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,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of Texas
(Case No. 6:21-cv-256) (District Judge J. Daniel Kernodle)

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

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October 7, 2022

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case as described in the fourth sentence of Fifth Circuit Rule 28.2.1. These representations are made so that the judges of this Court may evaluate possible disqualification or recusal.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It often appears as *amicus* opposing the accumulation of power in any one governmental branch, which violates the Constitution's careful separation of powers. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010).

WLF's Legal Studies Division, its publishing arm, regularly publishes pieces about the constitutionality of removal protections. *See, e.g.,* Steven Cernak, *FTC's Challenge To Altria-JUUL Transaction: Antitrust and Constitutional Issues Hiding In Plain Sight*, WLF LEGAL BACKGROUNDER (Sept. 7, 2022).

INTRODUCTION

One need only to peruse the table of contents of a Civil Appellate brief to grasp the strength of the Department of Justice's argument.

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[*] No party's counsel authored any part of this brief. No one, apart from WLF and its counsel, contributed money intended to fund the brief's preparation or submission. All parties consented to WLF's filing this brief.

When the facts, the law, or both are on the government's side, then most of the brief is dedicated to unpacking the legal issues in the case or applying the facts to well-settled law. But when the facts and the law are not on the government's side, these merits issues play only a supporting role.

If the smart attorneys representing the government know their case is weak on the merits, they trot out all the procedural arguments they can muster to avoid judicial review. That is what happened here. The blue brief devotes only ten pages to whether the Consumer Product Safety Commission's structure violates the Constitution. The bulk of the brief is focused instead on two jurisdictional issues. First, the CPSC argues that this Court lacks appellate jurisdiction over the case because the certification under Federal Rule of Civil Procedure 54(b) was improper. Second, in a Civil Appellate favorite, the CPSC argues that Plaintiffs lack standing to maintain this suit.

The CPSC focuses on very recent Supreme Court precedent when arguing that the District Court lacked subject-matter jurisdiction over Plaintiffs' claims. But it eschews that same recent precedent when discussing the merits of Plaintiffs' claims. Rather, the CPSC turns its

attention to Great Depression-era realities when arguing that its structure is constitutional. The Supreme Court's recent decisions support Plaintiffs' merits arguments while undermining the CPSC's jurisdictional arguments. This Court should see through the smokescreen the government deploys and affirm the District Court's judgment.

STATEMENT

In January 2021, the CPSC issued a final rule governing Freedom of Information Act requests. *See* Fees for Production of Records, 86 Fed. Reg. 7499 (Jan. 29, 2021) (codified at 16 C.F.R. pt. 1015). After the CPSC issued that rule, Plaintiffs filed multiple FOIA requests. *E.g.* ROA.120-21, 123-24. Dissatisfied with the CPSC's FOIA responses, Plaintiffs took administrative appeals.

The administrative appeals did not go Plaintiffs' way. *See* ROA.128-35. So they sued in federal court. ROA.11-42. Besides seeking traditional FOIA relief, Plaintiffs also challenged the Final Rule. They argued that the rule was invalid because the CPSC's structure violates the Appointments Clause; the five members of the commission may be removed only for cause. *See* 15 U.S.C. § 2053(a).

Plaintiffs' complaint sought both retrospective and prospective relief for the Appointments Clause violation. ROA.41-42. Still, the CPSC moved to dismiss the complaint for want of jurisdiction. ROA.327-70. According to the CPSC, Plaintiffs lack standing to sue because they have not suffered a concrete injury. The District Court rejected that argument and granted Plaintiffs partial summary judgment. ROA.612-50. It also certified the order as a final judgment under Rule 54(b). ROA.651-52. This appeal followed.

SUMMARY OF ARGUMENT

I. The CPSC tries to avoid the merits of this appeal by using one of Civil Appellate's favorite arguments—Plaintiffs' alleged lack of standing. This argument rests on a misinterpretation of the Supreme Court's precedent. The Supreme Court has rejected the CPSC's argument that Article III requires literal harm for a party to have standing. Rather, a likely, imminent harm suffices. Here, there is an imminent risk that the CPSC's unconstitutional structure will harm Plaintiffs. This alone gives the District Court subject-matter jurisdiction over the case. Other Supreme Court precedent also confirms that Plaintiffs have some legal recourse to the CPSC's unconstitutional structure. If this Court were to

hold that Plaintiffs lack standing to sue then it would encourage Congress to pass more unconstitutional statutes. That perverse incentive conflicts with Supreme Court precedent.

II. Attacking the District Court's subject-matter jurisdiction is not the only jurisdictional arrow that the CPSC deploys. Its argument that this Court lacks appellate jurisdiction over this appeal is also without merit. Plaintiffs raised three distinct claims relying on three different statutory provisions. Just because some elements of the claims overlap does not mean that Plaintiffs raised only one claim. A decision by the D.C. Circuit makes clear that the claims Plaintiffs raised are distinct. Because Plaintiffs raised multiple claims, the District Court had discretion to certify its judgment as final.

III. Recently, the Supreme Court has shed new light on Article II's Appointments Clause. Principal officers must be appointed by the President, who must have unrestricted power to remove those officers. Since the 87-year-old precedent blessing the multi-member Federal Trade Commission, for example, the federal government's structure has changed dramatically. Now members of "independent agencies" exercise significant executive power that is indistinguishable from traditional

executive agencies like the Department of Justice. Because the Supreme Court's recent case law holds that the Appointments Clause's requirements apply to all agencies that exercise executive power, the District Court properly held the CPSC's structure unconstitutional.

ARGUMENT

I. THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION BECAUSE PLAINTIFFS SUFFERED A CONCRETE, REDRESSABLE INJURY.

The CPSC argues that the District Court erred by reaching the merits of Plaintiffs' constitutional challenge because, even if its structure violates the Constitution, Plaintiffs lacked standing to seek declaratory relief remedying their injuries flowing from that violation. This argument conflicts with the Supreme Court's decisions on remedying constitutional violations.

Federal courts can adjudicate only actual "cases" and "controversies." *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct. 1743, 1746 (2019) (quotation omitted). A plaintiff's standing is a necessary element of a case or controversy. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 559-60 (1992). "[T]he irreducible constitutional minimum of standing consists of three elements: The Plaintiffs must have (1) suffered an injury in fact,

(2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quotation omitted). Plaintiffs bear the burden of establishing standing. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). Here, Plaintiffs carried that burden.

A. The Supreme Court encourages litigants to raise Appointments Clause defects. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). One of the factors that courts consider when crafting appropriate remedies for Appointments Clause violations is whether they will encourage similar challenges moving forward. *See id.*

The same principles should apply when considering when district courts have subject-matter jurisdiction over constitutional challenges to federal agencies' structures. If anything, the ability to challenge the agencies' structure is more important than the type of relief one can receive if successful. After all, a party's Appointments Clause remedy is moot if the district court lacks subject-matter jurisdiction to consider the challenge. Federal courts will never consider the appropriate remedy if they must dismiss cases for want of jurisdiction.

And that is what the CPSC asks this Court to hold. It wants to remain insulated from judicial review of its structure because that structure is so blatantly unconstitutional. The only way to maintain the status quo is to delay a merits adjudication by mooting individual challenges when they appear, trusting that most litigants lack the money and experience necessary to pursue costly litigation like this. The Court should not punt on the constitutionality of the CPSC's structure. Rather, it should follow the Supreme Court's lead and presume that the District Court has subject-matter jurisdiction.

B. Even if this Court does not apply the Supreme Court's precedent encouraging parties to raise Appointments Clause challenges, Plaintiffs have easily satisfied their burden of proving standing. They have shown that, at a minimum, there is imminent risk of a concrete harm that the declaratory judgment would remedy. That alone is enough to prove Article III standing.

"An injury sufficient to satisfy Article III must be concrete and particularized and actual or imminent," not "conjectural or hypothetical." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). Still, "[i]t need not be 'literally certain' that the injury will come

about, but there must be a 'substantial' risk." *In re Equifax Inc. Customer Data Sec. Breach Litig.*, 999 F.3d 1247, 1262 (11th Cir. 2021) (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013)); *see Nw. Requirements Utilities v. FERC*, 798 F.3d 796, 805 (9th Cir. 2015) (citation omitted).

The CPSC's brief, however, argues for this "literally certain" standard that the Supreme Court rejected in *Clapper*. This sleight of hand is particularly glaring because of the Supreme Court's other standing cases addressing what type of potential harm satisfied Article III's requirements. That precedent shows that past actions play a major role in determining whether there is risk of an imminent harm that satisfies Article III's requirements. *See Susan B. Anthony List*, 573 U.S. at 164; *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974).

One case shows how much weight the Supreme Court places on past enforcement action—even for statutes of relatively recent vintage. In *Ellis v. Dyson*, the Court examined whether evidence showing that "an average of somewhat more than two persons per day were arrested" under a Dallas loitering law was enough for someone to challenge the ordinance. 421 U.S. 426, 434 (1975). Rather than dismiss the case for lack

of subject-matter jurisdiction, the Court remanded the case so the district court could more thoroughly "examine the current enforcement scheme" to see if a "genuine threat" of prosecution existed. *See id.* at 434-35. This decision highlights the importance of past and current enforcement to the standing inquiry: to have standing to sue, a party need show only that there has been past enforcement that is likely to continue.

There is no question that Plaintiffs file frequent FOIA requests. They have done so in the past and will continue to do so. It is also undisputed that the CPSC's regulations govern how it responds to FOIA requests. These regulations were, of course, promulgated under the Administrative Procedure Act. If the CPSC's structure violates the Appointments Clause, then its regulations are ultra vires and it will continue to apply those regulations to future FOIA requests.

This is more than a speculative injury. Rather, it is a "substantial" risk of an imminent injury that satisfies Article III's requirements. *Clapper*, 568 U.S. at 414 n.5. The other two elements of standing are also satisfied under this harm that Plaintiffs face because of the substantial risk of an imminent injury.

The harm that Plaintiffs face is caused by the unconstitutional CPSC structure. There is no other cause of having to comply with unconstitutionally promulgated regulations or rules. Second, the declaratory judgment remedies that harm. With the declaration, any regulations or other actions that the CPSC takes on Plaintiffs' future FOIA requests would be void; the commissioners would lack the power to act on the CPSC's behalf. Thus, all three elements of standing are satisfied and the District Court has subject-matter jurisdiction over this case.

II. THIS COURT HAS APPELLATE JURISDICTION BECAUSE PLAINTIFFS RAISED DISTINCT CLAIMS.

Once it satisfies itself that the District Court had subject-matter jurisdiction here, the Court must next determine whether it has appellate jurisdiction over the District Court's entry of summary judgment. The CPSC argues that the Court lacks appellate jurisdiction because the District Court's certification under Rule 54(b) was improper. This contention, however, confuses a claim for a legal argument.

"When an action presents more than one claim for relief" district courts may certify an order that disposes of fewer than all the claims as final if "there is no just reason for delay." Fed. R. Civ. P. 54(b). Here, even

the CPSC doesn't contest the District Court's finding that there is no just reason for delay. The CPSC most likely seeks to delay final resolution of this appeal because it fears that it will eventually lose on the merits. What the CPSC is hoping for is to run out the clock so that this case becomes moot. Then, the CPSC could move for vacatur of the District Court's ruling under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) and continue with its unconstitutional structure.

This Court has declined to adopt a bright-line test for whether a plaintiff's complaint raises multiple claims. Rather, it consults several "rules of thumb." *Samaad v. City of Dallas*, 940 F.2d 925, 932 (5th Cir. 1991). For example, even if there are "common underlying facts," claims are separate if the plaintiffs may obtain different types of relief on each claim. *See id.* at 931 (citing *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1316 (9th Cir. 1979); 6 James W. Moore et al., *Moore's Federal Practice* ¶ 54.33[2] at 54-196 n.31 (2d ed. 1991)).

Plaintiffs' claims certainly overlap and include many of the same factual and legal questions. But they do provide for different forms of relief. The D.C. Circuit's decision in *Nichols v. Pierce*, 740 F.2d 1249 (D.C. Cir. 1984) proves the point. There, the plaintiffs prevailed on their APA

claim. The plaintiffs had also argued that the agency violated FOIA and so sought attorneys' fees after their victory. The D.C. Circuit held that they were not entitled to attorneys' fees because they did not specifically plead a FOIA claim separate from their APA claim. *Id.* at 1252-54. So if Plaintiffs prevail on Count II here they are not entitled to attorneys' fees. But if they prevail on Count III, they may recover attorneys' fees. This shows that the claims are separate.

In *Nichols*, the D.C. Circuit found that although nearly all the facts and legal issues were the same, a FOIA claim was distinct from an APA claim. The difference was key there because the failure to plead a FOIA claim cost the plaintiffs the ability to recover attorneys' fees. Here, the difference between an APA and FOIA claims is key because it shows that there are multiple claims that allowed the District Court to certify the judgment as final under Rule 54(b).

True, this Court has disagreed with parts of *Nichols*. *See Russell v. Nat'l Mediation Bd.*, 775 F.2d 1284, 1287 (5th Cir. 1985). But that disagreement focused on the Equal Access to Justice Act analysis and not on the distinction between the APA and FOIA claims. This Court has not questioned that part of the *Nichols* analysis.

The CPSC's reliance on the Supreme Court's decision in *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1976) is misplaced. There, the plaintiffs asserted a single claim—that the defendant discriminated against them in violation of Title VII. The plaintiffs' prayer for relief, however, sought four different remedies. As the Court said, "a complaint asserting only one legal right, even if seeking multiple remedies for the alleged violation of that right, states a single claim for relief." *Id.* at 744 n.4.

Even if this Court rejects Plaintiffs' argument about the importance of the word relief in Rule 54(b)'s "claim for relief," the District Court properly certified the judgment as final. The relief sought, which is what *Liberty Mutual* addressed, is different from a claim. A claim is a legal right. Here, Plaintiffs asserted three distinct legal rights. First, they asserted a right to a declaratory judgment that the CPSC's structure violates the Constitution. Second, they argued that the CPSC's action was invalid under the APA because of the agency's unconstitutional structure. Finally, Plaintiffs argued that the CPSC's response to the FOIA request must be set aside under FOIA because it relied on unconstitutional agency action. Each of these three claims was pleaded

in a different count in the complaint and thus differentiates this case from *Liberty Mutual*.

Plaintiffs had good reason to plead their claims in different counts. Each count requires satisfying different elements. For the APA claim, Plaintiffs must show that an action by an agency whose structure does not comply with Article II violates the APA. For the FOIA claim, Plaintiffs must show that some actions taken by an unconstitutionally structured agency violates FOIA. And for the declaratory judgment claim, Plaintiffs need only show that the Constitution does not permit unaccountable bureaucrats to exercise the executive power of the United States. As this case involves multiple claims, the District Court had authority to certify the entry of partial summary judgment as a final order under Rule 54(b). Thus, this Court has appellate jurisdiction over the CPSC's appeal.

That is why the CPSC appealed the District Court's order to this Court. If it believed that the order was not properly certified under Rule 54(b), the CPSC would have waited until entry of a final order and then argued on appeal that its notice of appeal was timely because the Rule 54(b) certification was void. Of course, the CPSC did not choose that path

because the District Court properly decided that it could certify the entry of partial summary judgment as final. As the District Court had subject-matter jurisdiction and this Court has appellate jurisdiction, the Court should reach the merits of the CPSC's appeal.

III. THE CPSC'S STRUCTURE VIOLATES ARTICLE II OF THE CONSTITUTION.

Congress may restrict the President's ability to remove principal officers in limited cases. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631-32 (1935). But as the Supreme Court recently explained, the power to remove Federal Trade Commission commissioners recognized in *Humphrey's Executor* is at "the outermost constitutional limits of permissible congressional restrictions on the President's removal power." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2200 (2020) (quotation omitted).

Seila Law addressed a challenge to the constitutionality of for-cause removal protection for the Consumer Finance Protection Bureau's director. The Court reiterated that "officers must remain accountable to the President, whose authority they wield." *Seila Law*, 140 S. Ct. at 2197. There are "only two exceptions to the President's unrestricted removal power." *Id.* at 2192. Relevant here, for principal officers—like the CPSC's

commissioners—Congress may "give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [does] not [] exercise any executive power." *Id.* at 2187.

Seila Law's analysis of the CFPB's director's for-cause removal protection mainly focused on executive power. It continually returned to the idea that the CFPB exercises executive power while, at most, the Court in *Humphrey's Executor* viewed the FTC as exercising "executive function" rather than "executive power." *Seila Law*, 140 S. Ct. at 2198 (cleaned up).

When an agency exercises executive power, "the general rule that the President possesses the authority to remove those who assist him in carrying out his duties" prevails. *Seila Law*, 140 S. Ct. at 2198 (cleaned up). The CPSC exercises executive power. So it falls outside *Humphrey's Executor*'s outermost constitutional limit and the general rule applies.

In 1935, the Court viewed the FTC as "an administrative body" performing "specified duties as a legislative or as a judicial aid." *Humphrey's Ex'r*, 295 U.S. at 628. So the Court thought the FTC did not

"exercise any executive power." *Seila Law*, 140 S. Ct. at 2199. That holding, however, "has not withstood the test of time." *Id.* at 2198 n.2.

The Court has thus questioned the continued viability of *Humphrey's Executor*. Developments over the past nine decades show that the FTC now exercises more executive power than many traditional executive agencies. Still, until the Court reconsiders *Humphrey's Executor* this Court is bound by that decision. So if the CPSC was structured and behaved like the FTC was structured and behaved in the 1930s, then the Court would have to reverse the District Court's order.

But the CPSC exercises executive power that was unknown to the FTC in the 1930s. The CPSC routinely "seek[s] daunting monetary penalties against private parties on behalf of the United States in federal court." *Seila Law*, 140 S. Ct. at 2200; *see* 15 U.S.C. § 2069(a). It also "issue[s] final decisions awarding legal and equitable relief in administrative adjudications." *Seila Law*, 140 S. Ct. at 2200; *see, e.g.,* 15 U.S.C. § 2064(c), (d), and (f).

As *Seila Law* explained, both functions are exercises of "quintessentially executive power not considered in *Humphrey's Executor*." 140 S. Ct. at 2200 (footnote omitted). Because the CPSC wields

these powers, it exercises executive power. Thus, the President must be able to remove CPSC commissioners at will. *See id.* at 2198; *Humphrey's Ex'r.* 295 U.S. at 632. Because CPSC commissioners have for-cause removal protection, this Court should affirm the District Court's merits determination that the CPSC's structure violates Article II of the Constitution.

CONCLUSION

This Court should affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limits of Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,540 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f).

I also certify that this brief complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 32(a)(5) and (6) because it uses 14-point Century Schoolbook font.

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CERTIFICATE OF SERVICE

I hereby certify that, on October 7, 2022, I served all counsel of record via the Court's CM/ECF system.

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