

No. 19-7

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**In the Supreme Court of the United States**

SEILA LAW LLC,

*Petitioner,*

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

*Respondent.*

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

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**BRIEF OF PROFESSOR JOHN HARRISON AS  
AMICUS CURIAE IN SUPPORT OF COURT-  
APPOINTED AMICUS CURIAE ON  
PRUDENTIAL RIPENESS**

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## **QUESTION PRESENTED**

Whether the Court may address the question of severability before it addresses the constitutional issue, and, if it finds that the CFPB's investigative authority is severable from the removal restriction, avoid reaching the constitutional issue.

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## **INTEREST OF *AMICUS CURIAE*\***

John Harrison is a professor at the University of Virginia School of Law. He teaches and writes about constitutional structure, federal courts, and related issues, including severability, and he has an interest in the sound development of the law in these fields.

## **SUMMARY OF ARGUMENT**

Court-appointed amicus recommends that the Court avoid the constitutional question on grounds of prudential ripeness. The Court can do that by considering the question of severability first, and, if it concludes that the CFPB's investigative authority is severable from the removal restriction, concluding that petitioner is not entitled to relief without reaching the constitutional issue. Petitioner's claim rests on inseparability: petitioner alleges that the removal restriction, to which it is not subject, is unconstitutional, not that the agency's investigative power, to which it is subject, is unconstitutional. The Court has prudential discretion to address those issues in either sequence, because both bear on the content of the rule of decision for this case. A court that decides a constitutional question is identifying

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\* No party's counsel authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. The University of Virginia School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of this brief.

the content of the applicable law, if necessary applying the principle that unconstitutional statutory rules are invalid. A court that decides a question of severability is construing the statute. It is identifying the application of the statute in light of a finding, or assumption for purposes of severability analysis, of unconstitutionality. In neither situation does the court apply a remedy in the sense of a judicial act that changes legal relations. Questions of severability can be described as questions of remedy in order to distinguish them from the constitutional questions with which they are connected. Courts do not, however, change the content of statutory law, either when they find a statutory rule unconstitutional or when they decide how much of a statute remains in place, or would remain in place, in light of partial unconstitutionality. Issues of severability thus arise in determining parties' primary legal relation, not in deciding on the remedy in the sense of a judicial act that changes those relations.

### **ARGUMENT**

Court-appointed amicus suggests that the Court decline to decide the constitutional question presented in this case on grounds of prudential ripeness. Court-Appointed Amicus Br. 21-27. This brief suggests another argument in support of that position, one involving the Court's option to address severability before it addresses the constitutional issue. If the Court considers severability first, and finds the CFPB's investigative authority to be severable from the removal restriction, petitioner will not be entitled to relief, whether or not the removal restriction is unconstitutional. That sequence of decision, and that resolution of the severability issue, would make

resolution of the constitutional question unnecessary. The order in which the Court considers the constitutional question and the severability question is within its discretion and is governed by prudential considerations. If the Court concludes that the CFPB's investigative power and the removal restriction are severable, it can decline to resolve the constitutional question on grounds of prudential ripeness.

**A. The CFPB's Investigative Authority Is Inoperative Only If It Is Inseverable from the Removal Restriction.**

Petitioner is subject to the CFPB's investigative power. Neither the President's removal power nor the statutory restriction thereon applies to petitioner, and the President has not taken any step that would bring the removal restriction into play. Petitioner does not argue that the grant of investigative power is, by itself, unconstitutional. Petitioner's constitutional objection is to the removal restriction. Petitioner therefore can prevail as to the investigative demands at issue in this case only if the statute's grant of investigative power is implicitly conditioned on the validity of the removal restriction – that is, only if the former is inseverable from the latter. In order to obtain relief, petitioner thus must prevail on two issues. If the Court resolves either issue against petitioner, petitioner cannot obtain relief.

**B. The Order in Which the Court Addresses Severability and the Constitutional Question Is Within Its Discretion, Guided by Prudential Considerations.**

In cases like this, the Court may turn to the severability question first. If it then concludes that the applicable aspect of the statute is severable from the allegedly unconstitutional aspect, it denies relief to the party raising the constitutional objection. *See, e.g., Champlin Ref. Co. v. Corp. Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (declining to address a constitutional challenge to a part of the statute that was not applicable in the case, on the grounds that if that part was unconstitutional, it was also severable). A conclusion of severability enables the Court to avoid the constitutional question because if the applicable aspect of the statute at issue – here, the CFPB’s investigative power – is severable from the challenged aspect, the applicable aspect is valid whether or not the challenged provision is constitutional. If the challenged aspect is constitutional, then severability does not arise. If the challenged aspect is unconstitutional but the applicable aspect is severable, the latter continues to apply. A finding of severability makes the constitutional issue irrelevant to the outcome, and so enables the Court to decline to decide it.

The Court has discretion concerning the sequence in which to decide these two issues because they both figure in identifying the operative rule of decision in the case. Neither is prior to the other. Questions concerning the constitutionality of statutes arise because statutory rules that are inconsistent with the Constitution are invalid and inoperative, and hence

form no part of the rule of decision in a case. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). In similar fashion, questions of severability sometimes must be resolved in order to identify the rule that applies to the case before a court. That aspect of severability is especially prominent in cases like *Bowsher v. Synar*, 478 U.S. 714 (1986), in which the relevant statute contains an explicit fallback provision, one that tells the court what the applicable rule is in case the statute as written is partly unconstitutional. *Id.* at 735-36.<sup>1</sup> Severability clauses, which instruct the courts to apply provisions that are not themselves unconstitutional, also provide an applicable rule in the contingency of partial unconstitutionality.

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<sup>1</sup> The Court's conclusion that the constitutional issue in *Bowsher* was ripe for review, 478 U.S. at 727 n. 5, does not entail that the constitutional issue in this case may not be avoided by addressing severability first. Like this case, *Bowsher* involved a provision regarding removal – there, a congressional removal power, rather than a restriction on presidential removal as here – that had not been put into operation. The parties who raised the constitutional issue in *Bowsher* were subject to a power granted by the statute, the power to rescind appropriations that benefited them. 478 U.S. at 721. Because the statute at issue in that case had an explicit fallback rule, one that in effect made the rescission power inseparable from the congressional power to remove the Comptroller General, 478 U.S. at 735-36, the Court could not avoid the constitutional issue by resolving severability first: the content of the statute as it applied to the parties differed depending on the resolution of the constitutional issue, as it does not here if the CFPB's investigative power is severable from the removal restriction.

Because questions of constitutionality and severability both go to determining the content of the law the court is to apply, they can be addressed in any order. A court may decide whether a challenged provision is constitutional and then turn to severability, if it finds the provision to be unconstitutional. A court may also decide first whether the applicable provision is severable, and only if it is not, then turn to the constitutional question. Both sequences are permissible, and the choice between them is governed by prudential considerations. *See Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1701-02 (2017) (Thomas, J., concurring in the judgment in part) (Court need not decide a constitutional question when the resolution of that question does not affect the outcome).

The sequence in which constitutionality and severability are addressed is not governed by the general (though by no means exceptionless) practice of determining the primary legal relations of parties before turning to the question of remedy. “Invalidation” of statutes, either on grounds of unconstitutionality or inseverability, is not a remedy in the sense relevant to the practice of deciding the primary issues first and the remedy next. A remedy changes the legal relations of parties, as when an injunction creates a new obligation that enforces a pre-existing obligation. The first principle of American constitutionalism is that sub-constitutional legal rules that conflict with the Constitution are invalid and hence inoperative in court. According to that principle, the Constitution itself causes lower-level rules that conflict with it to be invalid and inapplicable. Courts engaged in judicial review

recognize invalidity, but do not, strictly speaking, bring it about themselves.

We have no power *per se* to review and annul acts of Congress on the grounds that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.

*Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). If courts literally invalidated statutes on constitutional grounds, the decision of a single trial court, state or federal, that a federal statute is unconstitutional, would make the statute ineffective as to all parties throughout the country. The decisions of this Court, because of their nationwide precedential effect, have consequences similar to an actual change in the content of the law. That similarity is not identity: the Constitution, not the courts, brings about invalidity.<sup>2</sup>

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<sup>2</sup> Standard terminology can be misleading in this connection. It is common to say that a court that has found a statutory provision unconstitutional has invalidated it. Such statements refer to the holding and its precedential effect, not to the remedy. For example, Justice White, in dissent in *INS v. Chadha*, 462 U.S. 919 (1983), criticized the “apparent sweep” of the decision, saying that it “appears to invalidate all legislative vetoes

Just as courts do not, strictly speaking, apply a remedy of invalidation that causes statutory rules to be inoperative, so they do not decide, on severability grounds, whether aspects of a statute that are not themselves unconstitutional are to be made invalid as part of a remedy. Instead of changing the content of the statutory law, courts that decide on severability identify that content in light of a finding of unconstitutionality, or on an assumption of unconstitutionality made for purposes of severability analysis. That is why questions of severability are questions of statutory construction. Reflecting that feature of severability analysis, the Court sometimes formulates the question of severability as a counterfactual inquiry into what Congress would have done. “Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.” *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (per curiam) (quoting *Champlin*, 286 U.S. at 234). The Court also describes severability in the terms it often uses in construing statutes, those of congressional intent. “There is abundant indication of a clear congressional intent of severability both in the language and structure of the Act and in its legislative history.” *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 687 (1987).

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irrespective of form or subject.” 462 U.S. at 974 (White, J., dissenting). He did not mean that the relief granted to Chadha in that case had an effect on other statutes. He meant that the precedential effect of the Court’s holding apparently would entail that all legislative vetoes would be treated as inoperative.

Courts that engage in severability analysis construe, but do not change, the statutes before them. That basic feature of severability itself imposes a constraint on that inquiry, and that constraint shows that severability analysis is statutory construction. Courts sometimes conclude that having found a statute partially unconstitutional, they cannot identify any remaining constitutional aspects, because to do so would require that the court rewrite the statute as a legislature might. *See, e.g., Hill v. Wallace*, 259 U.S. 44, 70-72 (1922), which the Court in *Alaska Airlines* described as holding the statute at issue in that case “nonseverable because valid and invalid provisions [were] so intertwined that the Court would have to rewrite the law to allow it to stand,” *Alaska Airlines*, 480 U.S. at 684. That limitation results from the character of severability analysis as statutory interpretation. When the legislature has not given the courts enough implicit or explicit guidance concerning the statute’s application in the contingency of unconstitutionality, courts cannot supply the missing fallback rule themselves, because they cannot legislate. If courts were able truly to change the content of the law by “severing” statutes, exercising remedial discretion in order to do so, they would not be subject to that limitation.

When a court finds that a statute is partly or wholly unconstitutional, it is finding the law and not changing it. When a court finds that a constitutional aspect of a statute is inseverable from an unconstitutional aspect, it is finding the law and not changing it. The decision about how much of a statute survives a finding of unconstitutionality is not a decision about how much to make invalid, and

therefore does not involve a remedy.<sup>3</sup> If severability were to be conceived of as a remedy for purposes of the sequence in which issues are addressed, the Court's practice of avoiding constitutional issues by addressing severability first would not be called into question. Genuine questions of remedy may be resolved before the court addresses the primary issue, and sometimes the resolution of a genuine question of remedy will obviate the need to consider the primary issue. For example, courts that are asked to give equitable relief may pretermitt inquiry into the primary question by deciding that no relief will be available because of equitable principles governing remedies. A court may decline equitable relief by finding that the plaintiff would have an adequate remedy at law, without deciding whether the plaintiff has suffered or is threatened with wrongful injury. *See, e.g., Root v. Ry. Co.*, 105 U.S. 189 (1882) (denying

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<sup>3</sup> Questions of severability can bear on the appropriate remedy to be given, and so can arise at the point in a court's analysis when the court is considering the remedy. That does not mean that severance or non-severance are themselves remedies in the sense of directives that alter the content of the statute, the way an injunction alters a party's obligations. In *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), for example, the question of severability arose in deciding on the proper scope of the injunctive and declaratory remedies in that case. The lower courts had completely enjoined the defendant from enforcing the New Hampshire statute at issue. *Id.* at 325. The Court vacated that judgment and remanded for consideration of narrower relief, depending on legislative intent concerning severability. *Id.* at 331-332. Severability can be relevant to the remedy in a case because the remedy should track the parties' rights and obligations, which are found in the primary law, not because courts alter the content of the statutory rules that apply to the parties.

equitable relief because the remedy at law was adequate, without passing on the merits of the plaintiff's claim).

Petitioner suggests that the Court need not, should not, and perhaps may not address severability. Pet'r. Br. 35-41. Petitioner can prevail only if the CFPB's investigative power, to which it is subject, is inseparable from the removal restriction, which is not in operation in this case. Petitioner's suggestion that "an agency with a structural constitutional defect lacks the authority to take executive action," *id.* at 36, states far too broad a principle. Different flaws related to constitutional structure have different consequences. An officer whose appointment is inconsistent with the Constitution's rules concerning appointment cannot exercise governmental power, *see, e.g., NLRB v. Noel Canning*, 573 U.S. 513 (2014) (appointments of NLRB members held inconsistent with Recess Appointments Clause), because an individual without a valid appointment is not an officer. Not all flaws of constitutional structure in the statute empowering an agency make the agency incapable of exercising power, however. The Court found an unconstitutional removal restriction to be severable from the grant of agency power in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 508-10 (2010).

Petitioner's claim for relief is like that of the airlines in *Alaska Airlines*. They were regulated parties subject to employee-protection rules found in a statute with a legislative veto and to implementing regulations that the statute had made subject to that veto. *Alaska Airlines*, 480 U.S. at 682-683. The statutory rules and the regulatory authority were not

themselves unconstitutional, just as the CFPB's investigative authority is not unconstitutional. Just as the airlines were free from the statute's rules and the FAA's regulatory authority only if those rules and that authority were inseverable from the unconstitutional legislative veto, petitioner is free from the CFPB's investigative authority only if that authority is inseverable from a removal restriction that is itself unconstitutional.<sup>4</sup>

Petitioner seeks relief from the CFPB's investigative demand. Pet'r. Br. 37.<sup>5</sup> Whether that

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<sup>4</sup> In some cases, the court need not and probably should not address severability. Petitioner is correct, Pet'r. Br. 39, that *Printz v. United States*, 521 U.S. 898 (1997), was such a case. Sheriff Printz had an obligation under a statutory provision that, he argued, was unconstitutional. *Id.* at 904. His claim for relief did not rely on inseverability. The Court declined to resolve the question whether private firearms dealers and purchasers were relieved of their obligations under the statute on the grounds that those obligations were inseverable from the obligations of government officials like Printz. *Id.* at 935. "These are important questions, but we have no business answering them in these cases. These provisions burden only firearms dealers and purchasers, and no plaintiff in either of those categories is before us here. We decline to speculate regarding the rights and obligations of parties not before the Court." *Id.* Unlike Sheriff Printz and like the private parties the Court discussed in *Printz*, petitioner can prevail only on grounds of inseverability.

<sup>5</sup> Petitioner has not sought a declaratory judgment. The Court directed the issuance of a declaratory judgment in *Free Enterprise Fund*, 561 U.S. at 513. Whether a declaratory judgment would be appropriate in a case like this is doubtful. The declaratory judgment statute provides that "in a case of actual controversy within its jurisdiction," any court of the United States "may declare the rights and other legal relations

relief is appropriate depends on the content of the law concerning the CFPB's authority, which depends on a question of severability and possibly one of constitutionality. The constitutional question may be avoidable, but the severability question is not.

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of any interested party seeking such declaration.” 28 U.S.C. §2201. The removal restriction at issue in this case involves legal relations between the President and the Director of the CFPB. A declaration that the President has power to remove the Director at pleasure and that the Director is liable to the exercise of that power, or a declaration that the President is disabled from removing the Director contrary to the statute and the Director has immunity from any such removal, would declare the legal relations of the President and the Director. Were petitioner to seek a declaration concerning the President's removal authority, that judgment would not “declare the rights and other legal relations” of a party “seeking such declaration,” because the legal relations between the President and the Director are not those of petitioner.

**CONCLUSION**

The Court may decide to consider the question of severability first, and if it does so, and decides that the CFPB's investigative power is severable from the removal restriction, the judgment below should be affirmed.

Respectfully submitted,

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