

No. 24-156

In The
Supreme Court of the United States

LEACHCO, INC.,

Petitioner,

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Petitioner Leachco is suffering a here-and-now injury by being subjected to an ongoing proceeding by the unconstitutionally structured Consumer Product Safety Commission. Leachco now seeks a preliminary injunction so that its constitutional challenges may be heard by a court before it's "too late." *Axon Enter. Inc. v. FTC*, 598 U.S. 175, 191 (2023). The Tenth Circuit held that separation-of-powers violations alone can never cause irreparable harm and that, regardless, Leachco is not suffering any harm. These egregious errors warrant this Court's review.

* * *

To protect the People's liberty, the Constitution divides the government's powers into three, and only three, defined categories. *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 483, 501 (2010). Article II vests "the" executive power—all of it—in "a" President, who must "take Care that the Laws be faithfully executed." U.S. CONST. art. II, § 1, cl. 1; § 3. To help the President discharge his duties, the Constitution provides for executive officers. *Free Enter. Fund*, 561 U.S. at 483. "Since 1789, the Constitution has been understood to empower the President to keep these officers accountable—by removing them from office, if necessary." *Id.*; see *Myers v. United States*, 272 U.S. 52, 115 (1926) (same).

Some 150 years later, this Court discovered an exception to the President's removal power. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). This exception is limited to a "multimember body of experts, balanced along partisan lines," that exercises "no part of the executive power." *Seila Law LLC v.*

CFPB, 591 U.S. 197, 215–16 (2020) (quoting *Humphrey’s Executor*, 295 U.S. at 628). Here, the government contends that *Humphrey’s* narrow exception saves the CPSC removal restriction—even though it concedes that the CPSC’s Commissioners are principal executive officers who wield significant executive power. See Br. in Opp. 2–3, 6, 15.

But the government doesn’t even try to defend *Humphrey’s* actual reasoning or apply it to the CPSC. Instead, the government cites “history and precedent”—principally from 1935. In its view, post-*Humphrey’s* history and precedent confirm Congress’s ability to establish removal protections for independent agencies.

But the 1935 FTC and its contemporaries did not exercise significant executive power, unlike the modern independent agency that “wields vast [executive] power and touches almost every aspect of daily life” *Free Enter. Fund*, 561 U.S. at 499. *Humphrey’s* is not settled practice, but a constitutional aberration. And the government’s purported reliance interests on this exception (Br. in Opp. 9–12) must yield to the People’s liberty, for which the Constitution’s powers were divided in the first place.

Thus, while the Court could reverse the Tenth Circuit’s decision without overruling *Humphrey’s*, the government’s continued reliance on it, the confusion it continues to cause lower courts, and the unaccountable government action it protects counsel in favor of overruling it once and for all.

This Court’s decision in *Collins v. Yellen*, 594 U.S. 220 (2021), does not stand in the way. *Collins* considered claims for retrospective compensable damages only after declaring that the removal protection for

the head of the Federal Housing Finance Agency (FHFA) violated the separation of powers. *Id.* at 256. It then rejected the challengers’ argument that the FHFA’s actions must be undone as void *ab initio*. *Id.* at 257–60. This analysis contradicts the government’s contention that even preliminary injunctive relief is unavailable to prevent an ongoing constitutional violation.

This Court has long held that courts can remedy here-and-now injuries like Leachco’s. *Free Enter. Fund*, 561 U.S. at 491 n.2. And it recently reconfirmed that mere *subjection* to a proceeding by an unconstitutionally structured agency is such a here-and-now injury that calls for immediate resolution, since post-proceeding relief would come “too late”—even if the challenger were to prevail at the proceeding. *Axon*, 598 U.S. at 191. Here, Leachco does not challenge an agency’s final decision; it does not seek to unwind or render void *ab initio* any agency decisions; and it does not seek compensable damages. It asks only for the chance to prevail on the merits and ensure that the agency enforcing the law be “accountable to the Executive.” *Free Enter. Fund*, 561 U.S. at 513.

* * *

The Court should grant certiorari to decide (1) if *Humphrey’s Executor* can be saved despite all its defects and (2) whether *Axon’s* guarantee of a federal forum to challenge here-and-now injuries is meaningful.

ARGUMENT

I. THE COURT SHOULD DECIDE WHETHER TO OVERRULE *HUMPHREY'S EXECUTOR*

1. In *Seila Law*, this Court confirmed that *Humphrey's Executor* created only a narrow exception to the President's unrestricted removal power. This exception allows Congress to give for-cause removal protections "for multimember expert agencies that do not wield substantial executive power." *Seila Law*, 591 U.S. at 218. *Humphrey's* upheld a removal protection for an FTC commissioner because: the (1935) FTC performed "specified duties as a legislative or as a judicial aid;" "[could]not in any proper sense be characterized as an arm or an eye of the executive;" and acted "in part quasi legislatively and in part quasi judicially;" and because the (1935) FTC officer "occu[pie]d no place in the executive department and ... exercise[d] no part of the executive power vested by the Constitution in the President." 295 U.S. at 628.

Here, the government doesn't try to fit the current CPSC within those parameters. Indeed, it concedes that CPSC Commissioners are principal executive officers who wield substantial executive power. *See* Br. in Opp. 2–3, 6, 15. Therefore, on *Humphrey's* own terms—as confirmed by *Seila Law*—the Tenth Circuit erred in upholding the CPSC removal protection.

2. Rather than apply *Humphrey's* on its own terms, the government contends that "history and precedent" allow removal protections for all multimember agencies wielding substantial executive power. Br. in Opp. 9–15. But the government points mainly to the Progressive Era, which decidedly spurned the Constitution's original meaning. *Humphrey's* and its limited progeny—expert agencies that do

not wield substantial executive power—cannot overcome original meaning, the Decision of 1789, consistent practice thereafter, and *Myers*.¹ Any doubt was removed by *Seila Law*, which confirmed that the President must have at-will removal power over principal officers who exercise significant executive power. 591 U.S. at 217–18.

Recent acquiescence to unconstitutional agency structure by the Executive Branch (and Congress) does not change things. Br. in Opp. 11–12. This Court’s precedents have long recognized that the separation of powers and the Constitution’s “checks and balances were the foundation of a structure of government that would protect liberty.” *Bowsher v. Synar*, 478 U.S. 714, 722 (1986). And, as a result, their “vitality does not depend on whether the encroached-upon branch approves the encroachment.” *NLRB v. Noel Canning*, 573 U.S. 513, 571–72 (2014) (Scalia, J., concurring) (citing *Free Enter. Fund*, 561 U.S. at 497). If anything, the Executive Branch’s improper concession to congressional intrusion strengthens the case for this Court to grant certiorari and confirm the President’s power to remove principal executive officers who wield substantial executive power.

Finally, the government’s “‘handful of isolated’ incidents” does not support its argument. *Seila Law*, 591 U.S. at 220 (quoting *Free Enter. Fund*, 561 U.S. at 505). See Br. in Opp. 9–10. The Interstate Commerce Commission was given only “feeble” power and, by the

¹ The Government’s reliance on Federalist No. 37 would surprise Madison, who “insisted” in the First Congress “that Article II by vesting the executive power in the President was intended to grant him the power of appointment and removal of executive officers except as thereafter expressly provided in that Article.” *Myers*, 272 U.S. at 115.

“early twentieth century, [it] was largely toothless,” “spen[ding] much of its energy gathering statistics about the rail industry.” James W. Ely, Jr., *The Troubled Beginning of the Interstate Commerce Act*, 95 Marq. L. Rev. 1131, 1134 (2012). The Federal Reserve Board’s “most important responsibility is administration of the money supply,” which “is not an executive function.” *Consumers’ Research v. Cons. Prod. Safety Comm’n*, 98 F.4th 646, 657 (5th Cir. 2024) (en banc) (Oldham, J., dissenting from the denial of rehearing en banc), cert. denied, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024). And the War Claims Commission was an “adjudicatory body’ tasked with resolving claims for compensation arising from World War II.” *Seila Law*, 591 U.S. at 216 (citing *Wiener v. United States*, 357 U.S. 349, 356 (1958)).

Humphrey’s Executor does not support the CPSC removal protection.

3. Nonetheless, the government’s continued defense of *Humphrey’s*—despite its doctrinal errors—shows why the Court should grant certiorari and overrule *Humphrey’s Executor* once and for all. See Pet. 21–23. Lower courts would benefit from a definitive resolution on this point. And parties like Leachco can be assured of regulation and adjudication “only by a constitutional agency accountable to the Executive.” 561 U.S. at 513. *Stare decisis* (Br. in Opp. 15–16) is no impediment. Indeed, the *stare decisis* factors support *Humphrey’s* demise. *Janus v. AFSCME*, 585 U.S. 878, 917 (2018) (identifying factors).

First, *Humphrey’s* was poorly reasoned and wrongly decided. *Janus*, 585 U.S. at 917. The government makes no attempt to defend it, which is unsurprising. *Humphrey’s* departed from the Constitution’s

original meaning and was “devoid of textual or historical precedent for the novel principle it set forth.” *Seila Law*, 591 U.S. at 246 (Thomas, J., concurring in part) (quoting *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting)). The distinction *Humphrey’s* made between *executive* agencies that wield executive power and those that supposedly wield “quasi-legislative” and “quasi-judicial” power clashes with the Constitution’s vesting clauses. *Id.* at 247–48. And this Court’s jurisprudence has already “eroded”—if not wholly repudiated—*Humphrey’s* attempted distinction. See *Seila Law*, 591 U.S. at 248–51 (reciting criticisms from *Morrison* to *Free Enterprise Fund*); see also *United States v. Arthrex*, 594 U.S. 1, 17 (2021) (“The activities of executive officers may take ‘legislative’ and ‘judicial’ forms, but they are exercises of—indeed, under our constitutional structure they *must be* exercises of—the ‘executive Power’”) (citation omitted).

Further, the government’s supposed reliance interests (Br. in Opp. 9–12) do not “outweigh the countervailing interest” of all citizens “in having their constitutional rights fully protected.” *Janus*, 585 U.S. at 927.

Finally, overruling *Humphrey’s* will not limit “Congress’s power to create a vast and varied federal bureaucracy” (assuming that’s desirable). *Free Enter. Fund*, 561 U.S. at 499. Indeed, despite the government’s concerns, overruling *Humphrey’s* would not eliminate the CPSC—or any other agency. Nor would it circumscribe any agency’s jurisdiction or substantive authority. See *In re Aiken Cnty.*, 645 F.3d 428, 446 n.5 (D.C. Cir. 2011) (Kavanaugh, J., concurring) (“*Humphrey’s Executor* is not necessary to the exist-

ence of any particular agency.”). Overruling *Humphrey’s* would mean only that these agencies would be “more accountable to the people,” *id.*, as the Constitution demands. On the other side of the ledger, “continued reliance on *Humphrey’s Executor* ... creates a serious, ongoing threat to our Government’s design” and the People’s liberty. *Seila Law*, 591 U.S. at 251 (Thomas, J., concurring in part).

Accordingly, if the government’s reading of *Humphrey’s Executor* is correct, and executive branch agencies may continue to wield significant executive power insulated from the President’s duty to “take Care that the Laws be faithfully executed,” the Court should grant certiorari and “repudiate what is left of this erroneous precedent.” *Id.* at 239.

II. THE COURT SHOULD DECIDE WHETHER PARTIES SUFFERING ONGOING HERE-AND-NOW SEPARATION OF POWERS INJURIES MAY OBTAIN PRELIMINARY RELIEF

This Court has forcefully repudiated the contention that separation-of-powers’ violations are less important than other constitutional violations. *Free Enter. Fund*, 561 U.S. at 491 n.2 (citation omitted). The Tenth Circuit’s irreparable-harm analysis breaches this precept. The court compounded its mistake by misconstruing this Court’s decision in *Collins*, which called for proof of causation in its discussion of the challengers’ claim for retrospective, compensatory remedies. The Tenth Circuit, however, applied that discussion to a request for prospective relief and thus erroneously held that Leachco could not establish any harm by being subjected to an unconstitutionally structured agency. App. 24a. That holding cannot be squared with the Court’s later decision in *Axon*. And

it would leave aggrieved parties with no apparent way to prevent ongoing constitutional violations.

1. The government does not dispute that a categorical bar on finding irreparable harm, based solely on separation-of-powers violations, is erroneous. Br. in Opp. 16–17. Instead, the government claims the Tenth Circuit didn’t make that ruling. But the court was explicit: “Tenth Circuit precedent establishes that, while violations of certain individual constitutional rights, without more, can constitute irreparable harm, violations of separation of powers provisions do not.” App. 10a. A previous decision from the court had “surveyed [its] precedent” and “distinguished between separation of powers violations ... and violations of individual constitutional rights” App. 11a. And the court emphasized that it meant what it said: A “mere generalized separation of powers violation, by itself, does not establish per se irreparable harm.” App. 14a n.5. This holding conflicts with this Court’s and other courts’ precedent, *see* Pet. 23–32, and could not more clearly disregard the separation of powers.

2. The Tenth Circuit also held—erroneously—that Leachco was not entitled to a preliminary injunction because it could never establish *any* harm. App. 24a. The government defends this conclusion based on its misreading of *Collins*. Br. in Opp. 17–20. But because the petitioners there “no longer [had] a live claim for prospective relief,” *Collins* said nothing about prospective relief—which is what Leachco seeks here. 594 U.S. at 257; *see id.* at 276 (Gorsuch, J., concurring) (“As the Court observes, the only question before us concerns retrospective relief.”) Any inference drawn from *Collins* about remedies does not apply to prospective relief.

Thus, despite the government’s claim (Br. in Opp. 17), *Collins* did not establish that preliminary injunctive relief is unavailable to prevent an ongoing constitutional violation. *Collins*’s call for proof that the unconstitutional restriction caused harm was based on the challengers’ demand that the FHFA’s actions be “completely undone” as void *ab initio*, or that they were entitled to compensatory relief. 594 U.S. at 259. For that retrospective relief, the challengers had to show that the government would have acted differently without the removal restriction. *Id.*; see, e.g., *Texas v. Lesage*, 528 U.S. 18, 21 (1999) (per curiam) (“[W]here there is no allegation of an ongoing or imminent constitutional violation to support a claim for forward-looking relief, the government’s conclusive demonstration that it would have made the same decision absent the alleged [violation] precludes any finding of [damages] liability.”).

Leachco’s claims are entirely different. Like the regulated parties in *Free Enterprise Fund* and *Axon*, Leachco challenges ongoing agency action and seeks declaratory and injunctive relief. See *Free Enter. Fund*, 561 U.S. at 487; *Axon*, 598 U.S. at 183. *Axon* confirms that Leachco has properly sought relief in district court. And *Free Enterprise Fund* confirms that immediate relief is available to remedy ongoing removal violations. It held that the challengers were “entitled to declaratory relief sufficient to ensure” that they will be regulated “only by a constitutional agency accountable to the Executive.” 561 U.S. at 513.

And because *Axon* instructs that post-agency-action review will come “too late” to be meaningful, 598 U.S. at 191, Leachco needs a preliminary injunction now—“when the threatened harm ... impair[s] [a] court’s ability to grant an effective remedy,” 11A Fed.

Prac. & Proc. Civ. § 2948.1 (3d ed.). If a plaintiff could obtain prospective relief only in the extremely rare circumstances suggested by the government—such as where the President expressly states that he would have removed an officer but for a statutory removal protection, *see, e.g.*, Br. in Opp. 17–18—then *Axon* would be a virtual dead letter.²

In short, *Collins* does not preclude Leachco from seeking relief from the harm it is suffering—a “here and now’ injury that can be remedied by a court.” *Free Enter. Fund*, 561 U.S. at 513.

The Tenth Circuit’s effective nullification of *Axon* (*see* Br. in Opp. 20–21) thus flouts this Court’s separation-of-powers precedent by establishing an insurmountable disincentive to raise certain constitutional challenges in federal court. *See Lucia v. SEC*, 585 U.S. 237, 251 n.5 (2018) (endorsing remedies that “create incentives to raise” separation-of-powers challenges). And if any tension exists between *Collins* and *Axon*, the Court should clarify this issue sooner rather than later. Otherwise, prospective relief for Article II removal claims is effectively precluded in the mine run of cases.

III. THIS CASE IS AN EXCELLENT VEHICLE

Both the separation of powers and irreparable harm questions are vitally important to the Constitution’s structure and the People’s ability to hold government accountable. This case’s posture highlights the liberty-threatening powers of unaccountable agencies.

² *See Alpine Sec. Corp. v. FINRA*, No. 23-5129, – F.4th –, 2024 WL 4863140, at *27 (D.C. Cir. Nov. 22, 2024) (Walker, J., concurring in part and dissenting in part) (*Axon* “tells us that Alpine faces certain and imminent harm that cannot later be fixed.”).

This live controversy, unlike that presented in *Consumers' Research v. CPSC*, No. 23-1323 (Oct. 21, 2024), allows the Court to confirm that individuals may obtain relief for separation-of-powers violations before it's "too late." *Axon*, 598 U.S. at 191.³ The Court should grant certiorari and resolve these important issues.

Lastly, the government's contention (Br. in Opp. 7) that the Tenth Circuit "just briefly" addressed the merits is incorrect. The court explained its view that because Leachco's irreparable-harm argument is predicated on its ability to prevail on its constitutional arguments, "we will address them here." App. 24a; *see id.* ("In the context of constitutional claims, the constitutional-violation-as-irreparable-injury principle collapses the first and second preliminary-injunction factors, equating likelihood of success on the merits with a demonstration of irreparable injury.") (cleaned up). The court thoroughly considered the merits and analyzed the relevant issues raised by Leachco here.

* * *

³ In *Consumers' Research*, the government's primary argument against certiorari was standing, a problem absent here. *Contra* Br. in Opp. 6–7.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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