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 OF AMICUS CURIAE ALAN B. MORRISON IN SUPPORT OF NEITHER PARTY

ALAN B. MORRISON
COUNSEL OF RECORD
GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H STREET NW
Washington, DC 20052
(202) 994-7120
abmorrison@law.gwu.edu

December 13, 2019

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INTEREST OF THE AMICUS[1]

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 this case. He was lead counsel in *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 case. Amicus is filing this brief because neither the parties, nor the amicus United States House of Representatives, nor the Court-appointed amicus on the merits is likely to discuss these issues. This Court granted the motion of amicus to file a shorter version of this brief at the certiorari stage.

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[1] No person other than Brian Wolfman of Georgetown Law Center, who made suggestions on prior drafts, and amicus have authored this brief in whole or in part or made a monetary contribution toward its preparation or submission. The parties have filed blanket consents to the filing of amicus briefs on the merits.

INTRODUCTION AND SUMMARY OF ARGUMENT

At the outset it is essential to determine the precise legal claim before the Court that petitioner has asserted and with which respondent agrees. The question presented by the petition is stated broadly:

> Whether the vesting of substantial executive authority in the Consumer Financial Protection Bureau, an independent agency led by a single director, violates separation of powers. Pet at i.

The petition describes various features of the agency, including the actions that it is authorized to take, the term of the Director, and the method by which it is funded. However, the body of the petition and petitioner's brief on the merits make it clear that the sole constitutional question that it is asking this Court to resolve is whether the limit on the President's power to remove the Director, except for cause, is constitutional.

There is no doubt that the Director was properly appointed by the President with the advice and consent of the Senate and that the Constitution permits appointments of even principal officers to be for terms of years. And despite the unusual source of the agency's funding, no party has cited a case that found that feature to be unconstitutional. Moreover, in his briefs on behalf of respondent supporting certiorari and on the merits, the Solicitor General did not suggest

that there is any other constitutional defect beyond the for-cause removal provision, which is the entire focus of his restated question presented. To be sure, both petitioner and respondent argue that other factors in the statute support their position that the limits on removal are invalid, but that is different from arguing that they form independent bases for a finding of unconstitutionality, let alone that these other questions are presented in this case.

But even as limited, the question of whether the Constitution requires that all principal officers, and perhaps all officers of the United States, be removable by the President for any reason, for no reason, or for a reason that Congress or even the Constitution may conclude is inappropriate, is enormously significant to the operation of the federal government. Although this case involves the Consumer Financial Protection Bureau ("CFPB") which has a number of unique features, the briefs of petitioner and the Solicitor General do not ask this Court to differentiate this agency from the many other federal agencies, such as the Federal Election Commission, the Federal Communications Commission, the National Labor Relations Board, and the Securities and Exchange Commission, which also make policy determinations pursuant to federal law, and whose officers can only be removed for cause. Indeed, the Solicitor General has argued that the President's right to remove without cause extends to inferior officers whose sole function is to adjudicate cases. *See infra* at 24 (arguing that ALJs are removable without cause).

Despite the importance of the question presented, there are very significant jurisdictional hurdles under Article III that preclude the Court from reaching the merits. The President has never attempted to fire the Director of the CFPB, and the petitioner is a private law firm, whose shareholder is not subject to any form of removal from federal office. Its objection is that a federal officer who has demanded certain information from the petitioner cannot be removed by the President which allegedly interferes with the President's duty in Article II, Section 3 to "take Care that the Laws be faithfully executed."

The first jurisdictional problem is that no private party has standing to assert any rights that the President may have. Nor is there any showing that the inability of the President to remove the Director injured petitioner in a way in which it has a right to object. Allowing any person who is affected by any order of any federal agency, in which the head of the agency, its members, or the various administrative judges who support its mission, can only be removed for cause, to challenge that order on the grounds asserted here would open the floodgates to a tide of constitutional lawsuits against almost every federal agency.

There is another set of reasons why this Court should decline to decide the merits of this lawsuit. Article III requires that there be adverse parties, and this Court's appointment of an amicus to defend the statute cannot fill that void. This is now precisely the kind of "friendly suit" that this Court required to be dismissed in *Muskrat v. United States,* 219 U.S. 346, 359-60 (1911), and for

which dismissal is even more appropriate here because of the potential impact of the decision on the operation of many federal agencies. Indeed, dismissal is singularly appropriate here because, as explained below, the current President had almost ten months in which he could have removed the Director appointed by the previous President, but chose not to do so. Nor did he ask Congress to amend the removal portion of the CFPB statute when his political party controlled both Houses of Congress and when it amended other significant portions of the law that created the CFPB. The President simply chose not to seek to change the provisions on the removal of the Director, preferring instead to ask this Court to strike the offending restriction.

As noted above, if the theory of petitioner and the Solicitor General is accepted, that would have vast consequences for the scores of federal agencies that have both principal and inferior officers with for-cause removal protections. Congress has relied on the constitutionality of these provisions since at least 1935 in assigning duties and responsibilities to numerous federal agencies, in an effort to balance the interests in fairness to all parties and the ability of the President to carry out his policies. Moreover, although the Solicitor General seeks to portray for-cause protections as if they exclusively harm the President, they also provide offsetting benefits because the next President cannot immediately sweep prior appointees from office.

This is not a case where Congress has flaunted an express provision in the Constitution

because nowhere in the Appointments or Take Care Clauses, or anywhere else, except in the Impeachment Clause in Article II, § 4, is removal ever mentioned, let alone accompanied by a phrase such as "at will." Furthermore, the case on which the theory of at-will removal by the President is based, *Myers v. United States,* 272 U.S. 52 (1926), did not involve a statute with a for-cause limitation, but one in which the President had to obtain the permission of the Senate to remove the officer. That kind of clear congressional aggrandizement is not present here, but was present in cases such as *INS v. Chadha,* 462 U.S. 919 (1983); *Bowsher v. Synar*, 478 U.S. 714 (1986); and *Metropolitan Washington Airports Authority v. Citizens for Abatement of Aircraft Noise, Inc.,* 501 U.S. 252 (1991).

If there was ever a case that called for judicial restraint, this is it. Although purporting to be about the President's removal powers, no one – let alone this petitioner – has been removed from office. There is no actual case or controversy between adverse parties, and no need to decide any question, let alone one with such momentous consequences as the one posed by the parties. If the President truly believes that this law, or the many others applicable to other federal officers, offends his powers under the Constitution – and he is prepared to take the political heat for doing so – he can remove any of the thousands of officers who have for-cause removal protections and do what President Roosevelt did in *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), and defend his

decision in court, with a real adversary on the other side.

ARGUMENT

THE CASE SHOULD BE DISMISSED FOR LACK OF JURISDICTION.

The principal bases for dismissal – that petitioner lacks standing and that the parties are no longer adverse because they agree on the merits of the constitutional claim – are interrelated because standing is part of the Article III requirement of a case or controversy. Both of these jurisdictional issues were previewed in a brief filed by amicus at the certiorari stage, but, for whatever reasons, both petitioner and respondent have chosen not to address them in their merits briefs. Because petitioner's lack of standing to challenge the CFPB removal limits would have been a basis for dismissal even if the parties were not in agreement on the merits, this brief will address that issue first.

I. PETITIONER DOES NOT HAVE STANDING TO CHALLENGE THE LIMITS ON REMOVAL OF THE CFPB DIRECTOR.

It is a fundamental tenet of Article III that a party must have standing to raise the legal challenge at issue. In most cases the relevant party is the plaintiff, but this Court has made it clear that defendants must also meet the requirements

of standing, most recently in *Hollingsworth v. Perry*, 570 U.S. 693 (2013). There this Court held that the proponents of a state initiative had no legally protected interest in the defense of their initiative. As a result, they lacked standing to appeal an adverse ruling in a challenge to its constitutionality, even though they had intervened to support the law in the district court and that court had ruled against them on the merits.

Petitioner here was the defendant in a proceeding brought by respondent to enforce a civil investigative demand. In this context the question is whether petitioner had standing to raise the limits on the removal of the Director of the CFPB as an independent basis for non-compliance, just as if petitioner had filed a pre-enforcement suit against respondent seeking that same relief.

Amicus recognizes that this standing argument was not raised in the lower courts. However, because lack of standing is jurisdictional, it can and must be raised by the Court at any time. One reason why standing may not have been raised below is that courts, including this Court, have decided removal issues even when there has been no actual removal and even though the President did not claim that a limit on removal had actually prevented him from discharging the officer whose actions were at issue. *See Bowsher v. Synar*, 478 U.S. 714 (1986); *Morrison v. Olson,* 487 U.S. 654 (1988), and *Free Enterprise Fund v. Public*

Company Accounting Oversight Bd., 561 U.S. 477 (2010).

However, in each of those cases, there was a challenge to the basic authority of the individual or entity to act, and in each case, the Court considered whether the method of removal bore on the basic authorization claim. There is no doubt that a person challenging an action taken by a federal official has the right to challenge the appointment of that officer under the Appointments Clause, because the protections of that Clause are for the benefit of everyone subjected to an action by a federal officer. By contrast here, although the removal restriction may arguably cause injury to the President by limiting his ability "to take care that the Laws be faithfully executed," that limitation has no impact on petitioner or other private parties.

Moreover, a plaintiff's standing to raise one claim does not create standing to raise even related claims. Thus, in *Lewis v. Casey,* 518 U.S. 343 (1996), inmates filed a class action raising a variety of challenges to the lack of access to services that would enable them to exercise their right to litigate about prison conditions or their confinement. Based in part on a finding that only two inmates had shown specific injuries to themselves, this Court cited lack of standing in rejecting the broad class relief granted by the district court, which was designed to remedy a number of other prison conditions that the trial court concluded impeded access to the courts. *Id.* at 354-57. Thus, *Lewis*

confirms that a plaintiff who may have standing to challenge an Appointments Clause violation does not have standing to sue to invalidate a removal restriction.

In any event, now that amicus has raised a standing issue, the Court must address it. And it is important for the Court to reject petitioner's standing here. Otherwise, a similar removal claim will be added by every person challenging a decision of every agency with members or even ALJs or other inferior officers who have similar protections.

The test for meeting the requirement of standing was set forth in *Warth v. Seldin*, 422 U.S. 490, 498 (1975): "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *See also Spokeo, Inc. v. Robins,* 136 S. Ct. 1540, 1548 (2016) (emphasizing that the injury must be "concrete' and "particularized" and constitute "an invasion of a legally protected interest" of the person raising the claim).

In *Allen v. Wright,* 468 U.S. 737, 751 (1984), the Court described what it called "judicially-self-imposed limits on the exercise of federal jurisdiction" including "that a plaintiff's complaint fall within the zone of interests protected by the law invoked." The Court went on to describe what

it called "a core component derived directly from the Constitution. A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Id.* Petitioner cannot meet this standard principally because the President's asserted inability to remove the Director has no connection to whether the demand made by the CFPB was lawful.

A major obstacle to petitioner's standing is that nowhere does it describe any injury that it suffered as a result of the fact that the Director who issued the order was not subject to removal at will by the President. Petitioner does not contend that, had the Director been subject to removal at will, the demand for information made to it would not have been made or enforced, and any such claim would be pure speculation that would not suffice to give petitioner standing. *See Clapper v. Amnesty International, USA,* 568 U.S. 398, 401, 409-14 (2013).

The lack of injury is also apparent when the claim is examined from the redressability perspective. If this Court agreed with petitioner on the merits, or if Congress passed a law making the Director removable at will, petitioner would still be subject to the same investigative demand. That is because it has suffered no injury from the removal limitations, and hence its elimination would not satisfy petitioner's objection to the CFPB's demand for information. And for essentially the same reasons, it also fails to satisfy the traceability

requirement. The real standing problem is that there is no connection between any injury that petitioner or any other similar plaintiff would suffer and the removal or non-removal of the Director by the President.

In many respects, the claim of standing here is even weaker than that rejected in *Raines v. Byrd*, 521 U.S. 811 (1997). The claim on the merits there was that the powers conferred on the President by the Line Item Veto Act violated Article I, § 7 and other provisions of the Constitution by giving him the power to make laws, which can only be done by Congress. As part of that Act, Congress created an express right of individual Members of Congress to challenge the constitutionality of the Act, based on the recognition that Members would lose power to the President as a result of his ability to use the veto to alter agreed-upon legislation. This Court nonetheless concluded that the statute did not meet the requirements of Article III insofar as it gave individual Members the right to sue over the Line Item Veto Act when they could show no injury personal to themselves.

In reaching that conclusion, the Court made several observations applicable to this case. First, the Court noted that it has "always insisted on strict compliance with this jurisdictional standing requirement." *Id.* at 819. It further observed that the "standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government

was unconstitutional," and that the Court "must put aside the natural urge to proceed directly to the merits of this important dispute and to 'settle' it for the sake of convenience and efficiency." *Id.* at 819-20. *Accord Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 17 (2004) (lack of prudential standing found in face of strong dissent that reached merits and rejected controversial Establishment Clause claim).

One further concern that *Raines* expressed about upholding the congressional standing statute there was that the rationale might extend to allowing the President to ask the courts for rulings on the limits on his powers under laws such as the Tenure of Office Act, which required Senate approval in order for the President to remove certain executive branch officers. 421 U.S. at 826-27. Indeed, now that the President has agreed with petitioner that it may raise this constitutional challenge, this lawsuit has become the equivalent of a declaratory judgment action brought by the President asking this Court to rule that the removal restrictions are unconstitutional. Therefore, for this reason as well, the relief sought here is inconsistent with this aspect of *Raines*.

Raines does not hold that one or both Houses of Congress lack standing in all situations to defend laws that grant them powers beyond those in the legislative process. For example, in *INS v. Chadha,* 462 U.S. 919 (1983), the Executive Branch declined to defend a statute granting either House of Congress a veto over certain decisions by the INS regarding the deportability of aliens, and both

Houses intervened to support the law. In that situation, the intervenors had standing to protect their distinct statutorily-granted interest in exercising the veto, which was particularized to them, and was therefore different from any general interest that they may have had in defending laws that Congress had enacted. And because both Houses had standing to defend their vetoes, there was no case or controversy problem of the kind discussed in Point II *infra.*

This Court has never shied away from a standing ruling on the ground that, if this plaintiff lacks standing, then no one will be able to make the constitutional challenge. *See e.g. Clapper* and *Warth, supra.* But, like *Raines,* there is a direct path by which this removal claim can be litigated, and it is solely within the power of the President – the person who would benefit from a ruling striking down this or other removal limitations – to set up a case in which there would be no question of standing or any other barrier to reaching the merits. The President could simply fire the current Director, or any one of the many other officers who have statutory removal protections. And if that person sued, as did the plaintiffs in *Myers* and *Humphrey's Executor*, *supra,* there would be a proper Article III case in which the President or the United States as defendant would have standing to assert that the statutory limitations on removal were unconstitutional. That is what happened in the wake of *Raines,* when the President exercised his line-item veto, and parties injured by it brought suit and were vindicated by this Court in *Clinton v. City of New York,* 524 U.S. 417 (1998).

The Court need not reach the prudential zone-of-interest requirement noted in *Allen, supra,* but if the Court does, it further supports the conclusion that petitioner does not have standing to raise the removal claim. Zone of interest inquiries focus on the law on which the claimant relies. There is nothing in the Appointments Clause that mentions removal, and the parties base their claims on removal on the Take Care Clause, which is specifically directed at the President. Amicus does not argue that the Constitution should be read narrowly to limit the protections that it affords, but only that those who rely on it must show that the law being challenged "causes injury [to them] that is concrete, particular, and redressable." *Bond v. United States,* 564 U.S. 211, 222 (2011) (upholding standing of defendant in criminal case to challenge on federalism grounds the power of Congress to enact offense charged there).

Although amicus does not agree that the Take Care Clause invalidates for-cause removal provisions, if that Clause protects anyone, it is the President and no one else. Indeed, if its protections extended to cover petitioner, then any person who objected to an agency action affecting them, would have standing to object to that action on the ground that a relevant agency official was unconstitutionally protected by a for-cause removal provision. Furthermore, as noted above, if the President truly wants a ruling on this issue, and is prepared as prior Presidents were to take the political heat for firing an officer who has statutory removal protections, there is no barrier

to obtaining the adjudication that this President seeks.

II. THERE IS NO ACTUAL CONTROVERSY BETWEEN THE PARTIES, AND THEREFORE THERE IS NO ARTICLE III JURISDICTION.

Unlike the absence of standing to litigate the removal claim, which existed from the moment that petitioner raised that claim, the lack of an actual case or controversy only arose when the Solicitor General filed his response to the petition in September 2019. But now that the parties agree on the merits of the constitutional claim at issue, the absence of adversity between the parties means that there is no longer any Article III case or controversy. Thus, while the constitutional issue is of great legal and practical significance, it may never have to be decided, or if it has to be decided, it will be in a case in which the parties are truly adverse to each other, without the need to appoint an amicus to argue the other side.[2]

Two recent cases illustrate the problem caused by the lack of adversity here, with the Court

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[2] Cases involving statutory interpretation issues requiring appointment of an amicus raise much less concern because Congress can always fix a statute if it disagrees with a ruling of this Court and because, for many statutes, it is more important that there be a definitive answer to their meaning than that the answer be the correct one. *See Culbertson v. Berryhill,* 139 S. Ct. 517, 521 (2019) (amicus appointed to defend judgment below favoring agency, which no longer supported that judgment, where review was necessary to resolve a conflict in the circuits).

in one, *United States v. Windsor,* 570 U.S. 744 (2013), narrowly agreeing to reach the merits, while a 5-4 majority in the other, *Hollingsworth v. Perry,* 570 U.S. 693 (2013), reaching the opposite conclusion. Both were constitutional challenges to laws that treated same-sex couples less favorably than opposite sex couples. In both, the named defendants had chosen not to defend the laws at issue, in both cases before there had been any determinations on the merits. The law in *Windsor* was the Defense of Marriage Act ("DOMA"), whose unfavorable treatment for same-sex married couples extended to more than 1000 federal statutes. Because those statutes also affected the legislative and judicial branches (mainly because of the impact of DOMA on some of their employees), even the President's unilateral refusal to enforce the law would have left it in place in the other two branches.

In *Windsor* the plaintiff sought a tax refund of $363,053, which the Government declined to give her without a final order from this Court. The House intervened in the district court and fully defended the law including in this Court. The court of appeals did not raise any jurisdictional objection, nor did any party, but this Court sua sponte appointed an amicus to argue that the Court lacked jurisdiction because the plaintiff and the United States agreed on the merits, even though there was no question as to the adversity between the House and the existing parties.

The legal basis on which the majority found the requisite case or controversy is not entirely

clear, but it surely was based in large part on practical considerations. The majority assumed that, if this Court and the court of appeals lacked jurisdiction, plaintiff's judgment that she was entitled to her tax refund would still be upheld. *Windsor,* 570 U.S. at 755. Even the dissent did not suggest that the district court judgment had to be vacated. *Id.* at 791 (finding that this Court and the court of appeals "had no power to decide this suit," with the only result being that appeal be dismissed, leaving the district court judgment in place).

However, if the position argued by the amicus there were taken to its logical conclusion, at least the portion of the district court's ruling that declared DOMA unconstitutional would have to be stricken, in which case plaintiff might have prevailed on the basis of a default judgment. *But see* Federal Rule of Civil Procedure 55(d): "A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court." One way or the other, it would have been perverse beyond all reason if the plaintiff had lost her claim against the Government because the Government agreed that she was entitled to the relief that she sought, but refused to give it to her.

The majority in *Windsor* also relied heavily on the near chaos that would ensue if the Court refused to decide the constitutionality of DOMA in that case. Thus, if the position of the amicus had been sustained, there would be no way for an appeal to be taken from a ruling adverse to DOMA,

if any court could even go that far. Meanwhile, federal agencies would be compelled to follow DOMA, with no means in sight to resolve its constitutionality. And because DOMA affected over 1000 statutes, covering all three branches of Government, the situation would shortly become intolerable.

At the very least, to the extent that Article III has flexibility based on prudential considerations, such as the practical consequences of granting or denying judicial review, as the majority concluded it did, *id.* at 762, *Windsor* cried out for an immediate judicial resolution of the constitutional question. Moreover, if the court-appointed amicus had been correct, there would be no way *any* plaintiff could litigate the constitutionality of DOMA unless a new President in 2017 decided to defend its constitutionality.

Justice Alito concurred with the majority on the jurisdictional issue (but not on the merits) on the ground that intervention by the House to defend DOMA starting in the district court satisfied Article III. 570 U.S. at 803. He based his opinion in part on his reading of *Chadha,* although, as shown above, the congressional intervenors had standing there. His position commanded no other votes in *Windsor* and only three others in *Hollingsworth.* And for good reason, as Justice Rehnquist observed in *Kremens v. Bartley,* 431 U.S. 119, 134 n. 15 (1977):

> The availability of thoroughly prepared attorneys to argue both sides of a

> constitutional question, and of numerous amici curiae ready to assist in the decisional process, even though all of them 'stand like greyhounds in the slips, straining upon the start,' does not dispense with the requirement that there be a live dispute between 'live' parties before we decide such a question.

Most significant for this case, no one with standing has sought to intervene in this or any other Court, and so that Justice Alito's rationale, even if correct, cannot save this case from the lack of adversariness required by Article III.

By contrast here, this removal provision could have been tested in court, if President Trump had been willing to fire the previous Director in the ten months that he served after the President was sworn in.[3] And he can still obtain a legitimate test today. Even if the President does not want to remove the current Director (or she would not resist), there are many other officers of the United States at other agencies who have for-cause removal protection that the President could fire if he wanted to test the limits on removal. For that reason, unlike *Windsor,* this is not a situation in which there may never be a test of these provisions .

Hollingsworth is in many respects closer to this case than *Windsor*. At issue there was a ballot

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

measure (Prop 8) that barred California from approving same-sex marriages. When two same-sex couples brought a non-class action constitutional challenge to Prop 8, the Governor and the state Attorney General declined to defend the law, and so the group that had sponsored the ballot initiative intervened and fully litigated the case in the district court and the court of appeals where the plaintiffs prevailed. This Court, however, declined to reach the merits of the challenge, instead dismissing the petition for lack of standing, although the same result based on the absence of adversity would also have been appropriate. That ruling had the effect of leaving in place the order of the district court invalidating Prop 8, at least as applied to these plaintiffs. The proponents of Prop 8 declined to continue the battle in California, but they and their allies supported other states that defended similar bans on same-sex marriages, but which this Court struck down in *Obergefell v. Hodges,* 135 S. Ct. 2584 (2015).

Muskrat v. United States, 219 U.S. 346 (1911), also provides important wisdom on the application of the adversity aspect of the case or controversy requirement. At issue there was the impact of two conflicting federal statutes on the rights of two different groups of Native Americans. A statute designed to provide a means to resolve this dispute directed one group to sue the United States and asked the courts to decide whether latter-enacted statutes could constitutionally deprive that group of their rights under an earlier law.

As part of its discussion, the Court quoted from *Chicago & G. T. Railroad Co. v. Wellman*, 143 U. S. 339, 345 (1892), in words that resonate here about the dangers of constitutional litigation when both sides agree.

> 'Whenever . . . there is presented a question involving the validity of any act of any legislature . . . and the decision necessarily rests on the competency of the legislature to so enact, [a constitutional ruling] is legitimate only in the last resort, and as a necessity in the determination of real, earnest, and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.' *Quoted* at 219 U.S. at 359-60.

The *Muskrat* Court also refused to reach the merits, observing that deciding whether a law of Congress is unconstitutional is "the most important and delicate duty of this court," and is given to it "because the rights of the litigants in justiciable controversies require the court to choose between the fundamental law and a law purporting to be enacted within constitutional authority, but in fact beyond the power delegated to the legislative branch of the government." *Id.* at 361. The Court then refused to decide the constitutional issue presented there because the United States "has no interest adverse to the claimants" and the "whole purpose of the law [authorizing the litigation] is to determine the constitutional

validity of this class of legislation, in a suit not arising between parties concerning a property right necessarily involved in the decision in question, but in a proceeding against the government in its sovereign capacity, and concerning which the only judgment required is to settle the doubtful character of the legislation in question." *Id.* at 362.

The lessons from *Muskrat* apply fully here. The federal courts do not sit to advise parties on constitutional questions, but to decide actual disputes between them, in part because to decide those questions is "the most important and delicate duty of this court." That consideration is of special significance here given the importance and breadth of the ruling that the existing parties seek from this Court. *Muskrat* did not foreclose litigation over the statutes at issue there, but the Court insisted that the parties be real adversaries. So too here: the claim that the limits on removal are unconstitutional can be readily tested by this President by removing someone who holds a position protected by those limits and who is willing to sue to reclaim his or her job.

Indeed, the President had such an opportunity for the ten months that the prior CFPB Director held that office after January 20, 2017, but the President declined to pursue that path. Thus, unlike with DOMA, in which dismissal of *Windsor* might have precluded *any* court from *ever* reviewing the constitutional ruling, there is no chance that the courts will be unable to review these removal limits, if a President chooses to

remove the Director (or any other similarly protected officer) without asserting good cause.

Moreover, President Trump 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 these restrictions. Thus, Congress, with the agreement of the President, amended the part of the statute creating the CFPB,[4] but they chose not to address this issue, preferring instead to ask this Court to decide the constitutional question. Accordingly, this Court should not come to the rescue of one branch of Government when that branch has the ability to remedy any perceived injuries without invoking the power of the Court. *Cf., Raines,* 521 U.S. at 529 (noting ability of Congress to repeal provisions at issue as alternative to suing to invalidate them).

In fact, this is the second time that this Solicitor General has asked this Court to decide this constitutional question without actually removing the officers in question. In *Lucia v. Securities & Exchange Commission,* 138 S. Ct. 2044 (2018), the question on which this Court granted review was whether the administrative law judges at the SEC ("ALJs") were inferior officers or employees. In his merits brief, the Solicitor General also asked the Court to decide that the limits on firing those ALJs, which are similar to those that apply to the Director, were unconstitutional. *See* Brief of Respondent

[4] Title II, Public Law 115–174, 132 Stat. 1297 (2018).

Supporting Petitioner in *Lucia v. SEC*, 2018 WL 1251862 at 39-55. *But see* Brief for Respondent Supporting Vacatur ("Br"). at 40 (suggesting that inferior officers may not be required to be removable at will).

In addition, respondent's brief in *Lucia* also suggested a means to avoid deciding the constitutional question. It proposed "Narrowly Construe[ing] 'Good Cause' Restrictions On Removing ALJs" in order "to permit the removal of an ALJ "for misconduct or failure to follow lawful agency directives or to perform his duties adequately." *Id.* at 39. That suggestion, which respondent has not pressed here (Br. at 43), provides another way to avoid the constitutional question. Moreover, if that approach has any viability, it should be examined in the context of a specific removal action, including the basis for doing so, not in a friendly lawsuit devoid of all facts and adversity.

At the very least, these alternatives, which were absent in *Windsor* and *Hollingsworth,* present further compelling reasons why the Court should decline to address the constitutional issue presented in the petition.

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One final word is in order that relates to the lack of adversity in this case. The Take Care Clause of the Constitution applies to "the Laws," which does not mean only the laws that the

President or his attorneys like, but all the laws that Congress has enacted, with very limited exceptions. *See* Presidential Residual Authority to Decline to Execute Unconstitutional Statutes, 18 Op. Off. Legal Counsel 199 (1994).

The main justification for a President's refusal to defend a federal law is that the law impedes the ability of the President or those acting on his behalf from carrying out their statutory or constitutional duties. Thus, in *Chadha,* a statute gave to either House of Congress the right to veto the decision assigned by law to the INS to allow an otherwise deportable alien to remain in this country. In doing so, the veto directly affected the ability of officials working for the President to carry out the applicable law. The fact that similar legislative veto provisions had been included in over 200 laws over a period of 40 years provided further justification for the President to side with the alien after ensuring that the House and Senate would intervene to defend the law.

By contrast, the Obama Administration in *Windsor* refused to defend DOMA although the law did not even arguably interfere with any power of the President. In addition, the Equal Protection claim of the plaintiff was by no means compelled by prior law, and the argument put forth by the Solicitor General – that heightened scrutiny was required for discrimination against same-sex couples – had never been adopted by any court. As a result of choosing not to take care that DOMA be

faithfully executed, the House of Representatives was required to intervene to support the law, and this Court had to appoint an amicus to argue that the Court lacked jurisdiction because of the lack of adversity among the parties. 570 U.S. at 755.[5]

Dickerson v. United States, 530 U.S. 428 (2000), is an example of a closer case for not defending a federal statute. The law challenged there, 18 U.S.C. § 3501, was enacted to lessen the restrictions on admissibility of evidence obtained from suspects while in custody, established by *Miranda v. Arizona,* 384 U.S. 436 (1966). The Department of Justice declined to defend the law on the ground that *Miranda* directly controlled the outcome, while still maintaining that the underlying prosecution of the defendant would continue. An amicus was appointed to defend the statute, which the lower court had upheld, but the majority struck it down, over the dissent of Justices Scalia and Thomas, *id.* at 444, which suggests that the constitutional question was not open and shut.

Nor is this a case in which Congress has flaunted a prior ruling of this Court (as arguably it did in *Dickerson*). The principal case on which the Solicitor General relies, *Myers v. United States,* 272 U.S. 52 (1926), did not involve a for-cause limitation, but was described by Chief Justice Rehnquist in *Raines*, as one in which "this Court

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[5] Amicus's disagreement with the Obama Administration is not over the merits in *Windsor*: he filed an amicus brief supporting the plaintiff in *Windsor* on behalf of Citizens for Responsibility and Ethics in Washington. *See* 2013 WL 573933 (2013).

held that Congress could not require senatorial consent to the removal of a Postmaster who had been appointed by the President with the consent of the Senate." 521 U.S. at 827. On the other side, there is direct precedent in *Humphrey's Executor* and *Morrison v. Olson,* 487 U.S. 654 (1988), upholding for-cause limits on removal. Although respondent seeks to distinguish those cases, it also asks this Court to overrule them, if necessary. Br. at 8, 44. Under these circumstances, it seems singularly inappropriate for the Solicitor General to refuse to defend a statute without also taking the political consequences from removing an officer subject to an allegedly unconstitutional restriction. As a result, he is, in effect, seeking an advisory opinion from this Court that the removal restrictions applicable to the Director are unconstitutional.

It is not the role of amicus or this Court to spell out in detail precisely when and under what circumstances the President and his Attorney General may properly decline to defend a law duly enacted by Congress. But it would be appropriate for this Court to remind the President that his basic duty is to take care that *all* of the laws be faithfully executed and defended in court, and that exceptions to that principle should be a last resort. It is particularly ironic in this case that the President's refusal to defend this law is justified on the broad theory that his inability to remove the Director of the CFPB except for cause interferes with his ability to take care that the laws, which Congress has entrusted to the Director, not the President, be faithfully executed. And he has done

so in a case in which he has not attempted to fire a Director who has sued to regain his position. Whatever the standards may be for declining to defend a federal statute, the refusal here does not meet them and has caused the Court to deal with serious jurisdictional problems that arise when all parties agree that the challenged law is unconstitutional.

CONCLUSION

For all of these reasons, the Court should dismiss the petition and the underlying case for want of jurisdiction, or, alternatively, it should dismiss the petition as improvidently granted.

Respectfully submitted,

Alan B. Morrison
Counsel of Record
George Washington
University Law School
2000 H Street NW
Washington D.C. 20052
202 994 7120
abmorrison@law.gwu.edu

December 13, 2019