No. 24-156

In the Supreme Court of the United States

LEACHCO, INC.,
Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 17 OTHER STATES IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the for-cause restriction on the President's authority to remove the CPSC's Commissioners violate the separation of powers?

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?

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INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[*]

Imagine a governmental agency with vast, unrestrained power over America's consumer markets. All on its own, the agency can declare that the items that line our store shelves are unsuitable and instruct the public to avoid them. It can strong-arm companies into recalling products. And when that doesn't work, it can force products off the market through internal agency proceedings. If someone complains, then the agency can retaliate by going after that individual for recall costs and more. Worse yet, in doing all this, the agency is accountable to essentially no one. The president doesn't have easy power to steer the agency by firing subordinates, and he isn't accountable when the agency missteps. Meanwhile, the courts can act only once the damage has been done and it's too late to do any good.

Unfortunately, one needn't imagine such an agency—it's the Consumer Product Safety Commission. In this case, one company that drew the Commission's ire tried to fight back. Petitioner Leachco, Inc. insisted that the Commission must at least answer to the President if it's going to wield broad executive authority. But the lower courts rebuffed Leachco, holding that the Commission's power and autonomy—including its for-cause removal protections—are no real issue. Even if they were unconstitutional, the lower courts didn't think a separation-of-powers violation could justify preliminary injunctive relief.

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[*] Under Supreme Court Rule 37, *amici* timely notified counsel of record of their intent to file this brief.

The lower courts were wrong, and the flaws that permeate their decisions concern more than just the CPSC. Independent agencies—agencies that dodge the ordinary constraints under which other executive-branch agencies work—are now everywhere. They regulate expansive realms of American life, including financial markets, communications, elections, employment, energy, and more. And "[b]ecause of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 165 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). They have become "a *de facto* fourth branch of Government," operating in a fuzzy space that blends legislative, executive, and judicial powers. *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 240 (2020) (Thomas, J., concurring in part and dissenting in part).

Amici States have watched the growth of independent agencies—and their accompanying attack on the separation of powers—with increasing concern. Separating the powers of our federal government preserves the "integrity, dignity, and residual sovereignty of the States." *Bond* v. *United States,* 564 U.S. 211, 221 (2011); see also *Garcia* v. *San Antonio Metro. Transit Auth.,* 469 U.S. 528, 550 (1985) (explaining how the Framers chose the "structure of the Federal Government" as the "principal means" "to ensure the role of the States"). Balancing powers among the branches helps "ensure that States function as political entities in their own right." *Bond*, 564 U.S. at 221. On the flipside, "[p]ermitting the federal government to avoid these constraints would allow it to exercise more power than the Constitution contemplates, at the expense of state authority." Bradford R. Clark, *Separation of Powers As*

A Safeguard of Federalism, 79 TEX. L. REV. 1321, 1324 (2001). So the "success of American federalism" might be undermined "[i]f the federal government were free to evade federal lawmaking procedures by shifting substantial lawmaking authority to unelected officials" like "independent agencies." Bradford R. Clark, *Putting the Safeguards Back into the Political Safeguards of Federalism,* 80 TEX. L. REV. 327, 337 (2001).

The CPSC is a special problem for States because the Commission is operating in a field—"consumer protection"—that is "traditionally regulated by the [S]tates," creating a risk that States will be pushed to the side. *Gen. Motors Corp.* v. *Abrams*, 897 F.2d 34, 41 (2d Cir. 1990); see also Amicus Br. of La. & 15 Other States at 10-18, *Consumers' Research* v. *CPSC*, No. 23-1323 (U.S. filed July 18, 2024) (describing CPSC's special threat to States). Before the Commission can start rewriting consumer-protection law, States should at least have a say. But independent agencies like the CPSC have fewer political access points because they "lack sufficient accountability to the President," Daniel Backman, *The Antimonopoly Presidency*, 133 YALE L.J. 342, 402 (2023), so States are often left out in the cold.

Yet independent agencies like the CPSC have no business operating as they do in our constitutional system. These agencies aren't consistent with any original understanding of the separation of powers. Even though they've sometimes been defended on functionalist grounds, time has shown that reasoning doesn't hold up, either. Promised benefits are illusory, while the harms have been obvious and repeated. And problems will continue if courts are unwilling to expeditiously address them. So courts must be willing to step up and acknowledge these harms at the preliminary-injunction

stage. When a party is being affected by an unconstitutionally structured regulator, that creates irreparable injury that warrants immediate relief.

The Court should grant this Petition to begin to tackle the serious problems that agencies like the CPSC cause. Denying the Petition will allow harm to small businesses, consumers, the States, and others to continue. Milton Friedman had it right: while "[m]any people want the government to protect the consumer," a "much more urgent problem is to protect the consumer from the government." Adam Benforado, *Don't Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business and Government*, 5 ENTREPRENEURIAL BUS. L.J. 509, 509 (2010) (quoting Milton Friedman).

SUMMARY OF ARGUMENT

I. Early political theorists—those that shaped the Founders' thinking—would not have imagined the world of independent agencies we see today. Those thinkers pushed for a clear separation of powers, which assigned all executive authority to a responsible executive. The Framers, too, thought the executive should hold *all* executive authority. The executive should thus be empowered to hire and fire as he wishes. Structures like those at the CPSC can't be justified by the sort of "close-enough" constitutionalism embraced by cases like *Humphrey's Executor*.

II. Some have contended independent agencies can be a little incongruent with the true understanding of separation of powers so long as they roughly approximate separation and produce benefits. But this functionalist understanding hasn't been borne out with time. The logic was flawed to begin with, but the evidence now shows that

independent agencies aren't uniquely skilled in their subject-matter areas or exceptionally sheltered from political influence. The parade of dubious actions recently undertaken by several major independent agencies confirms as much.

III. Separation-of-powers violations justify early equitable relief. The lower court tried to distinguish between individual constitutional violations and structural constitutional violations in holding that the latter don't give rise to irreparable injuries. But that's a false dichotomy; individual and structural constitutional rights advance similar interests, protect liberty interests by working together, and don't otherwise function as "greater" and "lesser" sets of rights. The lower court's contrary opinion would defeat the Court's recent aim of providing litigants fast relief when an unconstitutionally constituted agency acts against them. And it would create a system of flawed incentives that would undermine our constitutional system.

The Court should therefore grant the Petition.

REASONS FOR GRANTING THE PETITION

I. The CPSC's Structure Is Inconsistent With Basic Separation-Of-Powers Principles.

The Constitution's text decides this case. It provides that "[t]he executive power"—not *some* executive power—"shall be vested in a President." U.S. CONST. art. II, § 1, cl. 1; see also Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93, 134 (2020). This power to execute the laws brings a necessary implication: "as [the President's] selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue

to be responsible." *Myers* v. *United States*, 272 U.S. 52, 117 (1926). And "the fact that no express limit was placed on the power of removal by the executive [is] convincing indication that none was intended." *Id.* In other words, "formal constitutional principles" drive a "logical proof": "the President must oversee executive branch officers; such oversight requires the removal power; and Congress cannot diminish or modify the removal power." Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund *v.* PCAOB, 79 FORDHAM L. REV. 2541, 2575 (2011). Yet with independent agencies like the CPSC, Congress has done exactly that.

Aside from text, though, "this Court has often put significant weight upon historical practice" "[i]n separation-of-powers cases." *Zivotofsky ex rel. Zivotofsky* v. *Kerry*, 576 U.S. 1, 23 (2015) (cleaned up). That history confirms that insulating agency commissioners from removal is constitutionally untenable.

A. "On questions concerning government and law, eighteenth-century Americans turned to three writers in particular—John Locke, William Blackstone, and Montesquieu." John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 199 (1996); see also, *e.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 607 (1994) (describing how the "orthodox understanding of executive power held by Locke, Blackstone, and Montesquieu remained supreme" at the time of the Founding). Indeed, this Court has looked to these same writers in sizing up the removal power. *Myers*, 272 U.S. at 234. And the writings of all three

highlight how independent agencies are deeply problematic.

Locke, for instance, stressed that laws "have a constant and lasting force, and need a perpetual Execution." JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT § 144 (C.B. Macpherson ed., 1980) (1690). Given that continuing need, an executive must be established to see to it—"[a]nd thus the legislative and executive power come often to be separated." *Id.* Partly this separation arose because legislatures weren't always in session. *Id.* But the separation also acknowledged human nature; "it may be too great a temptation to human frailty, apt to grasp at power, for the same persons, who have the power of making laws, to have also in their hands the power to executive them." *Id.* § 143.

Throughout his *Second Treatise*, Locke "repeatedly illustrated the core meaning of executive power"—and contemplated that a "supreme executor" would be the only one to wield it. Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 745 (2003). And even though Locke saw more importance in the legislative role than the executive's authority, "Locke [wa]s emphatically not suggesting that legislative supremacy entitles legislators to perform adjudicative and executive functions." Jeremy Waldron, *Separation of Powers in Thought and Practice?*, 54 B.C. L. REV. 433, 441 (2013); see, *e.g.*, *Wellness Int'l Network, Ltd.* v. *Sharif*, 575 U.S. 665, 710 (2015) (Thomas, J., dissenting).

On this score, Blackstone echoed Locke. "[T]he making of laws is entirely the work of ... the legislative branch, of the sovereign power," he explained, "yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate." 1 WILLIAM BLACKSTONE,

COMMENTARIES *261 (1765). In contrast, "tyrannical governments" tended to "vest[]" "the right both of making and of enforcing the laws" in "the same body of men." *Id.* at 142. And because the British government had "wisely placed in a single hand" the executive power, others must act in "due subordination" of that single individual. *Id.* at *242-43.

Blackstone's model promoted "unanimity, strength, and dispatch." BLACKSTONE, *supra*, at *242. It also ensured that the legislative branch would "take care not to entrust the [executive] with so large a power, as may tend to the subversion of its own independence." *Id.* at *142. So both "Blackstone and Locke accept the value of delegation," but "the delegations they accept are to a unitary executive." David Casazza, *Liberty Requires Accountability: Checking Delegations to Independent Agencies*, 38 HARV. J.L. & PUB. POL'Y 729, 742 n.65 (2015) (cleaned up).

Montesquieu was a third voice in the chorus. He emphasized that "[w]hen the legislative and executive powers are united in the same person … there can be then no liberty." CHARLES DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAW 185 (1751). "Miserable indeed would be the case" if one authority were able "to exercise those three powers, that of enacting laws, that of executing the public resolutions, and that of judging the crimes … of individuals." *Id.* at 186. Montesquieu also thought that keeping executive power under one central figure would advance "expedition"—a noble goal for anyone who has watched the creaking wheels of the modern administrative state try to push forward. *Id.* at 68.

"[O]ne can only make sense of Montesquieu's famous separation maxim if one regards him as subscribing to a

modern conception of executive power—as all powers to execute the law except for the judicial power." Prakash, *supra*, at 747. So as then-Judge Scalia (and two others) recognized, limiting or reassigning the presidential removal powers "violates the[se] fundamental principle[s] expressed by Montesquieu upon which the theory of separated powers rests." *Synar* v. *United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986).

In sum, all three thinkers assumed that a strong executive would wield the complete executive power. Meanwhile, "a separate administrative power has no basis in the political philosophers that so influenced the founding generation." Calabresi & Prakash, *supra*, at 606. So "students of … Locke, Montesquieu, and Blackstone" would see that "permit[ting] Congress to strip away a president's control of the executive branch by limiting his capacity to fire subordinates … would indulge" one of the "gravest threat[s] to the separation of powers." Andrew C. McCarthy, *The Accidental Defender of the Constitution*, 21 FEDERALIST SOC'Y REV. 226, 228 (2020).

B. "The leading members of the Constitutional Convention of 1787 combined [this] profound scholarship and learning with practical experience." *United States ex rel. Brookfield Constr. Co.* v. *Stewart*, 234 F. Supp. 94, 97 (D.D.C. 1964). Some of that practical experience came from their own States, where no "pre-1787 state constitution" referred "to the existence of administrative power not already vested with the executive authority." Calabresi & Prakash, *supra*, at 607. More experience came from the weakened, plural system employed in the Articles of Confederation, a "failed" approach that at one point entailed "a series of executive departments" responsible to Congress. STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE:

PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 33 (2008); see also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1407 (1833) (describing how the grant of executive power to Congress was thought to be a "fatal defect" in the Articles of Confederation).

Driven by their education and experience, many Framers spoke out against weakened executive power that omitted a muscular removal power. Although sometimes cited as an *opponent* of a broad removal power, James Madison came to believe that "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws." 1 ANNALS OF CONG. 481 (1789) (Joseph Gales ed., 1834). Because the power of "removing persons" was "as much of an Executive nature as" the right to appoint persons, that power couldn't be interfered with by others, Congress included. *Id.* Alexander Hamilton, too, thought that the executive power was "subject only to the exceptions and qualifications which are expressed in the [Constitution]." 7 WORKS OF ALEXANDER HAMILTON 76, 80–81 (J. C. Hamilton ed., 1851). "Decision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number," he concluded. THE FEDERALIST NO. 70 (Alexander Hamilton). Hamilton urged that "the executive power is more easily confined when it is ONE," as "all multiplication of the Executive is rather dangerous than friendly to liberty." *Id.* George Washington sought a "strong, independent, and energetic executive" at the Philadelphia Convention. GLENN A. PHELPS, GEORGE WASHINGTON AND AMERICAN CONSTITUTIONALISM 103 (1993). And later, as President, John Adams wrote that "[t]he worst evil that can happen in any government is a

divided executive; and, as a plural executive must, from the nature of men, be forever divided, this is a demonstration that a plural executive is a great evil, and incompatible with liberty." CALABRESI & YOO, *supra* at 59 (quoting John Adams, Letter to Timothy Pickering (Oct. 31, 1797)).

Other early American political figures thought much the same. James Monroe, for example, believed "[t]he establishment of inferior independent departments, the heads of which are not, and ought not to be members of the Administration," was an idea "liable to many serious objections." Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RES. L. REV. 1451, 1512 (1997) (quoting James Monroe, Letter to Congressman Adam Seybert (June 10, 1812)). Likewise, John Quincy Adams perceived "an obvious incongruity and indecency that a head of Department should make a report to either House of Congress which the President should disapprove." *Id.* at 1522 (quoting Entry for January 12, 1819 in THE MEMOIRS OF JOHN QUINCY ADAMS 217 (Charles Francis Adams, ed., 1874-77)).

Views like these led to what the Court has since called the "Decision of 1789," a choice by the early Congress to make the heads of the first executive departments answerable to and removable by the President alone. *Free Enter. Fund* v. *Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010). The decision "provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." *Bowsher* v. *Synar*, 478 U.S. 714, 723-24 (1986) (cleaned up). The early congressional debates were again colored with the separation-of-powers absolutism of the early "judicious

writers" like Montesquieu. See 1 ANNALS OF CONG. 545 (1789) (Joseph Gales ed., 1834) (statement of Rep. Richard Henry Lee). And in the years that followed, America's first Presidents likewise acted with a firm belief that they—and they alone—could act to remove those executing and administering the laws. See Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756, 1764-82 (2023). Indeed, "executive power to remove executive officers coupled with a congressional inability to curb that power … was the practice until the Civil War." *Id.* at 1789.

C. Now measure this indefeasible conception of the executive power with the way things work today.

Humphrey's Executor is the root of the problem. See Pet.App.26a-27a. There, the Court held that Congress could constrain the President's power of removal so long as the officer wasn't performing "purely executive" duties. *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 628 (1935). A special "administrative body" that also exercised some "quasi legislative or quasi judicial powers" was thought to receive special protection. *Id.* Oddly, the Court rested its decision in part on separation of powers, reasoning that the President would exercise "control or coercive influence" and "threaten[] the independence of a commission" if he could exercise his power of removal. *Id.* at 629-30. And it thought the Federal Trade Commission was not truly an executive agency. But see *Seila Law*, 591 U.S. at 216 n.2 ("The Court's conclusion that the FTC did not exercise executive power has not withstood the test of time.").

Later, in *Morrison* v. *Olson*, 487 U.S. 654, 691 (1988), the Court purported to narrow the categories described in *Humphrey's Executor* to some degree—but with limited success. *Morrison* still upheld a removal restriction in

part because the need to control a special counsel's discretion was not thought to be "central to the functioning of the executive branch," *id.* at 691—sounding eerily like *Humphrey's Executor*'s "purely executive officer" test by another name. And the misguided idea that "administrative bodies" sometimes get special immunities from ordinary presidential power remains entrenched, at least in the lower courts.

And that's how we end up with an agency like the CPSC. The Commission can shape markets, launch large-scale investigations, and bring substantial enforcement authority to bear. Pet.6-7. The Commission can drag companies into an in-house enforcement mechanism where it can push a target off the retail market and levy substantial monetary penalties. Pet.7-9. And it does so free from any worries about presidential oversight, as Commissioners can't be removed except for "neglect of duty or malfeasance in office." 15 U.S.C. § 2053(a). And all because, in some ambiguous way, its work doesn't strike some as sufficiently at the heart of the executive power—whatever the Framers might've expected.

This setup can't continue. The Constitution "[d]ivide[s] power everywhere *except* for the Presidency." *Seila Law*, 591 U.S. at 224 (emphasis added). The executive power "acquires its legitimacy and accountability to the public through a clear and effective chain of command down from the President, on whom all the people vote." *United States* v. *Arthrex, Inc.*, 594 U.S. 1, 11 (2021) (cleaned up). So "[t]he President's control over subordinates"—so-called independent agencies included—"constitutes an essential aspect of the independence of the executive branch in the scheme of separation of powers." Neomi Rao, *Removal: Necessary and Sufficient for Presidential Control*, 65 ALA. L. REV. 1205, 1228 (2014). The Court

should grant the Petition to reaffirm that key element of executive power.

II. Agency Independence Does More Harm Than Good.

A. For too long, those who support independent agencies with removal limits have pushed for a "functional" or "pragmatic" approach to independent agencies. Functionalists suggest independent agencies, despite questionable legal justifications, are necessary because of their purported decision-producing benefits. Specifically, they are thought to attract uniquely qualified experts, render politically independent decisions, and embrace cooperatively driven outcomes (particularly with politically diverse, multi-member boards).

Considering these supposed benefits, "[f]unctionalists were prepared to accept independent agencies not established under the original constitutional structure because those agencies performed only 'quasi' legislative, executive, or judicial functions." Samuel W. Cooper, *Considering "Power" in Separation of Powers*, 46 STAN. L. REV. 361, 370 (1994). Courts then step in only when an agency's independence "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 443 (1977). Some continue to push a "classically functionalist" argument today in defending the continued use of independent agencies: "if the system is not broken and has worked thus far, why fix it?" Linda D. Jellum & Moses M. Tincher, *The Shadow of* Free Enterprise*: The Unconstitutionality of the Securities & Exchange Commission's Administrative Law Judges*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 611, 686 (2017).

This functionalist approach was problematic from the beginning. Most obviously, "[f]unctionalism invites judges to make subjective judgments based on their personal values and ideological preferences." Robert L. Glicksman & Richard E. Levy, *The New Separation of Powers Formalism and Administrative Adjudication*, 90 GEO. WASH. L. REV. 1088, 1104 (2022). Rather than measuring an agency's actions and authority against our Constitution, surmise whether a given structure involves inputs and outputs to the judges' liking. Functionalism also unduly minimizes the real harms that flow from independence—including in a lack of accountability. See, *e.g.*, Alison Gocke, *Pipelines and Politics*, 47 HARV. ENV'T L. REV. 207, 269 (2023) (describing how the Federal Energy Regulatory Commission, as "an independent agency, … [is] generally less responsive to the standard actors we might think of as being able to check agency malfeasance"). And little evidence suggested the supposed benefits from endorsing independent agencies in this way were real. It bordered on the absurd to say that independent agencies like the Federal Trade Commission (or here, the CPSC) don't exercise executive functions. Of course they do. See, *e.g.*, Pet.18-21.

But "[f]rom the functionalist perspective, the distinctive expertise and impartiality of independent agencies appear much less compelling in the light of a half-century of experience." Peter P. Swire, *Incorporation of Independent Agencies into the Executive Branch*, 94 YALE L.J. 1766, 1766 (1985). We now know that even independent agencies sometimes exercise their authority in a biased way, sometimes engage in discriminatory acts, and sometimes push out others to expand their own power. Bijal Shah, *A Critical Analysis of Separation-of-Powers Functionalism*, 84 OHIO ST. L.J. 1007, 1039 (2024). Even with the FTC—the very agency addressed

in *Humphrey's Executor*—the evidence says *Humphrey's Executor*'s premises were mistaken. "A century of experience has shown that" the FTC "is independent from the President but inclined to the will of Congress, not uniquely expert, and not predominantly legislative or adjudicatory." Daniel A. Crane, *Debunking* Humphrey's Executor, 83 GEO. WASH. L. REV. 1835, 1871 (2015). The "benefits of administrative independence, such as freedom from 'politics' or the promotion of scientific or other expertise," have simply "eroded over time." Rao, *Removal*, *supra*, at 1232.

A recent empirical analysis confirmed it. Professors Neal Devins and David E. Lewis surveyed hundreds of executive-branch and independent-agency officials from both the Obama and Trump administrations. Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1311 (2023). Their conclusion? "[T]he independent agency model no longer works." *Id.* at 1309. "[E]xpertise, political insulation, and policy stability goals have not been realized," they conclude, and independent agencies often fail to coordinate with other agencies while suffering from political neglect. *Id.* at 1340. And an ugly paradox results from these realities: even if presidential *control* lurks around independent agencies, ultimate *accountability* for those agencies is still lessened. Presidents can disclaim responsibility for their actions. See *Free Enter.*, 561 U.S. at 498 (noting how laws that "grant[] … executive power without the Executive's oversight … subvert[] the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts"); see also, *e.g.*, Federalist Society Panel, *Federalism: Deference Meets Delegation: Which Is the Most Dangerous Branch?*, 43 U. DAYTON L. REV. 31, 51 (2018) (quoting Neal Katyal: "[B]ecause of the[ir] lack of accountability,"

"independent agencies are a unique problem" and "are dangerous in ways not anticipated by our founders.").

B. It might be tempting to dub these theoretical concerns. But recent real-world examples confirm independent agencies have run amuck.

Take the CPSC itself. This case is just one example of the agency going too far. A while back, for instance, the Commission announced it was considering banning gas stoves, which 40% of Americans use. See Ari Natter, *US Safety Agency to Consider Ban on Gas Stoves Amid Health Fears*, BLOOMBERG (Jan. 9, 2023, 1:01 PM), https://tinyurl.com/3k8vv5t4. Americans were justifiably outraged. But when pressed, the White House leaned on the agency's structure to dodge responsibility: CPSC Commissioners "are independent," so explanations for the agency's actions were "not something that the White House can … provide." *Press Briefing by Press Secretary Karine Jean-Pierre,* THE WHITE HOUSE (Jan. 11, 2023, 2:26 PM), https://tinyurl.com/pm2zea38. CPSC was thus able to do its problematic work without fearing actual accountability, and the President was able to insulate himself from blame for a controversial initiative.

The Federal Deposit Insurance Corporation provides another example. There, Chair Martin Gruenberg came under fire when an extensive investigation revealed he had fostered "a workplace culture that is 'misogynistic,' 'patriarchal,' 'insular,' and 'outdated.'" Fatima Hussein, *FDIC Report Outlines 'Misogynistic,' 'Patriarchal' 'Good Ol' Boys' Workplace Culture*, AP NEWS (May 7, 2024, 6:30 PM), https://tinyurl.com/2m37jcw6. Here again, outrage ensued. And again, the White House quickly retreated behind the notion that the FDIC is "an independent agency." Victoria Guida, *Embattled FDIC Chair To Step Down When a Successor Is Confirmed*, POLITICO (May 20,

2024, 5:37 PM), https://tinyurl.com/3erk8z73. All the White House would do is "refer [the press] to them as to anything else coming out from the FDIC." Tim Hains, *RCP's Phil Wegmann: Does WH Have Any Response To Reports Of Toxic Work Environment At FDIC?*, REALCLEAR POLITICS (May 13, 2024), https://tinyurl.com/ymk99e86. Though the Chair says he will resign, he is still running the FDIC. Meanwhile, the White House has evaded substantial criticism for the agency's dysfunction.

Just last term, the Court examined the Securities and Exchange Commission's administrative process for levying civil penalties for securities fraud. *SEC* v. *Jarkesy*, 144 S. Ct. 2117 (2024). The Court found that the Commission had unconstitutionally purported to assume "the roles of prosecutor, judge, and jury." *Id.* at 2139. Asserting self-aggrandizing power like that is bad enough. But in fighting to defend its work, the Commission touted how it was employing "classic executive power"—apparently free from Presidential oversight. Pet.'s Br. at 34, *SEC* v. *Jarkesy*, No. 22-859 (U.S. filed Aug. 28, 2023). The Commission has thus dispensed with any pretense that it's exercising something other than "executive power in the constitutional sense"—one of *Humphrey's Executor*'s key findings. 295 U.S. at 628. And this inflated sense of power might explain why the Commission has acted so aggressively in other contexts where it has no legitimate claim of expertise. See, *e.g.*, Kristy Balsanek, *et al.*, *SEC Stays Climate Rules: An Overview of Ongoing Legal Challenges*, DLA PIPER (Apr. 9, 2024), https://tinyurl.com/ywbh93sh (describing the SEC's new unlawful climate-related-risk disclosure regime).

All in all, independent agencies have felt free to take adventuresome approaches in rulemakings, apply constitutionally dubious methods in adjudications, and

even play fast and loose in their own day-to-day management. Meanwhile, the President can take a see-no-evil, hear-no-evil, speak-no-evil approach to all the above. See also, *e.g.*, *White House Daily Briefing*, C-SPAN (Nov. 18, 2022), https://tinyurl.com/2p8x7879 (declining to address potential FTC action against Twitter because "the FTC is an independent agency"); *Press Briefing by Press Secretary Karine Jean-Pierre*, THE WHITE HOUSE (Apr. 21, 2023, 1:31 PM), https://tinyurl.com/3uffh32k (limiting comments on approval of mifepristone because "[a]gain, [the FDA is] an independent agency"); *Press Briefing by Press Secretary Karine Jean-Pierre and NSC Coordinator for Strategic Communications John Kirby*, THE AMERICAN PRESIDENCY PROJECT (Dec. 14, 2023, 1:17 PM), https://tinyurl.com/3znyzwc5 ("[T]he Fed ... is, as you know, an independent agency. Going to be super mindful on that … So, I'm just not going to speak to that.").

The Constitution calls for more.

III. Separation-of-Powers Violations Create Immediate, Irreparable Harms.

In a last stumble, the Tenth Circuit held that Leachco had alleged "a mere generalized separation of powers violation" that "does not establish irreparable harm." Pet.App.14a. The lower court tried to distinguish between "individual" harms and the structural ones that flow from separation-of-powers violations. *Id.* That reasoning warrants a second look from this Court.

As even the lower court recognized, "the loss" of at least some constitutional freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod* v. *Burns*, 427 U.S. 347, 373 (1976) (plurality op.). But the lower court tried to do some hair-splitting,

suggesting a deprivation of a constitutional right *can* be irreparable *but only* when it's stacked on some other type of harm. Pet.App.14a. It's hard to find a principle like that in *Elrod* or any cases that follow it. Quite the opposite: the Court has said that constitutionally deficient removal provisions that "violate[] the separation of powers … inflict[] a 'here-and-now' injury on affected third parties that can be remedied by a court." *Seila Law*, 591 U.S. at 212 (quoting *Bowsher*, 478 U.S. at 727 n.5.

Elrod addressed the First Amendment, but there's no good reason to place speech rights on a higher pedestal than the Constitution's institutional and structural protections. See *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values."). For one thing, they often serve similar purposes tied to accountability. The First Amendment was "inspired" by "a desire for government accountability in the face of perceived abuses." *Cooper* v. *Dillon*, 403 F.3d 1208, 1214 (11th Cir. 2005); see also *Citizens United* v. *FEC*, 558 U.S. 310, 339 (2010) ("Speech … is the means to hold officials accountable to the people."). Likewise, appropriate respect for separation of powers avoids a "diffusion of power [that] carries with it a diffusion of accountability." *Free Enter.*, 561 U.S. at 497.

And separation-of-powers protections *are* individual protections in many ways. After all, "[t]he structural principles secured by the separation of powers protect the individual as well." *Bond*, 564 U.S. at 222; accord *Bowsher*, 478 U.S. at 730. Ultimately, all these provisions serve to "safeguard liberty." *United States* v. *Munoz-Flores*, 495 U.S. 385, 395 (1990); see also *Consumers' Rsch.* v. *FCC*, 109 F.4th 743, 788 (5th Cir. 2024) (Ho, J.,

concurring) ("If you believe in democracy, then you should oppose an administrative state that shields government action from accountability to the people.").

A preliminary injunction is also an important tool against structural violations like the CPSC's. For leaders to be held accountable, they must face sanctions for bad decisions. Molly Beutz, *Functional Democracy: Responding to Failures of Accountability*, 44 HARV. INT'L L.J. 387, 402 (2003). And the stronger the sanction, the more "powerful [the] incentive for responsible and, more importantly, responsive decision-making." *Id.* A full-stop order at the start of the case is the right tool for the job. Anything weaker invites the agency to press ahead in the hopes the target will acquiesce or bankrupt before getting to the end of the road. In contrast, an injunction encourages both the agency to conform *and* litigants to act to hold it accountable. See Kent Barnett, *To the Victor Goes the Toil-Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. REV. 481, 497 (2014) ("[T]he mere pronouncement of a norm through a declaratory judgment may be less valuable than a prohibitory injunction that limits administrative action, leaving litigants less incentive to vindicate that norm. If affected parties have no incentive to enforce a norm, that norm may cease to operate.").

In refusing to recognize these ideas, the lower court effectively rendered a recent decision from this Court dead letter. In *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), the Court held that a respondent to an administrative proceeding who sought to challenge the agency's constitutional authority could sue to "stop the administrative proceedings." *Id.* at 180. The Court recognized the claimed separation-of-powers violation would be "impossible to remedy once the proceeding is

over," as "[j]udicial review of [the] structural constitutional claims would come too late to be meaningful." *Id.* at 191. So faster, immediate relief was necessary. But if the Tenth Circuit were right, then Petitioners in *Axon* would be out of luck. Yes, they could file their complaint in federal court, but they'd receive no preliminary relief—and their relief at the end of the federal case would almost "come too late to be meaningful." "[B]y the time that they access[ed] any judicial review" *and relief*, "the proceedings w[ould] be complete, rendering the possibility of obtaining an injunction moot even if the final Commission order is vacated." *Tilton* v. *SEC*, 824 F.3d 276, 298 (2d Cir. 2016) (Droney, J., dissenting). The Court could not have intended that backwards result.

And the States are collateral damage in this upside-down world. If the CPSC is allowed to ban another product under its unconstitutional structure, then States' markets are lessened in a way that might not have happened if the Commission were accountable. If the CPSC may issue another broad rule setting onerous standards, then States' product-liability law is effectively mooted (or worse, preempted) without a democratically accountable actor having ever given the thumbs-up for that aggressive tack. And if all the real decisions continue to be made by the "fourth branch of the Government" ensconced safely in Washington, *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting), then no one will feel a need to make those decisions back in the States.

The Court should not embrace those outcomes. It should instead grant the Petition and recognize that "[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).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

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