No. _____

In the
Supreme Court of the United States

LEACHCO, INC.,

Applicant,

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,

Respondents.

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION PENDING APPEAL

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PARTIES TO THE PROCEEDING

The parties to the proceeding below are as follows:

Applicant is Leachco, Inc. Leachco was the plaintiff in the district court and the appellant in the court of appeals.

Respondents are the Consumer Product Safety Commission; Alexander Hoehn-Saric, Chair of the Consumer Product Safety Commission; Dana Baiocco, Commissioner of the Consumer Product Safety Commission; Mary T. Boyle, Commissioner of the Consumer Product Safety Commission; Peter A. Feldman, Commissioner of the Consumer Product Safety Commission; and Richard Trumka, Commissioner of the Consumer Product Safety Commission. The Respondents were the defendants in the district court and the appellees in the court of appeals.

RELATED PROCEEDINGS

The related proceedings are:

In the Matter of Leachco, Inc., CPSC Docket No. 22-1.

Leachco, Inc. v. Consumer Product Safety Commission, et al., 6:22-CV-00232-RAW (E.D. Okla. Dec. 8, 2022) (order denying motion for injunction to enjoin CPSC proceeding pending appeal; granting stay of district court action pending appeal).

Leachco, Inc. v. Consumer Product Safety Commission, et al., 6:22-CV-00232-RAW (E.D. Okla. Nov. 29, 2022) (order denying motion for preliminary injunction).

Leachco, Inc. v. Consumer Product Safety Commission, et al., No. 22-7060 (10th Cir. Jan. 30, 2023) (order denying motion for injunction pending appeal).

RULE 29.6 STATEMENT

As required by Supreme Court Rule 29.6, Applicant hereby submits the following corporate disclosure statement.

1. Applicant has no parent corporation.
2. No publicly held corporation owns any portion of Applicant, and Applicant is not a subsidiary or an affiliate of any publicly owned corporation.

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TO THE HONORABLE NEIL M. GORSUCH,
CIRCUIT JUSTICE FOR THE TENTH CIRCUIT:

Pursuant to Rules 22 and 23 of this Court, the All Writs Act, 28 U.S.C. § 1651, and the Administrative Procedure Act, 5 U.S.C. § 705, applicant Leachco Inc. respectfully requests that this Court enjoin the Consumer Product Safety Commission's administrative-enforcement action against Leachco pending its appeal of the district court's order, which denied preliminary injunctive relief solely on the ground that separation-of-powers violations cannot establish irreparable harm.

INTRODUCTION

1. Leachco, Inc., a small, family-owned company in Ada, Oklahoma, is suffering through a bet-the-farm—indeed, a lose-the-farm—enforcement proceeding initiated and overseen by the Consumer Product Safety Commission. But structural constitutional defects render this proceeding unlawful: (1) CPSC Commissioners may not be removed by the President except for cause, and (2) the administrative law judge conducting Leachco's proceeding enjoys an unconstitutional multi-level tenure protection. As a result, the Commission's in-house proceeding not only inflicts a here-and-now constitutional injury; it also threatens Leachco's viability and the livelihoods of the Leach family and their employees. Since the Commission commenced its action, large retailers like Amazon have stopped carrying Leachco's (allegedly dangerous) product; Leachco's founders, Jamie and Clyde Leach, are forgoing salaries and living off savings to keep the company viable and its workers employed. These constitutional, economic, and reputational harms continue, but Leachco cannot recover damages. Its harms, therefore, are the very definition of irreparable. Accordingly, after

filing a collateral action in federal district court, Leachco moved for a preliminary injunction to enjoin the Commission's in-house proceeding and allow Leachco to pursue its separation-of-powers claims in court before it's too late.

But the district court denied Leachco's motion, holding that a separation-of-powers violation can *never* result in irreparable harm. Contrary to this Court's repeated affirmations—that the Constitution divides government powers to protect individual liberty and that the established practice of this Court is to sustain federal-court jurisdiction to grant equitable relief to protect all rights safeguarded by the Constitution—the district court divined a distinction between cases involving "individual constitutional" rights and cases involving separation-of-powers violations. The latter cases, according to the district court, do not affect individual rights; they concern merely the allocation of powers among government branches. Solely on this deeply flawed premise, the district court declared that a "separation of powers violation does not establish irreparable harm" and denied Leachco's motion for a preliminary injunction. Appx 58a. A two-judge motions panel for the Tenth Circuit then denied, without analysis, Leachco's motion for injunction pending appeal. Appx 65a. The panel also denied Leachco's alternative request for expedited review.

2. All this is bad enough. But for Leachco, a perfect storm of devastating alternatives makes this situation far worse. First, without this Court's intervention, the Commission's in-house trial will almost certainly be completed before any court rules on Leachco's structural constitutional challenges. All the while, Leachco will continue to suffer irreparable constitutional, economic, and reputational injuries before a tribunal that lacks the power to adjudicate Leachco's constitutional claims.

Second, the conclusion of the Commission's administrative proceeding could preclude Leachco from obtaining any meaningful relief on its structural removal claims against the ALJ and the Commission—*regardless of the outcome*. In the unlikely event that Leachco manages to prevail before the Commission, its case ends there, and important structural removal claims would remain unresolved. On the other hand, if Leachco loses before the Commission, seeks judicial review, and then succeeds in its removal challenges, *Collins v. Yellen* makes retrospective relief unlikely. 141 S. Ct. 1761, 1787–89 (2021). Thus, Leachco must "bet the farm" in the Commission's in-house proceeding merely for a chance to vindicate its removal claims in court. And, even if Leachco ultimately succeeds on those claims, it will have secured a victory that "would be appropriate for hanging on the wall but not much else." *Collins v. Mnuchin*, U.S. No. 19-422, Oral Argument Transcript 26 (Gorsuch, J.).[1]

Finally, Leachco's precarious finances place Leachco in a *lose*-the-farm predicament. Even with pro bono counsel representation, Leachco may be forced to close its doors and settle the Commission's claim. If so, Leachco would join the long list of private companies that have lost wars of attrition to unaccountable federal agencies. But these agencies should not hold the power to determine whether and when regulated parties may raise constitutional challenges to agency structure. *Cf. Cochran v. SEC*, 20 F.4th 194, 225 (5th Cir. 2021) (en banc) (Oldham, J., concurring) ("The SEC's litigation position is a combination of 'trust us, we're the experts' and 'there will be time for judicial review when we're good and ready, thank you.'"). In all events, even if

[1] Leachco submits that its situation is distinguishable from the facts the Court addressed in *Collins*. Nonetheless, the *Collins* decision makes preliminary injunctive relief all the more crucial for Leachco.

Leachco survives financially, without this Court's immediate intervention, Leachco will likely lose the opportunity to press its constitutional claims in an Article III court and any chance of obtaining meaningful relief—and the question whether a separation-of-powers violation can ever cause irreparable harm will go unresolved.

3. The *only* genuine relief available to Leachco is preliminary injunctive relief. And resolving whether separation-of-powers violations can ever cause irreparable harm will have ramifications far beyond Leachco's case. Indeed, two cases pending before the Court demonstrate that, without preliminary injunctive relief, weighty issues like those raised by Leachco might never make it beyond the pleading stage. In *Cochran v. SEC* and *Axon Enterprise, Inc. v. FTC*, the Fifth and Ninth Circuits stayed administrative proceedings pending appeal. *See* Appx. 78a. (5th Cir. order staying SEC proceeding pending appeal); Appx. 79a (9th Cir. Order staying FTC proceeding pending appeal). Without those stay orders, this Court likely could not have considered the important question those cases raise, namely, whether Congress, by granting jurisdiction to certain courts to review final agency action from the FTC and SEC, implicitly stripped federal district courts of jurisdiction to hear (like Leachco's claims) collateral constitutional challenges to agency structure. *See Axon Enter., Inc. v. FTC* (No. 21-86); *Cochran v. SEC* (No. 21-1239).

Indeed, the Court's consideration of this issue only underscores Leachco's predicament. A ruling in favor of the challengers in *Axon* and *Cochran* would confirm Leachco's right to an Article III forum. But, without a stay of the Commission's administrative proceeding, Leachco will run out of time to exercise that right. And, if

this Court rules for the challengers in *Axon* and *Cochran* but denies Leachco a stay here, district courts might be compelled to accept jurisdiction over structural constitutional challenges, but those courts would also have an easy path to avoid the merits.

Leachco's unique procedural posture presents the Court with the only way this Court can determine whether a separation-of-powers violation establishes irreparable harm.

4. Of course, challengers like Leachco must meet the traditional injunctive-relief test. Leachco easily meets that test here. As then-Judge Kavanaugh explained, "[i]rreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted). Leachco is not only being regulated by an agency, but it is already subject to an enforcement action that threatens the company's survival. *Cf. Cochran*, 20 F.4th at 229–30 (Oldham, J., concurring) (disputing contention that a party to an existing enforcement action doesn't face the bet-the-farm test because, "[t]hroughout the *entire* administrative process—regardless of whether enforcement has begun—the target must choose whether to settle or bet the farm").

5. Leachco is also likely to succeed on the merits, and the equities resoundingly favor Leachco. On the merits, Leachco's claims—that the CPSC Commissioners, who cannot be removed by the President except for cause, and the ALJ, who has improper

multi-level tenure protection, both enjoy unconstitutional removal protections—follow ineluctably from this Court's precedents. The Commissioners are principal officers of an agency that exercises substantial, "quintessentially executive power [that was] not considered in *Humphrey's Executor*." *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2200 (2020). As such, they must be removable at-will by the President. *Id*. Next, the ALJ—as the Commission conceded below—is an inferior executive officer who may be removed only for cause by other officers who themselves cannot be removed by the President except for cause. Appx. 69a (ALJ acknowledging status as inferior officer). This Court has confirmed that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). While *Free Enterprise Fund* left open the question whether its holding applied to ALJs, later cases confirm that ALJs—even while performing adjudicative-like functions—are executive officers who necessarily exercise *executive* powers. *Lucia v. SEC*, 138 S. Ct. 2044, 2054 (2018); *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021). Accordingly, the ALJ conducting Leachco's proceeding enjoys improper multi-level tenure protection. Leachco is likely to succeed on both of its removal claims.

Further, the Commission has no legitimate interest in violating the Constitution. Therefore, any interest it claims in enforcing its regulatory scheme—through unconstitutional means—is irrelevant, because "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2490 (2021). And "it is always in the public interest to prevent the

violation of a party's constitutional rights." *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1145 (10th Cir. 2013) (en banc), *aff'd sub nom.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014). The "public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

6. Finally, the structural constitutional challenges here are of enormous importance, as a brief review of this Court's decisions shows. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714 (1986); *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991); *Free Enter. Fund*, 561 U.S. 477; *NLRB v. Noel Canning*, 573 U.S. 513 (2014); *Lucia*, 138 S. Ct. 2044; *Seila Law, LLC*, 140 S. Ct. 2183; *Arthrex*, 141 S. Ct. 1970. Similar issues await this Court's review. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (holding SEC ALJs enjoy unconstitutional multilevel removal tenure); *Consumers' Research v. CPSC*, 592 F. Supp. 3d 568 (E.D. Tex. 2022) (holding CPSC unconstitutionally structured), *appeal filed* May 18, 2022.

Accordingly, the Court should grant Leachco's application to stay the Commission's administrative-enforcement action. Such a ruling would ensure that Leachco has a path out of the lose-the-farm limbo in which it finds itself. And it would signal to lower courts that separation-of-powers challenges may not be casually swept aside. Indeed, the Constitution divided the government's powers precisely "to protect the liberty and security of the governed." *Metro. Wash. Airports Auth. v. Citizens for the*

Abatement of Aircraft Noise, Inc., 501 U.S. 252, 272 (1991). And this Court has emphatically rejected the argument that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund*, 561 U.S. at 491 n.2. Allowing courts to relegate separation-of-powers claims to secondary status would gut the "Constitution's core, government-structuring provisions," which "are *no less critical* to preserving liberty than are the later adopted provisions of the Bill of Rights." *Noel Canning*, 573 U.S. at 570–71 (Scalia, J., concurring) (emphasis added) (joined by Roberts, C.J., and Thomas, Alito, JJ.).

To ensure that Leachco—and all others similarly situated—will receive meaningful review of its important and likely meritorious claims, this Court should grant a stay of the Commission's administrative proceeding pending Leachco's appeal in the Tenth Circuit.

OPINIONS BELOW

The Tenth Circuit's January 30, 2023 order is unreported and attached at Appx. 65a. The opinion of the United States District Court for the Eastern District of Oklahoma is unpublished but available at 2022 WL 17327494. Appx 54a.

JURISDICTION

The district court denied Leachco's Motion for a Preliminary Injunction on November 29, 2022. Appx. 54a. Leachco filed a notice of appeal on December 5, 2022, and moved the district court for an injunction pending appeal the next day. Appx 63a. This motion was denied on December 8, 2022, and Leachco filed a similar motion with the Tenth Circuit Court of Appeals on December 12, 2022. Appx. 61a. On January 30,

2023, a panel of the Tenth Circuit denied Leachco's motion for injunction pending appeal. Appx 65a. Leachco's merits appeal is pending at the Tenth Circuit Court of Appeals, briefing is not complete, and oral argument has not been scheduled. This Court has jurisdiction under 28 U.S.C. §§ 1254, 1331, 1651, 2101, and 5 U.S.C. § 705.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional, statutory, and regulatory provisions are reproduced in the appendix to this brief. Appx. 81a–87a.

STATEMENT OF THE CASE

A. Factual and Procedural Background

Leachco was founded in 1988 by Jamie Leach and her husband Clyde. Its first design predated the company. It was inspired by a near-accident involving Jamie's then seven-month-old son, who almost slipped out of a restaurant high-chair due to a missing restraint buckle. Jamie quickly fashioned a temporary fix with her purse strap. Within the next few days, Jamie designed a safety wrap using dental floss, tape, and a kitchen hand towel. The "Wiggle Wrap" was born. After parents saw Jamie using it, the Wiggle Wrap gained a lot of attention, and Jamie and Clyde launched Leachco out of their three-bedroom home.

Jamie still designs all Leachco's products based on her experiences as a registered nurse, mother, and grandmother. She has always strived to create products that are useful and safe for her children and grandchildren. After a challenging first few years, Leachco got its big break when Wal-Mart made a significant order. Leachco grew into a successful business and currently employs around 40 full-time employees

and seven temporary employees. Jamie has become a prolific designer: she has over 40 patents and scores of trademarks. For more than three decades, Leachco has crafted dozens of safe and useful products for expecting mothers and families—including an infant lounger called the "Podster."

Leachco's Podster. *See* https://leachco.com/products/podster (last visited Feb. 4, 2023).

Unfortunately, as no company can prevent misuse of its products or accidents, in the years since the Podster was put on the market, three infants have tragically died while caregivers were mis-using the product. In one instance, personnel at a daycare put an infant (who suffered breathing problems) in a crib (in a Podster) and left him unattended for 90 minutes. In another, parents slept with their child (on a Podster) between them and, in the morning, found the infant (off the Podster) unresponsive. These incidents allegedly took place in 2015 and 2018, respectively, and while the Commission has lately claimed urgency, its administrative complaint based on these two incidents was not filed until 2022. The Commission recently advised

Leachco of a third death allegedly related to the (mis-)use of a Podster. These accidents represent an infinitesimal percentage of Leachco's sales, as it has sold over 180,000 Podsters since 2009. Nonetheless, the Commission alleges that the Podster presents a "substantial product hazard" under the CPSA, 15 U.S.C. § 2064(a)(2), and seeks to recall all Podsters from the market.

B. Statutory and Regulatory Background

The Consumer Product Safety Commission is an independent executive agency headed by five Commissioners, each appointed to a seven-year term by the President, with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1). The Commission exercises sweeping executive power. It has broad enforcement power through the Consumer Product Safety Act (CPSA), among several other laws. It is authorized to conduct wide-ranging investigations; promulgate interpretive and binding regulations; initiate and adjudicate administrative claims through in-house proceedings and unilaterally review resulting administrative decisions; and prosecute civil and criminal violations in federal court.

When the Commission decides that an everyday item like the Podster is a "substantial product hazard" presenting a supposedly "substantial risk of injury to the public," 15 U.S.C. § 2064(a)(2), it may haul unsuspecting companies before its in-house tribunal where it may consider and enforce non-binding interpretive regulations—"as [it alone deems] appropriate." 16 C.F.R. § 1115.4(e).

These in-house hearings are conducted by a Commission-appointed "Presiding Officer"—here Michael Young, an ALJ on loan from the Federal Mine Safety and

Health Review Commission. As Presiding Officer, ALJ Young enjoys "broad discretion." 16 C.F.R. § 1025.1. He has the power to administer oaths and affirmations; compel discovery; rule upon offers of proof; receive relevant, competent, and probative evidence; and consider procedural and other "appropriate" motions. *Id.* § 1025.42(a)(1)–(3), (a)(6). While the Federal Rules of Evidence generally apply to Commission hearings, these rules may "be relaxed by the Presiding Officer if," he determines, "the ends of justice will be better served by so doing." *Id.* § 1025.43(a). At the end of a hearing, the Presiding Officer issues an Initial Decision, which includes findings of fact and conclusions of law. *Id.* § 1025.51. Any party may appeal an Initial Decision, or the Commission may unilaterally order review. *Id.* §§ 1025.53(a), 1025.54. At that point, the Commission may affirm or reverse, and may even enter new findings of fact. *Id.* §§ 1025.54, 1025.55.

In sum, in the administrative action against Leachco, the Commission acts as prosecutor, judge, jury, and appellate court (with fact-finding power).

C. Leachco's Federal Lawsuit and the District Court's Erroneous Ruling

Leachco has vigorously defended itself but has suffered—and continues to suffer—financially. In August 2022, Leachco retained pro bono counsel, without which it would have almost certainly been unable to continue, and filed suit in the United States District Court for the Eastern District of Oklahoma. Appx. 1a. Leachco raises structural constitutional challenges and argues that the Commission's proceeding against Leachco is unlawful for two independent reasons: (1) the CPSC Commissioners, principal executive officers who head the Commission, may not be removed by

the President except for cause; and (2) the "Presiding Officer" conducting the Commission's enforcement action enjoys an unconstitutional multi-level tenure protection.

After filing this action in district court, Leachco moved for a preliminary injunction. Leachco argued that the Commission's unconstitutional structure and its administrative proceeding continue to inflict ongoing "here-and-now" injuries, along with injuries in the form of significant costs that threaten Leachco's survival, for which no damages are available. Leachco pointed to the Tenth Circuit's decision in *Free the Nipple-Fort Collins v. City of Fort Collins*, which stated that "[w]hat makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill." 916 F.3d 792, 806 (10th Cir. 2019).

The Commission argued that Leachco could not establish irreparable harm because (1) it could later appeal a final agency action (citing, inter alia, *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)), and (2) Leachco's separation-of-powers claims raise issues about the allocation of government powers, not individual rights. The district court agreed with the Commission's second argument, relying on *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020), which stated, "our cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government." *See* Appx. 57a–58a.

The district court thus adopted a bright-line rule—a "separation of powers violation does not establish irreparable harm." Appx. 58a. A two-judge motions panel from the Tenth Circuit denied without analysis Leachco's motion for injunction pending appeal and its alternative request for expedited review. Appx. 65a. Leachco filed its merits brief at the Tenth Circuit on January 17, 2023, the Commission's response brief is due February 16, 2023, and Leachco may file a reply. Oral argument has not been scheduled. The Commission's in-house trial, set to begin August 7, 2023, will proceed without this Court's intervention.

REASONS FOR GRANTING THE APPLICATION

This case serves as Exhibit A for why emergency relief exists. An administrative agency is forcing a small company to litigate existential claims before an administrative law judge while the ALJ and the agency's leaders both enjoy unconstitutional removal protections under this Court's precedents. This unlawful and unjust scheme is allowed to persist because the Tenth Circuit has decided that the separation of powers—which this Court has repeatedly held exists not only to preserve the vital structure of our government, but to preserve and protect individual liberty as well—is not important enough to constitute irreparable harm when it is violated.

To make matters worse, because irreparable harm rarely comes up outside of the injunctive-relief context and because the resolution of administrative-enforcement actions can effectively moot regulated parties' constitutional challenges, the question whether a separation-of-powers violation may ever establish irreparable harm can likely be resolved only in a procedural setting such as this. If this Court

does not accept this case now, it is unlikely Leachco will ever be able to vindicate its constitutional rights. Other courts have sensibly issued injunctions in similar situations. *See* Appx.77a–79a. While the clash between these orders and the Tenth Circuit's erroneous ruling below may not constitute a classic circuit split, both the importance of the issues and the inconsistent rulings by the circuit courts makes this case appropriate for review.

Leachco easily satisfies the standard to obtain an injunction here. A Circuit Justice may issue an injunction under the All Writs Act, 28 U.S.C. § 1651(a), when (1) the denial of injunctive relief "would lead to irreparable injury," (2) claims "are likely to prevail," and (3) "granting relief would not harm the public interest." *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020). These are the same well-known factors used for preliminary injunctions. *See id.* (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)).

First, Leachco is already suffering irreparable harm—being subjected to an unconstitutional administrative proceeding, together with economic and reputational harms for which no remedies are available. The orders below place Leachco in an untenable position—proceed through the unconstitutional proceeding, risk a lose-the-farm sanction, and, if it manages to persevere, attempt to vindicate its removal claims despite the potential that *Collins* precludes retrospective relief. Leaving in place the lower courts' orders would also threaten the ability of all separation-of-powers claimants in the Tenth Circuit to obtain meaningful relief. *Second*, Leachco is likely to

prevail on its removal claims, which follow directly from this Court's precedent. *Finally*, the Commission has no interest in acting unconstitutionally, since "our system does not permit agencies to act unlawfully even in pursuit of desirable ends," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Instead, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law." *Id.* (citation omitted). The "public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

Without a stay, Leachco—and other parties in the Tenth Circuit—may *never* get a chance to vindicate constitutional rights, and, under the strictures of *Collins*, Leachco may be unable to obtain retrospective relief. It makes no sense that Leachco's rights turn on where its case is located. And in the absence of an injunction, Leachco will incur the very constitutional harm it hopes to avoid. Moreover, this Court will soon be asked to resolve Leachco's underlying constitutional claims, which are very likely meritorious. The orders below allow courts to watch with arms folded as a small American company's existence is threatened, while it is being dragged through an unconstitutional proceeding. And from here on out, *no* litigant in the Tenth Circuit can challenge agency proceedings on separation-of-powers grounds because of its unsupportable distinction between structural and individual rights violations. But this Court has already explained that there is no difference between separation-of-powers

claims and any other constitutional claim. *Free Enter. Fund*, 561 U.S. at 491 n.2. This Court should therefore not countenance a heightened standard for injunctive relief merely because parties raise separation-of-powers claims.

I. Without a Stay, Leachco Will Continue to Suffer Irreparable Harm and Forever Lose Any Chance to Obtain Meaningful Relief

Leachco is suffering a here-and-now constitutional injury—along with economic and reputational harms—for which no damages are available. *See, e.g.*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *irreparable injury* as an "injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction"); *Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (The "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.") (cleaned up); *Cloud Peak Energy Inc. v. U.S. Dep't of Interior*, 415 F. Supp. 3d 1034, 1042–43 (D. Wyo. 2019) (The "general rule that economic harm is not normally considered irreparable does not apply where there is no adequate remedy to recover those damages, such as in APA cases.") (citations omitted).

Further, there can be no genuine dispute that these irreparable harms are caused by the Commission's proceeding, which Leachco alleges is unconstitutional because the CPSC Commissioners and the ALJ enjoy unlawful removal protections. The only question is: Does this irreparable harm, caused by separation-of-powers violations, support the issuance of a preliminary injunction? The answer is undeniably yes. And the district court's holding that a "separation of powers violation does not establish irreparable harm" cannot stand.

Indeed, there is no basis to distinguish between "individual constitutional" rights and rights protected by the Constitution's structure. As Justice Scalia observed, the "Constitution's core, government-structuring provisions are *no less critical* to preserving liberty than are the later adopted provisions of the Bill of Rights." *Noel Canning*, 573 U.S. at 570–71 (Scalia, J., concurring) (emphasis added). The Court has repeatedly recognized this crucial insight about the Constitution's structural protections. Thus, the "declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty." *Bowsher*, 478 U.S. at 721 (cleaned up); *see also Bond v. United States*, 564 U.S. 211, 221 (2011) (The separation of powers is designed to "secure[] the freedom of the individual."); *Metro. Wash. Airports Auth.*, 501 U.S. at 272 (The "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed."). And "[l]iberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring).

Any doubt that the Constitution equally protects "individual constitutional" rights and "structural" rights was resolved by this Court in *Free Enterprise Fund*, which emphatically rejected the argument that a "separation-of-powers claim should be treated differently than every other constitutional claim." 561 U.S. at 491 n.2.

In *Free Enterprise Fund*, the Court also rejected the claim that parties in Leachco's position lack a right to seek injunctive relief. *Id*. Rather, the Court reiterated, "'it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.'" *Id*.

(quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946)); *see also Marbury v. Madison*, 5 U.S. 137, 147 (1803) (recognizing the "settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress") (citing 3 BLACKSTONE'S COMMENTARIES *402); *Bond*, 564 U.S. at 223 (When "the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable *injury* may object.") (emphasis added).

In sum, this Court has repeatedly and consistently held that (1) rights protected by the Constitution's structural protections are just as valid as the "individual constitutional" rights identified in the Bill of Rights, and (2) parties may seek injunctive relief in court when their rights have been infringed by separation-of-powers violations. The district court's order flouted these foundational precepts. By doing so, the district court ignored Leachco's irreparable harm and left Leachco subject to the whims of an unaccountable administrative agency.

Without a stay of the Commission's administrative proceeding, Leachco will "suffer irreparable harm before a decision on the merits can be rendered." *Winter*, 555 U.S. at 22. Leachco may well forever lose its ability to vindicate its constitutional rights and to obtain meaningful relief. And, the whole time, it will suffer through the very process it claims is unconstitutional and continue to endure financial and reputation injuries. Nor does it make any sense to compel Leachco (and the government) to proceed through the administrative action, since "agency adjudications are ill suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 141 S. Ct. 1352, 1360 (2021)

(citations omitted). Thus, Leachco must "bet the farm"—indeed, it must *lose the farm*—just to get to any resolution of its constitutional claims. And, once in court, it must overcome dubious deference and remedial doctrines—and, because of the significant challenges presented by *Collins*—hope that it may receive retrospective relief. *Cochran*, 20 F.4th at 232 (Oldham, J., concurring) (recognizing importance of review before an in-house hearing occurs because "it will be very challenging to obtain meaningful retrospective relief for constitutional removability claims after *Collins*").

Because Leachco can recover no damages for any of its injuries, and because *Collins* limits Leachco's ability to obtain any retrospective relief should it succeed on its removal claims, only a stay of the Commission's administrative proceeding will allow Leachco even an opportunity to secure meaningful relief.

II. Leachco Has a Strong Likelihood of Success on the Merits

Article II of the Constitution provides "[t]he executive Power shall be vested in a President," who must "take care that the laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; § 3. Article II thus vests the President with "all" of the executive power. *Seila Law*, 140 S. Ct. at 2191. And because the President must rely on subordinates to carry out his constitutional duties, the Constitution gives him "the authority to remove those" subordinates. *Id.* (cleaned up). "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* (cleaned up). And it would be "impossible for the President to take care that the laws be faithfully executed." *Id.* at 2198 (cleaned up). The "President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First

Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52 (1926)." *Seila Law*, 140 S. Ct. at 2191–92 (cleaned up).

Here, both the Commissioners and ALJ Young enjoy removal protections that violate the separation of powers, Article II's vesting of the executive power in the President, and the President's duty to "take Care that the laws be faithfully executed." U.S. CONST. art. II, § 3. Leachco is likely to succeed on these claims.

A. CPSC Commissioners Are Improperly Insulated from Removal

In *Seila Law*, this Court confirmed that the heads of agencies wielding substantial executive power must be removable at will by the President. 140 S. Ct. at 2192, 2199–2200. Here, the Commission has not disputed that its Commissioners are heads of an agency that wields substantial, quintessentially executive powers—enforcing numerous laws, including the Consumer Product Safety Act; investigating manufacturers and retailers; bringing administrative-enforcement actions; and initiating civil and criminal actions in court. Therefore, Leachco is likely to succeed on its claim that 15 U.S.C. § 2053(a)—which precludes the President from removing Commissioners except for "neglect of duty or malfeasance in office but for no other cause"—violates Article II and the Separation of Powers.

This Court has recognized only two limited exceptions to the President's otherwise "unrestricted" removal power:

(1) an exception for inferior officers with limited duties and no policy-making or administrative authority, *Seila Law*, 140 S. Ct. at 2199–2200; and

(2) an exception for principal officers who do not exercise executive power, *id.* 2198–99 (discussing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

But neither the inferior-officer exception nor the "*Humphrey's Executor* exception" applies here because CPSC's Commissioners are (1) principal (not inferior) officers (2) who exercise substantial, "quintessentially executive power [that was] not considered in *Humphrey's Executor*." *Seila Law*, 140 S. Ct. at 2200. Accordingly, the Commissioners' for-cause removal protections are unconstitutional.

1. The Commissioners are principal officers

The exception "for *inferior* officers with limited duties and no policymaking or administrative authority," *Seila Law*, 140 S. Ct. at 2200 (emphasis added), does not apply because the Commissioners are principal officers. They are appointed to office by the President with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1). This appointment method is required for principal officers. U.S. CONST. art. II, § 2, cl. 2. Further, Congress authorizes the Commissioners to appoint inferior officers. 15 U.S.C. § 2053; *see* U.S. CONST. art. II, § 2 (allowing Congress to "vest the Appointment of such inferior Officers . . . in the Heads of Departments"). Accordingly, the CPSC Commissioners are heads of the Commission, *Free Enter. Fund*, 561 U.S. at 512–13, and thus principal officers, *Freytag*, 501 U.S. at 884.

2. The *Humphrey's Executor* exception does not apply because the Commission exercises substantial executive power

The Commission does not dispute that it wields significant executive power. The Commission enforces, among other laws, the Consumer Product Safety Act, the

Flammable Fabrics Act, the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, and the Refrigerator Safety Act. 15 U.S.C. § 2051, *et seq*. It has extensive investigatory powers, through which it may compel sworn testimony and document productions. *Id*. §§ 2065, 2076(b)(1)–(3), (c). It may "conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." *Id*. § 2076(a). The Commission may also initiate civil actions for civil penalties, up to $100,000 for each violation, and up to $15 million total for a related series of violations, adjusted for inflation; and injunctive relief. *Id*. §§ 2069, 2071(a), 2073(b), 2076(b). And, with the concurrence of or through the Attorney General, the Commission may bring "any criminal action" to enforce all laws subject to its jurisdiction and seek up to five years' imprisonment. *Id*. §§ 2070(a), 2076(b)(7)(B).

Commissioners thus hold core executive power to, among other things, "file suit in federal court 'to seek daunting monetary penalties against private parties' as a means of enforcement." *Consumers' Research*, 592 F. Supp. 3d at 584 (quoting *Seila Law*, 140 S. Ct. at 2200). Indeed, "no real dispute" exists that "law enforcement functions that typically have been undertaken by officials within the Executive Branch" qualify as "executive" power. *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *id*. at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

In short, the CPSC exercises substantial, "quintessentially executive power [that was] not considered in *Humphrey's Executor*." *Seila Law*, 140 S. Ct. at 2200; *see*

also id. 2199 (noting that *Humphrey's Executor* applied to an agency "said not to exercise *any* executive power") (emphasis added); *Consumers' Research*, 592 F. Supp. 3d at 583–84 (CPSC "exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception."). Therefore, the *Humphrey's Executor* exception to the President's otherwise unrestricted removal power does not apply here.

3. The Commissioners are improperly insulated from removal

Under 15 U.S.C. § 2053(a), the President may not remove Commissioners except for "neglect of duty or malfeasance in office but for no other cause." But, as explained above, the President possesses "unrestricted removal power," subject to only two, narrow exceptions—neither of which applies here. *Seila Law*, 140 S. Ct. at 2192. Therefore, the "restriction on presidential removal established by 15 U.S.C. § 2053(a) violates Article II of the U.S. Constitution." *Consumers' Research*, 592 F. Supp. 3d at 586. *See also Seila Law*, 140 S. Ct. at 2191; *Free Enter. Fund*, 561 U.S. at 513–14. Leachco is thus likely to prevail on its claim that the Commissioners' removal protections are unconstitutional.

B. The ALJ Is Improperly Insulated from Removal

Leachco's Article II removal challenge to ALJ Young is not only likely to succeed on the merits; it is all but assured to succeed under this Court's precedent. In *Free Enterprise Fund*, this Court held that multilevel-tenure protection for inferior executive officers "is contrary to Article II's vesting of the executive power in the President." 561 U.S. at 484. There, members of the Public Company Accounting Oversight Board (PCAOB) could not be removed by the Securities and Exchange Commission

except for cause, and SEC Commissioners themselves could not be removed by the President except for cause. *Id.* at 486–87. Here, ALJ Young is—as both he and the Commission acknowledge—an inferior executive officer; he cannot be removed except for cause; and the officials who could remove him cannot be removed by the President except for cause. He thus enjoys unconstitutional multi-level removal protection.

That the ALJ engages in adjudicatory-like processes does not change this conclusion, because he exercises *executive* power. In *Lucia*, the Court confirmed that the ALJs in the SEC were executive officers. 138 S. Ct. at 2054. And, in *Arthrex*, the Court held that administrative patent judges exercise *executive* power because executive-branch actions "are exercises of—indeed under our constitutional structure they *must* be exercises of—the 'executive power.'" 141 S. Ct. at 1982 (cleaned up).

1. ALJ Young is an officer of the United States

An officer of the United States is a federal-government employee who (1) occupies a "continuing position established by law" and (2) exercises "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051 (cleaned up). Here, ALJ Young's position and authority are nearly identical to those of SEC ALJs who, the Court held in *Lucia*, are officers of the United States. Both ALJ Young and the Commission acknowledge that he is an executive officer. Appx 69a.

2. ALJ Young's removal protections violate the Constitution

"[M]ultilevel protection from removal is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 484. ALJ Young here is unconstitutionally protected from removal because (1) he cannot be removed except

for cause by other officers (2) who themselves cannot be removed by the President except for cause. *Cf. id.* at 486–87.

Here, ALJ Young enjoys at least two levels of protection from removal:

- ***First***, ALJ Young may not be removed except "for good cause established and determined by the Merit Systems Protection Board [MSPB]" following "[a]n action" brought by "the agency in which the administrative law judge is employed." 5 U.S.C. § 7521(a).

- ***Second***, all officers who could perhaps remove ALJ Young— the CPSC Commissioners, Mine Commissioners, and members of the MSPB— themselves may not be removed by the President except for cause:

    - The President may not remove CPSC Commissioners except for "neglect of duty or malfeasance in office but for no other cause." 15 U.S.C. § 2053(a).

    - The President may not remove Mine Commissioners except for "inefficiency, neglect of duty, or malfeasance in office." 30 U.S.C. § 823(b).

    - The President may not remove MSPB members except for "inefficiency, neglect of duty, or malfeasance in office" 5 U.S.C. § 1202(d).

Under *Free Enterprise Fund*, therefore, ALJ Young unconstitutionally enjoys multilevel removal protection. In fact, ALJ Young's removal protections provide even more insulation than those considered in *Free Enterprise Fund*. Indeed, an agency may not independently find good cause and remove ALJ Young. Instead, the agency must first establish "good cause"—on the record and after the opportunity for a hearing—to the MSPB, a separate, independent agency. 5 U.S.C. § 7521(a). Only then, if the employing agency so decides, may ALJ Young be removed. *Cf. Jarkesy*, 34 F.4th at 465 ("[F]or an SEC ALJ to be removed, the MSPB must find good cause *and* the

Commission must choose to act on that finding.") (emphasis added); *id.* at 463–65 (holding removal protections for SEC ALJs are unconstitutional).

ALJ Young's "multilevel protection from removal" is flatly "contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 484. And so Leachco is likely to succeed on its claim.

III. An Injunction Is Equitable and in the Public Interest

The last two injunction factors—balancing the equities and the public interest—collapse when the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors support the issuance of an injunction.

The government "does not have an interest in enforcing a law that is likely" invalid, *Chamber of Com. v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010), and "our system does not permit agencies to act unlawfully even in pursuit of desirable ends," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490. Instead, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law." *Id.* (citation omitted). *See NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (holding that when a rule exceeds an agency's authority, the court should not "weigh [] tradeoffs" between its intended effect and harms). And it is "always in the public interest to prevent the violation of a party's constitutional rights." *Free the Nipple*, 916 F.3d at 807; *see also Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (finding public interest always supports enforcing Constitution).

The government's interest in enforcing a regulatory scheme thus "pales in comparison" to either a plaintiff's "constitutional" or even "statutory rights." *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th

Cir. 2013); *see also Hobby Lobby*, 723 F.3d at 1145 ("When a law is likely unconstitutional, the interests of those the government represents, such as voters do not outweigh a plaintiff's interest in having its constitutional rights protected," and "it is always in the public interest to prevent the violation of a party's constitutional rights.") (cleaned up).

The same principle applies to the balance of equities and thus supports enjoining CPSC's unconstitutional adjudication against Leachco. "When a constitutional right hangs in the balance . . . even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citing Wright & Miller § 2948.2 & n.10).

Further, this Court has also explained that its remedies in these types of cases "are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise" these types of challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). But if the Commission's proceeding against Leachco goes forward despite the agency's structural infirmities—and its lack of authority to even address, much less rule on, Leachco's constitutional claims—this Court will have reduced the incentives for future litigants to raise challenges arising out of Article II violations and seek relief for their injuries. *See also* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 Notre Dame L. Rev. 1475, 1493 (2018) ("As should be evident with both the PCAOB and the CFPB, Congress presently has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries.").

In short: "The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

IV. Leachco's Separation-of-Powers Claims Raise Significant Questions that This Court Will Likely Review Soon

In addition to the unique procedural circumstances Leachco faces here, the substantive issues raised below are issues that this Court has shown a marked interest in. *See, e.g.*, *Bowsher*, *Freytag*, *Free Enter. Fund*, *Noel Canning*, *Lucia*, *Seila Law*, *Arthrex*. And Leachco's removal challenges likely represent the next logical questions to be addressed in this Court's Appointments Clause doctrine—the validity of removal protections for the heads of multi-member agencies and for administrative law judges. The lower courts are already divided on these topics. *Compare Jarkesy*, 34 F.4th 446 (holding SEC ALJs enjoy unconstitutional multilevel removal tenure), *with Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir 2021) (holding that removal restrictions for Department of Labor ALJs do not violate Constitution because their decisions were reviewed by officers removable at will); *see also Consumers' Research*, 592 F. Supp. 3d 568 (holding CPSC unconstitutionally structured), *appeal filed* May 18, 2022.

As this case shows, the lowers courts are also divided on the question whether and when injunctive relief is available in separation-of-powers cases. In contrast to the district court and Tenth Circuit below, the Second, Fifth, and Ninth Circuits have

enjoined ongoing agency proceedings in similar circumstances. *See* Appx. 77a–79a (orders enjoining agency enforcements); *see also Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020) (enjoining a violation of the Appropriations Clause, "a bulwark of the Constitution's separation of powers"). A merits ruling to the contrary by the Tenth Circuit would confirm a clear circuit split on the question of injunctive relief in separation-of-powers cases, and "[s]uch a division is a traditional ground for certiorari." *Wheaton College v. Burwell*, 573 U.S. 958 (2014).

For all of these questions, then, there is a "reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). This case would thus preserve "important question[s] of federal law that ha[ve] not been, but should be, settled by this Court," and on which the lower courts are divided. *See* Sup. Ct. R. 10(c).

Without a stay from this Court, Leachco will almost certainly be unable to either bring these questions to this Court or benefit from the Court's consideration of these weighty issues.

CONCLUSION

The Court should issue an injunction to enjoin the Commission's administrative-enforcement action, *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1, pending resolution of Leachco's appeal in the Tenth Circuit.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Oliver Dunford, a member of the bar of this Court, hereby certify that on this 6th day of February, 2022, a copy of the foregoing Emergency Application was served by electronic mail upon:

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