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-RAW

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

INTRODUCTION

Leachco seeks an equitable remedy for the here-and-now constitutional injuries inflicted by the Commission, whose structure violates the Separation of Powers because (1) the President may not remove the CPSC Commissioners except for cause and (2) the Commission's Presiding Officer enjoys multilevel removal protection. *See* Leachco Mem. in Supp. (Dkt. No. 10) 7–15. Faced with the likelihood of losing on the merits, the Commission responds with an astonishing claim that the Administrative Procedure Act *precludes* Leachco's equitable causes of action. This argument is based on a non sequitur—that the APA allows courts to review only final agency orders. But Leachco does not seek review of *any* agency order. Instead, Leachco alleges that being subject to an enforcement proceeding carried out by an unconstitutionally structured agency inflicts a here-and-now injury. The issues raised here are wholly unrelated and collateral to the substance of the Commission's proceeding.

The Commission cites no case to support its proposed APA-bar. But if adopted, it would prevent regulated parties from challenging an agency's constitutional violations—no matter how egregious. Agencies could drag out investigations and proceedings indefinitely and ratchet up pressure on small businesses like Leachco, who would face prohibitively costly monetary and reputational injuries, but who could do *nothing* until the agencies—at some point—allow a challenge. *See Cochran v. SEC*, 20 F.4th 194, 225 (5th Cir. 2021) (en banc) (Oldham, J., concurring) ("The SEC's litigation position is a combination of 'trust us, we're the experts' and 'there will be time for judicial review when we're good and ready, thank you.'"). That threat is even more acute here because Leachco's injury—being subject to an unconstitutional proceeding—will cease when the Commission's proceeding ends, at which point Leachco will be left without adequate or meaningful relief.

Fortunately, the Supreme Court has repeatedly confirmed that parties suffering here-and-now injuries because of separation-of-powers violations may seek immediate equitable relief in federal district court. *Seila Law, LLC v. CFPB*, 140 S. Ct. 2183 (2020); *Bond v. U.S.*, 564 U.S. 211 (2011); *Free Enter. Fund v. PCAOB*, 561 U.S. 477 (2010); *Bowsher v. Synar*, 478 U.S. 714 (1986). The injunction should issue.

I. THE SUPREME COURT EXPRESSLY RECOGNIZES AND APPROVES LEACHCO'S EQUITABLE CAUSES OF ACTION

The Commission contends that Leachco may not seek "interlocutory review of ongoing CPSC proceedings." Opp. 5 (heading) (capitalization altered). But Leachco does not seek *review* of *anything,* interlocutory or otherwise. Instead, Leachco brings collateral causes of action, which allege that *being subject to* an unconstitutional administrative proceeding inflicts an injury—an injury the Supreme Court confirms may be remedied immediately in district court. *See Free Enter. Fund*, 561 U.S. at 491 n.2 (citations omitted); *Seila Law*, 140 S. Ct. at 2196. The Commission's arguments based on the APA's post hoc review provisions are completely beside the point.

A. Leachco challenges the Commission's unconstitutional structure

Leachco's claims here fit neatly within longstanding practice. And the Supreme Court has overruled arguments now advanced by the Commission. Opp. 5–11. *Free Enterprise Fund* flatly rejected the argument that parties in Leachco's position have no equitable cause of action to protect their constitutional rights. 561 U.S. at 491 n.2. The Court stressed the "established" practice of federal court jurisdiction to grant equitable relief "to protect rights safeguarded by the Constitution." *Id.* (cleaned up). If the Commission's "point is that an Appointments Clause or separation-of-powers claim should be treated differently than every other constitutional claim, it offers no reason and cites no authority why that might be so." *Id.*

Indeed, the "ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). In the Founders' era, it was already a "settled and invariable principle[] that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). It is, therefore, "undisputed that federal courts need no statutory basis to award equitable relief for constitutional violations." Willett & Gordon, *Rights, Structure, and Remediation*, 131 YALE L.J. 2126, 2187 (2022) (footnote omitted).

Nor must Leachco wait until the Commission's proceeding concludes (at which

time its constitutional injury will have ceased). Rather, as the Supreme Court has confirmed, a claim that an agency's structure violates the separation of powers is ripe as soon as the violation inflicts harm: "We have expressly rejected the argument that consideration of the effect of a removal provision is not ripe until that provision is actually used, because when such a provision violates the separation of powers it inflicts a here-and-now injury on affected third parties that can be remedied by a court." *Seila Law*, 140 S. Ct. at 2196 (cleaned up).

The Commission claims that *Seila Law* recognized here-and-now claims only for defendants. Opp. 9–10. This is untenable—a here-and-now injury may arise in any procedural posture. Any doubt is resolved by *Seila Law*'s reliance on *Bowsher*, in which plaintiffs challenged a law that made the Comptroller General removable by Congress. 478 U.S. at 717, 719–20, 727–28. The Supreme Court rejected the government's argument that, since the removal provision had not been used, the plaintiffs' removal claim was unripe. *Id.* at 727 n.5. Thus, *Bowsher* and *Seila Law* confirm that when a separation-of-powers violation inflicts a here-and-now injury, the injured party may immediately challenge the violation, either defensively or affirmatively.

B. The APA has no effect on Leachco's causes of action

The Commission claims to have unearthed a long-hidden power in the APA that upends this clear line of authority. Opp. 5–11. But the APA merely provides the default means for parties to seek judicial review of final agency orders. 5 U.S.C. §§ 704, 706. The APA says nothing about unrelated challenges to administrative agencies, and it certainly does not preclude equitable causes of action. Unsurprisingly, the Commission points to no cases (and Leachco is aware of none) holding that the APA "bars" claims like Leachco's here. Opp. 11. Thus, while courts' equitable power to enjoin unlawful government action may be subject to statutory limits, *id.* 7, the Commission cites no APA statute that *precludes* Leachco's causes of action to remedy immediate constitutional injuries. The Commission's complaint that *Free Enterprise Fund* did not consider the APA is thus irrelevant.

Nonetheless, like the government in *Free Enterprise Fund*, the Commission erroneously contends, Opp. 7, 9, that judicial-*review* provisions are the exclusive

means by which Leachco may seek relief. *See id.*, 561 U.S. at 489 (rejecting government's argument that 15 U.S.C. § 78y was the "exclusive route to review"). Thus, the question in these circumstances is not whether regulated parties may, at some point, seek judicial review of agency actions that culminate in a final agency order. The question is whether a party may obtain immediate relief for a here-and-now constitutional injury—*i.e.*, being subjected to an unconstitutionally structured agency—an injury that is wholly independent of any final agency order. The availability of APA review of defects that may (later) occur during the administrative proceeding has no bearing on whether Leachco may immediately challenge here-and-now constitutional violations that *are already inflicting* harm. Again, if Leachco must wait until the administrative proceeding is over, its constitutional injury—being subject to the unconstitutionally structured Commission—will have ended, and Leachco will have been denied any adequate or meaningful remedy.

In *Free Enterprise Fund*, the Supreme Court held that a party merely being investigated by an unconstitutionally structured government entity could bring an equitable claim and that the party was not required to ripen such a claim by manufacturing an enforcement action. 561 U.S. at 487, 490.[1] The Commission's contention that Leachco must wait, because it is already the target of an enforcement action, is ludicrous. Opp. 9. The very fact that Leachco is currently the target of an administrative proceeding—in violation of the separation of powers—only underscores the need for immediate equitable relief.

[1] The Commission's argument at times conflates (1) whether a cause of action exists and (2) whether a court has jurisdiction to hear a cause of action. Ultimately, it does not matter—the result here is the same. First, *Free Enterprise Fund* gave short shrift to any suggestion that the plaintiff lacked an equitable cause of action. 561 U.S. at 491 n.2. Second, it ruled that the Securities Exchange Act did not preclude district courts from hearing that claim. The Court's reasoning supports Leachco: (A) a finding of preclusion here would "foreclose all meaningful judicial review" of Leachco's constitutional claims; (B) Leachco's claims are wholly collateral to APA's review provisions; and (C) Leachco's *constitutional* claims are outside the expertise of an agency focused on consumer-product law. *See id.* at 489–91 (applying *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994)).

C. The Commission's reliance on final-order rules is misplaced

The Commission contends that *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232 (1980), is controlling. Opp. 6. But that case merely confirms that parties in an administrative action may not challenge interlocutory administrative orders. *Id.* at 239 (holding agency complaint is not final agency action). Since Leachco does not challenge *any* agency orders, *Standard Oil* is inapposite. For the same reasons, the Commission's reliance on 28 U.S.C. § 1291, the judicial equivalent of the administrative final-agency-order rule, fares no better. Opp. 8–9.

Even so, §1291 (like the APA) does *not* preclude collateral attacks—such as Leachco's—that challenge the constitutional infirmity of the proceeding itself, rather than actions taken therein. *See Abney v. U.S.*, 431 U.S. 651 (1977) (holding pretrial denial of motion to dismiss indictment on Double Jeopardy grounds is a "collateral order" exception to final-judgment rule). The analysis in *Abney* supports Leachco's collateral action here. The Supreme Court observed that "the very nature of a double jeopardy claim is such that it is collateral to, and separable from, the principal issue at the accused's impending criminal trial, *i.e.,* whether or not the accused is guilty of the offense charged." *Id.* at 659. Here, the very nature of Leachco's constitutional challenge is such that it is collateral to, and separable from, the principal issue in the CPSC's administrative hearing, *i.e.*, application of the Consumer Product Safety Act. Further, the Double Jeopardy claimant, like Leachco, made "no challenge whatsoever to the merits of the charge against him." *Id.* And that claimant was, like Leachco, "contesting the very authority of the Government to hale him into court [or administrative proceeding] to face trial on the charge against him." *Id.* (citations omitted). In sum, final-order provisions do not "bar" collateral claims like Leachco's.

II. LEACHCO WILL BE IRREPARABLY HARMED WITHOUT AN INJUNCTION

The Commission asserts that Leachco will not suffer irreparable harm because its "removal" claims involve governmental "allocation of powers," not Leachco's individual rights. Opp. 12. This betrays a profound misunderstanding of the Constitution's separation of powers. The Supreme Court has repeatedly affirmed that the "ultimate purpose of th[e] separation of powers is to protect the liberty and security of

the governed." *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991); *see also Bowsher*, 478 U.S. at 721 ("The declared purpose of separating and dividing the powers of government, of course, was to diffuse power the better to secure liberty.") (cleaned up). "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers." *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). Accordingly, the Supreme Court has expressly recognized "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." *Bond*, 564 U.S. at 222. And *Free Enterprise Fund*, which recognized an equitable cause of action to challenge illegal government conduct, and *Seila Law*, which emphasized the need for relief when a separation-of-powers violation inflicts here-and-now injuries, both confirm the close connection between the separation of powers and individual liberty.[2]

As then-judge Kavanaugh explained, "[i]rreparable harm occurs almost by definition when a person or entity demonstrates a likelihood that it is being regulated on an ongoing basis by an unconstitutionally structured agency that has issued binding rules governing the plaintiff's conduct and that has authority to bring enforcement actions against the plaintiff." *John Doe Co. v. CFPB*, 849 F.3d 1129, 1136 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (citations omitted). This Court should reject the Commission's attempt to divorce the government's structural integrity from its (intended and declared) protection of individual liberty.[3]

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[2] The Tenth Circuit's decision in *Aposhian v. Barr*, 958 F.3d 969 (10th Cir. 2020), says nothing to the contrary. There, the court simply stated that a "violation of a constitutional right alone constitutes irreparable harm" only in "cases involving individual rights." *Id.* at 990. But that's precisely the situation here—the Commission's unconstitutional structure violates Leachco's individual rights. Also, unlike Leachco, the plaintiff in *Aposhian* was eligible for compensatory damages. *Id.* at 990 n.11.

[3] The Commission's complaint about Leachco's delay is baseless. Delay is "only one factor to be considered among others," and the Commission's failure to identify prejudice "alone is sufficient" to reject the factor. *Fish v. Kobach*, 840 F.3d 710, 753 (10th

III. LEACHCO IS LIKELY TO SUCCEED ON THE MERITS

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

The Commission does not deny that it wields substantial power, that its Commissioners are principal executive officers, or that the President may remove them only for cause. Nor does the Commission dispute that the President's removal power is a key means to hold executive officers accountable. And the Commission does not dispute that there are only two, narrow exceptions to the President's "unrestricted removal power." *Seila Law*, 140 S. Ct. at 2192. Instead, the Commission ignores the limited scope of those exceptions.

The Commission relies on *Humphrey's Executor v. U.S.*, a 1935 decision in which the Supreme Court upheld removal protections for FTC Commissioners because the FTC, acting "in part quasi legislatively and in part quasi judicially," "[could] []not in any proper sense be characterized as an arm or an eye of the executive." 295 U.S. 602, 628 (1935). The Supreme Court has since confirmed that the "*Humphrey's*" exception to the President's otherwise "unrestricted" removal power applies only to "a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and [i]s said not to exercise *any* executive power." *Seila Law*, 140 S. Ct. at 2199 (emphasis added).

The Commission does not fit within this exception, and the Commission doesn't even try to make it fit. Instead, the Commission argues that *Seila Law* forecloses Leachco's argument. Opp. 15. But *Seila Law* itself identified and then applied the limited scope of *Humphrey's* to hold invalid the for-cause removal protection enjoyed by the director of the Consumer Financial Protection Bureau. 140 S. Ct. at 2198–99. *Seila Law* thus shows that the for-cause removal protections for CPSC Commissioners are unconstitutional. To be sure, the CPSC is a multimember body of experts

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Cir. 2016). Further, Leachco's delay was reasonable, and it did not sit on its rights. *Id*. Leachco has vigorously defended itself before the Commission and, upon retaining pro bono counsel in August, immediately sought an injunction. Most importantly, an injunction should issue because Leachco's constitutional injury continues. *See, e.g., Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019).

balanced along partisan lines and appointed to staggered terms, and in these respects, it differs from the CFPB. *See id*. at 2200. But those are not the only factors for the "*Humphrey's*" exception.

CPSC's Commissioners, like the CFPB director, are "hardly [] mere legislative or judicial aid[s]." *Seila Law*, 140 S. Ct. at 2200. "Instead of making reports and recommendations to Congress, as the 1935 FTC did," the Commissioners, like the CFPB director, have broad authority to promulgate binding rules. *Id*. And "instead of submitting recommended dispositions to an Article III court," the Commissioners, like the CFPB director, "may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications." *Id*. The Commissioners have the power, like the CFPB director, to pursue civil or criminal claims in federal court—"a quintessentially executive power not considered" in *Humphrey's*. *Id*. (footnote omitted). *See* Leachco Mem. 7–9 (describing Commission's powers). Thus, *Seila Law* fully supports Leachco's claim that the Commissioners' removal protections are unconstitutional.

The Commission reliance on *Collins v. Yellen* fails. While *Collins* did not give weight to the "relative importance" of agencies' regulatory and enforcement power, Opp. 16 (quoting *Collins*, 141 S. Ct. 1761, 1785 (2021)), Leachco's argument does not turn on such a factor. Rather, as just discussed, the question is whether the Commission is or is not "a multimember body of experts, balanced along partisan lines, that perform[s] legislative and judicial functions and" does not "exercise *any* executive power." *Seila Law*, 140 S. Ct. at 2199 (emphasis added). Because the Commission exercises executive power, it does not fit within *Humphrey's* narrow exception.

B. CPSC is unconstitutionally structured because the Presiding Officer enjoys multilevel tenure protection

The Commission does not dispute that *Free Enterprise Fund* precludes multilevel removal protections for executive officers or that the Presiding Officer is an executive officer who enjoys multilevel tenure protection. But the Commission claims that *Free Enterprise Fund* does not apply to administrative law judges. *See* Opp. 17–20. Leachco has already countered that argument. *See* Leachco Mem. 10–15.

The Commission goes further, however, and suggests that *Free Enterprise Fund* itself *foreclosed* its application to ALJs. Opp. 2, 7–9. This misreads the case. In *Free Enterprise Fund*, the Court merely noted that its holding "[did] not address that subset of independent agency employees who serve as [ALJs]." 561 U.S. at 507 n.10. And since then, previously unresolved issues concerning ALJs have confirmed *Free Enterprise Fund*'s reach. In *Lucia v. SEC*, the Supreme Court held that SEC ALJs are executive officers of the United States. 138 S. Ct. 2044, 2054 (2018). And in *U.S. v. Arthrex, Inc.*, the Supreme Court confirmed that administrative patent judges, even though performing adjudicative functions, "exercise[e] executive power." 141 S. Ct. 1970, 1982 (2021). Thus, ALJs are subject to the strictures of the Appointments Clause, and the Presiding Officer's multilevel tenure protection violates the Clause.

The Commission fails to grapple with *Arthrex* and *Lucia*'s Article II holdings, which place the Presiding Officer squarely within the ambit of *Free Enterprise Fund*. And the Commission relies on cases that similarly avoid these issues. *See Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (erroneously giving weight to ALJs' adjudicative function); *Calcutt v. FDIC*, 37 F.4th 293, 317–23 (6th Cir. 2022) (discussing unrelated issues in *Lucia* and *Arthrex*).[4] *Compare Jarkesy v. SEC*, 34 F.4th 446, 464 (5th Cir. 2022) (noting *Lucia*'s holding that ALJs are officers of the United States and invalidating ALJ multilevel tenure protection).

C. Leachco is likely to succeed on its Seventh Amendment claim

The Commission contends that a jury claim does not apply in administrative proceedings involving public rights. Opp. 20–22. But the Supreme Court has made clear that the Seventh Amendment applies to statutory-enforcement actions

[4] Both cases are also distinguishable. *See Decker*, 8 F.4th at 1134 (noting President's broad power to compel removal of ALJs from adjudicatory process); *Calcutt*, 37 F.4th at 318 (holding that plaintiffs—after administrative proceeding—could not show that separation-of-powers violation inflicted compensable harm). The *Calcutt* panel also erroneously asserted that *Free Enterprise Fund* "explicitly exclude[d]" ALJs from its holding. *Id.* Again, the Supreme Court merely declined to address the issue. Petitioners in *Calcutt* applied for a stay pending their filing of a cert petition. *See* https://www.supremecourt.gov/docket/docketfiles/html/public/22a255.html.

analogous to English 18th-century common-law causes of action. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41–42 (1989). And Congress "lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury." *Id.* at 51–52. Also, the Commission tries but fails to distinguish *Great-West Life & Annuity Ins. Co. v. Knudson*, which recognized that "restitution" may be a legal remedy. 534 U.S. 204 (2002). The Commission claims it seeks merely to "restore to" consumers the money they gave Leachco. Opp. 24. But the Commission omits here its other "restitution" claim, which seeks to compel Leachco to pay (not restore) *future* expenses incurred by third parties. This latter claim, at least, is one for legal damages. *See* Leachco Mem. 17–19. *See also Integrity Advance v. CFPB*, --- F.4th ---, No. 21-0521, 2022 WL 4241846 (10th Cir. Sept. 15, 2022) (Phillips, J., concurring) (noting the substance, not the description ("restitution") of a remedy, controls).

IV. THE BALANCE OF EQUITIES FAVORS LEACHCO'S CONSTITUTIONAL RIGHTS

It is "always in the public interest to prevent the violation of a party's constitutional rights." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 807 (10th Cir. 2019) (cleaned up). The Commission's supposed interests are belied by its own inaction. Over 180,000 Podsters have been sold, and the two user-caused deaths alleged by the Commission occurred in December 2015 and January 2018, respectively. Yet the Commission did not bring its enforcement action until February 2022. And if the threat were as imminent as the Commission professes, it could file an action in district court to seize the products. 15 U.S.C. § 2061. Thus, the Commission's interest in enforcing its regulatory scheme "pales in comparison" to Leachco's constitutional rights. *Newland v. Sebelius*, 881 F. Supp. 2d 1287, 1295 (D. Colo. 2012), *aff'd*, 542 F. App'x 706 (10th Cir. 2013).

CONCLUSION

Leachco respectfully asks the Court to issue a preliminary injunction to prevent the Commission from continuing its unconstitutional proceeding, which inflicts a here-and-now constitutional injury upon Leachco.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 23, 2022, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following:

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