No. 19-422

In the Supreme Court of the United States

PATRICK J. COLLINS, ET AL.,
PETITIONERS

v.

STEVEN T. MNUCHIN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PROFESSOR JOHN HARRISON AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Interest of *Amicus Curiae*[1]

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Summary of Argument

The invalidity of unconstitutional statutory rules is brought about by the Constitution. The severance of statutory rules that are constitutional and severable is brought about by the statute involved. Because they are caused by the Constitution and the statute in question, those results arise when the statute is adopted. They are not brought about later by the courts; courts do not give a remedy that changes the content of statutory law by invalidating or severing parts of a statute. Invalidity and severance are made by the law and found by the courts in applying the law to cases. If the statutory grants of power to the FHFA

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[1] The parties have consented in writing to the filing of this brief and their letters of consent have been filed with the Clerk. No party's counsel authored this brief in whole or in part, and no party's counsel or party made a monetary constribution 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 and for clinical activities, 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.

at issue in this case are severable from the removal restriction, the grants have been operative since the statute was adopted. Petitioners can prevail on constitutional grounds only if the removal restriction is unconstitutional and the grants of power are inseverable from it. (This brief addresses only petitioners' argument based on the Constitution.)

Petitioners maintain that the removal restriction at issue in this case is unconstitutional and that it rendered the FHFA Director's actions unlawful even if the statutory grants of power to the Director are severable from the removal restriction. They argue that an official who is unconstitutionally insulated from removal may not exercise power, that the Director was so insulated when he took the actions they challenge, and that the unconstitutional insulation will continue in effect until a judicial decision makes it invalid. Petitioners' argument misconceives the operation of the Constitution, the role of the courts in enforcing it, and the timing of legal events that follows from the Constitution and the courts' role. No official is ever insulated from removal by an unconstitutional statutory provision. The Constitution's self-executing effect invalidates statutory rules that are unconstitutional. Invalidity does not wait for a judicial act. Courts find invalidity when appropriate in deciding cases. They do not make it. The Constitution does. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803).

Just as the invalidity of unconstitutional statutory rules arises when the statute is adopted, so does the severance of the invalid part from other rules that are

themselves constitutional and severable. If part of a statute is unconstitutional, other parts that are constitutional and severable go into effect when the statute is adopted. The constitutional and unconstitutional parts are severed from one another by the statute itself because a statute's operation in light of partial unconstitutionality is an aspect of its content. That content is fixed upon enactment. Courts later find it when appropriate. They do not, however, sever statutes in the sense of changing their content. Courts do not apply a remedy of severance that causes previously inoperative components to come into force by cutting out unconstitutional components and freeing the rest of the statute from the effect of the unconstitutional parts. Unconstitutional components of statutes have no legal effect.

Invalidity arises ab initio by operation of the Constitution. Severance and non-severance arise ab initio by operation of the statute. Courts find them and do not bring them about. If the agency powers at issue here are severable from the removal restriction, they have been operative from the beginning. Petitioners can prevail only if the removal restriction is unconstitutional and the grants of power are inseverable from it.

The Court need not give petitioners relief in order to hold the removal restriction unconstitutional. If the Court's reasoning in deciding the case is that the restriction is unconstitutional but severable, so that respondents prevail, its reasoning concerning the constitutional issue will be a holding. The resolution of an issue that could have been decisive, but that was

not decisive because of the resolution of another issue, is not a dictum.

Cases like this present a problem of administrative, not constitutional, law that has not been explored. Unconstitutional removal restrictions are void ab initio, but they may not be known to be void by the officials they affect. An official's incorrect belief that the official is not freely removable by the President may affect the official's actions. Principles of administrative law address situations in which an erroneous legal assumption affected an official decision. Principles of constitutional invalidity and severability deal with the content of the law itself, not with possibly mistaken official beliefs about it. The way in which administrative law may deal with mistaken beliefs about removability is an important issue, but it has not been explored in this case.

Argument

I. Unconstitutional Statutory Provisions Are Invalid When Adopted, and Are Not Made Invalid Later When a Court Finds Unconstitutionality, and Severable Provisions are Operative When Adopted, and Do Not Become Operative Only Later When a Court Finds Severability

Petitioners seek a remedy that would undo acts of the Director of the FHFA. They are entitled to such a remedy only if those acts were unlawful. Petitioners argue that the Director's tenure protection is unconstitutional, but they are not directly subject to the provisions of the act that structure the agency.

They can obtain the remedy they seek only if the removal restriction somehow undermines the lawfulness of the Director's acts. If the removal restriction is unconstitutional and the relevant statutory grants of power to the Director are inseverable from the restriction, then the Director's acts lacked statutory authority. If an otherwise-constitutional statutory provision is conditioned on the constitutionality of another provision—if the two are inseverable—then the otherwise-constitutional provision is inoperative if the other provision is unconstitutional.

Petitioners maintain that they are entitled to the relief they seek even if the grants of power are severable from the removal restriction. Their argument relies on the alleged unconstitutionality of the removal restriction. Petitioners do not argue that the grants of power are inoperative until Congress itself repeals the removal restriction. They assume that if this Court finds that the removal restriction is unconstitutional but the grants of power are severable, the removal restriction will not undermine acts of the Director taken after the Court's decision. Their claim for what they call backward-looking relief rests on the premise that until this Court makes such a decision, the unconstitutionality of the removal restriction causes the grants of power to be ineffective even if they are severable.

For petitioners to prevail on this theory, the removal restriction must have some legal effect, even though it is unconstitutional, and that legal effect must change with a decision of this Court. Two lines

of reasoning might support that conclusion. First, an unconstitutional removal restriction might be legally operative, protecting officials from removal, even though it is unconstitutional, until a court "strikes it down."[2] Acts of officials who are protected by an unconstitutional but valid removal restriction might be unlawful because of the officials' insulation from removal. Second, statutory provisions that are themselves constitutional and severable from an unconstitutional provision might be inoperative until they are held to be severable by a court, as if a judicial act of severance freed the constitutional provision from the unconstitutional provision that up to that point made the other inoperative.

Both lines of reasoning are incorrect for the same reason. They rest on an error about the time at which the relevant legal events occur, and a related error about the significance of judicial decisions. Unconstitutional statutory rules are invalid ab initio, and never come into effect. The Constitution's self-executing effect invalidates them immediately. Invalidity is later found by courts in the process of deciding cases, but courts do not bring it about. No agency is ever "unconstitutionally independent of the President." Agency heads and the President may mistakenly believe that an unconstitutional removal restriction is constitutional, and so mistakenly believe that an agency head is independent. Agency heads who actually are unconstitutionally independent of the

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[2] Two judges on the court of appeals referred to an order prospectively striking down the removal restriction. Pet. Br. 64, Pet. App. 73a-75a.

President, however, are like square circles. Neither can exist.

Severability and inseverability arise when a statute is adopted, so a severable provision is operative when the statute is enacted. Severability arises ab initio because it is part of the statute's content. Severability and inseverability are later found by courts in the process of deciding cases. Courts do not, strictly speaking, change the content of the law by severance any more than they change the content of the law by invalidation. Judicial severance and invalidation are figures of speech that must be used with care.

A. Unconstitutional Statutory Provisions Are Void When Enacted

1. The Constitution Makes Unconstitutional Statutory Provisions Invalid Ab Initio, and Courts Later Find Invalidity as Necessary to Decide Cases

The first line of reasoning on which petitioners' theory may rest attributes to the Constitution a strange collection of principles. The Constitution, according to this theory, disapproves of certain removal restrictions. It does not, however, keep them from going into effect. An officer who is subject to an unconstitutional removal restriction is in fact protected from removal, even though the restriction is unconstitutional. The Constitution does not invalidate the restriction ab initio, but it does have two other consequences. First, it instructs courts to cause unconstitutional restrictions to become invalid

prospectively from the time of the court's decision. Second, the Constitution does make invalid, not removal restrictions, but the acts of officials who are protected by unconstitutional but operative removal restrictions. The Constitution does that as long as such restrictions are in force, which they are until a court invalidates them.

The Constitution does not engage in half measures like that. If petitioners are correct that the removal restriction is unconstitutional, it was void when adopted and never went into effect. It was rendered invalid by the Constitution's self-executing effect. Chief Justice Marshall thought it "a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it." *Marbury*, 5 U.S. (1 Cranch) at 177. He attributed that control to the Constitution itself, not the judgment of any court. As he explained, "a legislative act contrary to the Constitution is not law." *Ibid.* The courts' obligation to disregard unconstitutional laws follows from such laws' invalidity, which the Constitution itself produces. "If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law?" *Ibid.* To find that courts should follow invalid statutory provisions "would be to overthrow in fact what had been established in theory." *Ibid.*

Because unconstitutional statutory provisions are void ab initio, courts treat them as already being void at the time a case is decided. That is why judicial

findings of unconstitutionality are in a manner of speaking retrospective: they apply the law as it already is, including to events that took place before the court's decision. "'[B]oth the common law and our own decisions' have 'recognized a general rule of retrospective effect for the constitutional decisions of this Court.'" *Harper* v. *Virginia Dep't of Tax'n*, 509 U.S. 86, 94 (1993) (quoting *Robinson* v. *Neil*, 409 U.S. 505, 507 (1973)).

Justice Scalia explained how that result follows from the principle that courts apply the law. Judges make law, he wrote, "but they make it *as judges make it,* which is to say *as though* they were 'finding' it, discerning what the law *is,* rather than decreeing what it is today *changed to,* or what it will *tomorrow* be." *James B. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring in the judgment). For purposes of determining when invalidity arises, the Constitution makes invalidity and judges find it. Judges make law in the sense that they authoritatively clarify its content. But courts produce clarifications *of the law*, and those clarifications therefore generally operate as of the time the law was adopted.

The Court applied the principle of ab initio invalidity in *Myers* v. *United States*, 272 U.S. 52 (1926). *Myers* was a suit for back pay, maintained in this Court by the administratrix of a Postmaster who had been removed contrary to a statutory removal restriction. The Court found the restriction unconstitutional. *Id.* at 176. It denied Myers' claim for back pay. *Id.* at 177 (affirming the Court of

Claims's judgment against Myers). The disposition of the case entails that the removal restriction was invalid when it was adopted. If it had become invalid only when the Court found it to be so, it would have been valid from the day Myers was removed until the end of the four-year term to which he had been appointed. See *id.* at 106 (noting that Myers claimed back pay up to the expiration of his term on July 21, 1921).

In criminal prosecutions, the Court regularly applies the principle that unconstitutional statutory rules are invalid when adopted. When the Court reviews a criminal conviction under an allegedly unconstitutional statute, it deals with conduct that took place after the statute was enacted but before the Court decided on its constitutionality. Because unconstitutional statutes are inoperative when enacted, conduct that violates them is never criminal. See, *e.g.*, *United States* v. *Davis*, 139 S. Ct. 2319, 2323-2324 (2019) (affirming that unconstitutionally vague statute "is no law at all" and cannot support a criminal conviction); *Packingham* v. *North Carolina*, 137 S. Ct. 1730, 1738 (2017) (holding that conduct contrary to a statute that was inconsistent with the First Amendment not criminal); *Bond* v. *United States*, 564 U.S. 211, 236 (2011) (Ginsburg, J., concurring) ("Bond, like any other defendant, has a personal right not to be convicted under a constitutionally invalid law."). If unconstitutional statutes became invalid only when made so by a court, violations prior to judicial invalidation would be crimes.

The principle that applications of the Constitution are retroactive in the sense that they apply to events that already occurred extends beyond the Constitution's invalidation of statutes. It also applies to the Constitution's rules concerning criminal investigation. Those rules, whenever found by the courts, apply to investigators' conduct as of the time that conduct occurs. That is why changes in this Court's doctrine apply, in effect, retroactively. "As we have previously said, the 'source of a "new rule" is the Constitution itself, not any judicial power to create new rules of law.'" *Davis* v. *United States*, 564 U.S. 229, 254 (2011) (Breyer, J., dissenting) (quoting *Danforth* v. *Minnesota*, 552 U.S. 264, 271 (2008)).[3]

The use of declaratory relief in constitutional cases confirms that invalidity is made by the Constitution and recognized by the courts. Coercive remedies like injunctions change legal relations. Declaratory remedies resolve disputes by conclusively stating legal relations that already exist. *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227 (1937), in which the Court found that the federal Declaratory Judgment Act is consistent with Article III, illustrates the point. Aetna sought a declaration that certain insurance policies "had lapsed according to their terms," so that Aetna

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[3] *Davis* involved the Fourth Amendment, which governs the conduct of officials, not the validity of statutes. 564 U.S. at 232. The Court in *Davis* agreed with Justice Breyer that, under a later-announced Fourth Amendment principle, the officers' conduct at issue in *Davis* had been unlawful. *Id.* at 240. The issue in that case, which divided the Court, was the operation of the remedy of exclusion of evidence. *Id.* at 242.

had no duty to pay under them. *Id.* at 238. Aetna's claim for declaratory relief rested on its argument that the policies already were void—that they "had lapsed." *Ibid.* When the Court finds that a statutory provision is unconstitutional and invalid and directs that declaratory relief be given, *e.g.*, *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) (directing declaratory relief), its judgment rests on the assumption that the Constitution produced a result that a court can declare and did not bring about.

The Constitution invalidates statutory rules that are inconsistent with it. The courts neither have nor need any power to make statutory rules inoperative themselves. They do not "invalidate" statutory rules by giving a remedy that changes the content of the law. "The term 'invalidate' is a common judicial shorthand," this Court has noted, for "when the Court *holds* that a particular provision is unlawful and therefore may not be enforced against a plaintiff. To be clear, however, when it 'invalidates' a law as unconstitutional, the Court of course does not formally repeal the law from the U.S. Code or the Statutes at Large." *Barr* v. *American Ass'n of Pol. Consultants*, *Inc.*, 140 S. Ct. 2335, 2351 n.8 (2020) (opinion of Kavanaugh, J.) (emphasis added). A holding is not a remedy strictly speaking. When a court holds that a statutory provision is unconstitutional and invalid, "the formal remedy afforded to the plaintiff is an injunction, declaration, or damages." *Ibid.* Holdings find but do not change the generally-applicable law. Remedies change or declare the legal relations of the parties

before the court.[4] Holdings of this Court have an effect similar to actual invalidation, but that effect works through norms of precedent, not by changing the content of the law. *Ibid.*

Diverging holdings on the same constitutional question by the federal courts of appeals show that there is no remedy of invalidation. When one court of appeals finds a statutory rule invalid and another finds the same rule valid, the difference is in judicial decisions, not in the content of the law.[5] The statute is not in the condition of the unfortunate cat in the

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[4] Justice Gorsuch's analysis in *American Association of Political Consultants* also reflects the distinction between conclusions of unconstitutionality, which may be said to invalidate statutory rules, and remedies strictly speaking. He found that the statutory rule at issue was unconstitutional as applied to the plaintiffs themselves, *Barr* v. *American Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335 (2020) (Gorsuch, J., concurring in the judgment in part and dissenting in part) (finding that regulation of robocalls is a content-based regulation that fails strict scrutiny), so that severability was irrelevant, *id.* at 2365-2366. Having reached that conclusion on the constitutional question, he found that the plaintiffs were entitled to "an injunction preventing its enforcement against them. This is the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future." *Id.* at 2365. Justice Gorsuch referred to remedies, and the law of remedies, in the strict sense: judicial orders, and the principles governing their availability, that affect the parties before the court. A finding of invalidity is not a remedy in the sense in which an injunction is.

[5] Prior to this Court's decision in *NFIB* v. *Sebelius*, for example, the courts of appeals had divided on the constitutionally of the Affordable Care Act's individual mandate. 567 U.S. at 540-541 (describing division among the courts of appeals on the constitutional issue).

famous thought experiment, simultaneously alive and dead. It is either valid or not. Judicial conclusions sometimes differ, but the content of the law does not. Courts do not give a remedy that changes the content of the statutory law.

Judicial invalidation may seem to be a remedy for the constitutional violation caused by an unconstitutional statute. The idea of constitutional violations for which courts give remedies is not a unitary concept. A physical act that violates a duty imposed on an official, like forcible entry contrary to the Fourth Amendment, is a wrong. Such conduct may give rise to the remedy of compensatory damages. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). An official act that has been treated as legally effective, even though the officer had no authority to take it, may call for a remedy that will undo the effect the act was given but should not have received.

Unconstitutional statutory rules are violations of the Constitution in a very different sense. Because they are inconsistent with the Constitution, such statutory rules are invalid ab initio. No remedy is needed to make them so. The courts may be called on to undo official acts that were taken on the mistaken assumption that an unconstitutional rule was valid. Courts do not, however, undo the unconstitutional statutory rule itself. Unconstitutional statutory rules are never valid.

2. The Court's Cases Concerning the Timing of Invalidity Show that If the Removal Restriction Is Unconstitutional, It Never Protected the Director from Removal

Petitioners point to separation-of-powers cases that reflect the principle that purported exercises of power that are unconstitutional are void ab initio. Pet. Br. 62-66. Petitioners are correct about that principle, but it cuts against their position.

Petitioners appear to reason as follows: This Court's cases show that the actions of unconstitutionally structured agencies lack legal effect, and if given effect are wrongful. The FHFA will be unconstitutionally structured until a court "invalidates" the removal restriction, because up to that point, the Director will not have served at the President's pleasure. The Director's acts up to that point should be treated like the acts of an individual who lacks an appointment that complies with the Appointments Clause. In general, the purported acts of such individuals are treated as legally ineffective, and, if they have been given effect, the courts undo them. Every act of an "unconstitutional agency," Pet. Br. 62, is a constitutional violation that calls for a remedy.

No officer is ever unconstitutionally protected from removal, however, because the Constitution invalidates unconstitutional removal restrictions. Petitioners' analogy pays insufficient attention to the

different points in time at which constitutional principles can operate in different circumstances.

Petitioners are correct about the Appointments Clause, see Pet. Br. 63-64 (discussing *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), and *NLRB* v. *Noel Canning*, 134 S. Ct. 2550 (2014)). An individual whose ostensible appointment is not consistent with the clause has no valid appointment. The Appointments Clause primarily operates on acts purporting to appoint officers. It determines which of those acts are legally effective. The timing of that operation is an aspect of the Appointments Clause, not of the constitutional structure in general.[6]

When the Constitution invalidates a statutory grant of power, it does so ab initio. As a result, purported exercises of the power are also void ab initio. *Clinton* v. *New York*, 524 U.S. 417 (1998), on which petitioners also rely, Pet Br. 64, is an example. The Court found that the Line Item Veto Act's grant of cancellation authority was unconstitutional and invalid. *Id.* at 421. Any purported cancellation was therefore also invalid, and the Court applied that principle in that case. *Id.* at 448-440.

INS v. *Chadha*, 462 U.S. 919 (1982), which petitioners also discuss, Pet. Br. 64, involved the same configuration as *Clinton* v. *New York*. The grant of legislative veto authority in the Immigration and Nationality Act was void when enacted, whether or not

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[6] The Appointments Clause also may be said to invalidate statutory rules that provide for appointments that the clause does not allow. That effect operates at the time of enactment.

anyone believed that at that time. See *Chadha*, 462 U.S. at 958-959. Because the grant of power was void, so was the purported exercise of it as to Jagdish Chadha.

New York City and Chadha were entitled to the relief they sought because the provisions authorizing actions that affected them adversely were invalid when adopted. Petitioners are in a quite different situation. The ab initio invalidity of unconstitutional provisions undermines petitioners' argument. Petitioners' argument requires that invalidity arise after enactment, and only at the point of judicial decision, but the Constitution makes statutory rules that are inconsistent with it invalid when they are enacted.

Petitioners are also correct that in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the Court undid an official act for reasons related to the constitutional structure. See Pet. Br. 64 (citing *Youngstown*). *Youngstown* involved an executive act that was unlawful when taken. Unconstitutional statutory rules are invalid when adopted. The Constitution operates ab initio in both situations.

Petitioners also rely on *Bowsher* v. *Synar*, 478 U.S. 714 (1986). See Pet. Br. 62. In *Bowsher*, this Court affirmed a three-judge district court's decision declaring "without legal force and effect," *Synar* v. *United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986), a presidential sequestration order that had been directed by the Comptroller General pursuant to the Balanced Budget and Emergency Deficit Control Act

of 1985. 478 U.S. at 736.[7] The relief in *Bowsher* did not reflect a principle that the acts of unconstitutionally structured agencies are unlawful. It reflected the principle that some combinations of statutory rules—in *Bowsher*, executive power and congressional removal—are void ab initio and applied that principle to a statute with an explicit fallback system. Because the Court found that the statute's primary system was unconstitutional, *id*. at 734, the fallback system was operative, *id*. at 735-736.

Another aspect of *Bowsher* may seem to support petitioners, but does not. *Bowsher* involved a ripeness question. The plaintiffs' argument rested on the incompatibility of a congressional removal power with an executive function. Unlike *Myers* and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *Bowsher* did not involve removal. The Court concluded that the issue involving Congress's removal power was ripe because of the "here-and-now" effect of that power on the Comptroller's decisions. "As the District Court concluded, 'it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.'" 478 U.S. at 727 n.5 (quoting *Synar* v. *United States*, 626 F. Supp. at 1392).

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[7] Petitioners say that the lower court's decision "set aside" the presidential sequestration order. Pet. Br. 62. The lower court did so only in that it gave declaratory relief and disregarded the sequestration order and certain aspects of the statute. Declarations state but do not change the legal relations they declare. See *Synar*, 626 F. Supp. at 1404.

Petitioners may mean to argue that the here-and-now effect of the removal restriction for the FHFA caused the Director's acts to be unlawful, and will continue to do so until a court "invalidates" it. Until a court holds a removal restriction invalid, the reasoning may be, an officer may be influenced by it, and decisions made under that influence are unlawful. *Bowsher*'s ripeness holding did not rest on the error of attributing legal effect to an invalid statutory rule. That holding reflects the principle that the *possible* effect of certain rules about removal is the *reason* the Constitution makes some of them, and some combinations of rules involving them, invalid ab initio. Some removal restrictions might make the officer subject to them insufficiently responsive to the President. The removal power in *Bowsher* might have made the Comptroller General too responsive to Congress when performing an executive function. The Constitution keeps those possibilities from becoming actual. It invalidates rules that would permit them.

That is why the Court referred to the "presumed" effect of the removal power and had no need in *Bowsher* to inquire into Comptroller Bowsher's state of mind. 478 U.S. at 727 n.5. The mere possibility of influence was the reason the Constitution disallowed the statute's primary mechanism.

3. The Remand in *Seila Law*, and Statements Made Concerning It, Rested on the Position Taken by One of the Parties

Petitioners point to the Court's decision to remand *Seila Law*, 140 S. Ct. 2183 (2020), to consider the question of ratification and the explanation that appears in the Chief Justice's opinion.[8] Pet. Br. 63. They reason that the remand shows that "absent a 'legally sufficient cure,' the civil investigative demand issued by the unconstitutionally insulated CFPB Director would have to be vacated." *Id.* at 63 (quoting *Seila Law*, 140 S. Ct. at 2208). It may seem that ratification was relevant only if the acts of the CFPB Director were unlawful until the Court "invalidated" the removal restriction. The initial decision to issue the CID was unlawful, the reasoning goes, only because the CFPB statute contained an unconstitutional removal restriction that no court had found to be unconstitutional when the CID was issued to Seila.

The remand in *Seila Law* does not reflect any conclusion by the Court concerning the lawfulness of Director Cordray's decision. The Court resolved no issue concerning ratification, including even the issue

[8] The Chief Justice's opinion, joined by Justices Alito and Kavanaugh on this issue, stated that a remand was called for to determine whether an alleged ratification "actually occurred and whether, if so, it is legally sufficient to cure the constitutional defect in the original demand." 140 S. Ct. at 2208.

of whether ratification was relevant. It remanded the case for further proceedings.

Perhaps even more important is that the disposition of *Seila Law* reflected the position of one of the parties. In this Court, the CFPB sought vacatur. See Gov't Br. 49, *Seila Law*, 140 S. Ct. 2183 (2020) (No. 19-7). The Government agreed that the removal restriction was unconstitutional, and argued that it was severable from the provisions creating and empowering the agency. *Id.* at 8. From those premises, the Government might have drawn the conclusion that the removal restriction was void ab initio and therefore had not undermined the lawfulness of the decision to issue the CID. That line of reasoning would have led the Government to ask that the decision below be affirmed, but not on the grounds given by the Ninth Circuit. But the Government sought vacatur, not affirmance. *Id.* at 49. The Government may have assumed that invalidation is a remedy that operates only prospectively. Its brief said that the removal restriction "should be invalidated" and that the Court "should sever the provision from the remainder of the Act." *Id.* at 8.

This Court decides cases and resolves questions of law in order to do so. The issues presented by a case are largely structured by the parties. The Court is free to assume for purposes of deciding a case that a point of law on which the parties agree is correct. The Court did so in *Free Enterprise Fund*. In that case, "[t]he parties agree[d] that [SEC] Commissioners cannot themselves be removed by the President except [for] 'inefficiency, neglect of duty, or malfeasance in office'"

and the Court "decide[d] the case with that understanding." 561 U.S. at 487 (quoting *Humphrey's Executor*, 295 U.S. at 620).[9] Just as the Court need not question a party's position, so it need not give a party more relief than it seeks. The CFPB's decision to request vacatur in *Seila Law* provided the context in which members of the Court discussed vacatur, the reasons for it, and proceedings on remand. The Court and its members did not have to endorse the assumptions underlying the agency's requested disposition, just as they did not have to endorse the assumption about the removability of SEC Commissioners in *Free Enterprise Fund*.[10]

B. Aspects of a Statute That Are Severable from Unconstitutional Aspects of That Statute Become Effective When the Statute Is Adopted

Petitioners contend that they can prevail even if the statutory grants of power to the FHFA are severable from the removal restriction. See Pet. Br. 64-65. Their reasoning rests on an error about the timing of severance. Petitioners might be correct if the part of a statute that is severable from an unconstitutional part is inoperative until a court "severs" the unconstitutional part from the statute.

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[9] See *Shurtleff* v. *United States*, 189 U.S. 311, 314 (1903) (assuming, "for the purposes of this case only," that Congress could limit the President's removal power).

[10] For the same reason, the Court in this case may decide pursuant to any assumptions shared by the parties concerning the operation of the Constitution without endorsing those assumptions.

Severance and non-severance, however, arise when a statute is adopted. They result from the statute's content, which provides for severability or inseverability. That content is later found by courts. Courts do not give a remedy of severance by which they alter the content of a statute. Severability is not a question of remedy in that sense.

1. Severability Is an Aspect of Statutory Content, Which Is Fixed at Enactment

In resolving severability questions, courts seek to find the content of the statute involved. As Justice Kavanaugh recently explained, the terms in which the Court describes that content depend on the principles of statutory construction the Court follows. Conducting severability analysis in *Barr* v. *American Association of Political Consultants*, he explained that the analysis properly looks to statutory text. Inquiry into congressional intent "may have carried some force back when courts paid less attention to statutory text as the definitive expression of Congress's will." 140 S Ct. at 2349 (opinion of Kavanaugh, J.). "[C]ourts today," however, "zero in on the precise statutory text, and, as a result, courts hew closely to the text of severability or nonseverability clauses." *Ibid*. As he recognized, text and intent are different ways of conceptualizing the same object: Congress's will. That will produces the content of statutes.

In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), the Court formulated the severability question in terms of legislative will as it was commonly understood when that case was decided. The Court asked whether "the

Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Id*. at 108 (quoting *Champlin Refin. Co.* v. *Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932)). Text and hypothetical decisions reflect Congress's choice about the content of statutory law. So does the inquiry into "congressional intent of severability" that the Court conducted in *Alaska Airlines, Inc.* v. *Brock*, 480 U.S. 678, 687 (1987).

Ways of understanding what Congress has done vary over the years, but severability is always an inquiry into what Congress has done. Congress's will, whatever it is, creates law when that will is exercised by making a statute. That is the point at which the content of a statute is set, including its content in the contingency that the statute, at that very moment, has a constitutional defect.

The limits of severability also reflect the fact that statutory law, including statutory law in light of constitutional defects, must come from the legislature. It cannot come from the courts, which have judicial and not legislative power. That is why this Court sometimes explains that it cannot, under the guise of severance, rewrite a statute that is partly unconstitutional. An example is *Hill* v. *Wallace*, 259 U.S. 44, 70-72 (1922). The Court in *Alaska Airlines* described *Hill* as holding the statute in the earlier case "nonseverable because valid and invalid portions [were] so intertwined that the Court would have to rewrite the law to allow it to stand." *Alaska Airlines*, 480 U.S. at 684. If courts made statutory law rather

than finding it when resolving severability issues, they would not be under that limitation.

This Court's approach to severability in cases involving state statutes shows that severability is a question of the content of the statute at issue. The severability of a state statute is "a matter of state law." *Leavitt* v. *Jane L.*, 518 U.S. 137, 139 (1996). Federal courts cannot make or remake state law. In its appellate jurisdiction over the state courts, this Court sometimes remands to state court for an inquiry into severability. In *Dorchy* v. *Kansas*, 264 U.S. 286 (1924), the Court remanded so that the Supreme Court of Kansas could consider severability. That case presented a question of severability of a state statute, which this Court saw as "a question of interpretation and of legislative intent." *Id*. at 290. "The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court." *Ibid*. (citations omitted).

Statutory content is fixed when the statute is enacted. It includes the statute's operation in the contingency of partial unconstitutionality. The statute is not remade later when a court addresses severability.

2. Severability Questions May Arise in Formulating a Remedy, but Severance Is Not a Remedy Given by the Courts

Although severance of a statute is not a judicial remedy, questions of severability and remedy are

sometimes closely connected. Reflecting that connection, the Court and its members in recent decades have sometimes referred to questions of severability as questions of remedy. In some leading cases, the question of severability has arisen in connection with the Court's disposition of the case, and hence in connection with the remedy strictly speaking. In *Ayotte* v. *Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), the lower courts had enjoined the defendant from enforcing any feature of the New Hampshire statute at issue against the plaintiffs. *Id*. at 325. The Court vacated that judgment, and remanded so that the lower courts could consider whether a narrower injunction was appropriate in light of legislative intent concerning severability. *Id*. at 331-332. Questions of severability had to be decided to decide a remedial question in the strict sense—a question concerning the scope of an injunction.

The Court in *United States* v. *Booker*, 543 U.S. 220 (2005), also addressed severability to decide on a remedy in the narrow sense: the directions the Court was to give concerning proceedings on remand. The Court had concluded that the proceedings in Booker's sentencing were inconsistent with the Constitution. *Id*. at 227-229. In order to tell the lower courts how to proceed on resentencing, the Court had to identify the applicable law in light of a constitutional defect. To do so, the Court asked "what 'Congress would have intended' in light of the Court's constitutional holding." *Id*. at 246. The severability inquiry was about the remedy that the Court gave in that case.

The Court did not change the law and direct that Booker be sentenced under rules that had not existed at the time of his offense.

Referring to severability as a question of remedy can also be shorthand for describing a court's reasoning process. When the primary law as applied to the facts leads to the conclusion that something has gone wrong, the law of remedies is applied to determine what the court should do about it. When application of the Constitution leads to the conclusion that a statute as written is not the law, severability principles often determine what the court should do in light of that finding. Severability is thus a question that often arises after a constitutional question is resolved. That does not make severability a question of remedy in the strict sense or imply that the courts administer a remedy that alters the content of statutory law.[11]

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[11] The connection between severability and remedy in the Court's cases may have its roots in equal-treatment cases that raise severability-type questions and address those question while formulating a remedy. The statutory provision at issue in *Heckler* v. *Mathews*, 465 U.S. 728 (1984), for example, gave a benefit to women but not to men. A severability provision stated that if the sex-based distinction was unconstitutional neither men nor women were to receive the benefit. That provision raised the question whether Mathews would be entitled to a remedy even if he were correct about the constitutional question. That, in turn, raised a question concerning his standing, as Mathews would not receive the benefit in any event. The Court concluded that giving the benefit to women and not men would impose on Mathews the injury of "unequal treatment in the provision of his Social Security benefits solely because of his gender." *Id.* at 738. The

As with constitutional invalidity, the perspective of this Court can be misleading with respect to severability. Because its conclusions concerning federal law bind all other courts, this Court's precedents concerning severability can have effects quite similar to those of actual statutory changes. No other court's decisions have that practical effect. One lower court can find two provisions inseverable while another finds them severable. If courts had the power to alter statutes through a remedy of severance, conflicting decisions on severability would produce different statutory rules.

II. The Court Need Not Give Petitioners Relief to Hold that the Removal Restriction Is Unconstitutional

Petitioners argue that the Court should find the FHFA's prior acts to have been unlawful even if it concludes that the grants of power to the agency are severable from the removal restriction. Petitioners' position may seem to have the advantage that it would enable the Court to hold the removal restriction unconstitutional while also holding it to be severable from the power grants as to future agency action. By contrast, a conclusion that the removal restriction is unconstitutional but the grants of power are severable from it might seem not to qualify as a holding on the

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Court found the discrimination unconstitutional. In light of the severability provision, it did not give Mathews the benefit, but "order[ed] that [the statute's] benefits not extend to the class that the legislature intended to benefit." *Ibid.* (citations omitted). That order was a remedy as to Mathews, not a change in the statutory law.

constitutional question. Were the Court to find the grants of power severable from the removal restriction, while concluding that the restriction is unconstitutional, the conclusion about the constitutional issue would be unnecessary in the sense that a different opinion could have been written that did not address the constitutional issue.

The Court does not treat statements that are unnecessary in that sense as dicta. In *Sessions* v. *Morales-Santana*, 137 S. Ct. 1678 (2017), the Court decided a constitutional question that it could have avoided by deciding severability first. "The gender-based distinction infecting [the immigration provisions at issue], we hold, violates the equal protection principle." *Id.* at 1700-1701. The Court also found that severability principles led to the conclusion that no one, including Morales-Santana, should receive the benefit at issue. *Id.* at 1698-1700. The Court could have avoided the constitutional holding, but decided not to do so. See *id.* at 1701-1702 (Thomas, J., concurring in the judgment in part) (Court can avoid a constitutional question when its severability holding can resolve the case).

When a party must show both unconstitutionality and inseverability in order to prevail, as petitioners must, the Court may decide to address severability first. If it does so and finds the provision that applies to the party before it severable, it can avoid the constitutional issue. This Court sometimes exercises its discretion to proceed in that order. See, *e.g.*, *Champlin Refin. Co.* v. *Corporation Comm'n of Okla.*, 286 U.S. 210, 234 (1932) (declining to address a

constitutional question because the challenged provision, if unconstitutional, was severable from the provision that applied in the case). The point of avoidance is to prevent avoidable holdings, not avoidable dicta.

III. Officials' Possibly Mistaken Beliefs About Removability May Present Questions of Administrative Law, Not Constitutional Law, Which Have Not Been Addressed in This Case

Cases like this one raise an important question of administrative law. The question concerns the possible effects of officials' mistaken beliefs about removability. As petitioners suggest, President Obama may have believed that he could not give an explicit order to Acting Director DeMarco or remove him because he believed that the removal restriction was valid. See Pet. Br. 72. If this Court decides otherwise, any such belief will have been wrong. Mistaken beliefs can have real effects.

Official decisions made under mistaken beliefs about the law present a problem. A solution to that problem that would regard unconstitutional statutes as valid until a court makes them invalid, while regarding as unlawful official acts taken while the unconstitutional provision was in effect, is inconsistent with basic constitutional principles. Any solution should be sought in principles of administrative law.

In *Lucia* v. *SEC*, 138 S. Ct. 2044 (2018), the Court applied administrative law principles to a problem that arose from an agency adjudication that reflected

an error concerning structural constitutional law. An SEC ALJ had decided Lucia's case on the assumption that the ALJ had a valid appointment. The Court concluded that Judge Elliot's appointment was invalid under the Appointments Clause. The Constitution required that his decision be vacated.

The Court also addressed another problem. The agency's error concerning a constitutional question—the assumption that officials like Judge Elliot could decide adjudications—had a practical effect. Judge Elliot had heard Lucia's case, and formed a view about it. The Court recognized that he might later receive a valid appointment, and so become eligible to decide agency adjudications. It directed that the case not be assigned to Judge Elliot on remand, should he receive a valid appointment. 138 S. Ct. at 2055. That directive dealt with the practical consequences of an agency error about structural constitutional law. It rested on a principle of administrative law: adjudicators' decisions should not be influenced by extraneous considerations. A prior decision by the same person, made when the person lacked legal authority, might well qualify as extraneous. The adjudicator "cannot be expected to consider the matter as though he had not adjudicated it before." *Ibid.* (footnote omitted). The Court's directions on remand avoided that possible problem. It brought administrative law to bear on the practical consequences of an agency mistake about the Constitution's structural requirements.

Cases like this similarly raise questions concerning the practical effect of government errors about the

Constitution's structural requirements. In a future case involving such a question, the Court, with the assistance of decisions below and briefs of parties, may consider the administrative law questions at issue. Those questions have not been raised in this case, which has focused on the Constitution itself. Amicus respectfully suggests that this case does not properly present this important question.

Conclusion

Petitioners can prevail only if the removal restriction is unconstitutional and the grants of power to the agency are inseverable from it. The Court should thus affirm the denial of injunctive relief to petitioners if it concludes either that the removal restriction is constitutional or that the grants of power to the agency are inseverable from it.

Respectfully submitted,

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