

No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW, LLC,
PETITIONER,

v.

CONSUMER FINANCIAL PROTECTION
BUREAU,
RESPONDENT.

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

**MOTION FOR LEAVE TO FILE BRIEF OUT
OF TIME AND BRIEF OF AMICUS CURIAE
ALAN B. MORRISON IN SUPPORT OF
NEITHER PARTY**

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October 9, 2019

**MOTION FOR LEAVE TO FILE OUT OF
TIME BRIEF OF ALAN B. MORRISON IN
SUPPORT OF NEITHER PARTY.**

There are the serious jurisdictional problems in this case that neither petitioner nor respondent has called to the attention of this Court because both parties are in agreement that the statute at issue is unconstitutional and both seek to have the Court decide that question. In an effort to fill the recognized adversarial void, respondent has suggested that the Court appoint an amicus to defend the merits. The House of Representatives has filed a motion for leave to file an amicus brief in support of the statute and the judgment below, but it has not raised any jurisdictional issues. Amicus is seeking to file the attached amicus brief to call the jurisdictional issues to the attention of the Court at the certiorari stage and in connection with the appointment of an amicus to raise them.

Because of the urgency of the matter, amicus has not sought the consent of the parties. For these reasons and those set forth in the motion of the House of Representatives, the out of time filing of this motion and the filing of the proposed amicus brief are warranted, and the motion should be granted.

Respectfully submitted,

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INTEREST OF THE AMICUS¹

Alan B. Morrison is an associate dean at the George Washington University Law School where he teaches constitutional law and civil procedure. He has extensive litigation experience in the field of separation of powers, which is the subject of the petition in this case. His cases before this Court in which he was lead counsel include *INS v. Chadha*, 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); *Mistretta v. United States*, 488 U.S. 361 (1989); and *Raines v. Byrd*, 521 U.S. 811 (1997). He has no financial or other interest in the outcome of this case which challenges the limits on the President's authority to remove the Director of the respondent Consumer Financial Protection Bureau except for cause. Amicus supports those limits.

There are, however, serious jurisdictional issues, explained below, that preclude the Court from reaching the merits of this petition. Because neither the parties nor the amicus United States House of Representatives has discussed those issues, and because the Court may not focus on them until after the petition has been granted, amicus is filing this brief now so that any amicus that the Court may appoint is directed to consider these issues as well as the merits, which amicus is prepared to do. Because of the limited time in

¹ No person other than amicus has authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. The parties were notified by email on October 8, 2019 of the intent to file this amicus brief.

which to prepare this brief, the jurisdictional issues will only be summarized.

SUMMARY OF ARGUMENT

Because the parties agree that the statute at issue in this case is unconstitutional, there is no proper case or controversy under Article III, which cannot be cured by the appointment of an amicus to argue the merits. The claim on the merits is that the limits on the President's power to remove the Director of respondent Consumer Financial Protection Bureau ("CFPB") deprives him of the ability to take care that the laws are faithfully executed. But the President has not sought to exercise that power, and it is doubtful that a private party in an action brought by the CFPB has standing to raise that argument. Moreover, the current President had an opportunity to exercise his asserted power when the predecessor Director remained in office for ten months, but declined to do so. For these reasons and more, the Court should decline to issue the advisory opinion that the parties seek.

ARGUMENT

THERE ARE SIGNIFICANT JURISDICTIONAL ISSUES THAT PRECLUDE THE COURT FROM DECIDING THE MERITS.

This Court is being asked to decide a momentous constitutional question in which both parties agree that the statute being challenged is unconstitutional. This Court was presented with a

similar situation, but with some significant factual differences in the facts, in *United States v. Windsor*, 570 U.S. 744 (2013). There, a divided Court concluded that it could decide the merits. In addition, in a case decided the same day, with facts even closer to this one, a divided Court found that a non-party lacked standing to appeal and therefore dismissed the petition for lack of jurisdiction. *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

There is a serious question as whether there is a real controversy (constitutional or otherwise) between the parties. The underlying action is a proceeding seeking to enforce a civil investigatory demand, in which there has been no determination on the merits because of the constitutional challenge made by petitioner. Respondent agrees that the removal provision of its organic statute is unconstitutional because of the allegedly flawed removal provision. If that is respondent's position, it can simply dismiss the proceeding which it filed in February 2017, and it can either abandon the request or file it again, this time with respondent's Director being subject to removal at will by the President. Either way, there will be no need for any court to pass on the constitutional question presented.

The current Solicitor General has previously sought to have this removal issued decided in *Lucia v. Securities & Exchange Commission*, 138 S. Ct. 2044 (2018), even though the Court had expressly declined his request to grant review on that issue.

More important, in his brief on the merits, the Solicitor General proposed an interpretation of the “for cause” removal provision at issue there, which is substantially the same as that applicable to the Director of respondent, under which passing on the constitutionality of both provisions could be avoided.² That possibility, which the Solicitor General has not raised here, is another reason why the Court need not, and should not, decide the constitutional question presented.

The principal cases from this Court in which the Court passed on removal provisions that limited the power of the President arose when the President had actually tried to remove an officer in the face of those limitations. In this case, the President has made no attempt to remove respondent’s Director or her predecessor, even though the latter, who was appointed by President Obama, served for ten months after President Trump was inaugurated.³ After the former Director resigned, the President installed first an interim Director of his choosing and now has his own Senate-confirmed nominee as the Director. Under those circumstances, there is unlikely to be any need to rule on this constitutional issue while the current President is in office, because a request from the President to the Director for her

² See Brief of Respondent Supporting Petitioners in 17-130, 2018 WL 1251862 at 45: “To Avoid Serious Constitutional Concerns, This Court Should Narrowly Construe ‘Good Cause’ Restrictions On Removing ALJs.”

³<https://www.washingtonpost.com/news/business/wp/2017/11/15/richard-cordray-is-stepping-down-as-head-of-consumer-financial-protection-bureau/>.

resignation would almost certainly not be resisted. And if it were, the issue could be decided at that time.

There is also the question of standing, which the parties have not briefed, but simply assumed that a private party could properly raise the claim that a statute that limited the power of the President to remove the agency head, could be litigated by a party on whom the agency had made a demand. Amicus recognizes that in *Morrison v. Olson*, 487 U.S. 654 (1988), and *Free Enterprise Fund v. Public Company Accounting Oversight Bd.*, 561 U.S. 477 (2010), this Court decided removal issues in cases where no one sought the removal of the officers in question. However, in neither case was there litigation over the issue of standing – principally whether the private party comes within the zone of interest protected by the ability of the President to remove officers without limitation. The likely reason that the Court decided the removal issues in those cases was that in both cases there were challenges to the appointment of the officers, who were the opposing parties, for which the standing of the private party was clear. In any event, drive-by jurisdictional rulings do not bind the Court, especially when the merits issue is a weighty constitutional one such as this.

Surely, if the President had filed a declaratory judgment action asking the Court to rule that the statutory limits on his power to remove the Director of the respondent Consumer

Protection Bureau was unconstitutional, the Court would have dismissed the action as seeking an advisory opinion. Where the President has the power to take the action that he claims to be within his power, without obtaining permission of the Court, there is no reason for this Court to decide a major constitutional issue simply because the President seeks what amounts to an advisory opinion on the subject. Moreover, the President and his party controlled both Houses of Congress for two full years, during which they had the virtually unchecked ability to revise the CFPB's removal provision to eliminate the restrictions. Despite the fact that Congress, with the agreement of the President, amended the statute of which the creation of the CFPB was a part,⁴ they chose not to address this issue, preferring instead to ask the Court to decide. Accordingly, this Court should also conclude that it should not come to the rescue of one branch of Government when that branch has the ability to remedy any perceived wrongs without invoking the power of the Court. *Cf., Raines*, 521 U.S. at 529 (noting ability of Congress to repeal provision at issue as alternative to suing to invalidate it).

Amicus notes that the basis of the President's objection to the limits on his power of removal is that it interferes with his ability to carry out his constitutional duty to take care that the laws be faithfully executed. The real problem in this case is that the President has decided that some laws – the removal limitations in the CFPB

⁴ Title II, PUBLIC LAW 115–174, 132 STAT. 1297 (2018).

statute – should not be faithfully executed. Nonetheless, he has chosen not to act on his views of selected faithful execution by removing the prior Director and defending that action in court if it were challenged. Instead, he has, in effect, asked this Court for an advisory opinion on a major constitutional question, which Article III allow the Court to answer. Recognizing the need for the appointment of an amicus to argue the merits does not cure, but rather underscores, these Article III problems.

Amicus recognizes that the House of Representatives supports the constitutionality of the removal provisions and will defend them on the merits. However, amicus notes that in *Windsor* the House argued, in similar but slightly different circumstances, that its participation as an amicus solved any Article III problems.⁵ For that and perhaps other reasons, the House may not raise the jurisdictional issues presented in this brief. Furthermore, its role as an independent amicus raises no separation of powers concerns, but its appointment by the Court as the Court's amicus might suggest that it would be seen as acting as an arm of the judicial branch, rather than as one part of an independent branch of the federal government.

⁵ See Reply Brief for Bipartisan Legal Advisory Group of the United States House of Representatives in *Windsor*, *supra*, 2013 WL 1209174.

CONCLUSION

For all of these reasons, amicus suggests that the Court should deny certiorari, or dismiss the petitions for want of jurisdiction, in this and other similar cases raising the CFPB removal issue. However, if it grants any of these petitions, it should direct the parties to brief these and any other jurisdictional issues, and it should appoint an amicus to address them, as well as the merits of the question presented by the petition.

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