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ORAL ARGUMENT SCHEDULED FOR APRIL 24, 2023

No. 22-1300

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UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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WINDOW COVERING MANUFACTURERS ASSOCIATION,  
*Petitioner,*

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,  
*Respondent.*

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

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**Brief of Amici Curiae Consumer Federation of America,  
Consumer Reports, Kids In Danger, Parents for Window Blind  
Safety, Public Citizen, and United States Public Interest  
Research Group in Support of Respondent**

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March 9, 2023

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## **CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES**

### **A. Parties and Amici**

Petitioner is the Window Covering Manufacturers Association. Respondent is the United States Consumer Product Safety Commission.

The Chamber of Commerce of the United States of America, National Association of Manufacturers, and New Civil Liberties Alliance are amici curiae in support of Petitioner.

Consumer Federation of America, Consumer Reports, Kids In Danger, Parents for Window Blind Safety, Public Citizen, and United States Public Interest Research Group are amici curiae in support of Respondent.

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the amici in support of Respondent certifies that the amici in support of Respondent are non-profit organizations. They have no parent corporations and no publicly traded company has an ownership interest in them. The general purpose of the amici organizations, as relevant to this lawsuit, is to advocate for health and safety.

**B. Ruling Under Review**

Petitioner seeks review of the Consumer Product Safety Commission's final rule entitled "Safety Standard for Operating Cords on Custom Window Coverings," 87 Fed. Reg. 73144 (Nov. 28, 2022).

**C. Related Cases**

Amici curiae are not aware of any related cases.

/s/ Adina H. Rosenbaum  
Adina H. Rosenbaum

## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES .....	i
TABLE OF AUTHORITIES .....	iv
GLOSSARY .....	vii
INTERESTS OF AMICI CURIAE .....	1
SUMMARY OF ARGUMENT .....	3
ARGUMENT .....	6
I. The Final Rule is Necessary to Reduce an Unreasonable Risk of Injury and Death. ....	6
A. Every year, children die from strangulation by window covering cords. ....	6
B. The CPSC has given the industry decades to adopt a voluntary standard that adequately addresses the strangulation risk. ....	8
C. The 2022 voluntary standard still does not adequately address the strangulation risk from custom window covering cords. ....	18
II. Statutory Limitations on the Removal of CPSC Commissioners do not Render the Final Rule Invalid .....	20
CONCLUSION .....	28
CERTIFICATE OF COMPLIANCE .....	29
CERTIFICATE OF SERVICE .....	30

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Calcutt v. FDIC</i> , 37 F.4th 293 (6th Cir. 2022).....	25, 26
<i>Collins v. Yellen</i> , 141 S. Ct. 1761 (2021) .....	21, 22, 23, 24, 26
<i>Community Financial Services Ass’n of America v. CFPB</i> , 51 F.4th 616 (5th Cir. 2022).....	24, 26
<i>Free Enterprise Fund v. Public Co. Accounting Oversight Board</i> , 561 U.S. 477 (2010) .....	27
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935) .....	21
<i>Integrity Advance, LLC v. CFPB</i> , 48 F.4th 1161 (10th Cir. 2022).....	25
<i>Kaufmann v. Kijakazi</i> , 32 F.4th 843 (9th Cir. 2022).....	25
<i>Seila Law LLC v. CFPB</i> , 140 S. Ct. 2183 (2020) .....	21
<b>Statutes</b>	
15 U.S.C. § 2051(b)(1).....	3
15 U.S.C. § 2053(a) .....	20
15 U.S.C. § 2056(a) .....	3

15 U.S.C. § 2056(b)(1).....	3
15 U.S.C. § 2058(b)(2).....	18

## Federal Register Notices

CPSC, Advance Notice of Proposed Rulemaking, <i>Corded Window Coverings; Request for Comments and Information</i> , 80 Fed. Reg. 2327 (Jan. 16, 2015) .....	13
CPSC, Final Rule, <i>Safety Standard for Operating Cords on Custom Window Coverings</i> , 87 Fed. Reg. 73144 (Nov. 28, 2022) .....	2, 4, 5, 6, 8, 13, 14, 15, 16, 17, 18, 19, 20
CPSC, Notice of Proposed Rulemaking, <i>Safety Standard for Operating Cords on Custom Window Coverings</i> , 87 Fed. Reg. 1014 (Jan. 7, 2022) .....	8, 9, 10, 11, 16

## Other Authorities

Consumer Federation of America, Ballot vote—WCMA/ANSI A100.1 for Safety of Window Covering Products (Aug. 31, 2022), <i>available at</i> <a href="https://consumerfed.org/wp-content/uploads/2022/09/CFA-Submits-Comments-on-Standard-for-Window-Covering-Products-8.31.22.pdf">https://consumerfed.org/wp-content/uploads/2022/09/CFA-Submits-Comments-on-Standard-for-Window-Covering-Products-8.31.22.pdf</a> .....	17
CPSC, Voluntary Standards Activities FY 2012 Annual Report (Mar. 18, 2013), <i>available at</i> <a href="https://www.cpsc.gov/s3fs-public/pdfs/fy12volstds.pdf">https://www.cpsc.gov/s3fs-public/pdfs/fy12volstds.pdf</a> .....	11
CPSC, CPSC Warns of The Danger Of Children Strangulation In Window Blind Or Drapery Cords, Release #85-069 (Dec. 20, 1985), <i>available at</i> <a href="https://www.cpsc.gov/Newsroom/News-Releases/1986/CPSC-Warns-of-The-Danger-Of-Children-Strangulation-In-Window-Blind-Or-Drapery-Cords">https://www.cpsc.gov/Newsroom/News-Releases/1986/CPSC-Warns-of-The-Danger-Of-Children-Strangulation-In-Window-Blind-Or-Drapery-Cords</a> .....	8

Letter from CPSC Staff to Peter Rush, Window Covering Mfrs. Ass’n (Jan. 19, 2001), <i>available at</i> <a href="https://www.cpsc.gov/s3fs-public/2001-19-01-Medford-letter-to-Peter-Rush-WCMA.pdf?VersionId=50CCfA33qd9eiNOHq%E2%80%8CBlsr.ZX2i_e.EAv">https://www.cpsc.gov/s3fs-public/2001-19-01-Medford-letter-to-Peter-Rush-WCMA.pdf?VersionId=50CCfA33qd9eiNOHq%E2%80%8CBlsr.ZX2i_e.EAv</a> .....	10
Letter from CPSC Staff to Peter Rush, Window Covering Mfrs. Ass’n (Jan. 28, 2002), <i>available at</i> <a href="https://www.cpsc.gov/s3fs-public/20020128_Elder_to_Rush_Letter.pdf?VersionId=biRfVJegNKscBJAzbj.Ufgcs7TIYb5sD">https://www.cpsc.gov/s3fs-public/20020128_Elder_to_Rush_Letter.pdf?VersionId=biRfVJegNKscBJAzbj.Ufgcs7TIYb5sD</a> .....	10
Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Aug. 17, 2010), <i>available at</i> <a href="https://www.cpsc.gov/s3fs-public/pdfs/blk_media_wcma08_17_10.pdf">https://www.cpsc.gov/s3fs-public/pdfs/blk_media_wcma08_17_10.pdf</a> .....	10

## **GLOSSARY**

CPSC                      Consumer Product Safety Commission

NPRM                     Notice of Proposed Rulemaking



## INTERESTS OF AMICI CURIAE<sup>1</sup>

Consumer Federation of America, Consumer Reports, Kids In Danger, Parents for Window Blind Safety, Public Citizen, and United States Public Interest Research Group are non-profit organizations that are concerned about the strangulation risk posed to young children by accessible window covering cords. The amici were all signatories to a 2013 petition asking the Consumer Product Safety Commission (CPSC) to promulgate a mandatory standard that eliminates the hazard posed by accessible cords on window coverings.<sup>2</sup> They also all participated in the rulemaking process that resulted in the final rule at issue in this case, which establishes a safety standard for operating cords on custom window coverings. CPSC, Final Rule, *Safety Standard for Operating*

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<sup>1</sup> All parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amici curiae or their counsel made a monetary contribution to the preparation or submission of this brief.

<sup>2</sup> See Petition for Rulemaking, CP 13-2 (2013), CPSC-2013-0028-0002. Documents with a number beginning with CPSC-2013-0028 are part of the administrative record accessible to the public on [www.regulations.gov](http://www.regulations.gov) by searching for Docket No. CPSC-2013-0028.

*Cords on Custom Window Coverings*, 87 Fed. Reg. 73144 (Nov. 28, 2022) (Final Rule).<sup>3</sup>

Amici are filing this brief because they believe that the Final Rule is vital to protecting young children from the dangers posed by accessible window covering cords. In addition, as organizations that promote health and safety, and that believe that the CPSC plays an important role in protecting the public from dangerous products, amici have a strong interest in responding to Petitioner's broad attack on the CPSC's authority to promulgate rules and in ensuring that rules promulgated by the multi-member, expert agency are not vacated simply because its members are protected from removal at will by the President.

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<sup>3</sup> Comments submitted by the amici in the rulemaking process include, among others, CPSC Public Hearing: Safety Standard for Operating Cords on Custom Window Coverings (Mar. 16, 2022), CPSC-2013-0028-3136 (including statements from Consumer Federation of America, Consumer Reports, Kids In Danger, and Parents for Window Blind Safety); Comments of Consumer Reports (Mar. 23, 2022), CPSC-2013-0028-3618; Comments of Parents for Window Blind Safety (Mar. 23, 2022), CPSC-2013-0028-3471; Comments of 33 State, Local, and National Consumer Organizations (June 1, 2015), CPSC-2013-0028-1557; Comments of Public Citizen (June 1, 2015), CPSC-2013-0028-1549; Comments of Consumer Federation of America (June 1, 2015), CPSC-2013-0028-1543; Comments of Kids In Danger (May 29, 2015), CPSC-2013-0028-1495.

## SUMMARY OF ARGUMENT

The Final Rule at issue in this case seeks to protect toddlers and other young children from being killed or severely injured by operating cords on custom window coverings. The rule follows decades of voluntary standard revisions that have failed to produce a voluntary standard that adequately protects children from strangulation.

The Consumer Product Safety Act is intended “to protect the public against unreasonable risks of injury associated with consumer products.” 15 U.S.C. § 2051(b)(1). Under the Act, if compliance with a voluntary standard would eliminate or adequately reduce the risk of injury from a consumer product—and if it is likely that the industry will substantially comply with the voluntary standard—the CPSC is required to rely on that standard. *Id.* § 2056(b)(1). When voluntary standards do not adequately address the safety risk from a consumer product, however, the CPSC may promulgate mandatory safety standards “to prevent or reduce an unreasonable risk of injury associated with such product.” *Id.* § 2056(a).

The Final Rule arises from such a situation. For over 35 years, the CPSC and the window covering industry have known of the risk of child

strangulation by accessible cords on window coverings. During that time, the CPSC has diligently worked with the industry to develop voluntary standards to address the risk. But despite the decades that have passed, the voluntary standard process still has not resulted in a standard that adequately protects children from the risk of death and injury from accessible cords on custom window coverings. While the CPSC has waited for the industry to adopt adequate standards, children have continued to be injured and killed by accessible window covering cords, and hazardous window coverings have continued to be installed in homes, where they can remain for decades.

Recognizing, based on its years of experience, that the voluntary standard process was “unlikely to address the unreasonable risk of injury associated with operating cords on custom window coverings,” Final Rule, 87 Fed. Reg. at 73184, in November 2022, the CPSC adopted the Final Rule to finally “eliminate the ongoing tragedy of child deaths on corded custom window coverings,” *id.* at 73144. The Final Rule addresses the hazard by requiring custom window coverings to abide by standards already in place for stock window coverings that require the window coverings to be cordless, have inaccessible operating cords, or have

operating cords that are no longer than eight inches long. *See id.* at 73144–45. The Final Rule is well supported and long overdue, and this Court should reject Petitioner’s challenge to it.

This Court should also reject Petitioner’s contention that the Final Rule should be vacated because of statutory limitations on the President’s authority to remove CPSC commissioners. The Supreme Court has long held that that Congress can create multi-member, expert agencies whose members are removable only for good cause. Moreover, even when limits on removal of federal officers are unconstitutional, they do not render actions taken by the officers unlawful unless those actions are causally related to the invalid removal restrictions. Here, the President did not seek to remove the commissioners, and there is no reason to believe that he would have had any interest in removing the commissioners to prevent the Final Rule from being issued.

## ARGUMENT

### **I. The Final Rule is Necessary to Reduce an Unreasonable Risk of Injury and Death.**

#### **A. Every year, children die from strangulation by window covering cords.**

Window coverings with accessible cords pose a risk of death or severe injury to young children from strangulation. As the Final Rule explains, “[i]f children can access a window covering cord that is longer than 8 inches, children can wrap the cord around their neck, or insert their head into a loop formed by the cord and strangle.” 87 Fed. Reg. at 73192. “Data show that the strangulation hazard associated with window covering cords is silent, quick, and hidden to consumers.” *Id.* at 73171. “Children can wrap the cord around their neck, insert their head into a cord loop and get injured or die silently in a few minutes in any room, with or without supervision.” *Id.* at 73192.

This risk of strangulation is not theoretical: There were at least 209 fatal or near-miss strangulation incidents involving window covering cords and young children (eight years old or younger) between 2009 and 2021. *See id.* at 73151. In at least 100 of those cases, the child died. *See id.* Other cases resulted in “severe neurological sequelae, ranging from

loss of memory to a long-term or permanent vegetative state requiring tracheotomy and gastrointestinal tube feeding.”<sup>4</sup> The administrative record in this case is replete with comments from parents telling the stories of their young children who were killed by window covering cords and urging the CPSC to protect other children.<sup>5</sup>

Moreover, these deaths continue through the present. While data collection is ongoing, at the time of the Final Rule, CPSC was already

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<sup>4</sup> Staff briefing package regarding Notice of Proposed Rulemaking (Oct. 6, 2021), Administrative Record Doc. 62, at 61, *available at* <https://www.cpsc.gov/s3fs-public/NPRs-Add-Window-Covering-Cords-to-Substantial-Product-Hazard-List-Establish-Safety-Standard-for-Operating-Cords-on-Custom-Window-Coverings.pdf?VersionId=OL.hyoBmX6egXanHTkevJJs7gGeQuHG3>.

<sup>5</sup> *See, e.g.*, Comments of Erica Thomas (Mar. 23, 2022), CPSC-2013-0028-3466; Comments of Jessie Hawk (Mar. 23, 2022), CPSC-2013-0028-3420; Comments of Zoe Hoepfner (Mar. 21, 2022), CPSC-2013-0028-2884; Comments of April Finvold (Mar. 21, 2022), CPSC-2013-0028-2852; Comments of Carolyn Eastburn (Mar. 21, 2022), CPSC-2013-0028-2822; Comments of Erin Shero (June 1, 2015), CPSC-2013-0028-1521; Comments of Kimberly Magnuson (June 1, 2015), CPSC-2013-0028-1516; Comments of April Carlson (June 1, 2015), CPSC-2013-0028-1504; Comments of Shavonne Smith (May 11, 2015), CPSC-2013-0028-1455; Comments of Lesley Wyman (Apr. 2, 2015), CPSC-2013-0028-1437; Comments of Harvey Cain (Mar. 18, 2015), CPSC-2013-0028-1352; Comments of Chesshuwa Beckett (Mar. 18, 2015), CPSC-2013-0028-1298; Comments of Lori White (Mar. 11, 2015), CPSC-2013-0028-1081; Comments of Chris Parslow (Mar. 2, 2015), CPSC-2013-0028-0860; Comments of Pratima Sampat-Mar (Feb. 27, 2015), CPSC-2013-0028-0728.

aware of eight fatal strangulations of young children in 2020 and six in 2021. *See* Final Rule, 87 Fed. Reg. at 73152.

**B. The CPSC has given the industry decades to adopt a voluntary standard that adequately addresses the strangulation risk.**

The CPSC and window covering industry have known for decades of the strangulation risk posed by window covering cords. In 1985, the CPSC and industry issued a safety alert warning parents of the dangers posed by window covering cords.<sup>6</sup> The alert noted that window covering cords had been identified as one of the products most frequently associated with child strangulation.<sup>7</sup>

In the intervening years, the CPSC has worked closely with the industry to try to get it to adopt voluntary standards that would adequately address the window covering cord risk. But despite the time

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<sup>6</sup> *See* CPSC, CPSC Warns of The Danger Of Children Strangulation In Window Blind Or Drapery Cords, Release #85-069 (Dec. 20, 1985), *available at* <https://www.cpsc.gov/Newsroom/News-Releases/1986/CPSC-Warns-of-The-Danger-Of-Children-Strangulation-In-Window-Blind-Or-Drapery-Cords>; CPSC, Notice of Proposed Rulemaking (NPRM), *Safety Standard for Operating Cords on Custom Window Coverings*, 87 Fed. Reg. 1014, 1038 (Jan. 7, 2022); Petition for Rulemaking, CPSC-2013-0028-0002, at 3.

<sup>7</sup> *See* CPSC Warns of The Danger Of Children Strangulation In Window Blind Or Drapery Cords, *supra* n.6.



that has passed, and although the voluntary standard has gone through numerous revisions, the industry has yet to adopt a voluntary standard that adequately addresses the risk from operating cords on custom window coverings.

The CPSC began working with Petitioner Window Covering Manufacturers Association (the “Association”) on a voluntary standard in 1995, and the first voluntary standard was adopted in 1996. *See* NPRM, 87 Fed. Reg. at 1027. The 1996 standard imposed some requirements to try to address the strangulation risk of looped cords. *See id.* However, it left many hazardous cords unaddressed and some safety devices that were adopted failed; as a result, children continued to be strangled and killed.<sup>8</sup>

In 2002, the industry published revisions to the voluntary standard to address the risks of inner cords on window coverings—cords located inside the product. *See* NPRM, 87 Fed. Reg. at 1018, 1027. Although CPSC staff had also identified to the Association the risks posed by

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<sup>8</sup> *See* Petition for Rulemaking, CPSC-2013-0028-0002, at 4.

“exposed cords longer than the circumference of a child’s neck,”<sup>9</sup> had urged the industry to adopt revisions that would address that risk,<sup>10</sup> and had expressed concern that the proposed revisions did not address potential sources of strangulation besides inner cords,<sup>11</sup> the 2002 revisions did not address the hazards of operating cords—loops or cords used to manipulate window coverings.<sup>12</sup> Revisions in 2007 and in 2009 and 2010 also did not adequately address the risks posed by operating cords.<sup>13</sup>

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<sup>9</sup> Letter from CPSC Staff to Peter Rush, Window Covering Mfrs. Ass’n (Jan. 19, 2001), at 4, *available at* [https://www.cpsc.gov/s3fs-public/2001-19-01-Medford-letter-to-Peter-Rush-WCMA.pdf?VersionId=50CCfA33qd9eiNOHq%E2%80%8CBrlrs.ZX2i\\_e.EAv](https://www.cpsc.gov/s3fs-public/2001-19-01-Medford-letter-to-Peter-Rush-WCMA.pdf?VersionId=50CCfA33qd9eiNOHq%E2%80%8CBrlrs.ZX2i_e.EAv).

<sup>10</sup> *See id.* at 5; *see also* NPRM, 87 Fed. Reg. at 1027.

<sup>11</sup> *See* Letter from CPSC Staff to Peter Rush, Window Covering Mfrs. Ass’n (Jan. 28, 2002), *available at* [https://www.cpsc.gov/s3fs-public/2002-0128\\_Elder\\_to\\_Rush\\_Letter.pdf?VersionId=biRfVJegNKscBJAzbj.Ufgcs7TIYb5sD](https://www.cpsc.gov/s3fs-public/2002-0128_Elder_to_Rush_Letter.pdf?VersionId=biRfVJegNKscBJAzbj.Ufgcs7TIYb5sD).

<sup>12</sup> *See* NPRM, 87 Fed. Reg. at 1016, 1027; Comments of Parents for Window Blind Safety (Mar. 23, 2022), CPSC-2013-0028-3471, at 1; Petition for Rulemaking, CPSC-2013-0028-0002, at 5.

<sup>13</sup> *See* Petition for Rulemaking, CPSC-2013-0028-0002, at 5; Comments of Parents for Window Blind Safety (Mar. 23, 2022), CPSC-2013-0028-3471, at 1; *see also* Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Aug. 17, 2010), at 1 (“[F]urther improvements are needed to address strangulation risks in all shades[.]”), *available at* [https://www.cpsc.gov/s3fs-public/pdfs/blk\\_media\\_wcma08\\_17\\_10.pdf](https://www.cpsc.gov/s3fs-public/pdfs/blk_media_wcma08_17_10.pdf).

Concerned about the continued risks to children, in 2010, the CPSC and health agencies in Canada and the European Union joined together to call for “a swift and comprehensive process that concurrently eliminates the risk factors causing deaths and injuries from all types of corded window covering products.”<sup>14</sup> The industry again reopened and revised the standard, but the resulting standard again failed to adequately address the hazards posed by window covering cords. Although CPSC staff provided comments on the proposed version of the standard that “primarily addressed the remaining risks associated with operating cords and loop cords,” the “major hazards associated with operating cords and looped cords remained the same as the originally proposed version.”<sup>15</sup>

Because of the industry’s failure in the previous 28 years to adopt an adequate voluntary standard, in 2013, safety organizations and advocates, including the amici, petitioned the CPSC to promulgate a

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<sup>14</sup> Petition for Rulemaking, CPSC-2013-0028-0002, at 2.

<sup>15</sup> CPSC, Voluntary Standards Activities FY 2012 Annual Report (Mar. 18, 2013), at 14, *available at* <https://www.cpsc.gov/s3fs-public/pdfs/fy12volstds.pdf>; *see also* Petition for Rulemaking, CPSC-2013-0028-0002, at 6; NPRM, 87 Fed. Reg. at 1027–28.

mandatory rule on window covering cords. In particular, the petition asked the CPSC to promulgate a mandatory standard that prohibits any window covering cords where a feasible cordless alternative exists, and, where a feasible cordless alternative does not exist, to require all cords to be made inaccessible through the use of passive guarding devices.<sup>16</sup> In July 2014, the industry adopted a revised voluntary standard that included an editorial change. That same month, CPSC staff urged the voluntary standards committee to incorporate into the standard requirements that would effectively reduce or eliminate the risks of pull cords and continuous loop cords.<sup>17</sup>

On October 8, 2014, the CPSC granted the petition, and on January 16, 2015, it published an advance notice of proposed rulemaking “seeking information and comment on regulatory options for a mandatory rule to address the risk of strangulation to young children on window covering

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<sup>16</sup> See Petition for Rulemaking, CPSC-2013-0028-0002, at 2.

<sup>17</sup> See Letter from CPSC staff to Ralph Vasami, Window Covering Mfrs. Ass’n (July 22, 2014), Administrative Record Doc. 7, *available at* [https://www.cpsc.gov/s3fs-public/pdfs/blk\\_media\\_WCMALtr22July2014.pdf](https://www.cpsc.gov/s3fs-public/pdfs/blk_media_WCMALtr22July2014.pdf).

cords.”<sup>18</sup> After the CPSC published the advance notice of proposed rulemaking, CPSC staff continued to urge the industry to revise the voluntary standard<sup>19</sup> and, once the standard was reopened, provided input on proposals.<sup>20</sup>

In 2018, 33 years after the first safety alert on the strangulation risk posed by window coverings, the industry finally adopted a voluntary standard that provides strong protections against the risks posed by window covering operating cords on *stock* window coverings—window coverings that are “completely or substantially fabricated ... prior to being distributed in commerce.” Final Rule, 87 Fed. Reg. at 73148. To comply with that standard, stock window coverings must either be cordless, have cords that are inaccessible to children, or have operating cords that are equal to or shorter than eight inches long. *See id.* at 73145.

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<sup>18</sup> CPSC, Advance Notice of Proposed Rulemaking, *Corded Window Coverings; Request for Comments and Information*, 80 Fed. Reg. 2327, 2327 (Jan. 16, 2015).

<sup>19</sup> *See* Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Oct. 28, 2015), Administrative Record Doc. 18, *available at* [https://www.cpsc.gov/s3fs-public/pdfs/blk\\_media\\_WCMALetter28Oct2015.pdf](https://www.cpsc.gov/s3fs-public/pdfs/blk_media_WCMALetter28Oct2015.pdf).

<sup>20</sup> *See, e.g.*, Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Jan. 24, 2017), Administrative Record Doc. 35, *available at* <https://www.cpsc.gov/s3fs-public/CPSC%20Letter%20to%20WCMA%20January%202017.pdf>.

The adoption of the 2018 standard did not negatively affect the sales of stock window coverings, which increased after the standard was revised. *See id.* at 73194.

Stock window coverings, however, are not the only window coverings with cords that pose a hazard to children. Although the CPSC does not always have sufficient information to identify whether a strangulation incident involved a custom or stock window covering, 42 percent of the incidents between 2009 and 2021 for which the CPSC has been able to identify that information have involved custom window coverings. *See id.* at 73152. The CPSC has determined that, had the 2018 voluntary standard “for operating cords on stock products been in effect for custom window coverings, the requirements would have prevented 100 percent of the incidents” known to have involved operating cords on custom window coverings. *Id.* at 73157. Nonetheless, the 2018 voluntary standard did not apply standards to custom window coverings similar to the ones it applied to stock window coverings, and hazardous custom window coverings have remained on the market. In particular, the 2018 standard allowed custom window coverings to have operating cords long enough for children to wrap around their necks and continuous loop

operating systems that lack safety features necessary to prevent strangulation of children. *See id.* It also allowed single retractable cord lift systems—systems in which an operating cord is pulled out to operate a window covering, but then retracts to a shorter length when the user releases the cord—without specifying a maximum cord length or a minimum pull force required to operate the system. *See id.* at 73157–58.

Both leading up to and following the adoption of the 2018 voluntary standard, CPSC staff urged the industry to move quickly to “address the remaining hazards associated with custom products.”<sup>21</sup> CPSC staff also prepared a notice of proposed rulemaking for a mandatory standard, of which the Association was aware.<sup>22</sup> The industry did not reopen the

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<sup>21</sup> Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (July 13, 2017), at 4, Administrative Record Doc. 42, *available at* <https://www.cpsc.gov/s3fs-public/CPSC%20Staff%20Letter%20to%20WCMA%207.13.2017.pdf?inispIX7Sb8.56SnkmWXYIo1cm4oh9xL>; *see also*, e.g., Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Feb. 3, 2020), Administrative Record Doc. 58, *available at* <https://www.cpsc.gov/s3fs-public/CPSC-Staff-Letter-to-WCMA-Feb-2020.pdf?TZtarOeedGSVnaPzS5dHOEKpKz7f3N24>.

<sup>22</sup> *See* Log of meeting between CPSC staff and Window Covering Mfrs. Ass’n attendees (Oct. 28, 2021), CPSC-2013-0028-3645.

voluntary standard until late in 2021.<sup>23</sup>

On January 7, 2022, CPSC published a proposed rule that would extend the standards for stock window coverings in the 2018 voluntary standard to custom window coverings. *See* NPRM, 87 Fed. Reg. at 1014. After the proposed rule was published, the Association “brought forth several proposals” to modify the voluntary standard. Final Rule, 87 Fed. Reg. at 73165. Once again, however, the proposals did not adequately protect against the risk of injury or death from custom window covering cords. CPSC staff participated in meetings about the voluntary standard and provided comments on the proposed revisions, expressing concern about the adequacy of the proposals as they related to continuous loop operating systems and single retractable cord lift systems.<sup>24</sup> On July 15,

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<sup>23</sup> *See id.* (noting, on October 28, 2021, that Association intended to reopen the standard); Log of meeting between CPSC staff and Window Covering Mfrs. Ass’n attendees (Dec. 2, 2021), CPSC-2013-0028-3646 (stating that Association had reopened the standard).

<sup>24</sup> *See* Staff briefing package regarding Final Rules to (1) Add Window Covering Cords to the Substantial Product Hazard List, and (2) Establish a Safety Standard for Operating Cords on Custom Window Coverings (Sept. 28, 2022), Administrative Record Doc. 101, at OS-249–50, *available at* <https://www.cpsc.gov/s3fs-public/Final-Rules-to-1-Add-Win-dow-Covering-Cords-to-the-Substantial-Product-Hazard-List-and-2-Est-ablish-a-Safety-Standard-for-Operating-Cords-on-Custom-Window-Cov-erings.pdf?VersionId=nDxz9G5hfDy5k.SnXkqgGKLiDsMK4hpe>; Letter



2022, the Association issued a ballot on proposed revisions to the voluntary standard. The CPSC staff voted no on the balloted standard and explained the ways in which the balloted standard was still inadequate.<sup>25</sup> Amici Parents for Window Blind Safety and Consumer Federation of America, as well as Independent Safety Consulting, LLC, likewise voted no on the balloted standard and explained why the revisions would not adequately protect children.<sup>26</sup>

On September 23, 2022, the Association issued a recirculation ballot of the revisions. The reballoting did not resolve the concerns identified by CPSC's staff and the consumer groups. *See* Final Rule, 87 Fed. Reg. at 73155.

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from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass'n (Mar. 1, 2022), CPSC-2013-0028-3652.

<sup>25</sup> *See* Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass'n (Aug. 15, 2022), CPSC-2013-0028-3667.

<sup>26</sup> *See* Letter from Linda Kaiser, Parents for Window Blind Safety, regarding proposed safety standard, CPSC-2013-0028-3668; Consumer Federation of America, Ballot vote—WCMA/ANSI A100.1 for Safety of Window Covering Products (Aug. 31, 2022), *available at* <https://consumerfed.org/wp-content/uploads/2022/09/CFA-Submits-Comments-on-Standard-for-Window-Covering-Products-8.31.22.pdf>; Final Rule, 87 Fed. Reg. at 73155.

On November 28, 2022, the CPSC promulgated the Final Rule, “to address the unreasonable risk of strangulation to children 8 years old and younger associated with hazardous operating cords on custom window coverings.” *Id.* at 73144. The industry subsequently adopted its proposed revisions to the voluntary standard, despite the CPSC staff’s and consumer groups’ explanations of the revisions’ inadequacy.

**C. The 2022 voluntary standard still does not adequately address the strangulation risk from custom window covering cords.**

Although the 2022 revisions to the voluntary standard were not yet “in existence” when the CPSC promulgated the Final Rule, 15 U.S.C. § 2058(b)(2), the rule addressed the balloted draft of that standard, explaining why adoption of the draft standard would not likely result in an adequate reduction in the risk of injury. *See* Final Rule, 87 Fed. Reg. at 73165–68, 73171, 73183–84. In particular, the Rule explained that the draft standard’s requirements for continuous loop operating systems and retractable cords do not adequately protect children.

With respect to continuous loop systems, although the 2022 voluntary standard requires such systems to have tension devices intended to keep the loops taut, based on testing, CPSC’s staff “concluded

that a properly installed tension device that would be acceptable under the balloted standard still allows an accessible hazardous loop.” *Id.* at 73167. Moreover, the standard’s requirements do “not ensure that tension devices will be effective for the life of the window covering.” *Id.* at 73165.<sup>27</sup>

With respect to retractable cords, if the amount of cord that can be pulled out is too long, and the amount of force needed to pull it out is too low, a child can strangle on the exposed cord. *See* Final Rule, 87 Fed. Reg. at 73158. As the Final Rule explains, the 2022 voluntary standard allows for the cord to be pulled out to 36 inches, long enough for a child “to wrap the cord around his/her neck.” *Id.* at 73165.<sup>28</sup>

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<sup>27</sup> *See also, e.g.*, Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Aug. 15, 2022), CPSC-2013-0028-3667, at 1 (“Incident data demonstrate that tension devices may come off the wall, may not be installed at all, or may not keep continuous loops taut enough to prevent incidents.”); Letter from Linda Kaiser, Parents for Window Blind Safety, regarding proposed safety standard, CPSC-2013-0028-3668, at 2 (explaining that the “updated 2022 language for tension devices does not fix the problems associated with tension devices”).

<sup>28</sup> *See also, e.g.*, Letter from CPSC Staff to Ralph Vasami, Window Covering Mfrs. Ass’n (Aug. 15, 2022), CPSC-2013-0028-3667, at 2 (noting that “a child may be able to wrap a cord around his/her neck if it is 3-feet long”); Letter from Linda Kaiser, Parents for Window Blind Safety, regarding proposed safety standard, CPSC-2013-0028-3668, at 3

At stake in this rulemaking are the lives and safety of toddlers and other young children who interact with custom window coverings. Given the long history of voluntary standards that do not adequately protect against the risk of injury and death from window covering cords, along with the continued inadequacy of the 2022 standard, the CPSC was correct to move ahead with a mandatory rule. As the Final Rule explains, “[t]he protracted and incompletely successful history of the voluntary standard process on this issue demonstrates that continuing to wait for [the industry] to address the injuries in the voluntary standard will result in additional deaths and injuries to children, with little hope of progress if the Commission does not pursue rulemaking.” Final Rule, 87 Fed. Reg. at 73184.

## **II. Statutory Limitations on the Removal of CPSC Commissioners do not Render the Final Rule Invalid.**

The Association contends that the Final Rule is invalid because the Consumer Product Safety Act allows to President to remove CPSC commissioners from office only for neglect of duty or malfeasance in

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(explaining that the “maximum allowable cord length [should be] 12 inches from the headrail”).

office. *See* 15 U.S.C. § 2053(a). The Supreme Court held in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), however, that Congress can “create expert agencies led by a *group* of principal officers removable by the President only for good cause.” *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (declining to extend *Humphrey's Executor* “to the novel context of an independent agency led by a single Director”). The CPSC is precisely the type of multi-member, expert agency whose members, under *Humphrey's Executor*, can be protected from at will removal by the President without violating separation-of-powers principles.

In this case, the Court does not need to address whether the limits on the President's authority to remove CPSC commissioners violate separation-of-powers principles because, regardless of how that issue is resolved, it does not provide a basis for vacating the Final Rule. In *Collins v. Yellen*, 141 S. Ct. 1761, 1787 (2021), the Supreme Court explained that actions taken by properly *appointed* federal officers are not void because of improper statutory limits on their *removal*. Unlike improperly appointed officers who “lack[] constitutional authority,” *id.*, officers subject to invalid tenure protections do not exercise “power that [they] did not lawfully possess.” *Id.* at 1788. Thus, “there is no basis for

concluding that any [such officer] lacked the authority to carry out the functions of the office.” *Id.* Only if the removal restriction had a causal effect on actions taken by the officer, *Collins* held, would there be any basis for granting a remedy aimed at those actions. *See id.* at 1789. The Court posited, for example, that a party might be entitled to relief if the President had tried to remove an officer but had unconstitutionally been blocked from doing so. *See id.*

Justice Thomas, concurring fully in the Court’s opinion, wrote separately to underscore his agreement that officers lawfully appointed “could lawfully exercise executive power,” notwithstanding an unconstitutional removal restriction, and that any remedy in such cases “should fit the injury.” *Id.* at 1789 (Thomas, J., concurring). “The Government,” he added, “does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract.” *Id.* Any remedy against agency action, Justice Thomas emphasized, depends on a “show[ing] that the challenged Government action at issue ... was, in fact, unlawful.” *Id.* at 1790. Actions taken by an officer subject to an unconstitutional removal restriction are not necessarily unlawful, because such an officer, if properly appointed, may validly “exercis[e] power in the first instance.”

*Id.* at 1793. And the resulting actions are not “automatically taint[ed]” by the “mere existence of an unconstitutional removal provision” that the President could presumably have successfully challenged at any time. *Id.*

In an opinion concurring in the judgment and joined in relevant part by Justices Breyer and Sotomayor, Justice Kagan likewise agreed that officers with unconstitutional tenure protections, “unlike those with invalid appointments, possess[] the ‘authority to carry out the functions of the office.’” *Id.* at 1801 (Kagan, J., concurring in part and in the judgment) (quoting majority opinion). Accordingly, “plaintiffs alleging a removal violation are entitled to injunctive relief—a rewinding of agency action—only when the President’s inability to fire an agency head affected the complained-of decision,” because “[o]nly then is relief needed to restore the plaintiffs to the position they would have occupied in the absence of the removal problem.” *Id.* (cleaned up). Moreover, “[g]ranting relief in any other case would, contrary to usual remedial principles, put the plaintiffs in a better position than if no constitutional violation had occurred.” *Id.* (cleaned up).

Here, regardless of whether the restrictions on the removal of CPSC commissioners are constitutional, the commissioners who promulgated

the Final Rule “were properly *appointed*.” *Id.* at 1787 (majority opinion). Accordingly, “there is no reason to regard any of the actions taken by [them] in relation to the [Final Rule] as void.” *Id.* The President did not “attempt[] to remove” the CPSC’s commissioners but find himself “prevented from doing so.” *Id.* at 1789. Nor did he “ma[ke] a public statement expressing displeasure with actions taken by” the commissioners and assert “that he would remove [them] if the statute did not stand in the way.” *Id.* And there is no other reason to believe that the “President’s inability to fire [CPSC commissioners] affected the complained-of decision.” *Id.* at 1801 (Kagan, J., concurring in part and in the judgment).

Simply put, there is no causal connection between the removal restrictions and the promulgation of the Final Rule. Therefore, even if those restrictions violated separation-of-power principles, vacatur of the Final Rule would not be the appropriate remedy. *See, e.g., Cmty. Fin. Servs. Ass’n of Am. v. CFPB*, 51 F.4th 616, 633 (5th Cir. 2022) (rejecting argument that rule should be invalidated due to unconstitutional removal provision where the record did not demonstrate that, but for the provision, the President would have removed the Director and the agency



“would have acted differently as to the rule”), *petition for cert. granted on other grounds*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023), *denied as to relevant question*, No. 22-663, 2023 WL 2227679 (U.S. Feb. 27, 2023); *Integrity Advance, LLC v. CFPB*, 48 F.4th 1161, 1170 (10th Cir. 2022) (rejecting argument that enforcement action should be set aside where party did not point to any compensable harm from unconstitutional removal provision), *petition for cert. on other grounds pending*, No. 22-838 (U.S. Filed Mar. 1, 2023); *Calcutt v. FDIC*, 37 F.4th 293, 316 (6th Cir. 2022) (rejecting argument that agency proceeding should be invalidated based on allegedly unconstitutional removal restrictions where plaintiff did not demonstrate that the removal restrictions caused him harm), *mandate recalled and stay granted*, No. 22A255, 2022 WL 4546340 (U.S. Sept. 29, 2022) (Kavanaugh, J., in chambers), *petition for cert. pending*, No. 22-714 (U.S. Filed Jan. 30, 2023); *Kaufmann v. Kijakazi*, 32 F.4th 843, 849–50 (9th Cir. 2022) (rejecting challenge to Social Security benefits decision based on limitations on removing Commissioner of Social Security where there was no link between the claimant’s case and the removal provision).

The Association's attempts to distinguish *Collins* are meritless. First, the Association notes that the director who adopted the amendment challenged in *Collins* was removable at will. But directors who were *not* removable at will took actions to implement that amendment, and the Court held that that was no reason to regard "that subset of actions" as void. 141 S. Ct. at 1787.

Next, the Association states that *Collins* concerned "retroactive relief" whereas it "is seeking to block the CPSC Commissioners' future exercise of unlawful authority" through the Final Rule. But this case does not seek an injunction against future CPSC actions. It seeks judicial review of a final agency action taken by the CPSC in November 2022. As in *Collins*, the relevant question is whether the removal restrictions that governed when the CPSC undertook that action render the action unlawful. And under *Collins*, absent a causal connection between the removal restrictions and the action, the answer is no. *See Cmty. Fin. Servs. Ass'n*, 51 F.4th at 631–32 (applying *Collins* in a challenge to a final rule); *Calcutt*, 37 F.4th at 316 (explaining that fact that a challenged order "remains in effect and operates prospectively" does not matter to the *Collins* inquiry).

In any event, if removal restrictions were found invalid in a case challenging future agency action, the proper remedy would not be against the agency action yet to be taken, let alone prior agency action. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010) (rejecting argument that removal restrictions that violated separation-of-powers principles rendered the agency itself “and all power and authority exercised by it” invalid). Under the reasoning in *Collins*, as long as the officials who took the action were properly appointed, both the future and prior action would be lawful, absent a causal connection between the actions and the removal restrictions.

Finally, the Association states that *Collins*, which involved a challenge by Fannie Mae’s and Freddie Mac’s shareholders to an amendment to agreements that the Federal Housing Finance Agency had negotiated for the companies with the Department of Treasury, “involved a collateral attack on an intergovernmental agreement,” whereas “the Rule directly regulates [the Association’s] members’ businesses.” The Association does not even attempt to explain why this distinction makes a difference.

In short, even if the statutory restrictions on the President's authority to remove CPSC commissioners violated separation-of-power principles, that violation would not render the CPSC's actions unlawful, absent a nexus between the action and the removal restrictions. There is no such nexus here, and no reason to vacate the Final Rule.

### CONCLUSION

The Court should deny the petition for review.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because, excluding those parts permitted to be excluded under Federal Rule of Appellate Procedure 32(f), it contains 5,377 words.

This brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 29(a)(4), 32(a)(5), and 32(a)(6) because it is composed in a 14-point proportional typeface, Century Schoolbook.

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**CERTIFICATE OF SERVICE**

I hereby certify that, on March 9, 2023, this brief was served through the Court's ECF system on counsel for all parties.

/s/ Adina H. Rosenbaum  
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