No. 19-7

IN THE
Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR *AMICUS CURIAE* CENTER FOR THE RULE OF LAW IN SUPPORT OF PETITIONER

THEODORE B. OLSON
Counsel of Record
HELGI C. WALKER
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Amicus Curiae Center for the Rule of Law

QUESTIONS PRESENTED

The questions presented are:

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

2. If the Consumer Financial Protection Bureau is found unconstitutional on the basis of the separation of powers, can 12 U.S.C. § 5491(c)(3) be severed from the Dodd-Frank Act?

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Center for the Rule of Law is an independent center dedicated to public education on issues related to the rule of law. Matters central to the interests and work of scholars at the Center include issues concerning separation of powers, constitutional structure, administrative organization, and statutory interpretation that are relevant to the questions presented in this case. Affiliated scholars at the Center include long-time teachers and authors in the fields of constitutional and administrative law, who have served in various positions in government in Executive-Branch departments and independent agencies and have strong interests in promoting adherence to constitutional and statutory requirements that preserve liberty under law.

SUMMARY OF THE ARGUMENT

For the reasons advanced by petitioner Seila Law LLC and others, the Consumer Financial Protection Bureau ("CFPB") is unconstitutionally structured and this Court should so hold. But the Court should not "sever" Section 5491(c)(3) from the Consumer Financial Protection Act, contained in Title X of the Dodd-Frank Act.

"Some delegations of power to the Executive or to an independent agency may have been so controver-

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *Amicus* represents that this brief was not authored in whole or in part by counsel for a party and that none of the parties or their counsel, nor any other person or entity other than *Amicus*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

sial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 685 (1987). The basic inquiry is about congressional intent: Would the enacting Congress have passed the statute without the offending provision? The answer here is an overwhelming no.

Congress's willingness to insulate the CFPB from congressional appropriations oversight depended on insulating the agency from presidential control as well. It blinks reality to say that the Congress that enacted Title X would have given up its own appropriations and oversight powers while granting the President *increased* power to enforce consumer-protection law. But that is exactly what severing the statute would do. Such action would consolidate in the Executive Branch enforcement authority over the 18 preexisting statutes that were transferred to the CFPB—most of which were previously administered by independent agencies—while sacrificing Congress's power of the purse. Congress is not that self-abnegating.

Indeed, key proponents of the CFPB have *told* the courts of appeal that severing the removal restriction would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." Members of Cong. Supporting Reh'g En Banc Br. 2, 5, *PHH Corp.* v. *CFPB*, No. 15-1177, 2016 WL 6994388 (D.C. Cir. Nov. 29, 2016); *see also* Members of Cong. *Amici* Br. 1, *CFPB* v. *All Am. Check Cashing, Inc.*, No. 18-60302 (5th Cir. Sept. 17, 2018) (explaining "how critical the CFPB's leadership structure is to the Bureau's ability to play its intended role effectively"). While there may be close cases under severability doctrine, here it is plain that severing only the for-cause removal provision would fundamentally "alter[] the balance of powers between the Legislative and Executive Branches" in a manner that Congress never intended. *Alaska Airlines*, 480 U.S. at 685.

If this Court feels bound by precedent to sever the for-cause removal provision, it should reexamine that precedent. As recent scholarship has shown, severance is an arrogation of legislative power by courts that is at odds with founding-era practice. Severance simply is not a "remedy" within the Article III judicial power. Courts may render judgments in specific cases and controversies, not abstractly declare various components of a statute valid or invalid without altering the rights and remedies for the parties before the court. This is why, historically, courts that declared a statutory provision unconstitutional would simply decline to enforce the statute against the party at bar. That is the proper approach here: Because the CFPB is unconstitutionally structured, Title X cannot be enforced against Seila Law, and the CFPB's Civil Investigative Demand must be dismissed.

Deleting the for-cause removal provision would not be appropriate for an additional reason: Severance would not solve the problem of the CFPB's unconstitutionality because it would leave in place the agency's unconstitutional funding structure. The CFPB is funded outside the congressional appropriations process—it may appropriate over $600 million each year from the Federal Reserve's funding, which is *itself* independent of congressional control. This unique, double layer of insulation from Congress's exclusive power of the purse violates the Appropriations Clause. The agency's independent funding highlights the problems with judicial severance, since fixing the unconstitutional features of the agency would require wholesale rewriting of Title X. But whether and how to reconstitute the CFPB is a legislative task, not a judicial one.

Finally, severance would be improper here because it would engender questions about the ultimate remedy due to defendants in pending enforcement actions who have timely raised the constitutional issue as a defense. That is because severance only addresses the constitutional problem going forward; it does nothing to redress the retrospective injury of those who have been subject to coercive action at the hands of an unconstitutional entity. If the Court does not resolve the question of what should happen to these pending cases, lower courts will be left without guidance as to how to proceed. This will only increase the confusion that already proliferates in pending actions, and the remedial question will soon land back on the Court's doorstep.

For all of these reasons, it would be entirely inappropriate for this Court to sever the for-cause removal provision.

ARGUMENT

TITLE X'S UNCONSTITUTIONAL LIMITATION ON THE PRESIDENT'S REMOVAL POWER CANNOT BE SEVERED.

The Court cannot sever Section 5491(c)(3) from its broader statutory home. First, deletion of that provision would result in a statute that Congress never would have passed. Second, this Court's severability doctrine should be reexamined because severance is not a power belonging to Article III courts in the first place. Third, severance of the for-cause removal provision would not be sufficient to resolve the CFPB's defects anyway since the agency is self-funded in violation of the Appropriations Clause. Finally, simply severing the removal restriction would force courts to confront the ultimate remedial question regarding the status of enforcement proceedings initiated by the unconstitutional CFPB.

A. Section 5491(c)(3) Is Not Severable Because Severance Would Result In An Agency That Congress Never Would Have Created.

Courts may not sever an unconstitutional provision from the remainder of an Act if it is "'evident that Congress would not have enacted those provisions which are within its power, independently of those which are not.'" *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1482 (2018) (alterations omitted) (quoting *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 684 (1987)). The "relevant inquiry" for this evaluation "is whether the statute will function in a manner consistent with the intent of Congress," *Alaska Airlines*, 480 U.S. at 685 (emphasis omitted), or, instead, will result in legislation that Congress "would not have enacted," *Murphy*, 138 S. Ct. at 1482.

Courts must be particularly sensitive to congressional intent when severance would "alter[] the balance of powers between the Legislative and Executive Branches of the Federal Government." *Alaska Airlines*, 480 U.S. at 685. In those circumstances, the Court must "evaluate the importance of the [unconstitutional provision] in the original legislative bargain," and also "consider the nature of the delegated authority," keeping in mind that "[s]ome delegations of power" to "an independent agency" are "so controversial or so broad that Congress would have been unwilling to make the delegation without a strong oversight mechanism." *Ibid*.

Applying these standards, severance is plainly impermissible here—"severing" Section 5491(c)(3) would amount to this Court crafting a new federal agency, one that the Congress that enacted Title X *never* would have approved. *See CFPB* v. *RD Legal Funding, LLC*, 332 F. Supp. 3d 729, 784 (S.D.N.Y. 2018) (holding that CFPB's for-cause removal provision is not severable). Congress abdicated its appropriations power over 18 federal statutes—many of which were previously administered by independent agencies—only because it simultaneously limited the President's influence. Severing the for-cause provision here "would yield a mutant CFPB responsive to the President—and hence to majoritarian politics and lobbying—*but nowise accountable to the Congress*." *PHH Corp.* v. *CFPB*, 881 F.3d 75, 163 (D.C. Cir. 2018) (en banc) (Henderson, J., dissenting). Severance is entirely inappropriate here.

1. Title X's text, structure, context, and history demonstrate that severance would be incorrect.

First, Congress gave numerous unambiguous textual indications that one of its paramount concerns was keeping the CFPB independent of the President. Section 5491(a) establishes the CFPB "in the Federal Reserve System," which is itself independent from the President. Within that shell, Congress emphasized that the CFPB is "an *independent bureau*." 12 U.S.C. § 5491(a) (emphasis added); *see also PHH*, 881 F.3d at 161 (Henderson, J., dissenting) ("[S]ection 5491(a) ties the CFPB's very existence to its freedom from the President."); 44 U.S.C. § 3502(5) (listing the CFPB as an "independent regulatory agency"). And Congress further confirmed the CFPB's insulation from the President by providing that the Office of Management and Budget lacks "any jurisdiction or oversight over the affairs or operations of the Bureau," 12 U.S.C. § 5497(a)(4)(E), and by giving the CFPB Director's statutory interpretations deference over those of agencies controlled by the President, *id.* § 5512(b)(4)(B).

Second, Section 5491(c)(3) doubles down on this independent framework by stating that "[t]he President may remove the Director [of the CFPB only] for inefficiency, neglect of duty, or malfeasance in office." This removal restriction is "obviously transplanted" from previous legal sources, and it thus "brings the old soil with it." *Sekhar* v. *United States*, 570 U.S. 729, 733 (2013). This is the very restriction protecting the members of the Federal Trade Commission ("FTC"), which this Court described as "demonstrat[ing] the congressional intent to create" a "body which shall be independent of executive authority" and be "free to exercise its judgment without the leave or hindrance of any other official or any department of the government." *Humphrey's Ex'r* v. *United States*, 295 U.S. 602, 625-26 (1935). The use of the same language in Title X communicates an unmistakable intent that the CFPB Director *not* be removable "at the mere will of the President," which would "thwart, in large measure, the very ends which Congress sought to realize." *Id.* at 626.

Third, Congress transferred to the CFPB "all authority" to regulate and enforce *18* different federal consumer-protection laws previously administered by a host of agencies. 12 U.S.C. § 5581. Crucially, the lion's share of these statutes were administered previously by *independent agencies*. *See id*. § 242 (Federal Reserve); *id*. § 1752a(a) (National Credit Union Administration); 15 U.S.C. § 41 (FTC); 44 U.S.C. § 3502(5) (Federal Deposit Insurance Corporation). Congress wanted to consolidate all enforcement and regulation of consumer-finance-related affairs into one independent agency, from numerous scattered independent agencies. *See PHH*, 881 F.3d at 162 (Henderson, J., dissenting) ("Reinventing the CFPB as an executive agency through excision of section 5491(c)(3) would by judicial decree transfer to the executive branch far-reaching new powers that, before Title X, resided with several non-executive agencies."). It is evident that Congress would not have desired to increase the President's authority relative to its own. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol'y 147, 153 (2017) ("[T]he grant of power from one entity to another is never an act of pure generosity; the grantor invariably gains something from the grant." (emphasis omitted)).

Fourth, and critically, Congress—with the expectation that the CFPB would be independent of the President—ceded its *own* oversight power. Congress directed that the CFPB could unilaterally draw its budget from the Federal Reserve's budget, up to 12% annually, rather than be subject to the congressional appropriations process. And Congress then directed that such money "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a). Severing only the removal provision while leaving the CFPB independent from congressional appropriations and oversight—thereby dramatically expanding presidential power at the expense of Congress—"would have seemed exactly backwards" to Congress. *Murphy*, 138 S. Ct. at 1483.

Not only do the text and structure of Title X leave no room for doubt that Congress desired the CFPB to be strictly independent of the Executive Branch, its "legislative history" (*Alaska Airlines*, 480 U.S. at 687) is equally overwhelming. Members of Congress declared that they were seeking to create an agency "completely independent, with an independently appointed director, an independent budget, and an autonomous rulemaking authority." 156 Cong. Rec. H5239 (June 30, 2010) (Rep. Maloney); *see also PHH*, 881 F.3d at 162 (Henderson, J., dissenting) (listing additional legislative history). Indeed, numerous legislators, including Dodd-Frank sponsor Representative Barney Frank and Title X's architect, Senator Elizabeth Warren, have confirmed that severing Title X's removal provision is "at odds with Congress's design," would "undermine the CFPB's ability to fulfill its important role under Dodd-Frank," and would "fundamentally alter[] the CFPB and hamper[] its ability to function as Congress intended." Members of Cong. Supporting Reh'g En Banc Br. 2, 5, *PHH Corp.* v. *CFPB*, No. 15-1177, 2016 WL 6994388 (D.C. Cir. Nov. 29, 2016). As even the en banc *PHH* majority recognized, Congress sought to "insulat[e]" the CFPB "from political winds and presidential will," whereas severing the removal provision would "effectively turn[] the CFPB into an instrumentality of the President." 881 F.3d at 83, 110.

The CFPB points out that the Dodd-Frank Act as a whole contains a single severability provision. CFPB Br. 46. But a severability clause is "not an inexorable command," *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924), and "the ultimate determination of severability will rarely turn on the presence or absence of such a clause." *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); *see also*, *e.g.*, *Hill* v. *Wallace*, 259 U.S. 44, 70-71 (1922) (declining to sever despite severability clause). Indeed, severability clauses typically are "little more than a mere formality," 2 Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction*, § 44:8, at 627 (7th ed. 2009), and Dodd-Frank's boilerplate severance clause is no exception. It "[a]ppear[s] in the mega Dodd-Frank legislation 574 pages before" the removability clause 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." *PHH*, 881 F.3d at 163 (Henderson, J., dissenting). "A severability clause" is not "a license to cut out the 'heart' of a statute." *Id.* at 163-64.

Whatever rebuttable "presumption" a severability clause creates, *Jackson*, 390 U.S. at 585 n.27, it is not a presumption that every provision could equally be jettisoned without interfering with the continued operation of the statute. And in any event, as detailed above, that presumption is amply rebutted here: It strains credulity to think that Congress would have willingly consolidated enforcement authority over all federal consumer-protection statutes in the Executive Branch, while ceding its own fiscal and other oversight powers over the agency. Congress is not that self-abnegating. At most, the clause supports severing not the for-cause removal provision from Title X, but Title X as a whole from the rest of Dodd-Frank.

See 16A Am. Jur. 2d *Constitutional Law* § 199 ("[T]he severability rule" allows "the severance and elimination not only of words, clauses, or sentences but also of whole sections of laws.").

2. This Court's precedents, too, demonstrate that where, as here, severance would simply result in a statutory scheme that rebalances powers in a manner that Congress most likely would not have accepted, severance is inappropriate.

In *Murphy*, the Court declined to sever an unconstitutional provision that prevented states from authorizing private gambling from provisions banning states from running their own gambling operations. 138 S. Ct. at 1483. Severance would have resulted in "a scheme sharply different from what Congress contemplated when [the Act] was enacted." *Id.* at 1482. The Court did not sever because these two "similar restrictions" "were obviously meant to work together," and Congress would not "have wanted the former to stand alone" because they were "meant to be deployed in tandem." *Id*. at 1483. Indeed, allowing private gambling while prohibiting state-run gambling "would have seemed exactly backwards" to Congress.

In *Bowsher* v. *Synar*, 478 U.S. 714 (1986), the Court held that it violated the separation of powers to give executive power to an officer who was removable by Congress—the Comptroller General. But the Court noted that severance of the congressional-removal provision "would significantly alter the Comptroller General's office, possibly by making him subservient to the Executive Branch," and that "[r]ecasting the Comptroller General as an officer of the Executive Branch would accordingly alter the balance that Congress had in mind." *Id*. at 734. Simply "striking the removal provisions would lead to a statute that

Congress would probably have refused to adopt." *Id.* at 735. Only the existence of statutory fallback provisions stripping the Comptroller's executive power prevented the Court from striking down the entire Act. *Ibid.*

Under these cases, there is simply no question that severance of Section 5491(c)(3) would be wildly inappropriate. Just as in *Murphy*, these two "similar restrictions"—the CFPB's independence from the President and its independence from Congress—"were obviously meant to work together," and Congress would not "have wanted the former to stand alone" because they were "meant to be deployed in tandem." 138 S. Ct. at 1483. Congress, which cares deeply about the independence of certain federal agencies from the President (because of the impact that independence has on congressional power and on the nature of substantive decisions by the agency), *never* would have consolidated vast powers previously administered by independent agencies into the hands of someone removable at will by the President, all while giving up *its* potent oversight power in the form of appropriations control. And like in *Bowsher*, "striking the removal provision[]" would so "alter the balance" between the branches that it "would lead to a statute that Congress would probably have refused to adopt." 478 U.S. at 734-36.

Bottom line: Congress simply never would have enacted Title X with a Director removable at will by the President. Article III nowhere gives courts the power to create new federal agencies, but if Section 5491(c)(3) is severed, that is exactly what the Court would be doing. All of the provisions that make the Director unaccountable are central to the CFPB's structure. Picking and choosing which ones to keep would not fix an existing agency; it would create a new one by judicial fiat. Severance is inappropriate in this case.

B. Severance Is Not A Remedy Within The Article III Power In Any Event.

If the Court concludes that it is bound by its precedent to sever the removal restriction in Title X, it should reexamine those precedents. As judges and commentators have recently noted, the Court's severability doctrine is at odds with founding-era practice and the Constitution's concept of "judicial power." It is particularly appropriate to reexamine the severability doctrine in the context of this constitutional case because *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because [the] interpretation can be altered only by constitutional amendment or by overruling [the] prior decisions." *Janus* v. *Am. Fed'n of State, County, & Mun. Emps.*, 138 S. Ct. 2448, 2478 (2018).

The Constitution confers on the "supreme Court" and the lower federal courts only "[t]he judicial power of the United States," which amounts to the authority to resolve a concrete "Case[]" or "Controvers[y]" between adverse parties. U.S. Const. art. III, §§ 1-2; *see also Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) ("'[J]udicial Power' is one to render dispositive judgments."). Thus, "when early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring); *see also Collins* v. *Mnuchin*, 938 F.3d 553, 610-11 (5th Cir. 2019) (en banc) (Oldham, J., concurring in part and dissenting in part, joined by Ho, J.) (traditionally, Article III courts "'decline to enforce'" unconstitutional statutes and "enjoin their future enforcement" (quoting Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018))); Kevin C. Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. Rev. 738, 756-57 (2010) (at the founding, "what we now call judicial review consisted of a refusal to give a statute effect as operating law in resolving a case" rather than "severing" or "striking down" some part of the statute).

Accordingly, severance is not in any sense a "remedy," John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 Geo. Wash. L. Rev. 56, 82-83 (2014), least of all one consistent with the separation of powers. Indeed, the doctrine frequently results in courts, rather than Congress, deciding the terms of enacted law. *See* Richard H. Fallon, *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1333-34 (2000) ("Judicial lawmaking would occur, for example, if the particular subrules that a court would need to specify to 'save' part of a statute would not sufficiently reflect the structure and history of the statute to be attributed to Congress, rather than the court"). At its root, "striking" this or that provision from a federal statute is akin to "prospective decisionmaking," a practice that "is quite incompatible with the judicial power, and that courts have no authority to engage in." *Harper* v. *Va. Dep't of Taxation*, 509 U.S. 86, 106 (1993) (Scalia, J., concurring).

The Court therefore should not parse through the provisions of Title X, determining which to sever and which to preserve. The limitation on the President's removal power means that the CFPB Director is unconstitutionally wielding "executive power," and the remedy here should be that the Court declines to enforce the statute against the defendant, *i.e.*, the unconstitutional actor's case against the defendant should be dismissed. *Cf. Stern* v. *Marshall*, 564 U.S. 462, 503 (2011) (unconstitutional conferral of Article III power on non-Article III judges results in vacatur of non-Article III tribunal's judgment); *FEC* v. *NRA Political Victory Fund*, 6 F.3d 821, 822 (D.C. Cir. 1993) (granting judgment to defendants since FEC "lack[ed] authority to bring this enforcement action because its composition violates the Constitution's separation of powers").

Dismissal would be the least intrusive remedy the Court could order because it would leave it to Congress to make the decisions about what form the CFPB should take, if any. And it would provide meaningful guidance to lower courts handling enforcement actions brought by the CFPB, without unnecessarily opining on the numerous provisions of Title X not at issue before the Court. Rather than engaging in this Court's dubious severance analysis, it should "simply decline to enforce" Title X here. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

C. Severance Of The Removal Restriction Would Not Solve The Constitutional Defects Stemming From The CFPB's Funding Outside Of The Congressional Appropriations Process.

Simply severing the for-cause removal provision is improper for yet another reason: It would not solve the CFPB's constitutional defects because the unprecedented method by which it is self-funded independently violates the Appropriations Clause. Severance would therefore leave behind an agency that remains unconstitutionally structured.

The Constitution mandates that "*No Money* shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." U.S. Const. art. I, § 9, cl. 7 (emphasis added). This provision reflects the ancient principle that the sword and the purse must never be held in the same hands. Title X, however, violates this constitutional requirement by bestowing on the CFPB a perpetual entitlement to hundreds of millions of dollars that the CFPB may demand from the Federal Reserve each year. 12 U.S.C. § 5497(a)(2). And the CFPB can use enforcement actions as an *additional* self-funding mechanism—indeed, its Civil Penalty Fund currently contains $543 million. *Id.* § 5497(d)(2); CFPB, *Financial Report of the Bureau of Consumer Financial Protection* 18 (Nov. 15, 2019), https://bit.ly/2LHGeIs.[2] In fact, the CFPB's funding authority is protected by *two* levels of independence: The CFPB has the power to self-fund by demanding funds from the Federal Reserve, which itself is independently funded. And Congress may not even "review" the CFPB's budget. 12 U.S.C. § 5497(a)(2)(C). This funding structure violates the separation-of-powers maxim, embodied in the Appropriations Clause, that the funding power and the executive power must be kept separate.

1. The Framers well understood this fundamental principle. During the Summer of 1787, George Mason averred that "[t]he purse & the sword ought never to

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[2] Penalties and fines that the CFPB extracts are deposited into the Civil Penalty Fund and, if not used to compensate affected consumers, may be expended by the Director "for the purpose of consumer education and financial literacy programs," 12 U.S.C. § 5497(d)(2), expenses that the CFPB would otherwise need to finance from its Federal Reserve funding.

get into the same hands (whether Legislative or Executive.)" 1 *The Records of the Federal Convention of 1787*, at 139-40 (Max Farrand ed., 1937). For this reason, the Framers wrote the Appropriations Clause, placing the funding power exclusively in the hands of Congress. And during the ratification debates, the Constitution's champions continually adduced this axiom. At the Virginia Convention on June 14, 1788, Madison defended the Constitution by pointing out that the Constitution embodied "the maxim, that the purse and sword ought not to be put in the same hands"; that is, "that the sword and purse are not to be given to the same member." 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 393-94 (Jonathan Elliot ed., 1891) ("*Elliot's Debates*"). In "the British government, … [t]he sword is in the hands of the British king; the purse in the hand of the Parliament," and so would it be under the proposed constitutional system. *Ibid.*; *see also* James Madison, *Letters of Helvidius, No. 1*, Gazette of the United States (Aug. 24, 1793) (describing the "principle in free government" that "separates the sword from the purse"), reprinted in 6 *The Writings of James Madison* 138, 148 (Gaillard Hunt ed., 1906). Hamilton at the New York convention, too, underscored that "you shall not place these powers either in the legislative or executive, singly; neither one nor the other shall have both, because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny." 2 *Elliot's Debates* 348-49.

This Court, also, has long recognized the importance of the principle that Congress alone, and not the Executive Branch, may authorize the withdrawal and use of particular public funds. *See*, *e.g.*, *Bradley* v. *United States*, 98 U.S. 104, 112 (1878) ("Moneys not appropriated cannot be drawn from the treasury."); *Knote* v. *United States*, 95 U.S. 149, 154 (1877) ("Moneys once in the treasury can only be withdrawn by an appropriation by law."); *Reeside* v. *Walker*, 52 U.S. (11 How.) 272, 291 (1850) ("However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.").

This limitation, established by the Appropriations Clause, "was intended as a restriction upon the disbursing authority of the Executive department." *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). As Joseph Story explained, to preserve "in full vigor the constitutional barrier between each department," the Constitution grants Congress "a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable." Joseph Story, *Commentaries on the Constitution of the United States* § 531, at 372 (1833). St. George Tucker, too, characterized the Appropriations Clause as "a salutary check" on "any misappropriation, which a rapacious, ambitious, or otherwise unfaithful executive might be disposed to make," thereby securing "the right of the people," through their elected representatives, to "be actually consulted upon the disposal of the money which they have brought into the treasury." St. George Tucker, *Views of the Constitution of the United States* 298 (1803).

The Framers knew firsthand how crucial it was to separate the power to appropriate funds from the power to execute the law against individuals. "The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist" executive power. *Noel Canning* v. *NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff'd*, 573 U.S. 513 (2014). The delegates to the Constitutional Convention gave Congress the sole power to provide "the supplies requisite for the support of government" because they saw how "that powerful instrument," in the hands of Parliament, had overcome the "overgrown prerogatives" of the British monarch. *The Federalist Papers, No. 58*, at 359 (Madison) (Clinton Rossiter ed., 1961). The Appropriations Clause is therefore "the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people." *Ibid.*; *see* Baron de Montesquieu, *The Spirit of the Laws* 119 (1748) (Thomas Nugent trans., 1793) ("Were the executive power to determine the raising of public money otherwise than by giving its consent, liberty would be at an end … because the executive power would be no longer dependent.").

Thus, as then-Judge Kavanaugh recognized, the legislature's "exclusive power over the federal purse" stands as "one of the most important authorities allocated to Congress" in the Constitution. *U.S. Dep't of Navy* v. *FLRA*, 665 F.3d 1339, 1346 (D.C. Cir. 2012); *see also Hart's Adm'r* v. *United States*, 16 Ct. Cl. 459, 484 (1880) ("The absolute control of the moneys of the United States is in Congress."), *aff'd*, 118 U.S. 62 (1886). The Appropriations Clause acts as a "bulwark of the Constitution's separation of powers" that is "particularly important as a restraint on Executive Branch officers." *Dep't of Navy*, 665 F.3d at 1347. It "assure[s] that public funds will be spent according to the letter of the difficult judgments reached by Congress as to the common good and not according to the individual favor of Government agents." *OPM* v. *Richmond*, 496 U.S. 414, 428 (1990). "Any other course would give to the fiscal officers a most dangerous discretion." *Reeside*, 52 U.S. at 291.

2. Congress violated the Appropriations Clause and its constitutional duty by abdicating its exclusive power of the purse and insulating the CFPB from congressional oversight with an unprecedented two layers of fiscal independence.

Congress ceded its appropriations power by granting the CFPB unilateral authority to appropriate over half-a-billion dollars from the Federal Reserve's budget at will each year—plus the money in the Civil Penalty Fund—and further abdicated its own power even to review that budget. This level of budgetary independence for an agency that wields so much core executive power is entirely novel. Prior to the creation of the CFPB, "Congress has utilized self-funding in only a limited number of 'narrowly-focused' independent agencies." Charles Kruly, *Self-Funding and Agency Independence*, 81 Geo. Wash. L. Rev. 1733, 1735 (2013). Those agencies "only regulate financial institutions or make technical financial decisions," or are otherwise "narrowly focused." Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 Harv. L. Rev. 1822, 1823 (2012). The CFPB, by contrast, has sweeping enforcement and regulatory authority, and "wields enormous power over American businesses, American consumers, and the overall U.S. economy." *PHH*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Congress's relinquishment of its budget authority over the CFPB is an unconstitutional "delegat[ion of] legislative power to the agency." *Whitman* v. *Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001).

Nor is it sufficient that Congress retains the power to amend Title X's funding provisions. *All* statutes are subject to repeal; that does not change their unconstitutionality. Congress could not delegate its constitutional "authority to admit states" or "to propose [constitutional] amendments" simply because it did so via an Act that could later be amended. *See* Larry Alexander & Saikrishna Prakash, *Delegation Really Running Riot*, 93 Va. L. Rev. 1035, 1054 (2007); *see also* Cass, *supra*, at 181-82. Moreover, "self-funding" in particular "is perhaps the ultimate weapon of legislative entrenchment." Kruly, *supra*, at 1737. The fact that Title X's funding defects could be repealed does not resolve its unconstitutionality.

This Court, however, need not define the precise extent to which, and circumstances in which, agencies can be funded outside the appropriations process. It is enough to hold that this agency—which is protected not merely by one but *two* layers of budgetary independence, with *additional* self-funding via civil penalties to boot—is too much for the Constitution to bear. Just like the dual-insulation from the President's removal power that this Court confronted in *Free Enterprise Fund* v. *PCAOB*, 561 U.S. 477 (2010), the CFPB funds itself by requisitioning over hundreds of millions of dollars from the Federal Reserve's budget, which itself is independently funded by fees assessed upon the Federal Reserve banks. 12 U.S.C. § 243. This "added layer of [budgetary] protection makes a difference." *Free Enter. Fund*, 561 U.S. at 495. The "novel structure does not merely add to the [CFPB's] independence, but transforms it," *id.* at 496, by thoroughly shielding the CFPB's expenditures from any accountability. "[W]here, in all this, is the role for oversight by an elected" Congress? *Id.* at 499. It has been left by the wayside on the highway of administrative "independence."

Thus, simply severing Title X's for-cause removal provision will not be sufficient to cure the CFPB's violation of the separation of powers and the Appropriations Clause. The only way for this Court to solve the CFPB's myriad constitutional defects is to invalidate Title X as a whole, and let Congress decide how to proceed.

D. Severance Would Not Resolve The Remedial Questions In Pending Enforcement Actions Filed By The CFPB.

There is a final reason why this Court should not simply sever the for-cause removal provision and call it a day: That approach leaves the problem of what should ultimately happen in pending enforcement actions brought by the CFPB. Are parties who have timely raised a structural constitutional challenge as a defense in such an action entitled to a meaningful remedy?

The CFPB has taken the position that such parties should receive no relief at all, and that this Court should simply sever the removal provision and allow the agency to continue to prosecute its enforcement actions as if nothing ever happened. CFPB Br. 49 (urging the Court to "remand[] to the court of appeals for further proceedings"). That approach cheapens the separation of powers. What good is it for a party to prevail on a constitutional ground if doing so does not change the outcome of the court's judgment on the challenged action being reviewed? If Congress and executive agencies are permitted to violate the separation of powers with impunity, litigants will be deprived of any "incentives to raise" these challenges in the first place. *Lucia* v. *SEC*, 138 S. Ct. 2044, 2055 n.5 (2018). And if unconstitutional agencies are permitted to avoid the award of any meaningful relief for the party at bar, no "rational litigant" will bring structural constitutional challenges going forward. Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014).

These remedial questions, however, arise only if this Court severs the removal provision. Severance only generates more problems, and does not settle anything. If the Court simply invalidated Title X, by contrast, the CFPB would be precluded from prosecuting the action, and the case would end, save for a ministerial order terminating the matter. *See*, *e.g.*, *RD Legal Funding*, 332 F. Supp. 3d at 785 ("Because Plaintiff Consumer Financial Protection Bureau is unconstitutionally structured and lacks authority to bring claims under the CFPA, the Clerk of Court shall terminate Plaintiff Consumer Financial Protection Bureau as a party to this action."). If, on the other hand, the Court severs but fails to answer this question of ultimate remedy, the lower courts would be left without any guidance as to what to do when an agency's action is challenged on the basis that the entity is unconstitutionally structured. That question has already created confusion and divergent views. *Compare Collins* v. *Mnuchin*, 938 F.3d 553, 592-94 (5th Cir. 2019) (en banc) (majority op. by Haynes, J., joined by Stewart, C.J., and Dennis, Owen, Southwick, Graves, Higginson, Costa, and Duncan, JJ.) (declining to invalidate agency action despite agency's unconstitutionality), *with id*. at 626-29 (Willett, J. joined by Jones, Smith, Elrod, Ho, Engelhardt, and

Oldham, JJ., dissenting in part) (opining that the unconstitutional agency's past actions had to be invalidated).

CONCLUSION

The Court should reverse the Ninth Circuit's judgment, hold the CFPB unconstitutionally structured, and order dismissal of the action or invalidate Title X in its entirety.

Respectfully submitted.

THEODORE B. OLSON
Counsel of Record
HELGI C. WALKER
LOCHLAN F. SHELFER
JEREMY M. CHRISTIANSEN
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Amicus Curiae Center for the Rule of Law

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