No. 24-156

IN THE

Supreme Court of the United States

LEACHCO, INC.,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Under Supreme Court Rule 37.2, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioner.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

Here, AFPF is interested in the first question Leachco, Inc.'s ("Leachco") petition presents for the reasons expressed in AFPF's amicus brief in support of petitioners in *Consumers' Research v. CPSC*, No. 23-1323. *See* AFPF Cert. Am. Br., *Consumers' Research v. CPSC*, No. 23-1323 (filed July 17, 2024). AFPF also believes that the separate remedial question Leachco's petition presents is important, particularly where, as here, an agency brings an inhouse administrative enforcement action—in which

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[1] All parties have received timely notice of *amicus curiae*'s intent to file this brief. *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

it acts as investigator, prosecutor, and judge of its own cause—impacting core private rights.

SUMMARY OF ARGUMENT

Leachco's petition squarely presents a question that is undeniably important to our constitutional Republic. As with *Consumers' Research v. CPSC*, No. 23-1323, Leachco's petition "tees up one of the fiercest (and oldest) fights in administrative law: the *Humphrey's Executor* 'exception' to the general 'rule' that lets a president remove subordinates at will." *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 91 F.4th 342, 345 (5th Cir. 2024), cert. pending, No. 23-1323 (filed June 14, 2024); *see* Pet. i. The time has come for this Court to answer it.

Both petitions are ideal—and indeed, complimentary—vehicles. These cases should travel together. This Court should grant both petitions and consider the cases alongside one another to ensure that this important constitutional question is fully briefed from a variety of perspectives arising out of differing factual contexts. Leachco's petition provides additional options for resolving the central issue common to both petitions should this Court conclude that revisiting *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), may be warranted. Should this Court choose to take that path, *stare decisis* provides *Humphrey's Executor* with no cover. *Humphrey's Executor* was poorly reasoned and cannot be reconciled with this Court's modern separation of powers jurisprudence. Today, it fails even to qualify for its own exception. And overruling it would not upset any reliance interests.

The remedial question Leachco's petition presents—"[f]or purposes of preliminary-injunctive relief, can a separation-of-powers violation cause irreparable harm," Pet. i—is also important, recurring, and independently warrants this Court's review. Whatever the answer, parties subject to regulation by unconstitutionally structured bodies deserve to know it.

The relationship between this Court's remedial opinion in *Collins v. Yellen*, 594 U.S. 220 (2021), and *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175 (2023), which opened up the courthouse doors to those facing inhouse administrative prosecutions brought by unconstitutionally structured entities, has sown confusion in the lower courts. Leachco's petition provides an ideal vehicle for this Court to harmonize those decisions and provide much-needed guidance on what types of separation-of-powers violations, standing alone, cause irreparable harm sufficient to sustain preliminary injunctive relief, a question of immense practical importance for parties harmed by agency regulations and enforcement actions.

For the foregoing reasons, this Court should grant Leachco's petition.

ARGUMENT

I. The CPSC Should Not Be Allowed To Escape Constitutional Accountability.

This Court should grant both the petition in *Consumers' Research v. CPSC*, No. 23-1323 (filed June 14, 2024), and Leachco's petition and decide the cases alongside one another for at least five reasons.

First, both petitions "tee[] up," *Consumers' Rsch.*, 91 F.4th at 345, what the CPSC agrees "is an "important constitutional question[.]" CPSC BIO 24, *Consumers' Research v. CPSC*, No. 23-1323 (filed Aug. 26, 2024); *see id.* at 10.[2] This Court's review is warranted for that reason alone. Underscoring this, the issue is recurring.[3] Given the importance of the question, this Court should hear these cases alongside one another to ensure that the answer is informed by perspectives arising in differing factual contexts.

Second, the panels in both cases misapprehended the scope of *Humphrey's Executor*'s exception to the President's at-will removal power for a similar reason: overfocusing on the CPSC's multi-member structure without giving due weight to the sweeping executive power it wields. *See* Pet. App. 25a–31a; *Consumers' Rsch.*, 91 F.4th at 353–55. *But see id.* at 356–58 (Jones, J., concurring in part, dissenting in part); *Consumers' Rsch. v. Consumer Prod. Safety Comm'n*, 98 F.4th 646, 655 (5th Cir. 2024) (Oldham, J., dissenting from denial of rehearing en banc). Both panels thereby adopted a maximalist reading of *Humphrey's Executor*'s fact-bound holding that expands it well beyond the metes and bounds set out by this Court. *See, e.g.*, *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020)

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[2] Below, the CPSC listed *Consumers' Research* in its Statement of Related Cases. *See* CPSC Br., *Leachco, Inc. v. CPSC*, No. 22-7060, Doc. No. 010110814100, ix (10th Cir., filed Feb. 16, 2023).

[3] *See, e.g., Space Expl. Techs. Corp. v. NLRB*, No. 24-cv-00203, 2024 U.S. Dist. LEXIS 129439, at *12 (W.D. Tex. July 23, 2024) (finding it is likely "NLRB Members are unconstitutionally protected from removal"); *see* Pet. 22 n.11 (collecting cases).

(describing *Humphrey's Executor* exception for "multimember expert agencies that do not wield substantial executive power" as "outermost constitutional limit[]" (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 196 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting)).

Third, granting both petitions would pretermit the CPSC's misguided suggestion that petitioners in No. 23-1323 lack Article III standing. In that case, both the district court and Fifth Circuit panel correctly rejected the CPSC's efforts to duck review on that ground. *See Consumers' Rsch.*, 91 F.4th at 348–51 (finding Article III standing); *Consumers, Rsch. v. Consumer Prod. Safety Comm'n*, 592 F. Supp. 3d 568, 576–79 (E.D. Tex. 2022) (same), *rev'd on other grounds*, 91 F.4th 342 (5th Cir. 2024). Yet the CPSC has renewed that wayward argument in this Court. *See* CPSC BIO 9–16, No. 23-1323; Consumers' Research Cert. Reply Br. 2–7, 10–11. Considering the cases together would take it off the table.

Fourth, doing so would also provide this Court with additional "concrete factual context conducive to a realistic appreciation of the consequences of judicial action."[4] *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 379 (2024). As with *Axon v. FTC*, No. 21-86, and *SEC v. Cochran*, 21-1239—both of which, as here,

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[4] In arguing against certiorari in *Consumers' Research,* the CPSC suggested that "[t]his Court's recent decisions addressing removal restrictions have all involved officers who exercised substantial executive power over the challengers themselves." CPSC BIO 11, No. 23-1323. That well describes the CPSC's administrative prosecution of Leachco.

involved separation of powers challenges to for-cause removal restrictions—Leachco's petition arises from an inhouse administrative enforcement action where the agency acts as investigator, prosecutor, and judge of its own cause. *See Axon*, 598 U.S. at 182–83; *see also* CPSC BIO 11, No. 23-1323 (noting that in *Axon* and *Cochran* "each challenger was a 'respondent in an administrative enforcement action'" (quoting *Axon*, 598 U.S. at 180)). And Leachco's multi-year odyssey showcases the sweeping executive power the democratically unaccountable CPSC wields over private parties, vividly illustrating the real-world impact of the agency's powers. *See* Pet. 2–3, 10–11.

"Leachco is a small business in Ada, Oklahoma, founded by Jamie Leach and her husband Clyde from their home in 1988." Pet. 2. It "has been subjected to" an inhouse administrative prosecution brought by the CPSC for over two years, *see* Pet. 10, "after several years of investigation, record demands, and pressure," Pet. 2.[5] Although Leachco prevailed before the ALJ, *see* Pet. 3–4, 11–12, the CPSC has appealed that decision to itself, *see* Pet. 11–12, and its Commissioners—the same body that voted to prosecute Leachco, *see* Pet. 10—will decide Leachco's fate, *see* 16 C.F.R. § 1025.55. For that reason, Leachco

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[5] The CPSC has sought to ban Leachco from selling its product; force it to "[r]efund the purchase price of the Podster" to all purchasers and "[r]eimburse distributors, retailers, and any other third parties for [certain] expenses"; impose burdensome and expensive notification requirements; require the company to create reports; and impose recordkeeping and monitoring requirements. *See* Compl., *In the Matter of Leachco, Inc.*, CPSC Dkt. 22-1, No. 1, at 9-10 (Feb. 9, 2022) ("Relief Sought").

remains "subject to" an "exercise of the Commission's regulatory, adjudicatory, or enforcement authority," CPSC BIO 23, No. 23-1323, and thus continues to suffer a "'here-and-now' injury of subjection to an unconstitutionally structured decisionmaking process."[6] *Axon*, 598 U.S. at 192.

Fifth, neither petition requires this Court to address thorny remedial questions, which may be left for another day.[7] *See* Consumers' Research Cert. Pet. 31–32, No. 23-1323.

In sum, if the CPSC Commissioners' removal protections are unconstitutional, let the chips fall where they may. But it is no answer to "allow the agency to duck and weave its way out of meaningful judicial review" of that question. *See Fleming v. United States Dep't of Agric.*, 987 F.3d 1093, 1111 (2021) (Rao, J., concurring in part, dissenting in part); *see also Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) (Marshall, C.J.) ("Questions may occur which we would gladly avoid; but we cannot avoid

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[6] The CPSC appears to agree that "*Axon* confirms that Leachco has alleged an injury sufficient for district court jurisdiction[.]" CPSC Opp. to Renewed Mot. For An Injunction Pending Appeal, *Leachco, Inc. v. CPSC*, No. 22-7060, Doc. 010110862535, at 2–3 (10th Cir., filed May 19, 2023). This holds true even if the only remedy for this specific claim is a declaration that the for-cause removal restrictions are unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010); *see also Seila Law*, 591 U.S. at 211.

[7] This Court has the option of granting Leachco's petition limited to the first question presented.

them."). Granting both petitions best ensures that the CPSC does not escape constitutional accountability.

II. *Stare Decisis* Would Provide *Humphrey's Executor* No Cover.

In the alternative, Leachco's petition presents the question whether "*Humphrey's Executor v. United States*, 295 U.S. 602 (1935), [should] be overruled[.]" Pet. i. This Court need not reach that question to conclude that the CPSC Commissioners' removal protections are unconstitutional. That is because "[r]ightly understood, the fact-bound holding of *Humphrey's Executor* does not encompass the Commission's removal protections." *Consumers' Rsch.*, 98 F.4th at 655 (Oldham, J., dissenting from denial of rehearing en banc); *see Consumers' Rsch.*, 91 F.4th at 356–58 (Jones, J., concurring in part, dissenting in part). *Cf. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 698 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *aff'd in part, rev'd in part*, 561 U.S. 477 (2010); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013).

But if the decision below (and the panel majority in *Consumers' Research*) correctly understood and applied *Humphrey's Executor*,[8] Leachco's petition provides this Court with the option of "reconsider[ing] *Humphrey's Executor in toto*," *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part and dissenting in

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[8] *Amicus* recognizes that there is room for reasonable scholarly disagreement on this point on which highly respected jurists have reached divergent conclusions.

part), and "place[ing] a tombstone on" it "no one can miss," *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2275 (2024) (Gorsuch, J., concurring).

"[*S*]*tare decisis* should be no barrier to overruling" *Humphrey's Executor*.[9] Andrew M. Grossman & Sean Sandoloski, *The End of Independent Agencies? Restoring Presidential Control of the Executive Branch*, 22 Federalist Soc'y Rev. 216, 223 (2021). When it "revisits a precedent[,] this Court has traditionally considered the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, 590 U.S. 83, 106 (2020) (cleaned up). To the extent *Humphrey's Executor* can be read to bless the CPSC Commissioners' for-cause removal protections, each of these factors would weigh in favor of jettisoning it. Buttressing this conclusion, *stare decisis* "is at its weakest when [this Court] interpret[s] the Constitution[.]" *Janus v. AFSCME, Council 31*, 585 U.S. 878, 917 (2018).

A. *Humphrey's Executor* Was Poorly Reasoned.

To begin, *Humphrey's Executor* was poorly reasoned, and its constitutional holding has only become lonelier with time. *See generally Seila Law,*

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[9] In any event, "it may be that *stare decisis* is not even applicable in this context; because [*Myers v. United States,* 272 U.S. 52 (1926)] has never been overruled, the Court's precedents on removal power could be viewed as conflicting, requiring the Court to pick one line or the other[.]" Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 223.

295 U.S. at 243–51 (Thomas, J., concurring in part and dissenting in part) (explaining why). "*Humphrey's Executor* laid the foundation for a fundamental departure from our constitutional structure with nothing more than handwaving and obfuscating phrases such as 'quasi-legislative' and 'quasi-judicial.'" *Id.* at 246 (Thomas, J., concurring in part and dissenting in part). It "relies on one key premise: the notion that there is a category of 'quasi-legislative' and 'quasi-judicial' power that is not exercised by Congress or the Judiciary, but that is also not part of 'the executive power vested by the Constitution in the President.'" *Id.* at 247 (Thomas, J., concurring in part and dissenting in part) (quoting *Humphrey's Executor*, 295 U.S. at 628). "The problem is that the [*Humphrey's Executor*] Court's premise was entirely wrong." *Id.* (Thomas, J., concurring in part and dissenting in part).

"'If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive and Judicial powers.'" *Myers v. United States*, 272 U.S. 52, 116 (1926) (quoting 1 Annals of Congress, 581). *Cf.* Federalist No. 47. Toward this end, the Constitution "sets out three branches and vests a different form of power in each—legislative, executive, and judicial." *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring in part and dissenting in part) (citing U.S. Const. art. I, § 1; U.S. Const. art. II, § 1, cl. 1; U.S. Const. art. III, § 1); *see Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.) ("[T]he legislature makes, the executive executes, and the judiciary construes the law[.]"). "These grants are exclusive." *Dep't of Transp.*

v. Ass'n of Am. R.R., 575 U.S. 43, 67 (2015) (Thomas, J., concurring in the judgment).

"It therefore follows that there can be no fourth branch, headless or otherwise." *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 892 (3d Cir. 1986) (Becker, J., concurring in part). "[C]onsent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches." *PHH*, 881 F.3d at 137 (Henderson, J., dissenting). Nor may Congress create administrative bodies that "straddle multiple branches of Government." *Seila Law*, 591 U.S. at 247 (Thomas, J., concurring in part and dissenting in part). But that is what *Humphrey's Executor* allows.

B. *Humphrey's Executor* Cannot Be Squared With Subsequent Legal Developments and Related Decisions of This Court.

Nor can *Humphrey's Executor* be reconciled with this Court's modern separation of powers precedent. As Judge Willett, who authored the panel decision in *Consumers' Research*, wrote, it "seems nigh impossible to square" *Humphrey's Executor* with this "Court's current separation-of-powers sentiment." 98 F.4th at 649 (Willett, J., concurring in denial of rehearing en banc). For good reason.

To begin, "[t]he [*Humphrey's Executor*] Court's conclusion that the FTC did not exercise executive power has not withstood the test of time." *Seila Law*, 591 U.S. at 216 n.2. This Court has since made clear that however one chooses to describe the vast and varied powers wielded by independent agencies, "under our constitutional structure" *all* of those

powers "must be exercises of" Article II executive power. *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (citing U.S. Const. art. II, §1, cl. 1). And as this Court has repeatedly recognized, "'[i]t is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered "executive," at least to some degree.'"[10] *Seila Law*, 591 U.S. at 216 n.2 (quoting *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988)).

Over a series of cases this "Court has repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 239 (Thomas, J., concurring in part and dissenting in part). That process began over twenty-five years ago in *Morrison*, which jettisoned *Humphrey's Executor*'s fiction of free-floating "quasi-judicial" and "quasi-judicial" power unmoored from any single branch of government. *See* 487 U.S. at 689–91 & nn. 28, 30. "*Morrison* expressly repudiated the substantive reasoning of *Humphrey's Executor*." *Seila Law*, 591 U.S. at 250 n.4 (Thomas, J., concurring in part and dissenting in part). *Cf. id.* at 217 (majority op.). Indeed, "all Members of the Court who heard *Morrison* rejected the core rationale of *Humphrey's Executor*." *Id.* at 249 (Thomas, J., concurring in part and dissenting in part); *see Morrison*, 487 U.S. at 725 (Scalia, J., dissenting)

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[10] For that matter, "the FTC has evolved significantly over time." *Consumers' Rsch.*, 91 F.4th at 357. "[T]he FTC of today wields vastly more *executive* power than it did when the Supreme Court first considered its constitutionality during FDR's first term." *Consumers' Rsch.*, 98 F.4th at 648 (Willett, J., concurring in denial of rehearing en banc); *see* AFPF Br. 21–24, No. 23-1323.

("Today . . . *Humphrey's Executor* is swept into the dustbin of repudiated constitutional principles.").

Then came *Free Enterprise Fund*, which held that "multilevel protection from removal" for Officers "is contrary to Article II's vesting of the executive power in the President." 561 U.S. at 484. "[T]here can be little doubt that the *Free Enterprise* Court's wording and reasoning are in tension with *Humphrey's Executor* and are more in line with Chief Justice Taft's majority opinion in *Myers*." *In re Aiken Cty.*, 645 F.3d 428, 446 (D.C. Cir. 2011) (Kavanaugh, J., concurring); *see id.* at 444–45 (Kavanaugh, J., concurring) (listing examples). For example, the *Free Enterprise Fund* Court stated:

> The landmark case of *Myers* v. *United States* reaffirmed the principle that Article II confers on the President "the general administrative control of those executing the laws." It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President[.] . . . [T]he President therefore must have some "power of removing those for whom he can not continue to be responsible."

561 U.S. at 492–93 (quoting *Myers*, 272 U.S. at 117, 164). *Free Enterprise Fund* "created further tension (if not outright conflict) with *Humphrey's Executor*." *Seila Law*, 591 U.S. at 249 (Thomas, J., concurring in part and dissenting in part).

Next, in *Seila Law* this Court expressly cabined *Humphrey's Executor* to "multimember expert

agencies that do not wield substantial executive power[.]" *Id.* at 218. For that reason, after *Seila Law* "*Humphrey's Executor* does not even satisfy its own exception." *Id.* at 250 (Thomas, J., concurring in part and dissenting in part). With *Seila Law*, this Court "repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 239 (Thomas, J., concurring in part and dissenting in part).

Collins v. Yellen, 594 U.S. 220 (2021), continued to chip away at whatever remained of *Humphrey's Executor*'s already cracked foundation, applying *Seila Law* and observing that "the nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head," *id.* at 251–52. "After *Collins*, the only question left on the table appears to be whether an officer protected by a removal restriction exercises executive power." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 222.

Underscoring this, just last Term, citing *Myers*, this Court noted that it has "held that Congress lacks authority to control the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed.'" *Trump v. United States*, 144 S. Ct. 2312, 2328 (2024) (quoting *Myers*, 272 U.S. at 106, 176). This Court observed that "[t]he President's management of the Executive Branch requires him to have unrestricted power to remove the most important of his subordinates . . . in their most important duties." *Id.* at 2335 (cleaned up). And this Court reiterated that the removal authority is one of the President's "core constitutional powers" "within his exclusive sphere of constitutional authority." *Id.* at 2327–28. Assuming one was even

needed, that decision may well put the nail in *Humphrey's Executor's* coffin.

In sum, put charitably, *Humphrey's Executor* is "nearly, *nearly*, zombified precedent." *Consumers' Rsch.*, 98 F.4th at 648 n.10 (Willett, J., concurring in denial of rehearing en banc). And the degree to which *Humphrey's* "runs against mainstream currents in our law regarding the separation of powers," *Loper Bright*, 144 S. Ct. at 2281 (Gorsuch, J., concurring), would further counsel in favor of overruling it.

C. The Sky Will Not Fall If This Court Puts a Tombstone On *Humphrey's Executor*.

Nor would overruling *Humphrey's Executor* have disruptive consequences. The CPSC has suggested elsewhere that jettisoning *Humphrey's Executor* would be problematic because "Congress has repeatedly relied on the Court's decision by creating the" CPSC and "many other" similarly structured administrative bodies.[11] CPSC BIO 10, No. 23-1323; *see id.* at 20. But the CPSC's concerns are overstated. And "Congress's reliance on its ability to enact such provisions is due little weight." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224.

Simply put, overruling *Humphrey's Executor* would not upset reliance interests. *See id.* That is because "*Humphrey's Executor* is not necessary to the *existence* of any particular agency." *In re Aiken*

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[11] Notably, the petitioners in No. 23-1323 do not ask this Court to do so but rather apply existing precedent. *See* Consumers' Research Cert. Pet. 27–29, Cert. Reply Br. 10.

Cty., 645 F.3d at 446 n.5 (Kavanaugh, J., concurring). And "the remedy for holding an independent agency unconstitutional under Article II is *not* to abolish the agency." *Id.* (Kavanaugh, J., concurring) (citing *Free Enterprise Fund*, 561 U.S. at 508–09). It is instead to make "the agency . . . more accountable to the people by giving the elected and accountable President greater control over the agency (by making the heads of agencies removable at will, not for cause)." *Id.* (Kavanaugh, J., concurring).

"[B]oth *Free Enterprise Fund* and *Seila Law* adopt a strong—perhaps insurmountable—presumption that a removal restriction may be severed from the remainder of a law and an agency's structure and powers thereby left otherwise unchanged." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224; *see Seila Law*, 591 U.S. at 233–38; *Free Enter. Fund*, 561 U.S. at 508–10. And *Collins* takes reliance interests "off the table": "The key is its holding that an agency's past actions remain valid, notwithstanding any improper statutory removal restriction, so long as its officers 'were properly *appointed*.'"[12] Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224 (quoting *Collins*, 594 U.S. at 257). Under *Collins*, actions taken by agency officials protected by unconstitutional removal restrictions are not void ab

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[12] *Collins* did not address the appropriate remedy for Article II challenges to for-cause removal restrictions seeking prospective, as opposed to retrospective, relief. *See* 594 U.S. at 257.

initio and retrospective relief will almost never be available.[13] *See* 594 U.S. at 257–61.

This means that "even an outright overruling of *Humphrey's Executor* and what it came to stand for would upset no one's reliance on the work of independent agencies to date." Grossman & Sandoloski, 22 Federalist Soc'y Rev. at 224. For that matter, "*Humphrey's Executor* does not affect the size and scope of the administrative state." *In re Aiken Cty.*, 645 F.3d at 446 n.5 (Kavanaugh, J., concurring). It is thus hard to see why "this modest step to restore democratic accountability to our federal bureaucracy," *Consumers' Rsch.*, 98 F.4th at 650 (Ho, J., dissenting from denial of rehearing en banc), is objectionable.

Whatever putative "reliance" interest unelected "heads" of free-floating administrative bodies may claim in tenure protections that shield them from accountability, any such interest pales in comparison to the People's interest in the system of separated powers and representative self-government established by the Constitution. Indeed, "[c]ontinued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design." *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part and dissenting in part). And to the extent *Humphrey's Executor* can be read to justify the CPSC

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[13] As this Court observed in *Collins*, "an unconstitutional provision is never really part of the body of governing law (because the Constitution automatically displaces any conflicting statutory provision from the moment of the provision's enactment)[.]" 594 U.S. at 259.

Commissioners' removal protections, keeping it on the books "does not enhance this Court's legitimacy; it subverts political accountability and threatens individual liberty." *Id.* (Thomas, J., concurring in part and dissenting in part). This, too, would counsel in favor of putting *Humphrey's Executor* out to pasture.

III. This Court Should Clarify The Meaning of *Collins* and Its Relationship to *Axon*.

This Court should also clarify whether and, if so, how *Collins* applies to separation of powers challenges to removal protections where the plaintiff is seeking *prospective*—as opposed to retrospective—relief, whether now or in a future appropriate case.

A. The Question *Collins* Left Open Has Sown Confusion.

On its terms, *Collins* only addressed the showing necessary to obtain *retrospective* relief from an unconstitutional removal restriction. *See* 594 U.S. at 257 ("only remaining remedial question concerns retrospective relief"); *id.* at 276 (Gorsuch, J., concurring in part) ("the only question before us concerns retrospective relief"). Thus, as Professor Aaron Nielson observed shortly after it was decided, "it is unclear whether *Collins* will prevent a party subject to ongoing agency action from seeking forward-looking injunctive relief. The majority did not resolve this issue, so we'll have to wait and see."[14]

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[14] Passages in *Collins* have been described as "baffling." *Bhatti v. Fed. Hous. Fin. Agency*, 646 F. Supp. 3d 1005, 1010 (D. Minn. 2022), *aff'd*, 97 F.4th 556 (8th Cir. 2024).

Three Views of the Administrative State: Lessons from Collins v. Yellen, 2020-2021 Cato Sup. Ct. Rev. 141, 163 (2021). The answer remains unknown.

The question left open in *Collins* has sown confusion in lower federal courts. That holds particularly true where, as here, the alleged violation is an unconstitutional removal protection and the plaintiff subject to the challenged agency proceeding is seeking *preliminary* injunctive relief.[15] *Compare, e.g.,* Pet. App. 19a ("*Collins*' relief analysis applies to both retrospective and prospective relief."), *and* Pet. App. 20a n.9 ("[T]he *Collins* relief analysis applies when the alleged violation is an unconstitutional removal provision."), *with Energy Transfer, LP v. NLRB*, No. 3:24-cv-198, 2024 U.S. Dist. LEXIS 133105, at *9 (S.D. Tex. July 29, 2024) ("For removal-restriction claims that seek relief *before* an insulated actor acts, it is not that *Collins*'s causal-harm requirement is altogether inapplicable, but rather that it is readily satisfied."), *with Space Expl. Techs. Corp.*, 2024 U.S. Dist. LEXIS 129439, at *17 ("*Collins* at most stands for the proposition that when a properly *appointed* officer with unconstitutional removal protections acts, appropriate retrospective relief does not include voiding said action."), *with Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021) (en banc) ("*Collins* does not impact our conclusion in this case because

[15] The question whether, on the merits, declaratory relief or a permanent injunction is appropriate is distinct from the question whether *preliminary* injunctive relief is warranted.

Cochran does not seek to 'void' the acts of any SEC official.*"), aff'd sub nom.*, 598 U.S. 175 (2023).

B. This Court Should Harmonize *Collins* and *Axon*.

Axon v. FTC 598 U.S. 175 (2023), decided together with *Cochran v. SEC*, *see id.* n.*, has further muddied the waters. Both cases involved collateral constitutional challenges to inhouse administrative prosecutions,[16] and in both cases the administrative proceeding was stayed by the circuit courts. *See* Order, *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019); Order, *Axon Enters., Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020).

The question presented in *Axon* was whether federal district courts had jurisdiction over collateral constitutional challenges to certain agencies' structure or existence brought by parties subject to ongoing inhouse administrative prosecutions. *See* 598 U.S. at 180. And *Axon* did not answer the question

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[16] The petitioner in *Axon v. FTC*, No. 21-86, argued that FTC "ALJs could not constitutionally exercise governmental authority because of their dual-layer protection from removal" and separately that "the combination of prosecutorial and adjudicative functions in the Commission renders all of its enforcement actions unconstitutional," "ask[ing] the court to enjoin the FTC from subjecting it to the Commission's unfair and unconstitutional internal forum." *Axon*, 598 U.S. at 183. The petitioner in *SEC v. Cochran*, No. 21-1239, "focused on the two layers of tenure protection all ALJs hold" arguing "ALJs could not constitutionally exercise power" and seeking "declaratory and injunctive relief freeing her of the obligation to submit to an unconstitutional proceeding." *Axon*, 598 U.S. at 182–83.

this Court left open in *Collins*. But *Axon* recognized that "being subjected to unconstitutional agency authority . . . is impossible to remedy once the proceeding is over[.]" 598 U.S. at 191 (cleaned up); *see Alpine Sec. Corp. v. Fin. Indus. Regul. Auth.,* No. 23-5129, 2023 U.S. App. LEXIS 16987, at *3-4 (D.C. Cir. July 5, 2023) (Walker, J., concurring) ("[T]he resolution of claims by an unconstitutionally structured adjudicator is a 'here-and-now injury' that cannot later be remedied." (quoting *Axon*, 598 U.S. at 191 (cleaned up)). "The claim," this Court emphasized, "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Axon*, 598 U.S. at 191. That seems to describe irreparable injury, at least in this context. *See* Pet. 25–27. The reason why is that "the injury" at issue is "subjection to an unconstitutionally structured decisionmaking process" "irrespective of its outcome, or of other decisions made within it." *Axon*, 598 U.S. at 192.

Leachco's petition provides this Court with an ideal opportunity to harmonize the remedial opinion in *Collins* with *Axon*. Read together with *Collins*, *Axon* suggests that regardless of whether the remedy for an unconstitutionally structured agency takes the form of an injunction or declaratory relief, a party in Leachco's position is irreparably harmed until it receives meaningful relief for that injury.[17]

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[17] Some separation of powers violations render a government action void ab initio. *See Calcutt v. FDIC*, 37 F.4th 293, 344–45 (6th Cir. 2022) (Murphy, J., dissenting), *rev'd on other grounds*,

This approach makes sense. 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." *Doe Co. v. Cordray*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (dissenting). Thus, at least for purposes of *preliminary* injunctive relief, likely unconstitutional removal restrictions, standing alone, cause irreparable harm. *See id.* at 1136–37 (Kavanaugh, J., dissenting). That holds true even if the only remedy Leachco is entitled to on that claim is a declaration that the removal restrictions are unconstitutional,[18] *see id.* (Kavanaugh, J., dissenting); *see also Space Expl. Techs. Corp.*, 2024 U.S. Dist. LEXIS 129439, at *13-15, as this Court's precedent suggests might be the case, *see Free Enter. Fund*, 561 U.S. at 513 (rejecting request for "broad injunctive relief" but

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598 U.S. 623 (2023); *see also Collins*, 594 U.S. at 258 (surveying precedent). Prime examples would include Article III and due process violations. *See Calcutt*, 37 F.4th at 348 (Murphy, J., dissenting). Those violations always cause irreparable harm sufficient to sustain preliminary and *permanent* injunctive relief. This Court should underscore this in an appropriate case.

[18] *Cf. Axon Enter. v. FTC*, 986 F.3d 1173, 1193 (9th Cir. 2021) (Bumatay, J., concurring in the judgment and dissenting in part) ("If Axon raises a valid constitutional infringement, it is entitled to relief appropriate to remedy the violation, such as injunctive or declaratory relief."), *overruled*, 598 U.S. 175 (2023); *Cochran*, 20 F.4th at 210 n.14 (taking "no position" on "whether [Ms. Cochran] is entitled to a preliminary injunction" based on the Article II removal violation).

finding petitioners "are entitled to declaratory relief"); *Seila Law*, 591 U.S. at 211.

C. The Answer to Leachco's Remedial Question Is of Practical Importance.

The answer to Leachco's remedial question—whatever it may be—is of practical importance to private parties harmed by what they believe to be unconstitutionally structured administrative bodies. Agency adjudications, for example, often last years. *See Axon*, 598 U.S. at 213–16 (Gorsuch, J., concurring in judgment); *SEC v. Jarkesy*, 144 S. Ct. 2117, 2141–42 (2024) (Gorsuch, J., concurring). It is rare for a business to have the fortitude to outlast the agency and properly raise all of its claims. *Cf. Axon*, 598 U.S. at 216 (Gorsuch, J., concurring in judgment). This remains true even *after Axon*, to the extent that agencies are allowed to proceed with imposing a process that is itself the punishment while collateral constitutional challenges wind their way through the federal courts, as has happened to Leachco.

Parties facing enforcement actions before administrative bodies should be able to ascertain which types of separation of powers violations allow them to obtain meaningful relief. "Sometimes this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it—though no one ever has or, in truth, ever will." *Edwards v. Vannoy*, 593 U.S. 255, 282–83 (2021) (Gorsuch, J., concurring). As the confusion *Collins*'s remedial opinion has caused in lower courts suggests, it may "impose[] serious and needless costs on litigants and lower courts alike." *Axon*, 598 U.S. at 212 (Gorsuch, J., concurring in judgment). If it is the case

that unconstitutional removal restrictions can never, standing alone, constitute irreparable harm sufficient to sustain a *preliminary* injunction, private parties deserve to know, so as to spare the litigation expense. And if *Collins*'s remedial opinion holds "out a 'false hope'" for unconstitutional removal restriction claims, then this Court should "close its door."[19] *Vannoy*, 593 U.S. at 283 (Gorsuch, J., concurring).

CONCLUSION

This Court should grant Leachco's petition.

Respectfully submitted,

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[19] It may be that an unconstitutional removal restriction coupled with *other* irreparable harms—such as destruction of a business, reputational harm, and loss of good will—would support an injunction. And the decision below recognized that "an injunction can be appropriate relief for [at least] some separation of powers violations[.]" Pet. App. 20a n.9.