No. 22-7060

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEACHCO, INC.,

Plaintiff-Appellant,

v.

CONSUMER PRODUCT SAFETY COMMISSION, *et al.*,

Defendants-Appellees.

On Interlocutory Appeal from the United States District Court
for the Eastern District of Oklahoma
No. 6:22-CV-00232-RAW
Hon. Ronald A. White, U.S.D.J.

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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Feb. 23, 2023

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Citizen, Inc. is a nonprofit, non-stock corporation. It has no parent corporation, and no publicly traded corporation has an ownership interest in it.

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GLOSSARY

ALJ	administrative law judge
CFPB	Consumer Financial Protection Bureau
CPSC	Consumer Product Safety Commission
FDIC	Federal Deposit Insurance Corporation
FTC	Federal Trade Commission
NRDC	Natural Resources Defense Council
SEC	Securities and Exchange Commission

INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit consumer advocacy organization with a nationwide membership. Public Citizen works before Congress, administrative agencies, and courts for enactment and enforcement of laws protecting consumers, workers, and the public. Public Citizen has a longstanding interest in effective federal safety regulation, including regulation of automobiles, drugs, medical devices, and, most pertinent here, the consumer products subject to the authority of the Consumer Product Safety Commission (CPSC).

Public Citizen advocated for the establishment of the CPSC in 1972 and for the enactment of the Consumer Product Safety Improvement Act of 2008, which augmented the CPSC's authority and responsibilities. Public Citizen has pressed for the appointment of strong leaders to the Commission and for funding from Congress sufficient to support the CPSC's efforts to protect consumers. Public Citizen has also supported adoption of specific CPSC standards, advocated for effective

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[1] Both parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund preparation or submission of this brief. No person or entity other than amicus made a monetary contribution to preparation or submission of this brief.

implementation of the statutory requirement that the CPSC maintain a public database of consumer product safety incidents, and participated in litigation seeking to seeking to ensure the CPSC's vigorous performance of its statutory duties. *See*, *e.g.*, *Company Doe v. Public Citizen*, 749 F.3d 246 (4th Cir. 2014) (intervening to unseal the record of a case in which a company sought to enjoin the CPSC from publishing a report in its online database regarding the death of an infant linked to use of the company's product); *NRDC v. CPSC*, 597 F. Supp. 2d 370 (S.D.N.Y. 2009) (appearing as co-plaintiff in litigation challenging the CPSC's failure to enforce the statutory prohibition on sales of children's products containing phthalates).

Public Citizen has also long been concerned with issues relating to separation of powers. Among its other efforts in this area, Public Citizen filed amicus briefs in the U.S. Supreme Court in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), and *Morrison v. Olson*, 487 U.S. 654 (1988), in support of statutes granting executive officers protection against removal without cause by the President.

Public Citizen's interests in consumer protection and separation of powers converge in this case, in which the plaintiff, Leachco, Inc., deploys

separation-of-powers arguments in an attempt to obtain a preliminary injunction against an enforcement action against it brought by the CPSC. The Supreme Court's decisions support neither Leachco's arguments that the CPSC's structure is unconstitutional nor its claim that it would be entitled to an injunction to halt the CPSC from exercising government authority if its separation-of-powers arguments were meritorious. Public Citizen submits this brief because it believes that additional discussion of these points may assist the Court in considering whether Leachco has carried its burden of showing a likelihood of success on the merits of its claim for injunctive relief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The CPSC's brief explains in detail the many reasons why the district court's denial of preliminary injunctive relief must be affirmed, including the absence of irreparable injury, the lack of reviewable final agency action, the infirmities in Leachco's constitutional separation-of-powers arguments, and the balance of equities and the public interest, which strongly weigh against interfering in the CPSC's enforcement action. This brief supplements the CPSC's brief by addressing in detail how the Supreme Court's most recent separation-of-power decisions

reveal that Leachco's showing of likelihood of success on the merits—a required element of the test for preliminary injunctive relief, *see Winter v. NRDC*, 555 U.S. 7, 20 (2008)—is deficient in three respects.

First, Leachco claims that the CPSC's structure violates separation-of-powers principles because its members are protected against removal at will by the President. That claim conflicts with the Supreme Court's repeated insistence that its decisions do not take issue with the constitutionality of tenure protection for independent agencies headed by multi-member commissions.

Second, Leachco asserts that the CPSC's use of administrative law judges whose employment may not be terminated without good cause violates the prohibition on "two-level" tenure protection for executive officers engaged in regulatory and law enforcement functions. That assertion ignores that administrative law judges are tasked with adjudication, not policymaking or the exercise of prosecutorial discretion.

Finally, Leachco's claim for injunctive relief against the CPSC's conduct of an enforcement proceeding against it has no likelihood of success, regardless of the merits of Leachco's underlying separation-of-powers arguments. The Supreme Court's recent decisions hold that limits

on removal of federal officers, even when they are unconstitutional, do not affect the officers' authority to take actions otherwise authorized by law, and do not render particular actions unlawful unless those actions are causally related to an invalid removal restriction. In this case, the President has not sought to remove the CPSC's commissioners or the administrative law judge (ALJ) handling this case and, therefore, has not been thwarted in an attempt to do so by the statutory provisions that Leachco contends are unconstitutional. Further, there is no reason to believe that the President objects to the proceedings against Leachco or would have any interest in using the removal authority Leachco claims he possesses to stop the proceedings. The actions Leachco seeks to enjoin are therefore not even arguably unlawful, and a claim seeking to enjoin them has no prospects of success on the merits.

ARGUMENT

I. Leachco's argument that it is unconstitutional for an independent, multi-member commission to exercise executive power has no likelihood of success.

Leachco's principal merits argument is that the CPSC is barred from exercising executive power because the President can remove its commissioners from office only for neglect of duty or malfeasance in

office. That argument is foreclosed by Supreme Court precedent and binding precedent of this Court.

A. In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Supreme Court held that separation-of-powers principles permit Congress to confer protection against at-will removal by the President on the principal officers of a multi-member commission with regulatory and adjudicatory authority—in that case, the Federal Trade Commission (FTC). Such protection, the Court held, does not interfere with the President's ability to carry out his constitutional functions. *See id.* at 629–31. The Supreme Court characterized the powers exercised by the FTC as "quasi legislative and quasi judicial," *see id.* at 629, though it has since recognized that such powers, in our tripartite form of government, are executive in nature, *see Morrison*, 487 U.S. at 690 n.28. *Humphrey's Executor* holds that "illimitable power of removal is not possessed by the President in respect of officers of the character of those" of the FTC and other similar agencies, 295 U.S. at 629—that is, "administrative bod[ies]" that are charged with performing regulatory and adjudicative functions "to carry into effect legislative policies embodied in [a] statute in accordance with the legislative standard therein prescribed," *id.* at 628,

and that consist of "nonpartisan" members "called upon to exercise the trained judgment of a body of experts," *id.* at 624.

The CPSC is precisely such an administrative body. Indeed, its structure is virtually identical to that of the FTC as described by the Court in *Humphrey's Executor*. It consists of five members, appointed by the President with the advice and consent of the Senate to staggered seven-year terms, no more than three of whom may be members of the same political party. *See* 15 U.S.C. § 2053(a) & (b); *cf. Humphrey's Executor*, 295 U.S. at 620 (describing the same attributes of the FTC). Like the FTC, the CSPC is a "body of experts," *id.* at 624: Its members are "individuals, who, by reason of their background and expertise in areas related to consumer products and protection of the public from risks to safety, are qualified to serve as members of the Commission." 15 U.S.C. § 2053(a). Its powers of rulemaking and adjudication, *id.* §§ 2056, 2058 & 2068, are similar in character to the "quasi legislative" and "quasi judicial" powers described in *Humphrey's Executor*. And the limits on presidential removal of CSPC commissioners—only for "neglect of duty or malfeasance in office," *id.* § 2053(a)—are similar to those at issue in

Humphrey's Executor: "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 619.

B. Leachco nonetheless contends that *Humphrey's Executor*'s holding does not apply to the CPSC because its authority to bring enforcement actions in federal courts is a "core executive power" that may only be exercised by an agency headed by officers subject to unfettered presidential removal. Leachco Br. 19. This Court, however, in *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988), squarely rejected the argument that the power of a multi-member independent agency "to commence a civil enforcement action in federal court" takes it outside the holding of *Humphrey's Executor*. Rather, *Blinder, Robinson* held that "Congress can, without violating Article II, authorize an independent agency to bring civil law enforcement actions where the President's removal power [is] restricted to inefficiency, neglect of duty, or malfeasance in office." *Id.* at 682. Canvassing the statutory structure authorizing the President to appoint SEC commissioners to staggered five-year terms, to designate the agency's chairman, and to remove commissioners for cause—provisions closely mirroring those governing the CPSC—the Court concluded that "these powers give the President

sufficient control over the commissioners to insure the securities laws are faithfully executed" and that "the removal restrictions do not impede the President's ability to perform his constitutional duty." *Id.* Accordingly, the Court held that "the civil enforcement power given to the SEC is constitutionally valid." *Id.*

C. Leachco does not address or even cite to *Blinder, Robinson*, but that decision is a binding precedent of this Circuit, unless and until (i) the Supreme Court issues a "superseding contrary decision," *In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993), (ii) this Court reconsiders the issue en banc and overrules its precedent, *id.*, or (iii) absent formal en banc rehearing, the active members of the Court *unanimously* authorize the panel to overrule a precedential decision, *Lincoln v. BNSF Ry.*, 900 F.3d 1166, 1185 (10th Cir. 2018). Except in those circumstances, a precedent remains "the law of this Circuit." *United States v. Baker*, 49 F.4th 1348, 1358 (10th Cir. 2022) (citations omitted). None of these circumstances is present here, and even Leachco would not suggest that the latter two apply.

As to the first, a superseding, contrary Supreme Court decision is one that "*contradicts* or *invalidates*" this Court's analysis. *United States*

v. Brooks, 751 F.3d 1204, 1210 (10th Cir. 2014). This Court does not abandon its precedents based only on arguments that "newly emergent authority" that is "not directly controlling" ought to convince the Court to "change its course." *United States v. Lira-Ramirez*, 951 F.3d 1258, 1261 (10th Cir. 2020) (citation omitted). Rather, "due respect for existing precedent" requires an "indisputable and pellucid" indication that intervening Supreme Court authority requires this Court to overrule one of its decisions. *Barnes v. United States*, 776 F.3d 1134, 1147 (10th Cir. 2015). And, of course, a Supreme Court decision that, "[r]ather than undermining" this Court's precedent, actually "compels it" is "not a superseding contrary Supreme Court decision." *United States v. Manzanares*, 956 F.3d 1220, 1225 (10th Cir. 2020).

The Supreme Court decisions Leachco invokes fall into the latter category. Far from undermining *Blinder, Robinson*'s holding, those decisions compel it both by emphasizing the continuing validity of *Humphrey's Executor* and by characterizing the scope of that decision's holding as including agencies that exercise powers that today are characterized as executive.

1. In each of its recent decisions addressing separation-of-powers issues arising from limitations on presidential authority to remove executive officers, the Supreme Court has explicitly stated that it does not question the holding of *Humphrey's Executor*. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010), the Court recognized that its precedents establish that presidential removal authority over executive officers "is not without limit" and that *Humphrey's Executor* holds "that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Id*. at 483. The Court emphasized that it was not "reexamin[ing]" that precedent." *Id*.

Again, in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the Supreme Court acknowledged that *Humphrey's Executor* holds "that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause," *id*. at 2192, and that *Free Enterprise Fund* "left in place" that holding, *id*. at 2198. The Court in *Seila Law*, as it had in *Free Enterprise Fund*, emphasized that it "d[id] not revisit *Humphrey's Executor* or any other precedent." *Id*. at 2206.

Likewise, in *Collins v. Yellen*, 141 S. Ct. 1761 (2021), the Court again stated that it had not "revisit[ed] our prior decisions allowing certain limitations on the President's removal power" over the heads of multi-member independent agencies, but had only "found compelling reasons not to extend those precedents to the novel context of an independent agency led by a single Director." *Id.* at 1783 (cleaned up). *Collins* explicitly notes that it does not comment on the scope of removal authority over the principal officers of "multi-member agencies," *id.* at 1787 n.21, and it nowhere casts doubt on the holding of *Humphrey's Executor*.

2. Importantly for this case, the Supreme Court's recent decisions also characterize *Humphrey's Executor*'s holding as permitting limitations on the removal of heads of multi-member commissions that exercise "executive" authority as a constitutional matter. *Free Enterprise Fund* begins with an acknowledgment that *Humphrey's Executor* announces a limit on the President's authority to remove "executive officers." 561 U.S. at 483. And it goes on to describe its precedents, including *Humphrey's Executor*, as involving "protected tenure

separat[ing] the President from an *officer exercising executive power*." *Id.* at 495 (emphasis added).

Seila Law similarly recognizes that *Humphrey's Executo*r's endorsement of tenure protection for multi-member, expert agencies is an "exception" to the President's otherwise "unrestricted removal power" over "those who wield *executive power* on his behalf." 141 S. Ct. at 2192 (emphasis added). And it explicitly recognizes that the "quasi legislative" and "quasi judicial" powers exercised by the FTC at the time of *Humphrey's Executor*, and exercised today by the CPSC and many similar agencies, are forms of executive power. *See id.* at 2198 n.2.

3. In holding that tenure protections for certain executive officers violate separation-of-powers principles, the Court's recent decisions have focused on features of agency structure that the CPSC does not possess. *Free Enterprise Fund* held that members of a multi-member agency exercising law enforcement authority may not be protected against removal without cause if that limited removal power is conferred on another multi-member agency whose members themselves are protected against removal by the President without cause. In those circumstances, the Supreme Court held, the double layer of removal

protection "transforms" the agency's otherwise permissible independence into an infringement on the President's "ability to execute the laws." 561 U.S. at 496. The Court stressed that, in addressing a board with "two layers of for-cause tenure," its "point [was] not to take issue with for-cause limitations in general; we do not do that." *Id.* at 501. The CPSC lacks double insulation from Presidential removal and possesses only the form of tenure protection with which *Free Enterprise Fund* did not take issue.

Similarly, *Seila Law* and *Collins* primarily address a structural feature the CPSC lacks: the conferral of executive power on an agency headed by a *single* principal officer not subject to unfettered presidential removal authority. That feature of the structure of the agencies in those cases was what the Court held to be an "innovation with no foothold in history or tradition," and one "incompatible with our constitutional structure." *Seila Law*, 140 S. Ct. at 2202; *see also Collins*, 141 S. Ct. at 1783, 1784, 1787. The Court explained in detail how this single-member structure departed from the historical practice of conferring authority on multi-member independent boards and commissions, *see Seila Law*, 140 S. Ct. at 2201, as well as from the structure considered in *Humphrey's*

Executor, a "non-partisan" "body of experts" appointed by the President with "staggered terms," *id.* at 2200. The CPSC shares the latter structural features, not the single-director structure at issue in *Seila Law* and *Collins*.

4. The Supreme Court's holding in *Free Enterprise Fund* is premised on the constitutional validity of conferring executive authority on the SEC, a multi-member commission whose members may not be removed by the President without cause. The petitioners in *Free Enterprise Fund*, who challenged the authority of the Public Company Accounting Oversight Board, argued that separation-of-powers principles required that the *President* have the authority to remove members of the Board "either directly or through an 'alter ego' *removable at will*." Pet. Br. 25, *Free Enterprise Fund*, No. 08-861 (U.S. filed July 27, 2009) (emphasis added). The Supreme Court, however, held that the separation-of-powers flaw that it identified—two levels of removal protection—could be remedied by vesting at-will removal authority in the SEC, whose members themselves are "tenured officers" not "subject to the President's direct control." *Free Enterprise Fund*, 561 U.S. at 495. That holding, in the face of the arguments advanced by the petitioners,

necessarily presupposed that the exercise of executive authority by the tenure-protected SEC was not itself unconstitutional.

Thus, rather than undermining this Court's holding in *Blinder, Robinson*, the decision in *Free Enterprise Fund* strongly supports this Court's conclusion that the SEC may constitutionally be vested with significant law enforcement authority. And *Blinder, Robinson*'s holding, in turn, compels the conclusion that the CPSC's comparable authority is constitutional. Leachco's contrary arguments therefore have no likelihood of success and cannot support preliminary injunctive relief.

II. Leachco's challenge to employment protections for administrative law judges is also unlikely to succeed.

Leachco's secondary argument—that separation-of-powers principles do not permit the CPSC to conduct adjudications in enforcement matters using ALJs who have statutory protections against termination of employment without cause—is also unlikely to succeed. *Free Enterprise Fund*'s holding that an agency that exercises enforcement discretion may not be granted "two layers" of tenure protection does not suggest that the employment protections enjoyed by ALJs to help ensure impartial adjudication are constitutionally impermissible. In fact, *Free Enterprise Fund* explicitly denies that its

reasoning extends to ALJs. The Court's opinion in *Free Enterprise Fund*—responding to the dissent's warnings that the majority's analysis might call into question the status of civil servants in the Senior Executive Service, ALJs, and military officers, *see* 561 U.S. at 541–43 (Breyer, J., dissenting)—states unqualifiedly that "none of the positions [the dissent] identifies are similarly situated to the [Public Company Accounting Oversight] Board." *Id.* at 506.

In particular, with respect to ALJs, the majority observed that "many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." *Id.* at 507 n.10. And it was the Board's performance of enforcement and policymaking functions, including the initiation of "significant enforcement actions" and the "daily exercise of prosecutorial discretion," *id.* at 504, that led the Court to conclude that members of a commission engaged in those executive tasks could not have two layers of for-cause removal protection between themselves and the President. The sole constitutional issue decided in the case arose from the two-level protection of an agency that was "the regulator of first resort and the primary law enforcement authority for a vital section of our economy." *Id.* at 508. By contrast, the ALJs utilized

by the CPSC have no such functions; they play the adjudicative role that *Free Enterprise Fund* suggests may permissibly be left in the hands of tenure-protected officials within multi-member independent agencies.

In addition, *Free Enterprise Fund* notes that employees who can be *reassigned* at will by the heads of tenure-protected agencies do not pose the same issues of multi-level protection from presidential control as did the Board in that case. *See id.* at 506 (discussing Senior Executive Service). As the CPSC's brief explains, there is no statutory restriction on the CPSC's ability to terminate at will an ALJ's detail to the CPSC to perform functions on its behalf. CPSC Br. 39. That an ALJ whose detail to the CPSC was terminated would remain an employee of the federal government would not mean that the CPSC lacked authority to control the ALJ's tenure as an officer exercising authority within the CPSC. For that reason as well, Leachco's challenge to the employment protections provided to ALJs under federal law is unlikely to succeed.[2]

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[2] There is currently a conflict among the circuits over the applicability of *Free Enterprise Fund* to the use of ALJs with statutory employment protection by multi-member agencies headed by officers with tenure protection. *Compare Decker Coal Co. v. Pehringer*, 8 F.4th 1123 (9th Cir. 2021) (rejecting a separation-of-powers challenge under *Free Enterprise Fund* to the use of ALJs by the Benefits Review Board), and *Calcutt v. FDIC*, 37 F.4th 293, 319 (6th Cir. 2022) (stating that a

III. Leachco's assertion that injunctive relief is a proper remedy for the separation-of-powers claims it asserts has no likelihood of success, regardless of the merits of those claims.

Leachco's request for preliminary injunctive relief seeks only one form of relief: an injunction against the conduct of the pending proceeding against it. But Leachco would have no entitlement to that relief even if it were to prevail in obtaining a final ruling that its separation-of-powers challenge had merit. For this reason, too, Leachco's request for preliminary injunctive relief must fail.

As the CPSC's brief explains, none of the Supreme Court's recent decisions holding that a statutory removal restriction violates separation-of-powers principles provides either a prospective or retrospective remedy against actions taken (or to be taken) by the officer or officers protected by the unconstitutional tenure provision. Rather, in

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similar challenge to use of ALJs by the FDIC is unlikely to succeed), *with Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) (holding the use of ALJs by the SEC unconstitutional). The SEC is expected to file a petition for certiorari on March 20, 2023, *see SEC v. Jarkesy*, No. 22A596 (U.S.) (orders granting extension of time to file petition). The dispute over the issue, however, does not suggest that Leachco's challenge is likely to succeed. Moreover, even if Leachco's separation-of-powers argument had some likelihood of success, a claim for injunctive relief against an ongoing proceeding based on that separation-of-powers argument would remain unlikely to succeed, for reasons explained below.

each case, the Supreme Court has declared the tenure protection invalid, severed it from the remainder of the statute (or affirmed a decision severing it), and allowed the agency to continue to carry out its functions. *See Free Enterprise Fund*, 561 U.S. at 508–10; *Seila Law*, 140 S. Ct. at 2207–11; *Collins*, 141 S. Ct. at 1775. Solely as to claims for retrospective relief (which were not involved in *Free Enterprise Fund*), *Seila Law* and *Collins* remanded for consideration by the lower courts of whether some remedy might be available with respect to past actions of the agencies. *See Seila Law*, 140 S. Ct. at 2211; *Collins*, 141 S. Ct. at 1789.

The Supreme Court's actions reflect its *rejection* of the argument that the limits on presidential removal that it held unconstitutional rendered the agencies themselves, "and all power and authority exercised by [them]" invalid. *Free Enterprise Fund*, 561 U.S. at 508. Rather, the Court held, "the existence of the [agencies] does not violate the separation of powers, but the substantive removal restrictions … do." *Id*. at 508–09. The remedy in such cases is to do away with the invalid statutory provision, not the agency subject to them or the actions it has taken or is taking. *See id*. at 509.

The Supreme Court elaborated on these points in *Collins*. There, the Court explained that actions taken by properly *appointed* federal officers are not void because of improper statutory limits on their *removal*. 141 S. Ct. at 1787. Unlike improperly appointed officers who "lack[] constitutional authority," *id.*, officers subject to invalid tenure protections do not "exercise power that [they] did not lawfully possess." *Id.* at 1788. Thus, "there is no basis for concluding that any [such officer] lacked the authority to carry out the functions of the office." *Id.* Only if the removal restriction had a causal effect on actions taken by the officer, *Collins* held, would there be any basis for granting a remedy aimed at those actions. *See id.* at 1789. The Court posited, for example, that actions taken by an officer whom the President had tried to remove but had unconstitutionally been blocked from removing might be set aside on that basis. *See id.*

Justice Thomas, concurring fully in the Court's opinion, wrote separately to underscore his agreement that officers lawfully appointed "could lawfully exercise executive power" notwithstanding an unconstitutional removal restriction, and that any remedy in such cases "should fit the injury." *Id.* at 1789 (Thomas, J., concurring). "The

Government," he added, "does not necessarily act unlawfully even if a removal restriction is unlawful in the abstract." *Id.* Any remedy against agency action, Justice Thomas emphasized, depends on a "show[ing] that the challenged Government action at issue … was, in fact, unlawful." *Id.* at 1791. Actions taken by an officer subject to an unconstitutional removal restriction are not necessarily unlawful, because such an officer, if properly appointed, may validly "exercise[e] power in the first instance." *Id.* at 1793. And the resulting actions are not "automatically taint[ed]" by the "mere existence of an unconstitutional removal provision" that the President could presumably have successfully challenged at any time. *See id.*

In an opinion concurring in the judgment and joined in relevant part by Justices Breyer and Sotomayor, Justice Kagan likewise agreed that officers with unconstitutional tenure protections, "unlike those with invalid appointments, possess[] the 'authority to carry out the functions of the office.'" *Id.* at 1801 (Kagan, J., concurring in part and in the judgment) (quoting majority opinion). Accordingly, "plaintiffs alleging a removal violation are entitled to injunctive relief … only when the President's inability to fire an agency head affected the complained-of

decision," because "[o]nly then is relief needed to restore the plaintiffs to the position they would have occupied in the absence of the removal problem." *Id.* (cleaned up). Moreover, "[g]ranting relief in any other case would, contrary to usual remedial principles, put the plaintiffs in a better position than if no constitutional violation had occurred." *Id.* (cleaned up).

Leachco has acknowledged that these principles would likely preclude it from obtaining relief against any final order that might be entered against it in the ongoing proceedings. *See* Emergency Application for Writ of Injunction Pending Appeal 20, *Leachco, Inc. v. CPSC*, No. 22A730 (U.S. filed Feb. 6, 2023). After all, there can be no suggestion that President Biden would, but for the tenure protections of the CPSC commissioners and the statutory employment protections of the ALJ, fire the commissioners and the ALJ for proceeding against Leachco based on its marketing of a product involved in the deaths of three infants. *Cf. Cmty. Fin. Servs. Ass'n v. CFPB*. 51 F.4th 616, 632 (5th Cir. 2022) ("As we read *Collins*, to demonstrate harm, the Plaintiffs must show *a connection* between the President's frustrated desire to remove the actor and the agency action complained of."), *petitions for cert. pending*, Nos. 22-448 & 22-663 (U.S. filed Nov. 14, 2022 & Jan. 13, 2023).

Leachco nonetheless insists that, although its separation-of-powers theories would not justify setting aside as unlawful any actions that the CPSC might take against it, it can rely on those theories as a basis for enjoining the agency from taking the very same *lawful* actions. That position does not square with the reasoning in *Collins*. If, as eight Justices agreed in *Collins*, the claimed separation-of-powers violation does not impair the agency's constitutional authority to act, and does not render the results of its exercise of that authority unlawful, a court would have no lawful basis for enjoining the agency from acting. Such a remedy would go far beyond "restor[ing] the plaintiff[] to the position [it] would have occupied in the absence of the removal problem." *Collins*, 141 S. Ct. at 1801 (Kagan, J., concurring) (cleaned up). Instead, it would turn the claimed constitutional violation into an undeserved windfall for Leachco by excusing it from having to face actions undertaken by the agency with lawful authority and aimed at a lawful end.

In its unsuccessful application to the Supreme Court for an injunction pending appeal, Leachco complained that denial of a preliminary injunction would deprive it of "meaningful relief." Emergency Application 17. But a party's view that the relief determined

by the Supreme Court to be appropriate for the type of violation claimed is not as "meaningful" as what the party wants is no basis for granting a remedy to which the party is not entitled.[3] The Supreme Court has determined that the appropriate remedy for claims such as Leachco's, if they are ultimately sustained on the merits, is a declaratory judgment severing an invalid removal restriction and, possibly, additional relief targeted at harms causally attributable to the removal restriction. To be sure, that form of relief will not spare Leachco the burden of defending itself against a proceeding lawfully undertaken by agency officers with authority to act. Under the Supreme Court's decisions, however, Leachco is not entitled to be spared that burden.

In short, even if Leachco's separation-of-powers arguments were well founded, Leachco would "not [be] entitled to broad injunctive relief against the [agency's] continued operations." *Free Enterprise Fund*, 561 U.S. at 513. Because there is no likelihood that Leachco can succeed in obtaining such injunctive relief on a permanent basis, its request for the same relief on a preliminary basis must be denied.

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[3] Moreover, the party's Article III standing to proceed in court does not entitle it to a form of relief that depends on a merits showing that the party cannot make. *See Collins*, 141 S. Ct. at 1788 n.24.

CONCLUSION

This Court should affirm the district court's denial of preliminary injunctive relief.

Respectfully submitted,

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February 23, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing brief is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word for Microsoft 365), contains 5,042 words.

/s/ Scott L. Nelson
Scott L. Nelson

CERTIFICATE OF SERVICE

I hereby certify that this brief has been served through the Court's ECF system on counsel for all parties required to be served on February 23, 2023.

/s/ Scott L. Nelson
Scott L. Nelson