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## **NCLA *Amicus* Brief Challenges CPSC’s Unconstitutional Shielding of Commissioners from Removal**

*Window Covering Manufacturers Association v. United States Consumer Product Safety Commission*

**Washington, DC (February 8, 2023)** – The New Civil Liberties Alliance has filed an [amicus curiae brief](#) in *Window Covering Manufacturers Association v. CPSC*, a case before the U.S. Court of Appeals for the D.C. Circuit. The Window Covering Manufacturers Association (WCMA) is challenging a new Consumer Product Safety Commission (CPSC) [rule](#) governing the length of cords for custom-made blinds. Petitioners challenge the rule on several grounds, including: a) CPSC’s failure to comply with the Consumer Product Safety Act, and b) the Commission’s unconstitutional structure shielding CPSC commissioners from at-will removal. On Jan. 10, the D.C. Circuit granted WCMA’s motion to stay the rule pending review and set an expedited briefing schedule.

CPSC “determined that custom window coverings with accessible operating cords longer than 8 inches pose an unreasonable risk of strangulation to children 8 years old and younger.” As a result of this determination, it required eliminating or substantially changing the most popular custom blind designs. The scale of the required changes is evident from the fact that “[n]o major manufacturer currently makes a corded custom window covering that complies with the Rule.” The Small Business Administration (SBA)—an Executive Branch agency led by a Senate-confirmed Cabinet-level official serving at the President’s will—opposed portions of the rule. CPSC enacted the rule over SBA’s opposition. But by ignoring SBA, CPSC disregarded the President’s preferred policy choices and substituted its own. Because CPSC’s very setup insulates its policy determinations from Presidential (and thus popularly accountable) review, it violates our Constitution’s structural strictures.

NCLA’s brief strongly supports judicial enforcement of the Constitution’s decision to vest exclusively in the President the obligation “to take Care that the Laws be faithfully executed.” The “take Care” clause means that only executive officers answerable to the President may exercise executive power. Such officers must be terminable at the President’s will to ensure his control over them. In this case, a statute purports to authorize government officials not removable by the President to usurp his Article II power to enforce the law. Given the powers it possesses, CPSC cannot claim that it exercises anything other than executive power. But, because they are not subject to the President’s at-will removal, CPSC Commissioners may not exercise such executive power.

Per *Humphrey’s Executor*—a flawed precedent which itself is ripe for reconsideration—an agency structured with Commissioners not removable by the President would be constitutional only if those Commissioners did not exercise executive power. But since CPSC Commissioners do exercise executive power, *Humphrey’s Executor* does not protect them from at-will removal by the President. Here, the D.C. Circuit should simultaneously criticize and follow *Humphrey’s Executor*. First, it should fault *Humphrey’s* as mistaken because the President necessarily enjoys constitutional authority to dismiss any other person exercising executive power—even if that person is a commissioner on a multi-member commission like CPSC. Second, the D.C. Circuit should follow *Humphrey’s* by holding that CPSC cannot exercise executive power because its Commissioners are shielded from at-will removal by the President. Because the CPSC cannot exercise executive power and the Commission is structured unconstitutionally, the D.C. Circuit should set aside the rule on permissible cord length for custom blinds.

**NCLA released the following statements:**

“It is long past time that courts enforce the Constitution’s structure and uphold the clear line of command within the Executive Branch. If CPSC is to continue as an Executive Branch agency, its structure must comply with the Constitution. To exercise Article II executive power, Commissioners must be removable at the President’s will.”

— **Greg Dolin, Senior Litigation Counsel, NCLA**

“As the recent gas stove spat showed, CPSC Commissioners are all too eager to espouse boneheaded ideas. To keep the agency in line, the President must be able to threaten individual Commissioners with removal credibly. As it stands, voters have no one to hold accountable for overreaching rules like this one. Custom window covering customers must be minutely involved in the ordering process, so they are in an ideal position to both assess the potential hazard to children on a case-by-case basis and to receive effective safety warnings. Instead, the agency is blindly banning a desirable product. And if CPSC is willing to ban custom window blind cords on such thin grounds, why should anyone think the agency will stop short at banning gas stoves?”

— **Mark Chenoweth, President and General Counsel, NCLA (and former legal counsel at CPSC)**

**For more information visit the *amicus* page [here](#).**

**ABOUT NCLA**

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA’s public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans’ fundamental rights.

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