No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR HARPETH FINANCIAL SERVICES, LLC, AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

This *amicus curiae* brief addresses the following questions:

1. If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?

2. If that provision can be severed, what remedy is required with respect to previous actions of the Director?

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INTEREST OF THE *AMICUS CURIAE*[1]

Harpeth Financial Services, LLC, is a financial technology provider. Doing business as Advance Financial, it provides consumer financial services online and through retail locations. As a consumer lender, it is subject to the jurisdiction of the Consumer Financial Protection Bureau under various of the statutes and regulations the Bureau administers.

INTRODUCTION AND SUMMARY OF ARGUMENT

Lobbying for the creation of what became the Consumer Financial Protection Bureau, its architect Elizabeth Warren identified complete "functional independence" from political control as the agency's central attribute. And if that could not be achieved, she said, better to have "no agency at all and plenty of blood and teeth left on the floor."[2]

Congress carried out that imperative in Title X of the Dodd-Frank Act by establishing an agency with unprecedented independence, going far beyond the restrictions on political accountability ever previously

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[1] Pursuant to Rule 37.6, counsel for the *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than the *amicus curiae* or its counsel made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to filing of this brief.

[2] Shahien Nasiripour, *Fight for the CFPA Is 'A Dispute Between Families and Banks,' Says Elizabeth Warren*, Huffington Post (May 3, 2010), https://www.huffpost.com/entry/fight-for-the-cfpa-is-a-d_n_483707.

seen or countenanced by this Court. While those features render the Bureau's structure unconstitutional, they equally demonstrate that severing the provision barring removal of the Bureau's director other than for cause would result in legislation that does not "function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis omitted).

Indeed, Congress relied on the Bureau's independence from Presidential control in ways that go well beyond Dodd-Frank itself. It empowered the Bureau to enforce and issue rules under eighteen existing financial-regulation statutes, fourteen of which have *never* been subject to enforcement by agencies under Presidential control. Severance of the removal bar would license the President to occupy a field of financial regulation that Congress established through 60 years of legislation as the exclusive province of independent agencies free from Presidential control. The same Congress that went to such great lengths to keep the President's hands off of the Bureau would clearly have rejected the wholesale transfer to the President of regulatory power under so many different statutes that would result from severance.

The Court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Railroad Retirement Bd. v. Alton R. Co.*, 295 U.S. 330, 362 (1935). Because that is what severance would do, if the Court holds the removal bar to violate the constitutional separation of powers, then the whole of Title X must fall with it.

At a minimum, the Court should hold that the Bureau's acts to date are invalid. The Executive Power is ultimately the President's, *see* U.S. Const., art. II, § 1, and subordinate officer therefore exercise delegated power. When a subordinate officer is improperly insulated from Presidential control, the delegation fails and that officer necessarily lacks authority to act. The proper remedy, then, is to recognize that the civil investigatory demand at issue here, like all the Bureau's acts to date subject to separation-of-powers objections, is invalid and that its invalidity cannot be cured by ratification, which would leave the taint of unconstitutional action.

ARGUMENT

I. The For-Cause Removal Bar Cannot Be Severed from Title X of the Dodd-Frank Act

A. Congress Regarded Independence as Fundamental to the Bureau's Design

The Bureau's independence from political control is central to its design, and it is no exaggeration to describe the provision barring at-will removal of its Director as the lynchpin of the statute. Pull the pin, and the jumble that results would be unrecognizable to the Congress that went beyond all precedent to provide the Bureau maximum independence from political, and specifically Presidential, control.

The outset of Title X proclaims, "There is established in the Federal Reserve System, an *independent* bureau to be known as the 'Bureau of Consumer Financial Protection.'" Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No.

111-203, Title X, § 1011, 124 Stat. 1376, 1964 (July 21, 2010) (emphasis added), codified at 12 U.S.C. § 5491(a). In that way, the statute "ties the CFPB's very existence to its freedom from the President." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 161 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

The Bureau, in turn, is headed by a single Director who serves for a five-year term and may not be removed by the President except "for inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b), (c).

The same four "structural attributes" of that office that the Bureau identifies as constitutionally distinguishing it from other independent-agency heads equally demonstrate that Congress regarded the Bureau's independence from Presidential control as essential to the functioning of the statute. *See* Brief for the Respondent, *Seila Law LLC v. CFPB*, No. 19-7 (filed Sept. 17, 2019) ("CFPB Brief"), at 11.

First is the single-director structure, precisely tailored to promote the Bureau's independence. As the Bureau explains, what justifies restrictions on the President's authority to remove members of an independent multi-member commission is Congress's interest in facilitating "deliberative group decisionmaking" that brings to bear expertise and "institutional continuity" in carrying out quasi-legislative and quasi-judicial functions. CFPB Br. at 11–12 (discussing *Humphrey's Executor v. United States*, 295 U.S. 602, 624, 628 (1935)).

The Bureau, however, is not structured to promote the deliberative application of expertise—with whom would the single Director deliberate? Instead, "a single-headed agency embodies a quintessentially executive structure," one that facilitates (as Justice Story put it) "'decision, activity, secrecy, and dispatch.'" CFPB Br. at 12 (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1414, at 283 (1833)). These are, as the Bureau recognizes, the essential characteristics of that most independent of offices, the Presidency. *Id*. Congress placed the Bureau under the control of a junior-varsity president, rather than a body of experts, so that it could exercise Presidential-style independence.

Second is the unique ability of a single-headed independent agency to take actions at odds with, or even undercut, the President's policies. Other independent agencies typically are comprised of multiple members serving staggered terms, which ensures a President the opportunity to appoint members, and are subject to bipartisan-membership requirements, assuring that at least some members are likely to share the President's views. Those features substantially reduce the ability of independent agencies to buck the President.

Freed from those structural constraints, the Bureau Director acts with complete independence. As the Bureau explains, "a single Director can decisively implement his own views and exercise discretion" in ways that conflict with the President's executive policy. CFPB Br. at 13. Congress surely anticipated and intended that there would be conflict. For one thing, the Director's five-year term ensures that, when there is a change in the party holding the Presidency, the Director will be a holdover. *See* 12 U.S.C. 5491(c)(1). For another, the Bureau, unlike nearly all other agencies, has independent litigating authority even in this Court, so that it can press positions opposed by the Department of Justice and ultimately the President. *See id.* § 5564(b). And the prospect of conflict is only increased by the Bureau's wide-ranging policymaking and enforcement authority that reaches so many areas of the private economy. *See id.* §§ 5511–18.

As the Bureau observes, giving the Director the upper hand over the President in this way "represents a stark departure from the Constitution's framework." CFPB Br. at 13. But it was Congress's considered choice to make that departure so as to provide the Bureau unique independence.

Third is the novelty of the single-headed independent agency structure. *See* CFPB Br. at 14. While "the lack of historical precedent" for a new structure is "[p]erhaps the most telling indication of [a] severe constitutional problem," *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 505 (2010) (citation omitted), it is an even more telling indication of Congress's intention to depart from precedent. And it is a matter of fact that Congress deliberately departed from its model for the Bureau, the Consumer Safety Product Commission,[3] a multi-member agency with staggered terms for members and a bipartisan-

[3] *See, e.g.*, Elizabeth Warren, *Unsafe at Any Rate*, Democracy Journal (Summer 2007, No. 5), https://democracyjournal.org/magazine/5/unsafe-at-any-rate/; 156 Cong. Rec. 6219 (Sen. Dodd); *id.* at 6237 (Sen. Whitehouse); *id.* at 6239 (Sen. Merkley); *id.* at 6363 (Sen. Durbin).

membership requirement. 15 U.S.C. § 2053(b), (c). The reason that Congress departed in the way that it did from the standard model for independent agencies was to achieve even greater independence for the Bureau.

Fourth is Congress's adoption of an extreme view of the separation of powers that lacks any limiting principle to cabin restrictions on Presidential control. The Bureau is correct to warn that a pinched understanding of the separation of powers that permits the Director to be free from Presidential control would license Congress to establish the independence of any executive office, up to and including department heads. *See* CFPB Br. at 15–16. That understanding of the separation of powers would be an extreme departure from tradition, practice, and judicial precedent. The fact that Congress adopted such an extreme view of its own authority to cut the President out of the execution of the laws reflects its determination, in the face of so much contrary authority, to establish a truly "independent bureau." 12 U.S.C. § 5491(a).

In short, the same attributes that make the removal bar unconstitutional equally demonstrate its essential place in the statutory scheme. Severing that provision would subject the Bureau to Presidential control and result in a statute that cannot "function in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted). The Congress that blocked even the Federal Reserve—an independent agency whose members may only be removed "for cause," 12 U.S.C. § 242—from "interven[ing] in any matter or proceeding" before the Bureau, 12 U.S.C. § 5492(c)(2)(A), would never have accepted a Bureau subject to domination by the President. Because a President-controlled Bureau is something that Congress "would not have enacted," *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018), severance must be rejected.[4]

Moreover, severance would impermissibly upset the balance of powers struck by Congress. In its zeal to insulate the Bureau from all manner of political control and influence, Congress not only handicapped the President but also itself. The Bureau stands outside the congressional appropriations process, free from the oversight and influence that accompanies the exercise of the power of the purse. Rather than go hat in hand to Congress, the Director sets the Bureau's budget herself, demands its funding directly from the Federal Reserve, and is shielded in those actions from "review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497.

That Congress weakened its own hand reflects its imperative of ensuring the Bureau absolute independence from politics. *See* S. Rep. No. 111-176 (2010), at 163 (finding that "adequate funding, independent of the Congressional appropriations process, is absolutely essential" to CFPB's "independent operations"); 156 Cong. Rec. 8931 (Sen. Dodd) ("[T]he [CFPB's] funding will be independent and reliable so

[4] It is also unclear that severance would result in a statute "fully operative as a law," *Free Enter. Fund*, 561 U.S. at 509, given that it would lead to the placement of an executive agency within the independent Federal Reserve.

that its mission cannot be compromised by political maneuvering.”).

At the same time, Congress could give up its own control over the Bureau only because it also denied the President control—after all, the point was *complete* independence from the political branches, not Presidential control free from congressional oversight. Severing only the removal bar would fundamentally “alter[] the balance of powers between the Legislative and Executive Branches,” *Alaska Airlines*, 480 U.S. at 685, resulting in a misshapen statute that a Congress so wary of political and specifically Presidential meddling with the Bureau’s affairs would have rejected out of hand. *See also Bowsher v. Synar*, 478 U.S. 714, 734 (1986) (expressing concern that severance of congressional-removal provision would leave the Comptroller General “subservient to the Executive Branch” and thereby “significantly alter…the balance that Congress had in mind”).

Finally, the Bureau’s backers in Congress were outspoken that the Bureau’s independence was essential to achieving its consumer-protection mission without being hamstrung (as they considered other financial regulators to have been) by “industry capture and heavy-handed political interference by Congress and the White House.” Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 339 (2013).

Senator Chris Dodd, a primary author of the Act, expressly connected the Bureau’s “independent” status with the need to avoid “political maneuvering.”

156 Cong. Rec. 8931 (2010). That concept—that independence was essential to achieving the Bureau's purpose—is echoed throughout the hearings and debates over the bill. *See, e.g.*, *id.* at 6365 (Sen. Whitehouse) (stating that the bill created a "strong" and "independent" consumer protection agency sufficient to "look out after the little guy"); *id.* at 13135 (Sen. Cardin) (stating that Dodd-Frank "will create a consumer bureau…that will be on the side of the consumer, that is independent, so the consumer is represented in the financial structure"); *id.* at 11814 (Rep. Lee) ("[T]his bill will create an independent agency that remains independent and puts consumers first."); *id.* at 3187 (Sen. Kaufman) (arguing that that the nation "must have an independent Consumer Financial Protection Agency, CFPA, that has strong and autonomous rule-making authority and the ability to enforce those rules").

Congress's design was to establish a Bureau that was "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." *Id.* at 12434 (Rep. Maloney). To strike only the removal bar, while leaving the remainder of Title X in place, would be to rewrite the statute to adopt an executive-agency model at odds with Congress's design. That the Court may not do.

B. Severance Would Radically Transform Financial Regulation, Upending the Balance Struck by Congress Over Decades

Severance of the removal bar would result in what may be the greatest transfer of statutory authority to the President of any of the Court's decisions. Title X conferred rulemaking and enforcement authority on the Bureau under eighteen preexisting financial-regulation statutes, and fourteen of them have *never* been subject to administration by an agency under Presidential control. A decision striking the removal bar would transform the field of financial regulation from one administered by independent expert agencies to one subject to the political interests of the President. Whatever the policy and constitutional merit of that transformation, it would have been anathema to the Congress that went to such great lengths to keep the President out of the financial-regulation space.

Title X contains a list of eighteen "enumerated consumer laws" that predate the Bureau's creation by as much as sixty years. 12 U.S.C. § 5481(12). Those laws, in turn, are part of a broader category of "Federal consumer financial law," *id*. § 5481(14), and the Bureau is "authorized…to administer, enforce, and otherwise implement the provisions of Federal consumer financial law," including through rulemaking, *id*. § 5512(a). Four of the enumerated consumer laws are subject to enforcement by the Department of Housing and Urban Development.[5] The remaining fourteen

[5] Those are the S.A.F.E. Mortgage Licensing Act of 2008, 12 U.S.C. § 5101 *et seq*.; the Interstate Land Sales Full Disclosure

are administered only by independent financial regulators.

Congress has placed primary responsibility for financial regulation in the hands of independent expert agencies for as long as there have been federal financial regulations and independent agencies. *See generally* James Landis, *The Administrative Process* 26, 111 (1938) (discussing Congress's use of independent agencies to free financial regulation from "political influence"). "The dominant paradigm in the U.S. financial regulatory apparatus has long centered on independent agencies like the Federal Reserve, the Federal Deposit Insurance Corporation, and the Securities and Exchange Commission." Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 Cal. L. Rev. 327, 330 (2013).

In Congress's view, expressed through decades' worth of statutory enactments, independent agencies are uniquely suited to carry out financial regulation. "Free from the constraints of electoral battles, independent agencies can devote their energy toward building up expertise and developing the skills and knowledge necessary to delve into the intricate details of highly technical regulatory areas." *Id.* Likewise, they "can prioritize long-term policy goals over immediate gains and ensure regulatory stability" in ways

Act (1968), 15 U.S.C. § 1701 *et seq.* (also administered by the Federal Trade Commission); the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. § 2601 *et seq.* (also administered by the Federal Reserve); and the Home Mortgage Disclosure Act of 1975, 12 U.S.C. § 2801 *et seq.* (also administered by the FDIC, Federal Reserve, NCUA, and OCC).

that those subject to the influence of political affairs cannot. *Id*. at 331.

Accordingly, the "defining feature" of financial regulators is their independence from Presidential control, particularly through restriction of the President's removal authority. *Id*. at 337. "The vast majority of financial regulators enjoy protection from removal from office, often coupled with budgetary autonomy from Congress and other indicia of independence, such as exemption from White House regulatory oversight." Gillian E. Metzger, *Through the Looking Glass to A Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 Law & Contemp. Probs. 129, 130 (2015).

The fourteen statutes at issue here are in the heartland of financial regulation, addressing important financial and economic matters that (in Congress's view) call for the application of expertise through deliberation, free from the influence of electoral politics:

1. <u>The Federal Deposit Insurance Act (1950)</u>. Also enforced by the Federal Trade Commission ("FTC") and by the Office of Thrift Supervision ("OTS"),[6] the provision assigned to the Bureau regulates disclosures by banks and other depository institutions. 12 U.S.C. § 1831t(b)–(f).

2. <u>The Truth in Lending Act (1968)</u>. Also enforced by the FTC, Office of the Comptroller of the Currency

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[6] OTS was dissolved by Dodd-Frank, and its functions were transferred to other independent agencies. *See* 12 U.S.C. § 5412. For ease of reference, and to track the language of the statutes at issue, this brief uses "OTS" to refer to its transferred functions.

("OCC"), Federal Reserve, Federal Deposit Insurance Corporation ("FDIC"), National Credit Union Administration ("NCUA"), and OTS, the Act regulates many aspects of consumer lending, including disclosures, prohibitions on certain costs and practices, recordkeeping requirements, and rate limitations. 15 U.S.C. § 1601 *et seq*.

3. The Fair Credit Reporting Act (1970). Also enforced by the FTC, Federal Reserve, FDIC, NCUA, OCC, and OTS, the Act comprehensively regulates credit reporting and the use of credit reports. 15 U.S.C. § 1681 *et seq*.

4. The Equal Credit Opportunity Act (1974). Also enforced by the FTC, OCC, Federal Reserve, FDIC, and NCUA, the Act prohibits discrimination by lenders against credit applicants and imposes notification and disclosure requirements on lenders. 15 U.S.C. § 1691 *et seq*.

5. The Fair Credit Billing Act (1974). Also administered by the FTC, OCC, Federal Reserve, FDIC, and NCUA, the Act regulates creditors' billing practices, including the correction of billing errors. 15 U.S.C. § 1666 *et seq*.

6. The Consumer Leasing Act of 1976. Also administered by the FTC, OCC, Federal Reserve, FDIC, and NCUA, the Act comprehensively regulates consumer personal property leases that exceed four months in duration. 15 U.S.C. § 1667 *et seq*.

7. The Fair Debt Collection Practices Act (1977). Also administered by the FTC, OCC, Federal Reserve,

FDIC, and NCUA, the Act comprehensively regulates debt-collection practices. 15 U.S.C. § 1692 *et seq*.

8. The Electronic Fund Transfer Act (1978). Also administered by the FTC, OCC, Federal Reserve, FDIC, and NCUA, the Act comprehensively regulates electronic fund transfers by consumers, including limitations on losses and liability. 15 U.S.C. § 1693 *et seq*.

9. The Alternative Mortgage Transaction Parity Act of 1982. Also administered by the OCC and NCUA, the Act authorizes and regulates certain alternatives to conventional fixed-rate mortgages. 12 U.S.C. § 3801 *et seq*.

10. The Truth in Savings Act (1991). Also administered by the Federal Reserve, FDIC, NCUA, and OTS, the Act regulates disclosure of depository-account terms to consumers. 12 U.S.C. § 4301 *et seq*.

11. The Home Owners Protection Act of 1998. Also administered by the FDIC and NCUA, the Act regulates the cancellation or termination of private mortgage insurance, as well as disclosure and notification requirements. 12 U.S.C. § 4901 *et seq*.

12. The Home Ownership and Equity Protection Act of 1994. Also administered by the FTC, OCC, Federal Reserve, FDIC, and NCUA, the Act regulates certain refinances and closed-end home equity loans. 15 U.S.C. § 1601.

13. The Gramm-Leach-Bliley Act (1999). Also administered by the FTC, Federal Reserve, OCC, FDIC, and NCUA, the provisions assigned to the Bureau regulate financial institutions' information-privacy practices. 15 U.S.C. §§ 6802–09.

14. The Omnibus Appropriations Act of 2009. Also administered by the FTC, the provision assigned to the Bureau authorizes rulemaking and enforcement with respect to unfair or deceptive acts or practices involving mortgage loans. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, § 626, 110 Stat. 3009 (1996).

"Reinventing the CFPB as an executive agency through excision of section 5491(c)(3) would by judicial decree transfer to the executive branch far-reaching new powers that, before Title X, resided with several non-executive agencies." *PHH*, 881 F.3d at 162 (Henderson, J., dissenting). And there is absolutely no indication that Congress would have done that itself; to the contrary, across fifteen separate enactments—the fourteen enumerated above and Title X—it took pains to insulate these financial-regulation statutes from Presidential administration. That further confirms what should now be plain: the Bureau's independence was an essential assumption for the enactment of Title X, such that the removal bar cannot be severed.

C. The Act's Severability Clause Does Not License Rewriting the Statute

Against the overwhelming and unequivocal evidence that independence from Presidential control was essential to the enactment of Title X stands only one thing: Dodd-Frank's boilerplate severability clause located over 500 pages before Title X and referenced nowhere in it. *See* 12 U.S.C. § 5302. That clause cannot bear the weight the Bureau would place upon it and does not license the Court to cut out the statute's heart, the Bureau's independence.

A severability clause does no more than "create[] a presumption that Congress did not intend the validity of the statute in question to depend on the validity of the constitutionally offensive provision." *Alaska Airlines*, 480 U.S. at 686. The Court regards such clauses as merely "provid[ing] a rule of construction which may sometimes aid in determining [congressional] intent" with respect to severance of a defective provision. *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924). A severability clause "is an aid merely; not an inexorable command." *Id*.

Dodd-Frank's severability clause does not permit severance of the removal bar because that provision is "inextricably bound together" with the remainder of Title X. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 83 (1976); *see also Hill v. Wallace*, 259 U.S. 44, 70 (1922) (no severance where provisions were "so interwoven…that they cannot be separated"). From the Bureau's conception through to its enactment in Dodd-Frank, the central organizing principle for it was that complete insulation from political control would allow it to serve consumers' interests in a way that other agencies—beholden to Congress, the President, or both and too often captured by industry—could not and did not.

That intention is reflected throughout Title X, beginning with its establishment of an "independent bureau," through the at-will removal bar, its independence from the Federal Reserve, its independence from the appropriations process, the authority to administer scores of preexisting independent-agency statutes, its independent litigation authority, and ultimately the vesting of enormous unilateral authority in a Director whose freedom from oversight and restraint would facilitate presidential-style dispatch and vigor to advance consumer interests.

Had Congress enacted a "fallback" like in *Bowsher*, 478 U.S. at 735–36, that replaced the single-head structure with a multi-member commission, its intentions for the Bureau could be preserved, at least in some measure. But it did not, and the Court lacks the authority to frame a new regulatory body itself.

Severance would rewrite the statute no less than the Court's legislating a commission to replace the Director, because it would "create a program quite different from the one the legislature actually adopted," *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). And that would "be a more extreme exercise of the judicial power than striking the whole statute." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting). The authority to take that drastic step resides exclusively with Congress.

D. The Court Must Reach the Severability Issue as a Jurisdictional Matter

The Court must decide whether the at-will removal bar can be severed from Title X because that question controls whether the district court had, and this Court has, jurisdiction over the Bureau's action to enforce a civil investigative demand. The Court's jurisdiction is implicated in two separate respects.

First, this case relies entirely on subject-matter jurisdiction conferred in Title X. The Bureau brought this enforcement action under a Title X provision authorizing enforcement of civil investigative demands. *See* Pet.App.2a (citing 12 U.S.C. § 5562(e)(1)). The petition for enforcement relied exclusively on the district court's subject-matter jurisdiction under another Title X provision, 12 U.S.C. § 5562(e)(1). Petition To Enforce Civil Investigative Demand, at ¶ 3, *CFPB v. Seila Law, LLC*, No. 17-cv-1081 (C.D. Cal. filed June 22, 2017). Accordingly, the Court's "independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party," *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006), requires it to decide whether that jurisdictional provision (along with the remainder of Title X) survives invalidation of the removal bar.

Second, the Bureau's standing to maintain this action, and thus the Court's Article III jurisdiction, depend on the Bureau's rights under Title X and the availability of relief under Title X. The Bureau's right to issue civil investigatory demands and the district court's power to enforce them are authorized by provisions of Title X, 12 U.S.C. § 5562(c), (e)(1). If the removal bar cannot be severed from the remainder of Title X, then the Bureau had no right to issue the demand here, suffered no "concrete harm" from the Petitioner's alleged failure to comply with the demand, and therefore does not "satisfy the injury-in-fact requirement of Article III." *Spokeo v. Robbins*, 136 S. Ct. 1540, 1549 (2016). Likewise, absent severance, the district court lacked authority to redress the Bureau's claimed injury, also defeating standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Accordingly, the Court's "obligation to assure [itself] of jurisdiction under Article III," *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018), requires it to decide severability.

Pragmatism counsels the same. The chaos that would follow a decision that holds the removal bar unconstitutional without addressing severability cannot be exaggerated. Every single action the Bureau takes would be shot through with confusion and uncertainty, destroying the Bureau's ability to function. Likewise, regulated entities subject to the Bureau's jurisdiction would have no way of ascertaining the law that they are bound to follow. Risk-avoidance would lead most to continue to comply with the Bureau's edicts, forcing them to bear what may prove to be unnecessary and unwarranted burden, if Title X subsequently falls.

II. If the Removal Bar Can Be Severed, the Court Must Hold the Bureau's Actions to Date Invalid

If the Court holds the Director's removal provision unconstitutional but also severable, it must then confront the question of the proper remedy for the Petitioner. *Lucia*'s remedial analysis provides the proper model. It recognizes, as the Court has in previous cases involving both the Appointments Clause and removal restriction, that a separation-of-powers violation deprives an officer of authority to act and thereby renders invalid that officer's actions taken prior to the defect's being cured. It also recognizes that the constitution requires that such acts be deprived of all force by requiring the agency, should it wish to proceed on remand, to exercise its discretion anew, untainted by the unconstitutional action. Here, that precludes ratification of prior actions taken by the Director.

A. The Actions of an Official Unconstitutionally Insulated from Removal Are Invalid

Holding invalid the actions that the Director has taken while unconstitutionally insulated from the President's removal authority is necessary because an officer improperly insulated from Presidential control lacks legal authority. Put simply: when "an unconstitutional removal protection breaks the 'chain of dependence' between the officer and the President, the delegation breaks down too." *Collins v. Mnuchin*, 938 F.3d 553, 628 (5th Cir. 2019) (en banc) (Willett, J., dissenting in part). Therefore, "[a]n unconstitutionally-insulated officer lacks authority to act." *Id.*

That logic applies here. Executive Branch officers other than the President and Vice President necessarily exercise delegated power. The "executive power" is "vested in [the] President of the United States of America," and it is the President's duty to "take care that the laws be faithfully executed." U.S. Const., art. II, §§ 1, 3. That power and duty may be delegated to subordinate officers. *See, e.g.*, *Wolsey v. Chapman*, 101 U.S. 755 (1880); *Williams v. United States*, 1 How. 290 (1843). Such a delegation requires that "'those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved.'" *Free Enter. Fund*, 561 U.S. at 498 (quoting 1 Annals of Cong. 499 (J. Madison)). When the chain is instead broken, as through an improper appointment or insulation from Presidential control, the officer lacks authority to act, and her "acts" are necessarily invalid. *Id.*

The Court's recent decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), illustrates the principle. *Lucia* held that the Securities and Exchange Commission's administrative law judges were officers of the United States subject to the Appointments Clause and had not been appointed as the Clause requires. *Id.* at 2055. That, in turn, rendered the actions taken by the ALJ in the petitioner's hearing invalid, such that the petitioner was entitled to "a new hearing before a properly appointed official." *Id.* (quotation marks omitted); *see also NLRB v. Noel Canning*, 573 U.S. 513, 521 (2014) (affirming that order issued by Board that lacked quorum because of Appointments Clause violation was "invalid").

Invalidation is likewise required for acts by an officer improperly insulated from removal. This is, in fact, the remedy applied by the Court in its only case to present the issue, *Bowsher v. Synar*, 478 U.S. 714 (1986). *Bowsher* held an act authorizing the Comptroller General to make budget cuts violated the separation of powers because the Comptroller General was removable only by Congress, not the President. *Id*. at 733–34. The Court therefore affirmed the remedy entered by the court below: that a sequestration order entered at the Comptroller General's behest was completely invalid, "without legal force or effect." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986).

Free Enterprise Fund is not to the contrary. There, the Court considered an action for pre-enforcement review of portions of the Sarbanes-Oxley Act brought by a regulated accounting firm that had been criticized by the Public Company Accounting Oversight Board ("PCAOB") but had not been subject to formal action by the PCAOB at the time of its lawsuit. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-cv-0217, 2007 WL 891675, at *1 (D.D.C. Mar. 21, 2007). The Court accordingly issued "declaratory relief sufficient to ensure that the reporting requirements and auditing standards to which [the petitioners] are subject will be enforced only by a constitutional agency accountable to the Executive." *See Free Enter. Fund*, 561 U.S. at 513. As PCAOB had not taken any action against the petitioners, there was nothing further to do. *See Salazar v. Buono*, 559 U.S.

700, 718 (2010) (plurality) ("A court must find prospective relief that fits the remedy to the wrong or injury that has been established.").

This case, by contrast, involves not pre-enforcement review in the absence of agency action, but the validity of an action already taken by an agency whose structure violates the separation of powers. The proper remedy is therefore is to invalidate that action, as in *Lucia* and *Bowsher*.

To rule otherwise would create an unjustifiable inconsistency with the Court's Appointments Clause cases. The Constitution's structural protections with respect to appointment and removal are analogous, because "the power of removal from office is incident to the power of appointment," *Keim v. United States*, 177 U.S. 290, 293 (1900), and both ultimately serve to promote accountability and liberty, *see Freytag v. Comm'r*, 501 U.S. 868, 880 (1991) (discussing Appointments Clause); *Free Enter. Fund*, 561 U.S. at 492–93 (discussing removal power); *Bond v. Unites States*, 564 U.S. 211, 222 (2011). Imposing a lesser remedy for removal-related violations would be to break that otherwise perfect symmetry and impermissibly relegate the Take Care Clause to second-class status among the Constitution's structural protections.

Indeed, the President's authority to take care that the law is faithfully executed is more severely impaired by a defect in removal authority than it is a defect in appointment authority. In the case of an improper appointment, the President (or, in some cases, another lawful constitutional officer) may ensure accountability through the prospect of removal. But where the defect is in removal, the President is powerless to ensure that the law is faithfully executed, and the people powerless to elect a President who can faithfully execute the law. *See Free Enter. Fund*, 561 U.S. at 498.[7]

Because an unconstitutionally insulated officer lacks constitutional authority to act, that officer's actions are necessarily invalid.

B. Invalidation Is Necessary To Redress Petitioner's Injury

Moreover, invalidation of the challenged action is necessary to redress the Petitioner's injuries. The Petitioner is not generally aggrieved because its regulator is structured unconstitutionally; instead, the Petitioner is the subject of a civil investigative demand issued under the authority of the Director. Pet.App.2a. Merely declaring invalid the at-will removal bar would not, in itself, redress the injury underlying this lawsuit.

Instead, the proper course is to provide "remedies…tailored to the injury suffered," *United States v. Montalvo-Murillo*, 495 U.S. 711, 721 (1990). In this instance, that requires invalidating the civil investigative demand. Only that remedy would relieve the Petitioner from being subject to an action that was

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[7] It should not go unnoticed that that precise scenario nearly played out when the Bureau's first appointed director attempted to install a successor opposed by the President at the time. Tara Siegel Bernard, *"Dueling Appointments Lead to Clash at Consumer Protection Bureau,"* N.Y. Times, Nov. 24, 2017, at A1.

unlawful on the day that it was made. By contrast, a remedy that does no more than declare invalid and sever the removal bar "affords Plaintiff no relief whatsoever" because its complaint is not about future injury, but "a past decision made by" an improperly insulated officer. *Collins*, 938 F.3d at 609–10 (Oldham, J., concurring in part and dissenting in part); *cf. Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (recognizing that the plaintiff would have to seek different relief depending on whether he brought a pre- or post-enforcement challenge).

C. Following *Lucia*, the Court Should Preclude Ratification of the Bureau's Invalid Action

To remedy the constitutional error underlying the Bureau's action here, the Court should preclude the Bureau, on any remand, from ratifying its invalid action. Instead, the Bureau, led by a newly accountable Director, must exercise its discretion anew, subject to Presidential control. To permit it to do otherwise would allow the taint of its invalid action to remain and deny the Petitioner meaningful relief.

Lucia recognizes that the Constitution may require going beyond mere invalidation of an action by an officer lacking constitutional authority. It was not enough, the Court held, to declare the action challenged there invalid and order a new hearing. Instead, "[t]o cure the constitutional error, another ALJ (or the Commission itself) must hold the new hearing to which [the petitioner] is entitled." *Id.* at 2055. In other words, what was required was a completely new exercise of discretion, one untainted by prior actions taken without constitutional authority. And only absolute "necessity," the Court held, would permit anything less than that. *Id*. at 2055 n.5.

Lucia dictates that the same remedy is required here: a new exercise of discretion by the Bureau untainted by its previous acts taken without the accountability that the Constitution demands. Ratification of invalid acts is inconsistent with that requirement, because it accepts as its baseline actions that were unchecked by Presidential control. While the Bureau may have authority and discretion to take a similar action on remand—here, issuing a new civil investigative demand—it actually has to exercise that discretion, subject to the influence of constitutionally-required control, and following the procedures prescribed by law.

To permit the Bureau to proceed otherwise would render enforcement of the separation of powers, and the Court's decision here, an empty formality, at least so far as litigants are concerned. But separation-of-powers remedies "are designed not only to advance" the structural design of the Constitution itself, "but also to create incentives to raise [] challenges," without which the separation of powers would go unenforced. *Lucia*, 138 S. Ct. at 2055 n.5 (cleaned up).

CONCLUSION

The Court should hold that the Bureau's structure violates the separation of powers and that 12 U.S.C. § 5491(c)(3) cannot be severed from Title X of the Dodd-Frank Act.

Respectfully submitted,

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