No. 24-156

In the Supreme Court of the United States

LEACHCO, INC., PETITIONER

v.

CONSUMER PRODUCT SAFETY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the statute specifying that the President may remove members of the multi-member Consumer Product Safety Commission only for cause violates the Constitution.

2. Whether the court of appeals erred in denying petitioner's request for a preliminary injunction against an administrative enforcement proceeding before the Commission where petitioner failed to make any showing that the challenged removal restriction has affected or will likely affect the proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 103 F.4th 748. The order of the district court (Pet. App. 36a-43a) is unreported but is available at 2022 WL 17327494.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2024. The petition for a writ of certiorari was filed on August 9, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a consumer-products company that is the respondent in an ongoing administrative enforcement proceeding before the Consumer Product Safety Commission (Commission). Petitioner filed this suit seeking to enjoin that proceeding based on its contention

that the Commission's statutory for-cause removal protection is unconstitutional. The district court denied preliminary relief without reaching that constitutional question because it held that petitioner had failed to establish irreparable harm. Pet. App. 36a-43a. The court of appeals affirmed. *Id.* at 1a-35a.

1. Congress created the Commission in 1972 to address findings that millions of Americans "were injured each year in the home as a result of accidents connected with consumer products," and "that industry self-regulation, the common law, existing federal programs, and state and local agencies were inadequate to protect the public from this excessive hazard." Antonin Scalia & Frank Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 UCLA L. Rev. 899, 900-901 (1973); see 15 U.S.C. 2051 (findings).

The Commission has authority to "promulgate consumer product safety standards" to "prevent or reduce an unreasonable risk of injury." 15 U.S.C. 2056(a). Congress has also authorized the Commission to ban hazardous consumer products and to take steps to protect the public from injuries. 15 U.S.C. 2057, 2064. As relevant here, the Commission is empowered to bring administrative enforcement proceedings seeking a determination that a product presents a "substantial product hazard." 15 U.S.C. 2064(a); see 15 U.S.C. 2064(f); 16 C.F.R. 1025.53(a), 1025.54; see also 5 U.S.C. 704. Those proceedings typically begin with a hearing conducted by an administrative law judge (ALJ). See 5 U.S.C. 556(b)(3); see also 16 C.F.R. 1025.3(i). Any party may appeal the ALJ's decision to the Commission, or the Commission may grant review on its own. 16 C.F.R. 1025.53(a), 1025.54. The Commission's decision is then

reviewable in district court. See, *e.g.*, *Zen Magnets, LLC* v. *CPSC*, 968 F.3d 1156, 1164 (10th Cir. 2020).

The Commission is headed by five Commissioners who are appointed by the President to seven-year terms based on "their background and expertise in areas related to consumer products and protection of the public from risks to safety." 15 U.S.C. 2053(a); see 15 U.S.C. 2053(b). During their terms, the Commissioners may be removed by the President only "for neglect of duty or malfeasance in office." 15 U.S.C. 2053(a).

2. Petitioner makes and markets various consumer products. Petitioner's infant lounger, called the "Podster," has been involved in at least two incidents that resulted in an infant's death. Pet. App. 5a. The Commission initiated an administrative proceeding to determine whether the Podster presents a substantial product hazard under 15 U.S.C. 2064. Pet. App. 5a. The Commission then assigned the matter to an ALJ.

3. While proceedings before the Commission were ongoing, petitioner filed this suit in the United Sates District Court for the Eastern District of Oklahoma. Pet. App. 6a. As relevant here, petitioner asserted that the Commissioners' for-cause removal restriction is unconstitutional and sought a preliminary injunction against the administrative proceeding. *Ibid.*[1]

The district court declined to issue an injunction, concluding that petitioner had not shown that it "is likely to suffer irreparable harm in the absence of preliminary relief." Pet. App. 39a (citation omitted); see *id.*

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[1] Petitioner also asserted various other claims, including an argument that the statutory restriction on the removal of ALJs is unconstitutional. Pet. App. 6a, 38a. Petitioner does not renew that argument before this Court, presumably because the ALJ has since issued a decision in its favor. See p. 6, *infra*.

at 36a-42a. The court rejected petitioner's contention that a separation-of-powers violation necessarily constitutes irreparable harm. *Id.* at 40a-42a. It also rejected petitioner's only other theory of harm, which was based on "the time and expense of litigation" before the Commission. *Id.* at 42a. And because the court concluded that petitioner had failed to demonstrate irreparable harm, it declined to consider whether petitioner "is likely to succeed on the merits." *Id.* at 42a-43a.

4. The district court, the court of appeals, and Justice Gorsuch denied petitioner's requests for an injunction pending appeal. Pet. App. 6a-7a n.1, 45a; 2023 WL 5728482 (No. 22A730). After this Court issued its decision in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), petitioner again moved for an injunction pending appeal. The district court, the court of appeals, and Justice Gorsuch again denied relief. Pet. App. 7a n.1, 44a-48a; 2023 WL 5728468 (No. 23A124).

5. The court of appeals affirmed the denial of a preliminary injunction. Pet. App. 1a-35a. In so doing, the court emphasized that "the sole issue" it was deciding was whether petitioner "has established irreparable harm." *Id.* at 7a-8a.

The court of appeals first noted that petitioner had not renewed its argument that "litigation expense constitutes irreparable harm." Pet. App. 8a n.2. And although petitioner argued that the administrative proceedings were inflicting "reputational and economic harm," the court held that petitioner had forfeited that argument by failing to raise it in the district court. *Ibid.*

The court of appeals then rejected petitioner's remaining argument that "being subjected to an administrative proceeding carried out by an unconstitutionally structured agency" necessarily constitutes irreparable

injury. Pet. App. 8a (citation omitted); see *id.* at 10a-35a. The court explained that "a mere generalized separation of powers violation, by itself, does not establish irreparable harm." *Id.* at 14a. Instead, the court reasoned that, under this Court's decision in *Collins* v. *Yellen*, 594 U.S. 220 (2021), a party seeking relief based on an allegedly invalid removal restriction "must demonstrate that the unconstitutional removal provision actually affected the agency's decision or conduct against him." Pet. App. 17a.

The court of appeals held that petitioner had "failed completely" to carry that burden. Pet. App. 20a. Indeed, the court emphasized that petitioner had not attempted to "make any showing" that the proceedings against him "would be different in any way" if the President could remove the Commissioners at will. *Ibid.* And absent any proof that the challenged removal restriction would likely affect the Commission's actions, the court held that "[petitioner] has failed to establish that it would suffer future irreparable harm if the preliminary injunction is denied." *Ibid.*

The court of appeals explained that because petitioner had failed to show that the removal restriction would likely affect the administrative proceeding, petitioner would not be entitled to relief "even assuming the removal protections are unconstitutional." Pet. App. 16a (capitalization altered); see *id.* at 10a. But to further buttress its conclusion that petitioner had not shown irreparable harm, the court "just briefly consider[ed]" petitioner's constitutional arguments. *Id.* at 26a; see *id.* at 24a. The court explained that the Commission's removal restrictions are materially identical to those this Court upheld in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and that the court of

appeals upheld in *SEC* v. *Blinder, Robinson & Co.*, 855 F.2d 677, 682 (10th Cir. 1988), cert. denied, 489 U.S. 1033 (1989). See Pet. App. 25a-29a. "Given the clear precedential support" for the Commission's structure, the court stated that petitioner had "failed to establish at this preliminary stage" that the removal protections are unconstitutional, and thus had "failed to demonstrate that such protections will cause it the narrow structural harm upon which it relies" even if petitioner were correct that a separation-of-powers violation necessarily inflicts irreparable harm. *Id.* at 31a.

6. After the court of appeals issued its decision, the ALJ issued an order dismissing the underlying administrative proceeding against petitioner. *In re Leachco, Inc.* at 65, CPSC (July 3, 2024), https://www.cpsc.gov/s3fs-public/pdfs/recall/lawsuits/abc/148-CPSC_Docket_No_22-1_In_the_Matter_of_Leachco_Inc_ALJ_Decision.pdf. The Commission's review of that decision is ongoing.

ARGUMENT

Petitioner principally asks this Court to grant certiorari and hold that Congress violated the Constitution by conferring for-cause removal protection on the members of the Consumer Product Safety Commission—and every other independent agency that exercises "significant executive power" (Pet. 4). This Court recently denied a petition for a writ of certiorari presenting a materially identical argument. See *Consumers' Research* v. *CPSC*, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024). The same result is warranted here. Indeed, this case would be an especially poor vehicle for considering the question presented because petitioner's failure to show that the removal restriction has had or will likely have any effect on its administrative proceeding means that

petitioner would not be entitled to preliminary relief even if this Court concluded that it was likely succeed on the merits.

The principal question presented also does not warrant review because the Commissioners' removal restriction is constitutional under *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Limits on the removal of the heads of multimember regulatory agencies have been a feature of our system of government for as long as such agencies have existed. And in the 90 years since *Humphrey's Executor*, Congress has repeatedly relied on the Court's decision by creating the Commission and many other agencies modeled on the structure this Court upheld. Petitioner offers no sound reason to upset that understanding at this late date.

Finally, petitioner's separate contention that the court of appeals erred in holding that it failed to show irreparable harm does not warrant review. That holding followed directly from this Court's decision in *Collins* v. *Yellen*, 594 U.S. 220 (2021), and no court of appeals has accepted petitioner's assertion that an allegedly invalid removal restriction warrants relief even if it has no effect on the challenged agency action.

A. Petitioner's Constitutional Challenge Does Not Warrant This Court's Review

1. Petitioner principally contends (Pet. 16-23, 32-34) that this Court should grant certiorari to consider the constitutionality of the statute providing that members of the Commission may be removed only for cause. This case would not be an appropriate vehicle in which to take up that question.

The court of appeals addressed petitioner's constitutional challenge "just briefly," in order to further bolster its conclusion that petitioner had not established

irreparable harm. Pet. App. 26a. But that discussion was not necessary to the court's decision to affirm the denial of preliminary relief. To the contrary, the court's decision is independently supported by its holding that petitioner failed to establish that the challenged removal restriction has had or will likely have any effect on the challenged administrative proceeding. The court made clear that petitioner's failure to make that showing was an independent ground for affirmance that would control "even assuming the removal protections are unconstitutional." *Id.* at 16a (capitalization altered); see *id.* at 10a.

A decision resolving the constitutional question in petitioner's favor thus would not entitle petitioner to relief unless the Court also reviewed and reversed the court of appeals' separate holding that petitioner failed to establish irreparable harm because it failed to show that the removal restriction affected its administrative proceeding. But that question does not warrant this Court's review, and the court of appeals' holding was clearly correct—indeed, petitioner does not even attempt to engage with the court's straightforward application of *Collins*. See pp. 17-20, *infra*. Even if this Court were inclined to revisit *Humphrey's Executor*, it should not take up a constitutional question of this magnitude in a case where its resolution would have no effect on the result.

2. Even setting aside that threshold problem, petitioner has offered no sound reason for this Court to grant certiorari to revisit the established understanding that *Humphrey's Executor* allows Congress to confer removal protection on the heads of traditional multimember regulatory agencies like the Commission.

a. Except for impeachment, the Constitution does not expressly address the removal of executive officers. See *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 258 (1839). But "[t]he President's removal power has long been confirmed by history and precedent." *Seila Law LLC* v. *CFPB*, 591 U.S. 197, 214 (2020). "It was discussed extensively in Congress when the first executive departments were created in 1789," and "[t]he view that prevailed, as most consonant to the text of the Constitution and to the requisite responsibility and harmony in the Executive Department, was that the executive power included a power to oversee executive officers through removal." *Ibid.* (citation and internal quotation marks omitted). Long historical practice has cemented that "decision of 1789," *id.* at 231, as an authoritative "practical construction of the Constitution" by the political Branches, *Hennen*, 38 U.S. (13 Pet.) at 259. This Court's precedents likewise firmly establish "the President's general removal power," which generally includes the authority to remove principal officers at will. *Seila Law*, 591 U.S. at 215; see *id.* at 215-217; *Myers* v. *United States*, 272 U.S. 52, 163-164 (1926).

b. History and precedent, however, have also established an exception to the general rule of at-will removal applicable to multimember regulatory agencies. The first such agency was created in 1887, when Congress passed and President Cleveland signed the Interstate Commerce Act, ch. 104, 24 Stat. 379, which established the Interstate Commerce Commission. From the beginning, members of the Commission could be removed only "for inefficiency, neglect of duty, or malfeasance in office." § 11, 24 Stat. 383. In 1913, when Congress established the Federal Reserve Board, it provided that the Board's members may be "removed for cause."

Federal Reserve Act, ch. 6, § 10, 38 Stat. 260-261. And in 1914, Congress created the Federal Trade Commission and specified that its members could be removed "for inefficiency, neglect of duty, or malfeasance in office." Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717-718.

In *Humphrey's Executor*, this Court unanimously upheld the removal restriction applicable to members of the Federal Trade Commission. 295 U.S. at 631-632. The Court concluded that the President's "illimitable power of removal" did not extend to the Federal Trade Commission, which the Court described as a "quasi-legislative or quasi-judicial" agency. *Id.* at 629. Instead, the Court reasoned that Congress's authority to create such an agency "includes, as an appropriate incident, power to fix the period during which [its members] shall continue in office, and to forbid their removal except for cause in the meantime." *Ibid.* And in *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court reaffirmed *Humphrey's Executor* and applied it to hold that the President could remove a member of the War Claims Commission only for cause. *Id.* at 356.

More recently, this Court has recognized that *Humphrey's Executor's* "quasi-legislative" and "quasi-judicial" terminology "has not withstood the test of time" because the Federal Trade Commission and other independent agencies exercise executive power. *Seila Law*, 591 U.S. at 216 n.2. The Court has also "declined to extend" the exception recognized in *Humphrey's Executor* to novel agency structures "with no foothold in history or tradition," such as an agency headed by a single director or one protected by two layers of removal restrictions rather than one. *Id.* at 215, 222; see *Free Enterprise Fund* v. *Public Co. Accounting Oversight Bd.*,

561 U.S. 477, 483-484 (2010). But the Court has never questioned the continued application of *Humphrey's Executor* to "a traditional independent agency headed by a multimember board or commission." *Seila Law*, 591 U.S. at 207.[2]

Similarly, the Executive Branch has sometimes resisted extensions of *Humphrey's Executor* that would have made novel incursions on the President's removal authority. But the United States has not asked this Court to disturb its application to traditional independent commissions. In *Free Enterprise*, the government disclaimed any request to "overrule *Humphrey's Executor*," explaining that "[i]n the seven decades since that decision, 'independent' agencies ha[d] become an accepted part of American government." U.S. Br. at 43 n.16, *Free Enterprise*, *supra* (No. 08-861). And in *Seila Law*, the government suggested that *Humphrey's Executor* should be "narrowed or overruled" if and "to the extent" it were construed to apply to single-headed agencies, but declined to join the private petitioner in urging that the decision be overruled outright. U.S. Br. at 44-45, *Seila Law*, *supra* (No. 19-7).

Congress, for its part, has repeatedly relied on *Humphrey's Executor* by creating multimember

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[2] One of petitioner's amici points to this Court's statement in *Trump* v. *United States*, 144 S. Ct. 2312 (2024), that "Congress lacks authority to control the President's 'unrestricted power of removal' with respect to 'executive officers of the United States whom he has appointed.'" *Id.* at 2328 (quoting *Myers*, 272 U.S. at 106, 176). See Americans for Prosperity Amicus Br. 14. But the Court there recognized that the President's removal power is subject to "two exceptions," *Trump*, 144 S. Ct. at 2328 (quoting *Seila Law*, 591 U.S. at 215), and had no occasion to address the scope of the exception for multimember commissions.

agencies headed by officers protected from removal at will.[3] Congress has also afforded tenure protections to executive branch adjudicators, including the members of the Court of Appeals for the Armed Forces, 10 U.S.C. 942(c), the Court of Appeals for Veterans Claims, 38 U.S.C. 7253(f), the Court of Federal Claims, 28 U.S.C. 171(a), 176(a), and the Tax Court, 26 U.S.C. 7443(f).

That "[l]ong settled and established practice" is itself entitled to "great weight in a proper interpretation of constitutional provisions." *Chiafalo* v. *Washington*, 591 U.S. 578, 592-593 (2020) (citation omitted). "As James Madison wrote, 'a regular course of practice' can 'liquidate & settle the meaning of' disputed or indeterminate 'terms & phrases.'" *Id.* at 593 (citation omitted). And that remains true "even when that practice began after the founding era." *NLRB* v. *Noel Canning*, 573 U.S. 513, 525 (2014). Here, therefore, "longstanding congressional practice" both "reflects and reinforces this Court's precedents," *Moore* v. *United States*, 144 S. Ct. 1680, 1692 (2024), upholding removal restrictions for

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[3] See, *e.g.*, 42 U.S.C. 7412(r)(6)(B) (Chemical Safety and Hazard Investigation Board); 42 U.S.C. 1975(e) (Commission on Civil Rights); 42 U.S.C. 7171(b)(1) (Federal Energy Regulatory Commission); 5 U.S.C. 7104(b) (Federal Labor Relations Authority); 46 U.S.C. 46101(b)(3) (Federal Maritime Commission); 5 U.S.C. 1202(d) (Merit Systems Protection Board); 30 U.S.C. 823(b)(1) (Mine Safety and Heath Review Commission); 29 U.S.C. 153(a) (National Labor Relations Board); 45 U.S.C. 154 (National Mediation Board); 49 U.S.C. 1111(c) (National Transportation Safety Board); 42 U.S.C. 5841(e) (Nuclear Regulatory Commission); 29 U.S.C. 661(b) (Occupational Safety and Health Review Commission); 39 U.S.C. 502(a) (Postal Regulatory Commission); 49 U.S.C. 1301(b)(3) (Surface Transportation Board); 39 U.S.C. 202(a)(1) (United States Postal Service Board of Governors).

the heads of traditional multimember regulatory agencies like the Commission.

c. Presumably in an effort to avoid the powerful *stare decisis* principles that would stand in the way of overruling a nearly century-old precedent on which Congress has repeatedly relied, petitioner first asserts (Pet. 18) that *Humphrey's Executor* does not apply to the heads of any multimember agency that "wields substantial executive power"—by which petitioner appears to mean any power to regulate primary conduct, conduct adjudications, or bring enforcement actions. Accepting that position would invalidate not just the removal restriction that applies to the Commission, but also those applicable to virtually every other agency with a similar structure—including the Federal Trade Commission, the agency at issue in *Humphrey's Executor* itself. See Pet. App. 28a.

That is not a tenable reading of this Court's precedent. For nearly a century, *Humphrey's Executor* has been understood to hold that Congress may provide removal restrictions "for so-called 'independent regulatory agencies,' such as the Federal Trade Commission, the Interstate Commerce Commission," and—as particularly relevant here—"the Consumer Product Safety Commission." *Morrison* v. *Olson*, 487 U.S. 654, 724-725 (1988) (Scalia, J., dissenting) (citation omitted); see *id.* at 692 n.31 (majority opinion) (citing the Commission's removal protections with approval).

This Court has repeatedly recognized that *Humphrey's Executor* stands for the proposition that Congress can "create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause." *Free Enterprise*, 561 U.S. at 483; see, *e.g.*, *Bowsher* v. *Synar*,

478 U.S. 714, 724-725 & n.4 (1986); *Buckley* v. *Valeo*, 424 U.S. 1, 141 (1976). The Court's decision in *Free Enterprise*, for example, rested on the express understanding that "the Commissioners [of the Securities and Exchange Commission] cannot themselves be removed by the President except under the *Humphrey's Executor* standard." 561 U.S. at 487. That premise was essential to the Court's holding that the Public Company Accounting Oversight Board's protection from removal by the Commission was an invalid "second level of tenure protection" on top of the Commission's own removal restriction. *Id.* at 496. And even those who have criticized *Humphrey's Executor* as a matter of first principles have recognized that it "approved the creation of 'independent' agencies" like the Commission. *In re Aiken County*, 645 F.3d 428, 441 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

In arguing otherwise, petitioner principally relies on *Seila Law*, emphasizing (Pet. 17, 19) the Court's statement that *Humphrey's Executor* characterized the Federal Trade Commissions as a quasi-legislative or quasi-judicial body that did not "wield substantial executive power." 591 U.S. at 218. But petitioner errs in treating that statement as effectively overruling *Humphrey's Executor* or limiting it to the rare agencies that would not today be recognized as exercising substantial executive power. The Court emphasized, again and again, that the Consumer Financial Protection Bureau "deviated from the structure of nearly every other independent administrative agency in our history" because it is not led by "a board with multiple members." *Id.* at 203; see, *e.g.*, *id.* at 207, 220. All of that analysis would have been unnecessary if the Bureau's mere exercise of

substantial executive power were sufficient to invalidate its removal restriction.

Even more to the point, seven Justices agreed in *Seila Law* that Congress could preserve removal protections for the Consumer Financial Protection Bureau by "converting [it] into a multimember agency." 591 U.S. at 237 (plurality opinion); see *id.* at 298 (Kagan, J., concurring in part and dissenting in part). That makes perfect sense if the *Humphrey's Executor* exception authorizes removal restrictions for traditional multimember regulatory agencies. But it makes no sense on petitioner's view, because the Bureau undoubtedly "wields significant executive power." *Id.* at 204 (majority opinion); see *id.* at 205-207 (cataloguing authorities). Petitioner cannot plausibly maintain that the closing pages of the plurality opinion invited Congress to adopt a structure that the preceding pages of the same opinion had just declared unconstitutional—yet that is the central premise of the petition.

d. Petitioner's brief alternative request (Pet. 21-23) to overrule *Humphrey's Executor* outright is equally unavailing because petitioner has not offered the sort of special justification this Court demands before overruling a precedent—let alone a longstanding precedent on which Congress has relied so extensively.

"Although 'not an inexorable command,' *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan* v. *Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (citations omitted); see *Kimble* v. *Marvel Entm't, LLC*, 576 U.S. 446, 455 (2015). Adherence to precedent "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and

contributes to the actual and perceived integrity of the judicial process." *Payne* v. *Tennessee*, 501 U.S. 808, 827-828 (1991). "For that reason, this Court has always held that any departure from the doctrine demands special justification." *Bay Mills*, 572 U.S. at 798 (citation and internal quotation marks omitted).

Petitioner does not purport to offer any special justification for overruling *Humphrey's Executor*, contending only that it is inconsistent with this "Court's current separation-of-powers sentiment." Pet. 22 (quoting *Consumers' Research* v. *CPSC*, 98 F.4th 646, 649 (5th Cir.) (Willett, J., concurring in the denial of rehearing en banc), cert. denied, No. 23-1323, 2024 WL 4529808 (Oct. 21, 2024)); see Pet. 21-23. As explained above, the restrictions on removal of multimember agencies are permissible under the Constitution, as liquidated and settled by longstanding practice. See pp. 9-13, *supra*. Nor, in any event, would petitioner's mere assertion that *Humphrey's Executor* is mistaken justify overruling it. This Court always "demand[s] a 'special justification,' over and above the belief 'that the precedent was wrongly decided,'" before reversing one of its decisions. *Allen* v. *Cooper*, 589 U.S. 248, 259 (2020). And adhering to that course is particularly appropriate here given the decades of congressional reliance on *Humphrey's Executor* in structuring key institutions of modern government.

B. Petitioner's Irreparable-Harm Argument Does Not Warrant This Court's Review

Petitioner separately contends that this Court should grant certiorari to review the court of appeals' purported holding that "separation-of-powers violations never cause irreparable harm." Pet. i; see Pet. 23-32. But the court of appeals held no such thing. It expressly

recognized that separation-of-powers violations *can* cause irreparable harm; it merely concluded that petitioner had not established such harm here because it failed to show that the challenged removal restriction has had or will likely have any effect on the challenged administrative proceeding. That holding follows directly from this Court's decision in *Collins* and does not conflict with any decision of another court of appeals.

1. In *Collins*, this Court addressed the showing that a plaintiff must make in order to secure relief from an agency action based on a claim that the agency is headed by officers subject to unconstitutional removal restrictions. 594 U.S. at 257-260. So long as the officers in question were "properly appointed," the Court explained, "there is no reason to regard" their actions as "void ab initio." *Id.* at 257-258 (emphasis omitted). Instead, a plaintiff invoking an allegedly improper removal restriction must show that the unconstitutional provision "inflict[ed] compensable harm"—that is, that the President's inability to remove the relevant officers caused the agency to do something to the plaintiff that it would not otherwise have done. *Id.* at 259; see *id.* at 260 (asking whether the statutory provision "cause[d] harm"); see also *id.* at 267 (Thomas, J., concurring); *id.* at 275 (Kagan, J., concurring in part and concurring in the judgment).

Applying *Collins* here, the court of appeals correctly held that petitioner failed to establish irreparable harm. Pet. App. 7a-35a. As the court explained, "to be entitled to relief, [petitioner] needed to demonstrate how the allegedly unconstitutional removal protections * * * actually affected, or will affect, the [Commission's] actions against it." *Id.* at 35a (citing *Collins*, 594 U.S. at 259). But petitioner "failed to make any showing that, but for

the allegedly unconstitutional removal provisions," the Commissioners "would have been removed, the [Commission] proceedings against it would not be occurring, or the proceedings would be different in any way." *Id.* at 20a. Accordingly, even if petitioner were correct on the merits of its constitutional argument, it would not be entitled to a preliminary injunction because it has not shown that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Winter* v. *Natural Res. Defense Council*, 555 U.S. 7, 24 (2008).

Petitioner contends (Pet. 23-30) that the court of appeals erred affirming the denial of a preliminary injunction, but the argument section of the petition does not even acknowledge *Collins*. Instead, petitioner asserts that the court of appeals erred by "holding that separation-of-powers claims can never establish irreparable harm." Pet. 30. In fact, the court expressly recognized that "an injunction can be appropriate relief for some separation of powers violations." Pet. App. 20a n.9. The court merely held, consistent with *Collins*, that an assertion that a removal provision is unconstitutional is not *sufficient* to establish harm absent a showing that the challenged provision will likely affect the plaintiff. *Id.* at 14a, 17a. Petitioner makes no attempt to refute that straightforward application of *Collins*.[4]

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[4] Although the argument section of the petition does not address *Collins* at all, the procedural history suggests in a single sentence (at 15) that *Collins* is distinguishable because it "involve[ed] a retrospective award of damages" rather than prospective relief. Every court of appeals to consider that argument has rejected it, explaining that "*Collins* did not rest on a distinction between prospective and retrospective relief." *Community Fin. Servs. Ass's of Am., Ltd.* v. *CFPB*, 51 F.4th 616, 631 (5th Cir. 2022), rev'd on other grounds, 601 U.S. 416 (2024); see Pet. App. 19a-20a; *CFPB* v. *Law Offices of Crystal Moroney, P.C.*, 63 F.4th 174, 180 (2d Cir. 2023), cert. denied,

Petitioner errs in asserting (Pet. 24-28) that this Court's decision in *Axon Enterprise, Inc.* v. *FTC*, 598 U.S. 175 (2023), suggests that an asserted separation-of-powers violation necessarily inflicts irreparable harm justifying preliminary injunctive relief. In *Axon*, this Court held that district courts have jurisdiction to hear certain constitutional challenges to an ongoing administrative proceeding, observing that precluding district-court jurisdiction "could foreclose all meaningful judicial review" when challengers allege that they are "being subjected" to "unconstitutional agency authority." *Id.* at 190-191 (citations omitted). But *Axon* considered only a threshold jurisdictional question; it did not address the showing that a plaintiff must make in order to secure relief. *Id.* at 180. In *Collins*, this Court emphasized that a holding on a similar threshold jurisdictional issue "should not be misunderstood as a holding on a party's entitlement to relief based on an unconstitutional removal restriction." 594 U.S. at 258 n.24. *Collins* directly addressed the latter question, and nothing in the Court's decision in *Axon* casts any doubt on the Court's holding in *Collins* that a party

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144 S. Ct. 2579 (2024); *Calcutt III* v. *FDIC*, 37 F.4th 293, 316 n.9 (6th Cir. 2022). Instead, *Collins* held that because an invalid removal restriction does not strip the covered officer of "the authority to carry out the functions of the office," a plaintiff challenging an agency action must show that the restriction actually affected the challenged action. 594 U.S. at 258, 260. Absent such a showing, the Court explained, the agency action is lawful and the removal restriction has not caused the plaintiff any harm. *Ibid.* The same principles apply when a plaintiff seeks prospective relief: Absent a showing that the action the plaintiff seeks to enjoin will likely be affected by the allegedly unlawful removal restriction, there is no basis for concluding that the action is likely unlawful or that the plaintiff is likely to suffer harm attributable to the restriction.

challenging a removal restriction must show that the restriction "inflicted harm." *Id.* at 260.

2. The court of appeals' decision does not conflict with any decision of another court of appeals. Petitioner asserts that "[o]ther circuits hold separation-of-powers violations may cause irreparable harm." Pet. 30; see Pet. 30-32. But again, the court of appeals expressly agreed with that principle. See p. 18, *supra*. The decision below thus does not conflict with any of the decisions petitioner cites (Pet. 30-31)—all of which are either vacated or otherwise nonprecedential in any event.

Indeed, petitioner has not identified any post-*Collins* court of appeals decision holding that preliminary relief is warranted where, as here, the only harm alleged by the challenger was the existence of a removal provision. Petitioner cites the D.C. Circuit's order in *Alpine Securities Corp.* v. *FINRA*, No. 23-5129, 2023 WL 4703307 (July 5, 2023) (per curiam), but the challenger in that case established irreparable harm by showing that the "ongoing FINRA enforcement proceedings would put it out of business," *id.* at *2 (Walker, J., concurring). Here by contrast, petitioner forfeited any argument about economic or reputational harm from ongoing proceedings. See Pet. App. 8a. And the Sixth Circuit recently denied an injunction pending appeal where, as here, the challenger failed to show that the allegedly unconstitutional removal provision inflicted harm. See *Yapp USA Auto. Sys., Inc.* v. *NLRB*, No. 24-1754, 2024 WL 4489598, at *1, *3 (6th Cir. Oct. 13, 2024). Justice Kavanaugh likewise denied injunctive relief. See *Yapp USA Auto. Sys., Inc.* v. *NLRB*, No. 24A348 (Oct. 15, 2024).

3. In short, petitioner provides no sound reason for this Court to review, much less reverse, the court of

appeals' holding that it failed to establish irreparable harm because it failed to show that the Commission's removal restriction has had or will likely have any effect on the ongoing administrative proceeding. And because that holding independently supports the judgment below, it also means that this case would not be an appropriate vehicle for considering petitioner's challenge to the Commission's removal protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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