No. 22-60639

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN HOME FURNISHINGS ALLIANCE;
MISSISSIPPI ECONOMIC COUNCIL;
MISSISSIPPI MANUFACTURERS ASSOCIATION,
Petitioners,

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 Amicus Curiae Public Citizen in Support of Respondent

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SUPPLEMENTAL STATEMENT OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

No. 22-60639

AMERICAN HOME FURNISHINGS ALLIANCE;
MISSISSIPPI ECONOMIC COUNCIL;
MISSISSIPPI MANUFACTURERS ASSOCIATION,
Petitioners,

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

Pursuant to this Court's Rule 29.2, the undersigned counsel certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case, in addition to those listed in the briefs of the parties. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Public Citizen, Inc.—amicus curiae

Public Citizen Litigation Group—law firm for Public Citizen

Public Citizen Foundation, Inc.—nonprofit organization of which Public Citizen Litigation Group is a part

Adina H. Rosenbaum—counsel for Public Citizen

Scott L. Nelson—counsel for Public Citizen

Allison M. Zieve—counsel for Public Citizen

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that amicus curiae Public Citizen, Inc., is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it of any kind.

Respectfully submitted,

/s/ Adina H. Rosenbaum
Adina H. Rosenbaum

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INTERESTS OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with members in all 50 states. Public Citizen works before Congress, administrative agencies, and the courts for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in effective federal safety regulation, including regulation of automobiles, drugs, medical devices, and, as pertinent here, the consumer products subject to the authority of the Consumer Product Safety Commission (CPSC).

Public Citizen advocated for the establishment of the CPSC in 1972 and for the enactment of the Consumer Product Safety Improvement Act of 2008, which augmented the CPSC's authority and responsibilities. Public Citizen has pressed for the appointment of strong leaders to the Commission and for funding from Congress sufficient to support the CPSC's efforts to protect consumers. Public Citizen has also supported adoption of specific CPSC standards, advocated for effective

[1] 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 the amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

implementation of the statutory requirement that the CPSC maintain a public database of consumer product safety incidents, and participated in litigation seeking to ensure the CPSC's vigorous performance of its statutory duties. *See*, *e.g.*, *Company Doe v. Public Citizen*, 749 F.3d 246 (4th Cir. 2014) (intervening to unseal the record of a case in which a company sought to enjoin the CPSC from publishing a report in its online database regarding the death of an infant linked to use of the company's product); *NRDC v. CPSC*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009) (appearing as co-plaintiff in litigation challenging the CPSC's failure to enforce the statutory prohibition on sales of children's products containing phthalates).

Public Citizen has also long been concerned with issues relating to separation of powers. Among its other efforts in this area, Public Citizen filed amicus briefs in the U.S. Supreme Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and *Morrison v. Olson*, 487 U.S. 654 (1988), in support of statutes granting executive officers protection against removal without cause by the President.

Public Citizen's interests in consumer protection and separation of powers converge in this case, in which the Petitioners contend that

restrictions on the President's power to remove CPSC commissioners violate separation-of-powers principles and require vacatur of a CPSC rule on the stability of clothing storage units, *Safety Standard for Clothing Storage Units*, 87 Fed. Reg. 72,598 (Nov. 25, 2022) (Final Rule). Public Citizen is filing this brief to address Petitioners' separation-of-powers argument for vacatur, which is contrary to the Supreme Court's and this Court's precedent and which, if adopted, would eviscerate CPSC safety standards, leaving the public exposed to unreasonable risks of injury and death.

SUMMARY OF ARGUMENT

Statutory limitations on the President's authority to remove CPSC commissioners do not render the Final Rule invalid. The Supreme Court has long held that Congress can create multi-member expert agencies whose members are removable only for good cause. The CPSC is precisely such an agency. 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 CPSC's commissioners, and there is no reason to believe that, if not for the

removal restrictions, he would have removed the commissioners to prevent the Final Rule from being issued. Because there is no nexus between the Final Rule and the statutory restrictions on the President's authority to remove CPSC commissioners, those restrictions do not provide a basis for vacating the Final Rule.

ARGUMENT

I. Statutory Limitations on the Removal of CPSC Commissioners do not Render the Final Rule Invalid.

The Consumer Product Safety Act allows the President to remove CPSC commissioners from office only for neglect of duty or malfeasance in office. *See* 15 U.S.C. § 2053(a). Petitioners argue that these limitations on the President's power to remove CPSC commissioners render the CPSC's structure unconstitutional. 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.

This Court does not need to address whether the limits on the President's authority to remove CPSC commissioners violate separation-of-powers principles, however, 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).

In *Community Financial Services Ass'n of America v. CFPB*, this Court applied *Collins* to hold that unconstitutional limitations on the President's authority to remove the director of the Consumer Financial Protection Bureau (CFPB) did not render provisions of a rule promulgated by the CFPB invalid. 51 F.4th 616, 631–33 (5th Cir. 2022). This Court explained that, "after *Collins*, a party challenging agency action must show not only that the removal restriction transgresses the Constitution's separation of powers but also that the unconstitutional provision caused (or would cause) them harm." *Id.* at 632. The Court then

identified "three requisites for proving harm: (1) a substantiated desire by the President to remove the unconstitutionally insulated actor, (2) a perceived inability to remove the actor due to the infirm provision, and (3) a nexus between the desire to remove and the challenged actions taken by the insulated actor." *Id*. Because the plaintiffs challenging the rule in that case did not demonstrate that, "but for the removal restriction," the President would have removed the CFPB director and "that the Bureau would have acted differently as to the rule," the Court held that the plaintiffs failed to demonstrate harm and that summary judgment had properly been entered against them on that ground. *Id*. at 633. Importantly, although the Supreme Court granted the CFPB's petition for certiorari on a different issue decided in *Community Financial Services Ass'n*—the constitutionality of the CFPB's funding structure, *see CFPB v. Cmty. Fin. Servs. Ass'n of Am.*, No. 22-448, 2023 WL 2227658 (U.S. Feb. 27, 2023)—it *denied* the plaintiffs' cross-petition for certiorari on the *Collins* question, *see Cmty. Fin. Servs. Ass'n of Am. v. CFPB*, No. 22-663, 2023 WL 2227679 (U.S. Feb. 27, 2023).

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

the Final Rule "were properly *appointed*." *Collins*, 141 S. Ct. at 1787. 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-powers principles, that violation would not render the Final Rule invalid or provide a basis for vacating it. *See Cmty. Fin. Servs. Ass'n*, 51 F.4th at 633; *see also*, *e.g.*, *CFPB v. Law Offices of Crystal Moroney*, __ F.4th __, 2023 WL 2604254, at *3 (2d Cir. Mar. 23, 2023) (rejecting argument that civil investigative demand for documents was void due to unconstitutional removal provision where

party challenging the demand could not show that the agency would not have issued the demand but for the removal provision); *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), *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).

II. Petitioners' Arguments that the Final Rule Should Be Set Aside as Void, or that Its Enforcement Should Be Enjoined, Are Meritless.

Petitioners' attempts to distinguish *Collins* and *Community Financial Services Ass'n* all fail.

First, Petitioners state that *Collins* concerned "*retrospective* relief" whereas here they are seeking to keep an agency from "inflicting *future* harm through a Rule it had no right to promulgate." Pet'rs Br. 29. This Court, however, has already rejected the argument "that *Collins* applies only to retrospective relief." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 631. As this Court explained, "*Collins* did not rest on a distinction between prospective and retrospective relief." *Id.* "*Collins*'s remedial inquiry 'focuse[d] on whether a 'harm' occurred that would create an entitlement to a remedy, rather than the nature of the remedy,'" and that inquiry "'remains the same whether the petitioner seeks retrospective or prospective relief.'" *Id.* (quoting *Calcutt*, 37 F.4th at 316); *see also CFPB v. Law Offices of Crystal Moroney*, 2023 WL 2604254, at *4 (rejecting argument that *Collins* applies only to retrospective relief and explaining that "the Supreme Court's reasoning that an officer's actions are valid so long as she was validly appointed applies with equal force regardless of the relief sought by the party challenging the officer's actions").

Moreover, this case challenges a final action taken by the CPSC in November 2022—the promulgation of the Final Rule. 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. Notably, *Community Financial Services Ass'n* rejected the argument that *Collins* does not apply to rulemaking challenges, and it applied *Collins* in a challenge to a final rule that would have effects into the future. *See* 51 F.4th at 631–32. Although Petitioners criticize this Court's decision in *Community Financial Services Ass'n*, they offer no basis on which to distinguish the future effects of the rule at issue there and of the rule at issue here.

Petitioners suggest that, instead of vacating the Final Rule, this Court could enjoin future agency actions applying or enforcing it. This case, however, was brought under a statutory provision giving the Court "jurisdiction to review the consumer product safety rule in accordance with chapter 7 of Title 5, and to grant appropriate relief … as provided in such chapter." 15 U.S.C. § 2060(c). That provision, giving the Court authority to directly review a CPSC rule, does not give the Court jurisdiction, upon determining that the rule under review is lawful, to review and enjoin *other* actions that might be taken by the agency in the future. *See Cochran v. SEC*, 20 F.4th 194, 207 (5th Cir. 2021) (en banc)

(explaining that claims seeking to prevent an agency from exercising its powers because its members were unconstitutionally insulated from removal were "beyond the bounds" of a statutory provision allowing for direct review of final orders in the courts of appeals), *cert. granted*, 142 S. Ct. 2707 (2022).

In any event, if removal restrictions were found invalid in a case in which future agency action were at issue, the proper remedy would not be against the agency action yet to be taken. *See Collins*, 141 S. Ct. at 1788 n.23 (explaining that "the unlawfulness of [a] removal provision does not strip the [agency head] of the power to undertake the other responsibilities of his office"); *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, the future action would be lawful, absent a causal connection between the actions and the removal restrictions.

Second, Petitioners attempt to distinguish *Collins* and *Community Financial Services Ass'n* on the ground that those cases involved single-

director agencies, whereas the CPSC is a multi-member commission. Petitioners argue that, in a multi-member body, it is nearly impossible to assess how an "unconstitutional decision-maker" affected the deliberations. Pet'rs Br. 30. But each of the CPSC commissioners was "properly *appointed*," and there is "no basis for concluding that any [commissioner] lacked the authority to carry out the functions of the office." *Collins*, 141 S. Ct. at 1787–88. Because none of the commissioners was exercising "power that the actor did not lawfully possess," it does not matter how each commissioner individually influenced the decision-making process. *Id*. at 1788.

Finally, Petitioners note that, after the CPSC issued the Final Rule, the President signed the Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (Dec. 29, 2022), which includes a provision entitled "STURDY" that requires the CPSC to issue a final consumer product safety standard for clothing storage units within the year and to adopt the performance requirements of a voluntary standard as the consumer product safety standard if the voluntary standard meets certain requirements set forth in the law. *Id*., div. BB, tit. II, § 201(c)–(d), 136 Stat. at 5553–54. The President's signing of the Consolidated

Appropriations Act in no way shows "that the President would have removed the [CPSC commissioners] but for the [allegedly] unconstitutional removal provision," *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 633, and is thus irrelevant to the *Collins* inquiry.

In short, even if the statutory restrictions on the President's authority to remove CPSC commissioners violated separation-of-powers principles, that violation would not render the CPSC's actions invalid, 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 2,916 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.

/s/ Adina H. Rosenbaum
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CERTIFICATE OF SERVICE

I hereby certify that, on March 24, 2023, this brief was served through the Court's ECF system on counsel for all parties.

/s/ Adina H. Rosenbaum
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