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 AMICI CURIAE PATRICK J. COLLINS, MARCUS J. LIOTTA, AND WILLIAM M. HITCHCOCK IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici Patrick J. Collins, Marcus J. Liotta, and William M. Hitchcock are Petitioners in *Collins v. Mnuchin*, No. 19-422, and Respondents in *Mnuchin v. Collins*, No. 19-563. Amici are shareholders in Fannie Mae and Freddie Mac whose economic rights in those tremendously profitable companies have been wiped out by a Government action known as the Net Worth Sweep—an action pursuant to which the Federal Housing Finance Agency ("FHFA"), acting as conservator for Fannie and Freddie, nationalized the companies by agreeing to pay Treasury nearly all of the companies' net worth on a quarterly basis. By virtue of the Net Worth Sweep, Amici's stock has effectively been removed from Fannie's and Freddie's capital structure.

Like the Consumer Financial Protection Bureau ("CFPB"), FHFA is an executive agency headed by a single individual with for-cause removal protection. And like this case, Amici's Petition presents the issues of whether such protection violates the separation of powers and, if so, whether that protection is severable from the remainder of the statute in question.

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[1] All parties have filed a notice of blanket consent to the filing of amicus briefs with the Clerk. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

Amici's Petition also presents a third issue: whether final agency action taken by an unconstitutionally structured agency must be vacated. The Court's ruling in this case may have implications for the proper answer to that question. Amici therefore file this brief to highlight the critical importance of ensuring that the lower courts do not improperly withhold remedies to litigants with valid separation-of-powers claims.

SUMMARY OF ARGUMENT

A successful separation-of-powers challenge to an official insulated from Presidential control may raise two distinct remedial issues:

(1) Whether the challenged actions taken by the official must be set aside; and,

(2) Whether moving forward the official's insulation can be severed.

This Court's decision in *Bowsher v. Synar*, 478 U.S. 714 (1986), demonstrates that these two issues must be decided separately. After finding that an official exercising executive power was unconstitutionally insulated from Presidential control, the Court in *Bowsher both* affirmed a lower-court judgment vacating the challenged government action *and* separately addressed whether the challenged provisions of law could be severed. Petitioner's position on the appropriate remedy in this case further underscores the same point: it asks the Court to refuse to enforce a Civil Investigative Demand without even reaching the separate issue of severability.

If the Court in this case finds CFPB's structure unconstitutional (as it should), it is imperative that the Court clarify that issue 1 (whether *past* actions *must be vacated*) is distinct from issue 2 (whether *moving forward* unconstitutional provisions can be *severed*). The need for such clarification is demonstrated by the en banc Fifth Circuit's decision in Amici's case, in which the two judges on whose votes the case turned misinterpreted *Bowsher* and improperly relied on this Court's decision in *Free Enterprise Fund v. Public Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010), to conflate these distinct issues and hold that meaningful backward-looking relief is unavailable for meritorious separation-of-powers claims. *See Collins v. Mnuchin*, 938 F.3d 553, 595 (5th Cir. 2019) (en banc) (Duncan, J., concurring).

Furthermore, to the extent the Court notwithstanding *Bowsher* determines that a prospective-only remedy is appropriate in this case, it should clarify that it is not establishing that as the proper remedy for *all* cases involving unconstitutional insulation of executive officials from Presidential control. Unlike Amici, Petitioner has not invoked the Administrative Procedure Act's command that a "reviewing court *shall* . . . *set aside* agency action . . . found to be . . . contrary to constitutional . . . power." 5 U.S.C. § 706(1)–(2)(B) (emphasis added).

Clarification of these issues is needed for more than simply ensuring a proper application of the law. Precluding separation-of-powers litigants from obtaining vacatur of harmful agency action "would

create a disincentive to raise" separation-of-powers claims. *Ryder v. United States*, 515 U.S. 177, 177 (1995). And holding that litigants may only obtain invalidation of the offending provisions without any backward-looking relief would make severability analysis—which "appear[s] to be in tension with traditional limits on judicial authority," *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring)—wholly *supplant* more traditional remedial inquiries in separation-of-powers cases. This Court's prompt attention is required to stop the spread of these errors in the lower courts.

ARGUMENT

Once a court determines that an official exercising executive power is unconstitutionally insulated from Presidential control, there are two remedial issues the court may be required to address: first, what must be done to remedy *past* actions taken by the official that have harmed the plaintiff in the case, and, second, what must be done to address the official's unconstitutional insulation *moving forward*.

This Court's decision in *Bowsher v. Synar*, 478 U.S. 714 (1986), illustrates the distinctiveness of these issues. In *Bowsher*, the Court held that the Gramm-Rudman-Hollings Act violated the separation of powers by vesting the Comptroller General—an official subject to removal by Congress, not the President—with the executive power to, in certain circumstances, mandate spending reductions to reduce the federal deficit. Having found this separation-of-

powers violation, the Court "turn[ed] to the final issue of remedy." *Id.* at 734. On the issue of forward-looking relief, the Court determined that it "need not enter" the "thicket" of a severability analysis because Congress had provided " 'fallback' provisions" to take effect in the event of judicial invalidation of the procedures in question. *Id.* at 735. On the issue of backward-looking relief, the Court affirmed the judgment of the three-judge district court below, which had "ORDERED that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect[.]" *Synar v. United States*, 626 F.Supp. 1374, 1404 (D.D.C. 1986).

The *Bowsher* vacatur order was consistent with the Court's approach of vacating actions taken in violation of the Appointments Clause and other structural provisions of the Constitution.[2] And that was for good reason: in the removal context, just as in the appointments context, a violation of the Constitution's structural requirements makes an officer's actions "void *ab initio*." *Noel Canning v. Nat'l Lab. Rel. Bd.*, 705 F.3d 490, 493 (D.C. Cir. 2013). It therefore follows that final agency action taken by an officer unconstitutionally insulated from Presidential control must be

[2] *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *Nat'l Lab. Rel. Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014); *Immigr. & Naturalization Servs. v. Chadha*, 462 U.S. 919, 936 (1983).

vacated when a plaintiff with standing challenges it in federal court.

In Amici's case in the Fifth Circuit, the en banc court by a 12-4 vote found that the FHFA Director's for cause removal protection violates the separation of powers. *See Collins*, 938 F.3d at 587–88; *id.* at 591 nn.1–2. Seven of the twelve judges in the majority on this issue properly reasoned that, under *Bowsher*, "[w]hen a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside," *id.* at 626, and therefore that the Net Worth Sweep must be "rescind[ed], *id.* at 629 (Willett, J., dissenting in part).

The remaining five judges in the majority on the merits of the separation-of-powers issue, however, joined with the four judges in the minority to deny Amici any backward-looking relief by a vote of 9-7. The only remedy the Fifth Circuit accorded Amici, therefore, was "to declare the 'for cause' provision severed[,]" *id.* at 595; meanwhile, Amici continue to be excluded from Fannie's and Freddie's capital structure under the Net Worth Sweep.

The concurring opinion of Judge Duncan, joined by Judge Owen—two judges whose votes were critical to the Fifth Circuit's judgment on remedy—misreads this Court's precedents to conflate the issues of remedying final agency action and severability. This conflation demonstrates the necessity for this Court to clarify that these are distinct issues.

The *Collins* concurrence erroneously reasoned that this Court's precedents "compel" the conclusion that the sole remedy for the type of separation-of-powers violation at issue in this case "is to sever the for-cause removal provision from the challenged statute." 938 F.3d at 595 (Duncan, J., concurring). As Judge Willett correctly explained, that is not correct—*Bowsher* establishes that in addition to any forward-looking relief the challenged past "action of an unconstitutionally-insulated officer . . . must be set aside." *Id*. at 626 (Willett, J., dissenting in part).

The *Collins* concurrence sought to distinguish *Bowsher* by referring to the Court's language about not needing to enter the severability "thicket." *Id*. at 596 (Duncan, J., concurring). But as explained above, that part of the Court's opinion in *Bowsher* concerned only what needed to be done to cure the Comptroller General's unconstitutional insulation from Presidential control going forward. It did not indicate that such prospective relief was the *only* type of relief potentially available, nor did it conflate that issue with the separate issue of relief from unlawful agency action. To the contrary, the Court *affirmed* the district court's judgment invalidating the budget sequestration the Comptroller General had caused to be ordered while operating in violation of the separation of powers. *Bowsher* thus confirms that forward-looking relief and backward-looking relief are distinct issues, and it also confirms that past actions of unconstitutionally insulated officers must be vacated regardless of what must

be done to cure the separation-of-powers violation moving forward.[3]

Having misread *Bowsher*, the *Collins* concurrence proceeded to misread this Court's opinion in *Free Enterprise Fund* to mandate a severability-only remedy. *See id.* at 596. In *Free Enterprise Fund*, this Court addressed the constitutionality of the Public Company Accounting Oversight Board. The Board's members were insulated from Presidential control by "double for-cause removal provisions," 561 U.S. at 488 (quotation marks omitted)—the Board's members could only be removed by the Securities and Exchange Commission for cause, and the commissioners of the Securities and Exchange Commission in turn could only be removed by the President for cause. The Court held that this structure violated the separation of powers by unconstitutionally insulating the Board members from Presidential control.

The Court next turned to the issue of remedy. While the "complaint argued that the Board's 'freedom from Presidential oversight and control' rendered it 'and all power and authority exercised by it' in

[3] The *Collins* concurrence also observed that the Comptroller General exercised executive power while removable by Congress, while FHFA's Director exercises executive power while removable by the President only for cause. *Id.* at 595–96. But the concurrence offered no reason for its apparent conclusion that this distinction in the details of why a particular official exercising executive power is unconstitutionally insulated from Presidential control should make a difference in determining whether a backward-looking remedy is appropriate.

violation of the Constitution," the Court "reject[ed] such a broad holding" and instead simply invalidated the Board members' for-cause removal protection. *Id.* at 508.

It is this language that the *Collins* concurrence seized on to hold that backward-looking relief is unavailable, *see Collins*, 938 F.3d at 596, but read in context it is clear that the Court did not *sub silentio* overrule *Bowsher* and establish an idiosyncratic prospective-relief-only rule for unconstitutional restrictions on the President's removal authority. Rather, the Court was simply engaging in a severability analysis while not commenting on the availability of backward-looking relief.

The Court's sole focus on severability is apparent on the face of its remedial analysis, for that analysis only addressed whether "the unconstitutional tenure provisions are severable from the remainder of the statute." *See Free Enterprise Fund*, 561 U.S. at 508.

And the reason for the Court's sole focus on this issue also is apparent from the opinion—no inquiry into vacatur of past agency action was necessary *because there was nothing for the Court to vacate.* The complaint in *Free Enterprise Fund* was brought on behalf of an accounting firm and a nonprofit organization of which it was a member. At the time the complaint was filed, the Board had inspected the firm, released a report critical of it, and opened a formal investigation. *Id.* at 487. By the time of this Court's

decision in the case, however, the investigation had "produced no sanction," and the "uncomplimentary inspection report" the Board had issued was "not subject to judicial review." *Id.* at 490. There therefore *was no final agency action for the Court to vacate*, and that is why the Court focused exclusively on forward-looking relief.

This case directly implicates these errors in the *Collins* concurrence. Under that opinion's reading of this Court's precedents, in Presidential removal cases the courts are categorically prohibited from awarding *any* relief apart from prospective severance of the unconstitutional statutory provision. In contrast, Petitioner asks the Court to not even reach the severability question; Petitioner urges the Court to rule that the CFPB's Civil Investigative Demand cannot be enforced while leaving it to Congress to decide what should happen to the CFPB going forward. No less than the backward-looking relief Amici seek in *Collins*, the primary remedy Petitioner requests in this case would not be available under the *Collins* concurrence. The Court should clarify that its precedents do not limit the remedies available in Presidential removal cases in the manner that the *Collins* concurrence thought.

The *Collins* concurrence also committed an error of omission—it ignored the Administrative Procedure Act, which provides a cause of action to plaintiffs such as Amici who seek relief from unlawful agency action. *See* 5 U.S.C. § 702. The APA is clear that vacatur is required once it is determined that an agency has

exceeded its constitutional authority: "The reviewing court *shall*," the APA states, "set aside agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2) (emphasis added). The APA thus commands that actions like the Net Worth Sweep taken by unconstitutionally insulated executive officers must be set aside, a command that the *Collins* concurrence ignored. To be sure, in this case Petitioner does not invoke the APA as a basis upon which the Court should order nonenforcement of the Civil Investigative Demand. At a very minimum, therefore, if in this case the Court limits the remedy to prospective severance of the unconstitutional statutory provision, it should make clear that it is not prescribing such a remedy for *all* cases involving unconstitutionally insulated executive officers, such as those like Amici's case to which the APA's remedial provisions apply.

* * * * *

This Court's severability "precedents appear to be in tension with traditional limits on judicial authority." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring). That is because severability analysis goes beyond issuing a traditional remedy "like an injunction, a declaration, or damages" to further "decide how a statute operates once [the courts] conclude that part of it cannot be constitutionally enforced"—an inquiry that requires "a nebulous inquiry into hypothetical congressional intent" and "often requires courts to weigh in on statutory provisions that no party has standing to

challenge, bringing courts dangerously close to issuing advisory opinions." *Id.* at 1486–87. While all of this is bad enough, this Court has never held that the legally tenuous severability analysis *supplants* the traditional inquiry into what relief must be entered to remedy harm visited upon a litigant by unlawful agency action. Yet as exemplified by the en banc Fifth Circuit's decision in *Collins*, lower courts are misconstruing this Court's precedents to improperly "create a disincentive" for litigants to raise separation-of-powers claims by depriving them of meaningful backward-looking relief for meritorious claims. *See Ryder v. United States*, 515 U.S. 177, 177 (1995).

CONCLUSION

For the foregoing reasons, this Court should clarify that the issues of backward-looking relief and severability are distinct and that a decision on the latter does not excuse a court from the obligation to set aside unlawful agency action.

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Respectfully submitted,

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