No. 22-7060

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
Honorable Judge Ronald A. White

APPELLANT LEACHCO, INC.'S OPENING BRIEF

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Oral Argument is Requested

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

GLOSSARY

ALJ: administrative law judge

CPSC: Consumer Product Safety Commission

Mine Commission: Federal Mine Safety and Health Review Commission

MSPB: Merit Systems Protection Board

PCAOB: Public Company Accounting Oversight Board

JURISDICTIONAL STATEMENT

Plaintiff-Appellant Leachco, Inc. alleges that Defendant-Appellee Consumer Product Safety Commission is unconstitutionally structured because (1) its Commissioners—principal officers who head the Commission—cannot be removed by the President except for cause, and (2) the administrative law judge conducting the Commission's administrative-enforcement against Leachco enjoys multilevel removal protections. *See* App. 29–33. Leachco moved for a preliminary injunction under Rule 65(a) of the Federal Rules of Civil Procedure. *Id.* 63–102.

The district court had jurisdiction under 28 U.S.C. § 1331 because Leachco alleged actions under the Constitution of the United States. This Court has jurisdiction to review "interlocutory orders of the district courts of the United States . . . refusing . . . injunctions." *Id.* § 1292(a)(1).

ISSUES PRESENTED FOR REVIEW

I. Is Leachco likely to succeed on the merits of its claims that the Consumer Product Safety Commission is unconstitutionally structured because (A) the CPSC Commissioners cannot be removed by the President except for cause (*Seila Law, LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020); *Consumers' Research v. CPSC*, 592 F.Supp.3d 568 (E.D. Tex. 2022), *appeal filed* May 18, 2022)), and because (B) the administrative law judge overseeing the Commission's administrative-enforcement action against Leachco—ALJ Michael Young—enjoys an unconstitutional multilevel removal protection (*Free Enter. Fund v. PCAOB*, 561 U.S. 477, 495–508 (2010))?

II. Because the doctrine of sovereign immunity precludes Leachco from recovering monetary damages, did the district court err by concluding that Leachco's structural separation-of-powers claims do not establish irreparable harm for purposes of injunctive relief, even though Leachco suffers (A) ongoing reputational and economic injuries and, separately, (B) a constitutional injury of being subjected to an unlawful administrative proceeding?

III. Because it is always in the public interest to prevent the violation of a party's constitutional rights, and because the government's interests in enforcing a regulatory scheme pale in comparison, do the public interest and the balance of equities favor the issuance of a preliminary injunction to prevent the Commission from continuing its unlawful administrative proceeding?

SUMMARY OF ARGUMENT

Leachco alleges that the Consumer Product Safety Commission suffers from structural, separation-of-powers defects because (1) the President cannot remove CPSC's Commissioners—principal executive officers—except for cause; and (2) the CPSC's adjudicative officer ALJ Young enjoys improper multilevel tenure protection. Despite these defects, the Commission continues to subject Leachco to an administrative-enforcement proceeding. This unlawful proceeding inflicts upon Leachco what the Supreme Court calls a "here-and-now" injury. *Seila Law*, 140 S. Ct. at 2196. And, as a result, Leachco has suffered and continues to suffer reputational, economic, and constitutional harms for which no damages are available. Leachco's injuries are—by definition—irreparable.

The district court, however, declared that unlike an individual-rights claim, "a separation-of-powers violation does not establish irreparable harm." App. 180. This was error. Indeed, the Supreme Court has expressly rejected the argument that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund*, 561 U.S. at 491 n.2. And the Supreme Court's "precedents have long permitted private parties aggrieved by an official's exercise of

executive power to challenge the official's authority to wield that power while insulated from removal by the President." *Seila Law*, 140 S. Ct. at 2196 (citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)); *Free Enter. Fund*, 561 U.S. at 487; *Morrison*, 487 U.S. at 668–69).

Accordingly, it is "the established practice for th[e Supreme] Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution.'" *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted). Here, an injunction is the *only* possible relief available to Leachco. Without an injunction, the unconstitutionally structured Commission will continue to subject Leachco to a here-and-now injury that can only increase its irreparable reputational, economic, and constitutional harms.

In *Free Enterprise Fund*, the Supreme Court held that an accounting company was injured merely because it was subject to an unconstitutionally structured agency's *investigation*. 561 U.S. at 489–90. And, as explained by then-Judge Kavanaugh, who later joined the Supreme Court's decision in *Seila Law*, "[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).

Leachco's injuries go beyond mere regulation, investigation, or potential enforcement. Leachco has been and continues to suffer significant reputational and economic harms, along with a constitutional injury of being subjected to an enforcement action carried out by government officials unconstitutionally protected from removal. The district court's ruling that Leachco's separation-of-powers claims could never establish irreparable harm was error, and this Court should reverse.

Further, because Leachco's request for an injunction needs no factual development and presents only pure questions of law, this Court should, to preserve the resources of all involved, consider the remaining injunctive-relief factors and order the district court to issue a preliminary injunction to preclude the Commission from continuing its administrative-enforcement action.

First, Leachco is likely to succeed on its claims that the Commissioners and CPSC's adjudicative officer enjoy unconstitutional removal

protections. These structural, separation-of-powers claims follow directly from the Supreme Court's decisions in *Seila Law*, 140 S. Ct. at 2191; *Lucia v. SEC*, 138 S. Ct. 2044 (2018); and *Free Enter. Fund*, 561 U.S. at 495–508. *See also Consumers' Research*, 592 F.Supp.3d at 586 (holding CPSC unconstitutionally structured).

Further, as just explained, Leachco continues to suffer irreparable harm.

Finally, an injunction would serve equity and the public interest. Indeed, 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).

Therefore, the Court should reverse the district court, remand, and instruct the district court to issue an injunction to prevent the Commission from proceeding with its unlawful administrative-enforcement action.

BACKGROUND

Leachco is a small, family-owned business in Ada, Oklahoma, founded in 1988 by Jamie Leach and her husband Clyde. *See* App. 13, Verified Compl. (Compl.) ¶12. Jamie still designs all Leachco products, inspired by her experiences as a mother, grandmother, and registered nurse. *Id.*, Compl. ¶¶12–14. Jamie has always strived to develop safe and useful products that her children and grandchildren can enjoy. App. 14, Compl. ¶22. One of those products is an infant lounger called the Podster. App. 13–14, Compl. ¶¶14–28. Over 180,000 Podsters have been sold but, because of *two* accidental deaths (caused by consumer misuse[1]) in 2015 and 2018, the Commission in 2022 initiated an in-house enforcement action to declare the Podster a "substantial product hazard" (15 U.S.C. § 2064); force a recall; and order Leachco to pay damages associated with the recall. App. 15, 43–60, Compl. ¶¶32–33, Exs. 1–2.

[1] In one case, personnel at a day care put an infant in a crib (in a Podster) and left him unattended for 90 minutes. In the other, parents slept with their child (on a Podster) between them and, in the morning, found the infant (off the Podster) unresponsive. App. 18, Compl. ¶¶48–49. The CPSC acknowledges that Leachco never designed or marketed the Podster for sleep and that Leachco always expressly warned against the very consumer misuse at issue. App. 15–18, Compl. ¶¶35–46.

The Commission is an independent executive agency headed by five Commissioners, each appointed to a seven-year term by the President, with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1). As described below, the Commission exercises sweeping executive power. It enforces, among other laws, the Consumer Product 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.

After filing its administrative complaint here, the Commission executed an interagency agreement for the services of Michael G. Young, an administrative law judge (ALJ) with the Federal Mine Safety and Health Review Commission (Mine Commission); and the CPSC Chair appointed ALJ Young as Presiding Officer of the administrative-enforcement action against Leachco. App. 30–31, Compl. ¶¶134–36.

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). Similarly, ALJ Young may not be removed from office except for "good cause," 5 U.S.C. § 7521, and those with authority to remove him

are also protected from removal except for cause. Leachco alleges that these removal protections violate Article II of the Constitution and, as a result, that the Commission is unconstitutionally structured. Accordingly, the Commission's administrative-enforcement proceeding is unlawful; and by subjecting Leachco to this proceeding, the Commission continues to inflict upon Leachco significant injuries.

First, because of the Commission's allegations, retailers like Amazon, Buy Buy Baby, and Bed, Bath, and Beyond no longer carry the Podster. App. 14, Compl. ¶25. Further, Leachco's reputation for exemplary product safety—which the company earned over three decades of careful design, hard work, proper and express warnings, honest dealings, and quality craftsmanship—has also been harmed. *Id.*, Compl. ¶26. Finally, Leachco's revenues have decreased and, as a result, Leachco's founders Clyde and Jamie are forgoing salaries and living off savings, hoping to keep Leachco solvent and their workers employed. *Id.*, Compl. ¶27.

Separately, Leachco is suffering a constitutional injury by being subjected to an administrative action carried out by an unconstitutionally structured agency. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2196; *Free Enter. Fund*, 461 U.S. at 513. And while an injunction can prevent this injury

from continuing, the doctrine of sovereign immunity precludes Leachco from recovering compensatory damages.

Therefore, in August 2022, Leachco sued the Commission in the United States District Court for the Eastern District of Oklahoma and immediately moved for a preliminary injunction. App. 5, 10–62; 6, 63–102. The district court denied Leachco's request for injunction solely on the ground that "a separation-of-powers violation does not establish irreparable harm." App. 180, Nov. 29, 2022 Order Denying Mtn. for Preliminary Inj. (Order) 5 (footnote omitted). Leachco appealed on December 5, 2022 (App. 8) and moved the district court for an injunction pending appeal (App. 9). The court denied that motion on December 8, 2022. *Id*. Leachco then moved this Court for an injunction pending appeal, and briefing was completed December 27, 2022. As of the filing of this Brief, the Court has not issued an order on Leachco's motion for injunction pending appeal. Accordingly, the Commission's unlawful in-house action against Leachco continues, and the in-house trial is scheduled for August 7, 2023.

STANDARD OF REVIEW

A plaintiff is entitled to a preliminary injunction when (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm without preliminary relief; (3) the balance of equities tips in its favor; and (4) the injunction is in the public interest. *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1128 (10th Cir. 2013) (en banc), *aff'd sub nom*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), (citing *Winter v. NRDC*, 555 U.S. 7, 20 (2008)). An appellate court reviews a district court's denial of a preliminary injunction for abuse of discretion. *Id*. (citation omitted). A district court "abuses its discretion by denying a preliminary injunction based on an error of law." *Id*. (citation omitted); *see id*. at 1147 (reversing denial of preliminary injunction).

The district court considered only the irreparable-harm factor. But because no factual development is necessary and this appeal presents pure questions of law, this Court may consider all the factors and order an injunction to issue. *See Ute Indian Tribe of the Unitah and Ouray Reservation v. Lawrence*, 22 F.4th 892, 899 (10th Cir. 2022) (reversing denial of preliminary injunction and issuing permanent injunction on the merits); *Athlone Indus., Inc. v. CPSC*, 707 F.2d 1485, 1488 (D.C. Cir. 1984)

(reversing denial of preliminary injunction and, because no further factual development was needed and "judicial economy w[ould] be served by a decision on the merits at this time," issuing injunction to stop ongoing CPSC administrative hearing).

Accordingly, Leachco here demonstrates that it meets all of the injunction factors and asks the Court to issue a preliminary injunction to prevent the unconstitutionally structured Commission from continuing its administrative-enforcement action.

ARGUMENT

I. LEACHCO IS LIKELY TO SUCCEED ON THE MERITS THAT THE COMMISSION IS UNCONSTITUTIONALLY STRUCTURED

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; § 3. Article II thus vests the President with "all" of the executive power. *Seila Law*, 140 S. Ct. at 2191. And because the President must rely on subordinates to carry out his constitutional duties, the Constitution gives him "the authority to remove those" subordinates. *Id.* (cleaned up). "Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* (cleaned up). And it would

be "impossible for the President to take care that the laws be faithfully executed." *Id.* at 2198 (cleaned up).

The "President's power to remove—and thus supervise—those who wield executive power on his behalf follows from the text of Article II, was settled by the First Congress, and was confirmed in the landmark decision *Myers v. United States*, 272 U.S. 52 (1926)." *Seila Law*, 140 S. Ct. at 2191–92 (cleaned up).

Here, both the Commissioners and ALJ Young enjoy removal protections that violate the Separation of Powers, Article II's vesting of the executive power in the President, and the President's duty to "take Care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

A. In *Seila Law*, the Supreme Court confirmed that the heads of agencies wielding substantial executive power must be removable at will by the President. 140 S. Ct. at 2192, 2199–2200. Here, the Commission does not dispute that the CPSC Commissioners are heads of the Commission, which wields substantial, quintessentially executive powers—enforcing numerous laws, including the Consumer Product Safety Act; investigating manufacturers and retailers; bringing administrative-enforcement actions; and initiating civil and criminal actions in court.

Therefore, Leachco is likely to succeed on its claim that 15 U.S.C. § 2053(a)—which precludes the President from removing Commissioners except for "neglect of duty or malfeasance in office but for no other cause"—violates Article II and the Separation of Powers. *See* App. 29–30, Compl. Count I.

B. In *Free Enterprise Fund*, the Supreme Court held that multi-level-tenure protection for inferior executive officers "is contrary to Article II's vesting of the executive power in the President." 561 U.S. at 484. There, members of the Public Company Accounting Oversight Board (PCAOB) could not be removed by the Securities and Exchange Commission except for cause, and SEC Commissioners themselves could not be removed by the President except for cause. *Id*. at 486–87. Here, ALJ Young is—as both he and the Commission admit—an inferior executive officer; he cannot be removed except for cause; and the officials who could remove him cannot be removed by the President except for cause. That the ALJ engages in adjudicatory-like processes does not affect the analysis, since he exercises *executive* power. In *Lucia*, the Supreme Court held that the ALJs in the SEC were executive officers. 138 S. Ct. at 2054. And, in *United States v. Arthrex*, the Supreme Court held that administrative

patent judges exercise *executive* power because, the Court explained, executive-branch actions "are exercises of—indeed under our constitutional structure they *must* be exercises of—the 'executive power.'" 141 S. Ct. 1970, 1982 (2021) (cleaned up). Therefore, Leachco is likely to succeed on its claim that ALJ Young, an inferior executive officer, enjoys an unconstitutional multilevel removal protection. *See* App. 30–33, Compl. Count II.

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

The Supreme Court has recognized only two limited exceptions to the President's otherwise "unrestricted" removal power:

(1) an exception for inferior officers with limited duties and no policymaking or administrative authority, *Seila Law*, 140 S. Ct. at 2199–2200; and

(2) an exception for principal officers who do not exercise executive power, *id*. 2198–99 (discussing *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)).

Here, neither the inferior-officer exception nor the "*Humphrey's Executor* exception" applies because CPSC's Commissioners are (1) principal (not inferior) officers (2) who exercise substantial, "quintessentially executive power [that was] not considered in *Humphrey's Executor*." *Seila*

Law, 140 S. Ct. at 2200. Accordingly, the Commissioners' for-cause removal protections are unconstitutional.

1. The Commissioners are principal officers

The exception "for *inferior* officers with limited duties and no policymaking or administrative authority," *Seila Law*, 140 S. Ct. at 2200 (emphasis added), does not apply here because the Commissioners are principal officers.

The Commissioners are appointed to office by the President with the advice and consent of the Senate. 15 U.S.C. § 2053(a), (b)(1). This appointment method is required for principal officers. U.S. CONST. art. II, § 2, cl. 2. Further, Congress authorizes the Commissioners to appoint inferior officers. 15 U.S.C. § 2053; *see* U.S. CONST. art. II, § 2 (allowing Congress to "vest the Appointment of such inferior Officers . . . in the Heads of Departments"). Accordingly, the CPSC Commissioners are heads of the Commission, *Free Enter. Fund*, 561 U.S. at 512–13, and thus principal officers, *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 884 (1991).

2. The *Humphrey's Executor* exception does not apply because the Commission exercises substantial executive power

The Commission does not dispute that it wields significant executive power.[2] The Commission enforces, 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. 15 U.S.C. §§ 2051 et seq. It has extensive investigatory powers, through which it may compel sworn testimony and document productions. *Id.* §§ 2065, 2076(b)(1)–(3), (c). It may "conduct any hearing or other inquiry necessary or appropriate to its functions anywhere in the United States." *Id.* § 2076(a). The Commission may also initiate civil actions for civil penalties and injunctive relief. *Id.* §§ 2069(a), 2071(a), 2073(b), 2076(b). And, with the concurrence of or through the Attorney General, it may 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).

[2] Indeed, in its Opposition to Leachco's Motion for Injunction Pending Appeal, the Commission argued that its significant executive powers served the public interest. *See* Opp. to Leachco's Mtn. For an Injunction Pending Appeal (Dec. 22, 2022) 22–24.

Commissioners thus hold core 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*, 592 F.Supp.3d at 584 (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.").

In short, the CPSC exercises substantial, "quintessentially executive power [that was] not considered in *Humphrey's Executor*." *Seila Law*, 140 S. Ct. at 2200; *see also id.* 2199 (noting that *Humphrey's Executor* applied to an agency "said not to exercise *any* executive power") (emphasis added); *Consumers' Research*, 592 F.Supp.3d at 583–84 (CPSC "exercises substantial executive power and therefore does not fall within the *Humphrey's Executor* exception."). Therefore, the *Humphrey's Executor* exception to the President's otherwise unrestricted removal power does not apply here.

3. The Commissioners are improperly insulated from removal

According to 15 U.S.C. § 2053(a), the President may not remove Commissioners except for "neglect of duty or malfeasance in office but for no other cause." But, as explained above, the President possesses "unrestricted removal power," subject to only two, narrow exceptions—neither of which applies here. *Seila Law*, 140 S. Ct. at 2192. Therefore, the "restriction on presidential removal established by 15 U.S.C. § 2053(a) violates Article II of the U.S. Constitution." *Consumers' Research*, 592 F.Supp.3d at 586. *See also Seila Law*, 140 S. Ct. at 2191; *Free Enter. Fund*, 561 U.S. at 513–14.

Leachco is thus likely to prevail on its claim that the Commissioners' removal protections are unconstitutional.

B. CPSC is unconstitutionally structured because the adjudicative officer overseeing the Leachco matter enjoys multiple levels of removal protections

The Commission admits that ALJ Young is an inferior officer and that he can be removed only for cause by other officers who themselves can be removed only for cause. *See* Opp. to Mtn. for Inj. Pending Appeal 2, 14–15. The Commission contends, however, that ALJ Young's removal protections are valid.

To the contrary, the Supreme Court holds that such multilevel removal protections for inferior officers violate the Constitution. In *Free Enterprise Fund*, the Court held that members of the PCAOB, a board overseen by the SEC, unlawfully exercised executive power free of Presidential control because (1) PCAOB members could not be removed by the SEC except for cause and (2) SEC Commissioners themselves could not be removed by the President except for cause. 561 U.S. at 486–87.

The same is true of Michael G. Young, an ALJ from the Mine Commission, who was appointed to serve as "Presiding Officer" over the enforcement action against Leachco. App. 30–31, Compl. ¶¶134–36. Like members of the PCAOB, ALJ Young enjoys an unconstitutional multilevel tenure protection.

1. ALJ Young is an officer of the United States

An officer of the United States is a federal-government employee who (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). Here, ALJ Young's position and authority are nearly identical to those of SEC ALJs who, the Supreme Court held in *Lucia*, are officers of the United States.

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

Presiding Officer Young is an ALJ employed "by law," 5 U.S.C. § 3105—the same statute by which the ALJ in *Lucia* was employed. *See Lucia*, 138 S. Ct. at 2053. He holds a continuing—indeed, a career—position. 5 C.F.R. § 930.204(a).[3] His "[a]ssignment, removal, and compensation" are set by "sections 3105, 3344, 5362 and 7521 of title 5." 30 U.S.C. § 823(b)(2). Therefore, ALJ 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 (citation omitted).

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

ALJ Young wields "significant discretion when carrying out important functions" pursuant to the laws of the United States. *Lucia*, 138 S. Ct. at 2053 (cleaned up). Indeed, the powers of a CPSC Presiding Officer are virtually indistinguishable from those of an SEC ALJ:

[3] That is 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 ALJ Loan Program under which ALJ Young was assigned to this proceeding).

CPSC Presiding Officer	SEC ALJ
Presiding Officer has "all powers necessary to" carry out the "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 regulate the course of a hearing, as well as the conduct of parties and counsel." *Id.* 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." *Id.*
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." *Id.* (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." *Id.* (citation omitted).

The Presiding Officer's Initial Decision becomes the CPSC'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.'" *Id.* at 2054 (citations omitted).

* * *

ALJs of the Mine Commission have similarly broad powers. *See* 29 C.F.R. §§ 2700.55, .59, .60(a), .67, .69(a) (Mine Commission ALJ 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, ALJ 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. ALJ Young is an executive officer

As an employee of the Mine Commission and appointee of the CPSC, ALJ Young is an executive officer carrying out executive power. The Supreme Court recently explained that, 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. *Arthrex*, 141 S. Ct. at 1982 (cleaned up). Executive-branch actions "are exercises of—indeed under our constitutional structure they *must* be exercises of—the 'executive power.'" *Id.* (citation omitted). *See also Lucia*, 138 S. Ct. at 2054 (SEC ALJs are officers of the United States).[4] Finally, as noted above, the Commission admits that ALJ Young is an inferior officer

[4] Below, the Commission argued that *Free Enterprise Fund* foreclosed its multilevel-removal holding to ALJs. Not so. There, the Supreme Court merely stated it was not addressing the issue. 561 U.S. at 507 n.10. In *Arthrex* and *Lucia*, the Supreme Court addressed the issue and held that ALJs are, in fact, executive officers.

of the United States—as did ALJ Young himself. App. 110, ALJ Order 3 ("[U]nder *Lucia v. SEC*, I am an executive officer of the United States.").[5]

3. ALJ Young's removal protections violate the Constitution

"[M]ultilevel 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. ALJ Young here is unconstitutionally protected from removal because (1) he cannot be removed except for cause by other officers (2) who themselves cannot be removed by the President except for cause. *Cf. id.* at 486–87.

Here, ALJ 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 officers who could perhaps remove ALJ Young—the CPSC Commissioners, Mine Commissioners, and members of the MSPB—themselves may not be removed by the President except for cause:

[5] Leachco moved to disqualify ALJ Young. But because he incorrectly read Leachco's motion as a challenge to his *appointment*, he did not consider Leachco's *removal* arguments. *See* App. 109, ALJ Order 2.

- 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 MSPB members except for "inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d).

Under *Free Enterprise Fund*, therefore, ALJ Young unconstitutionally enjoys a multilevel removal protection. The Fifth Circuit recently applied *Free Enterprise Fund* to nearly identical removal protections for SEC ALJs and held that those removal protections suffered the same constitutional defects. *Jarkesy v. SEC*, 34 F.4th 446, 463–65 (5th Cir. 2022).

So too here. In fact, ALJ Young's removal protections provide even more insulation than those considered in *Free Enterprise Fund*. Here, an agency may not independently find good cause and remove ALJ Young. Instead, the agency must first establish "good cause"—on the record and after the opportunity for a hearing—to the MSPB, a separate, independent agency. 5 U.S.C. § 7521(a). Only then, if the employing agency so decides, may ALJ Young be removed. *Cf. 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.") (emphasis added).

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.

II. LEACHCO IS SUFFERING IRREPARABLE HARM

In *Marbury v. Madison*, the Supreme Court recognized the "settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." 5 U.S. 137, 147 (1803) (citing 3 BLACKSTONE'S COMMENTARIES *402). More recently, the Supreme Court held that when "the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable *injury* may object." *Bond v. United States*, 564 U.S. 211, 223 (2011) (emphasis added). As a result, it is "the established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution'"—both individual rights and rights safeguarded by the Constitution's Separation of Powers. *Id*. (quoting *Bell v. Hood,* 327 U.S. 678, 684 (1946)).

Here, because the removal provisions discussed above "violate the separation of powers, they inflict 'here-and-now' injuries" upon Leachco—reputational and economic harm, as well as the constitutional injury of

being subjected to an administrative proceeding carried out by an unconstitutionally structured agency. *Seila Law*, 140 S. Ct. at 2196 (quoting *Bowsher*, 478 U.S. at 727 n.5) (cleaned up). Leachco cannot recover damages for these injuries, which are thus irreparable.

Without an injunction, the Commission will continue its unlawful administrative proceeding, and Leachco will continue to suffer injuries for which no damages are available. Nor can Leachco's injuries be remedied through the administrative proceeding. Not only does Leachco's participation in the proceeding add to Leachco's injuries, but also, the Commission has no authority to consider, much less resolve, Leachco's constitutional claims. And should Leachco prevail in front of the Commission, Leachco will be forever barred from having a court of law hear its constitutional challenges.

Accordingly, the district court erred by concluding that a separation-of-powers violation does not establish irreparable harm. The Supreme Court has expressly rejected the contention that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund*, 561 U.S. at 491 n.2. Not surprisingly, therefore, many courts have issued injunctions in cases involving separa-

tion-of-powers violations. The district court's order should therefore be reversed.

A. Leachco is precluded from recovering damages for its reputational and economic harms

As explained above, because the Commission is unconstitutionally structured, its administrative proceeding against Leachco is unlawful. And by subjecting Leachco to this proceeding, the Commission continues to inflict upon Leachco a here-and-now injury that is causing Leachco significant but irreparable reputational and economic harms.

Retailers like Amazon, Buy Buy Baby, and Bed, Bath, and Beyond no longer carry the Podster. App. 14, Compl. ¶25. Further, Leachco's reputation for making exceptionally safe products for families—which the company earned over three decades of careful design, hard work, proper and express warnings, honest dealings, and quality craftsmanship—has also been harmed. *Id.*, Compl. ¶26. Finally, because of the Commission's public allegations, Leachco's revenues have decreased and, as a result, Leachco's founders Clyde and Jamie are forgoing salaries and living off savings, hoping to keep Leachco solvent and their workers employed. *Id.*, Compl. ¶27.

The only question, therefore, is whether these injuries are irreparable, that is, whether Leachco can obtain a legal remedy for these injuries if the CPSC's adjudication continues. The answer is no—Leachco is *precluded* from recovering damages against the government for these injuries. *See Crowe & Dunlevy, P.C. v. Stidham*, 640 F.3d 1140, 1157 (10th Cir. 2011) (The "imposition of money damages that cannot later be recovered for reasons such as sovereign immunity constitutes irreparable injury.") (cleaned up); *cf. also Cloud Peak Energy Inc. v. U.S. Dep't of Interior*, 415 F.Supp.3d 1034, 1042–43 (D. Wyo. 2019) (The "general rule that economic harm is not normally considered irreparable does not apply where there is no adequate remedy to recover those damages, such as in APA cases.") (citations omitted).

Accordingly, Leachco's harm is, by definition, irreparable. *See* BLACK'S LAW DICTIONARY (11th ed. 2019) (defining *irreparable injury* as an "injury that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction"). "What makes an injury 'irreparable' is the inadequacy of, and the difficulty of calculating, a monetary remedy after a full trial." *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 806 (10th Cir. 2019) (cita-

tions omitted); *see also Crowe & Dunlevy*, 640 F.3d at 1157 (holding that because sovereign immunity precluded recovery of damages, plaintiff established irreparable harm); *Chamber of Com. v. Edmondson*, 594 F.3d 742, 770–71 (10th Cir. 2010) (same).

The district court's conclusion to the contrary is error, and this Court can reverse on this ground alone.

B. The Commission is inflicting upon Leachco an irreparable injury by subjecting Leachco to an unlawful administrative proceeding

Even if Leachco could not show irreparable reputation and economic injuries, Leachco would still be entitled to an injunction because Leachco is also suffering the irreparable injury of being subjected to an unconstitutional administrative proceeding. This proceeding is unconstitutional because, as explained above, the Commission is unconstitutionally structured—both the CPSC's Commissioners and ALJ Young enjoy removal protections that violate the Separation of Powers, Article II's vesting of the executive power in the President, and the President's duty to "take Care that the laws be faithfully executed." U.S. CONST. art. II, § 3.

The Supreme Court's "precedents have long permitted private parties aggrieved by an official's exercise of executive power to challenge the official's authority to wield that power while insulated from removal by the President." *Seila Law*, 140 S. Ct. at 2196 (citing *Bowsher*, 478 U.S. at 721; *Free Enter. Fund*, 561 U.S. at 487; *Morrison*, 487 U.S. at 668–69).

The Commission's proceeding violates Leachco's right to "an administrative adjudication untainted by separation-of-powers violations." *Cochran v. SEC*, 20 F.4th 194, 210 n.16 (5th Cir. 2021) (en banc); *see also Free Enter. Fund*, 561 U.S. at 513 (recognizing right to be regulated by "a constitutional agency accountable to the Executive"). And Leachco's resulting injury is irreparable. As this Court explained, "[w]hat 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." *Free the Nipple*, 916 F.3d at 806 (citations omitted); *see also Valley v. Rapides Parish 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); *John Doe Co.*, 849 F.3d at 1136 (Kavanaugh, J., dissenting) ("Irreparable 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.") (citations omitted).

As a result, Leachco has been and continues to suffer (in addition to the significant reputational and economic injuries discussed above) an irreparable constitutional injury by being subjected to an enforcement action carried out by government officials unconstitutionally protected from removal. *See Collins v. Yellen*, 141 S. Ct. 1761, 1797 (2021) (Gorsuch, J., concurring) ("In the case of a removal defect, a wholly unaccountable government agent asserts the power to make decisions affecting individual lives, liberty, and property.").

Without an injunction, this irreparable injury will continue.

C. Leachco's injuries cannot be remedied through the Commission's administrative-enforcement action

The Commission will likely argue that the harm of slogging through the administrative proceeding is not irreparable because Leachco could challenge an adverse administrative decision in court and raise its constitutional challenges then. The government made substantially the

same argument in *Free Enterprise Fund*, and the Supreme Court rejected it. This Court should do the same.

In *Free Enterprise Fund*, the government claimed that the plaintiffs were precluded from bringing their structural claims outside the agency-review process and that, instead, they could raise those claims by appealing an agency sanction. 561 U.S. at 490. The government thus proposed that the plaintiffs "*incur* a sanction (such as a sizeable fine)" just to "win access to a court of appeals—and severe punishment should its challenge fail." *Id.* (cleaned up). The Court shot down the government's proposal because "we normally do not require plaintiffs to bet the farm by taking the violative action before testing the validity of the law." *Id.* (cleaned up).

Here, Leachco's constitutional injury is the administrative process (which has also inflicted reputational and economic injuries upon Leachco). Because the Commission is unconstitutionally structured, it lacks the authority to subject Leachco to an administrative proceeding. By doing so, however, the Commission continues to inflict upon Leachco a here-and-now injury. *Seila Law*, 140 S. Ct. at 2196; *Free Enter. Fund*, 561 U.S. at 513; *Bowsher*, 478 U.S. at 727 n.5. Nonetheless, the Commission will

likely argue that Leachco must postpone a challenge to this here-and-now injury.

Indeed, the Commission seeks more than mere delay. The Commission would have Leachco either *lose or default* in the administrative hearing and raise its structural constitutional claims in its appeal of the Commission's final order.[6] According to the Commission, therefore, Leachco should "*incur* a sanction (such as a sizeable fine)" just to "win" access to court and the risk of "severe punishment should its challenge fail." *Free Enterprise Fund*, 561 U.S. at 490 (cleaned up). For small companies like Leachco, slogging through an administrative proceeding, filing an administrative appeal, losing (or defaulting), and incurring a substantial sanction—simply for an opportunity to present constitutional challenges in a court of law—is a bet-the-farm situation. *Id.*; *cf. also Cochran*, 20 F.4th at 229–30 (Oldham, J., concurring) (disputing the contention that a party to an existing enforcement action doesn't face the bet-the-farm test because, "[t]hroughout the *entire* administrative process—regardless of whether enforcement has begun—the target must choose whether to settle or bet the farm"). As in *Free Enterprise Fund*, this Court should not

[6] *See* CPSC Opp. to Leachco's Mtn. for Inj. Pending Appeal 7.

require Leachco to risk its financial future "before testing the validity" of the Commission's structure. 561 U.S. at 490 (cleaned up).

What's more, even if Leachco is compelled to continue in the Commission's in-house action, suffers an adverse decision, appeals to a court, and raises its constitutional claims then, Leachco will have simply incurred additional irreparable injuries. That's because no court can unwind the constitutional injury inflicted upon Leachco for its having been dragged through an unconstitutional administrative action, and no court can award Leachco damages for that injury or for its reputational and economic injuries. And because no "court can[] remedy the injury following a final determination on the merits," Leachco's injury is irreparable. *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (cleaned up).[7]

[7] For Leachco's constitutional claims, the administrative process is pointless. "Administrative agencies are creatures of statute," *Nat'l Fed'n of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661, 665 (2022) (per curiam), and therefore, they generally lack the institutional "competence" to review "the constitutionality of [a] statute," *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) ("[A]djudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies.") (citation omitted). Therefore, since neither the Presiding Officer nor the Commissioners has the authority to even consider Leachco's

Finally, Leachco's ongoing injuries would not be mitigated or remedied even if it wins in front of the Commission. To the contrary, if Leachco prevails in the administrative proceeding, Leachco will still have been injured by being subjected to the unlawful proceeding and by incurring additional reputational and economic harms—injuries, again, for which no remedy is available. And a victory on the Commission's substantive claim would preclude Leachco from ever raising its constitutional challenges in a court of law. *Cf. Cochran*, 20 F.4th at 208 n.12 (Cochran "asserts that she will be harmed by the very act of having to appear in proceedings before an ALJ who is unconstitutionally insulated from the President's removal power. Therefore, if the SEC were to decide Cochran's case in her favor on other grounds, it would be denying her any opportunity for meaningful judicial review of her alleged source of harm."). Once again, therefore, Leachco's injury—being subjected to an administrative proceeding by an unconstitutionally structured agency—cannot be remedied in the administrative hearing itself.

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challenge to the Commission's structure, forcing Leachco to suffer through the unlawful administrative proceeding would simply add insult to injury.

Accordingly, "just as in *Free Enterprise Fund*, it remains possible that [Leachco] will not be able to obtain judicial review over [its] removal power claim unless the district court hears it now." *Cochran*, 20 F.4th at 203. Without an injunction, Leachco must suffer through an unconstitutional proceeding—a "here-and-now" injury recognized by the Supreme Court—risk additional reputational and economic injuries, and perhaps lose forever the opportunity to obtain judicial review of that injury. "In a Nation that values due process," a regime that places fundamental "rights of ordinary Americans entirely at the mercy of [Commission] employees," while "block[ing] access to the courts," is "unthinkable." *Sackett v. EPA*, 566 U.S. 120, 132 (2012) (Alito, J., concurring).

D. Courts have found irreparable harm and issued injunctive relief for separation-of-powers violations

Leachco's request for injunctive relief in this situation is not unique. Article III courts have the power "to issue injunctions" against federal officers and agencies "to protect rights safeguarded by the Constitution." *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted); *see also Bell*, 327 U.S. at 684 ("[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the *necessary relief*." *Id.* at 684

(emphasis added) (footnotes omitted); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 338 (2015) (Sotomayor, J., dissenting) (In *Free Enterprise Fund*, "we found no support for the argument that a challenge to governmental action under the Appointments Clause or separation-of-powers principles should be treated differently than every other constitutional claim for which equitable relief has long been recognized as the proper means for preventing entities from acting unconstitutionally.") (cleaned up).

In cases with similar constitutional challenges to agency structure, both the Fifth and Ninth Circuits enjoined agency-enforcement actions pending appeal. *See* App. 98–102 (Orders from *Axon Enterprise, Inc. v. FTC*, 986 F.3d 1173 (9th Cir. 2021); *Cochran v. SEC*, *supra* (both pending before the U.S. Supreme Court, Nos. 21-86 and 21-1239, respectively)).

Such a here-and-now irreparable injury was also recognized by the Supreme Court in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There, steel-mill owners challenged the President's executive order seizing their mills. *Id.* at 582–83. The owners sued in district court, alleged that the seizures were "not authorized by an act of Congress or by any constitutional provisions," and sought preliminary and permanent

injunctions. *Id.* at 583. The Supreme Court affirmed the district court's issuance of a preliminary injunction. *Id.* at 584–85, 589. In doing so, the Supreme Court rejected the government's argument that the President's unconstitutional order did not inflict irreparable harm. *Id.* at 584–85; *see id.* at 660 (Burton, J., concurring) (The "President's order . . . invaded the jurisdiction of Congress [and] violated the essence of the principle of the separation of governmental powers. Accordingly, the injunction against its effectiveness should be sustained.").

The Ninth Circuit reached a similar result in *Sierra Club v. Trump*, 963 F.3d 874 (9th Cir. 2020), *vacated and remanded on other grounds*, 142 S. Ct. 46 (2021). There, the court considered a challenge to the Executive Branch's attempt to fund construction of a border wall with funds that were appropriated for other purposes. *Id.* at 882. The challengers therefore raised a claim based on the Appropriations Clause, "'a bulwark of the Constitution's separation of powers.'" *Id.* at 887 (citation omitted). The court upheld the challenge and affirmed the district court's order

finding irreparable harm and granting a permanent injunction based on the separation-of-powers claim. *Sierra Club*, 963 F.3d at 887, 895–97.[8]

In *Saenz v. Roe*, the United Supreme Court affirmed the issuance of preliminary injunction to prevent the irreparable harm that would have resulted from the government's infringement of the plaintiff's un-enumerated right to travel—a right based in part on another separation-of-powers concept—federalism, which divides powers among the national and state governments. 526 U.S. 489, 498, 504 n.17 (1999).

The Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), is also instructive. There, the Supreme Court upheld—on structural separation-of-powers grounds—a challenge to a provision in the Immigration and Nationality Act that purportedly gave the House of Representatives veto power over the Attorney General's deportation decisions. According to the Supreme Court, Mr. Chadha "demonstrated 'injury in fact and a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.'" *Id.* at 936 (citation omitted).

[8] The Supreme Court vacated the judgment of the Ninth Circuit because President Biden assured the Court that no tax-payer dollars would be diverted to the border wall. *See* Petitioners' Mtn. to Vacate and Remand in Light of Changed Circumstances, *Biden v. Sierra Club*, No. 20-138, 2021 WL 2458459 (U.S. June 11, 2021).

Thus, the Supreme Court reaffirmed the principle that the Separation of Powers exists not primarily to protect the interests of government branches, but to protect individual liberty. Notably, the House of Representatives (who argued that its "veto" powers did not violate the Separation of Powers) observed that district courts "remain open to individuals seeking declaratory and injunctive relief from allegedly unconstitutional statutes." Br. of U.S. House of Representatives, *INS v. Chadha*, Nos. 80-1832, 80-2170, 80-2171, 1981 WL 388493, at *24a (U.S. Nov. 19, 1981).

Indeed, issuing injunctions in separation-of-powers cases is standard operating procedure. *See Colorado v. Dep't of Just.*, 455 F.Supp.3d 1034, 1047–61 (D. Colo. 2020) (granting permanent injunction for violations of Separation of Powers, Spending Clause, Tenth Amendment, and Administrative Procedure Act); *City of Evanston v. Barr*, 412 F.Supp.3d 873, 886 (N.D. Ill. 2019) (same); *City of Chicago v. Sessions*, 264 F.Supp.3d 933, 946, 950–51 (N.D. Ill. 2017) (granting preliminary injunction for Spending Clause violation); *Rebman v. Parson*, 576 S.W.3d 605, 612 (Mo. 2019) (en banc) (granting permanent injunction and finding irreparable harm when state employee's employment would have been terminated "in violation of the constitution's separation of powers require-

ment," noting that the U.S. Supreme Court has held being subject to an unconstitutional statute, "'for even minimal periods of time, unquestionably constitutes irreparable injury'") (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).[9]

E. The district court misread non-binding precedent and adopted a categorical rule against irreparable harm in separation-of-powers cases

In denying Leachco's motion for preliminary injunction, the district court declared that, unlike cases involving "individual" rights, "[a] separation of powers violation does not establish irreparable harm." App. 179–80, Order 4–5 (footnote omitted). Yet it's difficult to imagine a situation that presents a better case of irreparable harm—where a target of government action challenges the constitutional structure and, therefore, the very existence of the governmental agency, *Free Enter. Fund*, 561 U.S. at 490, and where the agency's actions inflict here-and-now (1) reputational and economic injuries and (2) a constitutional injury—injuries for which Leachco is precluded from recovering compensatory damages.

[9] *See also Cnty. of Santa Clara v. Trump*, 250 F.Supp.3d 497, 537–38 (N.D. Cal. 2017) (granting preliminary injunction because an Executive Order would continue to cause plaintiffs constitutional injuries by violating the separation-of-powers doctrine *and* separately by depriving them of their Tenth and Fifth Amendment rights).

The district court's rationale would allow agencies like the CPSC to violate constitutional rights with impunity and relegate federal courts to mere observers of impropriety.

The district court's ruling is, however, erroneous. The Supreme Court has expressly rejected the contention that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund*, 561 U.S. at 491 n.2. As a result, it is "the established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution'"—both individual rights and rights safeguarded by the Constitution's Separation of Powers. *Id.* (citation omitted).

By treating Leachco's separation-of-powers claim differently than claims involving individual rights, the district court effectively ignored Leachco's injuries and jumped to the conclusion that those injuries cannot be irreparable. As explained below, the district court's supposedly dispositive distinction finds no support in Supreme Court precedents, and it would upend the Constitution's structural protections of liberty.

1. *Aposhian* did not preclude irreparable harm in separation-of-powers cases

The district court's distinction between individual-rights claims and separation-of-powers claims was based on a split decision from this Court. *See* App. 179–80 (Order) 4–5 (quoting *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020)). This decision, however, does not support the district court's strict, categorical distinction—a reading that has been rejected by the Supreme Court.

In *Aposhian*, the plaintiff challenged a rule classifying bump stocks as machine guns under the National Firearms Act. 958 F.3d at 974. He moved for a preliminary injunction. The parties stipulated that he would suffer irreparable harm, *id.* at 989, but they disagreed about what constituted irreparable harm. The plaintiff claimed that he would be harmed by having to comply with a rule "promulgated in contravention of constitutional principles of separation-of-powers." *Id.* The government conceded that his irreparable harm was the loss of his bump stock. *Id.* Accordingly, the district court did not consider the irreparable-harm factor, and it denied injunctive relief *solely* on the ground that the plaintiff had failed to show a likelihood of success on the merits. *Id.* 977.

The *Aposhian* panel affirmed over a dissent. 958 F.3d at 977. According to the panel, it could have denied the plaintiff's preliminary-injunction motion "solely" on the likelihood-of-success factor but continued to discuss other matters anyway. *Id.* at 989. First, the panel said that it was unable to conclude that the plaintiff had shown irreparable harm based on the deprivation of a constitutional right because he had "not even raise[d] a constitutional challenge." *Id.* at 990; *see id.* at 978 (noting that plaintiff's "merits arguments in this court concern only issues of statutory interpretation"). Next, the panel said that "even if" the plaintiff had raised a constitutional challenge, he still would not have been entitled to an injunction because a "generalized separation of powers, by itself," does not constitute irreparable harm. *Id.* at 990. Rather, the panel stated, "our cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government." *Id.* (citations omitted).

Thus, *Aposhian* merely observed that raising a "generalized" separation-of-powers issue—without showing any injury—does not form irreparable harm. While the plaintiff argued that the bump-stock rule vio-

lated separation-of-powers principles, he never established individual harm. *See Aposhian*, 958 F.3d at 990 ("While the government stated in the district court that the loss of Mr. Aposhian's bump stock would constitute irreparable harm, Mr. Aposhian has never made a loss-of-property argument.").

Here, Leachco has not alleged a "generalized" separation-of-powers violation. To the contrary, Leachco alleges that the removal protections enjoyed by the Commissioners and the Presiding Officer violate Article II of the Constitution and that, as a result, the Commission's administrative enforcement inflicts upon Leachco here-and-now injuries. *Seila Law*, 140 S. Ct. at 2196; *Free Enter. Fund*, 561 U.S. at 513; *Bowsher*, 478 U.S. at 727 n.5. Therefore, Leachco has alleged both specific separation-of-powers violations and an injury resulting directly therefrom.

2. *Aposhian* is distinguishable

Unlike Mr. Aposhian, Leachco has also alleged reputational and economic harms that cannot be remedied. And, as noted above, because Mr. Aposhian could recover monetary damages, *see Aposhian*, 958 F.3d at 990 n.11 ("In any event, we note that the loss of a bump stock cannot constitute irreparable harm because Mr. Aposhian could be awarded

compensatory damages."), his injury—unlike Leachco's—was not irreparable.

3. *Aposhian* should not be read to contradict the Supreme Court's precedents confirming here-and-now injuries through separation-of-powers violations

As explained above, the panel decision in *Aposhian* merely observed that alleging claims based on generalized separation-of-powers principles does not lead to irreparable harm without a showing of an injury. But if the district court read the irreparable-harm discussion in *Aposhian* correctly—that is, if the district court correctly found a categorical bar against irreparable harm in separation-of-powers cases—then Leachco respectfully submits that relevant discussion is *dicta*, as it was unrelated and unnecessary to the holding that the plaintiff failed to show a likelihood of success on the merits. As noted above, the panel expressly stated that it could have decided the appeal solely on a different factor, the government conceded irreparable harm, and the plaintiff did not raise a constitutional argument. 958 F.3d at 989–90. *See Cohens v. Virginia*, 19 U.S. 264, 399–400 (1821) (Marshall, C.J.) ("It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go

beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."). As such, the panel's irreparable-harm discussion cannot bind a future court's consideration of a party—like Leachco—that has raised a concrete constitutional challenge and established a resulting here-and-now injury. *See Bates v. Dep't of Corrections*, 81 F.3d 1008, 1011 (10th Cir. 1996) (A "panel of this Court . . . is not bound by a prior panel's dicta.").

Thus, to the extent that *Aposhian's* irreparable-harm discussion identifies a categorical distinction between individual-rights cases and separation-of-powers cases for purposes of injunctive relief, Leachco respectfully submits that it is *dicta* and that this Court should afford it no weight.

F. The Constitution protects individual rights and rights protected by the Separation of Powers equally

In the final analysis, however, the Supreme Court has definitively rejected any notion that a "separation-of-powers claim should be treated differently than every other constitutional claim." *Free Enter. Fund*, 561 U.S. at 491 n.2. And long-standing Supreme Court precedent confirms that the Constitution protects against harm caused both by the infringement of individual constitutional rights and by separation-of-powers

violations. The "declared purpose of separating and dividing the powers of government, of course, was to 'diffus[e] power the better to secure liberty.'" *Bowsher*, 478 U.S. at 721 (quoting *Youngstown Sheet & Tube*, 343 U.S. at 635 (Jackson, J., concurring)) *see also Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (The "ultimate purpose of th[e] separation of powers is to protect the liberty and security of the governed."). Indeed, "[n]o political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." *The Federalist No. 47*, at 324 (James Madison) (J. Cooke ed. 1961).

Thus, there is no constitutional distinction between rights guaranteed by the Bill of Rights and rights guaranteed by the Separation of Powers. As Justice Scalia made clear, the "Constitution's core, government-structuring provisions are *no less critical* to preserving liberty than are the later adopted provisions of the Bill of Rights." *NLRB v. Noel Canning*, 573 U.S. 513, 570–71 (2014) (Scalia, J., concurring) (emphasis added) (joined by Roberts, C.J., and Thomas, Alito, JJ.). And as Justice Kennedy explained:

> To demean the constitutional structure and the consent upon which it rests by implying they are wholly dependent for their

> vindication on the Due Process and Equal Protection Clauses is a further, unreasoned holding of serious import. The political freedom guaranteed to citizens by the federal structure is a liberty both distinct from and every bit as important as those freedoms guaranteed by the Bill of Rights. . . . The individual citizen has an enforceable right to those structural guarantees of liberty . . ..

United States v. Lara, 541 U.S. 193, 213–14 (2004) (Kennedy, J., concurring in the judgment) (citations omitted).

In short, "[i]f the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object." *Bond*, 564 U.S. at 223. And this must be the case since "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury*, 5 U.S. at 147 (citing 3 BLACKSTONE'S COMMENTARIES *402).

Therefore, the "Framers [] provided for a Judicial Branch equally independent with 'the judicial Power . . . extending to all Cases, in Law and Equity, arising under this Constitution, and the Laws of the United States.'" *Bowsher*, 478 U.S. at 722 (cleaned up) (quoting U.S. CONST. art. III, § 2). And because Congress gave district courts jurisdiction to resolve these cases (28 U.S.C. § 1331), Leachco's federal action is "'the proper

means for preventing entities from acting unconstitutionally,'" including claims seeking to prevent ongoing or imminent violations of "separation-of-powers principles." *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted); *see also Boumediene v. Bush*, 553 U.S. 723, 743 (2008) ("Because the Constitution's separation-of-powers structure, *like the substantive guarantees of the Fifth and Fourteenth Amendments*, protects persons as well as citizens, foreign nationals who have the privilege of litigating in our courts can seek to enforce separation-of-powers principles.") (emphasis added) (cleaned up); *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (The "structural principles secured by the separation of powers protect the *individual* as well.") (emphasis added); *cf. CFTC v. Schor*, 478 U.S. 833, 848 (1986) (explaining that one can waive "Article III, §1's guarantee of an impartial and independent federal adjudication," since it is "a personal right").

* * *

Then-Judge Kavanaugh's conclusion thus finds broad support from long-standing Supreme Court precedent: "Irreparable 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.*, 849 F.3d at 1136 (Kavanaugh, J., dissenting) (citations omitted).

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

The last two injunction factors—balancing the equities and the public interest—collapse when the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors support the issuance of an injunction here.

The government "does not have an interest in enforcing a law that is likely" invalid. *Edmondson*, 594 F.3d at 771. Instead, "the public interest will perforce be served by enjoining the enforcement of the invalid provisions of [] law." *Id.* (citation omitted). *See NFIB v. OSHA*, 142 S. Ct. 661, 666 (2022) (ruling that when a rule exceeds an agency's authority, the court should not "weigh [] tradeoffs" between its intended effect and harms). And 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) (finding public interest always supports enforcing Constitution).

Therefore, 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), *aff'd*, 542 F. App'x 706 (10th Cir. 2013); *see also Hobby Lobby*, 723 F.3d at 1145 ("When a law is likely unconstitutional, the interests of those the government represents, such as voters do not outweigh a plaintiff's interest in having its constitutional rights protected," and "it is always in the public interest to prevent the violation of a party's constitutional rights.") (cleaned up).

The same 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).

Further, the Supreme Court has explained that its remedies in these types of cases "are designed not only to advance those purposes [preventing structural constitutional violations] directly, but also to create incentives to raise" these types of challenges. *Lucia*, 138 S. Ct. at 2055 n.5 (citing *Ryder v. United States*, 515 U.S. 177, 183 (1995)). If the Com-

mission's proceeding against Leachco goes forward despite the agency's structural infirmities—and its lack of authority to even address, much less rule on, Leachco's constitutional claims—this Court will have reduced the incentives for future litigants to raise challenges arising out of Article II violations and seek relief therefor. *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).

* * *

CONCLUSION

This Court should reverse the district court's order, remand, and order the district court to issue a preliminary injunction prohibiting the Commission from proceeding with its administrative-enforcement action against Leachco.

DATED: January 17, 2023.

Respectfully submitted,

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ORAL ARGUMENT STATEMENT

Oral argument is requested. This case presents issues of foundational importance to the structure of the federal government and the accountability of Executive Branch agents. Leachco submits that oral argument would assist the Court in its consideration of issues that go to the heart of the Constitution's structural protections for individuals and, here, small businesses against arbitrary government action.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that this Brief complies with Fed. R. App. P. 28(a). It includes 10,636 words, excluding items enumerated in Rule 32(f). I relied on my word-processor, Microsoft Word, to obtain this word-count. Additionally, pursuant to Fed. R. App. P. Rule 32(a)(5)(A) and 10th Cir. R. 32(A), this Brief is written in 14-point Century Schoolbook, a proportionately spaced font.

I hereby certify that all required privacy redactions have been made pursuant to 10th Cir. R. 25.5, any required paper copies to be submitted to the Court are exact copies of the version submitted electronically, and the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2023, I electronically transmitted the foregoing document to the Clerk of Court or the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. and transmittal of a Notice of Electronic Filing was sent to the following:

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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

LEACHCO, INC., *Plaintiff*, v. **CONSUMER PRODUCT SAFETY COMMISSION, *et al.***, *Defendants.*	Case No. 22-CV-232-RAW

ORDER

This matter comes before the court on the Motion for Preliminary Injunction [Dkt. No. 9] of Plaintiff Leachco, Inc. ("Leachco), which seeks the issuance of a preliminary injunction to prevent the Consumer Product Safety Commission ("Commission") from proceeding with an administrative action the Commission filed against Leachco.[1] For the reasons set forth below, the court denies this motion.

BACKGROUND

The Commission is an executive regulatory agency authorized to enforce, among other laws, the Consumer Product Safety Act. *See* 15 U.S.C. §§ 2051, *et seq*. It is headed by five commissioners, no more than three of whom may be affiliated with the same political party. *Id*., § 2053(a), (c). Each commissioner is appointed by the President and "may be removed by the President for neglect of duty or malfeasance in office but for no other cause." *Id*., § 2053(a).

[1] The court additionally reviewed Leachco's Memorandum in Support of Motion for Preliminary Injunction [Dkt. No. 10]; Notice of Order Issued in Related Administrative Proceeding [Dkt. No. 38]; Defendants' Opposition to Plaintiff's Motion for Preliminary Injunction [Dkt. No. 39]; Leachco's Reply in Support of Motion for Preliminary Injunction [Dkt. No. 40]; Notice of Commission Order Issued in Related Administrative Proceeding [Dkt. No. 41]; and Defendants' Response to Plaintiffs' Notice of Commission Order [Dkt. No. 44].

The Commission conducts formal adjudicatory hearings pursuant to the Administrative Procedure Act. Each Commission hearing is overseen by an administrative law judge ("ALJ"). An ALJ may be removed from his or her position in an action initiated "by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a). Members of the Merit Systems Protection Board, in turn, may be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office." *Id*., § 1202(d).

Leachco is an Oklahoma corporation which designs, manufactures, and sells a variety of products, including an infant lounger called the "Podster." Two incidents involving Podsters have resulted in an infant's death. On February 9, 2022, the Commission authorized the issuance of an administrative complaint against Leachco, alleging the Podster presents a "substantial product hazard." *See* 15 U.S.C. § 2064.

Leachco subsequently filed the present action, seeking declaratory and injunctive relief. It asserts six causes of action. The first three causes of action allege the Commission's structure violates Article II, § 2 of the United States Constitution, and challenge: (1) the commissioners' for-cause removal protection, (2) the ALJ's multilevel removal protection, and (3) the commissioners' political-affiliation limit. The final three causes of action challenge the Commission's administrative action against Leachco, and allege it (4) violates Article III of the Constitution because the Commission is not vested with the judicial power of the United States, (5) violates the Fifth Amendment because it denies Leachco due process, and (6) violates the Seventh Amendment because it denies Leachco its right to a jury. Here, Leachco seeks a preliminary injunction to prevent the Commission from proceeding with the administrative action.

LEGAL STANDARD

Federal Rule of Civil Procedure 65(a)(1) authorizes the count to grant a preliminary injunction, and the party seeking a preliminary injunction must establish: (1) it is likely to suffer irreparable harm in the absence of preliminary relief; (2) it is likely to succeed on the merits; (3) the balance of equities tips in its favor; and (4) 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. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). The first element, a showing of likely irreparable harm, "is the single most important prerequisite for the issuance of a preliminary injunction." *Dominion Video Satellite, Inc. v. Echostar Satellite Corp*., 356 F.3d 1256, 1260 (10th Cir. 2004). As a consequence, "the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered." *Id*.

The "preliminary injunction is an extraordinary remedy." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019). It should only be granted when "the right to relief [is] clear and unequivocal." *Schrier v. Univ. Of Co*., 427 F.3d 1253, 1258 (10th Cir. 2005); *see also United States ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc*., 883 F.2d 886, 888–889 (10th Cir. 1989) ("Because it constitutes drastic relief to be provided with caution, a preliminary injunction should be granted only in cases where the necessity for it is clearly established.").

ANALYSIS

The court concludes Leachco is not entitled to a preliminary injunction because it has not shown it "is likely to suffer irreparable harm in the absence of preliminary relief." *See Planned Parenthood Ass'n of Utah*, 828 F.3d at 1252. The concept of "irreparable harm does not readily lend itself to definition," but "a plaintiff must demonstrate a significant risk that he or she will experience harm that cannot be compensated after the fact by money damages." *Fish v. Kobach*,

840 F.3d 710, 751–52 (10th Cir. 2016) (internal quotations marks omitted). Even harm that is "serious" or "substantial" is not sufficient. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003). Instead, the harm must be "certain," "great," and "actual." *Id*. The movant is required to "show that the injury complained of is of such imminence that there is a clear and present need for equitable relief." *Id*. at 1189. For example, irreparable harm was likely to occur where a proposed development was likely to kill bald eagles and damage their nesting territories. *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1252, 1258 (10th Cir. 2003). It is "not an easy burden to fulfill." *Id*. at 1250.

Leachco has failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction. It identifies two categories of harm which it alleges are likely and irreparable. First, it claims the Commission's structural separation-of-powers violations inflict "here-and-now" constitutional injuries that continue so long as the administrative action proceeds. It relies on *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792 (10th Cir. 2019) and *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020) for this proposition. In the former case, the Tenth Circuit held in admittedly broad language, "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." *Free the Nipple-Fort Collins*, 916 F.3d at 806. In a subsequent case addressing this passage, however, the court clarified it was referencing *individual* constitutional rights:

> [Movant] has not cited a single case where a generalized separation of powers, by itself, constituted irreparable harm. To the contrary, our cases finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the branches of government.

Aposhian v. Barr, 958 F.3d 969, 990 (10th Cir. 2020). Like the movant in in *Aposhian*, Leachco alleges structural, separation-of-powers violations, principally focused on the President's ability to remove executive branch officers. A separation of powers violation does not establish irreparable harm.[2]

In the latter case Leachco relies on, *Selia*, the Court considered a challenge to removal restrictions on the head of the Consumer Financial Protection Bureau. 140 S. Ct. at 2191. It held that "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." *Id*. at 2196. It made that statement, however, in considering a challenge to the plaintiff's *standing*. *Id*. at 2195. The case did not in any way involve a preliminary injunction. *Selia* does not stand for the proposition that a party allegedly harmed by a separation-of-powers issue is injured such that they may obtain a preliminary injunction against that harm. The Commission's alleged separation-of-powers violations are not likely to inflict irreparable harm.

The second category of irreparable harm identified by Leachco is the time and expense of litigation. The Supreme Court, however, has long recognized that "[m]ere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *F.T.C. v. Standard Oil Co. of California*, 449 U.S. 232, 244 (1980). As noted above, irreparable harm is "harm that cannot be compensated after the fact by money damages." *Fish*, 840 F.3d at 751–52. Quantifiable litigation expenses, therefore, cannot satisfy this standard. *See Heideman*, 348 F.3d at 1189 ("It is also well settled that simple economic loss usually does not, in and of itself, constitute irreparable

[2] In both the Memorandum and Reply in support of its motion, Leachco references only the constitutional violations pertaining to separation of powers when arguing it will be subject to irreparable harm. It does not assert the alleged Fifth Amendment or Seventh Amendment violations are likely to cause irreparable harm. Even if, however, the court were to consider those alleged violations, it would still decline to issue an injunction. It has found no authority for the proposition that an administrative action before an ALJ without a jury constitutes irreparable harm such that it must be enjoined.

harm; such losses are compensable by monetary damages."). Any expense Leachco incurs in the Commission's administrative action does not constitute irreparable harm. *See Stifel, Nicolaus & Co. v. Woolsey & Co.*, 43 F.3d 1483, at *2 (10th Cir. 1994) (unpublished) (holding that litigation expenses incurred in state court action did not constitute irreparable harm for the purpose of enjoining the state court action).

In sum, neither the Commission's alleged structural separation-of-powers violations nor the litigation expenses attendant to the administrative action are likely to inflict irreparable harm on Leachco. It has therefore failed to show it is likely to suffer irreparable harm in the absence of a preliminary injunction. This failure in and of itself prevents issuance of the injunction. Where the movant "fail[s] to meet its burden of showing a significant risk of irreparable injury," a court "need not address the remaining preliminary injunction factors." *New Mexico Dep't of Game & Fish v. United States Dep't of the Interior*, 854 F.3d 1236, 1249 (10th Cir. 2017). Accordingly, the court does not address whether Leachco is likely to succeed on the merits, whether the balance of equities tips in its favor, or whether an injunction is in the public interest.

Lastly, the court notes Defendants spent a large portion of their Response brief discussing the Administrative Procedure Act and asserting Leachco may not seek interlocutory review of ongoing Commission proceedings. *See* 5 U.S.C. § 704 (providing that only final agency action is subject to judicial review). Defendants, however, never specify how these procedural issues pertain to the Motion for Preliminary Injunction. They acknowledge the issues might be the basis of a motion to dismiss, but do not ask the court to take any action in response. *See Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1028 (10th Cir. 2017) ("The NIGC moved to dismiss on the ground that the letter did not constitute final agency action."). Because the Administrative

Procedure Act issues presented in the briefing do not impact the court's resolution of the Motion for Preliminary Injunction, it does not address them here.

CONCLUSION

For the reasons set forth above, Plaintiff Leachco, Inc.'s Motion for Preliminary Injunction of [Dkt. No. 9] is **DENIED**.

IT IS SO ORDERED this 29th day of November, 2022.

THE HONORABLE RONALD A. WHITE
UNITED STATES DISTRICT JUDGE
EASTERN DISTRICT OF OKLAHOMA

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Tenth Circuit Court of Appeals

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