No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, *Petitioner*

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

AMICUS BRIEF OF U.S SENATORS
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AND M. MICHAEL ROUNDS
SUPPORTING PETITIONER

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INTRODUCTION AND INTERESTS OF *AMICI*[1]

The severability question presented here raises a separation-of-powers issue that is at least as important to our constitutional structure as the President's authority over the removal of federal officials. Indeed, the severability question goes to the heart of the relationship between the first branch of government—Congress—and the Judicial Branch. It would be ironic indeed if this Court, in an effort to prevent an incursion into the prerogatives of the Executive Branch, engaged in its own independent incursion into the prerogatives of Congress. Yet that is what will likely happen unless this Court disregards—or uses this case to revisit—its prior cases on severability.

Amici are U.S. Senators Mike Lee of Utah, James Lankford of Oklahoma, and M. Michael Rounds of South Dakota. As three members of the United States Senate, *Amici* have a unique and profound interest in the Court's resolution of the severability issue. The Constitution tasks Congress, not the Judicial Branch, with making the law. Yet this Court's severability caselaw improperly requires it to attempt to divine legislative intent in determining whether to sever an unconstitutional provision or to find the entire statute (or section of a statute) unconstitutional.

Such attempts are futile. As Senators, *Amici* are particularly qualified to confirm that Congress is not

[1] The parties have consented to the filing of this brief, and their letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than *Amici* and their counsel made such a contribution.

monolithic. Thus, determining what Congress would have wanted had it known that a particular statutory provision would be deemed unconstitutional is an impossible endeavor even where, as here, a statute has a severability clause. "Severing" an unconstitutional provision from a broader statute or section is necessarily a legislative act. The end result is always a law that Congress *did not pass* and that the President *did not sign*. *Amici* have a strong interest in preventing judicial usurpation of an inherently legislative process and in protecting the proper role of Congress and its co-equal branches in our constitutional republic.

STATEMENT

This case presents a constitutional challenge to a provision of the Dodd-Frank Act (Act), which provides that the President can remove the Director of the Consumer Financial Protection Bureau (CFPB) *only* for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. 5491(c)(3). Petitioner Seila Law LLC is a law firm that "provides a variety of legal services to consumers." Pet. 4. When the CFPB—headed by a Director statutorily insulated from presidential control—issued a civil investigative demand seeking information from Petitioner, it objected based on the CFPB's unconstitutional structure. *Ibid.* CFPB then successfully sought enforcement of its demand in federal district court, and the Ninth Circuit affirmed. *Ibid.* Petitioner sought certiorari on the question whether the CFPB's structure violates the separation of powers. *Id.* at I. This Court granted certiorari and directed the parties to brief an additional question, namely whether the removal restriction, 12 U.S.C. 5491(c)(3), if unconstitutional, can be severed from the rest of Title X, the portion of the Act in which the removal restriction appears. *Seila Law LLC v. Consumer Financial Prot. Bureau*, No. 19-7 (Oct. 18, 2019).

SUMMARY OF ARGUMENT

If this Court determines that the CFPB is unconstitutionally structured, it should *not* conduct a severability analysis to determine whether the for-cause removal provision of the Dodd-Frank Act can be severed from the rest of Title X. Instead, the Court should craft a remedy that is narrow enough to resolve the controversy between the parties in this case, and leave the broader remedial questions to Congress, at least in the first instance. For several reasons, adopting a narrow remedy would be far better than either (1) severing the removal provision or (2) finding the provision nonseverable and invalidating all of Title X.

1. Several Terms ago, Justice Thomas expressed two concerns with this Court's severability doctrine that are particularly salient here. First, when the Court undertakes a severability analysis—even if Congress has enacted a severability clause—the Court's existing doctrine seeks to determine "congressional intent." But the very concept of "congressional intent" is nebulous. And the process of seeking it often involves ignoring statutory text—which, of course, is the only medium through which Congress, a co-equal branch of government, can make its will known.

Second, a severability analysis generally takes place only *after* the Court has resolved the controversy between the parties. Because of this, if the Court finds an unconstitutional provision is non-severable, the

Court will essentially be issuing an opinion on the constitutionality of the act or section as a whole—including provisions that no party before the Court has challenged. To answer questions beyond the controversy's scope is to render an advisory opinion.

Justice Thomas' concerns find support in several additional considerations. Most important, severing a statute is necessarily a legislative act, and the process of severance, therefore, necessarily intrudes into Congress' Article I authority.

Moreover, in a case like this, there is no principled reason to remedy an incursion into the President's removal power by severing the statute rather than by providing a narrow, case-specific remedy—such as simply vacating the order enforcing the investigative demand at issue here. That is the approach the Court has taken with other violations of the constitutional separation of powers, and it is what the Administrative Procedure Act would ordinarily require.

2. Rather than addressing broader questions of severability, if the Court finds that the CFPB's structure violates the Constitution, the Court should simply hold that the CFPB's investigative demand to Petitioner is unenforceable. That approach would preserve the Court's institutional integrity while allowing Congress to address the broader remedy in the first instance. It would also provide a remedy that makes Petitioner whole and resolves the underlying controversy without requiring the Court to inquire into congressional intent or issue an advisory opinion about the constitutionality of the remainder of Title X or the entire Act. Allowing Congress to address the broader severability issue would also allow *it* to decide whether

to retroactively ratify the CFPB's actions and thus limit the effect of this Court's ruling to Petitioner, or to amend the statute in a way that would provide relief to other parties as well.

In short, the Court should leave it to Congress to determine, at least in the first instance, the severability consequences of any decision holding that the Act's removal provision violates the Constitution.

ARGUMENT

I. IF A COURT CONCLUDES THAT A PORTION OF A FEDERAL STATUTE IS UNCONSTITUTIONAL, IT SHOULD ORDINARILY ALLOW CONGRESS TO DETERMINE HOW THE DEFECT SHOULD BE REMEDIED.

By design, the United States Constitution vests legislative and judicial powers in different departments or branches. And it gives Congress *alone* the authority to make all laws that are necessary and proper to carrying out its enumerated powers. U.S. Const. art. I, § 8, cl. 18. Consistent with that constitutional delegation of power, federal courts can and should allow *Congress* to fix constitutional defects in laws it has enacted, following the prescribed pattern of bicameralism and presentment.

A. Justice Thomas has correctly identified two compelling reasons for courts to leave severability issues to Congress, at least in the first instance.

Two terms ago, Justice Thomas correctly recognized that the practice of severing an unconstitutional provision from a statute conflicted "with longstanding limits on the judicial power." *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring). He identified two compelling reasons.

1. The first is that the Court's current severability doctrine fails to follow "basic principles of statutory interpretation." *Ibid.* The current doctrine asks whether the legislature would have "preferred what is left of its statute to no statute at all." *Ayotte* v. *Planned Parenthood of N. New England*, 546 U.S. 320, 330 (2006). Yet, even assuming there is an identifiable congressional intent absent bicameralism and presentment—which is dubious at best, see, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 951 (1983), no one is qualified to discern that intent. Certainly federal courts are ill-equipped to divine that intent when attempting to do so would require an impossible inquiry into the minds of 535 independent and freethinking members of two houses of Congress.

Further, as Justice Scalia correctly recognized, "it is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated. . . . It is the *law* that governs, not the intent of the lawgiver." Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997).

The problems inherent in government by legislative intent—rather than by law—are only exacerbated when courts hold statutes partially unconstitutional. In those instances, the severability doctrine allows this Court to give effect to "legislators' *hypothetical* intentions," despite the reality that no such collective intent was ever formed. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring) (internal quotation marks omitted).

The means through which federal courts determine Congress's putative intent highlight just how far severability doctrine has strayed from the rudimentary principles of statutory interpretation that the Court otherwise employs. In some severability cases, for example, courts have engaged in a "wide-ranging search for *indicia* of lawmaker's intent," including consideration of "legislative history and the context in which the statute was enacted in an effort to identify the legislature's preferred fallback law." Brian Charles Lea, *Situational Severability*, 103 Va. L. Rev. 735, 787 (2017) (emphasis added). Such considerations ignore both the primacy of statutory text and the source of that primacy—namely, the law-making authority granted solely to Congress by Article I, and the related processes of bicameralism and presentment. Legislative histories and "historical context" have gone through neither process and ignore the constitutional grant of authority. See *BNSF Ry. Co.* v. *Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (unenacted legislative history is not truly legislative at all, "having failed to survive bicameralism and presentment").

The problem with severability is no less apparent where, as here, Congress has included a severability clause in the enacting legislation. See, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 586 (2012) (citing 42 U.S.C. 1303). Under this Court's severability cases, even a duly enacted severability clause creates only a rebuttable presumption that "the objectionable provision can be excised." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 686 (1987). Indeed, this Court has long considered severability clauses to be, at best, *probative* of legislative intent, not dispositive of it. See *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."). And under that doctrine, litigants can rebut this presumption the same way that severability would be determined in the *absence* of the clause—by looking for evidence of congressional intent. *Alaska Airlines, Inc.*, 480 U.S. at 686. Under current doctrine, therefore, even express severability clauses require this Court to determine Congress' hypothetical preferences.

That "strong evidence" of Congressional intent is needed to rebut a severability clause—rather than mere "evidence" in the absence of such a clause—does nothing to eliminate the problem. *Alaska Airlines, Inc.*, 480 U.S. at 686. "Strong evidence" of congressional intent is not—and, under our constitutional structure, cannot be—law. As this Court recognized in *Whole Woman's Health* v. *Hellerstedt*, even a decision to enforce a severability clause necessarily, "to some extent, substitute[s] the judicial for the legislative department of the government." 136 S. Ct. 2292, 2319 (2016) (citation and internal quotation marks omitted); see also *ibid.* ("A severability clause is not grounds for a court to devise a judicial remedy that … entail[s] quintessentially legislative work.") (citation and internal quotation marks omitted)).

To the extent congressional intent is discernible, only neutral principles of statutory interpretation, applied solely to duly enacted statutory text, can adequately determine that intent. We are a "Government of laws, not of men," and to be governed by statutory text—as opposed to the hypothetical intent of the legislators as determined by judges—is necessary to maintaining such a government. *Zuni Pub. Sch. Dist. No. 89* v. *Dep't of Educ.*, 550 U.S. 81, 119 (2007) (Scalia, J., dissenting). Attempting to determine how Congress might have legislated had it known that the Act's removal clause would be deemed unconstitutional would require this Court to move beyond the text of the statute and thus undermine that fundamental principle.

2. As Justice Thomas also pointed out, the Court's modern severability analysis often requires courts to review "statutory provisions that no party has standing to challenge." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). Although standing concerns are not as salient here—because Petitioner was the defendant in an enforcement action—Justice Thomas' point nevertheless applies because severability is unnecessary to provide Petitioner with the relief he seeks and resolve the controversy between the parties.

Because the judicial power of Article III extends only to "cases" and "controversies," federal courts do not issue advisory opinions. *United Pub. Workers of Am. (C.I.O.)* v. *Mitchell*, 330 U.S. 75, 89 (1947). The live controversy here is readily identifiable: Petitioner seeks relief from an action enforcing a civil investigative demand from an agency whose structure it alleges impermissibly intrudes upon the President's removal power. If this Court were to agree with Petitioner on that point and then conduct a severability analysis, it could also determine that the for-cause removal restriction in 12 U.S.C. 5491(c)(3) is not severable from Title X or even from the Act as a whole. And if that restriction is both unconstitutional and non-severable, then under conventional wisdom, Title X, or the entire Act, will fall. Merely conducting that analysis, therefore, puts Title X (at a minimum) at risk.

In this case, then, as in others, the severability question would come "into play," if at all, "only *after* the court has resolved … the only live controversy between the parties"—that is, whether the Act's removal restriction is an impermissible intrusion into the President's authority. *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). Any further action, such as invalidating all of Title X, would therefore be an *ultra vires* advisory opinion.

B. Additional compelling considerations militate against unnecessary severability determinations.

Beyond the concerns raised by Justice Thomas in *Murphy*, other compelling considerations caution against a severability determination here.

1. First, determining whether to sever a statutory provision is a quintessentially legislative act. If such an analysis is conducted, the end result will always be different from what Congress actually enacted: Either (a) the statute is severable, in which case an act of Congress will mutate into a new quasi-legislative, quasi-judicial creation, or (b) the statute is nonseverable, in which case other presumably constitutional

provisions will fall along with the unconstitutional one.

In this case, Congress clearly established the CFPB as "an *independent* bureau." 12 U.S.C. 5491(a) (emphasis added). Not only did Congress provide the CFPB Director with for-cause removal protection from the President, but it also established that the Director would serve a fixed, five-year term. 12 U.S.C. 5491(c)(1)–(3). Thus, not only did Congress limit the ability of the President to remove CFPB Directors, but, with a five-year term, it also potentially foreclosed some future Presidents from appointing CFPB Directors altogether.[2] In short, there is strong statutory evidence that the CFPB was designed to remain independent from the political branches. *PHH Corp.* v. *Consumer Fin. Prot. Bureau*, 881 F.3d 75, 162 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting).

Severing the CFPB Director's for-cause removal protection from the rest of the Act would therefore create an entirely *new* system—one that was never legitimized through bicameralism and presentment. Indeed, affirmatively requiring the Director to be more accountable to the President would cause this Court to engage in the exact form of "blue-pencil[ed] . . . editorial freedom" that the Court has elsewhere determined "belongs to the Legislature, not the Judiciary." *Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 509–510 (2010).

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[2] That Congress desired an independent bureau is further demonstrated by the fact that the CFPB is funded, not by the typical Congressional appropriations process, but by the Federal Reserve. 12 U.S.C. 5497(a)(1)–(2).

Here, Congress demonstrably sought to keep the CFPB independent of political oversight—indeed, its attempts to do so have necessitated the very controversy here. Thus, regardless of the result of a severability analysis, it would ultimately and impermissibly amend Title X. See *Hill* v. *Wallace*, 259 U.S. 44, 71 (1922). And if this Court were to sever the for-cause provision, while expressly leaving in place the rest of the statutory provisions, it would "significantly alter" the "balance that Congress had in mind" between the Executive and the CFPB. *Bowsher* v. *Synar*, 478 U.S. 714, 734–736 (1986).

Moreover, the question whether the 111th Congress would have been willing to hold the CFPB accountable to the President while at the same time adopting the other provisions designed to further its independence is a question the federal judiciary is ill-equipped to answer. Any inquiry into Congress' "hypothetical intent" surrounding the CFPB will almost certainly produce a severability rule lacking "judicially discoverable and manageable standards." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962). This Court should not "add to the confusion about the judiciary's limited powers by claiming to 'sever' a statute based on open-ended speculation about how Congress would have solved the separation-of-powers problem." *Collins* v. *Mnuchin*, 938 F.3d 553, 611 (5th Cir. 2019) (en banc) (Oldham, J., dissenting in part). Nor should it "rewrite the statute while pretending such *legislative* activity is the most modest *judicial* remedy." *Ibid.*

Instead, should this Court find that the removal restriction in 12 U.S.C. 5491(c)(3) unconstitutionally limits the President's removal power, the Court should provide a limited remedy—one that resolves the harm to the Petitioner without performing the quintessentially legislative task of rewriting Title X or striking it down completely.

2. For similar reasons, a judicial severability analysis necessarily conveys a lack of respect for a coordinate Branch of government—namely, Congress—and necessarily raises political questions. See *Baker*, 369 U.S. at 217. Here, the CFPB's status as an independent agency concerns not only the President's removal authority, but also Congress' authority to make the law. While "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty," severing the removal restriction provision of Section 5491(c)(3) would effectively force Congress to relinquish authority on terms it may not accept. *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989); see also The Federalist No. 47 (James Madison).

Indeed, absent a particular textual assignment of authority to one particular branch, the legislative and executive branches often assert their authority along political lines, and properly so. See, *e.g.*, *Baker*, 369 U.S. at 217. Such was the case in *Goldwater* v. *Carter*, where then-Justice Rehnquist suggested that the process of withdrawing from treaties was a political question because the text of the Constitution was "silent as to [the Senate's] participation in the abrogation of a treaty." 444 U.S. 996, 1003 (1979) (Rehnquist, J., concurring).

So too here. The question of what kind of hypothetical statute would be acceptable to Congress and the President without the existing removal restriction is a quintessential political question—a question about which the Constitution itself provides no clear guidance. Accordingly, the question of how to deal with a determination that the removal restriction is unconstitutional should be left to the political branches in the first instance.

Free Enterprise Fund provides a recent example of the problems of forcing judge-made solutions onto political matters. There, this Court severed a statute to eliminate one layer of removal protection, but still allowed the PCAOB to remain largely free from the President's authority. See *PHH Corp.*, 881 F.3d at 191 (Kavanaugh, J., dissenting) (remarking how the second layer of removal protection "did not afford PCAOB members all that much additional insulation from the President"). As then-Judge Kavanaugh correctly recognized, if Congress—instead of the Court—had been the entity to repeal the for-cause removal provisions, it likely would have *also* enacted "more tightly drawn substantive statutes so as to prevent excessive delegations of power to the Executive Branch or perceived concentration of power in the President." *In re Aiken Cty.*, 645 F.3d 428, 447–448 (D.C. Cir. 2011) (Kavanaugh, J., concurring).

In short, a proper respect for congressional authority requires that Congress be allowed to determine, at least in the first instance, how to respond to a holding that any provision of a federal statute is unconstitutional. That is no less true of the Dodd-Frank Act than any other statute.

C. The Administrative Procedure Act forecloses the freewheeling approach to severability reflected in some of this Court's decisions.

Moreover, Congress has already addressed what should be done with unconstitutional agency actions in the Administrative Procedure Act. That law's remedy provision, 5 U.S.C. 706(2)(B), provides unequivocally that a court reviewing agency actions must "hold unlawful and set aside" any agency "action" determined to be contrary to constitutional requirements. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 413–414 (1971).

Thus, if an agency's structure makes its "action" unlawful, the proper remedy under the APA is simply to "hold unlawful and set aside" that particular "action." The APA's language forecloses by implication any broader relief,[3] including (1) rewriting a statute to "excise" the unconstitutional provision, or (2) invalidating an entire section or act—the only two possible results of a severability analysis.

To be sure, because of this case's posture, it does not directly implicate the APA as clearly as other cases. Yet because these considerations will necessarily arise in future cases challenging agency action,

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[3] This Court has previously remanded an invalid regulation to remedy APA violations. See, *e.g.*, *Dep't of Commerce* v. *New York*, 139 S. Ct. 2551, 2576 (2019). In the same vein, and because of the increased weight due to legislative enactments over regulations, the Court should allow Congress to remedy any constitutional violation that it finds in the CFPB's structure rather than conducting a severability analysis. See *infra*, Part II.

this Court should consider them concurrently with the other problems outlined above.

II. THERE IS NO PRACTICAL NEED TO CONDUCT A SEVERABILITY ANALYSIS HERE.

This case is a particularly poor vehicle for a severability analysis because the Court can easily resolve the disagreement between the parties—and thus dispose of the Article III case or controversy—without expressly addressing the broader question of severability.

A. The broader effects of a determination that the removal restriction is unconstitutional can be avoided by merely declining to enforce CFPB's civil investigative demand.

To be sure, there remains some confusion about the proper remedy the Constitution requires "when a litigant is injured by a[n] … agency action taken while an agency is exercising executive power without the required degree of oversight from the President." Petition for a Writ of Certiorari at 7 n.1, *Collins* v. *Mnuchin* (No. 19-422) (Sept. 30, 2019). The underlying question here, for example, is whether the federal judiciary can enforce the CFPB's civil investigative demand against Petitioner if, as Petitioner argues, the CFPB's structure impermissibly intrudes upon the President's removal power. That is the extent of the controversy between the parties.

1. The Court can easily resolve this dispute without conducting a severability analysis. Assuming the Court sides with Petitioner on the merits, Petitioner

can be made whole if this Court merely holds that the lower courts should not have enforced the CFPB's civil investigative demand. Providing this remedy—without addressing the severability issue—would prevent the Court from engaging unnecessarily in a legislative act. A remedy limited to Petitioner, therefore, would best preserve the institutional interests of the federal judiciary and our constitutional structure of separated powers.

There is ample precedent for affording Petitioner a purely retroactive remedy. Indeed, as multiple judges of the Fifth Circuit recently recognized, this Court afforded such a remedy in *Bowsher* v. *Synar* after it determined that it was unconstitutional to allow the Comptroller General, who is removable by Congress, to exercise executive authority. *Collins*, 938 F.3d at 626–628 (Willett, J., dissenting in part); *Synar*, 478 U.S. at 734–736. In *Synar*, the district court had declined to give "legal force and effect" to an order promulgated by the Comptroller General. *Synar* v. *United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986). This Court ultimately affirmed that judgment and afforded purely retroactive relief. *Synar*, 478 U.S. at 736.

This Court afforded a similar retroactive remedy after a litigant brought a successful challenge to the appointment of an Administrative Law Judge (ALJ) of the Securities and Exchange Commission in *Lucia* v. *SEC*, 138 S. Ct. 2044, 2049 (2018). After the SEC initiated an administrative proceeding against Lucia, Lucia claimed that SEC ALJs were "Officers of the United States" and thus subject to the Appointments Clause—and hence that only the President, courts, or department heads could appoint them. *Id.* at 2050.

The ALJ at issue had been hired by SEC staff members, not the Commission itself, which the Court agreed would have been a department head. *Ibid*.

This Court agreed with Lucia on the merits. *Lucia*, 138 S. Ct. at 2055. Then, consistent with its precedents, the Court held that the appropriate "remedy for an adjudication tainted with an appointments violation" was a new hearing before a constitutionally appointed ALJ. *Ibid.* (citing *Ryder* v. *United States*, 515 U.S. 177, 182–183 (1995)). The Court enhanced the *Ryder* remedy with a requirement that a *new* ALJ preside, given that the original ALJ would not be expected to reconsider the matter unbiased by the prior decision. *Ibid.*

Both *Synar* and *Lucia* highlight the appropriate remedy in cases where actions were taken against private parties by an officer who exercised authority in violation of the Constitution's structural design or the separation of powers. As Judge Willett urged in his *Collins* dissent, "[u]nconstitutional protection from removal, like unconstitutional appointment, is a defect in authority." *Collins*, 938 F.3d at 627 (Willett, J., dissenting in part). There are no reasons to treat structural violations differently, particularly when retroactive-only remedies are so clearly grounded in this Court's caselaw.

2. The narrowest remedy available here would be to decline to give "legal force and effect" to the civil investigative demand, just as this Court did in *Synar*. That narrow remedy would help preserve our system of separated powers and reinforce the importance of a clearly defined chain of command in our constitutional order. *Free Enterprise Fund*, 561 U.S. at 498. And it

would clarify that an "Officer of the United States" who falls outside that chain lacks the authority to exercise any executive power—thereby reinforcing the value of accountability that is central to the Constitution's structure. See, *e.g.,* U.S. Const. art. II, § 1 ("The executive power shall be vested in a President[.]"); 1 Annals of Cong. 463 (1789) ("[I]f any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.").

In sum, this Court can adequately resolve the controversy between the parties here by crafting a narrow, retroactive remedy, without answering the broader severability question.

B. Congress can deal with any transitional uncertainty created by a ruling of unconstitutionality.

Another reason to avoid answering the broader severability question in this case is that Congress is more than capable of resolving any uncertainty from a holding that the removal provision in Section 5491(c)(3) is unconstitutional. Once more, *Synar* is exemplary. *Synar* determined that the Comptroller General's exercise of executive power "violate[d] the command of the Constitution that the Congress play no direct role in the execution of the laws." 478 U.S. at 736. However, rather than immediately invalidating everything the Comptroller General had done, the Court stayed its judgment to allow Congress the opportunity to determine its next steps. *Ibid.*

So too here: If the removal protection in 12 U.S.C. 5491(c)(3) is held unconstitutional, this Court can afford Congress that same opportunity—as to both the CFPB and the similar Federal Housing Finance Agency.[4] If single-headed agencies with "for-cause" removal provisions are unconstitutional, then Congress can choose whether to ratify previous decisions of those agencies through legislation.

To be sure, Congress may decide against ratification. But giving Congress the opportunity, in the first instance, to determine what to do in the face of any resulting institutional uncertainty would lower the risk of excessive litigation and postpone the necessity of an intrusive severability analysis.

C. Dodd-Frank's severability clause further reduces the need for this Court to conduct such an analysis in the first instance.

Any perceived need for this Court to address severability in this case is further reduced by 12 U.S.C. 5302, the severability clause that Congress actually included in the Act. That clause provides that if "any provision" of the Act, or if any application of the statute, "is held to be unconstitutional, the remainder of [Dodd-Frank] . . . and the application of the provisions of such to any person or circumstance shall not be affected thereby." *Ibid.*

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[4] The FHFA is structured like the CFPB and has a single Director who, at present, can only be removed for cause. 12 U.S.C. 4512(b)(2). If this Court determines that the CFPB's structure violates the President's removal power, it will necessarily call into question the actions of the FHFA.

This clause confirms that Congress envisioned a regime in which federal courts might well find that some application of a Dodd-Frank provision was unconstitutional, but courts could then wait for future cases to ascertain the effect of such a finding on subsequent agency action. Thus, depending on the outcome in this case, the CFPB will be able to point to the severability clause in a future case where a litigant alleges harm from some other provision of Title X. Both parties will then be able to make appropriate arguments on the effect of the prior decision on the constitutionality of the second action.

Following this path, and saving the severability question for another case, will also increase the likelihood that any future challenge to other provisions of the Act will be addressed in cases where the parties have a live controversy. As mentioned, the parties here will no longer have a live controversy if Petitioner is given the narrow retroactive relief it seeks. Waiting for additional challenges before addressing severability will thus promote sound judicial administration even as it respects the separation of powers between this Court and Congress.

All of this highlights the wisdom of following the principles articulated in Justice Thomas' *Murphy* concurrence. *Murphy*, 138 S. Ct. at 1485–1487 (Thomas, J., concurring). Avoiding a severability analysis in this case will allow the Court to resolve the underlying constitutional question here and avoid the significant risk of immediate consequences to other provisions of the statute. See Pet. Br. 41–47.

CONCLUSION

In this case, conducting a severability analysis under the Court's usual precedents would necessarily intrude into Congress's own lawmaking power. Ironically, such an analysis would itself violate the very separation-of-powers principles that lie at the heart of the main question presented. For that and other reasons discussed above, the Court should decline even to conduct a severability analysis here.

Respectfully submitted,

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