

No. _____

In the
Supreme Court of the United States

LEACHCO, INC.,

Applicant,

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,

Respondents.

**APPENDIX TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION
PENDING APPEAL**

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

1. LEACHCO, INC.,
Plaintiff,

v.

1. CONSUMER PRODUCT SAFETY
COMMISSION;

2. ALEXANDER HOEHN-SARIC,
Chair of the CPSC;

3. DANA BAIOTTO, Commissioner
of the CPSC;

4. MARY T. BOYLE, Commissioner
of the CPSC;

5. PETER A. FELDMAN, Commis-
sioner of the CPSC;

6. RICHARD TRUMKA, Commis-
sioner of the CPSC,

Defendants.

Case No. 22-CV-232-JAR

VERIFIED COMPLAINT
FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiff Leachco, Inc. is a small, family-owned business in Ada, where it was founded in 1988 by Jamie Leach and her husband Clyde. Leachco designs and makes a variety of products, including an infant lounger called the Podster®. Over 180,000 Podsters® have been sold and, like all of Leachco’s products, it has an exemplary safety record. But, because of *two* accidents from 2015 and 2018, the United States Consumer Product Safety Commission suddenly wants to ban the Podster®. But the Commission is not pursuing its claim in a court of law. Instead, the Commission initiated an administrative proceeding. *In re Leachco, Inc.*, CPSC No. 22-1. Through this in-house proceeding, the Commission seeks—*from itself*—a determination that the Podster® presents a “substantial product hazard,” defined as a “product defect which . . . creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2). The Commission also seeks—*from itself*—an order imposing damages against Leachco.

This Court’s immediate attention is required because the Commission itself and its proceeding suffer from constitutional defects inflicting upon Leachco “here-and-now” injuries that can be remedied only by an Article III court. *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (cleaned up).

The Commission is unconstitutionally structured for two independent reasons. *First*, the President is precluded from removing Commissioners—principal officers who wield substantial executive power—except for cause. *See Seila Law*, 140 S. Ct. at 2191–92; *Consumers’ Research v. CPSC*, --- F.Supp.3d ---, No. 6:21-cv-256-JDK, 2022 WL 1577222, at *7 (E.D. Tex. Mar. 18, 2022) (holding removal protection for CPSC Commissioners is unconstitutional), appeal filed May 18, 2022. *Second*, the administrative adjudicator conducting the Commission’s proceeding improperly enjoys at least two levels of for-cause removal protections. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 495–508 (2010). These restrictions each 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.

The Commission’s in-house proceeding suffers from its own constitutional defects: it violates Article III, which vests the judicial power of the United States exclusively in federal courts, not in executive agencies; and it violates Leachco’s constitutional rights to due process and a jury trial.

Leachco’s “here-and-now” constitutional injuries continue so long as the Commission’s in-house proceeding remains pending. Accordingly, Leachco brings this Verified Complaint and asks the Court to issue an order (a) declaring the Commission’s structure and proceeding unconstitutional, and (b) temporarily and permanently enjoining the Commission from continuing its claim against Leachco through its in-house proceeding.

JURISDICTION AND VENUE

1. This action arises under the Constitution and laws of the United States, and this Court has federal-question jurisdiction under Article III of the Constitution and 28 U.S.C. § 1331. *See Free Enter. Fund*, 561 U.S. at 491 n.2 (recognizing “an implied private right of action directly under the Constitution to challenge

governmental action under . . . separation-of-powers principles”); *Seila Law*, 140 S. Ct. at 2196 (holding that parties alleging injury resulting from actions of an unconstitutionally structured agency have standing to challenge removal restrictions because “when such a provision violates the separation of powers it inflicts a here-and-now injury . . . that can be remedied by a court”) (cleaned up).

2. Jurisdiction is also proper under the Due Process Clause of the Fifth Amendment to the United States Constitution.

3. The Court has jurisdiction to issue declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202, and 28 U.S.C. § 1361.

4. Venue is proper under 28 U.S.C. § 1391(e).

THE PARTIES

5. Plaintiff Leachco, Inc. is an Oklahoma corporation, with its principal place of business in Ada, Oklahoma.

6. Defendant Consumer Product Safety Commission (CPSC or Commission) is an executive agency of the United States.

7. Defendant Alexander Hoehn-Saric is a Commissioner and Chair of the CPSC and is sued in his official capacity.

8. Defendant Dana Baiocco is a Commissioner of the CPSC and is sued in her official capacity.

9. Defendant Mary T. Boyle is a Commissioner of the CPSC and is sued in her official capacity.

10. Defendant Peter A. Feldman is a Commissioner of the CPSC and is sued in his official capacity.

11. Defendant Richard Trumka is a Commissioner of the CPSC and is sued in his official capacity.

BACKGROUND

Leachco

12. Leachco is a family-owned company in Ada, Oklahoma, founded in 1988 by Jamie Leach and her husband Clyde.

13. At the time, Clyde was a professional pilot and aerial applicator, and Jamie was employed as a registered nurse.

14. Jamie is still a registered nurse, and she uses her nursing know-how—and her experience as a mother and grandmother—to design Leachco's products.

15. Jamie's first design was inspired by a near-accident involving her 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 in May of 1988.

16. Leachco remained a bare-bones outfit for many years, and both Jamie and Clyde wore many hats—designer, managers, manufacturers, bookkeepers, sales representatives, human-resources managers, custodians, construction managers—just to keep the company alive. They worked hard and pinched every penny.

17. In 1991, Leachco's accountant told Jamie and Clyde that they needed to close the doors on Leachco. He didn't believe they could stay in business due to the company's debt, lack of sales, and recurring expenses.

18. But shortly after this meeting, Jamie made a chance, follow-up sales call to Wal-Mart—which ended up being Leachco's big break, as Wal-Mart made a significant order.

19. Leachco currently has around 40 full-time employees and seven temporary employees.

20. Jamie has been a prolific designer, and she has done so successfully: Jamie has over 40 patents and scores of trademarks.

21. Jamie finds great joy and pleasure in her work and in her ability to help, comfort, and support friends, family, and customers.

22. Jamie's intent and vision have always been to develop products that are useful and safe for her children and grandchildren.

23. The Leaches themselves have used the Podster® with their own children and grandchildren.

24. The Leaches deny the Commission's assertion that the Podster® is defective.

25. Because of the Commission's allegations, large retailers like Amazon, Buy Buy Baby, and Bed, Bath, and Beyond no longer carry the Podster®.

26. The Commission's allegations have also harmed Leachco's good name and exemplary product-safety record—both of which the Leaches earned over three decades of careful designs, hard work, proper and express warnings, honest dealings, and quality craftsmanship.

27. Because of the Commission's public allegations, Leachco's revenues have decreased, and the company was compelled to incur significant legal expenses. Among other measures, Clyde and Jamie are currently forgoing salaries and living off their savings, to ensure Leachco remains solvent and its employees have jobs.

28. Jamie and Clyde see Leachco as their story of the American way: work hard, innovate, and never give up. They have always modeled these virtues for their children and hope their kids can carry on in the business one day. The Commission's baseless allegations and arbitrary administrative proceeding threaten everything the Leaches have worked so hard for.

***The Commission's Unconstitutional
Administrative Proceeding Against Leachco***

29. Under the Consumer Product Safety Act, the Commission may, after affording the opportunity for a hearing, determine that a consumer product distributed in commerce presents a "substantial product hazard." 15 U.S.C. § 2064(c), (d), (f), (h). If the Commission so determines, it may, among other things, order the product's manufacturer, distributor, or retailer to: cease distribution of the product; provide

notice to third parties who transport, store, distribute, or otherwise handle the product; provide notice to “appropriate” state and local public-health officials; give public notice of the “defect;” bring the product into “conformity with the requirements of the applicable rule, regulation, standard or ban;” “refund” the purchase price; reimburse other manufacturers, distributors, or retailers for their expenses in connection with carrying out the Commission’s order; and submit an action plan, for Commission approval, to comply with the order’s requirements. *Id.* § 2064(c), (d), (e).

30. In February 2022, the Commissioners, by a vote of 3-1, authorized the issuance of an administrative complaint against Leachco under § 2064 alleging that certain lounging pillows manufactured and sold by Leachco—called Podsters®—present substantial product hazards. Attached here as Exhibit 1 is a true and correct copy of the Record of Commission Action (Feb. 9, 2022). See <https://www.cpsc.gov/s3fs-public/RCA-Vote-to-Issue-Administrative-Complaint-Against-Leachco-Inc.pdf?VersionId=faOQ7PzlN36LojGDxqcLkvqJTn.HIjny>.

31. The Commission filed the administrative complaint in February 2022. *In re Leachco, Inc.*, CPSC Docket No. 22-1. Attached as Exhibit 2 is a true and correct copy of the Commission’s Administrative Complaint. See https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/001-Complaint--In-the-Matter-of-Leachco-Inc-CPSC-Docket-No-22-1.pdf?VersionId=3WKMODTUGoNJPXYzM_VpsS8a.mtPRT5x.

32. Through this in-house proceeding, the Commission seeks—*from itself*—a determination that the Podster® presents a substantial product hazard.

33. Through this in-house proceeding, the Commission seeks—*from itself*—an order compelling Leachco to, among other things, pay damages to purchasers and to third parties who may incur compliance costs arising out of the Commission’s order.

34. In its administrative proceeding, the Commission alleges that since 2009, Leachco has manufactured and sold approximately 180,000 “Podsters®.”

35. Podsters® are products designed and marketed for infant lounging while the infant is awake and an adult is supervising.

36. A true and accurate picture of a Podster® is shown here:



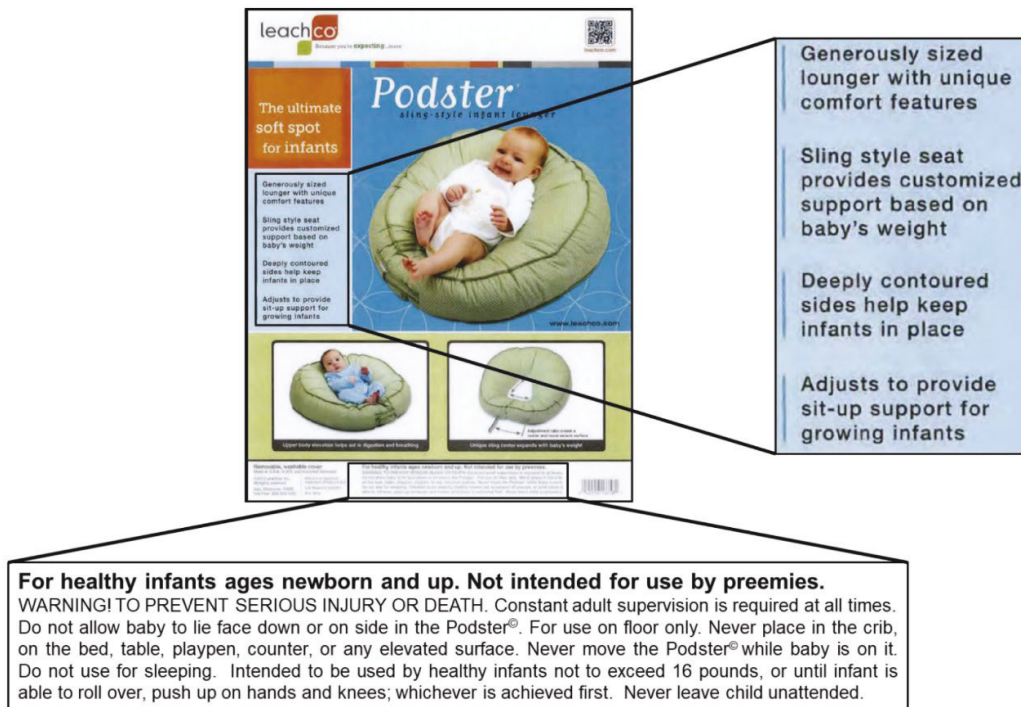
37. As the Commission itself alleges in its administrative complaint, the Podster® “is not and has never been advertised by [Leachco] as a sleep product.” Ex. 2, ¶ 14.

38. As the Commission alleges in its administrative complaint, the Podster® “contains warnings that the product should not be used for sleep and that adult supervision is always required.” Ex. 2, ¶ 15.

39. A true and correct copy of Podster® warnings and instructions is shown here:



40. A true and correct copy of Podster® warnings and instructions is shown here:



41. As the Commission alleges in its administrative complaint, the Podster® “contains warnings that the product should only be used on the floor, and not in another product, such as a crib, on a bed, table, playpen, counter, or any elevated surface.” Ex. 2, ¶ 16.

42. As the Commission alleges in its administrative complaint, the Podster® “contains warnings that infants should not be placed prone or on their side in the product.” Ex. 2, ¶ 17.

43. As the Commission alleges in its administrative complaint, the Podster® “contains instructions that it should be used for infants not to exceed 16 pounds, and should not be used if an infant can roll over.” Ex. 2, ¶ 18.

44. As the Commission alleges in its administrative complaint, the Podster® “contains warnings and instructions that use of the product in contravention to these warnings could result in serious injury or death.” Ex. 2, ¶ 19.

45. Podsters® have always been designed for infant lounging while the infant is awake and an adult is supervising.

46. Podsters® have always been marketed and advertised for infant lounging while the infant is awake and an adult is supervising.

47. According to the CPSC Complaint, there have been two incidents allegedly connected to the more than 180,000 Podsters® that have been sold.

48. The two tragic deaths were not caused by any defect in the Podster®. The two incidents—one more than five-and-a-half years ago, and the other more than three-and-a-half years ago—were caused because of multiple misuses of the Podster® that were not reasonably foreseeable uses of the product and violated multiple express warnings, as well as safe sleep practices.

a. In one instance, a daycare violated multiple state facility-operating regulations, as well as its own rules, safe-sleep practices, and multiple express warnings on the product when it left an infant with a recent respiratory problem to sleep unsupervised in the product, in a crib, for an extended period of time. The infant was not visible to employees, who failed to check on the infant as required. Additionally, the day care allowed other soft products to be in the crib. Each of these actions (i) contradicted Leachco's express warnings and instructions, (ii) violated the day-care center's operating rules, and (iii) violated state law and regulations. The daycare center's state license was revoked because of this incident.

b. In the second instance, a 17-day-old infant was placed in the Podster®, and then placed on an adult bed, between the infant's adult parents, along with bedding and pillows, for co-sleeping—contrary to Leachco's express warnings and instructions. Upon information and belief, the parents found the infant in the adult bedding and not on the product.

49. These two isolated incidents followed multiple unsafe practices, uses of the product not intended and directly contrary to multiple express warnings, and they are the only injuries known to have occurred in the vicinity of the more than 180,000 Podsters® sold to date.

50. In light of the above, Commissioner Baiocco, who voted against the issuance of the administrative complaint, stated, “Pleading that the product is not marketed for sleep, that parents do not use the product as intended and in direct [sic] contravention of the warnings, calls into question the legal sufficiency of the Complaint.” Ex. 1.

51. Yet the Commission remains intent on pursuing its argument through a proceeding in which the Commission acts as prosecutor, judge, and jury. *In re Leachco*, CPSC Docket No. 22-1.

***The Constitution Was Framed to Protect
Life, Liberty, and Property from Arbitrary Rule***

52. During the Revolutionary period, America’s Founders developed and adopted the conception of popular sovereignty—*i.e.*, that the people are the source of all government power. See V ELLIOT’S DEBATES 500 (1787) (Madison) (“The people were, in fact, the fountain of all power.”); *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471–72 (1793) (“[T]he sovereignty of the nation is in the people of the nation,” because the people “are truly the sovereigns of the country.”); U.S. Code, Organic Laws, Declaration of Independence (1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their *just* powers from the *consent of the governed*.”) (emphasis added).

53. Through the ratification of the United States Constitution, the American people delegated some of their power—as described and delimited in the Constitution—to the federal government.

54. This American system of sovereignty—in which a sovereign people divided power among their governmental agents—amounted to a “revolution in the[] conception of law, constitutionalism, and politics.” Gordon S. Wood, *The Creation of the American Republic* 383 (1969).

55. Under this system, government officials are “the people’s . . . agents.” Wood, *The Creation of the American Republic* 385; see also Akhil Reed Amar, *Of*

Sovereignty and Federalism, 96 Yale L.J. 1425, 1434 (1987) (observing that “government officials” became “merely agents of principals who had prescribed limits on the agents’ power in the founding charter”).

56. Because the American system of popular sovereignty was adopted through a written constitution, the federal government’s power is “collected, not from tacit implication, but from the positive grant expressed in the instrument of union.” James Wilson, State House Yard Speech (Oct. 6, 1787), *reprinted in* 1 COLLECTED WORKS OF JAMES WILSON 171, 172 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011).

57. In other words, “the legislative, executive and judicial departments are each formed in a separate and independent manner; and [] the ultimate basis of each is the constitution only, within which the limits of which each department can alone justify any act of authority.” *Hayburn’s Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

58. The Constitution divided the government’s powers not merely, or even primarily, to resolve inter-branch squabbles or ensure efficient government. Indeed, the “doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power.” *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

59. The “ultimate purpose of this separation of powers is 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).

60. To preserve life, liberty, and the pursuit of happiness, it is indeed necessary to divide governmental powers because the “accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” *The Federalist No. 47*, at 324 (Madison) (J. Cooke ed. 1961) (observing that “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty, than” that tyranny arises through concentrated power).

61. The Framers, of course, well understood how concentrated, arbitrary power could deprive Americans of their “unalienable” fundamental rights to life, liberty, and property.

62. Among the litany of complaints lodged against King George III were the following:

a. “He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers.”

b. “He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”

c. “He has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance.”

d. He has “depriv[ed] us in many cases, of the benefits of Trial by Jury.”

U.S. Code, Organic Laws, Declaration of Independence (1776).

***The Constitution’s
Structural Protections Against Arbitrary Power***

63. The Constitution vests “[a]ll legislative Powers herein granted” in Congress. U.S. CONST. art. I, § 1.

64. The Constitution vests all of “[t]he executive Power in [the] President of the United States,” who is duty-bound to “take Care that the Laws be faithfully obligated.” U.S. CONST. art. II, § 1, cl. 1; § 3. *See Seila Law*, 140 S. Ct. at 2191 (“Under our Constitution, the ‘executive Power’—all of it—is ‘vested in a President,’ who must ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art. II, § 1, cl. 1; § 3).

65. “In light of ‘[t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’” *Free Enter. Fund*, 561 U.S. at 483 (quoting 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939)).

66. “Since 1789, the Constitution has been understood to empower the President to keep these [executive] officers accountable—by removing them from office, if

necessary.” *Free Enter. Fund*, 561 U.S. at 483. Without this removal power, “the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.” *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 514).

67. The Constitution also established a judiciary—independent of the legislative and executive branches.

68. The Constitution vests “[t]he judicial Power of the United States . . . in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

69. To further ensure independent judgment, the Constitution provides that the “Judges, both of the supreme and inferior Courts shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1.

The Consumer Product Safety Commission

70. The Consumer Product Safety Commission is an “independent regulatory commission.” 15 U.S.C. § 2053(a).

71. The CPSC is headed by five Commissioners who are appointed to staggered, seven-year terms by the President, by and with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1).

72. No more than three of the five Commissioners shall be affiliated with the same political party. 15 U.S.C. § 2053(c).

73. The Commission chair is appointed by the President, by and with the advice and consent of the Senate, from among the five Commissioners. 15 U.S.C. § 2053(a).

74. Under the Appointments Clause, Congress may, by law, vest heads of departments with the power to appoint inferior officers. *See* U.S. CONST. art. II, § 2, cl. 2 (“Congress may by Law vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments.”).

75. The CPSC chair is authorized, subject to the full Commission’s approval, to appoint Commission officers such as an Executive Director and a General Counsel. 15 U.S.C. § 2053(g)(1)(A). And the chair may appoint “such other officers and employees (including attorneys) as are necessary in the execution of the Commission’s function.” *Id.* § 2053(g)(2). The “appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.” *Id.* § 2053(g)(4).

76. The Commission is a “free-standing, self-contained entity in the Executive Branch.” *Free Enter. Fund*, 561 U.S. at 511 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 915 (1991) (Scalia, J., concurring in part and concurring in judgment)).

77. The Commission is a “department” under the Appointments Clause.

78. CPSC Commissioners are the “head” of the Commission.

79. Each CPSC Commissioner is an officer of the United States.

80. Each CPSC Commissioner is a principal officer of the United States.

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

82. The Commission may “accept gifts and voluntary and uncompensated services,” except industry-sponsored travel. *See* 15 U.S.C. §§ 2076(b)(6), 2086.

***The Commission is Empowered with Substantial Executive Powers—
Namely, Regulatory, Investigatory, and Enforcement powers***

83. CPSC Commissioners exercise “significant authority pursuant to the laws of the United States.” *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976) (per curiam).

84. The Commission is authorized to enforce, 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.

85. The Commission has broad executive powers over consumer products. *See* 15 U.S.C. § 2058 (procedure for consumer-product safety rules).

86. Thus, the Commission may enact binding “consumer product safety standards.” 15 U.S.C. § 2056(a). Its rulemaking authority extends to, among other things, durable-infant or -toddler products (*id.* § 2056a(b)(2)), toys with spherical ends (*id.* § 2056b(b)(1)(C)), and drywall (*id.* § 2056c). The Commission may exempt certain state and local safety standards from preemption. *Id.* §§ 2056b(h), 2075(c).

87. Under the Act, the Commission may promulgate rules declaring products “banned hazardous product[s].” 15 U.S.C. § 2057. It may also declare substances or mixtures thereof to be “hazardous substance[s].” *Id.* § 1262.

88. The Commission may enact rules concerning the importation and exportation of consumer products. 15 U.S.C. §§ 2066, 2067.

89. The Commission also has extensive investigatory powers. Commission agents—for “purposes of implementing [15 U.S.C. ch. 47], or rules or orders prescribed” thereunder—may enter, at reasonable times, any manufacturing factory, warehouse, or establishment, to inspect areas “which may relate to the safety” of consumer products. 15 U.S.C. § 2065(a).

90. Manufacturers of consumer products must “establish and maintain” records and reports—and provide them to the Commission—as the Commission may, by rule, “reasonably” require to implement 15 U.S.C. ch. 47, or to “determine compliance” with rules or orders prescribed thereunder. 15 U.S.C. § 2065(b). Upon the request of a Commission designee, every consumer-product manufacturer “shall permit” the inspection of “appropriate books, records, and papers relevant to determining” whether the manufacturer “has acted or is acting in compliance with” 15 U.S.C. ch. 47 and related regulations. 15 U.S.C. § 2065(b). Manufacturers, importers, retailers, and distributors of consumer products must identify, with respect to a consumer product, the related manufacturers, importers, retailers, and distributors. *Id.* § 2065(c).

91. This is not all. Among other things, the Commission “shall have the power” (1) to compel “any person” to submit written, sworn answers and reports to questions “as the Commission may prescribe to carry out a specific regulatory or enforcement function of the Commission;” (2) to administer oaths; (3) to compel the

attendance of witnesses, testimony, and the production of documents and other physical evidence, “relating to the execution of [the Commission’s] duties.” 15 U.S.C. § 2076(b)(1)–(3), (c).

92. The Commission may “by rule” compel “any manufacturer of consumer products” (1) “to provide to the Commission such performance and technical data related to performance and safety” as the Commission considers necessary to “carry out the purposes of” 15 U.S.C. ch. 47, and (2) to give notice of the performance and technical data to prospective purchasers, at the time of original purchase, and to the first purchaser of such product for purposes other than resale. 15 U.S.C. § 2076(e).

93. As noted above, the Commission may, after affording the opportunity for a hearing, determine that a consumer product distributed in commerce presents a “substantial product hazard.” 15 U.S.C. § 2064(c), (d), (f), (h). If the Commission so determines, it may, among other things, order the product’s manufacturer, distributor, or retailer to: cease distribution of the product; provide notice to third parties who transport, store, distribute, or otherwise handle the product; provide notice to “appropriate” state and local public-health officials; give public notice of the “defect;” bring the product into “conformity with the requirements of the applicable rule, regulation, standard or ban;” “refund” the purchase price; reimburse other manufacturers, distributors, or retailers for their expenses in connection with carrying out the Commission’s order; and submit an action plan, for Commission approval, to comply with the order’s requirements. *Id.* § 2064(c), (d), (e).

94. The Commission may initiate “any civil action” to enforce all laws subject to the Commission’s jurisdiction (if the Commission makes a written request to the Attorney General for the latter’s representation and the Attorney General does not inform the Commission, within 45 days, that he will represent the Commission). 15 U.S.C. § 2076(b)(7)(A).

95. The Commission is empowered to seek civil penalties up to \$100,000 for each violation, and up to \$15 million total for a related series of violations, adjusted for inflation. 15 U.S.C. § 2069(a)(1), (a)(3).

96. The Commission may intervene in civil actions brought by individual persons or States to enforce certain consumer-product laws. 15 U.S.C. § 2073(b)(3).

97. The Commission is also authorized to seek “[i]njunctive enforcement and seizure” to restrain “any violation of” the act or to restrain “any person from distributing in commerce a product which does not comply with a consumer product safety rule.” 15 U.S.C. § 2071(a).

98. The Commission, with the concurrence of or through the Attorney General, may initiate “any criminal action” to enforce all laws subject to the Commission’s jurisdiction and seek up to five years’ imprisonment. 15 U.S.C. §§ 2070(a), 2076(b)(7)(B).

99. Finally, the Commission “may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States.” 15 U.S.C. § 2076(a). A Commissioner “who participates in such a hearing or other inquiry shall not be disqualified solely by reason of such participation from subsequently participating in a decision of the Commission in the same matter.” *Id.*

100. Commission hearings are conducted by Presiding Officers. 16 C.F.R. §§ 1025.1, 1025.3(i).

101. Presiding Officers enjoy broad discretion and significant powers.

102. According to the Commission’s regulations, “broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved.” 16 C.F.R. § 1025.1.

103. A Presiding Officer “shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order,” and he “shall have all powers necessary to that end,” including the powers 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. 16 C.F.R. § 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 the ends of justice will be better served by so doing.” *Id.* § 1025.43(a).

104. Presiding Officers may also, among other things, extend deadlines, allow “appropriate” amendments and supplemental pleadings, decide whether to allow intervening parties, decide whether to certify a class action and issue related orders, consider motions by parties, issue summary decisions and orders, “control” discovery, and issue discovery sanctions. 16 C.F.R. § 1025.13, .15(c), .17(d)–(e), .18(d)–(g), .25, .31(i), .37.

105. At the end of a Commission hearing, a Presiding Officer issues an Initial Decision, which includes (1) findings upon the material questions of fact and conclusions upon the material issues of law, along with the reasons therefor; and (2) an order. 16 C.F.R. § 1025.51(a)–(c).

106. A party may appeal an Initial Decision by filing and serving a notice of intention to appeal within 10 days after the Initial Decision is issued. 16 C.F.R. § 1025.53(a).

107. Separately, the Commission may unilaterally order review of an Initial Decision. 16 C.F.R. § 1025.54.

108. If no party appeals, and if the Commission does not order review of the Initial Decision, the Initial Decision becomes the Final Decision and Order of the Commission. 16 C.F.R. § 1025.52.

***Leachco’s Here-and-Now Constitutional Injuries
Continue So Long as the Commission’s Proceeding Continues***

109. Structural separation-of-powers violations inflict here-and-now injuries. *See Seila Law*, 140 S. Ct. at 2196 (holding that parties alleging injury resulting from actions of an unconstitutionally structured agency have standing to challenge removal restrictions because “when such a provision violates the separation of powers it inflicts a ‘here-and-now’ injury . . . that can be remedied by a court”) (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)).

110. The Commission’s unconstitutional structure has inflicted and continues to inflict a here-and-now injury on Leachco.

111. So long as the Commission’s administrative action continues, Leachco will remain subject to an unconstitutional in-house administrative proceeding initiated by an unconstitutionally structured agency and overseen by an ALJ who improperly enjoys multiple levels of for-cause removal protections.

112. Leachco has thus suffered, and continues to suffer, a here-and-now injury that can be remedied by an Article III court.

113. According to the Supreme Court, “whenever a separation-of-powers violation occurs, any aggrieved party with standing may file a constitutional challenge.” *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021); *see also Selia Law*, 140 S. Ct. at 2196 (“In the specific context of the President’s removal power, we have found it sufficient that the challenger ‘sustain[s] injury’ from an executive act that allegedly exceeds the official’s authority.”) (quoting *Bowsher*, 478 U.S. at 721); *id.* (“Our precedents have long permitted private parties aggrieved by an official’s exercise of executive power to challenge the official’s authority to wield that power while insulated from removal by the President.”) (citations omitted).

114. Without this Court’s review, Leachco will be irreparably harmed by being compelled to defend itself before an unconstitutionally structured Commission, in front of a Presiding Officer who is unconstitutionally protected by multiple levels of removal protection, and in a constitutionally deficient proceeding.

115. Congress does not intend to limit judicial jurisdiction “if ‘a finding of preclusion could foreclose all meaningful judicial review’; if the suit is ‘wholly collateral to a statute’s review provisions’; and if the claims are ‘outside the agency’s expertise.’” *Free Enter. Fund*, 561 U.S. at 489 (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212–13 (1994) (cleaned up)).

116. Plaintiff Leachco’s constitutional claims in this lawsuit are outside the Commission’s authority, competence, and expertise. *See Free Enter. Fund*, 561 U.S. at 491 (The plaintiffs’ constitutional claims “are instead standard questions of administrative law, which the courts are at no disadvantage in answering.”).

117. ALJ Young—the Presiding Officer in the administrative action—lacks authority to hear, consider, or resolve Leachco’s constitutional claims alleged in this lawsuit.

118. None of the CPSC Commissioners has authority to hear, consider, or resolve Leachco’s constitutional claims alleged in this lawsuit.

119. The Commission lacks authority to hear, consider, or resolve Leachco’s constitutional claims alleged in this lawsuit.

COUNT I

THE CPSC IS UNCONSTITUTIONALLY STRUCTURED

(The Commissioners’ For-Cause Removal Protection Violates U.S. CONST. art. II, § 2, cl. 2)

120. The preceding paragraphs are incorporated by reference.

121. The CPSC is headed by five Commissioners, who are appointed to staggered, seven-year terms by the President, by and with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1).

122. CPSC Commissioners are principal officers of the United States.

123. CPSC Commissioners wield extensive and wide-ranging executive powers—including regulatory, investigatory, and enforcement powers—concerning consumer products introduced domestically or internationally into commerce. *See Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (Even though the activities of administrative agencies “take ‘legislative’ and ‘judicial’ forms,” “they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’”) (quoting U.S. CONST. Art. II, § 1, cl. 1).

124. 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).

125. The Commissioners therefore wield vast executive powers free of direct Presidential control.

126. As “a general matter,’ the Constitution gives the President ‘the authority to remove those who assist him in carrying out his duties.’” *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 513–14).

127. The Supreme Court recognizes only two exceptions to this general rule that the President must be able to remove principal officers at will: “one for multi-member expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority.” *Seila Law*, 140 S. Ct. at 2199–2200.

128. Neither exception applies to the Consumer Product Safety Commission.

129. The CPSC wields substantial executive power.

130. The CPSC Commissioners are not inferior officers.

131. The removal restriction in 15 U.S.C. § 2053(a) on the President’s removal power violates 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. *See Seila Law*, 140 S. Ct. at 2191–92; *Consumers’ Research*, 2022 WL 1577222, at *7 (holding that removal protection for CPSC Commissioners is unconstitutional), appeal filed May 18, 2022.

COUNT II

THE CPSC IS UNCONSTITUTIONALLY STRUCTURED

(The Multilevel Removal Protection for the Presiding Officer Violates U.S. CONST. art. II, § 2, cl. 2)

132. The preceding paragraphs are incorporated by reference.

133. The Commission’s in-house proceedings are conducted under the Administrative Procedure Act (5 U.S.C. §§ 551–559) and the procedures set forth in 16 C.F.R. Part 1025.

134. ALJ Young was assigned to the Commission through an interagency agreement for the loan of his services. *See* Ex. 3 (Order Scheduling Prehearing Conference) (noting appointment); https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/010-Prehearing-Conference-Order-In-the-Matter-of-Leachco-Inc--CPSC-Docket-No-22-1.pdf?VersionId=9yTq5ZP_uhFymfqrC8ajJSr6CptGVuXY.

135. The Commission chair appointed ALJ Young as the Presiding Officer of the Commission’s in-house proceeding, *In re Leachco*, CPSC Docket No. 22-1.

136. Mr. Young is an administrative law judge employed by the Federal Mine Safety and Health Review Commission. See <https://www.fmshrc.gov/about/news/mary-lu-jordan-and-michael-g-young-sworn-commissioners>; see also <https://www.fmshrc.gov/about/aljs>.

137. ALJ Young’s assignment, removal, and compensation fall under 5 U.S.C. §§ 3105, 3344, 5362, and 7521. See 30 U.S.C. § 823(b)(2).

138. ALJ Young is an officer of the United States. See *Lucia v. SEC*, 138 S. Ct. 2044, 2051–55 (2018).

139. ALJ Young, as Presiding Officer of the *In re Leachco* proceeding, has extensive powers—including “all powers necessary to” carry out his “duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order.” 16 C.F.R. § 1025.42(a). See *Lucia*, 138 S. Ct. at 2049 (“An ALJ assigned to hear an SEC enforcement action has extensive powers—the ‘authority to do all things necessary and appropriate to discharge his or her duties’ and ensure a ‘fair and orderly’ adversarial proceeding.”) (quoting 17 C.F.R. §§ 201.111, 200.14(a)).

140. CPSC Commissioners may not be removed except for “neglect of duty or malfeasance in office but for no other cause.” 15 U.S.C. § 2053(a).

141. The Commissioners of the Federal Mine Safety and Health Review Commission, which employs ALJ Young, may not be removed except for cause. 30 U.S.C. § 823(b)(1).

142. ALJ Young may not be removed except “for good cause” as determined by the Merit Systems Protection Board. 5 U.S.C. § 7521.

143. Under the Administrative Procedure Act, “[a]n action may be taken against an administrative law judge . . . by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board [MSPB] on the record after opportunity for hearing before the Board.” 5 U.S.C. § 7521(a). “The actions covered by” the statute includes “removal.” *Id.* § 7521(b); see also 5 C.F.R. § 930.211(a) (“An agency may remove . . . an

administrative law judge only for good cause established and determined by the Merit System Protection Board.”).

144. To remove an ALJ like the Presiding Officer here, the CPSC must first make a “proposal[]” to the MSPB and file a complaint. 5 C.F.R. § 1201.137.

145. In the alternative, to remove an ALJ like the Presiding Officer here, his employer the Federal Mine Safety and Health Review Commission must first make a “proposal[]” to the MSPB and file a complaint. 5 C.F.R. § 1201.137.

146. MSPB has original jurisdiction to hear actions against ALJs. 5 C.F.R. § 1201.2(c); *see* 5 C.F.R. § 930.211(a) (specifying that actions to remove ALJs are heard by the MSPB under 5 C.F.R. part 1201)

147. MSPB Commissioners do not *themselves* hear the initial removal request filed by an agency. Instead, “[a]n administrative law judge will hear an action brought by an employing agency . . . against a respondent administrative law judge.” 5 C.F.R. § 1201.140(a)(1).

148. Only after the ALJ in the MSPB proceeding issues a ruling may a party file a petition for review with the MSPB. 5 C.F.R. §§ 1201.140(a)(2), .114, .117.

149. Ultimately, then, the CPSC or, in the alternative, the Federal Mine Safety and Health Review Commission, can do nothing without the MSPB first determining that good cause exists *and* that removal is the proper remedy. *See* 5 C.F.R. § 1201.140(b) (The MSPB “decision . . . will authorize the agency to take a disciplinary action, and will specify the penalty to be imposed, only after a finding of good cause.”).

150. After the MSPB decision, a party may seek review from the U.S. Court of Appeals for the Federal Circuit—an Article III court. 5 C.F.R. § 1201.141; *see also* 5 U.S.C. § 7703.

151. MSPB Commissioners may be removed by the President only for “inefficiency, neglect of duty, or malfeasance in office.” 5 U.S.C. § 1202(d).

152. These removal provisions not only “protect[] [ALJ Young] from removal except for good cause,” but they also “withdraw[] from the President any decision on whether that good cause exists. That decision is vested instead in other tenured officers—the [MSPB, CPSC, and/or Federal Mine Safety and Health Review Commis-

sion] Commissioners—none of whom is subject to the President’s direct control.” *Free Enter. Fund*, 561 U.S. at 495; *see also id.* at 542 (Breyer, J., dissenting) (noting that ALJs “are all executive officers” that are “removable only for good cause established by the” MSPB, whose members are “themselves protected from removal by the President absent good cause.”) (cleaned up).

153. The “result is [an ALJ] that is not accountable to the President, and a President who is not responsible” for ALJ Young. *Free Enter. Fund*, 561 U.S. at 495.

154. As the Supreme Court explained,

The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection, even if the President determines that the officer is neglecting his duties or discharging them improperly. That judgment is instead committed to another officer, who may or may not agree with the President’s determination, and whom the President cannot remove simply because that officer disagrees with him. This contravenes the President’s ‘constitutional obligation to ensure the faithful execution of the laws.’

Free Enter. Fund, 561 U.S. at 484 (quoting *Morrison v. Olson*, 487 U.S. 654, 693 (1988)).

155. Accordingly, these multilevel for-cause removal protections “‘combine to eliminate any meaningful Presidential control over’” ALJ Young. *Free Enter. Fund*, 561 U.S. at 488 (quoting *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 697 (D.C. Cir. 2008) (Kavanaugh, J., dissenting), *rev’d in part*).

156. This arrangement “is contrary to Article II’s vesting of the executive power in the President.” *Free Enter. Fund*, 561 U.S. at 496.

157. The CPSC’s structure therefore violates the Separation of Powers, Article II, and the President’s obligation to take care that the laws be faithfully executed.

COUNT III

THE CPSC IS UNCONSTITUTIONALLY STRUCTURED (The CPSC’s Political-Affiliation Limit Violates U.S. CONST. art. II, § 2, cl. 2)

158. The preceding paragraphs are incorporated by reference.

159. Under the Appointments Clause, the President has the power, “by and with the Advice and Consent of the Senate,” to appoint principal officers of the United States. U.S. CONST. art. II, § 2, cl. 2.

160. The Constitution, outside the Appointments Clause, places no limitations on whom the President may nominate and appoint as principal officers of the United States.

161. CPSC Commissioners are principal officers of the United States.

162. Commissioners of the CPSC are appointed pursuant to 15 U.S.C. § 2053.

163. Under 15 U.S.C. § 2053(c), “Not more than three of the Commissioners shall be affiliated with the same political party.”

164. The “political party” limitation in Section 2053(c) unconstitutionally limits the President’s Appointments Clause power to nominate and appoint, by and with the advice and consent of the Senate, principal officers of the United States.

COUNT IV

THE COMMISSION’S IN-HOUSE PROCEEDING IS UNCONSTITUTIONAL

(The Commission Is Not Vested with the Judicial Power of the United States, and Its In-House Proceeding Therefore Violates U.S. CONST. art. III)

165. The preceding paragraphs are incorporated by reference.

166. The Constitution vests the “judicial Power of the United States in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1.

167. The Constitution does not vest judicial power of the United States in the executive branch.

168. Through its in-house action, *In re Leachco*, the Commission seeks an administrative order and judgment determining that Leachco’s products present a “substantial product hazard.”

169. Through its in-house action, *In re Leachco*, the Commission seeks an administrative order and judgment compelling Leachco to pay damages in the form

of refunds to purchasers and reimbursement costs to third parties arising out of any orders issued from the Commission.

170. The Commission seeks to deprive Leachco of private rights.

171. Before depriving Leachco's private rights, the Commission must follow common-law procedure—most fundamentally, through an Article III court. *See Stern v. Marshall*, 564 U.S. 462, 482–84 (2011).

172. Only courts of law, through the exercise of judicial power, may issue *judgments* and deprive private parties of private rights. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“A judicial Power is one to render dispositive judgments.”) (cleaned up).

173. The Presiding Officer of the Commission's in-house proceeding is Michael G. Young.

174. Mr. Young is an administrative law judge employed by the Federal Mine Safety and Health Review Commission and appointed as Presiding Officer of *In re Leachco, Inc.*, CPSC Docket No. 22-1.

175. The Consumer Product Safety Commission is not an Article III court.

176. The Consumer Product Safety Commission is not an Article III agency.

177. The Federal Mine Safety and Health Review Commission is not an Article III court.

178. The Federal Mine Safety and Health Review Commission is not an Article III agency.

179. ALJ Young is not an Article III judge.

180. The Commission's in-house proceeding is not heard or overseen by an Article III judge.

181. The Commission's in-house proceeding therefore violates Article III.

COUNT V

**THE COMMISSION’S IN-HOUSE
PROCEEDING IS UNCONSTITUTIONAL
(The CPSC’s In-House Proceeding Violates Leachco’s
Due Process Rights Under U.S. CONST. amend. V)**

182. The preceding paragraphs are incorporated by reference.

183. The Fifth Amendment to the United States Constitution provides that no person shall be “deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

184. The Due Process of Law Clause guarantees an independent judgment by an independent judge.

185. The “judicial Power of the United States” is vested exclusively “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. To help ensure independence, the “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” *Id.*

186. The Constitution does not vest the judicial power of the United States in the Executive Branch.

187. Through its in-house action, *In re Leachco*, the Commission seeks an administrative order and judgment—from itself—determining that Leachco’s products present a “substantial product hazard” and, as a result, that Leachco should pay damages in the form of refunds to purchasers and reimbursement costs to third parties arising out of any orders issued from the Commission.

188. The Commission seeks to deprive Leachco of private rights.

189. The government may not deprive any person of private rights except through common-law procedures—most fundamentally, through an Article III court. *See Stern*, 564 U.S. at 482–84.

190. Only courts of law, through the exercise of judicial power, may issue *judgments* and deprive private parties of private rights.

191. Before depriving Leachco's private rights, therefore, the Commission must follow common-law procedure and seek an independent judgment from an independent, Article III court.

192. Mr. Young is an administrative law judge employed by the Federal Mine Safety and Health Review Commission and appointed as Presiding Officer of *In re Leachco, Inc.*, CPSC Docket No. 22-1.

193. The Consumer Product Safety Commission is not an Article III court.

194. The Consumer Product Safety Commission is not an Article III agency.

195. The Presiding Officer of the Commission's in-house proceeding is Michael G. Young.

196. The Federal Mine Safety and Health Review Commission is not an Article III court.

197. The Federal Mine Safety and Health Review Commission is not an Article III agency.

198. ALJ Young is not an Article III judge.

199. The CPSC's in-house proceeding is not overseen by an independent, Article III judge.

200. Additionally, the Commission's procedures themselves preclude fair hearings.

201. The Commission acts as prosecutor, judge, and jury in its administrative proceeding against Leachco.

202. To the extent the Commission seeks to adopt new, substantive rules or regulations through in-house adjudicatory means, it also acts as a lawmaker.

203. The CPSC does not afford litigants the same procedural and evidentiary rights as federal courts do. For example, under Fed. R. Civ. P. 30, parties to a federal lawsuit may take up to 10 depositions without leave of court. But in proceedings before the Commission, parties may not take any depositions without "leave of the Presiding Officer" and only "under such terms and conditions as the Presiding Officer may prescribe." 16 C.F.R. § 1025.35(a).

204. Presiding Officers have more discretion over adjudicative proceedings and the parties than do Article III judges. For instance, while the Federal Rules of Evidence generally apply to Commission hearings, these rules “may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.” 16 C.F.R. § 1025.43(a).

205. Additionally, while the Commission is generally barred from interfering with adjudicative hearings, *see id.* § 1025.42(d) (“In the performance of adjudicative functions, a Presiding Officer shall not be responsible to or subject to the supervision or direction of any Commissioner”), the rule is not absolute: “All directions by the Commission to a Presiding Officer concerning any adjudicative proceedings shall appear on and be made a part of the record.” *Id.*

206. Similarly, it is the Commission—not the Presiding Officer or the parties to a proceeding—which decides whether subpoenas should issue to compel testimony or documents. 16 C.F.R. § 1025.38.

207. Finally, the Commissioners themselves approved the issuance of the administrative complaint in *In re Leachco, Inc.*, CPSC Docket No. 22-1; and the Commission itself will hear an appeal from Presiding Officer’s Young’s determination. 16 C.F.R. § 1025.53. Indeed, even if no appeal is filed from a Presiding Officer’s initial decision, the Commission may unilaterally decide to review. *Id.* § 1025.54.

208. Similarly, the Commission “may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States,” but a Commissioner “who participates in such a hearing or other inquiry *shall not be disqualified* solely by reason of such participation from subsequently participating in a decision of the Commission *in the same matter.*” 15 U.S.C. § 2076(a) (emphasis added).

209. The Commission’s proceedings thus violate the ancient maxim—protected by the Due Process Clause—*nemo iudex in causa sua* (“no one should be a judge in his own cause”). *See The Federalist No. 10* (“No man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and not improbably, corrupt his integrity.”) (Madison).

210. The Commission's in-house proceeding, *In re Leachco*, violates the Constitution's Due Process of Law Clause and thus violates Leachco's due process rights.

COUNT VI

THE COMMISSION'S IN-HOUSE PROCEEDING IS UNCONSTITUTIONAL

(The CPSC's In-House Proceeding Violates Leachco's Right to a Jury under U.S. CONST. amend. VII)

211. The preceding paragraphs are incorporated by reference.

212. The Seventh Amendment to the Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. CONST. amend. VII.

213. Claims analogous to common law claims that existed at the time of the Seventh Amendment's ratification require a jury. *Curtis v. Loether*, 415 U.S. 189, 194 (1974).

214. Claims that seek legal remedies require a jury. *Tull v. United States*, 481 U.S. 412, 418–22 (1987).

215. Accordingly, it is "settled law" "that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'sound basically in tort,' and seek legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (cleaned up).

216. In its in-house administrative action, the Commission alleges that the Podster® presents a "substantial product hazard."

217. The Commission's claim is essentially a product-liability claim sounding in traditional tort law; that is, the Commission's claim sounds basically in tort. *See City of Monterey*, 526 U.S. at 729 (Scalia, J., concurring) (noting "[c]ommon-law tort actions" implicate the Seventh Amendment).

218. The Commission also seeks legal damages. It seeks an order compelling Leachco to pay damages to Podster® buyers and to reimburse third parties, such as retailers, who may incur costs arising out of the Commission's order.

219. Accordingly, Leachco is entitled to a jury trial in connection with the Commission's claim that the Podster® presents a substantial product hazard.

220. The Commission's failure to afford Leachco a jury trial violates Leachco's Seventh Amendment right to a jury.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Leachco, Inc. prays for relief as follows:

1. An order declaring that, because the President may not remove Commissioners from office except for cause, the Commission's structure violates Article II of the Constitution.

2. An order declaring that, because the Presiding Officer of Commission hearings enjoys multilevel removal protections, the Commission's structure violates Article II of the Constitution.

3. An order declaring that, because the Consumer Product Safety Act requires that three of the five Commissioners shall not be affiliated with the same political party, the Commission's structure violates Article II of the Constitution.

4. An order declaring that, because the judicial power of the United States is vested solely in the judicial branch, the Commission's proceedings pursuant to 15 U.S.C. § 2064 violate Article III of the Constitution.

5. An order declaring that the Commission's proceedings violate the Due Process Clause of the Fifth Amendment to the Constitution.

6. An order declaring that the Commission's proceedings violate the Seventh Amendment to the Constitution.

7. An order striking the removal restriction in 15 U.S.C. § 2053(a).

8. An order striking the removal restriction in 5 U.S.C. § 7521, at least when an administrative law judge is employed by or appointed to an executive agency whose head or heads are themselves protected from removal except for cause.

9. A preliminary and permanent injunction enjoining the Commission from continuing its administrative proceeding in *In re Leachco, Inc.*, CPSC Docket No. 22-1.

10. An award of reasonable attorney fees and costs, pursuant to 42 U.S.C. § 1988 or any other applicable authority.

11. All other relief the Court deems just and proper.

Date: August 17, 2022

Respectfully submitted,

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jkerkhoff@pacifical.org
fgarrison@pacifical.org

**Pro Hac Vice Motion to be filed*

Attorneys for Plaintiff Leachco, Inc.

DECLARATION

I, JAMIE LEACH, hereby declare as follows:

My husband Clyde Leach and I founded Leachco, Inc., the plaintiff in this action.

I have read the Verified Complaint for Injunctive and Declaratory Relief and know its contents. The facts alleged in this matter are within my own personal knowledge, and I know these facts to be true, except for matters stated on information and belief, and I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct. This Declaration was executed this 16th day of August, 2022, in Ada, Oklahoma.



JAMIE LEACH



United States
Consumer Product Safety Commission
cpsc.gov | info@cpsc.gov | 800.638.2772

Record of Commission Action
Commissioners Voting by Ballot*

Commissioners Voting: Chair Alexander D. Hoehn-Saric
Commissioner Dana Baiocco
Commissioner Peter A. Feldman
Commissioner Richard Trumka Jr.

ITEM:

Vote to Issue Administrative Complaint Against Leachco, Inc.
(Briefing package dated February 8, 2022, OS No. 0111)

DECISION:

The Commission voted (3-1) to authorize issuance of a Complaint, attachment B of the briefing package, against Leachco, Inc., seeking mandatory remedies under section 15(c) and (d) of the Consumer Product Safety Act ("CPSA"), for certain infant products manufactured by Leachco. Included in the complaint are products alleged to present a substantial product hazard: the Podster, Podster Plush, Bummzie and Podster Playtime infant loungers ("Subject Products"). The CPSA defines a substantial product hazard at 15 U.S.C. § 2064(a)(2).

Chair Hoehn-Saric, Commissioners Feldman and Trumka voted to authorize issuance of the Complaint. Commissioners Feldman and Trumka filed statements with their votes.

Commissioner Baiocco voted to take other action as follows:

"File the Complaint once staff has appropriate data to support the action. Pleading that the product is not marketed for sleep, that parents do not use the product as intended and in direction contravention of the warnings, calls into question the legal sufficiency of the Complaint."

For the Commission:

ALBERTA MILLS

Alberta Mills
Secretary

Digitally signed by ALBERTA
MILLS

Date: 2022.02.09 15:22:01 -05'00'

**U.S. Consumer Product
Safety Commission**
4330 East-West Highway
Bethesda, MD 20814

**National Product Testing
& Evaluation Center**
5 Research Place
Rockville, MD 20850



United States
Consumer Product Safety Commission
cpsc.gov | info@cpsc.gov | 800.638.2772

*Ballot vote due February 9, 2022, at 12:00p.m.

Attachments:

Statement by Commissioner Feldman
Statement by Commissioner Trumka

**U.S. Consumer Product
Safety Commission**
4330 East-West Highway
Bethesda, MD 20814

**National Product Testing
& Evaluation Center**
5 Research Place
Rockville, MD 20850



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER PETER A. FELDMAN

**STATEMENT OF COMMISSIONER PETER A. FELDMAN
ON VOTE TO ISSUE ADMINISTRATIVE COMPLAINT AGAINST LEACHO, INC.
FEBRUARY 9, 2022**

Today, the United States Consumer Product Safety Commission (CPSC) voted to issue an administrative complaint in a case where the Commission has reason to believe that the product at issue presents a substantial product hazard. This complaint follows the Commission's issuance of a [safety warning](#) about the product and a Health and Safety Finding to shorten the notice period required under our statute.

For too long, CPSC has not used all of the tools available to it when dealing with product safety enforcement matters. The Consumer Product Safety Act enables the Commission to provide unilateral warnings and also to litigate mandatory product recalls. Consumers deserve transparency about known product hazards. Consumers also deserve products that are safe. Companies deserve an opportunity to defend themselves in court.

I have long advocated that the Commission use its full complement of resources to protect American consumers. In my view, if a matter is serious enough for the Commission to issue a Health and Safety Finding to truncate the 6(b) process, it may be necessary to pair such public warnings with administrative litigation, as we have done here.



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814

COMMISSIONER RICH TRUMKA JR.

**STATEMENT OF COMMISSIONER RICH TRUMKA JR. ON APPROVAL OF
ADMINISTRATIVE SUIT AGAINST LEACHCO, INC., MAKER OF THE PODSTER
AND BUMMZIE INFANT LOUNGERS**

February 9, 2022

Today, the Commission voted in favor of agency staff suing Leachco to force a recall of its Podster and Bummzie infant loungers. There is a reasonable basis to believe that CPSC staff can prove that the loungers present a substantial product hazard.

Today's suit should be a signal that this Commission is serious about protecting consumers. When companies refuse to recall products deemed deadly by CPSC staff, they should expect an administrative complaint to quickly follow.

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	
Respondent.)	
)	

COMPLAINT

Nature of the Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act (“CPSA”), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risks of injury presented by various models of infant lounging pillows (“Podsters”) which were manufactured and distributed by Leachco, Inc. (“Respondent”).

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission (the “Commission”), 16 C.F.R. Part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d), and (f) of the CPSA, 15 U.S.C. § 2064(c), (d), and (f).

Parties

4. Complaint Counsel consists of attorneys in the Division of Enforcement and Litigation within the Office of Compliance and Field Operations representing the staff of the

Commission. 16 C.F.R. § 1025.3(d). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA. 15 U.S.C. § 2053.

5. Respondent is an Oklahoma corporation with its principal place of business located at 130 E. 10th Street, Ada, Oklahoma.

6. Upon information and belief, Respondent is a “manufacturer” and/or “distributor” of a “consumer product” that is “distribute[d] in commerce,” as those terms are defined in Sections 3(a)(5), (7), (8), and (11) of the CPSA, 15 U.S.C. § 2052(a)(5), (7), (8), and (11).

The Podsters

7. The Podsters consist of various models of infant lounging pillows that were manufactured and/or distributed in U.S. commerce and offered for sale to consumers for their personal use in or around a permanent or temporary household or residence, school, in recreation, or otherwise.

8. The Podsters are manufactured at Respondent’s facilities in Ada, Oklahoma.

9. Upon information and belief, the Podsters include, but are not limited to, the following models: Podster, Podster Plush, Bummzie, and Podster Playtime.

10. Upon information and belief, approximately 180,000 Podsters have been manufactured and distributed in U.S. commerce since 2009. The Podster and Podster Plush models have been sold from 2009 to present; the Bummzie was sold exclusively at Walmart from 2010 to 2018; and the Podster Playtime was sold from 2014 to 2017.

11. Upon information and belief, the retail price for the Podsters ranges from approximately \$49 and \$89.

12. The Podsters are sold at various retail chains including, but not limited to, Amazon.com, Bed Bath and Beyond, Buy Buy Baby, Kohls, Macy’s, Toys R Us/Babies R Us,

and Walmart.

13. The Podster is a product marketed for caregivers to use for infant lounging and to “provide[] a warm and cozy caress for infants.” It was designed to permit a caregiver to keep an infant in a safe environment, allowing for hands-free supervision.

14. The Podster is not and has never been advertised by Respondent as a sleep product.

15. The Podster contains warnings that the product should not be used for sleep and that adult supervision is always required.

16. The Podster contains warnings that the product should only be used on the floor, and not in another product, such as a crib, on a bed, table, playpen, counter, or any elevated surface.

17. The Podster contains warnings that infants should not be placed prone or on their side in the product.

18. The Podster contains instructions that it should be used for infants not to exceed 16 pounds, and should not be used if an infant can roll over.

19. The Podster contains warnings and instructions that use of the product in contravention to these warnings could result in serious injury or death.

The Podsters’ Defects Create a Suffocation Hazard

20. Despite the warnings and instructions, it is foreseeable that caregivers will use the Podster without supervision. It is also foreseeable that caregivers will use the Podster for infant sleep.

- a. The Podsters are marketed for use with infants, and caregivers may trust that the products are safe places to leave infants. Because the Podsters appear simple to use, are likely to be used frequently, and do not appear dangerous, it

is foreseeable that some caregivers may disregard or not fully read the Podsters' warnings.

- b. If an infant falls asleep in the Podster, a caregiver may choose not to disturb the infant and may leave the infant asleep in the product.
- c. Caregivers facing difficulties in getting their infant to sleep may choose to use the Podster for that purpose if the Podster appears to help with sleep or if the infant appears to be comfortable in the Podster, even if the caregiver is aware of the contrary product warnings.
- d. Caregivers with an infant who are traveling or who are dealing with significant financial hardship may be more likely to allow an infant to sleep in the Podster, as they may not have a crib or safe infant sleep product readily available.
- e. If an infant falls asleep in the Podster, it is foreseeable that the caregiver may intentionally sleep while the infant is asleep, may accidentally fall asleep while the infant is asleep, may use the time that the infant is asleep to catch up on work or chores, or otherwise may leave the infant unsupervised.

21. Unsupervised infants can roll or move on the Podster into a position where their nose and mouth are obstructed by the Podster.

22. Unsupervised infants can roll or move off the Podster into a position where their nose and mouth are obstructed by another object, such as soft bedding.

23. Despite warnings and instructions, some caregivers may not place infants on their backs in the Podster and may place infants in positions where their nose and mouth may be obstructed by the Podster.

24. The Podster is defective because it can cause airflow obstruction if an unsupervised infant rolls, moves, or is placed in a position where the infant's nose and mouth

are obstructed by the Podster.

25. The Podster is defective because it is constructed of thick, soft padding that has a concave shape which can envelop an infant's face and cause airflow obstruction if an unsupervised infant rolls, moves, or is placed in a position where the infant's nose and mouth are obstructed by the Podster.

26. The Podster is defective because it lacks rigid underlying components, which can impede the ability of an infant to self-rescue in the event that the infant rolls, moves, or is placed in a position where the infant's nose and mouth are obstructed by the Podster.

27. The Podster is defective because it facilitates an infant's movement on the Podster, enhancing the risk that the infant's nose and mouth will be obstructed by the Podster.

28. The Podster is defective because it facilitates an infant's movement off the Podster, enhancing the risk that the infant's nose and mouth will be obstructed by another object in the infant's environment, such as soft bedding.

29. The design of the Podster allows infants to bend their knees and push off the raised edges of the Podster with their feet, allowing an infant to roll or move on or off the Podster.

30. The Podster may allow an infant to roll, even if the infant is not able to roll on a flat surface, such as in a crib or bassinet.

31. The Podster's design also can lead to unsafe bedsharing where the infant sleeps in an adult bed with one or more adult caregivers.

32. The Podster may be attractive to caregivers who wish to bedshare with an infant because it is soft and portable, and caregivers may believe that the product's high sides will act as a sufficient barrier between the adult and the infant to keep the infant secure in the

Podster.

33. Bedsharing with an infant in a Podster can result in an infant moving into a compromised position within the Podster and suffocating, or moving outside the Podster and suffocating on another person or object, such as soft bedding or the adult bed.

34. If an infant rolls, moves, or is placed in a position where the infant's nose and mouth are obstructed by the Podster or another object, such as soft bedding, the infant can suffocate and die in three to 10 minutes.

Fatal Incidents Caused by the Podsters

35. The Podster's defects have led to the deaths of at least two infants.

36. Upon information and belief, on or about December 16, 2015, a 4-month-old infant suffocated after being placed face-up or on their side in the Podster in a crib. The infant was found face-down on the Podster and later died of complications from asphyxia.

37. Upon information and belief, on or about January 27, 2018, a 17-day-old infant suffocated after being placed face up in the Podster on an adult bed between two caregivers. Upon information and belief, the infant had moved off the Podster onto the adult bed after one of the caregivers rolled onto the Podster and infant.

The Substantial Risk of Injury Posed by the Podsters

38. It is foreseeable that caregivers will use the Podster for infant sleep, despite the instructions and warnings. It is also foreseeable that caregivers will use the Podster without supervision.

39. It is foreseeable that some caregivers will not place infants on their backs in the Podster.

40. It is foreseeable that caregivers will place infants in Podsters and use the Podster for bedsharing in an adult bed.

41. If an infant rolls, moves, or is placed in a position where the infant's nose and

mouth are obstructed by the Podster itself or by another object or person with whom the infant is bedsharing, the infant may not be able to self-rescue and can suffocate within minutes.

42. Upon information and belief, at least two infants, members of a vulnerable population, have suffocated and died after being placed in the Podster for unsupervised sleep.

Legal Authority Under the CPSA

43. Under the CPSA, the Commission may order a firm to provide notice to the public and take remedial action if the Commission determines that a product “presents a substantial product hazard.” 15 U.S.C. § 2064(c) and (d).

44. Under CPSA Section 15(a)(2), a “substantial product hazard” is “a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2).

45. A product may contain a design defect even if it is manufactured exactly in accordance with its design and specifications if the design presents a risk of injury to the public. *See* 16 C.F.R. § 1115.4.

46. A defect can also occur in a product’s contents, construction, finish, packaging, warnings, or instructions.

47. In assessing whether a product contains a defect, the Commission may consider a consumer’s foreseeable use or misuse of the product. *See* 16 C.F.R. § 1115.4.

Count I

The Podsters Are a Substantial Product Hazard Because They Contain Defects That Create a Substantial Risk of Injury to the Public

48. Paragraphs 1 through 47 are hereby realleged and incorporated by reference as if fully set forth herein.

49. The Podsters are consumer products.

50. The Podsters contain defects because it is foreseeable that caregivers will use the product for infant sleep and it is foreseeable that caregivers will leave infants unattended in the product, and:

- a. The Podster can cause airflow obstruction leading to suffocation if an infant rolls, moves, or is placed in a position where their nose and mouth are obstructed by the Podster;
- b. The design of the Podster prevents infants from self-rescuing once their nose and mouth are obstructed by the Podster;
- c. The design of the Podster facilitates infant movement on the Podster, which can result in an infant's nose and mouth becoming obstructed by the Podster;
- d. The design of the Podster facilitates movement off the Podster, which can result in an infant's nose and mouth being obstructed by another object in the infant's environment, such as soft bedding; and
- e. The design of the Podster may lead to it being used for bedsharing, which can facilitate an infant's rolling off the product onto an adult bed, leading to the infant's nose and mouth being obstructed by another object or an individual sleeping in the bed.

51. These defects separately, and in combination, create a substantial risk of injury to infants because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise.

52. Therefore, the Podsters present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

RELIEF SOUGHT

WHEREFORE, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that the Podsters present a “substantial product hazard” within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect the public from the substantial product hazard presented by the Podsters, and order Respondent under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), to:

(1) Notify all persons who sell or distribute the Podsters, or to whom such Podsters have been sold or distributed, to immediately cease distribution of the Podsters;

(2) Notify appropriate state and local public health officials;

(3) Give prompt public notice of the defect in the Podsters, including the incidents and injuries associated with the use of the Podsters, including posting clear and conspicuous notice on Respondent’s website, and providing notice to any third-party website on which Respondent has a presence, and provide further announcements in languages other than English and on radio, television, and social media;

(4) Mail and email notice to each distributor and retailer, of the Podsters;
and

(5) Mail and email notice to every person to whom the Podsters were delivered or sold.

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest and additionally order Respondent to:

(1) Refund the purchase price of the Podster;

(2) Reimburse distributors, retailers, and any other third parties

for expenses in connection with carrying out any Commission Order issued in this matter, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(3) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (5), above and C(1) through (2) be taken in a timely manner;

(4) Submit monthly reports, to the Commission, documenting the progress of the corrective action program ordered pursuant to this matter;

(5) For a period of five (5) years after issuance of the Final Order in this matter, keep records of its actions taken to comply with Paragraphs B(1) through (5), C(1) through (4), above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order; and

(6) For a period of five (5) years after issuance of the Final Order in this matter, notify the Commission at least sixty (60) days prior to any change in its business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter.

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D. Order that Respondent take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

ALBERTA MILLS Digitally signed by ALBERTA MILLS
Date: 2022.02.09 15:32:24 -05'00'

Dated this 9th day of February 2022

ROBERT KAYE Digitally signed by ROBERT
KAYE
Date: 2022.02.09 16:03:33
-05'00'

By: Robert Kaye
Assistant Executive Director
Office of Compliance and Field Operations
(301) 504-6960

Mary B. Murphy, Director, Division of Enforcement and Litigation
Leah Ippolito, Supervisory Attorney
Brett Ruff, Trial Attorney
Rosalee Thomas, Trial Attorney

Complaint Counsel
Office of Compliance and Field Operations
U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7809

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of)	
)	
)	
LEACHCO, INC.)	CPSC DOCKET NO. 22-1
)	
)	
Respondent.)	

LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

Pursuant to 16 C.F.R. § 1025.11(b)(3) of the Commission’s Rules of Practice for Adjudicative Proceedings, the following is a list and summary of documentary evidence supporting the charges in this matter. Complaint Counsel reserves the right to offer additional or different evidence during the course of the proceedings, or to withhold evidence on the basis of any applicable legal privileges.

1. Claims, complaints, records, reports, CPSC’s In-Depth Investigations, and lawsuits concerning incidents or injuries involving infant lounging pillows manufactured and distributed by Respondent Leachco, Inc. (“Podsters”).
2. CPSC Product Safety Assessments.
3. Correspondence between Respondent and CPSC staff related to the Podsters.
4. Documents and information related to the Podsters, including notices issued regarding the Podsters and similar products.

Dated this 9th day of February 2022

Mary B. Murphy

Mary B. Murphy, Director, Division of Enforcement
and Litigation

Leah Ippolito, Supervisory Attorney

Brett Ruff, Trial Attorney

Rosalee Thomas, Trial Attorney

Complaint Counsel

Office of Compliance and Field Operations

U.S. Consumer Product Safety Commission

Bethesda, MD 20814

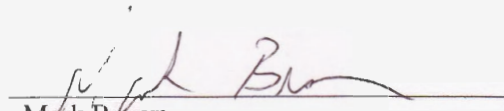
Tel: (301) 504-7809

CERTIFICATE OF SERVICE

I hereby certify that on February 10, 2022, I served the foregoing Complaint and List and Summary of Documentary Evidence upon all parties of record in these proceedings by delivering them in person to the following individual:



Leachco, Inc.
130 E 10th Street
Ada, OK 74820



Mark Brown
Product Safety Investigator
U.S. Consumer Product Safety Commission

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950
FAX: 202-434-9949

April 4, 2022

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

ORDER SCHEDULING PREHEARING CONFERENCE

This proceeding commenced with the filing of a complaint on February 9, 2022. The complaint was published in the Federal Register on February 16, 2022. 87 Fed. Reg. 8,733, 8,804 (Feb. 16, 2022). An interagency agreement for the loan of my services to the Consumer Product Safety Commission was finalized on February 25, 2022. On March 17, 2022, the Chair of the CPSC appointed me as the presiding officer for this proceeding.

Under 16 C.F.R. § 1025.21, an initial prehearing conference shall be held within fifty days of the publication of the complaint in the Federal Register unless “unusual circumstances would render it impractical or valueless” to do so. Due to the timing of my appointment and the public notice requirement, holding a prehearing conference within fifty days of publication is impossible, and therefore impractical. A prehearing conference shall be held as follows:

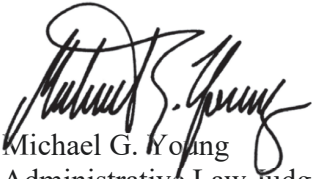
Date: Friday, April 22, 2022

Time: 1:00 p.m. Eastern Time

Means: Zoom [link provided to those listed in Distribution]

Before the prehearing conference, the parties must confer and discuss the issues listed in 16 C.F.R. § 1025.21(a)(1) through (14). The parties should also discuss a plan for discovery and whether there are issues as to preservation, retrieval, review, disclosure, or production of discoverable information, including issues as to the disclosure or discovery of electronically stored information. The parties should have prepared for the conference, a summary of their discussion as well as proposed procedures and deadlines. The parties should also report whether they have discussed settlement and, if so, whether they believe settlement is possible or likely.

The CPSC should arrange for a court reporter for the prehearing conference. I direct that notice of this conference be published in the Federal Register. 16 C.F.R. § 1025.21(b) (2022).


Michael G. Young
Administrative Law Judge

Distribution:

Leah Ippolito, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, lippolito@cpsc.gov

Brett Ruff, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, bruff@cpsc.gov

Rosalee Thomas, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, rbthomas@cpsc.gov

Caitlin O'Donnell, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, codonnell@cpsc.gov

Cheryl A. Falvey, Crowell & Moring LLP, 1001 Pennsylvania Avenue, NW, Washington, DC 20004, cfalvey@crowell.com

Bettina J. Strauss, Bryan Cave Leighton Paisner LLP, One Metropolitan Square, 211 North Broadway, Suite 3600, St. Louis, MO 63102, bjstrauss@bclplaw.com

Nina E. DiPadova, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, ndipadova@cpsc.gov

Alberta E. Mills, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, amills@cpsc.gov

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

<p>LEACHCO, INC.,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p>v.</p> <p>CONSUMER PRODUCT SAFETY COMMISSION, <i>et al.</i>,</p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>Case No. 22-CV-232-RAW</p>
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ORDER

This matter comes before the court on the Motion for Preliminary Injunction [Dkt. No. 9] of Plaintiff Leachco, Inc. (“Leachco), which seeks the issuance of a preliminary injunction to prevent the Consumer Product Safety Commission (“Commission”) from proceeding with an administrative action the Commission filed against Leachco.¹ For the reasons set forth below, the court denies this motion.

BACKGROUND

The Commission is an executive regulatory agency authorized to enforce, among other laws, the Consumer Product Safety Act. *See* 15 U.S.C. §§ 2051, *et seq.* It is headed by five commissioners, no more than three of whom may be affiliated with the same political party. *Id.*, § 2053(a), (c). Each commissioner is appointed by the President and “may be removed by the President for neglect of duty or malfeasance in office but for no other cause.” *Id.*, § 2053(a).

¹ The court additionally reviewed Leachco’s Memorandum in Support of Motion for Preliminary Injunction [Dkt. No. 10]; Notice of Order Issued in Related Administrative Proceeding [Dkt. No. 38]; Defendants’ Opposition to Plaintiff’s Motion for Preliminary Injunction [Dkt. No. 39]; Leachco’s Reply in Support of Motion for Preliminary Injunction [Dkt. No. 40]; Notice of Commission Order Issued in Related Administrative Proceeding [Dkt. No. 41]; and Defendants’ Response to Plaintiffs’ Notice of Commission Order [Dkt. No. 44].

The Commission conducts formal adjudicatory hearings pursuant to the Administrative Procedure Act. Each Commission hearing is overseen by an administrative law judge (“ALJ”). An ALJ may be removed from his or her position in an action initiated “by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.” 5 U.S.C. § 7521(a). Members of the Merit Systems Protection Board, in turn, may be removed by the President “only for inefficiency, neglect of duty, or malfeasance in office.” *Id.*, § 1202(d).

Leachco is an Oklahoma corporation which designs, manufactures, and sells a variety of products, including an infant lounger called the “Podster.” Two incidents involving Podsters have resulted in an infant’s death. On February 9, 2022, the Commission authorized the issuance of an administrative complaint against Leachco, alleging the Podster presents a “substantial product hazard.” *See* 15 U.S.C. § 2064.

Leachco subsequently filed the present action, seeking declaratory and injunctive relief. It asserts six causes of action. The first three causes of action allege the Commission’s structure violates Article II, § 2 of the United States Constitution, and challenge: (1) the commissioners’ for-cause removal protection, (2) the ALJ’s multilevel removal protection, and (3) the commissioners’ political-affiliation limit. The final three causes of action challenge the Commission’s administrative action against Leachco, and allege it (4) violates Article III of the Constitution because the Commission is not vested with the judicial power of the United States, (5) violates the Fifth Amendment because it denies Leachco due process, and (6) violates the Seventh Amendment because it denies Leachco its right to a jury. Here, Leachco seeks a preliminary injunction to prevent the Commission from proceeding with the administrative action.

LEGAL STANDARD

Federal Rule of Civil Procedure 65(a)(1) authorizes the court to grant a preliminary injunction, and the party seeking a preliminary injunction must establish: (1) it is likely to suffer irreparable harm in the absence of preliminary relief; (2) it is likely to succeed on the merits; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The first element, a showing of likely irreparable harm, “is the single most important prerequisite for the issuance of a preliminary injunction.” *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1260 (10th Cir. 2004). As a consequence, “the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered.” *Id.*

The “preliminary injunction is an extraordinary remedy.” *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019). It should only be granted when “the right to relief [is] clear and unequivocal.” *Schrier v. Univ. of Co.*, 427 F.3d 1253, 1258 (10th Cir. 2005); *see also United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888–889 (10th Cir. 1989) (“Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established.”).

ANALYSIS

The court concludes Leachco is not entitled to a preliminary injunction because it has not shown it “is likely to suffer irreparable harm in the absence of preliminary relief.” *See Planned Parenthood Ass'n of Utah*, 828 F.3d at 1252. The concept of “irreparable harm does not readily lend itself to definition,” but “a plaintiff must demonstrate a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages.” *Fish v. Kobach*,

840 F.3d 710, 751–52 (10th Cir. 2016) (internal quotations marks omitted). Even harm that is “serious” or “substantial” is not sufficient. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Instead, the harm must be “certain,” “great,” and “actual.” *Id.* The movant is required to “show that the injury complained of is of such imminence that there is a clear and present need for equitable relief.” *Id.* at 1189. For example, irreparable harm was likely to occur where a proposed development was likely to kill bald eagles and damage their nesting territories. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1252, 1258 (10th Cir. 2003). It is “not an easy burden to fulfill.” *Id.* at 1250.

Leachco has failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction. It identifies two categories of harm which it alleges are likely and irreparable. First, it claims the Commission’s structural separation-of-powers violations inflict “here-and-now” constitutional injuries that continue so long as the administrative action proceeds. It relies on *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019) and *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) for this proposition. In the former case, the Tenth Circuit held in admittedly broad language, “What 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.” *Free the Nipple-Fort Collins*, 916 F.3d at 806. In a subsequent case addressing this passage, however, the court clarified it was referencing *individual* constitutional rights:

[Movant] has not cited a single case where a generalized separation of powers, by itself, constituted irreparable harm. To the contrary, 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.

Aposhian v. Barr, 958 F.3d 969, 990 (10th Cir. 2020). Like the movant in *Aposhian*, Leachco alleges structural, separation-of-powers violations, principally focused on the President’s ability to remove executive branch officers. A separation of powers violation does not establish irreparable harm.²

In the latter case Leachco relies on, *Selia*, the Court considered a challenge to removal restrictions on the head of the Consumer Financial Protection Bureau. 140 S. Ct. at 2191. It held that “when such a provision violates the separation of powers it inflicts a ‘here-and-now’ injury on affected third parties that can be remedied by a court.” *Id.* at 2196. It made that statement, however, in considering a challenge to the plaintiff’s *standing*. *Id.* at 2195. The case did not in any way involve a preliminary injunction. *Selia* does not stand for the proposition that a party allegedly harmed by a separation-of-powers issue is injured such that they may obtain a preliminary injunction against that harm. The Commission’s alleged separation-of-powers violations are not likely to inflict irreparable harm.

The second category of irreparable harm identified by Leachco is the time and expense of litigation. The Supreme Court, however, has long recognized that “[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.” *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980). As noted above, irreparable harm is “harm that cannot be compensated after the fact by money damages.” *Fish*, 840 F.3d at 751–52. Quantifiable litigation expenses, therefore, cannot satisfy this standard. *See Heideman*, 348 F.3d at 1189 (“It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable

² In both the Memorandum and Reply in support of its motion, Leachco references only the constitutional violations pertaining to separation of powers when arguing it will be subject to irreparable harm. It does not assert the alleged Fifth Amendment or Seventh Amendment violations are likely to cause irreparable harm. Even if, however, the court were to consider those alleged violations, it would still decline to issue an injunction. It has found no authority for the proposition that an administrative action before an ALJ without a jury constitutes irreparable harm such that it must be enjoined.

harm; such losses are compensable by monetary damages.”). Any expense Leachco incurs in the Commission’s administrative action does not constitute irreparable harm. *See Stifel, Nicolaus & Co. v. Woolsey & Co.*, 43 F.3d 1483, at *2 (10th Cir. 1994) (unpublished) (holding that litigation expenses incurred in state court action did not constitute irreparable harm for the purpose of enjoining the state court action).

In sum, neither the Commission’s alleged structural separation-of-powers violations nor the litigation expenses attendant to the administrative action are likely to inflict irreparable harm on Leachco. It has therefore failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction. This failure in and of itself prevents issuance of the injunction. Where the movant “fail[s] to meet its burden of showing a significant risk of irreparable injury,” a court “need not address the remaining preliminary injunction factors.” *New Mexico Dep’t of Game & Fish v. United States Dep’t of the Interior*, 854 F.3d 1236, 1249 (10th Cir. 2017). Accordingly, the court does not address whether Leachco is likely to succeed on the merits, whether the balance of equities tips in its favor, or whether an injunction is in the public interest.

Lastly, the court notes Defendants spent a large portion of their Response brief discussing the Administrative Procedure Act and asserting Leachco may not seek interlocutory review of ongoing Commission proceedings. *See* 5 U.S.C. § 704 (providing that only final agency action is subject to judicial review). Defendants, however, never specify how these procedural issues pertain to the Motion for Preliminary Injunction. They acknowledge the issues might be the basis of a motion to dismiss, but do not ask the court to take any action in response. *See Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1028 (10th Cir. 2017) (“The NIGC moved to dismiss on the ground that the letter did not constitute final agency action.”). Because the Administrative

Procedure Act issues presented in the briefing do not impact the court's resolution of the Motion for Preliminary Injunction, it does not address them here.

CONCLUSION

For the reasons set forth above, Plaintiff Leachco, Inc.'s Motion for Preliminary Injunction of [Dkt. No. 9] is **DENIED**.

IT IS SO ORDERED this 29th day of November, 2022.



THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

LEACHCO, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, *et al.*,

Defendants,

Case No. CIV-22-232-RAW

ORDER

On November 29, 2022, finding that Leachco failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction, this court entered an Order denying Leachco's motion for preliminary injunction. Leachco filed a notice of appeal on December 5, 2022 and a motion for injunction pending appeal on December 6, 2022.

Now before the court is the Commission's motion to stay litigation or, in the alternative, to extend the Rule 12 response deadline [Docket No. 54] and Leachco's response in opposition thereto [Docket No. 56]. In opposition to the Commission's motion, Leachco argues that the court should *both* stay these proceedings *and* enjoin the Commission's administrative action pending appeal, or in the alternative, expedite these proceedings. The court "has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). Of course, the court considers potential prejudice to the non-moving party and "the economy of time and effort for itself, for counsel, and for litigants." *Landis*, 299 U.S. at 254.

As the court has previously found, Leachco has failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction preventing the Commission from proceeding with the administrative action against Leachco. Moreover, as the Commission argues, Leachco's appeal may implicate the same issues that will be addressed here in future proceedings, and a stay would avoid potentially duplicative briefing and conserve the resources of both the parties and the court.

Accordingly, the Commission's motion to stay [Docket No. 54] is hereby granted. This action is hereby stayed pending appeal. Leachco's motion for injunction pending appeal [Docket No. 53] is hereby denied.

IT IS SO ORDERED this 8th day of December, 2022.

A handwritten signature in cursive script that reads "Ronald A. White".

**THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA**

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA**

LEACHCO, INC.,

Plaintiff,

v.

**CONSUMER PRODUCT SAFETY
COMMISSION, ET AL.,**

Defendants.

Case No. 6:22-cv-00232-RAW

NOTICE OF APPEAL

Plaintiff Leachco, Inc. hereby appeals, pursuant to 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the Tenth Circuit from the Order of the District Court, entered on November 29, 2022 (ECF No. 49), denying Plaintiff's motion for a preliminary injunction.

DATED: December 5, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing which sent notice of electronic filing to the following:

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FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

January 30, 2023

Christopher M. Wolpert
Clerk of Court

LEACHCO, INC.,

Plaintiff - Appellant,

v.

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;
RICHARD TRUMKA, Commissioner of
the Consumer Product Safety Commission,

Defendants - Appellees.

No. 22-7060
(D.C. No. 6:22-CV-00232-RAW)
(E.D. Okla.)

ORDER

Before **HARTZ** and **MATHESON**, Circuit Judges.

Leachco, Inc., is a respondent in an ongoing administrative proceeding before the Consumer Product Safety Commission. It sought a preliminary injunction in district court to enjoin the administrative proceeding on the ground that the Commission is unconstitutionally structured. The district court denied the motion and Leachco appealed that ruling. The matter is before us on Leachco’s motion for an injunction prohibiting the

Commission from continuing the administrative proceeding pending appeal. The Commission opposes the motion.

We evaluate a motion for an injunction pending appeal using the preliminary injunction standard. *See Homans v. City of Albuquerque*, 264 F.3d 1240, 1243 (10th Cir. 2001). Thus, Leachco “must establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). “As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.” *Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005) (internal quotation marks omitted).

Leachco has failed to meet that burden. Accordingly, we deny its motion for an injunction pending appeal. We also deny Leachco’s alternative request to expedite the appeal.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', written over a horizontal line.

CHRISTOPHER M. WOLPERT, Clerk

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. Ziriox*, 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 Jarkey*, 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 lower 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.

DATED: February 6, 2023.

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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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No. 22-7060

**UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

LEACHCO, INC.,

Plaintiff–Appellant,

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,

Defendants–Appellees.

On Interlocutory Appeal from the United States District Court
for the Eastern District of Oklahoma

No. 6:22-cv-00232-RAW

**PLAINTIFF-APPELLANT LEACHCO, INC.’S
MOTION FOR INJUNCTION PENDING APPEAL**

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INTRODUCTION

The Supreme Court’s recent unanimous decision in *Axon Enterprise, Inc. v. FTC*, confirms three things: (1) Appellant Leachco, Inc., by “being subjected to unconstitutional agency authority,” is suffering irreparable harm; (2) Leachco properly sued Appellee Consumer Product Safety Commission in federal court to challenge the Commission’s unconstitutional authority; and (3) unless the Commission’s administrative proceeding against Leachco is enjoined, not only will Leachco’s irreparable harm continue, but also, Leachco will be forever barred from seeking “meaningful” judicial review of its constitutional claims. 143 S.Ct. 890, 903–04 (2023) (cleaned up).

Leachco, like the challengers in *Axon*, is subject to an administrative enforcement proceeding by an agency with structural, separation-of-powers defects. These defects deprive the agency of constitutional authority to proceed against Leachco “at all.” *Axon*, 143 S.Ct. at 904. Thus, as long as the Commission’s enforcement proceeding continues, so does Leachco’s irreparable harm. This alone warrants an injunction.

But injunctive relief is even more critical here: If the Commission’s proceeding ends, Leachco’s injury—“being subjected to unconstitutional agency authority”—would also end. *Axon*, 143 S.Ct. at 903. At that point,

Leachco’s injury would be “impossible to remedy” since a “proceeding that has already happened cannot be undone.” *Id.* at 903, 904.

Leachco raised these points in earlier, pre-*Axon* motions to the district court and to this Court. But the district court denied Leachco’s request for preliminary injunctive relief because it concluded—erroneously, as *Axon* shows—that a separation-of-powers violation cannot cause irreparable harm. This Court summarily denied Leachco’s motion for injunction pending appeal.

Because *Axon* definitively ruled that being subjected to an unconstitutional agency proceeding constitutes an injury that is “impossible to remedy,” Leachco again asks this Court to enjoin the Commission’s enforcement proceeding. An injunction is needed to stop Leachco’s ongoing irreparable injury and allow Leachco to pursue “meaningful” judicial review of its constitutional challenges before it’s “too late.” *Axon*, 143 S.Ct. at 903.

BACKGROUND

The Commission is an executive agency armed with sweeping regulatory and enforcement powers. Ex. 1, Verified Compl. (Compl.), ¶¶ 83–98. It is headed by five Commissioners, each of whom is 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 Commissioners are principal executive officers of the United States, but the President cannot remove them from office except for “neglect of duty or malfeasance in office but for no other cause.” *Id.* § 2053(a).

Leachco is a small, family-owned business in Ada, Oklahoma, founded in 1988 by Jamie Leach and her husband Clyde. Ex. 1, ¶ 12. Leachco designs and makes, among other things, an infant lounger called the Podster. *Id.* ¶¶ 14–28. Over 180,000 Podsters have been sold and, tragically, three infants died because of consumer misuse.¹ The Commission nonetheless claims that the Podster itself is a hazard and seeks a recall via an in-house administrative proceeding. *Id.* ¶¶ 29–33.

To oversee its proceeding, the Commission appointed Administrative Law Judge Michael J. Young as “Presiding Officer.” Ex. 1, ¶ 135. ALJ Young is an executive officer of the United States, but he may not be removed from office except “for good cause established and determined by the Merit Systems Protection Board [MSPB]” following “[a]n action”

¹ For example, one infant (who happened to have been in a Podster) died after personnel at a daycare put him in a crib with a bottle in his mouth and left him unattended for an hour-and-a-half. Ex. 1, ¶ 48.

brought by “the agency in which the administrative law judge is employed.” 5 U.S.C. § 7521(a). Those with the power to remove ALJ Young likewise may not be removed except for cause. 5 U.S.C. § 1202(d); 15 U.S.C. § 2053(a); 30 U.S.C. § 823(b). *See* Ex. 1, ¶¶ 132–157; Leachco Mtn. for Inj. Pending Appeal 13–19.

Leachco filed a lawsuit in federal court, alleging that the removal protections enjoyed by the Commissioners and ALJ Young are structural constitutional defects that violate the Constitution’s separation of powers. *Leachco, Inc. v. CPSC*, U.S.D.C., E.D. Okla., No. 6:22-cv-232-JAR. Those defects, Leachco argues, deprive the Commission of constitutional authority to proceed against Leachco. The district court denied Leachco’s motion to enjoin the Commission’s proceeding solely on the ground that a “separation of powers violation does not establish irreparable harm.” *See* Ex. 2, Nov. 29, 2022 Order, p. 5 (footnote omitted). The district court then stayed its proceedings pending Leachco’s appeal. *See* Exs. 3 & 4. A motions panel of this Court denied without analysis Leachco’s alternative requests for an injunction pending appeal or expedited briefing and consideration. *See* Ex. 5, Jan. 30, 2023 Order. The parties have completed merits briefing; oral argument has not been scheduled.

In the meantime, the Commission's in-house action against Leachco continues apace. Fact discovery concluded March 20, 2023; expert discovery closed April 28, 2023; dispositive motions and pre-hearing filings are due over the next several weeks; and the administrative hearing is set to begin August 7, 2023. *See* Ex. 6.

STANDARD OF REVIEW

A plaintiff is entitled to a preliminary injunction when (1) it is likely to suffer irreparable harm without preliminary relief; (2) it is likely to succeed on the merits; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc), *aff'd sub nom, Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). The last two factors merge when the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors support the requested injunction here. Leachco will discuss the irreparable-harm factor first to explain the import of the newly released *Axon* decision.

ARGUMENT

I. AXON CONFIRMS THAT LEACHCO IS SUFFERING AN IRREPARABLE HARM THAT WILL CONTINUE WITHOUT AN INJUNCTION

As explained below (Section II), Supreme Court precedents establish that the Commission’s separation-of-powers defects preclude it from proceeding against Leachco. *First*, the President is precluded from removing the CPSC’s Commissioners except for cause. *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2198–2200 (2020). *Second*, ALJ Young enjoys unconstitutional multi-level tenure protection. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). *Axon* confirms that by proceeding against Leachco despite these structural defects, the Commission is inflicting upon Leachco an irreparable injury.

In *Axon*, parties subject to FTC and SEC enforcement proceedings filed collateral lawsuits in federal court to challenge the agencies’ unconstitutional structures. 143 S.Ct. at 897, 903–04. The Supreme Court held that federal district courts have jurisdiction to hear these types of challenges because the injury complained of—being subjected to an unconstitutional proceeding—cannot be “meaningfully” redressed once agency proceedings end. *Id.* The Court emphasized that this injury is “impossible to remedy once the proceeding is over.” *Id.* at 903. Accordingly, while past

injury “cannot be undone,” future injury can be prevented—unless an agency proceeding ends—at which point, it’s “too late.” *Id.* at 904.

Leachco faces the same situation here—it suffers an ongoing irreparable injury that “cannot be undone” if the CPSC’s proceeding ends. *Axon*, 143 S.Ct. 904. And Leachco’s case has “more than a passing resemblance” to *Axon*. *Id.* at 901. Just as in *Axon*:

- Leachco is a respondent “in an administrative enforcement action” and Leachco “challenges the constitutional authority of the agency to proceed.” *Axon*, 143 S.Ct. at 897.²
- Leachco alleges that the agency’s ALJ is “insufficiently accountable to the President, in violation of separation-of-powers principles.” *Axon*, 143 S.Ct. at 897.³ (Leachco also alleges that the CPSC Commissioners are themselves insufficiently accountable to the President, in violation of separation-of-powers principles.⁴)
- Leachco’s separation-of-powers challenges are “fundamental, even existential.” *Axon*, 143 S.Ct. at 897.⁵
- Leachco “sued in district court prior to an ALJ decision, seeking to enjoin the Commission’s proceeding” because, Leachco alleges, “fundamental aspect[s] of the Commission’s structure violate[]

² See Ex. 1, Compl., pp. 1–2, ¶¶ 29–33, *Leachco, Inc. v. CPSC*, U.S.D.C., E.D. Okla., No. 6:22-cv-232-JAR.

³ See Compl. ¶¶ 100–104, 132–157; Leachco Opening Br. 16–20.

⁴ See Compl. ¶¶ 70–81, 120–131; Opening Br. 20–28.

⁵ See Opening Br. 28; Leachco Reply Br. 1.

the Constitution,” and these violations render “the entire [administrative] proceeding unlawful.” *Axon*, 143 S.Ct. at 898.⁶

- Leachco’s challenges are “not to any specific substantive decision” of the CPSC but are “instead challenges . . . to the structure or very existence of an agency: [Leachco] charge[s] that [the CPSC] is wielding authority unconstitutionally in all . . . of its work.” *Axon*, 143 S.Ct. at 902.⁷
- Leachco thus alleges that the Commission should not proceed “at all.” *Axon*, 143 S.Ct. at 905.
- Leachco claims that it is harmed by “being subjected to unconstitutional agency authority”—a harm that is inflicted “irrespective of [the administrative proceeding’s] outcome, or of other decisions made within it.” *Axon*, 143 S.Ct. at 903, 904 (cleaned up).⁸
- Leachco’s separation-of-powers injury—“being subjected to unconstitutional agency authority”—“is ‘a here-and-now injury.’” *Axon*, 143 S.Ct. at 903 (quoting *Seila Law*, 140 S.Ct. at 2196).⁹
- This injury “is impossible to remedy once the [CPSC’s] proceeding is over.” *Axon*, 143 S.Ct. at 903.¹⁰

⁶ See *Leachco, Inc. v. CPSC*, U.S.D.C., E.D. Okla., No. 6:22-cv-232-JAR; Compl. pp. 1–2, ¶¶ 1, 109–119, Request for Relief; Opening Br. 4–6, 28–29, 32–34; Reply Br. 1–2, 6, 9–11.

⁷ See Compl. pp. 1–2, ¶¶ 1, 109–119; Opening Br. 32–39, 44; Reply Br. 1–2.

⁸ See Compl. pp. 1–2, ¶¶ 1, 109–119; Opening Br. 32–34; Reply Br. 1–2.

⁹ See Compl. pp. 1–2, ¶¶ 1, 109–119; Opening Br. 4–6, 28–29, 39; Reply Br. 6, 12.

¹⁰ See Compl. pp. 1–2, ¶¶ 1, 109–119; Opening Br. 4–6, 29, 34–39; Reply Br. 6, 11.

- Leachco thus asks this Court “to enjoin the [CPSC] from subjecting it to the Commission’s unfair and unconstitutional internal forum.” *Axon*, 143 S.Ct. at 899 (cleaned up).¹¹

Leachco’s here-and-now injury precisely mirrors what *Axon* recognizes as a *fundamental* and *irreparable* separation-of-powers violation—being subjected to unconstitutional agency authority. *Axon*, 143 S.Ct. at 903; *see also Seila Law*, 140 S.Ct. at 2196 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). Leachco’s injury is fundamental because it arises from the constitutionally defective “structure or very existence” of the Commission, which is thus precluded from acting against Leachco “at all.” *Axon*, 143 S.Ct. at 902, 904.

Leachco’s harm is irreparable because Leachco is suffering a here-and-now constitutional injury that “is impossible to remedy.” *Axon*, 143 S.Ct. at 903. *See* Leachco Mtn. for Inj. Pending Appeal 20–24; Opening Br. 37–38. It is well settled that a constitutional violation causes irreparable injury, and *Axon* confirms that being subjected to an unconstitutional agency’s proceeding constitutes just such an injury. 143 S.Ct. at 903. *See Free the Nipple v. City of Fort Collins*, 916 F.3d 792, 806 (10th

¹¹ *See* Compl. pp. 1–2, Request for Relief; Opening Br. 6–7, 57.

Cir. 2019) (“[W]ell-settled law supports the constitutional-violation-as-ir-reparable-injury principle.”) (citations omitted).¹²

Further, once the Commission’s proceeding ends, Leachco’s injury “cannot be undone,” and Leachco is forever barred from even asking for meaningful judicial review. As *Axon* confirmed, delayed judicial review does not—indeed, cannot—remedy Leachco’s injury, because post-proceeding judicial review comes too late:

Suppose a court [] agrees with [Leachco], on review of an adverse [CPSC] decision, that [CPSC- and] ALJ-led proceedings violate the separation of powers. The court could of course vacate the [CPSC’s] order. But [Leachco’s] separation-of-powers claim is not about that order; indeed, [Leachco] would have the same claim had it *won* before the agency. The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court [] can do nothing: A proceeding that has already happened cannot be undone. Judicial review of [Leachco’s] structural constitutional claims would come too late to be meaningful.

¹² The district court erroneously claimed that a split decision from this Court qualified *Free the Nipple*’s categorical rule. See Ex. 2, pp. 4–5 (discussing *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020)). Leachco explained the district court’s error. See Opening Br. 44–50; Reply Br. 16–17. But the question is now moot, since *Axon* confirms that being subjected to an unconstitutionally structured agency’s proceeding is an irreparable harm.

Axon, 143 S.Ct. at 903–04.¹³ Compare Opening Br. 38 (A “victory on the Commission’s substantive claim would preclude Leachco from ever raising its constitutional challenges in a court of law.”).

Axon thus makes clear that if Leachco remains subject to the Commission’s unlawful proceeding, it will thereby continue to suffer irreparable harm. See *id.*, 143 S.Ct. at 903 (quoting *Seila Law*, 140 S.Ct. at 2196). Thus, even in the unlikely event that Leachco’s constitutional challenges could be resolved in court before the CPSC proceeding ends, Leachco will have, in the meantime, continued to suffer the irreparable harm of being subjected to an unlawful administrative proceeding.

Further, as explained above, the CPSC’s proceeding will end before any court hears Leachco’s constitutional claims. This appeal involves only Leachco’s request for preliminary-injunctive relief, and the district court has stayed its proceedings pending appeal. Therefore, the merits of Leachco’s constitutional claims will not be resolved by a court until after

¹³ See also *Cochran v. SEC*, 20 F.4th 194, 208 n.12 (5th Cir. 2022) (en banc) (Cochran “asserts that she will be harmed by the very act of having to appear in proceedings before an ALJ who is unconstitutionally insulated from the President’s removal power. Therefore, if the SEC were to decide Cochran’s case in her favor on other grounds, it would be denying her any opportunity for meaningful judicial review of her alleged source of harm.”), *aff’d sub nom.*, *Axon*, 143 S.Ct. 890.

the CPSC’s administrative proceeding. And a “proceeding that has already happened cannot be undone.” *Axon*, 143 S.Ct. at 904.

In short, without an injunction, Leachco will continue to suffer the irreparable harm of being subjected to an unconstitutional proceeding. If that proceeding ends before a court hears Leachco’s constitutional claims, “[j]udicial review” will “come too late to be meaningful” because Leachco’s harm will then be “impossible to remedy.” *Axon*, 143 S.Ct. at 903–04.

II. LEACHCO IS LIKELY TO SUCCEED ON THE MERITS

Supreme Court precedents show that Leachco is likely to succeed on its claims that **(A)** CPSC Commissioners, principal officers wielding substantial executive power, are unconstitutionally protected against Presidential removal, *see Seila Law*, 140 S.Ct. 2183; and **(B)** the ALJ conducting the proceeding against Leachco enjoys unconstitutional multi-level removal protection, *see Free Enter. Fund*, 561 U.S. at 484. *See* Opening Br. 13–28; Reply Br. 20–32. As such, the Commission is proceeding against Leachco unlawfully.

A. The CPSC Commissioners are unconstitutionally protected from Presidential removal

The President holds “unrestricted” removal power, subject to only two narrow exceptions:

- (1) an exception for inferior officers with limited duties and no policymaking or administrative authority, *Seila Law*, 140 S.Ct. at 2199–2200; and
- (2) an exception for principal officers who do not exercise any executive power, *id.* 2198–99 (discussing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)).

The Commission has never disputed that its Commissioners are (1) principal officers (2) who wield significant executive power. *See* Opening Br. 14–20. Thus, neither removal exception applies, and the Commissioners’ for-cause removal protection (15 U.S.C. § 2053(a)) is unconstitutional.

The Commission has nonetheless claimed that § 2053(a)’s for-cause removal protection is valid under *Humphrey’s Executor*. *See* CPSC Opp. Br. 27–31. But *Humphrey’s Executor* involved an agency (the 1935 Federal Trade Commission) that was “said not to exercise *any* executive power.” *Seila Law*, 140 S.Ct. at 2192 (emphasis added). There, the Supreme Court considered a removal protection for officers whose duties were “neither political nor executive, but predominantly quasi judicial

and quasi legislative.” *Humphrey’s Executor*, 295 U.S. at 624. The agency “carr[ied] into effect legislative policies” and “perform[ed] other specified duties as a legislative or as a judicial aid.” *Id.* at 628. “Such a body,” the Supreme Court said, “cannot in any proper sense be characterized as an arm or an eye of the executive.” *Id.*

Further, because the officers in *Humphrey’s Executor* exercised no executive power, the Supreme Court distinguished *Myers v. United States*, 272 U.S. 52 (1926), which upheld the President’s power to remove a purely executive officer (postmaster). As the Court explained, a postmaster, *unlike* an FTC Commissioner circa 1935, was “an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power.” *Humphrey’s Executor*, 295 U.S. at 627.

Accordingly, *Humphrey’s Executor* explained that the President’s unrestricted removal power recognized in *Myers* applies to “all purely executive officers.” *Humphrey’s Executor*, 295 U.S. at 628 (observing that *Myers* did not apply to “an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President”).

And in *Seila Law*, the Supreme Court reaffirmed that heads of agencies wielding substantial executive power must be removable at will by the President. 140 S.Ct. at 2199–2200.

Here, the 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, Leachco is likely to succeed on its claim that the for-cause removal protection for CPSC Commissioners is unconstitutional. *See* Opening Br. 13–15, 16–20; Reply Br. 23–26.

B. The ALJ is unconstitutionally protected from removal

Here, the Commission has never disputed the relevant facts: ALJ Young is an inferior executive officer; he exercises significant authority on behalf of the United States; he may not be removed from office except for cause; and those with authority to remove him may not themselves be removed (by the President) except for cause. *See* Opening Br. 15–16, 20–28; CPSC Merits Br. 31–43. Thus, ALJ Young enjoys multi-level removal protection, “contrary to Article II’s vesting of the executive power in the President.” *Free Enter. Fund*, 561 U.S. at 484.

The Commission has tried to brush aside *Free Enterprise Fund* because the Supreme Court there did not expressly invalidate multi-level removal protections for ALJs. See CPSC Merits Br. 34–35. But the Commission’s argument “still conflicts with *Free Enterprise Fund*’s reasoning,” *Axon*, 143 S.Ct. at 905, and with the reasoning of more recent Supreme Court precedent. Cf., e.g., *Collins v. Yellen*, 141 S.Ct. 1761, 1783 (2021) (finding *Seila Law* “all but dispositive” on the removal-protection issue). These precedents demonstrate that ALJ Young may not be protected by multiple levels of for-cause removal protection.

Free Enterprise Fund squarely held that multi-level tenure protection for inferior executive officers violates the Constitution. 561 U.S. at 484, 486–87. To be sure, the Court acknowledged (in a footnote) that it did not address ALJ removal protections because, at that time, it “[wa]s disputed” whether ALJs were “necessarily ‘Officers of the United States.’” *Id.* at 507 n.10. But in *Lucia v. SEC*, the Supreme Court held that ALJs of the SEC are inferior Officers of the United States. 138 S.Ct. 2044, 2053–54 (2018). And, as Leachco demonstrated, ALJ Young exercises substantially the same powers as SEC ALJs. See Opening Br. 22–24; CPSC Merits Br. 31–43 (not arguing otherwise). Therefore, ALJ Young’s

status as an ALJ does not remove him from the holding of *Free Enterprise Fund*.

Nor does ALJ Young’s adjudicative role alter the analysis. As the Supreme Court recently held, administrative patent judges, even though they perform adjudicative functions, are executive officers of the United States. *See United States v. Arthrex*, 141 S.Ct. 1970, 1982 (2021) (Executive-branch actions “are exercises of—indeed under our constitutional structure they *must* be exercises of—the ‘executive power.’”) (cleaned up).

In sum, *Free Enterprise Fund*, *Seila Law*, and *Arthrex* establish that the CPSC’s ALJ—an inferior executive officer wielding significant authority on behalf of the United States—may not enjoy multi-level removal protection. Leachco is thus likely to succeed on its claim that ALJ Young enjoys an unconstitutional multi-level removal protection. *See* Opening Br. 15–16, 20–28; Reply Br. 26–32.¹⁴

¹⁴ In *Axon*, the Supreme Court rejected the government’s attempt to distinguish *Free Enterprise Fund* because its argument “conflict[ed] with *Free Enterprise Fund*’s reasoning.” *Axon*, 143 S.Ct. at 905. This Court, likewise, should follow the “reasoning” of the Supreme Court’s modern separation-of-powers jurisprudence, which supports Leachco’s constitutional challenges.

III. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES WEIGH IN FAVOR OF LEACHCO

The last two injunction factors—balancing the equities and the public interest—merge when the government is the defendant. *Nken*, 556 U.S. at 435. These factors support Leachco.

First, the “public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law.” *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (citation omitted). 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. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012) (finding public interest always supports enforcing Constitution). Indeed, “[w]hen 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).

While the Commission has claimed that an injunction would harm its ability to protect consumers, “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). Accordingly, the government “does not have an interest in enforcing a law that is likely” invalid. *Edmondson*,

594 F.3d at 771. *See NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (ruling that when a rule exceeds an agency’s authority, the court should not “weigh [] tradeoffs” between its intended effect and harms). And “[w]hen 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.” *Hobby Lobby*, 723 F.3d at 1145 (cleaned up).

The Commission’s own inaction undercuts any purported interest in consumer protection. While the Commission claims that Leachco’s Podster presents a “substantial product hazard,” 15 U.S.C. § 2064(a)(2),¹⁵ it did not pursue a recall until 2022—seven years after the first (supposedly related) injury. Further, the Commission has always had the authority to ask a federal court for an injunction to seize or prevent distribution of the Podster. *See id.* §§ 2061, 2064(g). But it has never done so. The Commission’s (asserted) interest thus “pales in comparison” to Leachco’s

¹⁵ Leachco rejects this claim because, as noted above, the alleged harms were caused not by the Podster itself, but by consumer misuse. But even under the Commission’s theory, and assuming that each Podster is used only one time, the chances of injury are exceedingly remote: three injuries allegedly associated with 180,000 Podsters amounts to only 0.001%—that is, one-one-thousandth of a percent. And because each Podster is used dozens of times, the chance of harm is virtually zero.

constitutional rights. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

Further, an injunction would allow Leachco to pursue its constitutional challenges before it's "too late" to obtain "meaningful" judicial relief. *Axon*, 143 S.Ct. at 904. Allowing Leachco to do so would, in turn, further the Supreme Court's marked interest in "creat[ing] incentives" for parties "to raise" structural constitutional challenges. *Lucia*, 138 S.Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

Finally, an injunction here would follow a long line of orders enjoining separation-of-powers violations to prevent irreparable harm. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court affirmed an order enjoining President Truman's unilateral seizure of steel mills. In the two underlying challenges to agency proceedings in *Axon*, both the Fifth and Ninth Circuits stayed administrative proceedings pending appeal. *See* Ex. 7, Order, *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019); Ex. 8, Order, *Axon v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020) (ECF No. 40). *See also* *Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020) (affirming preliminary injunction to preserve claim based on Appropriations Clause, "a bulwark of the

Constitution’s separation of powers”), *vacated and remanded on other grounds*, 142 S.Ct. 46 (2021); *Colorado v. Dep’t of Just.*, 455 F.Supp.3d 1034, 1047–61 (D. Colo. 2020) (granting injunction for violations of Separation of Powers, Spending Clause, Tenth Amendment, and APA); *City of Evanston v. Barr*, 412 F.Supp.3d 873, 886 (N.D. Ill. 2019) (same).

In short, as then–Judge Kavanaugh stated, “[t]he 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. v. CFPB*, 849 F.3d 1129, 1137 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

CONCLUSION

Axon removes all doubt that Leachco, by being subjected to a proceeding carried out by an unconstitutionally structured agency, suffers an irreparable constitutional injury. 143 S.Ct. at 903. Leachco has suffered this irreparable harm since the Commission began its enforcement proceeding in February 2022. And although Leachco is precluded from obtaining any remedy for that harm, an order enjoining the Commission’s proceeding will put a stop to that ongoing harm. More importantly, an

injunction would ensure that Leachco can raise its constitutional challenges in court before the Commission’s proceeding ends. Otherwise, “[j]udicial review” of Leachco’s claims would “come too late to be meaningful” because Leachco’s harm would then be “impossible to remedy.” *Axon*, 143 S.Ct. at 903–04.

Accordingly, like the Fifth and Ninth Circuits in the cases underlying *Axon*, this Court should issue an order enjoining the Commission’s administrative enforcement action against Leachco (*In the Matter of Leachco*, CPSC Docket No. 22-1) pending appeal.

DATED: May 9, 2023.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this Motion complies with Fed. R. App. P. 27(d)(A)(2). It includes 4,358 words, excluding items enumerated in Rule 32(f). I relied on my word-processor, Microsoft Word, to obtain this word-count. Additionally, pursuant to Fed. R. App. P. Rule 32(a)(5)(A) and 10th Cir. R. 32(A), this Motion is written in 14-point Century Schoolbook, a proportionately spaced font.

/s/ Oliver J. Dunford

OLIVER J. DUNFORD
*Attorney for Plaintiff-Appellant
Leachco, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2023, I electronically transmitted the foregoing document to the Clerk of Court or the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. and transmittal of a Notice of Electronic Filing was sent to the following:

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FILED

United States Court of Appeals
Tenth Circuit

UNITED STATES COURT OF APPEALS

June 6, 2023

FOR THE TENTH CIRCUIT

Christopher M. Wolpert
Clerk of Court

LEACHCO, INC.,

Plaintiff - Appellant,

v.

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;
RICHARD TRUMKA, Commissioner of
the Consumer Product Safety Commission,

Defendants - Appellees.

No. 22-7060
(D.C. No. 6:22-CV-00232-RAW)
(E.D. Okla.)

PUBLIC CITIZEN, INC.,

Amicus Curiae.

ORDER

Before **TYMKOVICH** and **EID**, Circuit Judges.

Appellant Leachco, Inc., is a respondent in an ongoing administrative proceeding before the Consumer Product Safety Commission. In the underlying district court case,

Leachco sought a preliminary injunction to enjoin the administrative proceeding. The district court denied the motion and Leachco filed an interlocutory appeal from that ruling in this court. Leachco also moved in district court for an injunction pending appeal, which the district court denied. Leachco then filed a motion for injunction pending appeal in this court. On January 30, 2023, a panel of this court denied the motion.

On May 9, Leachco filed a second motion for injunction pending appeal, relying on the Supreme Court's recent decision in *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023), to argue it will suffer irreparable harm in the absence of an injunction. The appellees filed a response in opposition, and Leachco filed a reply.

Rule 8 of the Federal Rules of Appellate Procedure states that “[a] party must ordinarily move first in the district court for . . . an order . . . granting an injunction while an appeal is pending.” Fed. R. App. P. 8(a)(1)(C). A party may also move in the court of appeals for an injunction pending appeal, but the motion must “show that moving first in the district court would be impracticable” or “state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.” Fed. R. App. P. 8(a)(2)(A).

Before filing its current motion for injunction pending appeal, Leachco did not move first in the district court for the requested relief nor has it shown that doing so would be impracticable. Because Leachco did not comply with Rule 8 and give the district court an opportunity to consider Leachco's new authority for requesting an injunction pending appeal in the first instance, we deny its motion. This denial is without

prejudice to Leachco renewing its motion in this court, if necessary, after seeking the requested relief in district court.

Entered for the Court

A handwritten signature in black ink, appearing to read 'C. M. Wolpert', with a long horizontal stroke extending to the right.

CHRISTOPHER M. WOLPERT, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

LEACHCO, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, ET AL.,

Defendants.

Case No. 6:22-cv-00232-RAW

LEACHCO, INC.’s
MOTION FOR INJUNCTION PENDING APPEAL
AND BRIEF IN SUPPORT

Plaintiff Leachco, Inc., pursuant to Fed. R. Civ. P. 62(d), respectfully moves for an injunction, pending interlocutory appeal, to preclude the unconstitutionally structured Consumer Product Safety Commission from continuing its administrative enforcement action, *In the Matter of Leachco, Inc.*, CPSC Docket No. 22-1.¹

INTRODUCTION

The Supreme Court’s recent unanimous decision in *Axon Enterprise, Inc. v. FTC*, confirms three things: (1) Leachco, Inc., by “being subjected to unconstitutional agency authority,” is suffering irreparable harm; (2) Leachco properly sued in federal court to challenge the Commission’s unconstitutional authority; and (3) unless the Commission’s administrative proceeding against Leachco is enjoined, not only will Leachco’s irreparable harm continue, but also, Leachco will be forever barred from seeking “meaningful” judicial review of its constitutional claims. 143 S.Ct. 890, 903–04 (2023) (cleaned up).

Leachco, like the challengers in *Axon*, is being subjected to an enforcement proceeding by an agency with structural, separation-of-powers defects. These defects deprive the agency of authority to proceed against Leachco “at all.” *Id.* at 904. As long

¹ Pursuant to LCvR 7.1(f), Leachco’s counsel advises the Court that counsel for the parties met and conferred in good faith by telephone—Leachco’s counsel is located in Florida; CPSC’s counsel is located in Washington D.C.—but were unable to reach an accord.

as the Commission’s proceeding continues, so does Leachco’s irreparable harm. This alone warrants an injunction.

But injunctive relief is even more critical here: If the Commission’s proceeding ends, Leachco’s injury—“being subjected to unconstitutional agency authority”—also ends. *Axon*, 143 S.Ct. at 903. At that point, Leachco’s injury would be “impossible to remedy” because a “proceeding that has already happened cannot be undone.” *Id.* at 903, 904. An injunction is therefore necessary to allow Leachco to pursue “meaningful” judicial review of its constitutional challenges before it’s “too late.” *Id.* at 904.

BACKGROUND

The Commission is an executive agency armed with broad enforcement and regulatory authority. Ex. 1, Verified Compl. (Compl.), ¶¶ 83–98. It is headed by five Commissioners, each of whom is 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 Commissioners are principal executive officers of the United States, but the President cannot remove them from office except for “neglect of duty or malfeasance in office but for no other cause.” *Id.* § 2053(a).

Leachco is a small, family-owned business in Ada, Oklahoma, founded in 1988 by Jamie Leach and her husband Clyde. Ex. 1, ¶ 12. Leachco designs and makes, among other things, an infant lounger called the Podster. *Id.* ¶¶ 14–28. Over 180,000 Podsters have been sold and, tragically, three infants died because of consumer misuse.² The Commission nonetheless claims that the Podster itself is a hazard and seeks a recall through its in-house administrative proceeding. *Id.* ¶¶ 29–33.

To oversee its proceeding, the Commission appointed Administrative Law Judge Michael G. Young as “Presiding Officer.” Ex. 1, ¶ 135. ALJ Young is an executive officer of the United States, but he may not be removed from office except “for good cause established and determined by the Merit Systems Protection Board”

² For example, one infant (who happened to have been placed in a Podster) died after personnel at a daycare put him in a crib with a bottle in his mouth and left him unattended for an hour-and-a-half. Ex. 1, ¶ 48.

following “[a]n action” brought by “the agency in which the administrative law judge is employed.” 5 U.S.C. § 7521(a). Those with the power to remove ALJ Young likewise may not be removed except for cause. 5 U.S.C. § 1202(d); 15 U.S.C. § 2053(a); 30 U.S.C. § 823(b). *See* Ex. 1, ¶¶ 132–157.

Leachco sued to challenge these removal protections. Leachco alleges that the removal protections render the Commission unconstitutionally structured, in violation of separation-of-powers principles, such that its ongoing enforcement proceeding inflicts upon Leachco an irreparable injury.

Before the Supreme Court decided *Axon*, this Court denied Leachco’s requests for injunctive relief on the ground that a separation-of-powers violation does not establish irreparable harm. *See* Ex. 2, Nov. 29, 2022 Order, p. 5. The Court then stayed its proceedings pending Leachco’s appeal. *See* Exs. 3 & 4. A motions panel of the Tenth Circuit denied without analysis Leachco’s alternative request for an injunction pending appeal or expedited briefing and consideration. *See* Ex. 5. Merits briefing at the Tenth Circuit is complete, but oral argument has not been scheduled.

After *Axon* was issued, Leachco again moved the Tenth Circuit for an injunction pending appeal. In response, the Commission conceded (1) Leachco properly alleged an injury in this case and (2) this Court’s categorical view, that a separation-of-powers violation does not establish irreparable harm, is “in tension” with *Axon*. *See* CPSC May 19, 2023 Opp., p. 10. A Tenth Circuit panel denied Leachco’s motion without prejudice because Leachco did not first ask this Court. *See* Ex. 6.

In the meantime, the Commission’s in-house action against Leachco continues apace. Fact discovery concluded March 20, 2023; expert discovery closed April 28, 2023; dispositive motions were filed June 9, 2023 (responses due June 23); pre-hearing filings are due over the next several weeks; and the administrative hearing is set to begin August 7, 2023. *See* Ex. 7.

STANDARD OF REVIEW

A plaintiff is entitled to a preliminary injunction when (1) it is likely to suffer irreparable harm without preliminary relief; (2) it is likely to succeed on the merits; and (3) the balance of equities tips in its favor and the injunction is in the public

interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc), *aff'd sub nom, Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014), (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)); *see also Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors support the requested injunction here. Leachco discusses the irreparable-harm factor first to explain the import of the *Axon* decision.

ARGUMENT

I. AXON CONFIRMS THAT LEACHCO IS SUFFERING AN IRREPARABLE HARM THAT WILL CONTINUE WITHOUT AN INJUNCTION

In *Axon* (like here), parties subject to agency enforcement proceedings filed collateral lawsuits in federal court to challenge the agencies' unconstitutional structures. 143 S.Ct. at 897, 903–04. The Supreme Court held that district courts have jurisdiction to hear these types of challenges *precisely because* the injury—being subjected to an unconstitutional proceeding—is “impossible to remedy once the proceeding is over.” *Id.* at 903. Accordingly, while past injury “cannot be undone,” future injury can be prevented—unless an agency proceeding ends—at which point, it’s “too late.” *Id.* at 904.

Leachco faces the same situation here—it suffers an ongoing irreparable injury that “cannot be undone” once the CPSC’s proceeding ends. *Axon*, 143 S.Ct. at 904. And Leachco’s case has “more than a passing resemblance” to *Axon*. *Id.* at 901. Just as in *Axon*:

- Leachco is a respondent “in an administrative enforcement action” and Leachco “challenges the constitutional authority of the agency to proceed.” *Axon*, 143 S.Ct. at 897.³
- Leachco alleges that the agency’s ALJ is “insufficiently accountable to the President, in violation of separation-of-powers principles.” *Axon*, 143 S.Ct. at 897.⁴ (Leachco also alleges that the CPSC Commissioners are themselves insufficiently accountable to the President, in violation of separation-of-powers principles.⁵)

³ See Ex. 1, Compl., pp. 1–2, ¶¶ 29–33.

⁴ See *id.* ¶¶ 100–104, 132–157.

⁵ See *id.* ¶¶ 70–81, 120–131.

- Leachco’s separation-of-powers challenges are “fundamental, even existential.” *Axon*, 143 S.Ct. at 897.
- Leachco “sued in district court prior to an ALJ decision, seeking to enjoin the Commission’s proceeding” because, Leachco alleges, “fundamental aspect[s] of the Commission’s structure violate[] the Constitution,” and these violations render “the entire [administrative] proceeding unlawful.” *Axon*, 143 S.Ct. at 898.⁶
- Leachco’s challenges are “not to any specific substantive decision” of the CPSC but are “instead challenges . . . to the structure or very existence of an agency: [Leachco] charge[s] that [the CPSC] is wielding authority unconstitutionally in all . . . of its work.” *Axon*, 143 S.Ct. at 902.⁷
- Leachco thus alleges that the Commission should not proceed “at all.” *Axon*, 143 S.Ct. at 904.
- Leachco claims that it is harmed by “being subjected to unconstitutional agency authority”—a harm that is inflicted “irrespective of [the administrative proceeding’s] outcome, or of other decisions made within it.” *Axon*, 143 S.Ct. at 903, 904 (cleaned up).⁸
- Leachco’s separation-of-powers injury—“being subjected to unconstitutional agency authority”—“is ‘a here-and-now injury.’” *Axon*, 143 S.Ct. at 903 (quoting *Seila Law LLC v. CFPB*, 140 S.Ct. 2183, 2196 (2020)).⁹
- Leachco’s injury “is impossible to remedy once the [CPSC’s] proceeding is over.” *Axon*, 143 S.Ct. at 903.¹⁰
- Leachco thus asks this Court “to enjoin the [CPSC] from subjecting it to the Commission’s unfair and unconstitutional internal forum.” *Axon*, 143 S.Ct. at 899 (cleaned up).¹¹

Leachco’s here-and-now injury thus mirrors what *Axon* recognizes as *fundamental* and *irreparable* harm. *Axon*, 143 S.Ct. at 903; *see also Seila Law*, 140 S.Ct. at 2196 (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). Leachco’s injury is

⁶ *See id.* pp. 1–2, ¶¶ 1, 109–119, Request for Relief.

⁷ *See id.* pp. 1–2, ¶¶ 1, 109–119.

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.* pp. 1–2, Request for Relief.

fundamental because it arises from the constitutionally defective “structure or very existence” of the Commission, which is thus precluded from acting against Leachco “at all.” *Axon*, 143 S.Ct. at 902, 904.

And Leachco’s constitutional injury is irreparable because it “is impossible to remedy.” *Axon*, 143 S.Ct. at 903. As the Tenth Circuit holds, “well-settled law supports the constitutional-violation-as-irreparable-injury principle.” *Free the Nipple v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (citations omitted). And *Axon* confirms that being subjected to an unconstitutional agency’s proceeding constitutes just such an injury. 143 S.Ct. at 903.¹²

Further, once the Commission’s proceeding ends, Leachco’s injury “cannot be undone,” and Leachco is forever barred from even asking for meaningful judicial review. As *Axon* confirmed, delayed judicial review does not—indeed, cannot—remedy Leachco’s injury, because post-proceeding judicial review comes too late:

Suppose a court [] agrees with [Leachco], on review of an adverse [CPSC] decision, that [CPSC- and] ALJ-led proceedings violate the separation of powers. The court could of course vacate the [CPSC’s] order. But [Leachco’s] separation-of-powers claim is not about that order; indeed, [Leachco] would have the same claim had it *won* before the agency. The claim, again, is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker. And as to that grievance, the court [] can do nothing: A proceeding that has already happened cannot be undone. Judicial review of [Leachco’s] structural constitutional claims would come too late to be meaningful.

Axon, 143 S.Ct. at 903–04.¹³

¹² When Leachco first moved this Court for a preliminary injunction, the Commission erroneously argued that a split decision from the Tenth Circuit (*Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020)) qualified *Free the Nipple’s* categorical rule. This was error. But the issue is now moot, since *Axon* confirms that being subjected to an unconstitutionally structured agency’s proceeding is an irreparable harm. In the latest round of briefing at the Tenth Circuit, the Commission did not cite *Aposhian*.

¹³ See also *Cochran v. SEC*, 20 F.4th 194, 208 n.12 (5th Cir. 2022) (en banc) (Cochran “asserts that she will be harmed by the very act of having to appear in proceedings before an ALJ who is unconstitutionally insulated from the President’s removal power. Therefore, if the SEC were to decide Cochran’s case in her favor on other

Axon thus makes clear that if Leachco remains subject to the Commission’s unlawful proceeding, its irreparable harm will continue. *See id.*, 143 S.Ct. at 903 (quoting *Seila Law*, 140 S.Ct. at 2196). And, even in the unlikely event that Leachco’s constitutional challenges could be resolved in court before the CPSC proceeding ends, Leachco will have, in the meantime, continued to suffer that irreparable harm.

Ultimately, though, it is all but certain that the CPSC’s proceeding will end before any court hears Leachco’s constitutional claims. Leachco’s appeal involves only the preliminary-injunction order issued by this Court, which also stayed its proceedings pending appeal. Therefore, no court will resolve the merits of Leachco’s constitutional claims until after the Commission’s administrative proceeding. And a “proceeding that has already happened cannot be undone.” *Axon*, 143 S.Ct. at 904.

In short, without an injunction, Leachco will continue to suffer the irreparable harm of being subjected to an unconstitutional proceeding. Once that proceeding ends “[j]udicial review” will “come too late to be meaningful” because Leachco’s harm will then be “impossible to remedy.” *Axon*, 143 S.Ct. at 903–04.

II. LEACHCO IS LIKELY TO SUCCEED ON THE MERITS

Supreme Court precedents show that Leachco is likely to succeed on its claims that **(A)** CPSC Commissioners, principal officers who wield substantial executive power, are unconstitutionally protected against Presidential removal, *see Seila Law*, 140 S.Ct. at 2183; and **(B)** the ALJ conducting the proceeding against Leachco enjoys unconstitutional multi-level removal protection, *see Free Enter. Fund v. PCAOB*, 561 U.S. 477, 484 (2010). As such, the Commission is proceeding against Leachco unlawfully.

A. The CPSC Commissioners are unconstitutionally protected from Presidential removal

The President holds “unrestricted” removal power, subject to only two narrow exceptions:

grounds, it would be denying her any opportunity for meaningful judicial review of her alleged source of harm.”), *aff’d sub nom.*, *Axon*, 143 S.Ct. 890.

- (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 any executive power, *id.* 2198–99 (discussing *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935)).

The Commission has never disputed that its Commissioners are (1) principal officers (2) who wield significant executive power. *See* Ex. 1, Compl., ¶¶ 70–108, 120–131. Thus, neither removal exception applies, and the Commissioners’ for-cause removal protection (15 U.S.C. § 2053(a)) is unconstitutional.

The Commission has claimed that § 2053(a) is valid under *Humphrey’s Executor*. But *Humphrey’s Executor* involved an agency (the 1935 Federal Trade Commission) that was “said not to exercise *any* executive power.” *Seila Law*, 140 S.Ct. at 2199 (emphasis added). There, the Supreme Court considered a removal protection for officers whose duties were “neither political nor executive, but predominantly quasi judicial and quasi legislative.” *Humphrey’s Executor*, 295 U.S. at 624. The agency “carr[ied] into effect legislative policies” and “perform[ed] other specified duties as a legislative or as a judicial aid.” *Id.* at 628. “Such a body,” the Supreme Court said, “cannot in any proper sense be characterized as an arm or an eye of the executive.” *Id.*

Humphrey’s Executor thus easily distinguished *Myers v. U.S.*, 272 U.S. 52 (1926), which upheld the President’s power to remove a postmaster because, unlike a 1935 FTC Commissioner, a postmaster was “an executive officer restricted to the performance of executive functions. He [wa]s charged with no duty at all related to either the legislative or judicial power.” *Humphrey’s Executor*, 295 U.S. at 627. Accordingly, *Humphrey’s Executor* explained, the President’s unrestricted removal power recognized in *Myers* applies to “all purely executive officers.” 295 U.S. at 628.

Indeed, as the Supreme Court recently held, “*Humphrey’s Executor* re-affirmed the core holding of *Myers*, that the President has ‘unrestrictable power . . . to remove *purely executive officers*’—like the CPSC Commissioners here. *Seila Law*, 140 S. Ct. at 2199 (quoting *Humphrey’s Executor*, 295 U.S. at 632) (emphasis added); *see id.* at

2199–2207 (confirming that heads of agencies wielding substantial executive power must be removable at will by the President).

In sum, the 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, Leachco is likely to succeed on its claim that the for-cause removal protection for CPSC Commissioners is unconstitutional.

B. The ALJ is unconstitutionally protected from removal

Here, the Commission has never disputed the relevant facts: ALJ Young is an inferior executive officer; he exercises significant authority on behalf of the United States; he may not be removed from office except for cause; and those with authority to remove him may not themselves be removed (by the President) except for cause. *See* Ex. 1, Compl., ¶¶ 100–108, 132–157. Thus, ALJ Young enjoys multi-level removal protection, “contrary to Article II’s vesting of the executive power in the President.” *Free Enter. Fund*, 561 U.S. at 484.

The Commission will try to brush aside *Free Enterprise Fund* because the Supreme Court there did not expressly invalidate multi-level removal protections for administrative law judges. But the Commission’s argument “still conflicts with *Free Enterprise Fund*’s reasoning,” *Axon*, 143 S.Ct. at 905, and with the reasoning of more recent Supreme Court precedent. *Cf., e.g., Collins v. Yellen*, 141 S.Ct. 1761, 1783 (2021) (finding *Seila Law* “all but dispositive” on the removal-protection issue). These precedents demonstrate that ALJ Young may not be protected by multiple levels of for-cause removal protection.

First, *Free Enterprise Fund* squarely held that multi-level tenure protection for inferior executive officers violates the Constitution. 561 U.S. at 484, 486–87. The Court acknowledged (in a footnote) that it did not consider ALJ removal protections because it “[wa]s disputed” whether ALJs were “necessarily ‘Officers of the United States.’” *Id.* at 507 n.10. No longer. In *Lucia v. SEC*, the Supreme Court held that ALJs of the SEC are inferior officers of the United States. 138 S.Ct. 2044, 2053–54

(2018). Here, there is no dispute that ALJ Young exercises substantially the same powers as ALJs in the SEC. Therefore, ALJ Young’s status as an ALJ does not remove him from the holding of *Free Enterprise Fund*.

Further, ALJ Young’s adjudicative role does not alter the analysis. As the Supreme Court recently held, administrative patent judges, even though they perform adjudicative functions, are executive officers of the United States. *See United States v. Arthrex*, 141 S.Ct. 1970, 1982 (2021) (Executive-branch actions “are exercises of—indeed under our constitutional structure they *must* be exercises of—the ‘executive Power.’”) (cleaned up).

In sum, *Free Enterprise Fund*, *Seila Law*, and *Arthrex* establish that the CPSC’s ALJ—an inferior executive officer wielding significant authority on behalf of the United States—may not enjoy multi-level removal protection. Leachco is thus likely to succeed on its claim that ALJ Young enjoys unconstitutional multi-level removal protection.

III. THE PUBLIC INTEREST AND THE BALANCE OF THE EQUITIES WEIGH IN FAVOR OF LEACHCO

The last two injunction factors—balancing the equities and the public interest—merge when the government is the defendant. *Nken*, 556 U.S. at 435. These factors support Leachco.

Here, the “public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law.” *Chamber of Commerce v. Edmondson*, 594 F.3d 742, 771 (10th Cir. 2010) (citation omitted). 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. Ziriox*, 670 F.3d 1111, 1132 (10th Cir. 2012) (finding public interest always supports enforcing Constitution). Indeed, “[w]hen 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).

While the Commission has claimed that an injunction would harm its ability to protect consumers, “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 the government “does not have an interest in enforcing a law that is likely” invalid. *Edmondson*, 594 F.3d at 771. *See NFIB v. OSHA*, 142 S.Ct. 661, 666 (2022) (ruling that when a rule exceeds an agency’s authority, the court should not “weigh [] tradeoffs” between its intended effect and harms). “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.” *Hobby Lobby*, 723 F.3d at 1145 (cleaned up).

The Commission’s own inaction undercuts any purported interest in consumer protection. While the Commission claims that Leachco’s Podster presents a “substantial product hazard,” 15 U.S.C. § 2064(a)(2),¹⁴ it did not pursue a recall until 2022—seven years after the first (supposedly related) injury. Further, the Commission has always had the authority to ask a federal court for an injunction to seize or prevent distribution of the Podster. *See id.* §§ 2061, 2064(g). But it has never done so. The Commission’s (asserted) interest thus “pales in comparison” to Leachco’s constitutional rights. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff’d*, 542 F. App’x 706 (10th Cir. 2013).

Further, only an injunction will allow Leachco to pursue its constitutional challenges before it’s “too late” to obtain “meaningful” judicial relief. *Axon*, 143 S.Ct. at 904. Allowing Leachco to do so would, in turn, further the Supreme Court’s marked interest in “creat[ing] incentives” for parties “to raise” structural constitutional challenges. *Lucia*, 138 S.Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

Finally, an injunction here would follow a long line of orders enjoining separation-of-powers violations to prevent irreparable harm. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), the Supreme Court affirmed an

¹⁴ Leachco rejects this claim because, as noted above, the alleged harms were caused not by the Podster itself, but by consumer misuse. But even under the Commission’s theory, and assuming that each Podster is used only one time, the chances of injury are exceedingly remote: three injuries allegedly associated with 180,000 Podsters amounts to only 0.0017%—that is, less than two-one-thousandths of a percent. And because each Podster is used dozens of times, the chance of harm is virtually zero.

order enjoining President Truman’s unilateral seizure of steel mills. *See also Sierra Club v. Trump*, 963 F.3d 874, 887 (9th Cir. 2020) (affirming preliminary injunction to preserve claim based on Appropriations Clause, “a bulwark of the Constitution’s separation of powers”), *vacated and remanded on other grounds*, 142 S.Ct. 46 (2021); *Colorado v. Dep’t of Just.*, 455 F.Supp.3d 1034, 1047–61 (D. Colo. 2020) (granting injunction for violations of Separation of Powers, Spending Clause, Tenth Amendment, and APA); *City of Evanston v. Barr*, 412 F.Supp.3d 873, 886 (N.D. Ill. 2019) (same).

The *Axon* litigation itself supports an injunction here. In the two underlying challenges to agency proceedings there, both the Fifth and Ninth Circuits stayed administrative proceedings pending appeal. *See* Exs. 8 & 9. Further, after the Supreme Court remanded Axon Enterprise’s challenge, the district court issued a 60-day stay of the administrative enforcement proceeding. *See* Ex. 10. Then, in that administrative proceeding, the FTC filed an Unopposed Motion to Withdraw This Matter from (Administrative) Adjudication. *Id.*

In short, as then–Judge Kavanaugh stated, “[t]he 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. v. CFPB*, 849 F.3d 1129, 1137 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

CONCLUSION

Axon removes all doubt that Leachco, by being subjected to a proceeding carried out by an unconstitutionally structured agency, suffers an irreparable constitutional injury. 143 S.Ct. at 903. Leachco has suffered this irreparable harm since the Commission began its enforcement proceeding in February 2022. And although Leachco is precluded from obtaining any remedy for that harm, an order enjoining the Commission’s proceeding will put a stop to that ongoing harm. More importantly, an injunction would ensure that Leachco can raise its constitutional challenges in court before the Commission’s proceeding ends. Otherwise, “[j]udicial review” of

Leachco's claims would "come too late to be meaningful" because Leachco's harm would then be "impossible to remedy." *Axon*, 143 S.Ct. at 903–04.

Accordingly, this Court should issue an order enjoining the Commission's administrative enforcement action against Leachco (*In the Matter of Leachco*, CPSC Docket No. 22-1) pending appeal.

DATED: June 13, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

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**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF OKLAHOMA**

LEACHCO, INC.,

Plaintiff,

v.

CONSUMER PRODUCT SAFETY
COMMISSION, *et al.*,

Defendants,

Case No. CIV-22-232-RAW

ORDER

Leachco is an Oklahoma Corporation located in Ada, Oklahoma, which manufactures and distributes an infant lounger called the “Podster.” The Consumer Product Safety Commission (“Commission”) is an executive regulatory agency authorized to enforce, among other laws, the Consumer Product Safety Act (“CPSA”). *See* 15 U.S.C. §§ 2051, *et seq.* On February 9, 2022, after “the deaths of at least two infants”¹ linked with use of the Podster, the Commission brought an administrative enforcement proceeding pursuant to 15 U.S.C. § 2064 “for public notification and remedial action to protect the public from the substantial risks of injury presented by various models of infant lounging pillows (‘Podsters’).” *Docket No. 2-2, at 1*. The Commission alleges, *inter alia*, that it is foreseeable that a caregiver will leave an infant unattended in a Podster, that the design of the Podster facilitates movement, that the infant may then roll or move into a position where their nose and mouth are obstructed, and that the design

¹ Leachco states in its motion that three infants have died. *Docket No. 60 at 2*.

of the Poster prevents an infant from self-rescuing once their nose and mouth are obstructed. *Id.* at 8.

On August 17, 2022, Leachco filed its Complaint in this court seeking injunctive and declaratory relief. *Docket No. 2*. Leachco complains, *inter alia*, that the Commission is unconstitutionally structured because the President is precluded from removing the Commissioners except for cause and the administrative law judge conducting the Commission's proceeding improperly enjoys at least two levels of for-cause removal protections. *Id.* at 2. Leachco maintains that these removal restrictions "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.'" *Id.* (citing U.S. CONST. art. II, § 3).

On November 29, 2022, this court denied Leachco's motion for a preliminary injunction, finding that Leachco failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction. *Docket No. 49*. On December 8, 2022, this court stayed this action pending appeal and denied Leachco's motion for injunction pending appeal. *Docket No. 58*. On January 30, 2023, the United States Court of Appeals for the Tenth Circuit denied Leachco's motion for an injunction pending appeal, finding that Leachco failed to meet its burden to "establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest" and noting that "[a]s a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal." *Docket No. 60-5, Leachco, Inc. v. CPSC*, No. 22-7060 (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) and *Schrier v. University of Colo.*, 427 F.3d 1253, 1258 (10th Cir. 2005)).

On June 6, 2023, the Tenth Circuit Court of Appeals denied Leachco's second motion for injunction pending appeal, as Leachco failed to follow Fed. R. App. P. 8(a)(1)(C) requiring it to move first in the district court for an order granting an injunction while an appeal is pending.

Now before the court is Leachco's latest motion for injunction pending appeal, relying on the Supreme Court's recent decision in *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023) [Docket No. 60]. Leachco must "establish that [it] is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter*, 555 U.S. at 20 (citations omitted).

The Commission argues and the court agrees that the ruling in *Axon* does not change the irreparable harm analysis here. As the Commission argues, *Axon* answered the narrow question of whether a district court has jurisdiction to hear a collateral challenge while an administrative proceeding is ongoing. The Supreme Court held that "[t]he ordinary statutory review scheme does not preclude a district court from entertaining these extraordinary claims." *Axon*, 143 S.Ct. at 897.

Leachco argues that the language in *Axon* noting that "subjection to an illegitimate proceeding" is "impossible to remedy once the proceeding is over" dictates a finding of irreparable harm. While the court considers this language, the court does not agree that it dictates a finding of irreparable harm. Again, *Axon* simply answered a jurisdictional question; it did not include an injunction analysis. Further, as the Commission argues, *Axon* does not hold that a separation-of-powers allegation constitutes irreparable harm. The Tenth Circuit has held that "[t]o the contrary, 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.” *Aposhian v. Barr*, 958 F.3d 969, 990-91 (10th Cir. 2020) (citations omitted). “As a preliminary injunction is an extraordinary remedy, the right to relief must be clear and unequivocal.” *Schrier*, 427 F.3d at 1258 (citations omitted). Leachco has not met its burden.

Additionally, Leachco has not met its burden to show a likelihood of success on its constitutional attacks on the Commission’s structure.² Finally, the merged interest of the Commission and the public in protection “against unreasonable risks of injury associated with consumer products,” 15 U.S.C. § 2051(a)(3), weighs in favor of the Commission. Leachco’s Motion [Docket No. 60] is DENIED.

IT IS SO ORDERED this 2nd day of August, 2023.



THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

² As the Commission argues, the Supreme Court has held that “Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 483 (2010). The Supreme Court has also “sustained similar restrictions on the power of principal executive officers—themselves responsible to the President—to remove their own inferiors.” *Id.* While the *Free Enterprise* Court then held that “multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President,” that holding does not apply to administrative law judges. *Id.* at 484 and 507. “[O]ur holding does not address that subset of independent agency employees who serve as administrative law judges. Whether administrative law judges are necessarily ‘Officers of the United States’ is disputed. And unlike members of the Board, many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions . . . or possess purely recommendatory powers.” *Id.* at 507 n. 10 (internal citations omitted). Leachco argues that administrative law judges were later held to be “Officers of the United States” in *Lucia v. S.E.C.*, 138 S.Ct. 2044 (2018), but Leachco has not met its burden to show that the *Lucia* ruling necessarily changes the *Free Enterprise* ruling excepting administrative law judges.

FILED
United States Court of Appeals
Tenth Circuit

NITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

August 4, 2023

Christopher M. Wolpert
Clerk of Court

LEACHCO, INC.,

Plaintiff - Appellant,

v.

CONSUMER PRODUCT SAFETY
COMMISSION; ALEXANDER HOEHN-
SARIC, Chair of the Consumer Product
Safety Commission; DANA BAIOTTO,
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;
RICHARD TRUMKA, Commissioner of
the Consumer Product Safety Commission,

Defendants - Appellees.

PUBLIC CITIZEN, INC.,

Amicus Curiae.

No. 22-7060
(D.C. No. 6:22-CV-00232-RAW)
(E.D. Okla.)

ORDER

Before **MATHESON**, **EBEL**, and **CARSON**, Circuit Judges.

This matter is before the court on Leachco, Inc.’s emergency motion for injunction pending appeal. Leachco is a respondent in an ongoing administrative proceeding before

the Consumer Product Safety Commission (Commission) and seeks to enjoin the Commission's administrative hearing scheduled to begin on August 7, 2023.

The inquiry when ruling on a motion for injunction pending appeal is the same as when reviewing a district court's ruling on a motion for preliminary injunction. The movant must address four factors in its attempt to show entitlement to an injunction pending appeal: (1) whether the movant is likely to succeed on the merits; (2) whether the movant is likely to suffer irreparable harm unless the injunction issues; (3) whether the threatened injury to the movant outweighs whatever damage the injunction might cause the Commission; and (4) whether the injunction would not be contrary to the public interest. 10th Cir. R. 8.1. Because Leachco has not made the necessary showing, we deny the emergency motion for injunction pending appeal.

Judge Carson would grant the motion.

Entered for the Court

A handwritten signature in black ink, appearing to read 'Christopher M. Wolpert', written over a horizontal line.

CHRISTOPHER M. WOLPERT, Clerk

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950
FAX: 202-434-9949

September 2, 2022

In the Matter of

LEACHCO, INC.,

CPSC Docket No. 22-1

Respondent.

ORDER DENYING MOTION TO DISQUALIFY

The proceeding commenced on February 9, 2022, and I was appointed on March 17, 2022, under a February 25 interagency agreement. The initial prehearing conference occurred on April 22, 2022, and I agreed to a prehearing schedule including discovery deadlines. The parties have since challenged the others' discovery requests and notices of deposition. New counsel for Respondent subsequently submitted the motion at issue. *See* Leachco, Inc.'s, Mot. to Disqualify the Presiding Officer and Stay the Proc. or, In the Alternative, Mot. to Stay Disc. (Aug. 17, 2022) ("Resp't Mot.").

Respondent alleges:

(1) ALJ Young lacks constitutional authority to proceed with this matter, (2) the Commission itself is unconstitutionally structured, and (3) this unconstitutional proceeding inflicts an ongoing, irreparable injury upon Leachco

Id. at 2. Complaint Counsel moved in opposition, arguing: (1) the motion is procedurally defective, failing to request relief permitted under the APA and CPSC rules; (2) the "rule of necessity" prevents the motion from prevailing; (3) Respondent's declaration is inadequate; (4) the motion is untimely; (5) a stay is not warranted because of delay in addressing a public-safety issue; and (6) that discovery need not be stayed because Complaint Counsel has volunteered to continue the depositions and close of discovery is not imminent. Compl. Counsel's Opp. to Leachco, Inc.'s Mot. to Disqualify the Presiding Officer and Stay the Proc. or, In the Alternative, Mot. to Stay Disc. at 2 (Aug. 29, 2022) ("Compl. Counsel Mot.").

Respondent makes this motion because it filed a collateral action in the United States District Court for the Eastern District of Oklahoma. Resp't Mot. at 1. It cites a favorable decision to its constitutional challenge in a Texas District Court. *See id.* at 12; *Consumers' Rsch. v. CPSC*, No. 6:21-cv-256-JDK, 2022 WL 1577222 (E.D. Tex. Mar. 18, 2022). That court granted summary judgment against the CPSC regarding whether it fell under the *Humphrey's Executor* exception for commission structure. 2022 WL 1577222, at *8, *10.

Respondent's motion requires analysis of only two issues. First, whether I lack constitutional authority specifically as an appointed ALJ. Second, whether a District Court decision adverse to the constitutionality of CPSC's structure requires this proceeding to be stayed. CPSC's constitutionality need not be evaluated here, only the cited decisions' procedural impact on this proceeding.

For the reasons set forth below, the Motion to Disqualify the Presiding Officer and Stay the Proceeding is **DENIED**. I reserve judgment on the Motion to Stay Discovery for the conference scheduled for September 7, 2022. *See* Order Scheduling Conference (Aug. 16, 2022).¹

I. My Appointment is Not Constitutionally Defective Under Either FMSHRC or the CPSC Because Both Comply with *Lucia* Requirements.

It is important to bear in mind the limited nature of Respondent's motion. The motion challenges my appointment as an exercise of the CPSC's executive power. To grant the motion, I would be required to find either that my general appointment as an administrative law judge is contrary to the Constitution; or that the CPSC's decision to appoint me is constitutionally defective. I hold that neither premise requires my disqualification.²

There are two exceptions to the President's unrestricted removal power. First, for "expert agencies led by a group of principal officers removable by the President only for good cause." *Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2199–200 (2020) (citing *Humphrey's Ex'r v. United States*, 295 U.S. 602, 620 (1935)). Second, for "tenure protections for certain inferior officers with narrowly defined duties." *Id.* at 2192 (citing *Morrison v. Olson*, 487 U.S. 654, 679 (1988)).

¹ Respondent's motion presented a novel basis for disqualification not found in the CPSC's procedural rules. As it brings a constitutional challenge, supported by non-binding precedent awaiting circuit court review, I have taken additional time to research and consider a response. I consider non-conformance with the stated response period, *see* 16 C.F.R. § 1025.42(e)(2), an immaterial, procedural error.

² Whether the CPSC's structure is generally unconstitutional is not before me and need not be evaluated here. Deciding such an issue in this context is unnecessary. Further, Respondent has argued that I lack the power to decide constitutional questions. *See* Resp't Mot. at 17. I question that as a general matter. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214–15 (1994) (holding that administrative agencies may decide constitutional claims that germinate from an issue within the agency's statutory grant of authority). But I do find it would be improper for me to arrogate to myself the power to decide a question the Supreme Court appears to have reserved for itself. *See Seila L. L.L.C. v. CFPB*, 140 S. Ct. 2183, 2192 (2020) (declining to revisit *Humphrey's Executor* and *Morrison* and limiting decision to an independent agency wielding significant executive power and run by a single individual who cannot be removed by the President except for cause). And I note that Respondent has raised its constitutional claims in a collateral action in another forum. I therefore address only the cited decisions' procedural impact on this proceeding and my ability to conduct it.

Respondent correctly notes that, under *Lucia v. SEC*, as an administrative law judge, I am an executive officer of the United States. Resp't Mot. at 9; see 138 S. Ct. 2044, 2058 (2018). However, it is likely that if the *Humphrey's Executor* exception is preserved, FMSHRC would fall within its scope. The Commission's function is almost wholly adjudicatory. See 30 U.S.C. § 823(d) (describing general functions of the Commission and conferring power to establish rules of procedure); *Sec'y of Lab. v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006) (citing *Martin v. OSHRC*, 499 U.S. 144, 154 (1991)). While the Commission does have the power to issue subpoenas, and while such power has been held to be an executive function, *Collins v. Yellen*, 141 S. Ct. 1761, 1786, (2021), context is crucial. FMSHRC's subpoena power is exercised to compel the attendance of witnesses at quasi-judicial proceedings.

A. The FMSHRC Commissioners who Unanimously Appointed Me Were the “Head of the Agency” and are Within the *Humphrey's Executive* Exception to the General Presumption in Favor of Removability

The Supreme Court has held that the *Humphrey's Executor* exception applies to multi-member adjudicatory bodies who exercise little executive power. See *Wiener v. United States*, 357 U.S. 349, 354–55 (1958) (“The [War Claims] Commission was established as an adjudicating body with all the paraphernalia by which legal claims are put to the test of proof.”). Like the War Claims Commission, FMSHRC is a multimember expert board with no policymaking authority. *Twentymile Coal Co.*, 456 F.3d at 161. The Mine Act delegates to the Commission responsibility for adjudication of contests under the Act, and the Commission has no independent executive or rulemaking powers save those incidental to the ordinary administration of the agency and the power to develop its own procedural rules. 30 U.S.C. § 823 (b)(2), (c), (d)(2).

In holding that review by FMSRC is “nearly identical” to that provided by the SEC, the Sixth Circuit Court of Appeals held that FMSHRC ALJ's must be appointed by the President, a court of law, or the head of the agency. *Jones Bros., Inc. v. Sec'y of Lab.*, 898 F.3d 669, 679 (6th Cir. 2018). It then held that the “head” of FMSHRC is the Commission, acting as a body. *Id.* Following *Jones Bros.*, FMSHRC developed a process for appointment of ALJs and ratified the appointment of incumbent ALJs. I was hired as an ALJ under this policy in February 2021.

B. As a Duly-Appointed ALJ, I am an “Inferior Officer” as Defined by the Supreme Court, and thus Within the Court's *Morrison v. Olson* Exception

Neither *Lucia* nor *Seila Law* abrogated the Court's protection against unrestricted removal of “inferior officers” recognized in *Morrison v. Olson*. To the contrary, *Lucia* expressly recognized ALJs as such inferior officers, and *Seila Law* expressly declined to revisit the precedent.

FMSHRC ALJs are inferior officers rather than employees because they exercise significant discretion as adjudicators. However, the Court has not held that ALJs who have been properly appointed are outside of the exceptional protection against discharge recognized for such officers under *Morrison*. As the law currently stands, ALJs should fall within the exception because they have only adjudicatory—not substantial executive—authority.

I was appointed by FMSHRC under procedures specifically enacted to conform with the requirements in *Lucia*—i.e., my appointment was made by an affirmative vote of the Commissioners. See 138 S. Ct. at 2058 (noting that remedy for ALJs who were not appointed by head of agency, court, or President is a new hearing). Therefore, a general attack on my appointment on constitutional grounds is inconsistent with precedent.

C. I Have Been Properly Appointed by the CPSC to Hear This Case

Having decided that my appointment as an ALJ by FMSHRC was proper under *Lucia* and affords Respondent no grounds for my removal from this case, I turn to the question of the CPSC's appointment of me to act as an ALJ in this case. It is my alleged double removal protection *under appointment by the CPSC* that is challenged. The CPSC has similarly utilized procedures conforming with *Lucia* to appoint me. See Case Assignment Letter for OPM Loan No. 2022-20, In the Matter of Leachco, Inc., CPSC Docket No. 22-1, at 1 (Mar. 17, 2022) (“CPSC voted unanimously for your appointment to serve as presiding officer in Docket 22-1.”). Further, I am not protected from removal in a constitutionally invalid manner. I am accountable to the CPSC's members, under an annual contract that must be extended.

My individual constitutional validity as an ALJ is therefore not in question. Complaint Counsel correctly notes that “*any* Presiding Officer should be disqualified” under Respondent's challenge to the constitutionality of CPSC's structure—the challenge is with CPSC itself, not the validity of the judge. Compl. Counsel. Mot. at 5; see also Resp't Mot. at 5 (“[A]ny ALJ who could replace Presiding Officer Young would enjoy the same unconstitutional removal limitation; and, in any event, because the Commission is itself unconstitutionally structured, it lacks authority to appointment [sic] a replacement.”).

Respondent's comparison of the executive authorities exercised by CPSC Presiding Officers to those of the SEC ALJs found to violate the separation of powers in *Lucia* is irrelevant. See Resp't Mot. at 6–7 (citing 138 S. Ct. at 2053). The duties of the Presiding Officer are not at issue here. Rather, Respondent challenges the CPSC's ability to appoint judges, period. That was not the problem in *Lucia*. Rather, the Court faulted the SEC's process for appointing ALJ's, and the remedy was a new hearing before a judge that had been properly appointed. *Lucia*, 138 S. Ct. at 2055. Respondent has not identified any defect in that appointment, except for the CPSC's allegedly unconstitutional structure. The crucial issue for discussion then is whether the adverse District Court decision challenging the CPSC's structure requires staying this proceeding because of alleged injury to Respondent. I hold that it does not.

As I have noted, the issue before me is not whether Respondent has been harmed or has suffered prejudice because of the CPSC's general exercise of its claimed authority to regulate Respondent's products and commercial activity, but whether Respondent has been harmed by the CPSC's exercise of its power to assign this matter to me for adjudication. In deciding to do so, the CPSC has delegated to an independent adjudicator part of its decision-making authority. This is an inversion of the concentration of powers problem courts have found troubling. See *Jarkesy v. SEC*, No. 20-61007, 2022 WL 1563613, at *10–11 (5th Cir. May 18, 2022) (finding fault with SEC's exercise, in the same proceeding, of legislative, executive, and adjudicatory power); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 485–86

(2010) (noting the same problem with PCAOB). To the extent these precedents are relevant to the CPSC's decision to appoint me, they amplify the distinction between actions which aggregate government functions in a single agency or office and those that disperse them.

II. The Cited District Court Decision in *Consumer's Research v. CPSC* Does Not Require Staying These Proceedings Because Respondent's Parallel Challenge in Another Forum is Not Ripe for Adjudication.

Respondent urges that I disqualify myself because the U.S. District Court for the Eastern District of Texas has held the CPSC's structure to be invalid. *Consumers Rsch.*, 2022 WL 1577222, at *10. The court's decision in that case does not require my disqualification.

First, this is a District Court decision and not a binding precedent. I have noted above the problem with rendering a general constitutional finding where it is unnecessary to do so. The decision is not controlling legal authority here, and I am therefore not required to conform my decision to its holding.

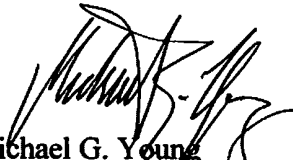
Second, I disagree that underlying logic in *Consumer's Research* is applicable to the disqualification question before me. While I agree with the Court that “‘there is ordinarily little question’ that a regulated individual or entity has standing to challenge an allegedly illegal statute or rule under which it is regulated,” *State Nat. Bank of Big Spring v. Lew*, 795 F.3d 48, 53 (D.C. Cir. 2015) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992)), that is not the question before me. The plaintiffs in *Consumer's Research* directly challenged an executive action—rulemaking—by the CPSC that they claimed would directly harm their interests. Here though, the challenged agency action is a decision to appoint a neutral adjudicator to develop a factual record and to rule on legal questions in rendering an administrative decision.

As Complaint Counsel's response observes, the objection raised in Respondent's Motion is a general objection that would bar any ALJ from hearing the claim. Compl. Counsel Mot. at 5. Thus, the objection is to the CPSC's exercise of the power to appoint an ALJ to hear disputes. Viewed discretely, this is essentially an adjudicatory function whose exercise has not been shown to exact any injury beyond the hypothetical—i.e., not imminent—harm that the delegation to any ALJ might pose to Respondent.

I agree with Complaint Counsel that the “Rule of Necessity” proscribes the “wholesale disqualification” sought by Respondent. Compl. Counsel Mot. at 6. The CPSC's duty to carry out its statutory mission, or my duty to conduct proceedings in furtherance of it, would be frustrated. Further, Respondent's objection is to the very constitutionality of the CPSC's structure under its organic statute. It is established to a point “beyond debate” that statutes must be construed to avoid serious constitutional problems unless the construction relied upon is “plainly contrary to the will of Congress.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Trades Council*, 485 U.S. 568, 575 (1988). Respondent would have me construe any exercise of any power by the CPSC to be unconstitutional. But “[a]n administrative agency may not invalidate the statute from which it derives its existence and that it is charged with implementing.” *Jones Bros.*, 898 F3d at 674. It therefore would be an abuse of discretion and clear legal error for me to grant the relief sought in Respondent's Motion.

III. Conclusion

I find that Respondent has not demonstrated that it has suffered or will suffer a particularized harm from the specific agency action in question. To the extent that Respondent objects generally to the powers exercised by the CPSC, it has exercised its right to challenge those in another forum, and a parallel challenge in this proceeding is not ripe for adjudication at this stage. Respondent's Motion to Disqualify the Presiding Officer is **DENIED**. The motion to stay the discovery conference is also **DENIED**. I reserve decision on the motion to stay discovery, which will be fully considered and discussed during the scheduled conference on September 7.



Michael G. Young
Administrative Law Judge

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UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

_____))
In the Matter of))
))
LEACHCO, INC.) CPSC DOCKET NO.: 22-1
))
Respondent.))
_____)

**ORDER AFFIRMING ADMINISTRATIVE LAW JUDGE’S
DENIAL OF MOTION TO DISQUALIFY**

On February 9, 2022, at the Commission’s direction, Complaint Counsel from the Office of Compliance and Field Operations filed a Complaint alleging that the Podster infant lounging pillow manufactured by Respondent Leachco, Inc., poses a substantial product hazard under section 15 of the Consumer Product Safety Act. On March 2, 2022, Respondent filed its Answer to the Complaint.¹

On March 16, 2022, the Consumer Product Safety Commission voted unanimously (4-0) to ratify Chair Alex Hoehn-Saric’s appointment of Michael Young, Administrative Law Judge (“ALJ”) with the Federal Mine Safety and Health Review Commission, in the above-captioned matter.

On August 17, 2022, Leachco filed a Motion to Disqualify the Presiding Officer and Stay the Proceeding, or in the Alternative, Motion to Stay Discovery (“Motion to Disqualify”). Leachco contended in its motion that: (1) ALJ Young lacks constitutional authority to oversee the administrative proceeding because he is insulated from being removed at the discretion of the President; (2) this Commission’s structure is unconstitutional because CPSC Commissioners themselves are insulated from removal at the discretion of the President; and (3) the administrative proceeding should be stayed while Leachco litigates these constitutional issues in a collateral action filed in federal court.

On August 29, 2022, Complaint Counsel filed its Opposition to Leachco, Inc.’s Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay

¹ See the electronic docket for *In the Matter of Leachco, Inc.*, CPSC Docket 22-1, at <https://www.cpsc.gov/Recalls/Recall-Lawsuits-Adjudicative-Proceedings>.

Discovery. Complaint Counsel asserted that: (1) the Motion to Disqualify is procedurally defective because it does not request relief permitted under the Administrative Procedure Act (“APA”), 5 U.S.C. § 556(b), and the Commission’s Rules of Practice for Adjudicative Proceedings, 15 C.F.R. § 1025.42(e); (2) the motion must fail under the “rule of necessity;” (3) a declaration Leachco provided in support of its motion is inadequate; (4) the Motion to Disqualify is untimely; (5) a stay would inappropriately delay the resolution of this public-safety-related adjudication; and (6) discovery should not be stayed because there are no imminent deadlines.

On September 2, 2022, ALJ Young issued an Order in which he denied the request to disqualify himself and declined to stay the adjudicative proceeding. ALJ Young determined that the Motion to Disqualify required analysis of only two issues: whether ALJ Young lacks constitutional authority as an appointed ALJ, and whether the proceeding should be stayed. The ALJ found that Leachco’s arguments on the constitutionality of the Commission did not require his disqualification or a stay of the proceedings. He further determined that he was properly appointed by the Federal Mine Safety and Health Review Commission, under procedures that comply with Supreme Court precedent. See *Lucia v. SEC*, 138 S. Ct. 2044 (2018). ALJ Young noted that in accordance with *Lucia* he was appointed by the Chair of the CPSC and his appointment was ratified by a vote of the full Commission. The ALJ found that the proceeding should not be stayed because a stay would frustrate the CPSC’s statutory mission and his responsibility to conduct proceedings in furtherance of that mission.

PROCEDURAL POSTURE

Pursuant to 16 C.F.R. § 1025.42(e)(2), if a Presiding Officer does not grant a motion to disqualify, “the Commission shall determine the validity of the grounds alleged, either directly or on the report of another Presiding Officer appointed to conduct a hearing for that purpose and, in the event of disqualification, shall take appropriate action by assigning another Presiding Officer or requesting loan of another Administrative Law Judge through the U.S. Office of Personnel Management.” Consistent with that rule, the Commission decides this issue based on the existing record as a matter of law. We do not address Respondent’s arguments regarding a stay of the proceeding, which are not before us under the rule.

ORDER

WHEREAS the Commission has reviewed and considered Respondent's Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery; Complaint Counsel's Opposition to Leachco, Inc.'s Motion to Disqualify the Presiding Officer and Stay the Proceeding or, in the Alternative, Motion to Stay Discovery; and ALJ Young's Order Denying Motion to Disqualify;

WHEREAS the Commission has reviewed and considered the manner of ALJ Young's appointment by the Federal Mine Safety and Health Review Commission and this Commission and concludes that the appointment processes comport with the Consumer Product Safety Act and Article II, section 2 of the United States Constitution; and

WHEREAS the Commission finds valid grounds for the ALJ's factual and legal findings and conclusions in the Order denying disqualification;

IT IS HEREBY ORDERED THAT:

- (1) Respondent's motion to disqualify the Presiding Officer is DENIED; and
- (2) The Presiding Officer's Order Denying Disqualification is AFFIRMED.

SO ORDERED this 7th day of October, 2022.

BY THE COMMISSION,

ALBERTA MILLS

Digitally signed by ALBERTA
MILLS
Date: 2022.10.07 09:26:47 -04'00'

Alberta E. Mills
Secretary
Consumer Product Safety Commission

S.D.N.Y. - NYC
15-cv-2472
Abrams, J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 17th day of September, two thousand and fifteen.

Before:

Jon O. Newman,
Robert D. Sack,
Christopher F. Droney,
Circuit Judges.

Lynn Tilton, Patriarch Partners, LLC, Patriarch Partners VIII, LLC,
Patriarch Partners XIV, LLC, Patriarch Partners XV, LLC,

Plaintiffs-Appellants,

v.

Securities and Exchange Commission,


Defendant-Appellee.

ORDER

Docket No. 15-2103

On application of the Appellants, the Securities and Exchange Commission proceedings against Appellants are STAYED pending further order of this Court.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court




IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10396

MICHELLE COCHRAN,

Plaintiff - Appellant

v.

SECURITIES AND EXCHANGE COMMISSION; JAY CLAYTON, in his
official capacity as Chairman of the U.S. Securities and Exchange
Commission; WILLIAM P. BARR, U. S. ATTORNEY GENERAL, in his
Official Capacity,

Defendants - Appellees

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellant's motion for an injunction pending
appeal under Federal Rule of Appellate Procedure 8 is GRANTED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION, a federal administrative agency; JOSEPH J. SIMONS, in his official capacity as Commissioners of the Federal Trade Commission; NOAH PHILLIPS, in his official capacity as Commissioners of the Federal Trade Commission; ROHIT CHOPRA, in his official capacity as Commissioners of the Federal Trade Commission; REBECCA SLAUGHTER, in her official capacity as Commissioners of the Federal Trade Commission; CHRISTINE WILSON, in her official capacity as Commissioners of the Federal Trade Commission,

Defendants-Appellees.

No. 20-15662

D.C. No. 2:20-cv-00014-DWL
District of Arizona,
Phoenix

ORDER

Before: SILER,* LEE, and BUMATAY, Circuit Judges.

In response to appellant's motion to stay the Federal Trade Commission administrative trial set to begin on October 13, 2020 (Docket Entry No. 38), we

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

grant a temporary stay of the order to preserve the status quo pending consideration of the appeal on the merits. See *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Article II.

SECTION. 1.

The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

[The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice President.]*

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

[In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.]*

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:- "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

SECTION. 2.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

SECTION. 3.

He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

SECTION. 4.

The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part III. Employees (Refs & Annos)
Subpart B. Employment and Retention
Chapter 31. Authority for Employment
Subchapter I. Employment Authorities (Refs & Annos)

5 U.S.C.A. § 3105

§ 3105. Appointment of administrative law judges

Currentness

Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

CREDIT(S)

(Pub.L. 89-554, Sept. 6, 1966, 80 Stat. 415; Pub.L. 95-251, § 2(a)(1), (b)(2), (d)(1), Mar. 27, 1978, 92 Stat. 183, 184.)

Notes of Decisions (24)

5 U.S.C.A. § 3105, 5 USCA § 3105

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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United States Code Annotated
Title 5. Government Organization and Employees (Refs & Annos)
Part III. Employees (Refs & Annos)
Subpart F. Labor-Management and Employee Relations
Chapter 75. Adverse Actions (Refs & Annos)
Subchapter III. Administrative Law Judges (Refs & Annos)

5 U.S.C.A. § 7521

§ 7521. Actions against administrative law judges

Currentness

(a) An action may be taken against an administrative law judge appointed under [section 3105](#) of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

(b) The actions covered by this section are--

(1) a removal;

(2) a suspension;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but do not include--

(A) a suspension or removal under [section 7532](#) of this title;

(B) a reduction-in-force action under [section 3502](#) of this title; or

(C) any action initiated under [section 1215](#) of this title.

CREDIT(S)

(Added [Pub.L. 95-454, Title II, § 204\(a\)](#), Oct. 13, 1978, 92 Stat. 1137; amended [Pub.L. 101-12, § 9\(a\)\(2\)](#), Apr. 10, 1989, 103 Stat. 35.)

[Notes of Decisions \(64\)](#)

5 U.S.C.A. § 7521, 5 USCA § 7521

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

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United States Code Annotated

Title 5. Government Organization and Employees (Refs & Annos)

Part II. Civil Service Functions and Responsibilities (Refs & Annos)

Chapter 12. Merit Systems Protection Board, Office of Special Counsel, and Employee Right of Action (Refs & Annos)

Subchapter I. Merit Systems Protection Board (Refs & Annos)

5 U.S.C.A. § 1202

§ 1202. Term of office; filling vacancies; removal

Currentness

(a) The term of office of each member of the Merit Systems Protection Board is 7 years.

(b) A member appointed to fill a vacancy occurring before the end of a term of office of the member's predecessor serves for the remainder of that term. Any appointment to fill a vacancy is subject to the requirements of [section 1201](#). Any new member serving only a portion of a seven-year term in office may continue to serve until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire, unless reappointed.

(c) Any member appointed for a 7-year term may not be reappointed to any following term but may continue to serve beyond the expiration of the term until a successor is appointed and has qualified, except that such member may not continue to serve for more than one year after the date on which the term of the member would otherwise expire under this section.

(d) Any member may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

CREDIT(S)

(Added [Pub.L. 95-454, Title II, § 202\(a\)](#), Oct. 13, 1978, 92 Stat. 1122; amended [Pub.L. 100-202, § 101\(m\)](#) [Title VI, § 620], Dec. 22, 1987, 101 Stat. 1329-390, 1329-427; [Pub.L. 101-12, § 3\(a\)\(2\), \(3\)](#), Apr. 10, 1989, 103 Stat. 17.)

5 U.S.C.A. § 1202, 5 USCA § 1202

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.

United States Code Annotated
Title 15. Commerce and Trade
Chapter 47. Consumer Product Safety (Refs & Annos)

15 U.S.C.A. § 2053

§ 2053. Consumer Product Safety Commission

Effective: December 23, 2011

[Currentness](#)

(a) Establishment; Chairman

An independent regulatory commission is hereby established, to be known as the Consumer Product Safety Commission, consisting of five Commissioners who shall be appointed by the President, by and with the advice and consent of the Senate. In making such appointments, the President shall consider individuals who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission. The Chairman shall be appointed by the President, by and with the advice and consent of the Senate, from among the members of the Commission. An individual may be appointed as a member of the Commission and as Chairman at the same time. Any member of the Commission may be removed by the President for neglect of duty or malfeasance in office but for no other cause.

(b) Term; vacancies

(1) Except as provided in paragraph (2), (A) the Commissioners first appointed under this section shall be appointed for terms ending three, four, five, six, and seven years, respectively, after October 27, 1972, the term of each to be designated by the President at the time of nomination; and (B) each of their successors shall be appointed for a term of seven years from the date of the expiration of the term for which his predecessor was appointed.

(2) Any Commissioner appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed only for the remainder of such term. A Commissioner may continue to serve after the expiration of this term until his successor has taken office, except that he may not so continue to serve more than one year after the date on which his term would otherwise expire under this subsection.

(c) Restrictions on Commissioner's outside activities

Not more than three of the Commissioners shall be affiliated with the same political party. No individual (1) in the employ of, or holding any official relation to, any person engaged in selling or manufacturing consumer products, or (2) owning stock or bonds of substantial value in a person so engaged, or (3) who is in any other manner pecuniarily interested in such a person, or in a substantial supplier of such a person, shall hold the office of Commissioner. A Commissioner may not engage in any other business, vocation, or employment.

(d) Quorum; seal; Vice Chairman

No vacancy in the Commission shall impair the right of the remaining Commissioners to exercise all the powers of the Commission, but three members of the Commission shall constitute a quorum for the transaction of business, except that if there are only three members serving on the Commission because of vacancies in the Commission, two members of the Commission shall constitute a quorum for the transaction of business, and if there are only two members serving on the Commission because of vacancies in the Commission, two members shall constitute a quorum for the six month period beginning on the date of the vacancy which caused the number of Commission members to decline to two. The Commission shall have an official seal of which judicial notice shall be taken. The Commission shall annually elect a Vice Chairman to act in the absence or disability of the Chairman or in case of a vacancy in the office of the Chairman.

(e) Offices

The Commission shall maintain a principal office and such field offices as it deems necessary and may meet and exercise any of its powers at any other place.

(f) Functions of Chairman; request for appropriations

(1) The Chairman of the Commission shall be the principal executive officer of the Commission, and he shall exercise all of the executive and administrative functions of the Commission, including functions of the Commission with respect to (A) the appointment and supervision of personnel employed under the Commission (other than personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman), (B) the distribution of business among personnel appointed and supervised by the Chairman and among administrative units of the Commission, and (C) the use and expenditure of funds.

(2) In carrying out any of his functions under the provisions of this subsection the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(3) Requests or estimates for regular, supplemental, or deficiency appropriations on behalf of the Commission may not be submitted by the Chairman without the prior approval of the Commission.

(g) Executive Director; officers and employees

(1)(A) The Chairman, subject to the approval of the Commission, shall appoint as officers of the Commission an Executive Director, a General Counsel, an Associate Executive Director for Engineering Sciences, an Associate Executive Director for Epidemiology, an Associate Executive Director for Compliance and Administrative Litigation, an Associate Executive Director for Health Sciences, an Associate Executive Director for Economic Analysis, an Associate Executive Director for Administration, an Associate Executive Director for Field Operations, a Director for Office of Program, Management, and Budget, and a Director for Office of Information and Public Affairs. Any other individual appointed to a position designated as an Associate Executive Director shall be appointed by the Chairman, subject to the approval of the Commission. The Chairman

may only appoint an attorney to the position of Associate Executive Director of Compliance and Administrative Litigation except the position of acting Associate Executive Director of Compliance and Administrative Litigation.

(B)(i) No individual may be appointed to such a position on an acting basis for a period longer than 90 days unless such appointment is approved by the Commission.

(ii) The Chairman, with the approval of the Commission, may remove any individual serving in a position appointed under subparagraph (A).

(C) Subparagraph (A) shall not be construed to prohibit appropriate reorganizations or changes in classification.

(2) The Chairman, subject to subsection (f)(2), may employ such other officers and employees (including attorneys) as are necessary in the execution of the Commission's functions.

(3) In addition to the number of positions authorized by [section 5108\(a\) of Title 5](#), the Chairman, subject to the approval of the Commission, and subject to the standards and procedures prescribed by chapter 51 of Title 5, may place a total of twelve positions in grades GS-16, GS-17, and GS-18.

(4) The appointment of any officer (other than a Commissioner) or employee of the Commission shall not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President.

(5) The Chairman may provide to officers and employees of the Commission who are appointed or assigned by the Commission to serve abroad (as defined in section 102 of the Foreign Service Act of 1980 ([22 U.S.C. 3902](#))) travel benefits similar to those authorized for members of the Foreign Service of the United Service under chapter 9 of such Act ([22 U.S.C. 4081 et seq.](#)).

(h) Omitted

(i) Civil action against United States

[Subsections \(a\) and \(h\) of section 2680 of Title 28](#) do not prohibit the bringing of a civil action on a claim against the United States which--

(1) is based upon--

(A) misrepresentation or deceit on the part of the Commission or any employee thereof, or

(B) any exercise or performance, or failure to exercise or perform, a discretionary function on the part of the Commission or any employee thereof, which exercise, performance, or failure was grossly negligent; and

(2) is not made with respect to any agency action (as defined in [section 551\(13\) of Title 5](#)).

In the case of a civil action on a claim based upon the exercise or performance of, or failure to exercise or perform, a discretionary function, no judgment may be entered against the United States unless the court in which such action was brought determines (based upon consideration of all the relevant circumstances, including the statutory responsibility of the Commission and the public interest in encouraging rather than inhibiting the exercise of discretion) that such exercise, performance, or failure to exercise or perform was unreasonable.

(j) Agenda and priorities; establishment and comments

At least 30 days before the beginning of each fiscal year, the Commission shall establish an agenda for Commission action under the Acts under its jurisdiction and, to the extent feasible, shall establish priorities for such actions. Before establishing such agenda and priorities, the Commission shall conduct a public hearing on the agenda and priorities and shall provide reasonable opportunity for the submission of comments.

CREDIT(S)

(Pub.L. 92-573, § 4, Oct. 27, 1972, 86 Stat. 1210; Pub.L. 94-284, §§ 4, 5(a), May 11, 1976, 90 Stat. 504; Pub.L. 95-631, § 2, Nov. 10, 1978, 92 Stat. 3742; Pub.L. 96-373, Oct. 3, 1980, 94 Stat. 1366; Pub.L. 101-608, Title I, §§ 102 to 105(a), Nov. 16, 1990, 104 Stat. 3110, 3111; Pub.L. 112-74, Div. C, Title V, § 501, Dec. 23, 2011, 125 Stat. 907.)

Notes of Decisions (3)

15 U.S.C.A. § 2053, 15 USCA § 2053

Current through P.L. 117-262. Some statute sections may be more current, see credits for details.