No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

BRIEF OF AMICUS CURIAE CONSUMER BANKERS ASSOCIATION IN SUPPORT OF NEITHER PARTY

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INTEREST OF AMICUS CURIAE

The Consumer Bankers Association ("CBA") is the only member-driven trade association focused exclusively on retail banking.[1] CBA members operate in all 50 states, serve more than 150 million Americans, and hold two thirds of the country's total depository assets. Eighty-five percent of CBA's corporate members are financial institutions holding

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than CBA or its counsel made a monetary contribution to this brief's preparation or submission. The parties have consented to the filing of this brief.

more than $10 billion in assets, and among them are some of the nation's largest retail banks. CBA's associate members include the premier providers of goods and services to those institutions. Whether buying a home, financing an education, or launching a small business, consumers look to CBA members for help in achieving the American dream.

As the voice of the retail banking industry, CBA represents its members and their customers in Congress and regulatory agencies, communicates the vital services retail banks provide to American consumers, and serves as the industry's definitive resource for engagement, analysis, and insight with respect to the Consumer Financial Protection Bureau ("CFPB," or the "Bureau"). In that capacity, CBA has advocated for a bipartisan, five-member Bureau since well before Dodd-Frank's passage. As CBA has argued, a commission structure—the one proposed by then-Professor Warren and later ratified in the version of Dodd-Frank the House of Representatives originally passed—would provide regulatory fairness, balance, and stability that cannot exist when every new appointment has the power to upend the regulatory environment unilaterally. Moreover, the elimination of the Bureau's single-director structure will help alleviate the political strife that has hindered CFPB since its inception. *See*, *e.g.*, Bipartisan Policy Center, *Analysis of the Nominations Process for Financial Regulators* 3, 5 (Apr. 4, 2013) (https://tinyurl.com/qu8ab4t) (noting that, on average, it takes "almost two years for a vacancy at a single-director [independent] agency to be resolved"—a "much longer" period than "the time involved for commission members and for chairs of commissions").

SUMMARY OF ARGUMENT

CBA takes no position on whether the single-director structure Congress ultimately enacted comports with the Constitution's requirements. But if the Court holds that it does not, CBA is vitally interested in the issue of remedy. That issue turns on a single question: whether, in the view of the Congress that enacted Dodd-Frank, independence from the Executive Branch was more fundamental to the Bureau's structure than leadership by a single director. If it was, then sacrificing the Bureau's independence to preserve its single-director structure would result in a statute Congress would never have enacted, thus "circumvent[ing] the intent of the legislature" in a manner this Court's precedents foreclose. *See*, *e.g.*, *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) ("[T]he touchstone for any decision about remedy is legislative intent."). Indeed, the Court has made clear that it would be legislating, not judging, if it employed severability doctrine to "create[] * * * legislation that Congress would not have enacted." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987); *see also United States* v. *Treasury Employees*, 513 U.S. 454, 479 n.26 (1995).

Dodd-Frank's text and history confirm that the 111th Congress valued the Bureau's independence far more than its single-director leadership. As a result, reconstituting the Bureau in the Executive Branch would yield a statute, agency, and politically charged regulatory environment Congress would unquestionably have rejected. If the Congress that enacted Dodd-Frank had known this Court would invalidate the Bureau's structure, it would have created a multi-member commission or, failing that, declined to create the Bureau in the first place. Under no circumstances would it have bypassed those options and bestowed the Bureau's substantial powers on an Executive Branch officer removable at the President's whim, commanding an agency exempt from Congress's budgetary control. Reconstituting the Bureau in the Executive Branch thus lies beyond this Court's power.[2] The mere fact that Congress enacted an unconstitutional statute does not vest in this Court the "legislative Powers," U.S. Const., Art I, § 1, required to create an alternative that would not have been Congress's actual second choice. *See*, *e.g.*, *Treasury Employees*, 513 U.S. at 479 n.26; *see also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 714 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (noting that "the Judiciary cannot defer to" other branches in matters involving "the separation of powers"). *Cf.* CFPB Br. 48.

Accordingly, if the Court determines the Bureau's single-director structure is unconstitutional (and assuming the Court cannot itself create the bipartisan commission Congress would have desired), the appropriate remedy is to invalidate Title X in its entirety and leave it to Congress, exercising legislative judgment that only it possesses, to formulate a new, permissible structure. If Congress cannot do so, the result would not be the wholesale elimination of federal consumer-financial protection, but reversion to the regime that existed prior to Dodd-Frank's enactment, when most of the powers the

[2] *PHH Corp.* v. *CFPB*, 881 F.3d 75, 185 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting); *see also Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (making officers "removable by the President" is an exercise of "editorial freedom" that "belongs to the Legislature, not the Judiciary").

Bureau now exercises were assigned to other, constitutionally permissible independent agencies. *See* Pet. Br. 46 (invalidating Title X "would restore" a "status quo" in which "the vast majority of federal consumer-protection law would remain on the books and subject to enforcement"). To avoid potential disruption, the Court should also stay its mandate for a period of time to allow Congress to act.

ARGUMENT

I. RECONSTITUTING THE BUREAU IN THE EXECUTIVE BRANCH WOULD RESULT IN A STATUTE CONGRESS WOULD NEVER HAVE ENACTED.

This Court has warned against using severability to "rewrit[e]" an unconstitutional statute. *Ayotte*, 546 U.S. at 329; *see also Free Enter. Fund*, 561 U.S. at 510 (severability doctrine does not give court "editorial freedom"); *United States* v. *Reese*, 92 U.S. 214, 221 (1875) (court cannot "introduce words" into a statute). With that in mind, the Court has refused to sever if doing so would result in a statute that Congress would not "have enacted," or that would function "in a manner [in]consistent with" congressional purpose. *Alaska Airlines*, 480 U.S. at 685 (question is whether statute "will function in a manner consistent with the intent of Congress") (emphasis omitted). Where there is doubt that Congress would have adopted a statute as remedied, it is a "serious invasion of the legislative domain" for the Court to do so on its behalf, even assuming Congress would prefer that statute to none at all. *Treasury Employees*, 513 U.S. at 479 & n.26 ("task of drafting a [constitutional] statute" falls "to Congress" unless it has sent "[]consistent signals as to where the new line or lines should be drawn").

Severing section 5491(c)(3) would impose a structure so unattractive to Congress that no member of that body ever proposed it. Dodd-Frank's text and history confirm the point. The statute's text makes clear that independence, not a single-director structure, is the Bureau's most fundamental attribute. And the Bureau's history demonstrates that Congress has never expressed any willingness, much less an intention, to place consumer-financial regulatory authority under direct presidential control. To eliminate for-cause removal would thus turn a statute designed to preserve and increase the buffer between politics and consumer-financial regulation into one that eliminates that buffer entirely—a result that, "[t]o the Congress that adopted" Dodd-Frank, "would have seemed exactly backwards." *Murphy* v. *Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1483 (2018).

A. Congress Prized The Bureau's Independence Over Its Single-Director Leadership.

"At the outset of Title X," and wholly apart from the for-cause removal provision, the statute "'establishe[s]' the CFPB as 'an independent bureau," while saying nothing about its single-director structure. *PHH*, 881 F.3d at 161 (Henderson, J., dissenting) (quoting 12 U.S.C. § 5491(a)). Throughout Title X, the statute makes clear that the authority it delegates belongs to "the Bureau"—*i.e.*, "***an independent bureau*** to be known as the 'Bureau of Consumer Financial Protection,'" 12 U.S.C. § 5491(a) (emphasis added)—rather than its director.[3] Moreover, when the statute

[3] *See also*, *e.g.*, 12 U.S.C. § 5512(a) ("In General—***The Bureau*** is authorized to exercise ***its*** authorities under the Federal consumer financial law to administer, enforce, and otherwise

does empower the director to act, it makes clear that his or her authority is to be exercised in a manner subservient to that of the "independent bureau" the director serves. *See*, *e.g.*, *id.* § 5512(b)(1) (Director's authority to be used "to enable the Bureau to administer and carry out the purposes and objectives" of consumer-financial laws).

When Congress decreed that the Bureau must be "independent," it meant that the Bureau must ***not*** be subject to direct presidential control. That is how this Court has consistently used the word "independent" in the context of agency structure. *See*, *e.g.*, *Buckley* v. *Valeo*, 424 U.S. 1, 136 (1976) (an "independent agenc[y]" is one run by principal officers sheltered from the "President's power to remove"); *Bowsher* v. *Synar*, 478 U.S. 714, 725 n.4 (1986). Indeed, the Court referred to that definition shortly before Congress enacted Title X. *See Free Enter. Fund*, 561 U.S. at 483 ("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."). Because Congress is presumed to be familiar with this Court's precedents—especially the "unusually important" ones, *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 699 (1979)—Congress was necessarily referring to protection from at-will removal by the President when, in 12 U.S.C. § 5491(a), it tied the Bureau's independence to its very existence. *See PHH*, 881 F.3d at 161 (Henderson, J., dissenting).[4] Dodd-

implement the provisions of Federal consumer financial law.") (emphasis added).

[4] That section 5491(a) says the Bureau is an "Executive agency, as defined in section 105 of Title 5," is immaterial, since section 105 defines an "Executive agency" to include not only "an

Frank's text thus makes that independence an indispensable feature of the Bureau's identity.

B. The Bureau Exercises Powers Congress Has Long Declined To Delegate To The Executive Branch.

Viewed in light of the history of financial regulation in the United States, Congress's choice to make CFPB an "independent bureau" is unsurprising. Throughout that history, Congress has chosen to bestow on independent agencies, rather than the Executive Branch, financial-regulatory powers such as those it gave the Bureau. Moreover, when Dodd-Frank was enacted, all but a narrow slice of the authority the Bureau now possesses was already being exercised by independent agencies whose constitutionality has long been settled.

CFPB's creation as an independent agency was in keeping with Congress's long-held preference to lodge authority to oversee the financial sector in independent, rather than executive, agencies. As the *PHH* majority observed, "Congressional alertness to the distinctive danger of political interference with financial affairs, dating to the founding era, began the longstanding tradition of affording some independence to the government's financial functions." *PHH*, 881 F.3d at 91; *see* Gerhard Casper, *An Essay in Separation of Powers: Some Early Versions and Practices*, 30 Wm. & Mary L. Rev. 211, 239, 241 (1989) (noting that, under the statutes of 1789 establishing the three "great departments" of government, "[o]nly the departments of State and War were completely

Executive department," but also "a Government corporation" and "an independent establishment." *See PHH*, 881 F.3d at 161 n.18 (Henderson, J., dissenting).

'executive' in nature," whereas the roles of Treasury officials were circumscribed substantially by statute).

Congress has reflected its preference in modern times, as well. The Federal Reserve Board is led by governors who serve 14-year terms and can be removed only for cause. 12 U.S.C. § 242.[5] The FTC is also independent, to ensure "a continuous policy * * * free from the effect of * * * changing incumbency" in the White House. 51 Cong. Rec. 10,376 (1914) (statement of Sen. Newlands); *see also id.* ("The powers [of the FTC] must be large, but the exercise of the powers will not be against honest business, but will be persuasive and correctional * * * ."). Other financial regulators, such as CFTC, FDIC, FHFA, NCUA, and SEC, are also understood to enjoy protection from at-will removal, even where—as is true for some them—for-cause removal is not statutorily prescribed. *See* Henry B. Hogue et al., Cong. Research Serv., R43391, *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 1, 15 (2017).

Most of the powers Congress gave the Bureau were transferred to it from independent commissions like those. Indeed, the principal effect of CFPB's creation was not to create new regulatory power, but to house in a single, independent agency a range of extant

[5] *See also PHH*, 881 F.3d at 92 (Federal Reserve must "provide for the sound, effective, and uninterrupted operation of the banking system," and independence is necessary to "increase the ability of the banking system to promote stability") (quoting H.R. Rep. No. 74-742, at 1 (1935)); *id.* (insulation permits Board to ensure that Fed "reflect[s], not the opinion of a majority of special interests, but rather than well considered judgment of a body that takes into consideration all phases of national economic life") (quoting H.R. Rep. No. 74-742, at 6).

regulatory authority that had previously been exercised by other independent agencies and Congress. *See*, *e.g.*, CFPB, *Building the CFPB* (https://tinyurl.com/v24tvwl) (last visited Dec. 13, 2019) ("This new agency would heighten government accountability by consolidating in one place responsibilities that had been scattered across government. * * * Part of the purpose of creating the Bureau was to increase accountability in government by consolidating consumer financial protection authorities that had existed across seven different federal agencies into one."). Specifically, Congress transferred to the Bureau the authority to enforce and issue rules under eighteen existing laws previously administered by seven different agencies. *See* 12 U.S.C. §§ 5481(12), 5512(b)(4), 5581(a)(2). Almost all of those agencies were free from presidential control. *See id.* § 5581(a)(2)(A) (Federal Reserve Board of Governors, Federal Deposit Insurance Corporation, FTC and National Credit Union Administration).

Most of those agencies were independent. Accordingly, very few consumer-financial protections the Bureau administers were ever the domain of the executive. Only those contained in Title X itself were new as of Dodd-Frank's creation. And even some of those "new" powers were variants of regulatory authority already exercised by other independent agencies. *Compare* 12 U.S.C. § 5536(a)(1)(B) (providing, *inter alia*, that industry participants may not engage in "unfair, deceptive, or abusive act[s] or practice[s]") *with* 15 U.S.C. § 45(a)(1), (b) (giving FTC power to prohibit "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce").

Thus, in addition to explaining why Congress considered the Bureau's independence so important, the history of independent authority over consumer-financial protection also shows that the Court's remedial choice is not between preserving consumer-financial protection law and eliminating it. *See* Pet. Br. 46. Rather, the severance question presents a choice between transferring to the Executive Branch power that Congress never delegated (and would not, under any circumstance, have delegated) and simply restoring the Bureau's powers to the commissions that previously exercised them, subject to Congress's ability to determine for itself a new, permissible structure. A delegation by judicial decree would radically depart from Congress's long-expressed preference, whereas maintaining the buffer between politics and consumer-financial regulation would preserve the one attribute—independence—Congress has always placed above all others. *See PHH*, 881 F.3d at 162 (Henderson, J., dissenting) (noting that Congress's paramount "intent, as CFPB's architects made clear, was to give the agency watertight freedom from both of the elected branches") (citing Elizabeth Warren, *Unsafe at Any Rate*, Democracy (Summer 2007), (perma.cc/52X3-892V)) (emphasis omitted).[6]

[6] The legislative history associated with Dodd-Frank also makes clear that Congress never considered lodging the Bureau's powers within the President's direct control. *See generally id.* at 162 (collecting materials).

C. Congress Insulated The Bureau From Legislative Oversight In A Manner It Would Not Have Approved For An Executive Agency.

Even if Congress had contemplated constituting the Bureau as an Executive Branch agency, it would never have enacted the statute this Court would create by severing the for-cause removal provision. As noted, those who designed the Bureau made clear that the goal was to provide freedom from ***both*** of the elected branches, to prevent the Bureau's mission from being compromised by shifting popular will or "legislative micromanaging." *See* Warren, *Unsafe at Any Rate*, *supra.* To further that interest, Congress provided that CFPB would be funded directly through the Federal Reserve, thus sacrificing the budgetary oversight power that serves as one of Congress's principal checks on the Executive Branch. *See PHH*, 881 F.3d at 95 ("The Bureau draws a statutorily capped amount from the Federal Reserve, which formerly administered many of the consumer-protection laws now largely under the CFPB's purview."); *see also id.* at 147 (Henderson, J., dissenting) (describing appropriations power as the "most potent form" of congressional oversight) (quoting Senate Committee on Government Operations, *Study on Federal Regulation II: Congressional Oversight of Regulatory Agencies*, S. Doc. No. 26, 95th Cong., 1st Sess. (1977)).[7] That

[7] *See also* S. Rep. No. 111-176, at 163 (2010) (finding that "the assurance of adequate funding, independent of the Congressional appropriations process, is absolutely essential" to CFPB's "independent operations"); 156 Cong. Rec. 8931 (2010) (statement of Sen. Dodd) ("[T]he [CFPB's] funding will be

"budgetary independence * * * is traditional among financial regulators, including in combination with typical removal constraints." *Id.* at 93. But it is highly atypical of Executive Branch agencies, because freeing such an agency from budgetary oversight would amount to unilateral disarmament by Congress. *See*, *e.g.*, *id.* at 163 (Henderson, J., dissenting) ("[O]ne branch's handicap is another's strength[.]") (quoting *Free Enter. Fund*, 561 U.S. at 500).

This Court has made clear that, before severing a provision that bears on the separation of powers, it must ask whether a "delegated authority" left in place "may have been so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines*, 480 U.S. at 685. Here, the answer to that question is plain. To provide for the maximum independence from all political influence—the very attribute severing for-cause removal would eliminate—Congress ceded its own budgetary oversight power. Congress would not have taken that step if it had delegated the Bureau's powers to the Executive Branch in the first place. Severing section 5491(c)(3) would thus yield "a mutant CFPB responsive to the President—and hence to majoritarian politics and lobbying—but nowise accountable to the Congress." *PHH*, 881 F.3d at 163 (Henderson, J., dissenting) (emphasis omitted). Thus, in order to create a statute Congress might conceivably have considered passing, this Court would have to invalidate not only for-cause removal, but also, at a bare minimum, the provision ceding

independent and reliable so that its mission cannot be compromised by political maneuvering.").

oversight. And marking up Dodd-Frank in that manner would be precisely the sort of "blue-pencil" operation the Court's precedents foreclose. *See Free Enter. Fund*, 561 U.S. at 509.

D. A Multi-Member Commission Would Have Been Congress's Obvious Second Choice.

The most basic reason why Congress would never have lodged the Bureau in the Executive Branch is that an obvious, permissible alternative has always been available. As Judge Henderson catalogued in her *PHH* dissent, legislators supporting the Bureau's creation "highlighted, more than any other consideration," the Bureau's independence. *See* 881 F.3d at 162 (collecting legislative materials). And the best way to ensure the independence Congress desired—and to depoliticize the Bureau's operations to the benefit of regulatory certainty and predictability—has always been for it to be governed by a bipartisan, multi-member, Senate-confirmed commission with staggered terms in office. A commission with diverse experience and expertise related to consumer-financial products and services would encourage compromise, elevate the Bureau's functions and transparency by providing an open debate, and ensure that federal policy regarding consumer-financial products reflected viewpoints and solutions from different perspectives and corners of the marketplace. The results would be decreased politicization, *see*, *e.g.*, Bipartisan Institute Study, *supra*, increased predictability, and, consequently, economic growth.

Subjecting the Bureau to complete Executive Branch control by judicial decree would only exacerbate difficulties to which the single-director structure has given rise. Because of that structure, disputes over the Bureau's leadership have significantly handicapped the agency even as it has been nominally shielded from politics. Its first director, Richard Cordray, was nominated only after officials in the previous administration became "convinced" that their first choice, then-Professor Warren, "could not overcome strong Republican opposition if chosen." Jim Puzzanghera, *GOP Stalls Confirmation of Consumer Agency Nominee*, L.A. Times (Sept. 7, 2011) (https://tinyurl.com/u5dbjzm). Cordray's nomination faced severe difficulties as well, and, after it had languished for months, President Obama ultimately resorted to a recess appointment of doubtful constitutionality. *See generally N.L.R.B.* v. *Noel Canning*, 573 U.S. 513 (2014); *see also*, *e.g.*, David G. Savage, *Court Rules Obama Recess Appointments Unconstitutional*, L.A. Times (Jan. 25, 2013) (https://tinyurl.com/sc9uo87).

Although Cordray received Senate confirmation before his recess appointment was tested, the battle over who would succeed him caused still more difficulties for the Bureau's operation, culminating in "a bizarre showdown" in which his hand-selected successor and a new presidential appointee both claimed the mantle of leadership. *See*, *e.g.*, Alison Frankel, *CFPB's Controversial Structure Looms Over Leadership Showdown*, Reuters (Nov. 27, 2017) (https://tinyurl.com/ux3cgn2). That battle was ultimately resolved in court, but the problems caused by the winner-take-all nature of the Bureau's single-director structure persist. *See*, *e.g.*, Renae Merle, *Mick Mulvaney Fires All 25 Members of Consumer Watchdog's Advisory Board*, Wash. Post (June 6, 2018) (reporting that then-acting director Mick Mulvaney, who had referred to the Bureau as a "joke" before being appointed, "fired the [Bureau]'s 25-member advisory board * * * after some of its members criticized his leadership").

Eliminating the Bureau's independence would only exacerbate the problems of political influence that have already plagued the Bureau, subjecting an industry that requires stability to potentially radical regulatory shifts with every new administration. It is inconceivable that Congress, which wanted to shield the Bureau from political vagaries, would have approved that result. Rather than create such an unwanted agency through judicial action, the Court should allow Congress to determine, through legislative deliberation, whether it would instead prefer a multi-member commission or no new agency at all.

II. DODD-FRANK'S SEVERABILITY CLAUSE DOES NOT PERMIT THIS COURT TO ENACT A STRUCTURE CONGRESS WOULD NOT HAVE CHOSEN.

As explained, eliminating the Bureau's independence to preserve its single-director structure would contravene Dodd-Frank's text, reassign to the Executive Branch a broad array of powers Congress would not have granted it, eliminate the premise on which Congress based its decision to abandon budgetary oversight authority, and exacerbate the problems to which political influence over the Bureau's leadership and operations has given rise. It is, in sum, a choice Congress never would have made, particularly since Congress could have chosen a commission structure instead. Dodd-Frank's general severability clause does not alter that analysis.

A. Merely Invalidating The Removal Provision Would Be Inadequate To Remedy The Bureau's Structure.

By its plain text, the severability clause neither permits nor requires the Court to strike only section 5491(c)(3). The clause states that, "[i]f any provision" of the Dodd-Frank Act "is held to be unconstitutional, the remainder of [the] Act * * * shall not be affected thereby." 12 U.S.C. § 5302. The clause thus turns on the "provision[s]" of Dodd-Frank that have been held unconstitutional, and (assuming it applies at all, *see infra* at 18-20) authorizes severance of only those provisions so as to save the rest of the Act. It does not purport to—and could not permissibly—require the Court to sever ***less*** than is necessary to bring the statute into compliance with the Constitution.

If this Court holds that the Bureau's independent structure renders it unconstitutional, such a holding would not apply only to the for-cause removal provision of section 5491(c)(3). Rather, as noted above, section 5491(a)—the provision that creates the Bureau in the first place—establishes that it is "an independent bureau," which necessarily means that its leadership must be insulated from at-will removal. *See supra* at 7-8. Because both sections thus require protection from at-will removal, they must stand or fall together. Moreover, because the severability clause expressly contemplates that the Court will invalidate unconstitutional "provision[s]" in their entirety, invalidating the provision that creates CFPB as an independent bureau would be perfectly consistent with the clause. And if that provision is invalid, then so is all of Title X, which necessarily depends on the Bureau's existence. For those reasons, assuming the Court is unwilling to create a multi-member commission, invalidating section 5491(a), and thus Title X, is the only way to fully remedy the constitutional violation the second question presented presupposes.

Other indicia of Congress's intent with respect to the general severability clause also support that result. As petitioner points out, "[w]hen Congress wanted specific provisions ***within*** a title of Dodd-Frank to be severable, it included an ***additional*** severability clause within that title." Pet. Br. 45 (first emphasis added). The general severability clause is thus best understood to indicate "that Congress viewed the various ***titles*** as severable from each other." *Id.* Because there is no severability clause within Title X, there is no textual indication that Congress would have wished for this Court to constitute a "mutant" agency that Congress itself never even considered creating. *See PHH*, 881 F.3d at 163 (Henderson, J., dissenting).

B. Congress's Specific Intentions With Respect To CFPB's Independence Overwhelm Any "Presumption" The Severability Clause Could Create.

In any event, as this Court has repeatedly emphasized, severability clauses are the beginning—not the end—of the inquiry into Congress's intentions. *See Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924) (severability clause "is an aid merely; not an inexorable command"); *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968) ("[T]he ultimate determination of severability will rarely turn on the presence or absence of such a clause."); 2 Norman J. Singer & J.D. Shambie Singer, Sutherland Statutes & Statutory Construction § 44:8, at 627 (7th ed. 2009) ("Because of the frequency with which it is used, the separability clause is regarded as little more than a mere formality."). Thus, where "strong evidence" suggests Congress would not have wanted a particular provision severed, that evidence governs over a boilerplate severability provision that would fail to effect Congress's preference. *Alaska Airlines*, 480 U.S. at 686.

Because independence is the Bureau's "core structural feature," Pet. Br. 46, the evidence here is not merely strong but overwhelming. If Congress had known it could not permissibly create a single-director, independent Bureau, it almost certainly would have created a multimember, independent Bureau, as the House of Representatives initially sought to do. *See* H.R. 4173, 111th Cong., 1st Sess. §§ 4101(b), 4102-4103 (as passed by House, Dec. 11, 2009); 155 Cong. Rec. 30,826-27 (2009) (statement of Rep. Waxman). Whether or not this Court can bring about that result on its own, *cf. PHH*, 881 F.3d at 200, the availability of an obvious, constitutionally permissible alternative that would have accomplished the legislature's most critical aim forecloses any possibility Congress might instead have located the Bureau within the President's direct control. *See Alaska Airlines*, 480 U.S. at 684 (Court cannot create statute Congress would never have enacted). The exemption from budgetary oversight only strengthens the point. *See id.*; *see also supra* at 12-14.

The severability clause cannot overcome that evidence. As noted, that general clause was designed simply to prevent categorical invalidation of Congress's "massive overhaul of U.S. financial regulations," John Ydstie, *5 Years Later, Legacy of Financial Overhaul Still Being Weighed*, NPR (July 21, 2015) (https://tinyurl.com/sbsz45o), based on isolated constitutional infirmities. *See PHH*, 881 F.3d at 163 (Henderson, J., dissenting) (noting that the general severability provision appears in Dodd-Frank hundreds of pages before section 5491(c)(3) and says "nothing specific about Title X, let alone the CFPB's independence, let alone for-cause removal, let alone the massive transfer of power inherent in deleting section 5491(c)(3), let alone whether the Congress would have endorsed that transfer of power even while subjecting the CFPB to the politics of Presidential control"). Even if the clause could be understood in a vacuum to weigh in favor of severing only section 5491(c)(3), the Court should not disregard the overwhelming textual, structural, and historical evidence of Congress's specific intentions with respect to the Bureau in favor of that "blinkered" approach to the text. *See Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (Kagan, J.) (plurality op.) (endorsing a "non-blinkered brand" of statutory "interpretation" that looks not only to "text," but to "context," "structure," "purpose," and "history"); *see also*, *e.g.*, *Dig. Realty Tr., Inc.* v. *Somers*, 138 S. Ct. 767, 782-83 (2018) (Sotomayor, J., concurring); *Yates* v. *United States*, 574 U.S. 528, 1081-82 (2015) (Ginsburg, J.).

C. This Court Lacks The Power To Enact An Alternative Congress Would Not Have Enacted.

For all of the reasons explained, the Congress that created CFPB in order to consolidate in a single independent agency the existing powers of other independent agencies would never have placed the Bureau in the Executive Branch. But even if it were consistent with anything Congress might conceivably have done, creating a new, Executive Branch agency "by judicial decree" would still lie beyond this Court's proper role. *See PHH*, 881 F.3d at 162 (Henderson, J., dissenting). As Judge Henderson and then-Judge Kavanaugh agreed in *PHH*, the mere fact that Congress might have preferred a particular constitutional remedy does not mean this Court is competent to provide it. *See* 881 F.3d at 163 (Henderson, J., dissenting); *id.* at 200 (Kavanaugh, J., dissenting). Indeed, if that were so, there is little doubt that the appropriate remedy here would be the creation of a multi-member commission, which would "deviate" far "less radically from Congress' intended system" than would an Executive Branch CFPB. *Id.* at 163 (Henderson, J., dissenting) (quotation marks omitted); *see also id.* at 200 (Kavanaugh, J., dissenting) (pointing to respect for "proper judicial role" as the only factor weighing against creating a commission); Pet. Br. 40 ("The Congress that created the CFPB would surely have chosen * * * to structure the CFPB as a multimember commission."). If the Court cannot itself create the structure Congress would have enacted, it surely cannot create a new structure that Congress plainly would not have. *See Treasury Employees*, 513 U.S. at 479 & n.26; *see infra* at 23-24.

Defending Executive Branch interests, the Solicitor General argues that severance of only section 5491(c)(3) "follows *a fortiori*" from this Court's decision in *Free Enterprise Fund*. CFPB Br. 46-47; *see also PHH*, 881 F.3d at 199 (Kavanaugh, J., dissenting) (opining that section 5491(c)(3) "presents an even easier case" for severability than was present in *Free Enterprise Fund*). But there is a critical distinction between the remedy ordered there and the one proposed by the Solicitor General here. In *Free Enterprise Fund*, the members of the multi-member commission at issue, the Public Company Accounting Oversight Board ("PCAOB"), were removable only for cause by the SEC, whose members are themselves removable only for cause by the President. To be sure, in invalidating one layer of that "double for-cause" protection, the Court held that the provision restricting at-will removal by the SEC could be severed. But, in concluding that the statute would still operate in a manner acceptable to Congress, the Court stressed that PCAOB ***remained an independent agency***, because severing still "le[ft] the President separated from Board members" by a level of good-cause tenure. *Id*. Thus, in *Free Enterprise Fund*, the Court did not transfer an entire regulatory body—much less one as powerful as CFPB—to an entirely new branch of government. *Cf. Free Enter. Fund* v. *Pub. Co. Accounting Oversight Bd.*, 537 F.3d at 715 (Kavanaugh, J., dissenting) (subjecting Board members to "remova[l] by the President" would have been a "fix" for "Congress," not the court). Nor did that case involve compelling evidence, as is present here, that Congress itself would never have chosen the structure that resulted from this Court's decision.

By contrast to *Free Enterprise Fund*, severing only section 5491(c)(3) would create a new Executive Branch agency and thereby completely destroy the independence Congress intended. That is the precisely the sort of Article III legislation *Free Enterprise Fund* condemns. There, the Court made clear that, like constituting new offices, making previously independent officers "removable by the President" would be an exercise of "editorial freedom" that "belongs to the Legislature, not the Judiciary." 561 U.S. at 510; *accord Free Enter. Fund.*, 537 F.3d at

715 (Kavanaugh, J., dissenting) (proposing to "invalidat[e]" PCAOB in its entirety, but noting that "the constitutional flaws . . . could be easily and quickly corrected" by "Congress"). The same is true here, and to a greater extent. The U.S. consumer-lending industry, just one piece of the Bureau's jurisdiction, "consists of [roughly] 13,500 establishments * * * with combined annual revenue of about $34 billion." FirstResearch.com, *Consumer Lending Industry Profile* (Aug. 26, 2019) (https://tinyurl.com/rrk6tkl). Reassigning to the Executive Branch the power to regulate that industry and the others under the Bureau's control is fundamentally the role of Congress, not this Court, particularly when "[t]he Congress that created the CFPB would surely have chosen a different option" had it known a single-director structure could not survive. Pet. Br. 40; *see also*, *e.g.*, *Nat'l Fed'n of Indep. Bus.* v. *Sebelius*, 567 U.S. 519, 692 (2012) (Scalia, Kennedy, Thomas & Alito, JJ., dissenting) ("The Judiciary, if it orders uncritical severance, then assumes the legislative function; for it imposes on the Nation, by the Court's decree, its own new statutory regime, consisting of policies, risks, and duties that Congress did not enact."); *Treasury Employees*, 513 U.S. at 479 & n.26.

The Solicitor General's only other argument, that Congress would have preferred severance because it found the prior regulatory regime inadequate, *see* CFPB Br. 48, is equally unpersuasive. As petitioner points out, that argument proves too much, since ***every*** statute exists because Congress deemed the status quo less than perfect. Pet. Br. 46-47; *see also Alaska Airlines*, 480 U.S. at 685 n.7 (deeming similar argument "tautological"). Moreover, the Court's power to invalidate statutes does not bring with it a power to create replacement laws that Congress would never have enacted. *See*, *e.g.*, *Treasury Employees*, 513 U.S. at 479 n.26 (where Congress has merely "sent ***inconsistent*** signals as to" its remedial preference, "rewrit[ing]" a statute on its behalf lies beyond this Court's power) (emphasis added). Therefore, no matter what result Congress might have preferred if faced with the possibility of no Bureau at all, it would be a "serious invasion of the legislative domain," *id.*, for this Court to reconstitute CFPB in the Executive Branch given the clear evidence that, if Congress had known its preferred structure was unconstitutional, it would have done something else. If this Court is unable to authorize Congress's actual favored alternative—a multimember commission—invalidating the Bureau in its entirety is the only remedy that respects the Court's proper role.

III. IF THE BUREAU'S STRUCTURE IS UNCONSTITUTIONAL, THE COURT SHOULD STAY ITS JUDGMENT TO ALLOW CONGRESS TO ACT.

This Court has stressed that constitutional remedies should give as much weight as possible "to the reliance interests of all parties affected by changes in the law." *Am. Trucking Ass'ns, Inc.* v. *Smith*, 496 U.S. 167, 185 (1990). Thus, in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982), the Court stayed its judgment that the bankruptcy courts were invalid to "afford Congress an opportunity to reconstitute the[m] or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws." *See also United States* v. *Marathon Pipe Line Co.*, 103 S. Ct.

200, 200 (1982) (extending stay to roughly six months from date of judgment). By allowing Congress time to enact a remedy of its choosing, the Court avoided the difficult questions of counterfactual legislative intent that are inherent in the severability analysis. *See generally Murphy*, 138 S. Ct. at 1485-1487 (Thomas, J., concurring); *Treasury Employees*, 513 U.S. at 479 n.6 (noting particular difficulty that exists "when Congress has sent inconsistent signals as to where the new line or lines should be drawn"); *Free Enterprise Fund*, 537 F.3d at 715 (Kavanaugh, J., dissenting) (discussing Congress's ability to "fix * * * constitutional flaws").

The Bureau is sufficiently important to warrant similar treatment. *See*, *e.g.*, *PHH*, 881 F.3d at 171 (Kavanaugh, J., dissenting) ("[O]ther than the President, the Director of the CFPB is the single most powerful official in the entire U.S. Government * * * ."); *see also supra* at 23 (noting Bureau's expansive regulatory authority). Therefore, if this Court concludes the Bureau's current structure is unconstitutional, it should stay its judgment for six months to provide Congress time to enact either a commission structure or other transitional provisions and thereby avoid the potentially unnecessary disruption that could otherwise result.

CONCLUSION

For the foregoing reasons, if the Bureau's structure is held unconstitutional, the Court should sever Title X, not merely section 5491(c)(3), and stay its judgment for six months to provide Congress time to enact a permissible structure.

Respectfully submitted,

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