No. 22-40328

In the United States Court of Appeals for the Fifth Circuit

CONSUMERS' RESEARCH; BY TWO, L.P.,
Plaintiffs-Appellees,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Defendants-Appellants.

Appeal from the United States District Court for the
Eastern District of Texas, Tyler Division, No. 6:21-cv-256-JDK

BRIEF *AMICUS CURIAE* OF THE NEW CIVIL LIBERTIES ALLIANCE IN SUPPORT OF PLAINTIFFS-APPELLEES AND RE-HEARING EN BANC

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel for *amicus curiae* certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1, in addition to those listed in the Petitioners' Certificate of Interested Persons, have an interest in the outcome of the case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

***Amicus*:** New Civil Liberties Alliance (NCLA) is a not-for-profit corporation exempt from income tax under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3). It does not have a parent corporation, and no publicly held company has a 10% or greater ownership interest in it.

***Counsel for Amicus*:** Gregory Dolin and John J. Vecchione are Senior Litigation Counsel at the NCLA. Mark Chenoweth is NCLA's President and Chief Legal Officer.

/s/ Gregory Dolin
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INTERESTS OF AMICUS CURIAE

The New Civil Liberties Alliance ("NCLA") is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] Its interests are more fully explained in the motion accompanying this brief.

NCLA is particularly disturbed by government officials unanswerable to the President who are purportedly authorized, by statute (and the panel decision), to usurp his Article II power to enforce the law.

STATEMENT OF THE CASE

NCLA agrees with and adopts Petitioner's statement of the case.

ARGUMENT

The panel reversed the district court's conclusion that "the [Consumer Product Safety] Commission exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 592

[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

F.Supp.3d 568, 583-84 (E.D. Tex. 2022). That decision is both erroneous and of grave importance, making review by the full Court appropriate. Indeed, Judge Willett's opinion for the panel majority acknowledges that this case "involves a question of exceptional importance," Fed. R. App. P. 35(a)(2), because "[i]t tees up one of the fiercest (and oldest) fights in administrative law: the *Humphrey's Executor* 'exception' to the general 'rule' that lets a president remove subordinates at will," *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, No. 22-40328, Op. at 2 (5th Cir., Jan. 17, 2024). The panel majority opinion and Judge Jones's thoughtful dissent illustrate profound disagreement on a fundamental Constitutional question and the scope of the Supreme Court's binding precedent. This Court sitting *en banc* should resolve this disagreement.

On review, the Court should (perhaps paradoxically) simultaneously reject *Humphrey's Executor* and follow it.

I. *HUMPHREY'S EXECUTOR* HOLDS THAT AGENTS INSULATED FROM PRESIDENTIAL REMOVAL CANNOT EXERCISE EXECUTIVE POWER

The panel majority erroneously rejected the proposition that *Seila Law, LLC v. CFPB*, 140 S.Ct. 2183 (2020), limited *Humphrey's Executor* to its facts. *See* Op. at 3. *Seila Law* was clear that "[i]n our constitutional

system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead." 140 S. Ct. at 2211. Admittedly, *Seila Law* left unclear the continued vitality of *Humphrey's Executor*, *see* Op. at 14 ("This is not to say that the doctrine is clear. And perhaps clarity will remain a mere aspiration so long as the doctrine's foundation includes a decision proclaiming that the F[ederal] T[rade] C[omission] 'exercises no part of the executive power.'") (*quoting Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935)), which explains Judge Jones's "trepidation" in reaching her conclusion. Although *amicus* certainly agrees that the Supreme Court has the sole "prerogative of overruling its own decisions," *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989), Judge Jones's approach demonstrates that faithful adherence to this Supreme Court precedent requires this Court to both uphold and reject *Humphrey's Executor*. *See* Op. at 23 (Jones, J., dissenting).

A. Removal Is Part of Executive Power and Is Unqualified

Removal of subordinates is part of the President's executive power. *See Seila Law*, 140 S.Ct. at 2211. The President by himself cannot

execute the law—so he necessarily must rely on a hierarchy of subordinates, whether officers or employees, to do most of the execution. *See Myers v. United States*, 272 U.S. 52, 117 (1926). If such persons are essential for executing the law, then the Constitution "empower[s] the President to keep these officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010). *See also Seila Law*, 140 S.Ct. at 2211.

Neither the panel majority nor the parties dispute that the Petitioners here were subject to executive power. *See, e.g.*, Op. at 3, 17. It is also undisputed here that the normal and "general 'rule' … lets a president remove subordinates at will." *Id.* at 2. The Constitution's text establishes the president's removal authority by vesting executive power in him without limiting it in respect to his power to remove subordinates. To put it another way, Article II modifies and limits his power *in appointments* (*e.g.*, by sometimes requiring Senate confirmation), but it leaves the power over *removal* untouched. *Seila Law*, 140 S.Ct. at 2211.

The President's removal authority is confirmed by his duty to "take care that the laws be faithfully executed." U.S. Const, art II, § 3. That duty is placed solely in the President and is non-delegable, *i.e.*, the

President remains exclusively responsible for the proper and lawful function of the Government. The President must have the power to remove individuals who do not help him fulfill, or worse yet, who undermine his duty to faithfully execute the Nation's laws. The threat of removal is the only way that the President can exercise control over his subordinates and ensure that, through their action or inaction, he does not fail in his duty. "[T]o hold otherwise would 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." *Myers*, 272 U.S. at 164 (quoted in *Free Enter. Fund*, 561 U.S. at 492; and in *Seila Law*, 140 S.Ct. at 2197). Given these bedrock principles, any derogation from the power of removal must be skeptically viewed and narrowly construed. *See* 1 ANNALS OF CONG. 481, 499 (1789) (Joseph Gales ed., 1834) (statements of James Madison and Thomas Hartley).

II. THE FULL CIRCUIT SHOULD FOLLOW *HUMPHREY'S EXECUTOR* AND DECLARE CPSC'S CONDUCT REGARDING PLAINTIFFS UNCONSTITUTIONAL

Though this Court has no power to abrogate *Humphrey's Executor* (which needs to be reconsidered by the Supreme Court), it should grant the petition for *en banc* review and follow *Humphrey's* to the letter. It

should thus decide that, because CPSC (unlike the 1930s-era FTC) exercises "substantial executive power," its structure and consequently its actions are unlawful. *See* Op. at 23-25 (Jones, J., dissenting). This court can modestly follow *Humphrey's* by holding as much—confident that even if the Supreme Court rejects that precedent, this court's judgment will be upheld. *See id.*

A. *Humphrey's Executor* Forbids CPSC from Exercising Executive Power

CPSC's actions in this case are unlawful under *Humphrey's Executor* because that case held that FTC Commissioners can enjoy tenure protection only because the Commission does *not* exercise executive power. *Humphrey's Ex'r*, 295 U.S. at 628.

The Court in *Humphrey's* did not doubt the President's power to terminate the employment of an executive officer. In fact, the Court characterized the President's Article II power to terminate as "exclusive and illimitable." *Id.* at 627. The Court assumed that the FTC brought enforcement actions only in its own, internal adjudications, not in Article III courts, and that such internal enforcement was evidence of FTC's quasi-legislative and quasi-judicial powers. But the holding came with its

own warning—whereas FTC enforcement within the agency was not "executive power in the constitutional sense," FTC enforcement *outside the agency*, in Article III courts, would be "executive power in the constitutional sense," and an agency so structured would run afoul of Article II's strictures. *Id*. at 628.

Reading *Humphrey's Executor* as a whole then, the conclusion is inescapable—CPSC's structure with "for cause" removal protections can be sustained only if the Commissioners do not exercise executive power. However, as the majority and dissent agree, the Commission *does* exercise such power. Therefore, concluding that CPSC's structure does not comply with constitutional requirements is not an act of judicial rebellion, but rather an exercise in faithful adherence to the Supreme Court's *Humphrey's Executor* precedent.

B. *Humphrey's Executor* Needs to Be Reconsidered

It ultimately will be necessary to reconsider the holding of *Humphrey's Executor*, which upheld the constitutionality of the FTC Commissioners' tenure protections. Though it is not up to this Court to do so, *see Rodriguez de Quijas*, 490 U.S. at 484, the Court should remember that *Humphrey's* did not dispute the President's executive

power to remove Executive Branch subordinates; rather, *Humphrey's* was predicated on the FTC's not exercising "executive power." *See* 295 U.S. 602, 628 (1935) ("[T]he commission acts in part quasi legislatively and in part quasi judicially … [and] [t]o the extent that it exercises any executive function, as distinguished from executive power in the constitutional sense, it does so … as an agency of the legislative or judicial departments of the government."). Even in 1935, however, FTC exercised "executive power in the constitutional sense[,]" and it certainly does so now. Hence, *Humphrey's Executor* was and is mistaken. *See Seila Law*, 140 S.Ct. at 2198 n.2. Therefore, it will ultimately have to be overruled. Meanwhile, this Court should recognize that "[f]acts are called facts for a reason" and that "[d]ifferent facts often mean different results." Op. at 23, 24 (Jones, J., dissenting). Because the facts here differ enough from those in *Humphrey's Executor*, this Court can both recognize that precedent is unlikely to survive—and follow it carefully.

B. This Court Has a Duty to Follow Precedent Faithfully and Fully

This Court must follow both the Constitution and Supreme Court precedent. And although *Humphrey's Executor* strays from the original

meaning of the Constitution, fortunately both the original meaning and *Humphrey's Executor* lead to the same conclusion—CPSC is unconstitutionally structured. As Judge Jones explained, "[t]he CPSC is not limited to duties as a legislative or judicial aid such as 'making investigations and reports' to Congress or 'making recommendations to courts as a master in chancery,'" Op. at 25 (Jones, J., dissenting) (quoting *Seila Law*, 140 S.Ct. at 2198), but instead wields "[p]lainly … executive powers." *Id.* Thus, CPSC's structure cannot be sustained even on *Humphrey's Executor*'s own terms.

Because the panel majority concluded otherwise, this court should grant *en banc* review and follow the dissent's approach.

CONCLUSION

Because CPSC Commissioners exercise executive power and are not removable at will by the President, the Commission is unconstitutionally structured. All members of the panel implicitly recognized that this case meets the requirements of Fed. R. App. 35, which governs *en banc* review. *See* Op. at 2; *id.* at 23 (Jones, J., dissenting). The Court as a whole should reach this same conclusion and resolve the important question that this appeal presents.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 1,680 words. This brief also complies with the typeface and type-style requirements of the Federal Rule of Appellate Procedure because it was prepared using Microsoft Word 2016 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Gregory Dolin
Gregory Dolin

CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Gregory Dolin
Gregory Dolin