasance in office"); *id.* §§ 12-16, 20 (conferring investigative and enforcement powers). Since then, this regulatory structure has proliferated throughout the federal government. *See* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111 (2000). By this point in history, the long pedigree of these agencies is all but dispositive of their legitimacy. "A legislative practice . . . marked by the movement of a steady stream for a century and a half of time" indicates "the presence of unassailable ground for the constitutionality of the practice." *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 327-28 (1936).

For generations, these independent, multimember agencies have wielded substantial executive power. Even when their actions take legislative or judicial forms, such as rulemaking and adjudication, they are still "exercises of . . . the 'executive Power'" under the Constitution. *Arlington*, 569 U.S. at 304 n.4 (quoting U.S. Const. art. II, § 1, cl. 1); *see INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983). Indeed, the Court explained in *Seila Law* that while it originally conceived of the FTC's authority to make investigations, reports, and recommendations as "quasi-legislative or quasi-judicial powers," rather than as executive power, this view "has not withstood the test of time." *Seila Law*, 140 S. Ct. at 2198 & n.2.

So while the modern Court has broadened its conception of executive power since *Humphrey's Executor* was decided, that decision nevertheless "approved for-cause removal protection," *Seila Law*, 140 S. Ct. at 2194, for the commissioners of an agency with powers that "would at the present time be considered 'executive,'" *Morrison v. Olson*, 487 U.S. 654, 699 n.28 (1988); *cf. Alexander v. Sandoval*, 532 U.S. 275, 282 (2001) ("this Court is bound by holdings, not language").

The Court never retreated from that holding, but instead repeatedly affirmed it. In *Wiener v. United States*, 357 U.S. 349 (1958), the Court addressed "a variant of the constitutional issue decided in Humphrey's Executor," *id.* at 351, and reached the same result. By the time of *Morrison v. Olson*, the legitimacy of "restriction upon removal of principal officers" who lead multimember regulators like "the Consumer Product Safety Commission" had been established for half a century. 487 U.S. at 725 (Scalia, J., dissenting); *see id.* at 687 (majority opinion) (reaffirming and applying the principle that "the Constitution did not give the President 'illimitable power of removal' over the officers of independent agencies" (quoting *Humphrey's Ex'r*, 295 U.S. at 630)).

Two decades after that, the Court again confirmed the validity of removal protections for multimember bodies that wield significant executive power, finding Article II satisfied where officers within the SEC were shielded from removal by

"a single level of good-cause tenure." *Free Enter. Fund*, 561 U.S. at 509. Under that traditional structure for a multimember regulator, these officers and the SEC's own commissioners were adequately "subject . . . to Presidential oversight." *Id.*

Still later, *Seila Law* reinforced these principles yet again. Not only did the Court expressly and repeatedly base its holding on the "new situation, never before confronted by the Court," of a tenure-protected officer wielding power "alone," but it went on to explain that Congress, if it wished, could cure the constitutional defect by "converting the CFPB into a multimember agency." *Seila Law*, 140 S. Ct. at 2211.

These decisions represent an unbroken record of nearly a century approving a governmental structure pioneered another half-century before that. Over the generations, Congress has repeatedly relied on this precedent to create "some two-dozen multimember independent agencies" with for-cause removal protections. *Id.* at 2206. "This practical exposition" of the Constitution is, by now, "too strong and obstinate to be shaken." *Laird*, 5 U.S. at 309.

The CPSC cannot be distinguished from the host of other multimember bodies with for-cause removal limits that have long populated the executive branch. Regardless of what activities these agencies engage in, *all* of them wield the Constitution's "executive Power." *Arlington*, 569 U.S. at 304 n.4. And there is no way to pick and choose which of them wields "substantial" power. Pet. Br. 19.

As the Court recently held, "the constitutionality of removal restrictions" does not hinge on "the relative importance of the regulatory and enforcement authority of disparate agencies," an inquiry that lacks "any clear standard." *Collins*, 141 S. Ct. at 1784-85.

III. Constitutional Text and History Further Underscore the Legitimacy of Multimember Independent Agencies.

In addition to being validated by established practice and longstanding precedent, multimember independent agencies like the CPSC are fully consonant with the original understanding of the Constitution.

When questions are raised about limits on the president's authority to remove executive officers, there are two sides to the coin: On one side is the president's "executive Power" and duty to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; *id.* art. II, § 3. On the other is Congress's authority to structure the federal government's "Departments" and "Officers," *id.* art. II, § 2, and to pass laws necessary and proper for "carrying into Execution . . . all . . . Powers vested . . . in the Government of the United States," *id.* art. I, § 8, cl. 18. The precise line between these powers has been contested throughout the nation's history, and the president has never been understood to enjoy an illimitable removal power.

Early on, it became "settled and well understood" that the president has inherent removal authority, not shared with the Senate or dependent on legislative

authorization. *In re Hennen*, 38 U.S. 230, 259 (1839). But the consensus ran no further than that. While presidents had removal authority "as a general matter," *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 513), it remained widely understood that Congress has some capacity to limit this authority.

As discussed, Congress has been creating offices with for-cause tenure since the nineteenth century. And until recently, the only removal limits struck down as unconstitutional were quite different than the one at issue here—they effectively prevented removals entirely, either by requiring congressional consent, *see Myers v. United States*, 272 U.S. 52, 107 (1926); *Bowsher*, 478 U.S. at 726, or by stacking multiple layers of tenure, *see Free Enter. Fund*, 561 U.S. at 486. While *Seila Law* clarified that "other innovative intrusions" can also violate Article II, 140 S. Ct. at 2205, this is plainly an area where doctrinal development is "liquidat[ing] & settl[ing] the meaning" of the Constitution, *Noel Canning*, 573 U.S. at 525 (quoting Letter from James Madison to Spencer Roane, *supra*). And that only reinforces the importance here of "[l]ong settled and established practice." *Id.* at 524 (quotation marks omitted).

A. The Constitution's text gives Congress broad flexibility in determining how to shape the federal government. While it anticipates the creation "by Law"

of "Departments" and "Officers," U.S. Const. art. II, § 2, it specifies very little about them or their relationship with the president.

That was no accident: the Framers rejected a plan to delineate in the Constitution the duties of specific departments while providing that their leaders would serve "during pleasure." 2 *Records of the Federal Convention of 1787*, at 335-36 (Max Farrand ed., 1911). Instead, they assigned Congress broad discretion over the manner in which "all" powers "vested by this Constitution" would be "carr[ied] into Execution." U.S. Const. art. I, § 8, cl. 18. And of course, they did not "declare expressly by what authority removals from office are to be made." Letter from James Madison to Edmund Pendleton (June 21, 1789), https://founders.archives.gov/documents/Madison/01-12-02-0152.

At the Founding, there was no consensus that "executive" power entailed an authority to remove officers. *See* Martin S. Flaherty, *The Most Dangerous Branch*, 105 Yale L.J. 1725, 1790 (1996). Such power was not "an inherent attribute of the 'executive power' as it was understood in England." Daniel D. Birk, *Interrogating the Historical Basis for A Unitary Executive*, 73 Stan. L. Rev. 175, 182 (2021). Nor was it so in Founding-era state governments, where the removal authority was typically "lodged in the Legislatures or in the courts." *Myers*, 272 U.S. at 118.

B. Because the Constitution is silent on removal, the issue came to the fore when Congress created the federal government's first departments. But the

ensuing "Decision of 1789" addressed only who, if anyone, possesses inherent removal power—not the extent to which Congress may condition that power.

As the House of Representatives considered legislation establishing a Foreign Affairs Secretary, disagreement arose about whether to declare that the president could remove the Secretary from office. *See* David P. Currie, *The Constitution in Congress: The First Congress and the Structure of Government, 1789–1791*, 2 U. Chi. L. Sch. Roundtable 161, 198 (1995). Views differed on whether the Constitution gave inherent removal power to the president, the Senate, both, or neither. *Hennen*, 38 U.S. at 233. The final legislation obliquely signaled that the president could remove the Secretary without identifying the source of this power (statutory or constitutional). *See* Act of July 27, 1789, ch. 4, § 2, 1 Stat. 28, 29. Congress thus "left presidential removal to shadowy implication." Saikrishna Prakash, *New Light on the Decision of 1789*, 91 Cornell L. Rev. 1021, 1052 (2006).

In short, the Decision of 1789 merely established that "the constitution vested the power of removal in the President alone." 1 Annals of Cong. 398 (Rep. Vining) (1789). The "real point which was considered and decided" was whether the Senate's role in appointments also gave it "part of the removing power." *Myers*, 272 U.S. at 119. Requiring Senate approval, it was explained, could make it impossible for presidents to fire officers who failed to execute the law faithfully.

See 1 Annals of Cong. 395, 515-16 (Rep. Madison). Whether Congress could limit presidential removals in other ways was "never really contested," because the debate focused on where the removal power was lodged, not on "whether it was a power that Congress could modify or abridge." Prakash, *supra*, at 1072.

The Decision of 1789 therefore only established the president's removal authority "as a general matter," not the scope of Congress's power to modify that "default rule." *Free Enter. Fund*, 561 U.S. at 513, 509. Indeed, soon afterward, Madison remarked that while his belief in inherent presidential removal authority prevailed, this principle "is subject to various modifications, by the power of the Legislature." Letter from James Madison to Edmund Pendleton, *supra*. In sum, the Decision "did not endorse the view that Congress lacked authority to modify the Constitution's grant of removal power to the President." Prakash, *supra*, at 1073.

C. In the following decades, Congress's power to modify the president's removal authority remained widely accepted. As the Supreme Court put it: all offices, "the tenure of which is not . . . limited by law," must be held "subject to removal at pleasure." *Hennen*, 38 U.S. at 259; *see* 1 James Kent, *Commentaries on American Law* 289 (1826) (the Decision of 1789 "applies equally to every other officer . . . whose term of duration is not specifically declared"). Indeed, *Marbury*

v. Madison concluded that Congress could deny the president removal power over certain officers entirely. *See* 5 U.S. 137, 156-57, 167-68 (1803).

Consistent with that understanding, when Congress later set fixed terms for certain officers, it deemed it necessary to specify that they "shall be removable from office at pleasure." Act of May 15, 1820, ch. 102, § 1, 3 Stat. 582, 582. That caveat was needed because the president's general removal authority "was not regarded either as embracing officers with fixed term[s], or as affecting Congress's right to fix official terms." Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Colum. L. Rev. 353, 379 (1927).

In the second half of the nineteenth century, Congress imposed a variety of removal restrictions. When disputes arose, the Supreme Court consistently resolved them as statutory matters, *e.g.*, *McAllister v. United States*, 141 U.S. 174 (1891); *Shurtleff v. United States*, 189 U.S. 311 (1903), expressly avoiding "arriving at a decision [on] the question of the constitutional power of the president in his discretion to remove officials during the term for which they were appointed," *Parsons v. United States*, 167 U.S. 324, 334 (1897).

Not until *Myers* did the Court firmly establish the president's removal authority, rejecting a requirement of Senate approval because it could 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." 272 U.S. at

164. But in marked contrast, the Court upheld good-cause tenure for multimember agencies less than ten years later. *See Humphrey's Ex'r*, 295 U.S. at 626. It has done so ever since. *See Free Enter. Fund*, 561 U.S. at 509 (curing constitutional defect by subjecting multimember body to "a single level of good-cause tenure"); *Seila Law*, 140 S. Ct. at 2211 (inviting Congress to preserve removal limits by "converting the CFPB into a multimember agency").

CONCLUSION

For the foregoing reasons, this Court should hold that the CPSC's structure is constitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,474 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 14-point Times New Roman font.

Executed this 9th day of March, 2023.

/s/ Brianne J. Gorod
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of March, 2023, I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: March 9, 2023

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