

No. _____

In The
Supreme Court of the United States

LEACHCO, INC.,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

For over two years, Petitioner Leachco, Inc., has been subjected to an administrative proceeding by Respondent Consumer Product Safety Commission, an Executive Branch agency whose Commissioners cannot be removed by the President except for cause. Leachco, like petitioners in *Axon Enterprise, Inc. v. FTC*, 598 U.S. 175, 191 (2023), is thus suffering an ongoing here-and-now injury that will be “impossible to remedy” once the proceeding is over. To obtain “meaningful” judicial relief before it’s “too late,” *id.*, Leachco sued in federal court for a preliminary injunction. But the Tenth Circuit affirmed the district court’s denial and held (1) the Commissioners’ for-cause removal protections are likely constitutional and, regardless, (2) preliminary-injunctive relief is precluded because, unlike violations of “individual” constitutional rights, violations of the separation of powers can never cause irreparable harm.

The questions presented are:

1. Does the for-cause restriction on the President’s authority to remove the CPSC’s Commissioners violate the separation of powers? *See Consumers’ Research v. CPSC*, No. 23-1323, cert petition at i (June 14, 2024) (presenting substantively identical question).
2. Should *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), be overruled?
3. For purposes of preliminary-injunctive relief, can a separation-of-powers violation cause irreparable harm—as this Court and several circuits hold—or can separation-of-powers violations never cause irreparable harm—as the Tenth Circuit alone holds?

PARTIES TO THE PROCEEDING

Petitioner Leachco, Inc., was the Plaintiff-Appellant in the proceedings below.

Respondents Consumer Product Safety Commission; Alexander Hoehn-Saric, Chair of the CPSC; Dana Baiocco, Commissioner of the CPSC; Mary T. Boyle, Commissioner of the CPSC; Peter A. Feldman, Commissioner of the CPSC; and Richard Trumka, Commissioner of the CPSC—sued in their official capacities—were Defendants-Appellees in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Petitioner Leachco, Inc., has no parent corporations, and no publicly held company owns 10% or more of the stock of the business.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are related:

- *Leachco, Inc. v. Consumer Product Safety Comm'n, et al.*, No. 23A730 (U.S.) (Leachco's application for writ of injunction pending appeal denied by Justice Gorsuch Aug. 14, 2023);
- *Leachco, Inc. v. Consumer Product Safety Comm'n, et al.*, No. 23A124 (U.S.) (Leachco's application for writ of injunction pending appeal denied by Justice Gorsuch Feb. 15, 2023);
- *Leachco, Inc. v. Consumer Product Safety Comm'n, et al.*, No. 22-7060 (10th Cir.) (Leachco's motion for injunction pending appeal or, in the alternative, expedited briefing denied Jan. 30, 2023; Leachco's second motion for injunction pending appeal denied without prejudice June 6, 2023; Leachco's emergency motion for injunction pending appeal denied Aug. 4, 2023; opinion and judgment issued June 4, 2024); and
- *Leachco, Inc. v. Consumer Product Safety Comm'n, et al.*, No. 22-cv-232-RAW (U.S.D.C., E.D. Okla.) (order denying Leachco's motion for preliminary injunction entered Nov. 29, 2022; order denying Leachco's motion for injunction pending appeal entered Dec. 8, 2022; order denying Leachco's motion for injunction pending appeal entered Aug. 2, 2023).

There are no additional proceedings in any court that are directly related to this case within the meaning of the Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT CERTIORARI

Petitioner Leachco, Inc., respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The decision of the Tenth Circuit is available at 103 F.4th 748 and reprinted at App. 1a–35a.

The decision of the United States District Court for the Eastern District of Oklahoma denying Leachco’s motion for preliminary injunction is not reported but is available at 2022 WL 17327494 and reprinted at App. 36a–43a.

The decision of the United States District Court for the Eastern District of Oklahoma denying Leachco’s motion for injunction pending appeal is not reported but is available at 2023 WL 4934989 and reprinted at App. 44a–48a.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2024. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

**CONSTITUTIONAL, STATUTORY,
AND RULE PROVISIONS INVOLVED**

The relevant constitutional, statutory, and rule provisions are included at App. 49a–51a.

INTRODUCTION

Petitioner Leachco is a small business in Ada, Oklahoma, founded by Jamie Leach and her husband Clyde from their home in 1988. Its first product predates the company: a safety restraint that Jamie fashioned from her purse strap after her then seven-month-old son almost slipped out of a restaurant high-chair. Within a few days, Jamie designed what became known as the “Wiggle Wrap.” People took notice, Jamie and Clyde launched the business, and Leachco became an American success story. It has developed a variety of products for families to care for their children. Jamie, a registered nurse, mother, and now grandmother, still designs all Leachco’s products; she has over 40 patents and scores of trademarks. Leachco now employs around 40 workers, including Jamie and Clyde’s three adult children. But Leachco’s success is now threatened by a powerful but unaccountable federal agency.

In February 2022, after several years of investigation, record demands, and pressure on Leachco to recall one of its products, Respondent Consumer Product Safety Commission authorized an in-house enforcement action against Leachco. The Commission claims that Leachco’s infant lounger, called the Podster, constitutes a “substantial product hazard.” The Commission seeks remedies that could cost Leachco millions of dollars, threatening the company’s existence and its employees’ livelihoods. The enforcement proceeding itself has subjected Leachco to yet more document demands, interrogatories, depositions of its officers and employees, expert-discovery obligations, and a trial before an administrative law judge—all governed by the Commission’s rules. After a four-day trial, Leachco prevailed before the ALJ, who found

that the Podster does not constitute a substantial product hazard and does not pose a substantial risk to the public. Undaunted, the Commission appealed the ALJ's decision to itself. The proceeding thus continues, and Leachco's fate lies with the agency that voted to commence the action in the first place.

Unlike most companies, who would have been forced to accede to the Commission's unjustified recall demands, Leachco has so far survived the Commission's war of attrition, but only because Leachco found pro bono legal representation. Leachco sued in federal court and asked for a preliminary injunction (and injunctions pending appeal) to halt the administrative proceeding, so that it may obtain "meaningful" judicial relief for its constitutional claims before it's "too late." *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023). Leachco alleges that the Commission is unconstitutionally structured because its Commissioners wield significant executive powers without the accountability the Constitution requires—unrestricted removal power by the President. Because the Commissioners enjoy for-cause removal protections, Leachco is being subjected to a structurally unconstitutional proceeding and thereby suffers ongoing "here-and-now" harm that cannot be remedied once the proceeding ends.

Yet the lower courts repeatedly denied Leachco's requests. The Tenth Circuit held that, unlike violations of "individual rights," violations of the separation of powers can never cause irreparable harm and, therefore, Leachco is categorically barred from receiving a preliminary injunction to stop its here-and-now injury. Separately, the Tenth Circuit held that Leachco is unlikely to succeed on the merits because the agency's Commissioners are lawfully insulated from

removal under *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

This deeply flawed reasoning effectively expunges this Court's decision in *Seila Law LLC v. CFPB*, 591 U.S. 197 (2020). There, the Court held that *Humphrey's* adopted only a narrow exception to the President's "unrestricted" removal power. *Id.* at 204. This exception applied only to a "multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said not to exercise *any* executive power." *Id.* at 216 (emphasis added). And the Court emphasized that *Humphrey's* itself "reaffirmed the core holding of *Myers*[*v. United States*, 272 U.S. 52 (1926)] that the President has 'unrestrictable power ... to remove purely executive officers.'" *Id.* at 217 (quoting *Humphrey's Executor*, 295 U.S. at 632).

Here, it is undisputed that the Commission exercises significant executive power and that its Commissioners may not be removed except for cause. Under *Seila Law*, this removal restriction is unconstitutional. But the Tenth Circuit, like other courts, failed to apply *Seila Law's* holding beyond the unique single-director agency.

This Court should grant certiorari to make clear that the Court meant what it said in *Seila Law*, that the *Humphrey's* exception is just that—a limited exception to the President's otherwise "unrestricted" removal power that applies only to agencies exercising no executive power. *Seila Law*, 591 U.S. at 204.

But if the Tenth Circuit's holding is justified by this Court's decision not to revisit *Humphrey's*, see *Seila Law*, 591 U.S. at 228, then *Seila Law* was merely "a step in the right direction," *id.* at 239

(Thomas, J., joined by Gorsuch, J., concurring in part and dissenting in part). To prevent further confusion, the Court should grant certiorari here and definitively overrule *Humphrey's*.

Finally, certiorari is warranted to bring the Tenth Circuit into line with this Court's precedents and provide uniformity in the lower courts concerning whether separation-of-powers violations may warrant preliminary injunctive relief. This case underscores the ability of unaccountable agencies to threaten people's livelihoods while evading judicial review—contrary to this Court's repeated affirmation that ongoing separation-of-powers violations cause “here-and-now” harm, which can be remedied through temporary injunctive relief. See *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 491 n.2 (2010); *Axon*, 598 U.S. at 191 (holding proceedings by unconstitutionally structured agencies are “impossible to remedy” once the proceedings are over); see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–85, 589 (1952) (rejecting government's no-irreparable-harm argument and affirming issuance of preliminary injunction to stop the President's executive order to seize private steel mills without authority from Congress or the Constitution). Moreover, the Fifth, Ninth, and D.C. Circuits have all approved injunctive relief for separation-of-powers claims. Here, the Commission could issue its final decision before Leachco has any chance for a definitive judicial resolution of the Commission's structural flaws. To prevent that, this Court should grant the petition, apply its precedents—and common sense—and hold that a separation-of-powers violation may cause irreparable harm.

STATEMENT OF THE CASE

Consumer Product Safety Commission

1. Created in 1972, the Commission is an independent Executive Branch agency. 15 U.S.C. § 2053. It enforces, among several other laws, the Consumer Product Safety Act, through which it exercises broad rulemaking, investigatory, and enforcement powers. In this way, it “dictate[s] and enforce[s] policy for a vital segment of the economy affecting millions of Americans.” *Consumers’ Research v. CPSC*, 98 F.4th 646, 652–53 (5th Cir. 2024) (en banc) (Oldham, J., dissenting from denial of rehearing en banc) (quoting *Seila Law*, 591 U.S. at 225), cert. petition filed June 14, 2024 (No. 23-1323). Its “jurisdiction” covers “more than \$1.6 trillion in consumer products sold each year.” *Id.* at 653 (citation omitted).

The agency is headed by five Commissioners, principal executive officers, appointed to staggered seven-year terms by the President, with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1). But the President may not remove the Commissioners except for “neglect of duty or malfeasance in office but for no other cause.” § 2053(a); App. 50a.

2. The Commission’s powers are vast. It may adopt, amend, or revoke “product safety standards.” 15 U.S.C. §§ 2056(a), 2058. It may ban outright any “consumer product” that it unilaterally deems to present an “unreasonable risk of injury.” §§ 2057, 2068.

The Commission also has “extensive investigatory powers, including the power to inspect facilities.” App. 5a. It may examine “any factory, warehouse, or establishment in which consumer products are manufactured or held.” 15 U.S.C. § 2065(a). It is also authorized to impose recordkeeping requirements.

§ 2065(b). And, as part of its investigatory and enforcement authority, it may demand production of records and condition the domestic sale of any consumer product on compliance with its recordkeeping mandates. § 2065(b), (d).

Its enforcement authority extends further. The Commission is authorized “to compel the production of documents and testimony, and to hold a wide range of [administrative] hearings.” App. 5a (citing 15 U.S.C. § 2076(a), (b)). The Commission may also, on its own, file enforcement suits in federal court to obtain injunctive relief, 15 U.S.C. § 2071(a), civil penalties of up to \$100,000 per violation, and up to \$15 million for a “related series of violations,” §§ 2069(a)–(b), 2076(b)(7)(A). With the Attorney General’s concurrence or through the Attorney General, the Commission may also prosecute criminal actions in federal court to seek a fine and up to five years’ imprisonment. §§ 2070, 2076(b)(7)(B).

3. Most relevant here, the Commission may hale companies before its in-house tribunal upon an allegation that a consumer product is a “substantial product hazard,” which is defined as a “product defect” that “creates a substantial risk of injury to the public.” 15 U.S.C. § 2064(a)(2). Through these administrative proceedings, the Commission’s enforcement attorneys (Complaint Counsel) may seek an order—ultimately from the Commission itself—to enjoin a company from manufacturing and selling a product, order a recall, and require a company to pay damages to third parties that incur recall-associated costs. § 2064(f).

An initial in-house hearing is conducted by a Commission-appointed “Presiding Officer,” who enjoys “broad discretion.” 16 C.F.R. § 1025.1. Much like dis-

strict court judges and ALJs in the SEC, Presiding Officers have the power “to administer oaths and affirmations”; “compel discovery”; “rule upon offers of proof”; admit (or not) “relevant, competent, and probative evidence,” including expert-witness evidence; and consider procedural and other “appropriate” motions. § 1025.42(a)(1)–(3), (a)(6); *compare Lucia v. SEC*, 585 U.S. 237, 241–42, 247–48 (2018).¹

As in many agency adjudications, the Presiding Officer “determines the scope and form of permissible evidence and may admit hearsay and other testimony that would be inadmissible in federal court.” *SEC v. Jarkesy*, 144 S. Ct. 2117, 2126 (2024) (citations omitted). *See, e.g.*, 16 C.F.R. § 1025.43(a) (allowing Presiding Officer to “relax[]” the Federal Rules of Evidence if he determines that “the ends of justice will be better served by so doing”).² Parties may not conduct fact depositions without leave of the Presiding Officer and may not serve subpoenas without approval from the Commission. 16 C.F.R. §§ 1025.35(a), 1025.38(c). Direct expert testimony is submitted solely through written reports, and no pre-hearing depositions of experts are permitted without leave of the Presiding Officer. § 1025.44(b). The Commission has not updated its procedural and discovery rules since 1982, and it applies circa-1982 caselaw related to the Federal Rules of Civil Procedure. *See* 16 C.F.R. Part 1025

¹ Leachco challenged the Presiding Officer’s multi-level removal protection in its preliminary-injunction motion, but it does not raise the issue here.

² As the Presiding Officer of the action against Leachco stated, “Some hearsay evidence is admissible in administrative proceedings.”

(CPSC’s Rules of Practice for Adjudicative Proceedings).³

At the end of an administrative hearing, the Presiding Officer issues an Initial Decision, which includes findings of fact and conclusions of law. 16 C.F.R. § 1025.51. An Initial Decision may be reviewed upon a party’s appeal or on the Commission’s unilateral order. §§ 1025.53(a), 1025.54. The Commission may then affirm or reverse—and adopt new findings of fact. §§ 1025.54, 1025.55.

In sum, in its in-house administrative enforcement proceedings, the Commission enforces its own regulations, makes its own procedural and evidentiary rules—which it can follow or not at its own discretion—and serves as prosecutor, judge, jury, and appellate court (with *de novo* fact-finding power).

³ For example, 16 C.F.R. § 1025.31(c)(1) still allows discovery that “appears reasonably calculated to lead to the discovery of admissible evidence,” even though that language was removed from Fed. R. Civ. P. 26 because of its potential to “swallow any other limitation on the scope of discovery.” Fed. R. Civ. P. 26, Committee Notes, 2000 Amendments.

Leachco, Inc.

For more than three decades, Leachco has designed and crafted dozens of safe and useful products for expecting mothers and families—including an infant lounger called the “Podster.” Approximately 180,000 Podsters have been sold.



Leachco’s Podster.

See <https://leachco.com/products/podster>
(last visited Aug. 8, 2024).

Administrative and Federal Proceedings

1.a. In January 2022, the Commission voted to initiate an in-house enforcement action against Leachco. Before commencing the action, though, the Commission published a warning on its website (where it remains⁴) that the Podster poses a “hazard.” A few weeks later, the Commission’s Complaint Counsel filed an administrative complaint.⁵ The Commission appointed Administrative Law Judge Michael Young, on loan from the Federal Mine Safety and Health Review Commission, as Presiding Officer over the enforcement action.⁶

⁴ See <https://tinyurl.com/2p948bk8>, last visited Aug. 8, 2024.

⁵ See <https://tinyurl.com/ytjtaf5c>, last visited Aug. 8, 2024.

⁶ See <https://tinyurl.com/3zffhvdn>, last visited Aug. 8, 2024.

The Commission claims that the Podster is a “substantial product hazard,” defined as “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). Relying on its nonbinding interpretative rule (16 C.F.R. § 1115.4), the Commission alleges that, regardless of the Podster’s warnings, it is “foreseeable” that consumers “may” misuse the product.

1.b. Following significant discovery, the Commission held a four-day trial in August 2023, ALJ Young presiding, at the Commission’s offices in Bethesda, Maryland. Almost a year later, July 3, 2024, ALJ Young issued his Initial Decision.⁷ He concluded that Complaint Counsel failed to prove the Podster has a defect and, even if some technical defect had been established, Compliant Counsel failed to prove that any defect created a substantial risk of injury to the public.⁸ Complaint Counsel filed a notice of intent to ap-

⁷ See <https://tinyurl.com/3mk46fub>, last visited Aug. 8, 2024.

⁸ The Commission’s allegation was based on three infant deaths that, the Commission claims, are associated with the Podster due to caregiver misuse (sleep). As the ALJ found, tragically between 1,000 and 3,500 infants die in their sleep each year—even in products that the Commission promotes for a “safe-sleep environment.” The Podster, as the Commission admits, is not a sleep product; it’s for supervised awake infants only. And, as the ALJ noted, there is no evidence of any injury when the Podster was used as intended. Common sense, too, shows that no “substantial” risk of injury to the public (15 U.S.C. § 2064(a)(2)) could exist here. Consider: if each of the 180,000 Podsters was used just once (an unreasonably low estimate), the injury rate the Commission links to the Podster (3 / 180,000) is less than two-one-thousandths of a percent (0.0017%). A realistic estimate—hundreds of uses per Podster—reduces that rate to near-zero.

peal to the full Commission on July 10, 2024. Accordingly, the Commissioners—who voted to commence the action—will now serve as appellate “judges” with fact-finding power. 16 C.F.R. § 1025.55.⁹

2. Separately, Leachco filed a verified complaint in federal district court, challenging the Commission’s structure and therefore its authority to bring an enforcement action at all. *Leachco, Inc. v. CPSC*, No. 22-cv-232-RAW (E.D. Okla. Filed Aug. 8, 2022). Leachco immediately sought a preliminary injunction. *Id.*, Dkt. No. 9. The briefing and the district court’s ruling occurred before this Court decided *Axon*. Nonetheless, Leachco argued that the Commission’s structural separation-of-powers violation inflicted upon Leachco a continuing and irreparable here-and-now injury. Dkt. No. 10 at 19–21.

The district court, however, found a distinction between cases involving “individual rights” and cases involving “the allocation of powers among the branches of government,” and held that a “separation of powers violation does not establish irreparable harm.” App. 40a–41a (citation and footnote omitted). The court acknowledged that, according to *Seila Law*, when 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.” App. 41a (quoting *Seila Law*, 591 U.S. at 212). But the court re-

⁹ The Commission “shall endeavor” to file its decision on review within 90 days after briefing is complete or once it receives a transcript of oral argument. 16 C.F.R. § 1025.55(c). This process can tack on an additional year to the proceedings, which all told may run upwards of five years. *See, e.g., In the Matter of Zen Magnets, LLC*, No. 12-2, 2017 WL 11672449, at *4 (CPSC Oct. 26, 2017) (administrative complaints filed 2012).

stricted this statement to this Court’s standing analysis: *Seila Law* therefore “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,” and the “separation-of-powers violations are not likely to inflict irreparable harm.” App. 41a. Based on the irreparable-harm factor alone, the district court denied Leachco’s motion for preliminary injunction. App. 36a–43a.

3. Leachco appealed the order of the district court, which then denied Leachco’s motion for injunction pending appeal and granted the Commission’s motion¹⁰ to stay the litigation pending appeal. Dkt. No. 58. A motions panel for the Tenth Circuit also denied, without analysis, Leachco’s motion for injunction pending appeal and its alternative request for expedited briefing. Jan. 30, 2023 Order (Doc. 010110805584). Leachco’s Emergency Application for a Writ of Injunction Pending Appeal was denied by Justice Gorsuch on February 15, 2023 (No. 22A730). The parties completed merits briefing in the Tenth Circuit in March 2023.

4. In June 2023, this Court issued *Axon* and confirmed—contrary to the Commission’s arguments and the district court’s ruling—that being subjected to unconstitutional agency authority does inflict a “here-and-now injury” which is “impossible to remedy” once a proceeding is over. 598 U.S. at 191. Leachco again asked the lower courts to enjoin the Commission’s proceeding pending appeal. Dkt. No. 60.

¹⁰ The Tenth Circuit inadvertently stated that Leachco sought the stay pending appeal. App. 6a n.1.

But, again, the courts myopically read this Court’s jurisprudence. The district court strictly limited *Axon*’s “impossible to remedy” discussion to questions of jurisdiction and held that *Axon* had no effect on the “irreparable harm analysis here.” App. 46a–47a. The court then hastily resolved the remaining injunction factors in the Commission’s favor. *Id.* 47a–48a & n.2.

The Tenth Circuit again summarily denied Leachco’s Emergency Motion for Injunction Pending Appeal, though Judge Carson would have granted the motion. Aug. 4, 2023 Order (Doc. 010110899236). Leachco then filed an Emergency Application for a Writ of Injunction, which was denied by Justice Gorsuch on August 14, 2023 (No. 23A124).

5.a. The Tenth Circuit affirmed the district court’s November 29, 2022 order denying Leachco’s motion for preliminary injunction and, in the process, addressed the post-*Axon* arguments presented in the briefing on Leachco’s Emergency Motion for Injunction Pending Appeal. App. 1a–35a.

First, the Tenth Circuit asserted that a “mere generalized separation of powers violation, by itself, does not establish irreparable harm.” App. 14a (footnote omitted). Therefore, the court said, “subjection to proceedings before an agency whose officials possess unconstitutional removal protections does not, by itself, establish irreparable harm.” *Id.* 10a (heading) (capitalization altered). The court distinguished (what it called) “individual constitutional rights” and separation-of-powers violations—*i.e.*, violations based on the “Constitution’s allocation of power between the three branches.” *Id.* 11a.

The Tenth Circuit further held that this Court’s decision in *Axon* is irrelevant to the irreparable-harm

analysis. App. 21a–24a. In the court’s view, *Axon* addressed a “strictly jurisdictional question,” namely, whether district courts could hear collateral constitutional challenges to administrative agencies. *Id.* 21a (citing *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994)). The court brushed aside *Axon*’s statement that “subjection to proceedings before an unconstitutionally structured agency [i]s a ‘here-and-now injury’ that is ‘impossible to remedy once the proceeding is over.’” App. 22a (quoting *Axon*, 598 U.S. at 191). Similarly, the Tenth Circuit concluded that *Seila Law*, like *Axon*, has no bearing on the analysis since it doesn’t “concern[] ... entitlement to injunctive relief.” App. 21a–24a.

To support its narrow readings of *Seila Law* and *Axon*, the Tenth Circuit (App. 23a) relied on *Collins v. Yellen*, 594 U.S. 220 (2021), a case involving a retrospective award of damages. Nonetheless, the Tenth Circuit concluded that Leachco was unlikely to succeed on the merits of its removal claim because, under *Collins*, Leachco won’t be able to establish “compensable” harm. App. 16a–17a.

Ultimately, the Tenth Circuit dismissed the notion that a regulated party could be harmed “by being forced even to appear before an unconstitutional agency.” App. 27a. Without this harm, a “necessary predicate[] of its ... irreparable harm argument,” the court said, Leachco was not entitled to a preliminary injunction. App. 35a.

5.b. The court also concluded that this Court’s decisions in *Humphrey’s* and *Morrison v. Olson*, 487 U.S. 654 (1988), preclude Leachco’s challenge to the Commissioners’ removal protections. App. 25a–31a. According to the court, the decision in *Humphrey’s* “was

based on both the structure of the FTC and the functions performed by the FTC.” App. 27a. The court held that the CPSC is structured like the FTC because it has five commissioners, no more than three of whom may be from the same political party, with staggered seven-year terms. App. 28a.

As for the functions, the court acknowledged that the CPSC wields executive powers. App. 28a. But here, the court looked to *Morrison*, which upheld a for-cause removal protection for an inferior officer tasked with executive functions. According to the Tenth Circuit, “statements” in *Morrison* “suggest that the exercise of some arguably ‘executive’ functions does not undermine the constitutionality of tenure protections for officers of an expert, non-partisan agency.” App. 28a.

The court then distinguished *Seila Law* again, on the ground that it turned solely on the CFPB’s unique, single-director structure. App. 28a–29a. It also relied on *Consumers’ Research v. CPSC*, 91 F.4th 342, 352 (5th Cir. 2024), *petition for reh’g en banc denied*, 98 F.4th 646, cert. petition filed June 14, 2024 (No. 23-1323), in which the Fifth Circuit similarly rejected a challenge to the CPSC Commissioners’ removal protections based on *Humphrey’s*. See App. 29a–30a.

REASONS TO GRANT THE PETITION

I. THE TENTH CIRCUIT’S DECISION CLASHES WITH THE SEPARATION OF POWERS AND THIS COURT’S JURISPRUDENCE

A. This Court recognizes only two exceptions to the President’s unrestricted removal power.

This Court’s precedents recognize “only two exceptions to the President’s unrestricted removal power,”

Seila Law, 591 U.S. at 204: (1) an exception for inferior officers with limited duties and no policymaking or administrative authority, *id.* at 217–18; and (2) an exception for “multimember bodies with ‘quasi-judicial’ or ‘quasi-legislative’ functions,” *id.* at 217 (quoting *Humphrey’s Executor*, 295 U.S. at 632). Critically, *Humphrey’s* itself “reaffirmed the core holding of *Myers* that the President has ‘unrestrictable power ... to remove purely executive officers.’” *Id.* (quoting *Humphrey’s Executor*, 295 U.S. at 632).

B. Neither exception to the President’s unrestricted removal power applies here.

Here, it is undisputed that the CPSC Commissioners are (1) principal (not inferior) officers (2) who exercise substantial, “quintessentially executive power [that was] not considered in *Humphrey’s Executor*.” *Seila Law*, 591 U.S. at 219.

1. The exception “for inferior officers with limited duties and no policymaking or administrative authority,” *Seila Law*, 591 U.S. at 218, does not apply because the Commissioners are principal officers. They are appointed to their offices by the President with the advice and consent of the Senate, 15 U.S.C. § 2053(a), (b)(1), which is the method required for appointing principal officers, U.S. CONST. art. II, § 2, cl. 2; App. 49a–50a. And Congress has authorized the Commissioners, as heads of the CPSC, to appoint inferior officers. 15 U.S.C. § 2053; *see* U.S. CONST. art. II, § 2, cl. 2 (allowing Congress to “vest the Appointment of such inferior Officers ... in the Heads of Departments”). Accordingly, the Commissioners are heads of the Commission, *Free Enter. Fund*, 561 U.S. at 512–13, and thus principal officers, *Freytag v. Comm’r*, 501 U.S. 868, 884 (1991).

2. It is undisputed that the Commission wields substantial executive power. *See, supra*, 6–7; App. 4a–5a (describing the Commission’s powers); *id.* 28a; *id.* 37a; *Consumers’ Research*, 91 F.4th at 353. And it wields this power through, among other laws, the Consumer Product Safety Act, the Flammable Fabrics Act, the Federal Hazardous Substances Act, 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. 15 U.S.C. §§ 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.” § 2076(a). The Commission may also initiate actions in federal court 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. §§ 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. §§ 2070(a), 2076(b)(7)(B).

The CPSC’s Commissioners thus exercise core executive power “to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in *Humphrey’s Executor*.” *Consumers’ Research*, 98 F.4th at 655 (Oldham, J., dissenting from the denial of rehearing en banc) (quoting *Seila Law*, 591 U.S. at 219).

* * *

Therefore, pursuant to this Court’s decision in *Seila Law*, the heads of agencies wielding substantial

executive power—like the CPSC Commissioners here—must be removable at will by the President. 591 U.S. at 204, 217–18. Indeed, as this Court confirmed only a few Terms ago, the *Humphrey’s* exception applies only to agencies that do “not ... exercise *any* executive power.” *Id.* at 216 (emphasis added); *see also Consumers’ Research*, 91 F.4th at 357 (Jones, J., concurring in part and dissenting in part) (“In 1935, the FTC satisfied the Court’s test for insulation from at-will removal because it did not exercise any executive power.”).

The Tenth Circuit’s decision to the contrary violates Article II and the separation of powers, and conflicts with this Court’s precedent in *Seila Law* and *Humphrey’s*.

C. The Tenth Circuit’s decision is wrong.

The Tenth Circuit’s decision cannot be squared with the Constitution or this Court’s precedent. Notably, the Tenth Circuit gave short shrift to *Seila Law*, instead focusing on the history of “independent” agencies and this Court’s decisions in *Humphrey’s* and *Morrison*. App. 25a–28a. Thus, while the court noted that, according to *Seila Law*, the decision in *Humphrey’s* was based on the (1935) FTC’s (1) structure and (2) functions (App. 27a), the court considered *Humphrey’s* only to consider the CPSC’s *structure*. The court noted the similarities between the CPSC and the FTC: each had five commissioners, a political-party limitation, and staggered seven-year terms. App. 28a.

But when it analyzed the CPSC’s admittedly executive *functions*, the court said nothing about the (1935) FTC’s “quasi-legislative” and “quasi-judicial” functions. Instead, the court compared the CPSC Commissioners to the officer in *Morrison*. App. 28a.

According to the court, “statements” in *Morrison* “suggest that the exercise of some arguably ‘executive’ functions does not undermine the constitutionality of tenure protections for officers of an expert, non-partisan agency.” App. 28a. *Morrison*, however, involved an inferior officer who was not in an “expert, non-partisan” agency. The court’s reliance on *Morrison* is thus wholly misplaced.

The faulty analysis is confirmed by the court’s failure to discuss what *Seila Law* itself said about the relevance of agency functions to the removal-protection question—even as the court acknowledged that part of *Seila Law*’s “reasoning focused on the executive nature of [the CFPB Director’s] powers.” App. 29a. By relying solely on the “suggestions” about executive functions in *Morrison*, the Tenth Circuit’s analysis of the CPSC’s functions did not mention any of the following from *Seila Law*:

- “Rightly or wrongly, the Court [in *Humphrey*’s] viewed the FTC (as it existed in 1935) as exercising ‘no part of the executive power.’” *Seila Law*, 591 U.S. at 215.
- *Humphrey*’s allowed Congress “to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed *legislative and judicial functions* and was said *not* to exercise *any* executive power.” *Id.* (emphasis added).
- *Humphrey*’s “reaffirmed the core holding of *Myers* that the President has ‘unrestrictable power ... to remove purely executive officers.’” *Id.* at 217.
- The CFPB Director has “the power to seek daunting monetary penalties against private

parties on behalf of the United States in federal court—a quintessentially executive power [that was] not considered in *Humphrey's*” *Id.* at 219 (footnote omitted).

By failing to consider the similarity between the functions of the CFPB and the Commission here, the Tenth Circuit misapplied *Seila Law* and erred by holding that the CPSC Commissioners’ removal protections are constitutional.

This Court’s review is necessary to correct this egregious error, which would require an expansively broad application of *Humphrey's*—an application that was rejected by this Court in *Seila Law*.

II. IN THE ALTERNATIVE, *HUMPHREY'S EXECUTOR* SHOULD BE OVERRULED

The Tenth Circuit’s decision conflicts with this Court’s current precedent and is wrong. But if the Tenth Circuit is correct that the Commission’s structure is likely constitutional under *Humphrey's*, the Court should overrule *Humphrey's*.

In *Seila Law*, the Court took “a step in the right direction by limiting *Humphrey's Executor* to ‘multi-member expert agencies that *do not wield substantial executive power.*” 591 U.S. at 239 (Thomas, J., joined by Gorsuch, J., concurring in part) (citation omitted). But courts, like the Tenth Circuit below, have limited their *Seila Law* analysis to agency *structure* and have failed to properly consider the nature of an agency’s *power*. App. 28a–29a; *see also Consumers' Research*, 91 F.4th at 352 (holding, “[a]s best we can gather, the Supreme Court has not yet limited [*Humphrey's*] to the FTC alone. Rather, so far as we can tell, the exception still protects any ‘traditional independent agency headed by a multimember board’—and thus

still protects the [CPSC].”); *United States v. SunSetter Prods. LP*, No. 23-cv-10744-ADB, 2024 WL 1116062, at *4 (D. Mass. Mar. 14, 2024) (holding *Humphrey’s* “continues to apply to any traditional independent agency headed by a multimember board, like the CPSC”) (simplified).

But the problem is even worse. The Tenth Circuit—like these other courts—has “*expand[ed]*” the borders of *Humphrey’s Executor* by extending the rule from agencies that *do not* exercise executive power to those that *do*.” *Consumers’ Research*, 91 F.4th at 357 (Jones, J., concurring in part and dissenting in part).

And the issue is not going away, as evidenced by the repeated removal challenges to “independent” agencies.¹¹ Even the author of the Fifth Circuit’s panel decision in *Consumers’ Research*, upholding CPSC Commissioners’ removal protections, is “skeptical of *Humphrey’s Executor*, which seems nigh impossible to square with th[is] Court’s current separation-of-powers sentiment.” 98 F.4th at 649 (Willett, J., concurring in the denial of rehearing en banc). He felt, however,

¹¹ See, e.g., *Consumers’ Research*, 98 F.4th 646 (5th Cir. 2024) (en banc); *Meta Platforms, Inc. v. FTC*, No. 24-5054, 2024 WL 1549732 (D.C. Cir. Mar. 29, 2024); *Illumina, Inc. v. FTC*, 88 F.4th 1036 (5th Cir. 2023); *Severino v. Biden*, 71 F.4th 1038 (D.C. Cir. 2023); *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022), *rev’d on other grounds*, 143 S. Ct. 1317 (2023); *Exela Enter. Solutions, Inc. v. NLRB*, 32 F.4th 436 (5th Cir. 2022); *PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc), *abrogated by Seila Law*, 591 U.S. 197; *Space Expl. Tech. Corp. v. NLRB*, No. 24-cv-00203-ADA, 2024 WL 3512082 (W.D. Tex. July 23, 2024); *FTC v. U.S. Anesthesia Partners, Inc.*, No. 23-cv-03560, 2024 WL 2137649 (S.D. Tex. May 13, 2024), appeal filed June 21, 2024; *Meta Platforms, Inc. v. FTC*, No. 23-cv-3562, --- F. Supp. 3d ---, 2024 WL 1121424 (D.D.C. Mar. 15, 2024), appeal filed Mar. 15, 2024; *SunSetter Prods. LP*, 2024 WL 1116062.

that only this Court could resolve the question. *Id.*; see also *FTC v. Walmart, Inc.*, No. 22-cv-03372, 2024 WL 3292800, at *16 (N.D. Ill. July 3, 2024) (“striking the FTC’s litigation authority and dismissing the complaint” would amount to overruling *Humphrey’s*, a question for the Supreme Court to decide).

Leachco disagrees that the CPSC Commissioners’ removal protections are valid under *Humphrey’s*. But it agrees that, if any doubt remains concerning *Humphrey’s* continued viability in light of this Court’s current separation-of-powers jurisprudence, this Court should grant certiorari and place “a tombstone on [*Humphrey’s Executor*] no one can miss.” *Loper Bright Enter. v. Raimondo*, 144 S. Ct. 2244, 2275 (2024) (Gorsuch, J., concurring).

III. THE TENTH CIRCUIT’S CATEGORICAL IRREPARABLE-HARM RULE CONFLICTS WITH THIS COURT’S JURISPRUDENCE AND CREATES A SPLIT AMONG THE CIRCUITS

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.” *Winter v. NRDC*, 555 U.S. 7, 20 (2008). The Tenth Circuit’s application of this test precludes a party with a separation-of-powers claim from ever obtaining preliminary-injunctive relief. This holding cannot be squared with this Court’s jurisprudence; it directly conflicts with decisions from other circuits; and it makes it nearly impossible for small, regulated parties to preserve separation-of-powers challenges and obtain meaningful judicial review. *Cf. Lucia*, 585 U.S. at 251

n.5 (noting this Court’s interest in “creat[ing] ‘incentives’” for parties “to raise Appointments Clause challenges”) (cleaned up) (quoting *Ryder v. United States*, 515 U.S. 177, 183 (1995)).

A. This Court’s precedent confirms that separation-of-powers violations may cause irreparable harm.

This Court has long recognized the judiciary’s vital role in protecting “individuals [who] sustain discrete, justiciable injury from actions that transgress separation-of-powers limitations.” *Bond v. United States*, 564 U.S. 211, 222 (2011). Indeed, this Court’s “established practice” is to “sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution”—including rights protected by the separation of powers. *Free Enter. Fund*, 561 U.S. at 491 n.2 (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). This Court rejects the contention that a “separation-of-powers claim should be treated differently than every other constitutional claim.” *Id.*; see also *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 338 (2015) (Sotomayor, J., dissenting) (In *Free Enterprise Fund*, “we found no support for the argument that a challenge to governmental action under ... separation-of-powers principles should be treated differently than every other constitutional claim for which equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.”) (simplified).

Consistent with these long-standing principles, this Court in *Axon* held that parties may bring structural separation-of-powers challenges directly to district court to enjoin agency proceedings. 598 U.S. at

195–96. To be sure, some statutory schemes concerning judicial review of agency action may implicitly “divest[] district courts of their ordinary jurisdiction over the covered cases.” *Id.* at 185 (citing *Thunder Basin*, 510 U.S. at 207–12; *Elgin v. Dep’t of Treasury*, 567 U.S. 1, 10–15 (2012); *Free Enter. Fund*, 561 U.S. at 489). But as in *Free Enterprise Fund*, some claims fall outside of these statutory review schemes. *Axon*, 598 U.S. at 187–88.

Key to the distinction is whether post-proceeding review through a particular statutory scheme would preclude meaningful judicial review of a challenger’s constitutional claim. *Axon*, 598 U.S. at 191. When such a scheme would preclude meaningful judicial relief, *Axon* held, district courts have jurisdiction to consider collateral challenges to agency structure; otherwise, judicial relief would come “too late to be meaningful.” *Id.*

Leachco, therefore, sought preliminary injunctive relief to obtain “meaningful” judicial review before it’s “too late.” *Axon*, 598 U.S. at 191. And Leachco’s case has “more than a passing resemblance” to *Axon*. *Id.* at 188. Just as in *Axon*:

- Leachco is a respondent “in an administrative enforcement action” and “challenges the constitutional authority of the agency to proceed.” *Axon*, 598 U.S. at 180.
- Leachco alleges that the CPSC Commissioners are insufficiently accountable to the President, in violation of separation-of-powers principles. *Cf. id.* (challengers’ alleging that the ALJ overseeing enforcement proceeding was “insufficiently accountable to the President, in violation of separation-of-powers principles”).

- Leachco’s separation-of-powers challenge is “fundamental, even existential.” *Id.*
- 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.” *Id.* at 182.
- Leachco does not challenge “any specific substantive decision” of the CPSC but “instead ... the structure or very existence of an agency: [Leachco] charge[s] that [the CPSC] is wielding authority unconstitutionally in all ... of its work.” *Id.* at 188–89.
- Leachco alleges that the Commission should not proceed “at all.” *Id.* at 192.
- Accordingly, 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.” *Id.* at 191–92 (cleaned up).
- Leachco’s separation-of-powers injury—“being subjected to unconstitutional agency authority”—“is ‘a here-and-now injury.’” *Id.* at 191 (quoting *Seila Law*, 591 U.S. at 212).
- This injury “is impossible to remedy once the [CPSC’s] proceeding is over.” *Id.*
- Leachco’s harm cannot be remedied after the Commission’s proceeding ends even if it were to ultimately succeed in that proceeding, since a “proceeding that has already happened cannot be undone,” and judicial review of Leachco’s

“structural constitutional claim[] would come too late to be meaningful.” *Id.*

- Leachco thus seeks “to enjoin the [CPSC] from subjecting it to the Commission’s unfair and unconstitutional internal forum.” *Id.* at 183 (cleaned up).

The Tenth Circuit’s assertion (App. 21a) that *Axon* is irrelevant to the irreparable-harm question cannot be sustained. *Axon*’s conclusion that district courts could hear separation-of-powers challenges turned precisely on the fact that the petitioners’ injury—being subjected to structurally unconstitutional proceedings—would be “impossible to remedy” once those proceedings ended. 598 U.S. at 191; *see also* 11A Fed. Prac. & Proc. Civ. § 2948.1 (3d ed.) (noting that injunction is proper “when the threatened harm would impair the court’s ability to grant an effective remedy”).¹²

The Tenth Circuit also ignored this Court’s well-established equity practice. The court didn’t even mention *Bell v. Hood*. Nor did it consider *Free Enterprise Fund*’s discussion of federal courts’ equitable power to enjoin separation-of-powers violations like every other constitutional violation. 561 U.S. at 491 n.2. Nor did it address then-Judge Kavanaugh’s considered opinion in *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted): “Irreparable harm occurs al-

¹² Below, even the Commission grudgingly conceded that “aspects” of *Axon*’s reasoning are “in tension with the district court’s categorical view that a ‘separation of powers violation does not establish irreparable harm.’” Opp. Br., *Leachco, Inc. v. CPSC*, No. 22-7060 (10th Cir. May 19, 2023) Doc. No. 010110862535, at 10.

most 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."

Most egregiously, the Tenth Circuit failed to consider this Court's decision in *Youngstown Sheet & Tube*. There, steel-mill owners challenged the President's executive order seizing their mills on the ground that the seizures were "not authorized by an act of Congress or by any constitutional provisions." *Id.*, 343 U.S. at 582–83. They sought preliminary and permanent injunctions. *Id.* at 583. This Court rejected the government's argument that the President's unconstitutional order did not inflict irreparable harm and affirmed the district court's issuance of a preliminary injunction. *Id.* at 584–85, 589. As Justice Burton explained, the injunction was properly issued because the "President's order ... invaded the jurisdiction of Congress[and] violated the essence of the principle of the separation of governmental powers." *Id.* at 660 (Burton, J., concurring).

Disregarding all this, the Tenth Circuit invented a distinction between violations of the separation-of-powers and violations of "individual" constitutional rights, and then held that only the latter could ever cause irreparable harm. App. 10a–15a. But this distinction between "individual" constitutional rights and "mere generalized separation of powers violation[s]," see App. 11a, 14a, has no basis in this Court's precedent, which rejects the contention 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.

The Tenth Circuit’s attempted defense of its ill-conceived distinction only underscores its error. Here, the court explained why its decision in *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792 (10th Cir. 2019), did not help Leachco. There, the court held that an alleged “equal protection violation based on [an] ordinance that prohibited public toplessness by women, but not men” was alone sufficient to establish irreparable harm. App. 15a (citing *Free the Nipple*, 916 F.3d at 794–95, 806). That equal protection claim, the court said, “involved only individual rights, not the separation of powers,” and, therefore, the challenger didn’t even need to establish that a “deprivation of any constitutional right constitutes irreparable harm.” App. 15a (citing *Free the Nipple*, 916 F.3d at 794–95, 806). Thus, in the Tenth Circuit, one who brings an “individual constitutional” challenge to public-toplessness prohibitions is automatically deemed to suffer irreparable harm. App. 15a. But small businesses like Leachco, subject to the whims of an unaccountable federal agency, can *never* establish that “mere subjection to administrative proceedings before an agency whose officials possess unconstitutional removal protections, alone, constitutes irreparable harm.” App. 10a.

Finally, the Tenth Circuit’s privileged protection for “individual” rights, unlike “mere generalized separation of powers violation[s],” App. 14a, betrays a fundamental misunderstanding of the separation of powers. As this Court has long emphasized, the “ultimate purpose of th[e] 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); *see also Bowsher*

v. Synar, 478 U.S. 714, 721 (1986) (The “declared purpose of separating and dividing the powers of government, of course, was to ‘diffus[e] power the better to secure liberty.’”) (quoting *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring)).

And “[l]iberty requires accountability.” *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 57 (2015) (Alito, J., concurring); see *Free Enter. Fund*, 561 U.S. at 483 (citing U.S. CONST. art. II, § 1, cl. 1 [App. 49a] and noting removal power as source of accountability); *id.* at 513 (holding laws may be enforced “only by a constitutional agency accountable to the Executive”) (citing *Bowsher*, 478 U.S. at 727 n.5, which concluded that “a separation-of-powers violation may create a ‘here-and-now’ injury that can be remedied by a court”). Thus, as Justice Scalia highlighted, 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.” *NLRB v. Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., joined by Roberts, C.J., and Thomas, Alito, JJ., concurring) (emphasis added).

The *only* relief available for Leachco’s here-and-now injury is a preliminary injunction so that Leachco may preserve its constitutional challenge before it’s “too late.” *Axon*, 598 U.S. at 191. This Court should grant certiorari and hold that the Tenth Circuit erred by holding that separation-of-powers claims can never establish irreparable harm. App. 11a, 14a.

B. Other circuits hold separation-of-powers violations may cause irreparable harm.

The Tenth Circuit’s holding also conflicts with decisions in other circuits. In *Sierra Club v. Trump*, for example, the Ninth Circuit considered a challenge to

President Trump’s attempt to fund construction of a border wall with funds that were appropriated for other purposes. 963 F.3d 874, 882 (9th Cir. 2020), *vacated and remanded on other grounds*, 142 S. Ct. 46 (2021). The challengers’ claim was based on the Appropriations Clause, “a bulwark of the Constitution’s separation of powers.” *Id.* at 887 (citation omitted). The Ninth Circuit affirmed the district court’s order finding irreparable harm and granting a permanent injunction based on the separation-of-powers claim. *Id.* at 895, 897.¹³

Similarly, the two cases underlying the Court’s *Axon* decision were stayed by the Fifth and Ninth Circuits, respectively. Order, *Cochran v. SEC*, No. 19-10396 (5th Cir. Sept. 24, 2019); Order, *Axon Enters., Inc. v. FTC*, No. 20-15662 (9th Cir. Oct. 2, 2020); see *Cochran v. SEC*, 20 F.4th 194, 212–13 (5th Cir. 2021) (en banc) (If the removal claim is “meritorious,” plaintiff should not be “forc[ed] ... to litigate before an ALJ who is unconstitutionally insulated from presidential control.”), *aff’d and remanded sub nom. Axon*, 598 U.S. 175. The D.C. Circuit Court of Appeals, too, granted an injunction pending appeal, based on a removal challenge to FINRA’s hearing officers. See *Alpine Sec. Corp. v. FINRA*, No. 23-5129, 2023 WL 4703307 (D.C. Cir. July 5, 2023).

* * *

The Tenth Circuit’s holding that structural separation-of-powers injuries can never cause irreparable

¹³ This Court vacated the Ninth Circuit’s judgment because President Biden assured the Court that no tax-payer dollars would be diverted to the border wall. See *Petitioners’ Mtn. to Vacate and Remand in Light of Changed Circumstances, Biden v. Sierra Club*, No. 20-138, 2021 WL 2458459 (U.S. June 11, 2021).

harm flouts the Constitution, this Court’s longstanding jurisprudence, and decisions from other circuits. This Court should grant the petition and determine whether unaccountable agencies may escape judicial review at the expense of “the people whose liberties are being infringed” *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

IV. THIS CASE PRESENTS EXCEPTIONALLY IMPORTANT AND RECURRING ISSUES OVER WHICH THE LOWER COURTS CANNOT AGREE

As noted above, in addition to the decision from the Tenth Circuit, the Fifth Circuit contends that the CPSC Commissioners’ removal restrictions are valid under *Humphrey’s*, and lower courts across the country must continue to grapple with the issue. Courts have also reached different conclusions about preliminary-injunctive relief premised on removal challenges.¹⁴ And new cases continue to be filed against various multi-member agencies.¹⁵

These cases are based on this Court’s decisions in *Seila Law*—which held that the President has full removal power to remove principal officers of agencies

¹⁴ See, e.g., *Meta Platforms*, 2024 WL 1549732, at *2 (denying motion for injunction pending appeal); *Meta Platforms*, 2024 WL 1121424 (denying motion for preliminary injunction); *Alpine Sec. Corp.*, 2023 WL 4703307, at *3 (Walker, J., concurring) (injunction of administrative proceeding proper under *Axon*); *Space Expl. Tech. Corp.*, 2024 WL 3512082 (granting preliminary injunction to preserve removal challenges); cf. *Cochran*, 20 F.4th at 212–13 (If removal claim is “meritorious,” plaintiff should not be “forc[ed] to litigate before an ALJ who is unconstitutionally insulated from presidential control.”).

¹⁵ See, e.g., *Energy Transfer LP v. NLRB*, No. 24-cv-198 (S.D. Tex. Filed June 27, 2024); *Ryan, LLC v. FTC*, No. 24-cv-986 (N.D. Tex. Filed Apr. 23, 2024); *Busler v. NLRB*, No. 24-cv-72 (N.D. Tex. Filed Jan. 22, 2024).

exercising executive power—and *Axon*—which held that district courts may hear collateral lawsuits to address structural separation-of-powers challenges. The challenges are indeed “fundamental, even existential.” *Axon*, 598 U.S. at 180.

And they go to the heart of the government’s power to restrict the People’s liberty. As this Court has stressed, laws may be enforced “only by a constitutional agency accountable to the Executive.” *Free Enter. Fund*, 561 U.S. at 513 (citation omitted). The apparent confusion concerning the proper scope of the *Humphrey*’s exception creates unnecessary and potentially devastating burdens on small companies like Leachco, who face an ever-expanding Executive Branch, “which now wields vast power and touches almost every aspect of daily life” *Free Enter. Fund*, 561 U.S. at 499; *see also City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., joined by Kennedy & Alito, JJ., dissenting) (“[T]he federal bureaucracy continues to grow; in the last 15 years, Congress has launched more than 50 new agencies. ... And more are on the way.”) (citations omitted).

Without this Court’s review, private parties in Leachco’s position will be absolutely precluded from obtaining preliminary injunctive relief when raising any separation-of-powers challenge, and lower courts will continue to ignore this Court’s precedent in *Seila Law* and *Axon*. Unless this Court intervenes, parties targeted for administrative enforcement will continue to be forced to defend themselves—sometimes for years—in the very agency tribunals they challenge as unconstitutional. Leachco’s plight exemplifies the problem.

Finally, the posture of the case allows this Court to consider a live controversy. While the ALJ's Initial Decision ruled in Leachco's favor, the Commission appealed, and its unlawful proceeding continues. Leachco thus remains subject to unaccountable Commissioners who voted to approve the action against Leachco and who will now sit as appellate "judges" with de novo fact-finding power. For Leachco, it is not yet too late, despite the lower courts' errors, to vindicate the separation of powers and the liberty and justice it protects.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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