

No. 24-156

In the Supreme Court of the United States

LEACHCO, INC.,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,

Respondents.

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

**BRIEF OF THE CATO INSTITUTE, NATIONAL
FEDERATION OF INDEPENDENT BUSINESS
SMALL BUSINESS LEGAL CENTER, INC., AND
BUCKEYE INSTITUTE AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

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?
2. For purposes of preliminary-injunctive relief, can a separation-of-powers violation cause irreparable harm?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	i
TABLE OF AUTHORITIES	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. THE PRESIDENT MUST HAVE REMOVAL AUTHORITY OVER OFFICERS WHO POSSESS SUBSTANTIAL EXECUTIVE POWER.	7
II. LITTLE REMAINS OF <i>HUMPHREY'S EXECUTOR</i> TO GUIDE LOWER COURTS IN EVALUATING THE CONSTITUTIONALITY OF REMOVAL RESTRICTIONS.	12
A. This Court Has Rejected Much of <i>Humphrey's Executor's</i> Rationale.	13
B. <i>Humphrey's Executor</i> is Inapplicable for Many Multimember Expert Agencies Today.....	16
III. PARTIES SUBJECTED TO PROCEEDINGS BY AN UNCONSTITUTIONALLY STRUCTURED AGENCY ARE IRREPARABLY HARMED.	19
CONCLUSION	22

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Axon Enter. v. FTC</i> , 598 U.S. 175 (2023)	5, 6, 19
<i>Bowsher v. Synar</i> , 478 U.S. 714 (1986)	9
<i>City of Arlington v. FCC</i> , 569 U.S. 290 (2013)	14
<i>Clinton v. Jones</i> , 520 U.S. 681 (1997)	9
<i>Collins v. Yellen</i> , 594 U.S. 220 (2021)	6, 20, 21
<i>Epic Sys. Corp. v. Lewis</i> , 584 U.S. 497 (2018)	18
<i>Ex parte Hennen</i> , 38 U.S. 230 (1839)	11
<i>Free Enter. Fund v. PCAOB</i> , 537 F.3d 667 (D.C. Cir. 2008)	16
<i>Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.</i> , 561 U.S. 477 (2010)	4, 8, 9, 11
<i>FTC v. Pac. States Paper Trade Assn.</i> , 273 U.S. 52 (1927)	14
<i>FTC v. Ruberoid Co.</i> , 343 U.S. 470 (1952)	16
<i>FTC v. Walmart Inc.</i> , 664 F. Supp. 3d 808 (2023)	7
<i>Humphrey’s Executor v. United States</i> , 295 U.S. 602 (1935)	3, 4, 12, 13, 15
<i>In re Aiken Cnty.</i> , 645 F.3d 428 (2011)	16
<i>Morrison v. Olson</i> , 487 U. S. 654 (1989)	5, 9, 12, 13, 15, 16
<i>Myers v. United States</i> , 272 U.S. 52 (1926)	11, 12
<i>Parsons v. United States</i> , 167 U.S. 324 (1897)	11

<i>PHH Corp. v. Consumer Fin. Prot. Bureau</i> , 881 F.3d 75 (D.C. Cir. 2018)	17
<i>Rodriguez de Quijas v. Shearson/American Exp., Inc.</i> , 490 U.S. 477 (1989)	7
<i>Schrier v. Univ. Of Co.</i> , 427 F.3d 1253 (10th Cir. 2005)	20
<i>Seila Law LLC v. Consumer Fin. Prot. Bureau</i> , 591 U.S. 197 (2020)	4, 5, 9, 10, 12, 13, 15, 16, 17, 21
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016).....	19
<i>Synar v. United States</i> , 626 F. Supp. 1374 (D.D.C. 1986)	9
Statutes	
15 U.S.C. § 2053(a)	12
15 U.S.C. § 2064.....	5
15 U.S.C. § 2069.....	17
15 U.S.C. § 2070.....	17
15 U.S.C. § 2071.....	17
15 U.S.C. § 2072.....	17
15 U.S.C. § 2076(b)(7)	17
Federal Trade Commission Act of 1914, Ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. § 45).....	14
Other Authorities	
Cass R. Sunstein & Adrian Vermeule, <i>The Unitary Executive: Past, Present, and Future</i> , 2020 SUP. CT. REV. 83 (2020).....	7, 16

Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, <i>The Unitary Executive During the Third Half-Century, 1889–1945</i> , 80 NOTRE DAME L. REV. 1 (2004)	16
Daniel A. Crane, <i>Debunking Humphrey’s Executor</i> , 83 GEO. WASH. L. REV. 1835 (2015)	14
GARY LAWSON & GUY SEIDMAN, A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017)	8, 9
Gary Lawson, <i>Command and Control: Operationalizing the Unitary Executive</i> , 92 FORDHAM L. REV. 441 (2023).....	8
Gary Lawson, <i>The Jeffersonian Treaty Clause</i> , 2006 U. Ill. L. Rev. 1 (2006).....	8
In the Matter of Leachco, Inc., Joint Motion to Set Briefing Schedule, CPSC Docket No. 22-1 (July 16, 2024).....	5
Jed H. Shugerman, <i>Movement on Removal: An Emerging Consensus about The First Congress and Presidential Power</i> , 63 AM. J. LEGAL HIST. 258 (2023)	11
Max Farrand, <i>The Federal Constitution and the Defects of the Confederation</i> , 2 AM. POL. SCI. R. 532 (1908)	10
Phillip Hamburger, <i>Nondelegation Blues</i> , 91 GEO. WASH. L. REV. 1083 (2023)	15
<i>Presidential Succession and Delegation in Case of Disability</i> , 5 OP. O.L.C. 91 (1981)	8, 9

Richard J. Pierce Jr., <i>The Scope of the Removal Power Is Ripe for Reconsideration</i> , 58 JUDGES' J. 19 (2019)	16
STEVEN GOW CALABRESI & GARY LAWSON, THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA (1st ed. 2020).....	10
THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).....	10
THE FEDERALIST NO. 51 (James Madison) (Clinton Rossiter ed., 1961)	11
THE FEDERALIST NO. 69 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
THE FEDERALIST NO. 70 (Alexander Hamilton) (Clinton Rossiter ed., 1961)	11
Thomas E. Kauper, <i>Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission</i> , 66 MICH. L. REV. 1095 (1968).....	14
William Yeatman & Keelyn Gallagher, <i>The Rise of Monetary Sanctions in Federal Agency Adjudication</i> , PAC. LEGAL FOUND. (Rsch. Paper No. 202401) (2024)	3
WRITINGS OF GEORGE WASHINGTON (J. Fitzpatrick ed. 1939)	8
Rules	
FED. R. CIV. PROC. 53(f)(3)	15
Constitutional Provisions	
U.S. CONST. art. II, § 1, cl. 1	3, 8, 14
U.S. CONST. art. II, § 3.....	3, 8

INTEREST OF *AMICUS CURIAE*¹

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The National Federation of Independent Business Small Business Legal Center, Inc. is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions. The Buckeye Institute is a non-partisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute engages in

¹ Rule 37 statement: All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

litigation in support of the principles of federalism and separation of powers and the protection of individual liberties. The Buckeye Institute also advocates on behalf of regulated entities when agencies have exceeded their constitutional authority or their congressionally authorized role.

This case interests *amici* because the Framers carefully crafted a tripartite federal government of separated powers to best preserve liberty. Removal protections for principal executive officers like the Consumer Product Safety Commissioners undermine the Framers' scheme and unlawfully expand the power of unelected government officials.

SUMMARY OF ARGUMENT

Quietly, and over decades, “independent” federal agencies have accumulated substantial executive power, including the power to impose severe financial penalties on Americans and their businesses. Some agencies grew their powers piecemeal, while others received broad new powers abruptly via Congressional authorization. Notably, the growth of this shadowy “fourth branch” of government—which possesses the power to investigate, adjudicate, and enforce financial penalties against parties for regulatory violations—began around 1970. *See* William Yeatman & Keelyn Gallagher, *The Rise of Monetary Sanctions in Federal Agency Adjudication*, PAC. LEGAL FOUND., at 25 (Rsch. Paper No. 202401) (2024).²

Despite the recent vintage of these agencies’ powers, lower courts still evaluate independent agencies as if they were mere “judicial or legislative aids” from a bygone era. *See Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). The Consumer Product Safety Commission (CPSC) is one of those agencies that claims substantial executive power, yet its Commissioners are largely shielded from the President’s removal. The 50-year “leakage” of executive power to unelected, difficult-to-remove government officials must be abated to preserve the separation of powers scheme that the Constitution requires.

The Constitution “vest[s] in the President all the “executive Power” and gives him the duty to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 1, cl. 1 & § 3. For the President to fulfill his

² Available at <https://tinyurl.com/4xnb3f8w>.

constitutional responsibilities, he must oversee, supervise, and control his principal subordinates. Therefore, the President has “as a general matter, the authority to remove those who assist him in carrying out his duties.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513–14 (2010). This Court has recognized only two exceptions to the presidential removal power. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 218 (2020). The exception relevant to this case stems from *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935). That case upheld for-cause removal protections for FTC Commissioners on the basis that the Commissioners “occup[y] no place in the executive department and . . . exercise[] no part of the executive power.” *Id.* at 628.

This Court has since acknowledged the deficiencies in *Humphrey’s Executor’s* reasoning³ and sharply narrowed its application.⁴ But although this Court has “repudiated almost every aspect of *Humphrey’s Executor*,” *Seila Law*, 591 U.S. at 239 (Thomas, J., concurring), this Court has not yet overruled it. *See id.* at 228 (majority opinion); *accord Free Enter. Fund*, 561 U.S. at 483.

Petitioner Leachco, Inc. is an Oklahoma corporation that manufactures various products, including an infant lounger called the “Podster.” *See* Pet. App. 5a. In 2022, the CPSC began a proceeding against Leachco, claiming that the Podster constitutes

³ *See* Part II.A.

⁴ *See Seila Law*, 591 U.S. at 218–19 & n.4 (interpreting *Humphrey’s Executor* to involve an agency acting as a “mere legislative or judicial aid” and not possessing “broad[] rulemaking, enforcement, and adjudicatory powers”).

a “substantial product hazard.” *Id.* (quoting 15 U.S.C. § 2064).⁵

In response, Leachco filed a complaint against the CPSC in the U.S. District Court for the Eastern District of Oklahoma, seeking injunctive and declaratory relief. *See id.* at 6a. Leachco alleged, among other claims, that the removal protections for the CPSC Commissioners and the Administrative Law Judge (ALJ) presiding over the agency proceeding were unconstitutional. *See id.* According to Leachco, the removal protections subjected the company “to proceedings before an unconstitutionally structured agency.” *Id.* This is “a here-and-now injury,” as *Seila Law* made clear. 591 U.S. at 212; *see also Axon Enter. v. FTC*, 598 U.S. 175, 191 (2023). And because “[a] proceeding that has already happened cannot be undone,” the only adequate remedy for the injury is an injunction against the CPSC’s continued proceedings until the unconstitutional removal protections are fixed. *Axon Enter.*, 598 U.S. at 191.

But the district court rejected Leachco’s motion for a preliminary injunction, and the Tenth Circuit affirmed. *See* Pet. App. 3a–4a. According to the Tenth Circuit, the CPSC’s removal protections are constitutional under *Humphrey’s Executor* and *Morrison v. Olsen*.⁶ *See* Pet. App. 26a. The Tenth Circuit cited its precedent in *SEC v. Blinder, Robinson*

⁵ While this litigation progressed, the proceedings against Leachco at the CPSC continued. On July 3, 2024, the CPSC presiding officer dismissed the CPSC staff complaint against Leachco. However, CPSC staff appealed to the Commission, and the CPSC briefing schedule extends into November 2024. *See* In the Matter of Leachco, Inc., Joint Motion to Set Briefing Schedule, CPSC Docket No. 22-1 (July 16, 2024), available at <https://tinyurl.com/3kzmrhe9>.

⁶ 487 U.S. 654, 691 (1989).

& Co., which held that “Congress can, without violating Article II, authorize an independent agency to bring civil law enforcement actions where the President’s removal power was restricted to inefficiency, neglect of duty, or malfeasance in office.” *Id.* at 28a. Although *Seila Law* had invalidated a similar removal protection as unconstitutional, the Tenth Circuit interpreted *Seila Law* narrowly, limiting its holding to apply only to agencies headed by a single director. *Id.* at 28a–29a.

Additionally, the courts below held that, while “subjection to an illegitimate proceeding, led by an illegitimate decisionmaker”⁷ may be a real injury for standing purposes, it is not “irreparable harm” under the standard for granting preliminary injunctions. *Id.* at 3a. The Tenth Circuit cited *Collins v. Yellen*⁸ for this proposition, despite *Collins* involving only retrospective relief and not prospective relief such as an injunction. *See id.* at 16a–20a.

In limiting *Seila Law* to agencies with single directors, the Tenth Circuit gave no weight to this Court’s reasoning in *Seila Law* that the key touchstone is substantial executive power. And in holding that “subjection to an illegitimate proceeding, led by an illegitimate decisionmaker” is not an irreparable harm, the Tenth Circuit rendered a “here-and-now injury” remediless, contrary to the determination in *Seila Law*, *Axon Enter.*, and *Collins* itself that the injury granted standing.

A straightforward reading of *Seila Law* would exclude basically any modern expert agency, including

⁷ *Axon Enter.*, 598 U.S. at 191.

⁸ 594 U.S. 220 (2021).

the FTC itself, from *Humphrey's Executor* protection. See Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, and Future*, 2020 SUP. CT. REV. 83, 85 (2020); *FTC v. Walmart Inc.*, 664 F. Supp. 3d 808, 844 (2023). Yet, until this Court overrules *Humphrey's Executor*, lower courts will decline to limit executive power so that it is exercised solely by accountable, removable officers. As this Court has held:

If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Exp., Inc., 490 U.S. 477, 484 (1989).

Only this Court can say that *Humphrey's Executor* does not apply to multimember expert agencies that wield substantial executive power. And only this Court can clarify that the harm this Court upheld as granting standing is remediable.

This Court should grant certiorari to give full effect to the principles of *Seila Law* and *Axon Enterprise*.

ARGUMENT

I. THE PRESIDENT MUST HAVE REMOVAL AUTHORITY OVER OFFICERS WHO POSSESS SUBSTANTIAL EXECUTIVE POWER.

Article II of the Constitution begins with the statement “The executive Power shall be vested in a President of the United States of America.” U.S.

CONST. art. II, § 1, cl. 1. By the plain terms of this clause, the totality of “the executive power” is placed in the hands of a single member of the executive branch, “the President.” Furthermore, Article II states that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3.⁹

In practice, it is impossible for “one man . . . to perform all the great business of the State,” and thus “the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’” *Free Enter. Fund*, 561 U.S. at 483 (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939)). But notably, the Constitution does not vest any executive power in any such subordinate executive officials. Gary Lawson, *Command and Control: Operationalizing the Unitary Executive*, 92 FORDHAM L. REV. 441, 443 (2023). Instead, subordinate executive officials may only exercise whatever executive power the President delegates to them. *See id.* at 444–45.¹⁰

⁹ To be precise, the President’s power to ensure the law is faithfully executed probably stems from the Article II Vesting Clause, and the Take Care Clause merely prohibits him from choosing to not do so. *See* Gary Lawson, *The Jeffersonian Treaty Clause*, 2006 U. Ill. L. Rev. 1, 33 (2006). But the exact source of the power does not matter for this argument—merely that the President has the power.

¹⁰ “[T]he general rule [is] that the functions vested in the President by the Constitution are not delegable and must be performed by him.” GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* 127 (2017) (quoting *Presidential Succession and Delegation in Case of Disability*, 5 OP. O.L.C. 91, 93 (1981)). However, the power to execute the laws is by “both . . . necessity and custom” delegable to lower executive officials. *Id.* at 128. Thus, the President “may generally delegate powers that have

The President has both the power and duty to personally oversee and supervise his subordinates' execution of the laws. See LAWSON & SEIDMAN, *supra* n.6, at 128. And the President “cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.” *Free Enter. Fund*, 561 U.S. at 496 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment)). This power and duty require the President to be able to step in “if the President determines that the officer is neglecting his duties or discharging them improperly.” *Id.* at 484. After all, “It is [the President’s] responsibility to take care that the laws be faithfully executed. The buck stops with” him. *Id.* at 493.

This responsibility requires the President to have the power to remove at least principal subordinates who exercise “policymaking or significant administrative authority.” *Seila Law*, 591 U.S. at 218 (quoting *Morrison v. Olson*, 487 U.S. 654, 691 (1989)). The President must control and oversee his executive officials to ensure that they faithfully execute the law. But “it is only the authority that can remove [an officer] . . . that he must fear and, in the performance of his functions, obey.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986) (quoting *Synar v. United States*, 626 F. Supp. 1374, 1401 (D.D.C. 1986)). Without a general removal power, the President cannot ensure that his subordinates follow his will; “the buck would stop somewhere else.” *Free Enter. Fund*, 561 U.S. at 514.

The Framers vested the President with a general removal power as a necessary measure to create the three co-equal branches of government. While in 1776

been conferred upon him by Congress.” *Id.* at 127 (quoting *Presidential Succession*, *supra*, at 95).

the 13 American colonies fought the Revolutionary War largely because of an out-of-control executive,¹¹ in 1787 the Framers of the Constitution faced a different problem. State governments had sharply weakened the executive since independence, and several hamstrung their executives by setting very short terms for governors and vesting the appointment power entirely in the state legislatures. See STEVEN GOW CALABRESI & GARY LAWSON, *THE U.S. CONSTITUTION: CREATION, RECONSTRUCTION, THE PROGRESSIVES, AND THE MODERN ERA* 28 (1st ed. 2020). Most notably, it was clear to state leaders soon after the War that the Articles of Confederation too severely weakened the central government. A list of the Articles' defects, circulated in May 1787 prior to the federal convention, noted the critical need for "a separate executive . . . able to take the initiative, . . . and [that] with or without a council might have . . . the power of appointment." See Max Farrand, *The Federal Constitution and the Defects of the Confederation*, 2 AM. POL. SCI. R. 532, 536 (1908).

The Framers, therefore, believed it "necessary to secure the authority of the Executive so that he could carry out his unique responsibilities." *Seila Law*, 591 U.S. at 223. According to Madison, while "the weight of the legislative authority requires that it should be . . . divided, the weakness of the executive may require . . . that it should be fortified." THE FEDERALIST NO. 51, at 290–91 (James Madison) (Clinton Rossiter ed.,

¹¹ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (arguing that the Colonies had a right and duty to "throw off" the British government because the British King had committed "repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States").

1961). Thus, the Framers created a “vigorous executive” by vesting all the executive power “in a single magistrate.” THE FEDERALIST NOS. 69, 70, at 383, 391 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

But “this unity may be destroyed . . . by vesting the [executive] power . . . ostensibly in one man, subject, in whole or in part, to the control and co-operation of others.” THE FEDERALIST NO. 70, *supra*, at 392. The Framers therefore created a unitary executive specifically to prevent differences of opinion from obstructing executive action, threatening national security, and destroying responsibility. *See id.* at 395. If the President cannot remove his subordinates for differences of opinion, the Framers’ design for three co-equal branches is undermined.

This Court therefore recognized the President’s authority to remove principal executive officers in *Myers v. United States*, 272 U.S. 52 (1926). In that “landmark case,” *Free Enter. Fund*, 561 U.S. at 492, this Court performed an extensive analysis of history¹² and concluded that the President has “the general administrative control of those executing the laws,

¹² While some scholarship claims that the First Congress’s iconic “Decision of 1789” was not actually a strong endorsement of presidential removal power—see Jed H. Shugerman, *Movement on Removal: An Emerging Consensus about The First Congress and Presidential Power*, 63 AM. J. LEGAL HIST. 258 (2023)—it was treated as such by all three branches of government in the aftermath: This Court “affirmed [the view] . . . in unmistakable terms” in *Ex parte Hennen*, 38 U.S. 230 (1839) and *Parsons v. United States*, 167 U.S. 324 (1897); Presidents “uniform[ly] adopted the view “whenever [the] issue ha[d] clearly been raised;” and Congress “followed and enforced the [view] . . . for seventy-four years.” *Myers*, 272 U.S. at 145, 148, 169.

including the power of appointment and removal of executive officers.” *Myers*, 272 U.S. at 164.¹³ Ultimately, the President must have “sufficient control . . . to ensure that [he] is able to perform his constitutionally assigned duties.” *Morrison*, 487 U.S. at 696.

Relevant here, the CPSC Commissioners are, like FTC Commissioners, officers largely shielded from removal by the President. The CPSC is an “independent regulatory commission,” with layered protections for its Commissioners. 15 U.S.C. § 2053(a). The President cannot remove a Commissioner except for “neglect of duty or malfeasance in office” and he is expressly barred from firing a Commissioner “for [any] other cause.” *Id.* In short, Congress designed the CPSC to regulate without accountability to the President.

II. LITTLE REMAINS OF *HUMPHREY’S EXECUTOR* TO GUIDE LOWER COURTS IN EVALUATING THE CONSTITUTIONALITY OF REMOVAL RESTRICTIONS.

Less than a decade after *Myers*, the Court in *Humphrey’s Executor* held that removal restrictions for FTC Commissioners were constitutional. 295 U.S. at 631–32. The Court distinguished *Myers* on the basis that *Myers* involved a “purely executive officer[],” while *Humphrey’s Executor* involved an officer “who occupies no place in the executive department and who exercises no part of the executive power.” *Id.* at 628. This reasoning was not accurate at the time of the

¹³ While this Court has at times strayed from this rule and permitted some restrictions on the President’s removal power, those were “exceptions.” *Seila Law*, 591 U.S. at 204.

decision, and it certainly does not apply to multimember expert agencies like the CPSC today.

A. This Court Has Rejected Much of *Humphrey's Executor's* Rationale.

According to the Court in *Humphrey's Executor*, the FTC's powers in 1935 were "predominantly quasi-judicial and quasi-legislative," and "to the extent that it exercise[d] any executive function . . . it d[id] so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Id.* at 624, 628. In particular:

In making investigations and reports thereon for the information of Congress under § 6, in aid of the legislative power, it acts as a legislative agency. Under § 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary.

Id. at 628.

This Court candidly acknowledged in *Seila Law* that its 1935 conclusion in *Humphrey's Executor*—that the FTC did not exercise executive power—"has not stood the test of time." *Seila Law*, 591 U.S. at 216 n.2. Likewise, in *Morrison* this Court admitted that "it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." 487 U.S. at 690 n.28.

"Quasi-legislative" and "quasi-judicial" powers do not exist in the Constitution. *See Seila Law*, 591 U.S. at 247 (Thomas, J., concurring). Such concepts stem

from the idea that administrative agencies are not exercising executive power when engaging in rulemaking and adjudication. See Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1844 (2015). But agency rulemaking and adjudication “are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power.’” *City of Arlington v. FCC*, 569 U.S. 290, 304 n.4 (2013) (quoting U.S. CONST. art. II, § 1, cl. 1).

Even in 1935 the FTC did not act as a mere agent of the judiciary like a master in chancery. Under Section 5 of the Federal Trade Commission Act of 1914, the FTC could impose by agency adjudication cease-and-desist orders against businesses it found had engaged in “unfair methods of competition.” Ch. 311, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45) (hereinafter “FTCA § 5”). Although the FTC could only enforce those orders through suit in federal circuit court,¹⁴ the court had to uphold the FTC’s findings of fact if supported by substantial evidence. See FTCA § 5 (“The findings of the commission as to the facts, if supported by testimony, shall be conclusive.”); accord *FTC v. Pac. States Paper Trade Assn.*, 273 U.S. 52, 63 (1927) (“The weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them, is for the commission.”).

Meanwhile, courts review the decisions of *actual* masters in chancery de novo. See Phillip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083,

¹⁴ See Thomas E. Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1099 (1968).

1142 (2023); *accord* FED. R. CIV. PROC. 53(f)(3), (governing special masters, which replaced masters in chancery when the courts of law and chancery merged).

The Court in *Humphrey's Executor* ignored this aspect of section 5 when discussing the section, instead emphasizing that the commission could not enforce its decisions without a court order. *See* 295 U.S. at 620–21. Furthermore, the Court ignored section 5 entirely when proclaiming that the FTC “exercises no part of the executive power vested by the Constitution in the President.” *Id.* at 628. This Court has acknowledged that the 1935 FTC may have “possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated.” *Seila Law*, 591 U.S. at 219 n.4.

Humphrey's Executor's silence on the FTC's executive powers is in part due to the decision's brevity—unlike *Myers's* “carefully researched and reasoned 70-page opinion,” *Humphrey's Executor* provided “six quick pages devoid of textual or historical precedent.” *Morrison*, 487 U.S. at 726 (Scalia, J., dissenting). As Justice Thomas (joined by Justice Gorsuch) has stated, “the foundation for *Humphrey's Executor* is not just shaky. It is nonexistent.” *Seila Law*, 591 U.S. at 248 (Thomas, J., concurring). Several other Justices have joined in condemning *Humphrey's Executor*, including

Kavanaugh,¹⁵ Scalia,¹⁶ and Robert Jackson.¹⁷ Numerous academics have also criticized the *Humphrey's Executor* decision.¹⁸ There are few precedents more worthy of this Court's reconsideration than *Humphrey's Executor*.

B. *Humphrey's Executor* is Inapplicable for Many Multimember Expert Agencies Today.

Even if *Humphrey's Executor* is correct as applied to the stipulated facts in that case, it is wrong when applied to many agencies today. That case blessed removal protections only for “multimember expert agencies that do not wield substantial executive power.” *Seila Law*, 591 U.S. at 218. But many modern multimember expert agencies, including the FTC, now wield substantial executive power. See Sunstein & Vermeule, *supra*, at 85. (“The main independent agencies with multiple heads wield broad rulemaking

¹⁵ See *In re Aiken Cnty.*, 645 F.3d 428, 441–42 (2011) (Kavanaugh, J., concurring); *Free Enter. Fund v. PCAOB*, 537 F.3d 667, 696 (D.C. Cir. 2008)).

¹⁶ See *Morrison*, 487 U.S. at 724–26 (Scalia, J., dissenting)).

¹⁷ See *FTC v. Ruberoid Co.*, 343 U.S. 470, 487–88 (1952) (Jackson, J., dissenting)).

¹⁸ See, e.g., Sunstein & Vermeule, *supra*, at 100 (describing *Humphrey's Executor* as “widely reviled” and noting that it “deals not at all with constitutional history and barely at all with constitutional text”); Richard J. Pierce Jr., *The Scope of the Removal Power Is Ripe for Reconsideration*, 58 JUDGES' J. 19, 21 (2019) (“The opinion in *Humphrey's Executor* has traditionally been interpreted to be inconsistent with the opinion in *Myers* and to authorize Congress to create agencies with vast power that are ‘independent’ of the president.”); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1, 88 (2004) (concluding “*Humphrey's Executor* was a shocking and poorly reasoned [decision]”).

and enforcement powers; the Court’s ruling [in *Seila Law*] thus casts a legal cloud over the removal provisions for the commissioners and heads of the FTC, the FCC, the SEC, the NRC, the NLRB, and others.”).

This Court in *Seila Law* set out three examples of agency action that constitute substantial executive power. First is “the authority to promulgate binding rules” about what constitutes illegal conduct. *Id.* Second is the authority to “unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications.” *Id.* at 219. Last is “the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power.” *Id.*

Here, “[i]t is undisputed that the Commission exercises significant executive power.” Pet. 4. The CPSC has statutory authority to issue substantive rules about consumer product safety. *See* Pet. 6 (citing 15 U.S.C. §§ 2056(a), 2058). The CPSC has the power to “hold[] formal adjudicatory hearings” and “order various remedies.” Pet. App. 4a. The CPSC can also “initiate civil and criminal actions.” *Id.* at 5a.¹⁹ Thus, under the plain holding of *Seila Law*, removal protections for the CPSC exceed the outermost constitutional limits. *Seila Law*, 591 U.S. at 218 (quoting *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 196 (D.C. Cir. 2018) (Kavanaugh, J.,

¹⁹ *See also* 15 U.S.C. §§ 2069–72 (imposing civil and criminal penalties for violations of product safety standards and authorizing the CPSC to sue violators in court for monetary penalties and injunctive relief); § 2076(b)(7) (permitting the CPSC to prosecute cases in court if the Attorney General approves or says nothing within 45 days).

dissenting) (“[R]emoval protections for ‘multimember expert agencies that do not wield substantial executive power . . . ‘represent what up to now have been the outermost constitutional limits of permissible congressional restrictions on the President’s removal power’”).

Despite this Court’s holding in *Seila Law* that an agency’s exercise (or non-exercise) of executive power is the determinative issue, the court below held that an agency’s *structure* is the determinative issue. *See* Pet. App. 29a. According to the Tenth Circuit, *Humphrey’s Executor* authorizes removal protections for executive officials so long as they are, like the CPSC, part of an independent commission of similar structure to the FTC. *See id.* at 27a. The Tenth Circuit completely ignored this Court’s clarification in *Seila Law* that *Humphrey’s Executor* rested on the FTC at the time not exercising substantial executive power.

The reasoning of this Court in *Seila Law* commands that Commissioners in the CPSC and the modern FTC cannot have removal protections. But so long as *Humphrey’s Executor* stands, lower courts will be unwilling to apply *Seila Law* rigorously. And because “like cases should generally be treated alike,” lower courts will continue to feel they must hold that removal protections are constitutional for all multimember expert agencies, even when those agencies wield substantial executive power. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 510 (2018).

Only this Court can overrule or cabin *Humphrey’s Executor* and clarify that *Seila Law* applies to powerful multimember expert agencies like the CPSC. Until then, the growing “fourth branch” will continue to undermine Americans’ constitutional rights and the

Framers' design for three co-equal branches of government.

III. PARTIES SUBJECTED TO PROCEEDINGS BY AN UNCONSTITUTIONALLY STRUCTURED AGENCY ARE IRREPARABLY HARMED.

The Tenth Circuit also held that “the constitutional injury of being subjected to an administrative proceeding carried out by an unconstitutionally structured agency” does not constitute “irreparable harm.” Pet. App. 8a. But Leachco has shown it will suffer an injury and that, absent a preliminary injunction, that injury is irreparable.

First, Leachco has clearly shown it will suffer harm. To have standing, “[t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). In other words, since it is undisputed that Leachco has standing to bring its constitutional complaint, Leachco has shown it has a remediable injury.

Second, Leachco has shown that its injury is irreparable. The harm here is not an agency's past decision against Leachco, but the “here-and-now injury” of an agency's *future proceeding*. See *Axon Enter.*, 598 U.S. at 191 (stating that the petitioner “would have the same claim had it won before the agency.”). Leachco's injury cannot be remedied by retrospective relief. Because “[a] proceeding that has already happened cannot be undone,” retrospective relief is incapable of remedying the harm. *Id.* Indeed, “[t]he purpose of a preliminary injunction is not to

remedy past harm but to protect plaintiffs from irreparable injury that *will surely result* without their issuance.” *Schrier v. Univ. Of Co.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (emphasis added).

Therefore, Leachco’s injury of “being subjected to proceedings before an unconstitutionally structured agency” constitutes irreparable harm justifying a preliminary injunction. Pet. App. 6a. Only prospective relief preventing Leachco from being subjected to the future, unconstitutional agency proceeding can remedy the harm.

The Tenth Circuit relied on this Court’s decision in *Collins v. Yellen* to reject Leachco’s irreparable harm argument, Pet. App. 16a-20a, but *Collins* is inapposite. The issue in *Collins* was, like this case, an agency’s unconstitutional removal protections. See 594 U.S. at 259–60. However, there is a key difference: *Collins* involved only retrospective relief. The challengers had no “live claim for prospective relief,” such as an injunction. *Id.* at 257.

The Tenth Circuit decision elides this critical difference and holds that “[t]o establish harm under *Collins*, Leachco would need to make a showing that the challenged removal provisions actually impacted, *or will impact*, the actions taken by the CPSC against it.” See Pet. App. 20a (emphasis added). Not only did the Tenth Circuit add its own gloss to *Collins*, it demanded that all plaintiffs facing the “here-and-now injury” of an impending proceeding before an unconstitutionally defective agency divine the future.

Requiring petitioners like Leachco to be credible fortunetellers who can read the minds of Presidents, administrative law judges, and agency commissioners

goes far beyond *Collins*, which merely held that parties subjected to agency proceedings by an unconstitutionally protected officer do not necessarily have available the remedy of voiding the officer's actions. *See* 594 U.S. at 258 n.24.

Additionally, under the Tenth Circuit's interpretation of *Collins*, Petitioner simultaneously has standing—that is, has a remediable injury—to bring its separation of powers complaint yet has no remedy—prospective relief. When determining standing, “a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove that the Government's course of conduct would have been different in a “counterfactual world” in which the Government had acted with constitutional authority.” *Seila Law*, 591 U.S. at 211. But the Tenth Circuit interprets *Collins* to require Petitioner show “that the challenged removal provisions actually impacted, or will impact, the actions taken by the CPSC against it” to obtain injunctive relief. Pet. App. 20a. And as explained previously in this section, only an injunction can remedy Petitioner's injury. Therefore, if the Court finds for Petitioner that the CPSC's removal protections are unconstitutional and that Petitioner is “being subjected to proceedings before an unconstitutionally structured agency,” Petitioner will simultaneously have an injury “that is likely to be redressed by a favorable judicial decision” and yet have no available remedy for the injury. This contradiction means that the Tenth Circuit's interpretation of *Collins* must be wrong.

Simply, the Tenth Circuit erred in concluding that Petitioner's injury does not constitute "irreparable harm" justifying a preliminary injunction.

CONCLUSION

For the foregoing reasons this Court should grant the petition.

Respectfully submitted,

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