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 NATIONAL CONSUMER LAW CENTER, CENTER FOR CONSUMER LAW AND EDUCATION, CENTER FOR CONSUMER LAW AND ECONOMIC JUSTICE, HOUSING CLINIC OF JEROME N. FRANK LEGAL SERVICES ORGANIZATION AT YALE LAW SCHOOL, CONSUMER ACTION, AND PROFESSOR CRAIG COWIE AS *AMICI CURIAE* IN SUPPORT OF *AMICUS CURIAE* PAUL D. CLEMENT, ESQ.

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INTEREST OF *AMICI CURIAE*[*]

The *amici curiae* joining this brief are consumer organizations, consumer law scholars, and law school consumer clinics and centers with an interest in the constitutional analysis that should guide this Court in determining whether the structure of the CFPB is consistent with constitutional separation-of-powers principles and, if it is not, what is the most appropriate remedy for the Court to impose.

The **National Consumer Law Center** (NCLC) is a national research and advocacy organization focusing on justice in consumer financial transactions, especially for low-income and elderly consumers. NCLC staff engage with the CFPB on a broad range of issues, and an NCLC staff member formerly served on the CFPB's Consumer Advisory Board.

The **Center for Consumer Law and Education**, a Joint Partnership between West Virginia University College of Law and Marshall University, coordinates the development of consumer law, policy, and education research to support and serve consumers in West Virginia and across the nation. The Center brings together scholars, practitioners, and students to empower, lead, and educate our communities.

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[*] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of *amicus* briefs in support of either party have been filed with the Clerk.

The **UC Berkeley Center for Consumer Law & Economic Justice** is a law school research and advocacy center dedicated to ensuring safe, equal, and fair access to the marketplace. The Center works with courts, legislative bodies, and administrative agencies – including the CFPB – on a wide range of issues affecting low-income consumers.

The **Housing Clinic of Jerome N. Frank Legal Services Organization at Yale Law School** is a legal clinic in which law students, supervised by faculty attorneys, provide legal assistance to people who cannot afford private counsel. Many of the Clinic's clients face unfair and deceptive practices from actors subject to CFPB activity. The CFPB has assisted the Clinic's clients by preventing these practices and providing both redress and avenues for redress for violations of consumer protection law.[†]

Consumer Action, a non-profit 501(c)(3) organization, has been a champion of underrepresented consumers nationwide since 1971. Consumer Action focuses on consumer education that empowers low-to-moderate-income and limited-English-speaking consumers to financially prosper. Consumer Action has a keen interest in the independence and effectiveness of the CFPB. Consumer Action advocated for the creation of the CFPB and has worked to support its role as a thoughtful, independent regulator with a commitment to fair and transparent consumer financial transactions—and consumer protection—

[†] *Amicus* briefs filed by a legal clinic affiliated with Yale Law School do not represent any institutional views of Yale Law School or Yale University.

since its inception. Consumer Action has engaged with the CFPB, regularly sharing consumer perspectives and advocating for reasonable rules and actions related to credit cards, credit reporting, mortgages, student loans, debt collection, language access and especially its complaint process and public complaint database.

Professor Craig Cowie is an Assistant Professor of Law and Director of the Blewett Consumer Law & Protection Program at the University of Montana Alexander Blewitt III School of Law.

SUMMARY OF ARGUMENT

In establishing the CFPB, Congress imbued the agency with significant authority as an independent consumer-oriented entity intended to end the fragmentation of the consumer-protection system that led to the Great Recession. The "for-cause" provision for the removal of the CFPB Director is commonly found in other, similar independent agencies created by Congress and has been affirmed by this Court in other contexts. The overall structure of the CFPB, as a single-director governed mixture of quasi-legislative, quasi-judicial, and executive authority, does not unduly interfere with the President's exercise of power and does not violate the separation of powers. Therefore, the Court of Appeals judgment should accordingly be affirmed.

If, however, the removal restriction of Title X of the Dodd-Frank Act nonetheless is deemed to be unconstitutional, the Court should sever the for-

cause provision. Congress has provided an express severability provision that controls Title X of the Dodd-Frank Act, and its inclusion of that provision resolves the question on relief. Even without that explicit provision, the intent of Congress should control. Because Congress mandated sweeping changes to the financial regulatory system in Title X, all of which would be undone if the provision were not severed, and because the CFPB could continue to operate independently, as Congress intended, without the for-cause provision, this Court should follow Congress's intent and sever the for-cause provision while leaving the remainder of the Act intact.

In creating the CFPB, Congress consolidated the implementation and enforcement of federal consumer financial law from seven separate agencies into a single, independent agency while also mandating that the agency develop numerous innovative initiatives to ensure the stability of the marketplace and the promotion of consumer protection. Congress modeled the CFPB on existing independent financial regulators and borrowed many structural elements from these existing agencies. Although the provision requiring for-cause removal of the CFPB's Director was one of these elements, Congress also provided for budgetary independence, freedom from Office of Management and Budget (OMB) review of regulations, and the ability to litigate in its own name. Consistent with congressional intent, the CFPB could, and would, continue to function as an independent agency even if the for-cause removal provision were severed.

To do otherwise would eliminate the significant benefits the CFPB has contributed to creating a more stable economy and a more accountable playing field in the marketplace as Congress intended. In fact, dismantling the agency would cause administrative chaos, threaten the overall viability of our economy, and undermine the stability of our free markets.

If the "for-cause" termination provision for the CFPB Director is deemed unconstitutional the proper remedy is the result that best gives effect to Congress's intent. Severing the provision leaves in place Congress's many interlocking changes to the financial regulatory system and would have the least impact on the continuing stability of the American financial system, the outcome Congress dictated under the circumstances.

ARGUMENT

I. The CFPB's structure does not violate the separation of powers.

"Congress can, under certain circumstances, 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 Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). In determining whether Congress may do so, the "real question is whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty." *Morrison v. Olson*, 487 U.S. 654, 691 (1988).

This Court consistently has held that, where a measure of independence is justified, Congress may limit the President's ability to remove officers without cause, so long as that restriction is limited to a single level of protected tenure, without interfering with the President's duty and therefore without violating the separation of powers. *See, e.g.*, *Free Enter. Fund*, 561 U.S. at 509; *Morrison*, 487 U.S. at 692-93 (holding that Attorney General's ability to remove independent counsel for cause gave President sufficient control over independent counsel so as not to interfere with President's constitutional obligations); *Wiener v. United States*, 357 U.S. 349, 356 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 628-32 (1935).

Eighty-five years ago this Court upheld the constitutionality of the Federal Trade Commission (FTC), an independent consumer-protection agency with powers similar to those of the CFPB, even though its commissioners could be removed only for cause. *See Humphrey's Executor*, 295 U.S. at 631-32. Although this Court used the terms "quasi legislative" and "quasi judicial" in deciding *Humphrey's Executor*, it later noted that it was hard to dispute that the FTC exercised executive powers "to some degree" at the time *Humphrey's Executor* was decided. *Morrison*, 487 U.S. at 689 n.28 (noting "difficulty of defining such categories of 'executive' or 'quasi-legislative' officials"). Indeed, in *Morrison* this Court went further to hold that Congress could limit the President's ability to remove the independent counsel, a single individual who exercised considerable executive power—the "full power and independent authority" of a criminal prosecutor—

and who controlled significant resources. *Id.* at 662, 689-92 (quoting 28 U.S.C. 594(a)); *see also id.* at 714 (Scalia, J., dissenting) (comparing independent counsel's budget with budget of entire Department of Justice (DOJ) Criminal Division).

More recently, this Court reaffirmed these holdings but held that a structure that imposed two levels of protected tenure—wherein it was understood that the President could remove Securities and Exchange Commission (SEC) commissioners only for cause, and the SEC in turn could also only remove Public Company Accounting Oversight Board (PCAOB) members for cause—impaired the President's ability to execute the laws. *Free Enter. Fund*, 561 U.S. at 483, 494-96; *see also id.* at 487. Severing the PCAOB for-cause provision, and thereby leaving only a "single level of good-cause tenure" between the President and the PCAOB, allowed the President to hold the SEC to account for its supervision of the PCAOB "to the same extent he may hold the [SEC] to account for everything it does." *Id.* at 495-96, 509.

Congress previously has chosen to establish independent agencies to regulate financial and consumer marketplaces and has used for-cause removal of agency heads as one aspect of those agencies' independence. *See, e.g.*, 12 U.S.C. 242 (Federal Reserve Board (FRB) members serve fourteen-year terms "unless sooner removed for cause by the President"); 15 U.S.C. 41 (FTC commissioners may be removed by President for "inefficiency, neglect of duty, or malfeasance in office"); 15 U.S.C. 2053(a) (requiring for-cause

removal of Consumer Product Safety Commission members).

In the wake of the 2008 financial crisis, Congress wanted to create a "new, streamlined independent consumer entity" to end the "fragmentation" of the consumer-protection system that led to the "Great Recession." S. Rep. No. 176, at 9-11 (2010). In designing the CFPB, Congress drew on structural elements from other independent regulators with similar authority, including the FRB, the Office of the Comptroller of the Currency (OCC), the FTC, and the Federal Deposit Insurance Corporation (FDIC). One such element provided that the President could remove the CFPB Director for "inefficiency, neglect of duty, or malfeasance in office," 12 U.S.C. 5491(c)(3), the exact restrictions this Court found constitutional in *Humphrey's Executor*. *See* 295 U.S. at 620, 632.

The CFPB is not an historical anomaly, and its structure falls squarely within this Court's precedents. Like the FTC, FRB, and PCAOB, the CFPB exercises significant (and in some cases overlapping) authority in the financial sector, including rulemaking, supervision, and enforcement powers. *Compare* 12 U.S.C. 5481(14), 5511(c), 5531(a), 5563 (CFPB), *with* 15 U.S.C. 45, 46(a), 49 (1934) (FTC at time of *Humphrey's Executor*), *and* 12 U.S.C. 248 (FRB), *and Free Enter. Fund*, 561 U.S. at 485 (discussing PCAOB powers). Like other agencies, the CFPB's mix of quasi-legislative, quasi-judicial, and executive authority justifies a measure of independence. *See Morrison*, 487 U.S. at 691 n.30.

Requiring for-cause removal for agency heads with terms longer than four years, 12 U.S.C. 242 (FRB fourteen years), 15 U.S.C. 41 (FTC seven years), 12 U.S.C. 5491(c) (CFPB five years), promotes needed consistency and reduces short-term partisan interference in the regulation of the financial sector. The for-cause removal requirement for dismissing the CFPB's Director, for example, does not impede the President's powers any more than limiting the removal of FTC commissioners, *Humphrey's Executor*, 295 U.S. at 630-32, or allowing the PCAOB to operate subject to the President's ability to remove SEC commissioners only for cause, *Free Enter. Fund*, 561 U.S. at 509.

The CFPB's single-director structure does not alter this conclusion because the existence of a single director—as opposed to a multi-member body—does not increase any possible interference with the President's ability to execute the laws faithfully, which is the "real question" here. *See Morrison*, 487 U.S. at 691. This Court has upheld the for-cause removal of single individuals who wield enormous executive power. *Id.* at 693. Similarly, other agencies are also headed by individuals who wield significant authority and are removable only for cause. *See, e.g.*, 5 U.S.C. 502(a) (Office of Special Counsel); 42 U.S.C. 902(a)(3) (Social Security Administration).

Indeed, a single director subject to for-cause removal actually presents less interference than a multi-member commission. For one, any given President is more likely able to appoint a chosen single director than to appoint a majority of commissioners with equivalent but staggered terms.

The seven fourteen-year staggered terms of the FRB, 12 U.S.C. 241, 242, for example, guarantee that no President is able to promote a majority of that agency's heads. Moreover, in order to appoint persons with control over the agency a President only needs cause to remove a single person, rather than the multiple people required for a majority of a commission. Last, even if a President has the opportunity to appoint a commissioner, the President may be required to appoint a commissioner from an opposing political party. *See, e.g.*, 15 U.S.C. 41.

Nor does the overall structure of the CFPB violate the separations of powers. This Court rejected this argument with respect to the independent counsel in *Morrison*. 487 U.S. at 694-96. The CFPB presents even less potential interference. Although the CFPB exercises considerable power, the independent counsel in *Morrison* had the full powers of a criminal prosecutor and neither the President nor the Attorney General could choose the independent counsel. *Id.* at 662, 695-96.

The President's power to remove the CFPB's Director for cause is sufficient control to avoid "unduly trammel[ing] on executive authority." *See id.* at 691, 693, 697.

II. If the CFPB is held unconstitutional based on the separation of powers, the for-cause removal provision can and should be severed from the remainder of Title X.

Should the Court nevertheless conclude that the for-cause removal provision at issue is

unconstitutional, Congress demonstrated its intent that Title X should remain in effect after severance of any unconstitutional provisions by including an express and controlling severability clause in the Dodd-Frank Act. *See* 12 U.S.C. 5302. Even apart from that express provision, Congress intended that its consolidation of consumer-protection authority in a single, independent agency would survive severance of the for-cause removal provision.

A. The doctrine of severability requires giving effect to a statutory-severability clause and severing no more than necessary.

1. The Court must give effect to the express language of Dodd-Frank Act's severability clause.

When, as here, Congress has explicitly provided for severance in a statute through inclusion of a general severability clause the inquiry into legislative intent is straightforward.

A severability clause creates the presumption that Congress did not intend the overall validity of a statute to turn on the validity of the constitutionally offensive provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987). When a severability clause is included in a statute, an offensive provision may be severed from the remainder absent "strong evidence that Congress intended otherwise." *Id.* at 686.

A severability clause should be given effect as long as the statute remains fully operative following

the excision. *See, e.g.*, *NFIB v. Sebelius*, 567 U.S. 519, 586 (2012) (noting inclusion of severability clause "confirm[ed] that [Court] need go no further"); *I.N.S. v. Chadha*, 462 U.S. 919, 932 (1983) (noting that Court did not need to "embark on that elusive inquiry [to ascertain congressional intent] since Congress itself has provided the answer to the question of severability" through inclusion of severability clause). Just as the Court gives effect to the legislature's fallback provisions or definition sections, so too must it give effect to severability clauses. *See Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning."); *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (giving effect to fallback provisions that are "fully operative as a law"); Michael D. Shumsky, *Severability, Inseverability, and the Rule of Law*, 41 Harv. J. Legis. 227, 250–51 (2004).

The general severability clause in Section 3 of the Dodd-Frank Act supplies the answer to the second Question Presented: "If any provision of this Act . . . is held to be unconstitutional, the remainder of this Act . . . shall not be affected thereby." 12 U.S.C. 5302. Notable is what the clause does *not* say. It does not provide, as it might have, that the *remaining titles* of the Act are unaffected; rather it provides that "the remainder" is unaffected – that is, all of the Dodd-Frank Act but the "provision . . . held to be unconstitutional." *See Chadha,* 462 U.S. at 932 (holding that one-house veto provision was "clearly a 'particular provision' of the Act as that language is used in the severability clause").

Petitioner contends without merit that the additional severability clause in Title V of the Dodd-Frank Act, and the absence of one in Title X, indicate that Congress did not intend provisions within Title X to be severable from each other. Brief for the Petitioner at 45. Critically, Petitioner's claim ignores the drafting history of Title V's severability clause.

When first introduced in the House, the additional severability clause in the Information Insurance Act of 2009, which served as the basis for the language in Title V, specified that provisions of two subsections governing the preemption of state insurance laws were *nonseverable*: "If any provision of subsection (e) or (h) . . . is declared or held invalid . . . all provisions of each such subsection shall be treated and deemed invalid . . . ." Insurance Information Act, H.R. 2609, 111th Cong. § 3(a) (2009). The clause further stated that notwithstanding the invalidation of either subsection, the validity of the remainder of the section would not be affected. *Id.* at § 3(b).

Thus, Congress's initial intent in adding the additional severability clause in the precursor to Title V was to *reverse*—with respect only to those subsections—the presumption of severability otherwise afforded to all provisions in the Act by Section 3. The final version of Title V of the Dodd-Frank Act has a general severability clause, holding any section or subsection of the subtitle severable, in place of the specific severability clause in the original legislation. Dodd-Frank Act, Pub. L. No. 111-203, § 542, 124 Stat. 1596 (2010) (codified at 15 U.S.C. 8232). The general severability clause

surviving in Title V thus is only the remnant of a clarification that the original legislation's attempt to make two specific subsections non-severable did not extend to any other portions of Title V, and Congress ultimately rejected even that limited attempt to make the two specified subsections non-severable in the final legislation.

The Court should not ignore the textual command of Section 3, which by its plain language applies to every title in the Act and demonstrates Congress's intent. *PHH Corp. v. CFPB*, 881 F.3d 75, 199 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (stating that Dodd-Frank Act and its CFPB-related provisions would remain "fully operative as a law" in absence of for-cause removal restriction). There is simply no need to conduct "a nebulous inquiry into hypothetical congressional intent" in this case; the text is direct and forecloses such inquiry. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018); *see also Zuni Public Sch. Dist. No. 89 v. Dep't of Ed.,* 550 U.S. 81, 119 (2007). To hold otherwise would completely invalidate the meaning of the general severability clause in Section 3.

2. The doctrine of severability requires that the Court nullify no more of a statute than is necessary.

Even if there were not an express severability provision controlling Title X of the Act, "partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). Here, notwithstanding the severance of the for-cause provision, "the statute will

function in a manner consistent with the intent of Congress." *Alaska Airlines, Inc.*, 480 U.S. at 685.

When confronting a constitutional flaw in a statute, this Court "limit[s] the solution to the problem," severing any "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328-29 (2005). Refraining from nullifying more of a legislature's work than is necessary reflects an understanding that "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Id.* at 329-30. As then-Judge Kavanaugh noted, a CFPB functioning as an executive agency under direction of the President may nevertheless "'regulate the offering and provision of consumer financial products or services . . . much as the Public Company Accounting Oversight Board has continued fulfilling its statutorily authorized mission" following *Free Enterprise Fund*. *PHH Corp.*, 881 F.3d at 199 (Kavanaugh, J., dissenting). This approach holds even in the absence of an express severability clause. *See Free Enter. Fund*, 561 U.S. at 508–10 (deciding that Act remained fully operative as law without tenure restrictions).

There is no evidence that Congress—legislating in the aftermath of grave, widespread abuses that preceded the collapse of the financial sector and wider economy—would prefer no CFPB at all to a CFPB with a director removable at will.

Following this Court's precedents, other courts have remedied constitutional flaws in the appointment and removal of government officials by

striking the offending provisions rather than invalidating entire statutory schemes. For example, after finding the for-cause removal restriction on Copyright Royalty Judges unconstitutional, the D.C. Circuit severed the removal restriction in order to "cure[] the constitutional defect with as little disruption as possible." *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1336–37 (D.C. Cir. 2012). Similarly, after the Fifth Circuit found the good-cause removal restriction on the Director of the Federal Housing Finance Agency (FHFA) unconstitutional, that court severed the restriction to allow FHFA to "survive[] as a properly supervised executive agency." *Collins v. Mnuchin*, 896 F.3d 640, 675–76 (5th Cir. 2019), *aff'd in part and rev'd in part en banc*, 938 F.3d 553, 592 (2019) (affirming severance of for-cause restriction on removal of FHFA director), *petitions for cert. filed*, No. 19-422 (U.S. Sept. 25, 2019), No. 19-563 (U.S. Oct. 25, 2019).

As discussed below, Congress invested the CFPB with numerous characteristics designed to ensure its independence in order to protect the country from another economic disaster. In this historical context, Congress's intent is clear: if the for-cause removal provision is unconstitutional, it should be severed, leaving the remainder of Title X, and the CFPB, intact to stave off a potential repeat of the 2008 financial crisis and the subsequent Great Recession.

B. Undoing Congress's sweeping restructuring of financial regulators by eliminating the CFPB instead of severing the for-cause removal provision would contravene Congress's intent to establish a sole federal regulator charged with stabilizing the marketplace and protecting consumers.

The Dodd-Frank Act was a legislative response to what was arguably the worst U.S. financial crisis since the Great Depression. David Pendery, *Three Top Economists Agree 2009 Worst Financial Crisis Since Great Depression; Risks Increase if Right Steps Not Taken*, Business Wire (Feb. 13, 2009, 6:00 AM), https://perma.cc/3E2J-23SP. Dodd-Frank addressed the lack of a cohesive regulatory regime for protecting consumers of financial products by creating the CFPB. The legislative text repeatedly stresses the importance of consistency in the CFPB's mandate. *See, e.g.,* 12 U.S.C. 5511(a) (stating purpose of CFPB is to "enforce Federal consumer financial law consistently"); 12 U.S.C. 5512(a)(4) (granting exclusive rulemaking authority under federal consumer financial law to CFPB); 12 U.S.C. 5493(g)(3)(E) (stating one of Office of Financial Protection for Older Americans' duties is to promote "consistent" enforcement); 12 U.S.C. 5495 (requiring CFPB to coordinate with other regulators to "promote consistent regulatory treatment of consumer financial and investment products and services"); 12 U.S.C. 5511(b)(4) (stating that CFPB's objectives include ensuring that "Federal consumer financial law is enforced consistently, without regard to the status of a person as a depository").

Before the CFPB, responsibility for "implement[ing], and where applicable, enforc[ing], Federal consumer financial law," 12 U.S.C. 5511(a), fell to a web of disparate federal agencies, or no agency at all. In creating the CFPB, Congress consolidated the implementation and enforcement of federal consumer financial law in a single agency while providing for several statutory innovations to ensure the promotion of consumer protection. These innovations go far beyond the provision of for-cause removal of the CFPB Director.

1. The failure of the prior regulatory scheme to protect consumers had disastrous effects on the nation's economy.

The financial industry of the United States "is central to our nation's ability to grow, to prosper, to compete and to innovate." President's Statement on Signing Dodd-Frank Act, 2010 U.S.C.C.A.N. S26 (July 21, 2010). Failures to adequately regulate consumer financial products and services, particularly home mortgages, led to the crash of the housing market which left many ordinary Americans with financial obligations that they did not understand and could not afford. The ensuing financial crisis jeopardized the national and global economies. These failures arose largely because the supervision and regulation of financial firms was governed by antiquated and poorly enforced rules with gaps and weaknesses that challenged the government's ability to prevent, monitor, and address risks in the system. White House, *Weekly Address: Protecting the Progress We've Made with Wall Street Reform* (July 23, 2016),

https://perma.cc/6WWQ-M3ZX. When considering Dodd-Frank, the Senate determined these failures "nearly crippled" the economy. S. Rep. 111-176, at 2 (2010).

Post-crisis research identified many sustained effects related to the crisis such as: credit markets still in recovery; lingering effects of unemployment; skews in the job market that hurt the middle class; foreclosures; lowered credit scores; weakened access to credit, Annie Lowrey, *The Great Recession is Still With Us*, The Atlantic (Dec. 1, 2017), https://www.theatlantic.com/business/archive/2017/12/great-recession-still-with-us/547268/; and drops in participation in civic activities, Doyle McManus, *Great Recession's Psychological Fallout,* L.A. Times (July 15, 2010, 12:00 AM), https://www.latimes.com/archives/la-xpm-2010-jul-15-la-oe-mcmanus-economy-pessimism-20100715-story.html. Others point to stress-related health problems such as "declining fertility and self-rated health, and increasing morbidity, psychological distress, and suicide." Claire Margerison-Zilko et al., *Health Impacts of the Great Recession: A Critical Review*, 3 Current Epidemiology Rep. 81 (2016).

2. Congress created the CFPB so that one financial regulator would be charged with consumer protection as its primary focus.

Before Congress created the CFPB, regulatory, supervisory, and enforcement authority over consumer financial products and services was splintered among several different federal agencies: the OCC for national banks; the FRB for domestic

operations of foreign banks and for state-chartered banks that are members of the Federal Reserve System (FRS); the FDIC for state-chartered banks and other state-chartered banking institutions that are not members of the FRS; the National Credit Union Administration (NCUA) for federally insured credit unions; and the Office of Thrift Supervision for federal savings and loan associations and thrifts.

The financial crisis exposed devastating gaps in oversight between the array of financial regulators. No federal agency had supervisory oversight over non-depository institutions, complicating federal efforts to address the crisis. Scott G. Alvarez & William Dudley, *Nonbank Financial Institutions: New Vulnerabilities and Old Tools* (Sept. 11, 2018), https://perma.cc/K8SX-G7Y9. No single agency was charged with looking at mortgage lenders to see whether home mortgage loans were being made fairly and transparently. Responsibility for implementation of the two major consumer financial protection laws in the mortgage area was split between the Department of Housing and Urban Development for the Real Estate Settlement Procedures Act and the FRB for the Truth-in-Lending Act. Bank holding company regulation focused on protecting the subsidiary bank, not on regulation of the whole firm.

Congress consolidated the functions of other agencies within the CFPB in order to fill oversight gaps and create a single point of accountability for consumer protection. Congress's vision was that a single agency would be more responsive to changes in the market and more vigorous in addressing

unfair and abusive practices. U.S. Dep't of the Treasury, *Administration's Regulatory Reform Agenda Moves Forward* (June 30, 2009), https://perma.cc/YGW6-2P4E; *see also* 12 U.S.C. 5512(a)(4)(B) (mandating deference to CFPB's rulemaking). In so doing, the new agency would stabilize the larger economy because – as with the inception of both the SEC and the FDIC – consumers' trust in banks and other financial entities and their subsequent participation in the market greatly increases when consumers are assured that these institutions must operate fairly or else face regulatory enforcement. James Surowiecki, *The Warren Court*, The New Yorker (June 6, 2011).

If the Court eliminates the CFPB, primary rulemaking authority for numerous statutes would shift again, leaving consumer financial regulation subject to the fragmentation, inattention, and uncertainty that Congress specifically intended to eliminate with Dodd-Frank.

3. Congress structured the CFPB with a multitude of characteristics to ensure its regulatory independence similar to those of other federal banking regulators.

The for-cause removal provision, as with other financial regulators, was only one part of the CFPB's intended independence. In other words, consistent with congressional intent here and with respect to other financial regulators, the CFPB could continue to function as an independent agency even if the for-cause removal provision were severed.

Congress has traditionally endowed financial regulators that exercise rulemaking, enforcement, and supervisory authority over financial institutions with certain characteristics that enhance their day-to-day independence from the President and Congress. *See* Henry B. Hogue et al., Congressional Research Service, *Independence of Federal Financial Regulators: Structure, Funding and Other Issues,* (2017), https://fas.org/sgp/crs/misc/R43391.pdf. These characteristics include budgetary independence and rulemaking authority insulated from review by the OMB and the Office of Information and Regulatory Affairs (OIRA).

None of the FRS, OCC, FDIC, or the NCUA are subject to congressional appropriation, which helps to preserve the independence of each. Likewise, the CFPB's budget is not appropriated annually by Congress. Instead, the CFPB is funded "from the combined earnings of the Federal Reserve System [in an] amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau" subject to a cap of 12% of the total operating expenses of the FRS. Only if it wishes to exceed that amount is a congressional appropriation necessary. *Id.*

Moreover, the FRB, FCC, FDIC, FTC, and OCC, along with the CFPB, are all excluded from OIRA review under Executive Order 12866 and the definition of "independent regulatory agency" contained in 44 U.S.C. 3502(5).

The CFPB also has the power to litigate in its own name, like the FTC, SEC, and others, rather than relying on the DOJ.

While some of these other independent regulatory agencies have agency heads protected by for-cause removal provisions, *see, e.g.,* 12 U.S.C. 242 (providing "for-cause" protections for FRB members), others do not. For example, the OCC's head may be removed at will by the President, although the OCC is an independent bureau within the Department of the Treasury and included in the statutory definition of an independent regulatory agency. Like the director of the CFPB, the head of the OCC is responsible for delegating powers and duties to staff. The head of the OCC is also presidentially appointed. The difference in the termination provisions is not determinative of the OCC's status as an independent regulatory agency.

In short, Congress endowed the CFPB with multiple protections for independence from both the executive and legislative branches, consistent with the statutory treatment of other financial regulators. For-cause removal was only one of these provisions and not by itself dispositive of the agency's independence; the agency could continue to function, with a degree of independence intended for financial regulators, without for-cause removal.

4. Shutting down the CFPB would shut down numerous statutory mandates themselves independent of the provisions for firing the agency's management.

Amici curiae, as advocates representing consumer interests, can attest to the importance of the existence of the CFPB and the work that it has done. The CFPB has significantly contributed to creating a more stable economy and more accountable playing field in the marketplace.

The statutory purpose of the CFPB is "to implement and, where applicable, enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and services and that markets for consumer financial products and services are fair, transparent, and competitive." 12 U.S.C. 5511(a). In furtherance of that purpose, Congress mandated specific CFPB offices with specific functions: a research unit charged with market monitoring and research on consumer financial markets, consumer understanding, and the experiences of traditionally underserved consumers, 12 U.S.C. 5493(b)(1); a community affairs unit, charged with providing "information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities," 12 U.S.C. 5493(b)(2); a consumer complaint unit, mandated in significant detail in the statute, 12 U.S.C. 5493(b)(3); an Office of Fair Lending and Equal Opportunity, charged with coordinating fair lending efforts across

the federal government and with states and non-governmental actors, 12 U.S.C. 5493(c); the Office of Financial Education, 12 U.S.C. 5493(d); the Office of Service Member Affairs, 12 U.S.C. 5493(e); the Office for Financial Protection for Older Americans, 12 U.S.C. 5493(g); and the Student Loan Ombudsman, 12 U.S.C. 5535. Each of these functions was an innovation and not a direct replica of existing work at other agencies. Congress judged them to be sufficiently important to expressly include them in the statute, separate and apart from what any given head of the agency might judge necessary and appropriate.

To take one example, the congressionally created consumer complaint function at the CFPB has facilitated significant advances in consumer protection. The complaint function provides a central avenue for consumers to seek redress, short of the expense, delay, and burden of litigation on the judicial branch.

Since 2011, the CFPB has received more than 1.5 million complaints. In 2018 alone, the CFPB handled approximately 329,800 complaints of consumer financial products and services including credit or consumer reporting; debt collection; mortgages; credit cards; checking or savings; student loans; money transfers; money services and virtual currencies; vehicle loans or leases; personal loans; payday loans; prepaid cards; and credit repair and title loans. CFPB, *Consumer Response Annual Report: January 1 – December 31, 2018*, at 4 n.4 (2019).

More than 2,700 companies responded to complaints sent to them for review and response by the CFPB in 2018. *Id.* at 7. A significant majority of these complaints, 74%, were addressed with a simple explanation. Without the CFPB, it is unclear who, if anyone, would field these complaints and if consumers would ever receive explanations as Congress intended when it mandated creation of the unit. The CFPB's imprimatur on these explanations in turn helps build consumer confidence in the financial system and thereby increases market stability.

Finally, the CFPB has promulgated many rules, regulations and standards that have had a material impact in curbing the abuses that plagued consumers prior to the CFPB's creation. *See Final Rules*, CFPB, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules (last visited Jan. 17, 2020) (listing seventy-four final rules issued by CFPB). Together these rules implicate large portions of the country's sprawling financial sector. For example, a recent study found that over half of the failed mortgages made in the three years prior to the 2008 financial crisis would not have satisfied current "ability to repay" requirements established by the CFPB after considerable industry and consumer advocate input. CFPB, *Ability-to-Repay and Qualified Mortgage Rule Assistance Report* 9 (2019).

Title X of the Dodd-Frank Act also provides for significant regulatory improvements, *see* Pub. L. No. 111-203, §§ 1071-1079A, 124 Stat. 2056-79 (2010), including mandating data collection on small

business lending and regulation of remittance transfers. Striking down all of Title X, as the Petitioner advocates, would not only dissolve the CFPB but would leave in question these statutory mandates.

None of the statutory mandates delegated by Congress to the CFPB are dependent upon the existence of the for-cause termination provision. It is the CFPB as a whole, exercising its statutory duties and responsibilities, that has carried out Congress's intent to create an environment in which consumer interests are recognized and their rights protected. Sacrificing all that the CFPB has done because of an isolated potential flaw in its management structure is not what Congress intended.

5. Dismantling the CFPB would result in chaos.

The continued existence of the CFPB is not only vital to protecting consumer rights but also critical to maintaining the overall viability of our economy and the stability of our free markets. The questions arising if the Court struck Title X would generate chaos in the national and global markets.

What would become of the CFPB's existing policies, practices, and procedures? Both consumer advocates and business interests agree that revoking them would be impractical at best. *See* Brief for the Mortgage Bankers Association et al. as *Amici Curiae* Supporting Neither Party, 10-21 ("Striking Down the CFPA in its Entirety Would Be Massively Disruptive to the Mortgage Industry").

Even small changes at the CFPB can pose major challenges to a financial market still recovering confidence from the financial crisis. For example, the internal CFPB analysis of the cost to industry of changing the agency's name (from Consumer Financial Protection Bureau to Bureau of Consumer Financial Protection) on all disclosure documents and other mandated documents for banks, mortgage providers, payday lender, and credit card companies under the CFPB's jurisdiction would cost in excess of $300 million. Sylvan Lane, *Consumer Bureau Name Change Could Cost Firms $300 Million,* The Hill (Dec. 3, 2018 4:44 PM), https://perma.cc/M9NE-X7UH.

If the mere reordering of the CFPB's initials could cause such upheaval, what would be the impact of unraveling the whole enterprise? Far more costly for both financial service providers and consumers alike would be the total reversion to the pre-CFPB era and the concomitant uncertainty it would cause.

Similarly, from a purely practical perspective, where would the CFPB's current functions and responsibilities be reassigned? Title X of the Dodd-Frank Act contains numerous provisions specifying the transfer date of various responsibilities. *See, e.g.,* 12 U.S.C. 5535(c)(2) (requiring memorandum of understanding as to Student Loan Ombudsman to be executed within 90 days of transfer date); 12 U.S.C. 5561 (providing state law preemption provisions effective on transfer date); *see generally* Pub. L. No. 111-203, §§ 961-68, 124 Stat. 1907-14 (2010) (providing for transfer of functions and personnel).

Provisions in Title X provided short-term waivers from federal hiring restrictions in order to staff the CFPB. *See* 12 U.S.C. 5493(a)(1)(C). Throughout Title X, Congress elaborated on how, exactly, the CFPB should coordinate with other federal and state agencies. *See, e.g.,* 12 U.S.C. 5512(a)(2)(B)-(C). Striking Title X destroys all of Congress's careful work to restructure financial regulation, and would be the epitome of unwarranted judicial activism.

What would become of the CFPB's current budget and staff? What would be the status of its ongoing enforcement actions? What would be the response of the diverse government agencies that would once again have to take on their former duties as a result of the "refragmentation" of financial oversight and supervision that Congress sought to eliminate when it consolidated such duties within the CFPB? The uncertainty and instability in the marketplace would be intolerable and not justified because of an alleged flaw in the CFPB's management structure that could easily be remedied by merely severing the for-cause clause and changing the Director's employment status.

If this Court determines that the for-cause termination provision is in any way invalid, the proper remedy is the result that will least affect the continuing stability of the American financial system. Severing the for-cause termination provision, and therefore essentially replacing it with at-will termination, would be a judiciously modest intervention. It is the outcome that Congress would want under the circumstances.

III. If it determines that the for-cause removal provision is unconstitutional, the Court should reach the severability issue in this case rather than give Congress a deadline for amending Dodd-Frank.

Petitioner speculates that Congress would prefer a multi-member commission to an agency under the control of a single Director removable at will. Brief for the Petitioner at 40. This Court, of course, does not possess the "editorial freedom" to restructure the CFPB in this way. *See Free Enter. Fund*, 561 U.S. at 508-10. That power rests with Congress. Severing the removal restriction from the remainder of Title X properly leaves "the ball . . . in Congress' court" to simply maintain the rest of the CFPB's structure without the removal restriction or, if Congress chooses, to restructure the CFPB. *United States v. Booker*, 543 U.S. 220, 265 (2005). In other words, if it really intended a post-severance structure different than a single at-will director, Congress would be free to amend Title X to create a structure in line with this Court's opinion. *See Morrison*, 561 U.S. at 510.

The Court has long recognized its power to rule on the severability of statutory provisions that do not burden the parties, and often decides severability questions following a ruling of unconstitutionality without even addressing whether the challenger has standing to raise severability. *See NFIB*, 567 U.S. at 588 (severing provision penalizing states that did not participate in Medicaid expansion from rest of Affordable Care Act without discussing standing); *Williams v. Standard Oil Co. of La.*, 278 U.S. 235, 242-44 (1929) (holding unconstitutional

price-fixing provisions nonseverable from rest of statutory provisions, though remaining provisions did not burden appellee sellers of gasoline).

Such a power is necessary to maintain the separation of powers: the Court must have the ability to make severability rulings in order to give effect to the will of legislatures, to avoid unnecessarily nullifying their work, and to avoid "legislation that Congress would not have enacted." *Alaska Airlines, Inc.*, 480 U.S. at 685. Furthermore, the standing element of injury-in-fact, usually defended as encouraging sound judicial decision-making, does not serve that purpose in the context of severability rulings because severability is a purely legal question, unlikely to be aided by development of the record. Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 Nw. U. L. Rev. 285, 331 n.2 (2015). Further, courts may benefit from seeing the operation of a post-severance statutory scheme in practice before holding it irrational. Shumsky, *supra* at 230 n.1.

This Court, if it deems it necessary, should therefore sever only the for-cause removal provision rather than set a deadline (*e.g.*, six months) for Congress to amend the statute itself. The alternative – preventing the Court from holding statutory provisions nonseverable that none of the parties has standing to challenge – would engender the very uncertainty in the markets that the express severance clause was designed to prevent, and further, would be, in the words of Justice Scalia, "destructive of sound government." *See NFIB*, 567 U.S. at 697 (Scalia, J., dissenting).

Justice Scalia raised two concerns particular to complex legislation such as the Dodd-Frank Act that counsel in favor of ruling on severability, both of which apply here: first, the long period of time that would be required to adjudicate each provision individually, and second, the existence of provisions which no one may have separate standing to challenge. *Id.* (Scalia, J., dissenting). Furthermore, from a prudential perspective, "[t]he Federal Government, the States, and private parties ought to know at once whether the entire legislation fails." *Id.* (Scalia, J., dissenting). That certainty is essential for the continued functioning of the consumer financial marketplace in the aftermath of a ruling that the Director's removal protection is unconstitutional. *See* Brief for the Mortgage Bankers Association et al. as *Amici Curiae* in Supporting Neither Party at 10-11.

In view of these pragmatic considerations, and the need to ensure uniformity and consistency in the enforcement of financial regulations, if the for-cause removal provision is found to be unconstitutional, the Court should reach the severability issue and hold the removal restriction severable from the remainder of Title X of the Dodd-Frank Act.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed. If, however, the Court determines that the "for-cause" provision limiting removal of the Director of the CFPB as set forth in Title X of the Dodd-Frank Act is unconstitutional, the Court should fulfill Congress's intent, as expressed in Section 3 and in its sweeping

restructuring of the financial regulatory system, by severing the for-cause provision.

Respectfully submitted,

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