No. ______

In the

Supreme Court of the United States

PATRICK J. COLLINS, ET AL.,
Petitioners,

v.

STEVEN T. MNUCHIN, SECRETARY,
U.S. DEPARTMENT OF TREASURY, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2008, Congress created the Federal Housing Finance Agency (FHFA)—an "independent" agency with sweeping authority over the housing finance system. 12 U.S.C. § 4511(a). Unlike every other independent agency except the Consumer Financial Protection Bureau, FHFA is headed by a single Director who can only be removed for cause by the President and is exempt from the congressional appropriations process. 12 U.S.C. §§ 4512(b)(2), 4516(f)(2). The questions presented are:

1. Whether FHFA's structure violates the separation of powers; and

2. Whether the courts must set aside a final agency action that FHFA took when it was unconstitutionally structured and strike down the statutory provisions that make FHFA independent.

PARTIES TO THE PROCEEDING

Petitioners Patrick J. Collins, Marcus J. Liotta, and William M. Hitchcock were the plaintiffs in the District Court and the plaintiffs-appellants in the Court of Appeals.

Respondents Steven T. Mnuchin, Secretary, U.S. Department of Treasury, Department of the Treasury, Federal Housing Finance Agency ("FHFA"), and Mark A. Calabria, Director of the Federal Housing Finance Agency were defendants-appellees in the Court of Appeals. The Department of the Treasury and the FHFA were defendants in the District Court. Jacob J. Lew, the previous Secretary of the Treasury, was initially a defendant in the District Court but later replaced as a defendant by the current Secretary of the Treasury, Steven T. Mnuchin. Melvin L. Watt, the previous Director of the FHFA, was a defendant in the District Court and initially a defendant-appellee in the Court of Appeals but later replaced as a defendant-appellee in the Court of Appeals by FHFA Acting Director Joseph M. Otting. Joseph M. Otting was subsequently replaced as a defendant-appellee in the Court of Appeals by FHFA's current Director, Mark A. Calabria.

STATEMENT OF RELATED PROCEEDINGS

- *Collins v. Mnuchin*, No. 17-20364 (5th Cir.) (en banc opinion issued and judgment entered September 6, 2019).

- *Collins v. Mnuchin*, No. 16-3113 (S.D. Tex.) (opinion issued and final judgment entered May 22, 2017).

Apart from the proceedings directly on review in this case, there are no other directly related proceedings in any court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to review the judgment of the en banc United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the en banc Court of Appeals has not yet been published in the Federal Reporter but can be found at 2019 WL 4233612 and is reproduced at App.1. The opinion of the three-judge panel of the Court of Appeals is reported at 896 F.3d 640 and reproduced at App.166. The District Court's opinion is reported at 254 F. Supp. 3d 841 and reproduced at App.283.

JURISDICTION

The en banc Court of Appeals issued its judgment on September 6, 2019. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of Article II of the United States Constitution provides in relevant part:

> The executive Power shall be vested in a President of the United States of America.

Section 3 of Article II of the United States Constitution provides in relevant part:

> [The President] shall take Care that the Laws be faithfully executed[.]

Section 4511(a) of Title 12 of the United States Code provides in relevant part:

> There is established the Federal Housing Finance Agency, which shall be an independent agency of the Federal Government.

Section 4512 of Title 12 of the United States Code provides in relevant part:

> (a) Establishment of position
> There is established the position of the Director of the Agency, who shall be the head of the Agency.
> (b) Appointment; term
> . . . .
> (2) Term
> The Director shall be appointed for a term of 5 years, unless removed before the end of such term for cause by the President.

Section 4516 of Title 12 of the United States Code provides in relevant part:

> (a) Annual assessments
> The Director shall establish and collect from the regulated entities annual assessments in an amount not exceeding the amount sufficient to provide for reasonable costs (including administrative costs) and expenses of the Agency . . . .
> (f) Treatment of assessments
> . . . .
> (2) Not Government funds
> The amounts received by the Director from any

> assessment under this section shall not be construed to be Government or public funds or appropriated money.

INTRODUCTION

This case provides the Court with an opportunity to ensure adherence to the separation-of-powers principles at the heart of our system of Government. Indeed, this Court's review is necessary to protect the integrity of all three branches of our tripartite Federal Government.

1. The Constitution vests "the executive Power in a President of the United States of America," and it directs the President to "take Care that the Laws be faithfully executed." U.S. Const. art. II, §§ 1&3. By vesting the executive power in a single individual, the Framers sought to ensure clear lines of responsibility for executive action—the buck stops with the President.

The Framers knew that the President alone would not be able to ensure the law's faithful execution, and the Constitution thus provides for the appointment of "Officers of the United States." *Id*. § 2. Although the Constitution does not expressly grant the President authority to remove executive Officers, in the "Decision of 1789," the First Congress recognized that the Constitution by necessary implication vests the President with removal authority. This Court ratified that decision in *Myers v. United States*, 272 U.S. 52 (1926). Writing for the Court, Chief Justice Taft—the only Justice also to have served as President—explained that "under the Constitution the President

has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate." *Id*. at 106.

So matters stood until 1935, when in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), the Court approved a restriction on presidential removal of commissioners of the Federal Trade Commission (FTC). In doing so, however, the Court reasoned that the FTC was not really an executive agency at all, but rather an independent "body of experts" whose duties were "predominantly quasi judicial and quasi legislative." *Id*. at 624, 626.

Today the notion of a quasi-legislative or quasi-judicial agency is an anachronism—"it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered 'executive,' at least to some degree." *Morrison v. Olson*, 487 U.S. 654, 689 n.28 (1988).

With the reasoning of *Humphrey's Executor* no longer viable, but with its holding intact, the courts have been left to answer the imponderable question whether particular removal restrictions go too far in interfering with the President's duty to take care that the laws be faithfully executed. *See id.* at 689–90. And that predictably has led not only to increasingly aggressive congressional restrictions on presidential control over executive functions, but also to confusion and conflict in the lower courts, as exemplified by two recently created agencies: the Federal Housing Finance Agency (FHFA) and the Consumer Financial Protection Bureau (CFPB). Both agencies wield tremendous regulatory power, the former over housing finance and

the latter over consumer finance. And both are "independent," headed by leadership with for-cause removal protection from the President. But unlike with other independent agencies, Congress made no pretense that FHFA and the CFPB would consist of an independent multi-member body of experts dispassionately addressing technical issues bereft of policy judgment. Instead, each agency is helmed by a single director who alone wields the tremendous power of the office without fear of interference by the President.

The en banc Fifth Circuit, in the decision below, correctly held that this design violates the separation of powers. The en banc D.C. Circuit and a panel of the Ninth Circuit, by contrast, have held that this design *does not* violate the Constitution. *See PHH Corp. v. CFPB*, 881 F.3d 75 (D.C. Cir. 2018) (en banc); *CFPB v. Seila Law LLC*, 923 F.3d 680 (9th Cir. 2019).

This Court should grant review to resolve this conflict by, at a minimum, declaring that Congress goes too far when it insulates from presidential control a principal officer who alone heads an executive agency. But the Court need not stop there. It also should take this opportunity to return the Executive Branch to presidential control, leaving behind the detour marked by *Humphrey's Executor* and returning to the path set by *Myers*, the Decision of 1789, and the Constitution itself.[1]

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[1] Although this Court has unqualified authority to grant certiorari "upon the petition of any party," 28 U.S.C. § 1254(1), including a prevailing party, the Court has "generally declined to consider

cases at the request of a prevailing party." *Camreta v. Greene*, 563 U.S. 692, 703–04 (2011). In this case, Petitioners prevailed below on the question whether the "for cause" restriction on removal of FHFA's single Director violates the separation of powers, but the Fifth Circuit ultimately afforded them no relief from the injuries they sustained from the Net Worth Sweep. Petitioners are thus not "prevailing parties" in any meaningful sense. Indeed, "this Court reviews only judgments, not statements in opinions," and Petitioners here ask the Court to alter the judgment entered below by vacating the Net Worth Sweep. *See id.* at 701.

In any event, even if Petitioners could reasonably be viewed as the prevailing parties below, there are several factors that, taken together, make Petitioners' admittedly unusual request exceptional. *First*, the single-director issue clearly is certworthy, as there is a clean circuit split on this important question. *Second*, the Solicitor General accordingly has urged the Court to grant a pending petition seeking review of the Ninth Circuit's decision upholding the constitutionality of the removal restriction on CFPB's single director structure. Brief for the Respondent at 20, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Sept. 17, 2019). *Third*, as discussed in detail *infra*, the *Seila Law* case is an exceedingly poor vehicle for this Court's review for a number of reasons, not least of which is that all of the parties to that case, as well as the Solicitor General, take the position that the CFPB's independent single-director structure is unconstitutional, and the Court would thus have to appoint an amicus to argue in support of the Ninth Circuit's contrary ruling. *Fourth*, while Petitioners anticipate that FHFA will in due course file its own petition seeking this Court's review of the decision below invalidating its single-director structure, by including the question in our petition we ensure that the question may be considered in this case even if FHFA does not affirmatively seek review by this Court. *Fifth*, it is apparent that FHFA, unlike CFPB, would continue to defend its constitutionality if this petition is granted. *See* FHFA FRAP 28(j) Letter, *Bhatti v. FHFA*, No. 18-2506 (8th Cir. Sept. 23, 2019) (criticizing en banc Fifth Circuit's decision in this case and arguing that FHFA is constitutionally structured). *Sixth*, and finally, also unlike the petition in *Seila Law*, granting the petition in this case would

2. While the Fifth Circuit correctly held that FHFA's insulation from at-will presidential removal power unconstitutionally dilutes the President's Article II authority, the court failed to carry out the Article III responsibilities that follow from that finding. "When a plaintiff with Article III standing challenges the action of an unconstitutionally insulated officer, that action *must* be set aside." App.152 (Willet, J., dissenting) (emphasis added). Yet a bare 9-7 majority of the en banc Fifth Circuit refused to vacate the action of the unconstitutionally structured FHFA that grievously harmed the Petitioners before it—the so-called "Net Worth Sweep" whereby FHFA, as conservator of Fannie Mae and Freddie Mac, transferred to the federal government the entire economic interest in those highly profitable companies held by private shareholders. This decision was both highly consequential and erroneous.

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afford the Court an opportunity to address in one case not only whether the separation of powers is violated by insulating a single agency head from Presidential control but also the independently certworthy question of what remedy the Constitution requires when a litigant is injured by a final agency action taken while an agency is exercising executive power without the required degree of oversight from the President.

In sum, Petitioners believe the Court should grant any petition filed by Respondents that asks the Court to rule on the constitutionality of FHFA's structure. If no such petition is filed, however, the Court should exercise its discretion to grant review on both questions presented in this petition.

First, the APA mandates that "the reviewing Court *shall* . . . *set aside* agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706 (emphasis added).

Second, this Court has consistently vacated agency action taken in violation of the Appointments Clause and other structural provisions of the Constitution. *See, e.g.*, *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *National Labor Relations Bd. v. Noel Canning*, 134 S. Ct. 2550 (2014); *Immigration and Naturalization Servs. v. Chadha*, 462 U.S. 919, 936 (1983). There is no basis for uniquely disfavoring claims based upon unconstitutional restrictions of the President's removal power.

Third, this Court decades ago repudiated as contrary to "basic norms of constitutional adjudication" the practice of prospective decision-making that fails to provide civil litigants with any remedy for a past constitutional violation. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993).

Fourth, this Court has acknowledged the need to "create incentives" for litigants to vindicate the Constitution's structural provisions. *Lucia*, 138 S. Ct. at 2055 & n.5.

The Fifth Circuit's refusal to vacate the Net Worth Sweep runs afoul of all of these principles: It (1) ignores the straightforward command of the APA, (2) bizarrely privileges Appointments Clause violations—which involve an illegitimate officer in an otherwise legitimate office—above removal violations—which involve an illegitimate office altogether, (3) amounts to illicit

prospective-only decision-making, and (4) all but ensures that unconstitutional restrictions on the President's removal power will go unredressed by failing to provide a meaningful reason for litigants to challenge unconstitutional agency action. This Court should correct these errors and ensure that the judiciary faithfully plays its role in our constitutional system.

3. Instead of fulfilling its judicial duty to remedy the harm that FHFA inflicted on Petitioners, the Fifth Circuit engaged in the quintessentially legislative act of rewriting the Housing and Economic Recovery Act (HERA) to eliminate the Director's removal protection going forward. Such a severability analysis is "in tension with traditional limits on judicial authority," requiring as it does inquiry into a "hypothetical intent" that cannot be reconciled with this Court's statutory interpretation precedents. *Murphy v. NCAA*, 138 S. Ct. 1461, 1485–87 (2018) (Thomas, J., concurring). The perilousness of such an inquiry is illustrated by this case. Congress's express intent was to create FHFA as "an *independent* agency of the Federal Government," 12 U.S.C. § 4511(a) (emphasis added)—indeed, FHFA's Director has more independence under HERA than the head of any other agency in our Nation's history. Yet under the Fifth Circuit's purportedly "judicially conservative" remedy of severing the Director's removal protection, *see* App.73, FHFA is now uniquely *dependent* on the President's authority. That clearly is not what Congress intended. This Court should grant review in this case to re-evaluate its approach to severability analysis to ensure that the judicial branch respects the separation of powers limits the Constitution places upon it.

STATEMENT

I. Congress Establishes FHFA as an Independent Agency Headed by a Single Director.

Fannie Mae and Freddie Mac are private, for-profit corporations that insure and securitize mortgages. From 1992 until 2008, the Companies were regulated by the Office of Federal Housing Enterprise Oversight (OFHEO). OFHEO was not an independent agency; its Director could be removed from office at the pleasure of the President. *See* Housing and Community Development Act of 1992 §§ 1311, 1312, 106 Stat. 3672 (Oct. 28, 1992).

During the summer of 2008, Congress enacted HERA, which established FHFA as the successor to OFHEO. Unlike its predecessor, FHFA is an "independent" agency, 12 U.S.C. § 4511(a); 44 U.S.C. § 3502(5), and it is headed by a Director who is removable only "for cause by the President," 12 U.S.C. § 4512(b)(2). FHFA is funded through assessments that are "not . . . construed to be Government or public funds or appropriated money." *Id.* § 4516(f)(2). As a result, FHFA is neither subject to presidential control nor constrained by the appropriations process.

II. FHFA Forces Fannie and Freddie into Conservatorship and Signs the PSPAs on their Behalf.

In addition to giving FHFA supervisory regulatory powers over the Companies, HERA also empowered FHFA to appoint itself as the Companies' conservator under specified circumstances. *See* 12 U.S.C. § 4617(a). On September 6, 2008, FHFA exercised that power.

HERA also gave Treasury temporary authority to invest in the Companies' securities. Concurrent with FHFA's imposition of conservatorship, Treasury exercised that authority by entering agreements with FHFA to purchase equity in the Companies ("Preferred Stock Purchase Agreements" or "PSPAs"). The PSPAs allowed the Companies to draw up to $100 billion each from Treasury as needed to avoid a negative net worth—an amount that was subsequently increased to allow the Companies to draw unlimited sums from Treasury until the end of 2012, and thereafter capped at the amount drawn from 2010 through 2012, plus $200 billion per Company.

In return for Treasury's funding commitment, FHFA agreed that the Companies would provide several forms of consideration. First, the PSPAs created a new class of securities with very favorable terms to Treasury, known as Senior Preferred Stock ("Government Stock"). For each Company, the Government Stock had an initial liquidation preference of $1 billion, an amount that would increase by one dollar for every dollar drawn on Treasury's funding commitment. The original PSPAs required the Companies to pay quarterly dividends on the

Government Stock's liquidation preference. These dividends could be paid in cash, at an annual rate of 10%, or in kind, by increasing the liquidation preference by an annual amount of 12%. Paying the dividends in kind would not have reduced the amount available under Treasury's funding commitment.

Second, FHFA agreed that the Companies would issue warrants entitling Treasury to buy 79.9% of their common stock at a nominal price. The warrants were designed to provide upside to taxpayers if the Companies recovered, but this upside would be shared with the Companies' other shareholders. The PSPAs also provided for the Companies to pay Treasury a quarterly market-based periodic commitment fee, but the fee was never charged and could only be set at a market rate with agreement from the Companies.

III. FHFA Expropriates Private Shareholders' Investments by Imposing the Net Worth Sweep.

Under FHFA's supervision in the years that followed, the Companies were forced to dramatically write down the value of their assets and to incur substantial and unjustified non-cash accounting losses in the form of loan loss reserves and write-offs of deferred tax assets. As a result of these accounting decisions, the Companies drew $187 billion on Treasury's funding commitment. But based on the recovery of the housing market and the Companies' performance in the second quarter of 2012, it was apparent that the Companies' private shares still had substantial value.

On August 17, 2012, FHFA and Treasury amended the PSPAs to impose the Net Worth Sweep. The Net Worth Sweep replaces the PSPAs' prior dividend structure with one that requires Fannie and Freddie to pay Treasury *their entire net worth* on a quarterly basis, minus a small capital buffer. FHFA thus agreed to nationalize the Companies and expropriated not just their future earnings but also their retained capital, thereby depriving the Companies' private shareholders of all of their economic rights.

As FHFA expected, the Net Worth Sweep has resulted in massive and unprecedented payments to the government. Since the Companies first began paying dividends under the Net Worth Sweep during the first quarter of 2013, they have transferred to Treasury nearly $246 billion in purported dividends—a sum that so far exceeds what the Companies would have paid under the prior arrangement that the excess payments could have otherwise been used to retire the entire $195 billion liquidation preference on the Government Stock. *See* FHFA, Table 2: Dividends on Enterprise Draws from Treasury, https://bit.ly/2mLAFPj. Altogether, Treasury has recouped almost $110 billion more than it disbursed to the Companies. *See id.*; FHFA, Table 1: Quarterly Draws on Treasury Commitments to Fannie Mae and Freddie Mac per PSPA, https://bit.ly/2l6Oyr7. Yet, FHFA insists that the outstanding liquidation preference remains firmly fixed and that the federal government has the right to all of the Companies' net worth in perpetuity.

IV. Petitioners Challenge FHFA's Constitutionality and the Net Worth Sweep.

Petitioners are Fannie and Freddie shareholders who sued under the Administrative Procedure Act (APA), arguing that the Net Worth Sweep must be set aside both because it exceeded the statutory authority of FHFA and Treasury and because FHFA is unconstitutionally structured. The basis for the district court's jurisdiction over this suit was 28 U.S.C. § 1331. In addition to seeking vacatur of the Net Worth Sweep, Petitioners also requested a declaratory judgment that FHFA is unconstitutionally structured. On May 22, 2017, the District Court dismissed the complaint, ruling that all of Petitioners' claims fail as a matter of law. App.283–97.

On appeal, a divided three-judge panel of the Fifth Circuit held that FHFA is unconstitutionally insulated from oversight by the President. In reaching that conclusion, the panel majority pointed to the combined effect of several provisions of HERA that make FHFA uniquely independent. These provisions give for-cause removal protection to the single Director who heads the agency, App.217–21, do not require bipartisan leadership at the agency, App.221–22, and exempt it from the normal appropriations process through which Presidents can influence most other independent agencies, App.223–24. As to the remedy for Petitioners' constitutional claim, the panel struck down and severed the Director's for-cause removal protection but refused to set aside the Net Worth Sweep. App.238–40. The panel also rejected Petitioners' statutory claims. App.185–86.

Chief Judge Stewart dissented from the panel's ruling that FHFA is unconstitutionally structured, App.241–45, and Judge Willett dissented from the panel's rejection of Petitioners' statutory claims, App.246–80.

Petitioners and FHFA both petitioned for rehearing en banc, and the Fifth Circuit granted both petitions. Twelve of the en banc court's sixteen judges agreed that FHFA's structure is unconstitutional, and the majority reinstituted the portion of the panel majority's opinion on that issue. App.63. By a vote of nine to seven, however, a different majority of the en banc court refused to set aside the Net Worth Sweep. App.73–81. In a concurring opinion joined by Judge Owen, Judge Duncan explained that he thought the court bound to limit the remedy for FHFA's unconstitutional structure to severance of the Director's for-cause removal protection by virtue of the remedy adopted by this Court in *Free Enterprise Fund v. Pub. Co. Accounting Oversight Board*, 561 U.S. 477, 508 (2010). *See* App.82–84. The decisive votes on the remedy issue were cast by the four judges who concluded that FHFA's structure is constitutional.

Judge Willett dissented from the en banc court's ruling on the remedy, arguing that analysis of that issue should be guided by this Court's decision in *Bowsher v. Synar*, 478 U.S. 714, 736 (1986), rather than *Free Enterprise Fund*. App.152–54. Judge Willett also observed that this Court has repeatedly set aside prior agency actions rendered in violation of the Appointments Clause and reasoned that it is anomalous to withhold the same remedy for violations

of the President's removal power. App.155–56. In a separate dissent on the remedy issue, Judge Oldham argued that the court exceeded its authority under Article III by rewriting HERA to strip FHFA of its independence while withholding relief that would fully redress Petitioners' injuries from the Net Worth Sweep. App.111–17.

Another nine to seven majority of the en banc court revived Petitioners' statutory claim that FHFA exceeded its power as conservator of the Companies in agreeing to the Net Worth Sweep and remanded that claim to the District Court for further proceedings. App.57–58. The en banc Fifth Circuit acknowledged that in reviving the statutory claim it was creating a circuit split with the decisions of at least two other courts of appeals. App.56.

REASONS FOR GRANTING THE PETITION

I. This Court Should Decide Whether Independent Agencies May be Headed by a Single Individual.

A. This case presents an important separation of powers question on which the lower federal courts are divided.

FHFA's Director wields vast regulatory power over our Nation's housing finance system without accountability to the President. The current President is a Republican, but for the first two years of his administration, policy at FHFA was set by a former Democratic congressman who was appointed by the President's Democratic predecessor. FHFA's current Director left the White House to take his post but since

moving to the agency has directed its lawyers to defend the constitutionality of his office despite the contrary position of the Department of Justice. And although the current Director's term does not expire until 2024, the American people may in 2020 choose a new President who fundamentally disagrees with the Director's policies.

For much of its short history, FHFA has been headed by a Director who comes from a different political party than the incumbent President, with Presidents from both parties unable to remove and replace the head of a key federal regulatory agency despite major policy differences. Whether this arrangement offends the separation of powers—and who ultimately sets housing finance policy for the Executive Branch—is an enormously important question.

Review by this Court is also warranted in light of the conflicting views on this issue expressed in the lower federal courts. In this case, the en banc Fifth Circuit divided twelve to four over the merits of Petitioners' constitutional challenge, ruling FHFA's structure unconstitutional despite the en banc D.C. Circuit's decision upholding the constitutionality of the similarly structured CFPB. *See PHH*, 881 F.3d at 175–76 (Kavanaugh, J., dissenting) (FHFA "is a contemporary of the CFPB and merely raises the same question we confront here"). And although the decision below leaves open the possibility that subtle differences between the two agencies might mean that the CFPB can stand even though FHFA must fall, the CFPB now concedes that its structure is unconstitutional for the

same reason that the Fifth Circuit ruled against FHFA in this case. Brief for the Respondent at 20, *Seila Law LLC v. CFPB*, No. 19-7 (U.S. Sept. 17, 2019). Regardless of whether the decision below can be said to create a square split with rulings of the D.C. and Ninth Circuits that upheld the CFPB, the hundreds of pages that the Federal Reporter devotes to this issue attest to the fact that many federal appellate judges have sharply disagreed over whether an independent agency may be headed by a single director. They also demonstrate that this issue has been fully ventilated in the lower courts and is ready for this Court's review.

The uncertainty generated by the differing decisions of the lower federal courts on this issue casts a pall over everything FHFA does. Asked about the constitutionality of his position by a business reporter shortly after the en banc Fifth Circuit's decision in this case, FHFA's Director promised to defend his office in court and serve out his full five-year term. *See Fannie & Freddie Regulator on Next Steps in Mortgage Market Reform*, CNBC, at 2:52 to 3:20 (Sept. 12, 2019), https://cnb.cx/2maxHUv. Yet market participants can hardly be faulted for wondering whether the current Director will be around to carry out the ambitious, multi-year plans he has announced if a different President wins the White House in the next election. This Court should move swiftly to put an end to the cloud of uncertainty that hangs over this important agency and its fundamental relationship to the rest of the Executive Branch.

Nor is further percolation in the lower federal courts a viable option in view of the Fifth Circuit's decision stripping FHFA of its independence. All that remains for the district court to do on the constitutional issue on remand is to enter a declaratory judgment in Petitioners' favor. At that point, the President would be placed in a legally precarious position. There would be a declaratory judgment in place in the Fifth Circuit stating that he could fire the FHFA Director at will, yet if the President did so the Director could seek redress in the D.C. Circuit, where precedent would be in the Director's favor.

Petitioners submit that the Fifth Circuit was correct to conclude that FHFA's structure violates the separation of powers even considering this Court's decisions in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), and *Morrison v. Olson*, 487 U.S. 654 (1988). Although the decision below correctly resolved the merits of Petitioners' constitutional claim, it is an important issue on which the lower courts are divided and therefore merits further review by this Court.

B. This case is the best vehicle for ruling on the constitutionality of independent agencies headed by a single director.

The Solicitor General has agreed that this Court should take up the question whether the separation of powers permits an independent agency to be headed by a single director in a different case—*Seila Law, LLC v. CFPB*, No. 19-7 (U.S.). For at least two reasons, this case is the better vehicle.

First, although the issue was not addressed below by the parties or the Ninth Circuit, it is doubtful that the district court order enforcing a Civil Investigative Demand (CID) at issue in *Seila Law* qualifies as a final appealable order under 28 U.S.C. § 1291; *see* 12 U.S.C. § 5562(h)(2). The general rule is that discovery orders compelling the production of evidence are non-final, and "[a] party that seeks to present an objection to a discovery order immediately to a court of appeals must refuse compliance, be held in contempt, and then appeal the contempt order." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992); *see MDK, Inc. v. Mike's Train House, Inc.*, 27 F.3d 116, 120–22 (4th Cir. 1994) (Wilkinson, J.) (same rule applies to ancillary proceedings in which discovery is obtained from a third party).

This Court has recognized an exception to the general rule where an agency seeks a district court's enforcement of an administrative subpoena that "is not ancillary to any judicial proceeding." *Cobbledick v. United States*, 309 U.S. 323, 330 (1940); *see Ellis v. Interstate Commerce Comm'n*, 237 U.S. 434, 442 (1915). The rationale for the exception is that in such cases "there is not, as in the case of a grand jury or trial, any further judicial inquiry which would be halted were the offending witness permitted to appeal." *Cobbledick*, 309 U.S. at 330. Notably, by statute the CFPB may only issue CIDs "before the institution of any proceedings" in court, 12 U.S.C. § 5562(c)(1); *cf. United States v. Kernan Hospital*, No. 11-2961, 2012 WL 5879133 (D. Md. Nov. 20, 2012), so an order enforcing a properly-issued CID is generally appealable without the recipient needing to defy the order and be held in contempt.

Despite the statutory restriction on when the CFPB may issue CIDs, however, the CID at issue in *Seila Law* was issued *after* the agency filed two related enforcement proceedings in district court. The agency told the district court in a notice of related cases that the CID "is part of an investigation that seeks information into Seila Law's role in the continuing scheme that was the subject of two earlier cases." Notice of Related Cases at 3, *CFPB v. Seila Law, LLC*, No. 17-1081 (C.D. Cal. June 22, 2017), Doc. 5. One of those cases was still pending when the same judge to whom all three matters were assigned ordered that the CID issued to Seila Law be enforced. *See CFPB v. Howard*, No. 17-161 (C.D. Cal.). In denying a motion to stay that order pending appeal, the district court emphasized that the CID issued to Seila Law was "intertwined" with the CFPB's enforcement action in the still-pending *Howard* case and expressed concern that delayed enforcement of the CID would "potentially hamper[ ]" those proceedings. Order at 5, *CFPB v. Seila Law, LLC*, No. 17-1081 (C.D. Cal. Sept. 1, 2017), Doc. 29.

Because the CID in *Seila Law* was issued while a related enforcement action was pending in federal court, the case does not fit within the rationale of *Cobbledick*. *See Reich v. National Engineering & Contracting Co.*, 13 F.3d 93, 95–96 (4th Cir. 1993) ("[D]istrict court orders enforcing subpoenas in connection with grand jury proceedings or criminal or civil trials are not immediately appealable, absent a contempt citation, because such appeals would greatly delay the judicial process; orders enforcing subpoenas in connection with administrative investigations, by

contrast, may be appealed immediately because there is no judicial proceeding in process that such appeals would delay."). Indeed, if the CFPB had sought the same information via third-party subpoena in the *Howard* case rather than by issuing an untimely CID, there is no question that an order directing Seila Law to produce the information could not have been appealed. This Court has repeatedly exhibited "a healthy respect for the virtues of the final-judgment rule," which promotes "efficient judicial administration" and protects "the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (internal quotation marks omitted). Whether an immediate appeal was nevertheless permissible in *Seila Law* is a novel question that the lower courts did not address, that only arises because all parties to the proceeding appear to have overlooked the statutory limits on when the CFPB may issue CIDs, and that this Court would need to answer in the first instance before it could reach the merits of the constitutional issue.

Second, this case is a better vehicle than *Seila Law* because it concerns an agency that is currently defending its constitutional structure. While the Solicitor General says that the Court can assure an adversary presentation by appointing an amicus to defend the statute in *Seila Law*, there is a simpler solution for guaranteeing an adversary presentation of the issues: grant certiorari in this case and let FHFA defend the constitutionality of its organic statute. Before the Court decides the important separation of powers question that both this case and *Seila Law*

present, it should hear from an independent agency headed by a single Director who is prepared to defend the constitutionality of the arrangement.

The CFPB's capitulation also points to a more fundamental difficulty this Court would face if it granted the writ in *Seila Law*. That case presents the separation of powers issue in the most abstract way possible—largely unmoored from the specific facts of a particular case, presented by a petitioner who has no clear continuing stake in how the question is resolved, and opposed by a respondent that concedes the petitioner is right. Perhaps it is sometimes necessary for the Court to take such cases to resolve important legal issues on which the lower federal courts are divided. But in this instance, there is an alternative.

II. This Court Should Decide Whether Backward-Looking Remedies Are Available in Presidential Removal Cases.

A. Guidance from this Court is needed on the proper remedy for violations of the President's removal power.

Despite holding that Petitioners have standing to challenge FHFA's structure and concluding that the Director's independence from presidential oversight offends the separation of powers, the Fifth Circuit refused to set aside the final agency action that Petitioners challenge. The Fifth Circuit reached that result by a vote of nine to seven, and a majority of the twelve judges who agreed with Petitioners on the merits thought that Petitioners were also entitled to have the Net Worth Sweep set aside.

The Fifth Circuit's splintered vote and the competing views expressed below on the proper remedy underscore the fact that there is substantial confusion in the lower courts over this issue. The disagreement turns in large measure on how to interpret the only two cases in which this Court has had occasion to address the remedy when an agency operates without the constitutionally required degree of oversight by the President—*Bowsher v. Synar*, 478 U.S. 714, 736 (1986), and *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 508 (2010). The Court should grant certiorari to clarify the law in this area.

1. To understand the significance of this Court's decision in *Bowsher*, it is necessary at the outset to distinguish between two remedial questions that can arise when an agency is held to be unconstitutionally insulated from presidential oversight: (1) whether past actions the agency took while it was unconstitutionally independent from the President should be set aside; and (2) what, if anything, the courts should do to sever the unconstitutional provisions or otherwise restructure the agency so that it operates constitutionally in the future. As the principal dissent below explained, *Bowsher* is "the only Supreme Court case that presented" the first of those issues. App.153 (Willett, J., dissenting).

Bowsher concerned provisions of the Gramm-Rudman-Hollings Act under which the Comptroller General released an annual budget report, which the President was in turn required to implement by ordering the sequestration of specified funds in the federal budget. The Comptroller General released his

first budget report under the Act on January 21, 1986, and President Reagan issued the mandated sequestration order on February 1, 1986. Ronald Reagan, *Order on Emergency Deficit Control Measures for Fiscal Year 1986*, https://bit.ly/2mqPHtz. A union whose retired members stood to lose cost-of-living adjustments to their pensions sued, arguing that this process was unconstitutional because the Comptroller General was removable by Congress and not the President.

A three-judge district court that included then-Judge Scalia agreed and entered a judgment that not only prospectively enjoined use of the challenged process but also declared "that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C. 1986). This Court upheld the backward-looking remedy, stating in the penultimate sentence of its opinion that "the judgment and order of the District Court are affirmed." *Bowsher*, 478 U.S. at 736. The judgment in *Bowsher* thus shows that backward-looking relief is available when a litigant with standing challenges the final decision of an official who unconstitutionally exercises executive power without oversight from the President.

The seven judges who dissented on the remedial issue in this case regarded *Bowsher* as controlling with respect to the availability of backward-looking relief. *See* App.152 (Willett, J., dissenting). But the majority thought it distinguishable because the Comptroller

General was a congressional officer who "never should have had the authority [to exercise executive authority] in the first place." App.176. The majority's basis for distinguishing *Bowsher* makes no sense: FHFA's Director, no less than the Comptroller General in *Bowsher*, "never should have had the authority" that he wields—authority to make decisions for the Executive Branch without any oversight from the President. If, as the majority assumed, the Net Worth Sweep would need to be invalidated under *Bowsher* if it had been unconstitutionally imposed by a congressional officer, there is no reason why it should stand when FHFA's Director is unconstitutionally unaccountable to *both* Congress and the President.

Equally unpersuasive is the argument that *Bowsher* provides no insight on the question of backward-looking relief in presidential removal cases because "Congress had provided a 'fallback' provision should the act be invalidated." App.83 (Duncan, J., concurring). The remedial "thicket" this Court was able to avoid in *Bowsher* was the distinct issue of severability—i.e., how the federal budgeting process should operate going forward if the Comptroller General's involvement were held unconstitutional. 478 U.S. at 735. Congress had included a provision in the statute that specifically addressed that "issue of remedy," *id.* at 734, but nothing in the statute empowered courts to award relief for *past* presidential sequestration orders that would not have otherwise been available under background principles of law, *see* Pub. L. No. 99-177 § 274, 99 Stat. 1037 (1985).

2. The en banc Fifth Circuit was similarly divided in this case over the import of this Court's decision in *Free Enterprise Fund*, with the majority regarding it as controlling and the judges in dissent vigorously arguing to the contrary. *See* App.73–74 (majority op.); App.83–84 (Duncan, J., concurring); App.114 (Oldham, J., dissenting); App.154 (Willett, J., dissenting).

Free Enterprise Fund concerned an investigation of an accounting firm by the Public Company Accounting Oversight Board (PCAOB). The accounting firm asked the courts to strike down the entire statute that created the agency, and its briefs to this Court did not address whether past agency actions should be set aside if the Court refused to supply the broader remedy it sought. By the time the case reached this Court, moreover, the PCAOB's investigation of the firm had concluded and "produced no sanction," thus leaving nothing to vacate. 561 U.S. at 490. And on remand after this Court's decision, the parties settled the case rather than litigating over what should happen to the PCAOB's past actions. *See* Michael Cohn, *Beckstead and Watts Settles Inspection Case with PCAOB*, ACCOUNTING TODAY (Feb. 23, 2011), https://bit.ly/2mb1jRw. Accordingly, no court was ever asked to decide what should happen to past actions the agency took during the time when it was operating without the constitutionally required degree of presidential oversight.

In nevertheless relying on *Free Enterprise Fund*, the majority focused on this Court's decision to sever the statutory provision that gave the PCAOB a second layer of for-cause removal protection rather than granting the

plaintiffs "broad injunctive relief against the Board's continued operations." 561 U.S. at 513; *see* App.73–74 (majority op.); App.83–84 (Duncan, J., concurring). But that conflates the distinct forward- and backward-looking remedial questions that the Fifth Circuit confronted. Whether the courts sever the statutory provisions that make FHFA independent, invalidate the entire statute, or take some other approach to resolving FHFA's structural defect going forward, the courts must set aside the final agency action that Petitioners challenge because FHFA took that action when it was operating in violation of the Constitution.

* * *

The en banc Fifth Circuit was closely divided over what this Court's decisions in *Bowsher* and *Free Enterprise Fund* mean for the appropriate remedy in a case like this one, and Petitioners submit that the majority went seriously astray in its reading of those precedents. The Court should grant certiorari to clarify the law in this important area.

B. The Fifth Circuit was wrong to refuse to set aside the final agency action that Petitioners challenge.

While much of the debate over remedy in the Fifth Circuit focused on the meaning of this Court's decisions in *Bowsher* and *Free Enterprise Fund*, the result the majority reached is fundamentally incompatible with several overarching legal principles. The Court should grant certiorari to harmonize the law of remedies for violations of the President's removal power with these principles.

First, Petitioners in this case challenge a final agency action—the Net Worth Sweep—and the APA says that "[t]he reviewing court *shall . . . hold unlawful and set aside* agency action . . . found to be . . . contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706 (emphasis added). This Court recently observed that the APA "instructs reviewing courts to set aside agency action that is . . . not in accordance with law." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2567–68 (2019) (internal citation and quotation marks omitted); *see also id.* at 2577–78 (Thomas, J., concurring in part and dissenting in part) ("[T]he APA *requires* courts to 'hold unlawful and set aside' agency action that is . . . 'not in accordance with law' " (emphasis added)); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413–14 (1971) ("In *all* cases agency action *must* be set aside . . . if the action failed to meet . . . constitutional requirements." (emphases added)); Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 VA. L. REV. 934, 1013 (2018) (observing that reviewing courts have an "obligation to 'set aside' unlawful agency action under the APA").

Second, the Fifth Circuit's refusal to set aside final agency action for violation of the President's removal power cannot be reconciled with this Court's repeated decisions vacating past agency actions in the closely related appointments context. In recent years, this Court has twice set aside decisions rendered by officials who were serving in violation of the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). As the D.C. Circuit explained in a decision this Court affirmed, the acts of an official who serves in violation

of the Appointments Clause are "void *ab initio*." *Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013), *aff'd*, 134 S. Ct. 2550 (2014); *see Nguyen v. United States*, 539 U.S. 69, 77–78 (2003).[2]

The remedial principles that control in appointments cases should also control in removal cases. The Constitution mandates certain procedures that must be followed for a federal official to act. Among those procedures are the requirements that certain senior officials be appointed in the manner specified by the Appointments Clause and subject to a minimum degree, at least, of oversight by the President. When these constitutionally prescribed procedures are not followed, the official's actions are *ultra vires* and must be set aside.

Third, in refusing to grant any remedy for a past violation of the President's removal power, the Fifth Circuit effectively revived this Court's former practice of denying backward-looking relief in certain landmark constitutional cases. *See, e.g.*, *Buckley v. Valeo*, 424 U.S. 1, 142–43 (1976); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87–89 (1982); *Lemon v. Kurtzman*, 411 U.S. 192 (1973). That practice

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[2] This Court has also awarded backward-looking relief in a variety of other separation of powers cases. *See, e.g.*, *Clinton v. New York*, 524 U.S. 417, 425 & n.9 (1998) (past cancellation of particular funds under Line Item Veto was invalid); *INS v. Chadha*, 462 U.S. 919, 936 (1983) (plaintiff had standing because "[i]f the [legislative] veto provision violates the Constitution, and is severable, the deportation order against Chadha will be cancelled"); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (President required to return steel mills he had already seized).

was "the product of the Court's disquietude with the impacts of its fast-moving pace of constitutional innovation," *Williams v. United States*, 401 U.S. 667, 676 (1971) (Harlan, J., dissenting), and the Court ultimately abandoned it in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993). As the *Harper* Court explained, prospective decisionmaking violates "basic norms of constitutional adjudication," *id.* at 97 (quoting *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987)), and "[n]othing in the Constitution alters the fundamental rule of 'retrospective operation' that has governed 'judicial decisions . . . for near a thousand years,' " *id.* at 94 (brackets omitted) (quoting *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting)).

It makes no difference that the Fifth Circuit withheld backward-looking relief when fashioning the remedy rather than by expressly refusing to apply its constitutional holding retroactively. That same analytical approach was considered and rejected in *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 753–54 (1995). "If *Harper* has anything more than symbolic significance," this Court asked, what could justify "a virtually identical denial simply because it is characterized as a denial based on 'remedy' rather than 'non-retroactivity'?" *Id.* at 754.

Whether framed in terms of retroactive application of the Fifth Circuit's decision on the merits or the appropriate "remedy" for past violations of the separation of powers, the majority's denial of all backward-looking relief was fundamentally inconsistent with the judicial function and violated

"basic norms of constitutional adjudication." *Harper*, 509 U.S. at 97 (quotation marks omitted); *see American Trucking Ass'ns v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., dissenting).

Fourth, this Court has made clear that to establish standing, separation of powers plaintiffs need not prove that the government would have made a different decision had it followed the procedures that the Constitution mandates. Standing in a case like this one "does not require precise proof of what [the government's] policies might have been in that counterfactual world." *Free Enterprise Fund*, 561 U.S. at 512 n.12. The Fifth Circuit majority nevertheless refused to set aside the Net Worth Sweep because they thought it likely that FHFA would have done the same thing even if it had been subject to oversight by the President. App.78–79. It was a mistake for the Fifth Circuit to smuggle in through the remedial back door a set of considerations that this Court has rejected at the standing threshold. Courts in separation of powers cases should not guess at what an administrative agency would have done had it been structured differently to comport with the Constitution.

C. The scope of a proper remedy for violations of the President's removal power is an important question.

1. Just two terms ago, this Court emphasized the need to craft remedies that "create incentives to raise Appointments Clause challenges," *Lucia*, 138 S. Ct. at 2055 n.5, and the same considerations that justify awarding meaningful relief in Appointments Clause cases make the appropriate remedy in removal cases

an important issue on which this Court should provide guidance. The cost of litigating a major separation of powers case is substantial, and the practical reality is that plaintiffs would not bring these cases if there were no prospect of winning vacatur of a harmful past agency action or some other form of backward-looking relief.

The current wave of litigation over the constitutionality of FHFA illustrates the point. Plaintiffs in several other cases are challenging the constitutionality of FHFA's structure, but in every one of them they seek vacatur or some other form of backward-looking relief targeting the Net Worth Sweep. *See Bhatti v. FHFA*, No. 18-2506 (8th Cir.); *Rop v. FHFA*, No. 17-497 (W.D. Mich.); *Wazee Street Opportunities Fund IV LP v. FHFA*, No. 18-3478 (E.D. Pa.). Parties regulated by the CFPB have similarly advanced constitutional challenges to that agency—not because they want their names to appear in a casebook but because they wish to avoid complying with civil investigative demands, *Seila Law LLC v. CFPB*, No. 19-7 (U.S.); *John Doe Co. v. CFPB*, 849 F.3d 1129 (D.C. Cir. 2017), or to obtain relief from agency enforcement actions, *PHH*, 881 F.3d at 82–83; *CFPB v. RD Legal Funding, LLC*, No. 18-2743 (2d Cir.); *CFPB v. All American Check Cashing*, No. 18-60302 (5th Cir.). If the only remedy for violations of the President's removal power is severance of the offending statutory provision, future litigants will have no incentive to raise such claims.

That result might not be troubling if safeguarding the President's removal authority were a matter of government protocol that affected only the Executive Branch itself, but "the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta v. United States*, 488 U.S. 361, 380 (1989); *see* THE FEDERALIST NO. 47 (James Madison). This Court has already recognized how a "clear and effective chain of command" within the Executive Branch is an essential part of the Framers' scheme for protecting liberty. *Free Enterprise Fund*, 561 U.S. at 498. It should not now cede the field by leaving in place a remedial decision that gives litigants no reason to bring similar cases in the future.

2. The distinct issue of the appropriate forward-looking remedy for FHFA's unconstitutional structure is also important in view of its profound implications for the agency's relationship to the rest of the federal government. Congress designed FHFA to be the most independent agency in our Nation's history—exempt not only from presidential influence but also the normal appropriations process through which Congress oversees the work of most other agencies. *See* 12 U.S.C. § 4516(f)(2). And to limit interference by the courts, Congress restricted judicial review, 12 U.S.C. § 4617(f), and—at least on Respondents' telling—framed the agency's statutory powers in sweeping terms, *see* 12 U.S.C. § 4617(b)(2)(J). These provisions were plainly "meant to work together" to ensure that FHFA's Director could exercise discretion as free as possible from presidential, congressional, and judicial influence. *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018).

The en banc Fifth Circuit adopted a remedy that unravels this tightly woven statutory fabric and transforms the most independent of agencies into one that is controlled by the President yet still insulated from corresponding checks by the other branches. As Justice Kavanaugh has recognized, if Congress were to repeal the for-cause removal provisions that apply to various agency heads, it would have good reason to also enact "more tightly drawn substantive statutes so as to prevent excessive delegations of power to the Executive Branch or perceived concentration of power in the President." *In re Aiken County*, 645 F.3d 428, 447–48 (D.C. Cir. 2011) (Kavanaugh, J., concurring). By rewriting the statutory provisions that concern FHFA's relationship to the President without diminishing the agency's insulation from the other branches, the Fifth Circuit remade FHFA into an agency nothing like the one that Congress created. The decision below casts severance of the for-cause removal provision as the most "judicially conservative" approach, App.73, but in fact this was an ambitious step that fundamentally altered FHFA's place in the administrative firmament.

The Fifth Circuit's severance analysis was inconsistent with this Court's precedents, which say that after severance the statutory provisions that remain must "function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987). This Court should decide whether the Fifth Circuit was correct to make FHFA "subservient to the Executive Branch" while leaving in place statutory provisions that insulate the agency from Congress and the judiciary, for this was an important decision that "significantly altered" the

"balance that Congress had in mind." *Bowsher*, 478 U.S. at 734–36.[3]

Justice Thomas has suggested a different approach when the courts confront a partially unconstitutional statute—one under which the Court would set aside the agency action Petitioners challenge while leaving it to Congress to correct the statute's constitutional problem going forward. *See Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring) ("[I]n a future case, we should take another look at our severability precedents."). As Judge Oldham's partial dissent demonstrates, this case is an ideal vehicle for considering the merits of that alternative. *See* App.117 ("Our Court should not add to the confusion about the judiciary's limited powers by claiming to 'sever' a statute based on open-ended speculation about how Congress would have solved the separation-of-powers problem."). Indeed, it is difficult to imagine a case that better illustrates how the Court's existing severability precedents are "in tension with traditional limits on judicial authority" and "do[ ] not follow basic principles of statutory interpretation." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

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[3] Because in *Free Enterprise Fund* this Court struck down one layer of the PCAOB's for-cause removal protection while leaving the other in place, the remedy adopted in that case did not similarly transform the PCAOB's basic relationship with the Executive Branch. Even after severance, the PCAOB continued to enjoy significant insulation from the President. *See PHH*, 881 F.3d at 191 (Kavanaugh, J., dissenting) (observing that second layer of for-cause removal protection "did not afford PCAOB members all that much additional insulation from the President").

Whether this Court adopts the approach proposed by Justice Thomas or adheres to its existing severability precedents, the question whether, and how much of, the statute survives if the Director's for-cause removal protection is unconstitutional has profound consequences for how FHFA relates to the rest of the federal government. This Court should decide that issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

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