UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF OKLAHOMA

LEACHCO, INC., Plaintiff, ***v.*** **CONSUMER PRODUCT SAFETY COMMISSION, ET AL.**, Defendants.	Case No. 6:22-CV-00232-JAR

MEMORANDUM IN SUPPORT OF PLAINTIFF LEACHCO, INC.'S MOTION FOR PRELIMINARY INJUNCTION

MEMORANDUM OF LAW

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Rules and Regulations

Other Authorities

INTRODUCTION

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

This Court's immediate attention is required because the Commission itself and its proceeding suffer from constitutional defects inflicting on Leachco irreparable "here-and-now" harm that can be remedied only by an Article III court. *See Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020). Leachco thus asks this Court to issue a preliminary injunction under Federal Rule of Civil Procedure Rule 65(a) to prevent the Commission from continuing its in-house administrative action.

Leachco meets the standards for the issuance of a preliminary injunction:

1. Leachco is likely to prevail on the merits

The Constitution "empower[s] the President to keep [executive] officers accountable—by removing them from office, if necessary." *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483 (2010). Inferior officers thus may not enjoy multiple levels of removal protection. *Id.* at 495–508. And principal officers who head powerful executive agencies may not be protected from removal by the President. *See Seila Law*, 140 S. Ct. at 2191. The Commission suffers both defects.

First, the Commission is unconstitutionally structured because it wields substantial executive powers but is headed by five Commissioners—principal officers—who may not be removed by the President except for cause. *See Seila Law*, 140 S. Ct.

at 2191–92; *Consumers' Research v. CPSC*, ---F.Supp.3d ---, No. 6:21-cv-256-JDK, 2022 WL 1577222, at *12 (E.D. Tex. Mar. 18, 2022), appeal filed May 18, 2022 (holding that CPSC Commissioners' for-cause removal protections violate Article II of the Constitution).

Second, the officer adjudicating the CPSC's proceeding is unconstitutionally protected by a multilevel removal restriction: (1) He may not be removed except for cause, and (2) The officers empowered to remove him may not be removed by the President except for cause. This multilevel removal restriction contravenes the Constitution's separation of powers and Article II's vesting of executive power in the President. *See Free Enter. Fund*, 561 U.S. at 483–84.

Separately, because the Commission alleges a product-liability claim sounding in traditional tort law and seeks legal damages, its proceeding violates Leachco's Seventh Amendment right to a jury trial. *See, e.g.*, *Jarkesy v. SEC*, 34 F.4th 446, 453–54 (5th Cir. 2022) (holding that SEC's administrative action alleging fraud required a jury trial).

Leachco is, therefore, likely to prevail on the merits.[1]

2. Without an injunction, Leachco will suffer irreparable harm by being subjected to an unconstitutional proceeding conducted by an unconstitutionally structured agency

The Commission's separation-of-powers defects inflict on Leachco "here-and-now" constitutional injuries that can be remedied in court. *Seila Law*, 140 S. Ct. at 2196. *Seila Law* thus confirms that Leachco may properly seek relief in this Court to prevent constitutional harms. And any constitutional deprivation—no matter how temporary—constitutes irreparable harm under Rule 65(a). *See* 11A Fed. Prac. & Proc. Civ. (Wright & Miller) § 2948.1; *see also Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019).

[1] Leachco's complaint alleges six separate constitutional violations. *See* Verified Complaint, Dkt. # 1, ¶¶120–220. Leachco believes all claims will ultimately be vindicated, but it addresses only Counts I, II, and VI here because these are the most immediate, irreparable constitutional harms that are clearly established by Supreme Court and circuit court precedent.

3. The public interest and equity favor an injunction here

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Free the Nipple*, 916 F.3d at 807; *see also Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (same). And when "a constitutional right hangs in the balance," as it does here, "even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citation omitted).

* * *

Because the Commission's administrative proceeding inflicts a continuing, irreparable "here-and-now" harm on Leachco, the Court should immediately issue a preliminary injunction to stay the Commission's action in *In re Leachco, Inc.*, CPSC Docket No. 22-1, until Leachco's structural constitutional challenges are resolved judicially. *See Seila Law*, 140 S. Ct. at 2196; *see also* Ex. 1 (Order, *Axon v. FTC*, No. 20-15662, (9th Cir. Oct. 2, 2020) (ECF No. 40) (staying administrative trial)); Ex. 2 (Order, *Cochran v. SEC*, No. 19-10396, (5th Cir. Sept. 24, 2019) (staying administrative trial)).

BACKGROUND

Leachco

Leachco is a family-owned company in Ada, Oklahoma, founded in 1988 by Jamie Leach and her husband Clyde. Jamie—who still designs all Leachco products—finds inspiration from her knowledge as a registered nurse and her experience as a mother and grandmother. *See* Verified Complaint (Compl.), Dkt. # 1, ¶¶12–14. Jamie's plan has always been to develop products that are useful and safe for her children and grandchildren. *Id.* ¶22.

Leachco started out as a bare-bones outfit, with Jamie and Clyde serving in many different capacities to keep the company alive. *Id.* ¶16. It remained that way for years. In 1991, Leachco's accountant told Jamie and Clyde that they could not afford to stay in business. *Id.* ¶17. But shortly after this meeting, Jamie made a chance, follow-up sales call to Wal-Mart—which ended up being Leachco's big break, as Wal-Mart made a significant order. *Id.* ¶18.

Since then, Leachco has become a successful business; it currently has around 40 full-time employees and seven temporary employees. Compl. ¶19. And Jamie has become a prolific designer: she has over 40 patents and scores of trademarks. *Id.* ¶20. And now, for more than three decades, Leachco has crafted various products, including an infant lounger called a Podster®. *See id.* ¶¶12–28.

But the Commission's unproven—and baseless—allegations have already caused significant harm. Large retailers like Amazon, Buy Buy Baby, and Bed, Bath, and Beyond no longer carry the Podster®. *Id.* ¶25. The Commission's allegations have also harmed Leachco's good name and exemplary product-safety record—both of which the Leaches earned over three decades of careful designs, hard work, proper and express warnings, honest dealings, and qualify craftsmanship. *Id.* ¶26. Because of the Commission's public allegations, Leachco's revenues have decreased, and the company was compelled—and is still being compelled—to incur significant legal expenses. *Id.* ¶27. Clyde and Jamie are now forgoing salaries, and living off their savings, to assure Leachco remains solvent, and its employees have jobs. *Id.*

The Commission's claim threatens everything that Jamie and Clyde have worked so hard for—a great, American success story attained through innovation and grit—and a legacy for their children. Compl. ¶28.

The Commission's Allegations and Its Unconstitutional Structure

Since 2009, Leachco has made and sold approximately 180,000 Podsters®, which are specifically designed, marketed, and sold for awake infants under constant adult supervision. Compl. ¶¶34–35. As the Commission itself alleges, the Podster® "is not and has never been advertised by [Leachco] as a sleep product;" and Leachco has expressly warned, among other things, that the Podster® should not be used for sleep, that adult supervision is always required, and that it should be used only on the floor, and not in another product, such as a crib, on a bed, table, playpen, counter, or any elevated surface. *Id.* ¶¶37–41. The Podster® is safe for its intended use—adult-supervised, awake-time use.

Tragically, two infants have died while a Podster® was present—but a Podster® was not the cause in either case. Nor is the Podster® defective. Compl. ¶48. Rather, the two incidents—which occurred more than five-and-a-half years ago and more than three-and-a-half years ago, respectively—were caused because of multiple misuses of the Podster® that were not reasonably foreseeable uses of the product and violated multiple express warnings, as well as safe sleep practices. *Id.* In one instance, a daycare violated multiple state facility-operating regulations, as well as its own rules, safe-sleep practices, and multiple express warnings on the product when it left an infant with a recent respiratory problem to sleep unsupervised in the product, in a crib, for an extended period. The infant was not visible to employees, who failed to check on the infant as required. Additionally, the daycare allowed other soft products to be in the crib. Each of these actions (i) contradicted Leachco's express warnings and instructions, (ii) violated the daycare center's operating rules, and (iii) violated state law and regulations. The daycare center's state license was revoked because of this incident. In the second instance, a three-week-old infant was placed in the Podster®, and then placed on an adult bed, between the infant's adult parents, along with bedding and pillows, for co-sleeping—contrary to Leachco's express warnings and instructions. Upon information and belief, the parents found the infant in the adult bedding and not on the product. These two isolated incidents followed multiple unsafe practices, uses of the product not intended and directly contrary to multiple express warnings, and they are the only injuries known to have occurred near the more than 180,000 Podsters® sold to date. *Id.* ¶¶48–49.

Even so, in February 2022, the Commissioners, by a vote of 3-1, authorized an administrative action against Leachco under § 2064. Compl. ¶30, Ex. 1. CPSC's administrative complaint alleges that Podsters® present a "substantial product hazard" under the Act and its implementing regulations. *Id.* ¶¶31-32, Ex. 2. Through this in-house proceeding, the Commission seeks—from itself—a determination that the Podster® presents a substantial product hazard and an order compelling Leachco to, among other things, pay damages to purchasers and to third parties who may incur compliance costs arising out of the order. *Id.* ¶¶32–33.

After filing its complaint, the Commission executed an interagency agreement for the services of Michael G. Young, an administrative law judge (ALJ). Compl. ¶134. The CPSC Chair appointed ALJ Young as Presiding Officer. *Id.* ¶135, Ex. 1. ALJ Young is employed by the Federal Mine Safety and Health Review Commission (Mine Commission). *Id.* ¶136. ALJ Young may not be removed from office except for "good cause," 5 U.S.C. § 7521, and those with authority to remove ALJ Young are also protected from removal except for cause.

The Commission is an independent executive agency headed by five Commissioners who are appointed by the President with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1)). As described below, the Commission enforces, among other laws, the Consumer Products Safety Act, and it is authorized to promulgate regulations, prosecute civil and criminal violations in federal court, initiate and adjudicate administrative claims through in-house proceedings, and unilaterally review decisions issued in those proceedings. The President may not remove CPSC Commissioners except for "neglect of duty or malfeasance in office but for no other cause." *Id.* § 2053(a).

STANDARD OF REVIEW

A plaintiff "seeking a preliminary injunction must establish that it is likely to succeed on the merits, that it is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in its favor, and that an injunction is in the public interest." *Planned Parenthood Ass'n of Utah v. Herbert*, 828 F.3d 1245, 1252 (10th Cir. 2016) (citing *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008)).

Well-settled law supports a "constitutional-violation-as-irreparable-injury principle." *Free the Nipple*, 916 F.3d at 806. This principle, in the context of constitutional claims, "collapses the first and second preliminary-injunction factors, equating likelihood of success on the merits with a demonstration of irreparable injury." *Id.* Similarly, the last two factors—balancing the equities and the public interest—collapse when the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

ARGUMENT

I. LEACHCO IS LIKELY TO SUCCEED ON THE MERITS

A. The CPSC's structure violates the Constitution's Separation of Powers because the President cannot remove Commissioners except for cause

Article II of the Constitution provides "[t]he executive Power shall be vested in a President," who must "take care that the laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; *id.*, § 3. This provision vests the President with not some, but "all" of the executive power. *Seila Law*, 140 S. Ct. at 2191. To carry out his duties under the Constitution, the President must rely on subordinate officers. So to ensure that the President stays fully accountable to the people, the Constitution gives him "the authority to remove those who assist him in carrying out his duties." *Id.* Indeed, "[w]ithout such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* And it would be "impossible for the President to take care that the laws be faithfully executed." *Id.* at 2198.

It is thus a baseline constitutional rule that the President has an "unrestricted removal power." *Seila Law*, 140 S. Ct. at 2192. The Supreme Court has recognized only two limited exceptions to this rule: (1) "one for multimember expert agencies that do not wield substantial executive power," (as in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935)); and (2) "one for inferior officers with limited duties and no policymaking or administrative authority." *Id.* at 2199–2200. Neither exception applies here because the CPSC Commissioners are principal (not inferior) officers who head an agency that wields substantial executive power.

1. The Consumer Product Safety Commission wields substantial executive power

In *Humphrey's Executor*, the Supreme Court approved a for-cause removal protection for FTC commissioners because the FTC (then) acted "in part quasi legislatively and in part quasi judicially." 295 U.S. at 628. "Such a body," the Court said, "cannot in any proper sense be characterized as an arm or an eye of the executive."

Id. In contrast, the CPSC Commission exercises substantial, "quintessentially executive power not considered in *Humphrey's Executor*." *Seila Law*, 140 S. Ct. at 2200.

The Commission is authorized to enforce, among other laws, the Consumer Product Safety Act, the Flammable Fabrics Act, the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, and the Refrigerator Safety Act. The Commission promulgates binding "consumer safety standards," 15 U.S.C. § 2056(a), as well as consumer-product safety rules, *id.* § 2058. Commissioners also issue rules declaring products "banned hazardous product[s]." *Id.* § 2057. And the Commission may declare substances or mixtures thereof to be "hazardous substance[s]." *Id.* § 1262.

The Commission has extensive investigatory powers. Commission agents—for "purposes of implementing [15 U.S.C. ch. 47], or rules or orders prescribed" thereunder—may enter, at reasonable times, any manufacturing factory, warehouse, or establishment, to inspect areas "which may relate to the safety" of consumer products. 15 U.S.C. § 2065(a). And Commissioners require consumer product manufacturers to "establish and maintain" records and reports and supply them to the Commission. *Id.* § 2065(b). The investigatory power allows Commissioners to compel "any person" to (1) submit written, sworn answers and reports to questions "as the Commission may prescribe to carry out a specific regulatory or enforcement function of the Commission;" (2) "to administer oaths;" (3) to compel the attendance of witnesses, testimony, and the production of documents and other physical evidence, "relating to the execution of [the Commission's] duties." *Id.* § 2076(b)(1)–(3), (c).

More still, the Commission can initiate civil actions seeking civil penalties and injunctive relief. 15 U.S.C. §§ 2076(b), 2069(a), 2071(a), 2073(b). And the Commission has, with the concurrence of or through the Attorney General, the power to bring "any criminal action" to enforce all laws subject to the Commission's jurisdiction and seek up to five years' imprisonment. *Id.* §§ 2070(a), 2076(b)(7)(B).

Finally, the Commission "may, by one or more of its members or by such agents or agency as it may designate, conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." 15 U.S.C. § 2076(a). A

Commissioner "who participates in such a hearing or other inquiry shall not be disqualified solely by reason of such participation from subsequently participating in a decision of the Commission in the same matter." *Id.*

Commissioners thus hold the "quintessentially executive power" to, among other things, "file suit in federal court 'to seek daunting monetary penalties against private parties' as a means of enforcement." *Consumers' Research*, 2022 WL 1577222, at *10 (quoting *Seila Law*, 140 S. Ct. at 2200). Indeed, "no real dispute" exists that "law enforcement functions that typically have been undertaken by officials within the Executive Branch" qualify as "executive" power. *Morrison v. Olson*, 487 U.S. 654, 691 (1988); *id.* at 706 (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

The Commission wields substantial executive power and, as such, the exception allowing for-cause removal protection recognized in *Humphrey's Executor* does not apply here. *See Seila Law*, 140 S. Ct. at 2199–2200; *see also Consumers' Research*, 2022 WL 1577222, at *10 (The Commission "exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception.").

2. The Commissioners are principal officers

The second exception to the general rule of Presidential removal—"one for *inferior* officers with limited duties and no policymaking or administrative authority," *Seila Law*, 140 S. Ct. at 2200 (emphasis added)—also does not apply here because the Commissioners are principal officers.

The Commissioners are appointed by the President with the advice and consent of the Senate. 15 U.S.C. § 2053(a). This method of appointment is required for principal officers. U.S. CONST. art. II, § 2, cl. 2. Further, under the Appointments Clause, which allows Congress to "vest the Appointment of such inferior Officers . . . in the Heads of Departments," U.S. CONST. art. II, § 2, the Commissioners may appoint inferior officers, 15 U.S.C. § 2053. Accordingly, the CPSC Commissioners are heads of the Commission. *See Free Enter. Fund*, 561 U.S. at 512–13 ("As a constitutional matter, we see no reason why a multimember body may not be the 'Hea[d]' of a 'Departmen[t]' that it governs."). And thus, the Commissioners are principal

officers. *See Freytag v. Comm'r*, 501 U.S. 868, 884 (1991) (explaining that "principal federal officers" are "ambassadors, ministers, *heads of departments*, and judges") (emphasis added); *see also Consumers' Research*, 2022 WL 1577222, at *8 (CPSC Commissioners are "principal, rather than inferior, officers under the Appointments Clause."). And even so, as detailed in the previous section, Commissioners clearly exercise policymaking and administrative authority.

3. The CPSC Commissioners are improperly insulated from removal

Because neither exception applies, and because the President may remove a Commissioner only for "neglect of duty or malfeasance in office but for no other cause," 15 U.S.C. § 2053(a), the President's ability "to remove those who assist him in carrying out his duties" is unconstitutionally limited. *Seila Law*, 140 S. Ct. at 2191 (quoting *Free Enter. Fund*, 561 U.S. at 513–14). *See Consumers' Research*, 2022 WL 1577222, at *12 ("[T]he restriction on presidential removal established by 15 U.S.C. § 2053(a) violates Article II of the U.S. Constitution.").

Leachco is thus likely to prevail on its claim that the Commission is unconstitutionally structured.

B. CPSC is unconstitutionally structured because its ALJs enjoy multilevel layers of removal protections

In *Free Enterprise Fund*, the Supreme Court held that certain officers of the United States—members of the Public Company Accounting Oversight Board—exercised executive power free of Presidential control because (1) members of this Board could not be removed by the Securities and Exchange Commission except for cause, and (2) the SEC Commissioners could not be removed by the President except for cause. 561 U.S. at 486–87. The Supreme Court held that this multilevel removal limitation contravened the Constitution's separation of powers and Article II's vesting of executive power in the President. *Id.* at 483–84, 492–98.

Here, Presiding Officer Young is an officer of the United States who enjoys a multilevel removal limitation. And because those restrictions free him from Presidential control, he is unconstitutionally conducting CPSC's proceeding.

1. Presiding Officer Young is an officer of the United States

Presiding Officer Young is an officer of the United States under the Appointments Clause (U.S. CONST. art. II, § 2, cl. 2) because he (1) occupies a "continuing position established by law" and (2) exercises "significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (cleaned up).

a. Presiding Officer Young occupies a continuing position established by law

Presiding Officer Young is an ALJ employed "by law," *i.e.*, 5 U.S.C. § 3105—the same statute by which the ALJ in *Lucia* was employed. *See Lucia*, 138 S. Ct. at 2053. Further, Presiding Officer Young holds a continuing—indeed, a career—position. 5 C.F.R. § 930.204(a).[2] His "[a]ssignment, removal, and compensation . . . shall be in accordance with sections 3105, 3344, 5362 and 7521 of title 5." 30 U.S.C. § 823(b)(2). Therefore, as in *Lucia*, Presiding Officer Young's "appointment is to a position created by statute, down to its 'duties, salary, and means of appointment.'" *Lucia*, 138 S. Ct. at 2053 (quoting *Freytag* , 501 U.S. at 878)).

b. Presiding Officer Young exercises significant authority pursuant to the laws of the United States

Presiding Officer Young exercises authority and wields "'significant discretion' when carrying out . . . 'important functions.'" *Lucia*, 138 S. Ct. at 2053. Indeed, as shown in the following chart, the Presiding Officer's powers are virtually indistinguishable from those of an SEC ALJ—who the Supreme Court held is an officer of the United States. *Id.*

[2] That's true even though ALJ Young is on loan from a different agency. *See* 5 U.S.C. § 3344 (statutory authority for ALJ loan program); 5 C.F.R. § 930.208 (detailing Administrative Law Judge Loan Program under which ALJ Young was assigned to this proceeding).

CPSC Presiding Officer	SEC Administrative Law Judge
Presiding Officer has "all powers necessary to" carry out "duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order." 16 C.F.R. § 1025.42(a)	SEC ALJ has "the 'authority to do all things necessary and appropriate to discharge his or her duties' and ensure a 'fair and orderly' adversarial proceeding." *Lucia*, 138 S. Ct. at 2049 (citations omitted).
Presiding Officer may administer oaths and "regulate the course of the proceedings and the conduct of the parties and their representatives." *Id.* § 1025.42(a)(1), (4).	SEC ALJs "administer oaths, rule on motions, and generally 'regulat[e] the course of' a hearing, as well as the conduct of parties and counsel." *Lucia* at 2053 (cleaned up).
Presiding Officer may rule on admissibility of evidence. *Id.* § 1025.43(c).	SEC ALJ may "rule on the admissibility of evidence." *Lucia* at 2053.
Presiding Officer may "compel discovery and to impose appropriate sanctions for failure to make discovery." *Id.* § 1042(a)(2); *see also id.* § 1025.37 (sanctions for failure to comply with discovery orders).	SEC ALJ may "enforce compliance with discovery orders." *Lucia* at 2053 (citation omitted).
Presiding Officer issues factual findings, legal conclusions, and appropriate remedies. *Id.* § 1025.51.	SEC ALJ may "issue decisions containing factual findings, legal conclusions, and appropriate remedies." *Lucia* at 2053 (citation omitted).
The Presiding Officer's Initial Decision becomes the Commission's Final Decision unless a party appeals or the CPSC decides to review. *Id.* § 1025.52	If the SEC declines review, an SEC ALJ's initial decision "'becomes final' and is 'deemed the action of the Commission.'" *Lucia* at 2054 (citations omitted).

* * *

The same conclusion follows an analysis of an ALJ's powers under the procedural rules of the Mine Commission. *See* 29 C.F.R. §§ 2700.55, .59, .60(a), .67, .69(a) (ALJ's powers include the powers to regulate the course of hearings; administer oaths and affirmations; rule on offers of proof and receive relevant evidence; dispose

of procedural requests or similar matters; including issuing summary decisions; compel discovery and issue appropriate sanctions for failure to comply; issue subpoenas; issue decisions that must include findings of fact and conclusions of law; and take other "action authorized by these rules, by 5 U.S.C. 556, or by the [Federal Mine Safety and Health Act]"); *see also* 30 U.S.C. § 823(d)(1) (ALJ's decision becomes the Mine Commission's final decision unless the Mine Commission, within 40 days of the ALJ's decision, directs review).

* * *

In sum, Presiding Officer Young (1) occupies a "continuing position established by law" and (2) exercises "significant authority pursuant to the laws of the United States." *Lucia*, 138 S. Ct. at 2051 (cleaned up). He is, therefore, an officer of the United States.

2. The Presiding Officer is an executive officer of the United States

Presiding Officer Young is an employee of the Mine Commission and appointee of the CPSC, and thus he is an executive officer carrying out executive power. As the Supreme Court recently explained, even if the "duties" of executive officials "'partake of a Judiciary quality,'" these officials "exercise[e] executive power" because they reside within the executive branch. *United States v. Arthrex*, 141 S. Ct. 1970, 1982 (2021) (quoting 1 Annals of Cong. at 611–12) (Madison). Executive-branch actions "are exercises of—indeed under our constitutional structure they *must* be exercises of—the 'executive power.'" *Id.* (quoting *Arlington v. FCC*, 569 U.S. 290, 305 n.4 (2013)). *See also Lucia*, 138 S. Ct. at 2054 (SEC ALJs are officers of the United States).

Here, Presiding Officer Young also performs substantial executive functions, most importantly, his substantial authority within CPSC proceedings. *Jarkesy*, 34 F.4th at 463–64. As a result, the President "must have sufficient control over the performance of [Presiding Officer Young's] functions." *Id.* at 463; *see id.* at 463–64 (holding that SEC ALJs unconstitutionally enjoy multilevel removal protections).

3. The Presiding Officer's removal protections violate the Constitution

According to the Supreme Court, "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 484. There, (1) members of the Public Company Accounting Oversight could not be removed by the SEC except for cause, and (2) the SEC Commissioners could not be removed by the President except for cause. *Id.*, 561 U.S. at 486–87.

Here, Presiding Officer Young enjoys at least two levels of protection from removal:

- ***First***, ALJ Young may not be removed except "for good cause established and determined by the Merit Systems Protection Board [MSPB]" following "[a]n action" brought by "the agency in which the administrative law judge is employed." 5 U.S.C. § 7521(a).

- ***Second***, all of the officers who might be responsible for removing ALJ Young—the CPSC Commissioners, Mine Commissioners, and members of the MSPB—themselves may not be removed by the President except for cause:

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

  - The President may not remove Mine Commissioners except for "inefficiency, neglect of duty, or malfeasance in office." 30 U.S.C. § 823(b).

  - The President may not remove members of the MSPB except for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

The Fifth Circuit recently applied *Free Enterprise Fund* to nearly identical removal protections for ALJs in the Securities and Exchange Commission and held that those removal protections suffered the same constitutional defects as those in *Free Enterprise Fund*. *Jarkesy*, 34 F.4th at 463–65.

So too here. Indeed, *Free Enterprise Fund* is indistinguishable. One might assert that the "good cause" removal protection for ALJ Young is less onerous than the protection for the officers in *Free Enterprise Fund*, who could be removed by the SEC

only if the SEC found that they had "willfully violated" certain laws. *Id.* at 486. But as the Fifth Circuit recently explained, this argument ignores the stringent procedures required to remove ALJs like Presiding Officer Young here. *See Jarkesy*, 34 F.4th at 465 ("[F]or an SEC ALJ to be removed, the MSPB must find good cause and the Commission must choose to act on that finding."). Therefore, unlike the situation in *Free Enterprise Fund*, to remove ALJ Young, it is not enough that his employer-agency finds "good cause." Instead, to remove an ALJ, "good cause" must first be "established and determined" (on the record and after the opportunity for a hearing) by *another* agency—the MSPB. 5 U.S.C. § 7521(a). This removal requirement—a finding of good cause by a non-employing agency—adds an extra layer of protection against removal for ALJs like ALJ Young.

In sum, the "multilevel protection from removal" enjoyed by ALJ Young "is contrary to Article II's vesting of the executive power in the President." *Free Enter. Fund*, 561 U.S. at 484.

C. The Commission's adjudicatory scheme violates Leachco's right to a jury trial under the Seventh Amendment

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

To determine whether a claim requires a jury, courts look to two factors. *First*, courts compare the action "to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 42 (1989). Claims analogous to common law claims that existed at the time of the Seventh Amendment's ratification require a jury. *Curtis v. Loether*, 415 U.S. 189, 194 (1974). *Second*, courts consider "the remedy sought and determine whether it is legal or equitable in nature." *Granfinanciera*, 492 U.S. at 42. Legal remedies require a jury. *See, e.g.*, *Tull v. United States*, 481 U.S. 412, 417–18 (1987) (cases involving civil penalties require a jury). The remedy factor is the more important of the two. *Chauffeurs, Teamsters and Helpers, No. Local 391 v. Terry*, 494 U.S. 558, 565 (1990).

1. The Commission alleges a legal claim

In its in-house administrative action here, the Commission alleges that the Podster® presents a "substantial product hazard"—a claim that sounds in traditional, common-law tort. Product liability claims emerged from basic tort law. *See* BLACK'S LAW DICTIONARY 1328 (9th ed. 2009) (defining product liability as a "manufacturer's or seller's tort liability for any damages or injuries suffered by a buyer, user, or bystander as a result of a defective product. Products liability can be based on a theory of negligence, strict liability, or breach of warranty"). These tort claims have long existed at common law and have been recognized as implicating the Seventh Amendment. *See Curtis*, 415 U.S. at 195 (ruling that the Civil Rights Act statutory "cause of action is analogous to a number of tort actions recognized at common law"); *Granfinanciera*, 492 U.S. at 51 (Seventh Amendment applies to tort cases); *cf. Robert L. Dawson Farms, LLC v. Meherrin Agric. & Chem. Co.*, No. 4:20-CV-29-FL, 2020 WL 1485673, at *3 (E.D.N.C. Mar. 23, 2020) (product-liability claims are legal claims recognizable at common law for Seventh Amendment). As the Supreme Court has explained, "[i]t is settled law . . . that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, *so long as the claims can be said to 'sound basically in tort*,' and seek legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709 (1999) (emphasis added) (quoting *Curtis*, 415 U.S. at 195–96).

Because the CPSC's product-liability claim sounds essentially in tort and because it is analogous to common-law causes tried before juries, it triggers the Seventh Amendment. *See City of Monterey*, 526 U.S. at 729 (Scalia, J., concurring) (noting "[c]ommon-law tort actions" implicate the Seventh Amendment); *United States v. ERR, LLC*, 35 F.4th 405, 411–12 (5th Cir. 2022) (recoupment claim brought by government required jury because the "action is, at its foundation, one for tort").

It does not matter that the CPSC's suit might also involve an equitable claim, since the "Seventh Amendment question depends on the nature of the *issue* to be tried rather than the character of the overall action." *Ross v. Bernhard*, 396 U.S. 531, 538

(1970); *see also Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510–11 (1959) (jury right attaches even when legal and equitable claims are blended).

2. The Commission seeks legal damages

The second factor—the nature of the remedy—"is the more important in [the Seventh Amendment] analysis." *Terry*, 494 U.S. at 565. Here, the Commission seeks legal damages in the form of refunds to purchasers of the Podsters® and reimbursement to third parties who may incur costs complying with a Commission order.

The Commission may contend that refunds and reimbursements are merely restitution, an equitable remedy. But that is incorrect. Restitution can be an equitable remedy, but it need not be. Indeed, "some restitutionary remedies were created in the law courts, and others in the equity courts." Douglas Laycock, *Modern American Remedies* 569 (4th ed. 2010). And the Supreme Court recognizes that "restitution was available in certain cases at law and in certain others in equity." *Great-W. Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212 (2002). Remedies at law require a jury.

Equitable restitution "require[s] identification of particular property or funds in the wrongdoer's possession traceable to the victim." *EER, LLC,* 35 F.4th at 413. This applies when the plaintiff is, in fact, the "true owner" of identifiable property or funds traced directly between the plaintiff and defendant. *Great-W. Life & Annuity*, 534 U.S. at 213. The equitable rule arises when the plaintiff does not seek "to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214. In other words, the equitable basis for restitution arises when the defendant holds specific property against which the plaintiff could seek a constructive trust or equitable lien because he was "in the eyes of equity, the true owner." *Id.* at 213–14.

Legal restitution, in contrast, arises in "cases in which the plaintiff could not assert title or right to possession of particular property, but in which nevertheless he might be able to show just grounds for recovering money to pay for some benefit the defendant had received from him." *Great-W. Life & Annuity*, 534 U.S. at 213. This remedy is invoked when a plaintiff seeks "a simple money judgment in restitution, to

be collected from defendant's general assets in the same way a damage judgment would be collected." Laycock *supra* at 623. "Such claims were viewed essentially as actions at law" because they "sought to obtain a judgment imposing . . . personal liability upon the defendant to pay a sum of money." *Id.* "Broadly speaking, a claim sounding in legal restitution seeks to impose personal, monetary liability on the defendant." *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 371 (2d Cir. 2011).

The simplest example of legal restitution is enrichment "resulting from a money payment," which "is measured by the amount of payment." *Restatement (Third) of Restitution and Unjust Enrichment* § 49(2). In such a case, the plaintiff does not seek return of *particular* property, but a money judgment. When a plaintiff cannot "show what bec[a]me of" specific property paid to another, she is "limited to a remedy in tort or restitution via money judgment against" the defendant—a legal remedy. *Restatement* § 58, Illustration 1.

Courts have recently begun to recognize the distinction between legal and equitable restitution. In *ERR*, the Fifth Circuit held that the government's reimbursement claim for the clean-up of an oil spill involved legal restitution. 35 F.4th at 412–14. The government wasn't "seeking particular property or funds in the defendant's possession caused by the wrongdoing." *Id.* at 413. Instead, it wanted merely to recoup money it paid that allegedly benefitted the private party. *See also AcryliCon USA, LLC v. Silikal GmbH*, 985 F.3d 1350, 1374 (11th Cir. 2021) (The Seventh Amendment applied there because "a money judgment, even if based on restitution, is generally a legal remedy.").

Here, the Commission seeks an order compelling Leachco to (1) refund the purchase price of the Podster® and (2) "[r]eimburse distributors, retailers, and any other third parties for expenses in connection with carrying out any Commission Order issued in this matter." (Dkt. # 1, Ex. 2 at 9–10.) The refund remedy could be an equitable remedy only if it is held that Leachco's customers are the "true owners" of identifiable funds. But even if the Commission seeks to impose personal liability on Leachco for the sales of allegedly defective products, the remedy is legal restitution.

Still, the Commission's second proposed remedy—that Leachco reimburse third parties for costs incurred to comply with the Commission's order—certainly does not involve an equitable remedy. The costs will be incurred, if at all, in the future; which necessarily means that Leachco is not in possession of particular, identifiable funds that properly belong to the (so far unidentified) third parties. Therefore, this second remedy, at least, is in the form of legal restitution for which a jury is required. Because the Commission's in-house proceeding does not—and cannot—afford Leachco a jury, it violates the Seventh Amendment. *See Jarkesy*, 34 F.4th at 452–54 (holding that SEC in-house proceeding violates Seventh Amendment because it did not provide a jury).

II. WITHOUT AN INJUNCTION, LEACHCO WILL SUFFER IRREPARABLE HARM

Leachco will suffer irreparable harm if this Court does not grant an immediate injunction requiring CPSC to cease its unconstitutional adjudication. *See Free the Nipple*, 916 F.3d at 806.

First, CPSC's adjudication violates the Constitution. "What makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial. Any deprivation of any constitutional right fits that bill." *Id.* (citations omitted). Structural separation-of-powers violations inflict here-and-now injuries. *See Seila Law*, 140 S. Ct. at 2196 (holding that parties alleging injury resulting from actions of an unconstitutionally structured agency have standing to challenge removal restrictions because "when such a provision violates the separation of powers it inflicts a 'here-and-now' injury . . . that can be remedied in court") (quoting *Bowsher v. Synar*, 478 U.S. 714, 727 n.5 (1986)). And as the Supreme Court has repeatedly made clear, when the government violates the separation of powers, it creates severe injury to peoples' individual rights. Indeed, the separation of powers "serves not only to make Government accountable but also to secure individual liberty." *Boumediene v. Bush*, 553 U.S. 723, 742 (2008). *See also Bond v. United States*, 564 U.S. 211, 222 (2011) (recognizing "an injured person's standing to object to a violation of a constitutional principle that allocates power within government" where "individuals sustain discrete, justiciable injury from actions that transgress separation-of-powers

limitations"); *Free Enterprise Fund*, 561 U.S. 477, 513 (2010) (recognizing parties' right to ensure that laws will be enforced only by "a constitutional agency accountable to the Executive" under Article II); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers.").

As then-Judge Kavanaugh has explained, "[i]rreparable harm almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted). Justice Kavanaugh later joined the opinion in *Seila Law*, which explained that when a removal provision—like the removal provisions at issue here—"violates the separation of powers it inflicts a 'here-and-now' injury . . . that can be remedied by a court." 140 S. Ct. at 2196 (quoting *Bowsher*, 478 U.S. at 727 n.5). A preliminary injunction would alleviate the harm now inflicted on Leachco—the regulation and enforcement by an unconstitutionally structured agency. *See, e.g.*, *Valley v. Rapides Par. Sch. Bd.,* 118 F.3d 1047, 1055–56 (5th Cir. 1997) (finding irreparable harm where plaintiff had to submit to a hearing that violated her due process rights).

Finally, without an injunction, Leachco will be forced to spend time and expense litigating before CPSC for no reason other than that the agency insists on pursuing its unconstitutional proceedings. This would allow the CPSC to punish Leachco with undue process. While the costs of litigation are often not found to constitute irreparable harm, Leachco's injuries are not simply litigation time and expense. It is pointless litigation time and expense because CPSC's in-house adjudication violates the Constitution in a myriad of ways. It is a fundamental maxim of due process that government must act with some rational basis and in a manner that is not arbitrary and capricious. And "[t]he touchstone of due process is protection of the individual against arbitrary action of government . . . whether the fault lies in a denial of fundamental procedural fairness . . . or in the exercise of power without any reasonable

justification in the service of a legitimate governmental objective." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845–46 (1998) (internal citations omitted). Yet requiring Leachco to litigate in an invalid enforcement proceeding is irrational.

If an injunction is not granted, the CPSC will continue to deprive Leachco of these fundamental rights and will continue to cause irreparable harm.

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

The public interest supports enjoining CPSC's unconstitutional adjudication against Leachco. Indeed, "it's always in the public interest to prevent the violation of a party's constitutional rights." *Free the Nipple*, 916 F.3d at 807; *see also Awad*, 670 F.3d at 1132 (finding the public interest always supports enforcing the Constitution). And the government's interest in enforcing a regulatory scheme "pales in comparison" to either a plaintiff's "constitutional" or even "statutory rights." *See Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012) (Kane, J.), *aff'd*, 542 F. App'x 706 (10th Cir. 2013); *see also Opulent Life Church v. City of Holly Springs*, 697 F.3d 279, 298 (5th Cir. 2012) (suggesting that injunctions protecting against constitutional violations are always in the public interest); *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson Cty., Tenn.*, 274 F.3d 377, 400 (6th Cir. 2001) ("[I]t is always in the public interest to prevent violation of a party's constitutional rights.") (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)); *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) ("[I]t may be assumed that the Constitution is the ultimate expression of the public interest.") (citation omitted).

The same basic principle applies to the balance of equities and thus supports enjoining CPSC's unconstitutional adjudication against Leachco. "When a constitutional right hangs in the balance . . . even a temporary loss usually trumps any harm to the defendant." *Free the Nipple*, 916 F.3d at 806 (citing Wright & Miller § 2948.2 & n.10); *see also Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) (concluding that, where there is a likelihood of success on the merits in a case involving a constitutional question, equity favors an

injunction because it is "questionable whether [there can be] any 'valid' interest in enforcing" an unconstitutional rule).

Further, as the Supreme Court emphasized, "our Appointments Clause remedies are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise Appointments Clause challenges." *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). If the Commission's proceeding against Leachco is allowed to go forward despite the structural infirmities—which arise out of the President's appointment and removal powers—this Court will have reduced the incentives for future litigants to raise Appointments Clause challenges. *See also* Kristin E. Hickman, *Symbolism and Separation of Powers in Agency Design*, 93 Notre Dame L. Rev. 1475, 1493 (2018) ("As should be evident with both the PCAOB and the CFPB, Congress presently has no qualms about designing new agencies in ways that push the constitutional envelope. It is up to the courts, therefore, to keep Congress within constitutional boundaries.").

Then-Judge Kavanaugh put the point succinctly: "The public interest is not served by letting an unconstitutionally structured agency continue to operate until the constitutional flaw is fixed. And in this circumstance, the equities favor the people whose liberties are being infringed, not the unconstitutionally structured agency." *John Doe Co.*, 849 F.3d at 1137 (Kavanaugh, J., dissenting).

Because this case involves serious violations of the separation of powers and individual constitutional rights and Leachco has shown a likelihood of success on the merits, the public interest and the equities warrant enjoining CPSC's ongoing adjudication.

CONCLUSION

For all these reasons, this Court should grant Leachco's motion for a preliminary injunction.

Dated: August 19, 2022.

Respectfully submitted,

/s/ Kurt M. Rupert

OLIVER J. DUNFORD
Florida Bar No. 1017791*
Pacific Legal Foundation
4440 PGA Blvd., Suite 307
Palm Beach Gardens, FL 33410
916.503.9060
odunford@pacificlegal.org

JOHN F. KERKHOFF
Ohio Bar No. 0097134*
FRANK D. GARRISON
Indiana Bar No. 34024-49*
Pacific Legal Foundation
3100 Clarendon Boulevard, Suite 610
Arlington, VA 22201
202.888.6881
JKerkhoff@pacificlegal.org
FGarrison@pacificlegal.org

KURT M. RUPERT
OBA No. 11982
Hartzog Conger Cason
201 Robert S. Kerr Ave., Suite 1600
Oklahoma City, OK 73102
405.235.7000
krupert@hartzoglaw.com

**Pro Hac Vice Motion to be filed*

Attorneys for Plaintiff Leachco, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on August 19, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. The foregoing will be served on all defendants with the Summons and Complaint.

/s/ Kurt M. Rupert
KURT M. RUPERT

Attorney for Plaintiff Leachco, Inc.

Exhibit 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 2 2020

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

AXON ENTERPRISE, INC., a Delaware corporation,

Plaintiff-Appellant,

v.

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

Defendants-Appellees.

No. 20-15662

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

ORDER

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

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

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

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

Exhibit 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-10396

MICHELLE COCHRAN,

Plaintiff - Appellant

v.

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

Defendants - Appellees

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

Before JONES, HIGGINSON, and OLDHAM, Circuit Judges.

PER CURIAM:

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