NO. 19-422

In the Supreme Court of the United States

PATRICK J. COLLINS, *et al.*,

Petitioners,

v.

STEVEN T. MNUCHIN, *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Defendants filed a cert petition in this case representing that the uncertain legal status of the Net Worth Sweep now poses a major obstacle to reforming the Nation's housing finance system. The Solicitor General made a similar representation when recommending that the Court grant the petition in *Seila Law v. CFPB*, saying that questions about the constitutionality of the CFPB create "uncertainty that undermines the Bureau's ability to fulfill its mission." Brief for Respondent 18, *Seila Law v. CFPB*, No. 19-7 (Sept. 17, 2019). But if the Court holds in *Seila Law* that independent agencies may not be headed by a single Director, that will only be the start of the legal jeopardy for the Net Worth Sweep, FHFA, and the CFPB. Absent intervention by this Court, in the years ahead pending cases challenging the Net Worth Sweep on constitutional grounds will reach at least three more courts of appeals. And a ruling for the petitioner in *Seila Law* is sure to trigger an avalanche of additional lawsuits challenging the past actions of the CFPB.

Plaintiffs' petition presents the Court with an opportunity to decide whether the Net Worth Sweep may stand despite the separation of powers infirmity that has infected both FHFA and the CFPB since they were created. Taking up this issue now would thus resolve two types of legal uncertainty that will otherwise inhibit the orderly functioning of important parts of the Executive Branch for years to come. The Court should grant the writ.

I. The Court should grant Plaintiffs' petition.

A. If the Court grants Defendants' petition, it should also review the Fifth Circuit's decision on the remedy for FHFA's unconstitutional structure.

The same week that Treasury and FHFA filed their opposition to Plaintiffs' cert petition, they also filed their own petition acknowledging that litigation over the Net Worth Sweep has "significant financial implications for the federal government" and that "[p]rolonged uncertainty concerning the validity of the Third Amendment and the capital structure of the enterprises could hinder" ongoing efforts to reform the housing finance system. Petition for Writ of Certiorari 25–26, *Mnuchin v. Collins*, No. 19-563 (Oct. 25, 2019) ("SG Pet."). If those considerations justify granting Defendants' petition, then they equally justify review of the issues on which Plaintiffs seek cert. Indeed, denying Plaintiffs' petition would assure the "prolonged uncertainty" that Defendants fear, for the remedial issue on which Defendants prevailed below is currently pending in cases challenging the Net Worth Sweep that will eventually reach three more courts of appeals. *See* Pet. 33.

Defendants say the Court should allow for further percolation by awaiting the outcomes in other cases in which shareholders have brought similar constitutional challenges to the Net Worth Sweep. Brief in Opposition 26, *Collins v. Mnuchin,* No. 19-422 (Oct. 2019) ("SG BIO"). But if the "cloud of uncertainty" created by ongoing litigation over the Net Worth Sweep

justifies immediate review of the Fifth Circuit's statutory ruling despite its interlocutory posture, then immediate review of the Fifth Circuit's remedial ruling is likewise needed. SG Pet. 25. Sixteen appellate judges have already weighed in on the appropriate remedy for FHFA's unconstitutional structure, and they split nine to seven, with a majority of the judges who thought FHFA's structure unconstitutional also voting to invalidate the Net Worth Sweep. The issue is ready for decision by this Court.

The relationship between the statutory and constitutional issues in this case also justifies granting Plaintiffs' petition if the Court grants the petition filed by Defendants. One of the key provisions relied upon by courts that have rejected statutory challenges to the Net Worth Sweep is 18 U.S.C. § 4617(b)(2)(J), which Defendants read to permit FHFA to do literally anything it deems to be in its own "best interests." *See Robinson v. FHFA*, 876 F.3d 220, 230 (6th Cir. 2017). But if Section 4617(b)(2)(J) confers powers that are as far reaching as Defendants claim, Congress probably would not have given those powers to an agency that lacks independence from the President. *See* Pet. 34.[1] Put another way, one of the statutory provisions that is most important to the first question presented in Defendants' petition is inextricably linked to, and must rise or fall with, the statutory provisions that

[1] We are puzzled by Defendants' suggestion that the petition does not raise this issue. *See* SG BIO 24. The petition specifically identifies Section 4617(b)(2)(J) as among the provisions that were "meant to work together" with the FHFA Director's for-cause removal protection and that therefore cannot be severed under this Court's precedents. Pet. 34–35 (quoting *Murphy v. NCAA*, 138 S. Ct. 1461, 1483 (2018)).

unconstitutionally shield FHFA's Director from supervision by the President. Given the relationship between the issues raised in the competing petitions in this case, the Court should not grant Defendants' petition without also agreeing to decide the issues raised by Plaintiffs.

Indeed, the remedial questions presented in Plaintiffs' petition are plainly more cert-worthy than the statutory issues Defendants ask this Court to decide. If the Court concludes in *Seila Law* that the CFPB—and, by necessary implication, FHFA—are unconstitutionally structured, the legal status of everything these agencies have ever done will be cast into doubt. As the en banc Fifth Circuit's fractured vote on the remedy in this case underscores, the lower federal courts need guidance on whether litigants who suffered injuries at the hands of these unconstitutional agencies are entitled to relief. Thus, while Defendants raise questions that are idiosyncratic to the Net Worth Sweep litigation, Plaintiffs ask the Court to decide issues with broader significance.

B. There is no obstacle to the Court reaching the important questions presented in Plaintiffs' petition.

Defendants argue that "[t]he court of appeals erred in reaching the merits of shareholders' constitutional claim" and that "the constitutional question that the shareholders raise is not properly presented on the facts of this case." SG BIO 14–15. But Defendants never suggest that any of the supposed vehicle problems they identify would deprive this Court of jurisdiction to review the Fifth Circuit's remedial holding, and they acknowledge that the logical implication

of their arguments is that the Fifth Circuit should not have ordered entry of a declaratory judgment in Plaintiffs' favor. By lopsided votes, the en banc Fifth Circuit held that FHFA's acting Director enjoys for-cause removal protection, App. 65–66, that HERA's succession clause does not apply to constitutional claims, App. 61–62, and that the Net Worth Sweep involved the exercise of executive power, App. 68–71. Defendants have not cross-petitioned on these issues, and a ruling in Defendants' favor on any of them would require changing the judgment below. Thus, far from qualifying as threshold issues the Court would need to resolve before reaching the remedial question presented in Plaintiffs' petition, these are non-jurisdictional issues that Defendants could not even properly raise in their merits briefs. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); ROBERT L. STERN & EUGENE GRESSMAN, SUPREME COURT PRACTICE 490–91 (9th ed. 2007) ("If the *rationale* of an argument would give the satisfied party more than the judgment below, even though the party is not asking for more, the Court has held that a cross-petition or cross-appeal must be filed.").

The one jurisdictional issue Defendants identify is whether Plaintiffs have appellate standing to seek review of the merits of the Fifth Circuit's separation of powers ruling even though Plaintiffs prevailed on that issue below. SG BIO 15. Standing is assessed on a claim-by-claim rather than an issue-by-issue basis, *Davis v. FEC*, 554 U.S. 724, 734 (2008), and Plaintiffs plainly have standing to press their separation of powers claim in this Court given the Fifth Circuit's decision to withhold a meaningful remedy. In any event,

since Defendants are apparently content to allow the Fifth Circuit's separation of powers ruling to remain in place, the Court could simply bypass the first question presented in Plaintiffs' petition and grant the second. Defendants do not suggest that Plaintiffs lack appellate standing to argue that the Fifth Circuit erred by refusing to set aside the Net Worth Sweep in light of FHFA's unconstitutional structure, and any such argument would be frivolous.

C. The Fifth Circuit's ruling on the remedy for FHFA's unconstitutional structure is wrong.

The Fifth Circuit held that unconstitutional restrictions on the President's removal power "are different" from other separation of powers violations and undertook a remedial analysis that singled out litigants who bring removal claims for special, disfavored treatment. App. 77; *see also* App. 83 (Duncan, J., concurring). As Plaintiffs' petition explains, the Fifth Circuit's reasoning was based on a misreading of this Court's decision in *Free Enterprise Fund*, contradicts the APA's mandate that the reviewing court "shall . . . set aside" unlawful agency action, 5 U.S.C. § 706, and is fundamentally inconsistent with a host of other legal principles. *See* Pet. 27–32.

Without attempting to defend the Fifth Circuit's reasoning, Defendants offer a different theory for why Plaintiffs should be denied any meaningful backward-looking relief. According to Defendants, in *all* separation of powers cases backward-looking remedies should be awarded only after the court considers possible equitable defenses and undertakes a freewheeling assessment of "what is fair." SG BIO 19 (internal

quotation marks omitted). The equitable balancing Defendants propose appears nowhere in *Lucia*, *Bowsher*, or any of the other cases in which this Court has awarded meaningful backward-looking remedies to successful litigants in separation of powers cases. Indeed, the cases Defendants cite to support their theory all concerned "prospective remedies like prohibitory or mandatory injunctions, not vacatur of agency action that violated the separation of powers." App. 158 (Willett, J., dissenting); *see* SG BIO 19, 22.

Furthermore, while Defendants emphasize that the Fifth Circuit's reasoning did not create a circuit split, the alternative rationale that they offer in support of the decision below conflicts with the decisions of at least two other courts of appeals. In the D.C. Circuit, "[i]ssues of separation of powers (including Appointments Clause matters)" are considered "structural," and their violation therefore requires "automatic reversal" of a challenged agency action. *Landry v. FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000). The Tenth Circuit has likewise held that violations of the Appointments Clause are structural and therefore "not subject to prejudicial-error review." *Bandimere v. SEC*, 844 F.3d 1168, 1181 n.31 (10th Cir. 2016). It was only by reasoning that courts should be more reluctant to provide meaningful remedies in removal cases than in appointments cases that the Fifth Circuit was able to avoid creating a circuit split, and Defendants do not even attempt to defend that analytical move.

In any event, even if equitable defenses were available to bar all meaningful relief in a case like this one, the equitable considerations Defendants identify would not sustain the decision below.

1. Defendants first argue that the constitutional flaw in FHFA's structure was harmless error because the President controlled Treasury and Treasury approved the Net Worth Sweep. As an initial matter, Defendants' argument that separation of powers claims are subject to the harmless error rule cannot be reconciled with the remedy this Court adopted in *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018). It was precisely because the Court thought that the Appointments Clause violation in that case might not have made a difference to the administrative law judge's decision that the Court ordered that the matter be assigned to a different administrative law judge on remand. Under this Court's precedents, separation of powers plaintiffs are not required to supply "precise proof of what [the government's] policies might have been" had the Constitution's structural provisions been followed. *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 512 n.12 (2010).

Regardless, Defendants err when they propose a harmless error analysis that holds constant everything except the Third Amendment. Had FHFA not been unconstitutionally structured, President Obama would have been able to select a FHFA Director of his choice in 2009 rather than spending years contending with Republican-appointee James Lockhart and, later, an acting Director who was eligible for the post only because he was one of Mr. Lockhart's handpicked deputies. *See* 12 U.S.C. § 4512(c)–(f). A proper harmless error analysis would require determining who the President would have selected to head a non-independent FHFA, what policies that individual would have pursued, and whether those policies would have

given rise to the same economic and political dynamics that produced the Net Worth Sweep. And that is to say nothing of whether "FHFA's status as an 'independent' counterparty could have boosted the Third Amendment's political salability" by enabling the Administration to invoke the approval of an independent financial regulator when defending the manifestly irresponsible decision to strip the Companies of almost all of their capital. App. 60. Courts are ill-equipped to opine on such questions, and, to the extent that the harmless error doctrine applies, Defendants cannot meet their burden to show that the error was harmless.

2. Defendants next criticize Plaintiffs for requesting that the Third Amendment be set aside without challenging the earlier investment agreements that FHFA signed with Treasury on behalf of the Companies. Defendants made this argument for the first time in their panel appellate briefs, and ever since Plaintiffs have consistently said that the agreements ought to be invalidated in their entirety to the extent that the courts deem that broader remedy to be more appropriate. *See* Reply Brief of Pls.-Appellants 7, *Collins v. Mnuchin*, No. 17-20364 (5th Cir. Sept. 22, 2017). In any event, as the seven judges who dissented below on the remedy issue explained, "[t]he Third Amendment is the smallest independent agreement that caused the Shareholders' injury, so that is what to rescind." App. 159 (Willett, J., dissenting).

3. Defendants also defend the Fifth Circuit's remedial holding by invoking laches. But it is undisputed that Plaintiffs sued within the six-year statute of limitations that applies to APA claims, *see* 28 U.S.C.

§ 2401(a), and this Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 664, 680 (2014). Because "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power," laches does not apply here. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 960 (2017).

Defendants are also wrong to suggest that Treasury somehow took on additional risk when it agreed to the Third Amendment and that invalidating the amendment now would unfairly allow shareholders to "capitalize on the benefits of hindsight." SG BIO 21. Defendants knew in August 2012 that the Companies were about to report the largest earnings in their history, and that is why they imposed the Net Worth Sweep. *See* Compl. ¶¶ 102, 105. Furthermore, due to how dividends on Treasury's stock under the prior arrangement were structured, there was no scenario—*none*—in which Treasury's net receipts from the Companies could decline thanks to the Net Worth Sweep. We will have much more to say about Defendants' factual presentation in our response to their petition. But for present purposes, it suffices to note that Defendants' claim that Treasury accepted additional risk when it agreed to the Third Amendment contradicts the allegations in the complaint and Defendants' own documents.

II. At an absolute minimum, the Court should hold Plaintiffs' petition for *Seila Law*.

When this Court receives a petition implicating questions it has already agreed to decide in another case, its usual practice is to hold the petition. As discussed above, Defendants' acknowledgement of the urgent need for this Court to weigh in on the legal status of the Net Worth Sweep provides ample justification for departing from that practice by granting Plaintiffs' petition. But in no event should the Court deny the petition before it decides *Seila Law*. *Seila Law* may clarify the law of remedies in a way that would require granting, vacating, and remanding in this case.

First, although Defendants argue that Plaintiffs should be denied all meaningful relief as a matter of equitable discretion, the decisive votes on remedy in the Fifth Circuit were cast by judges who thought that backward-looking relief is *categorically prohibited* in presidential removal cases under *Free Enterprise Fund*. *See* App. 82–84 (Duncan, J., concurring). If the Court determines in *Seila Law* that the CFPB Director's for-cause removal protection is unconstitutional and can be severed from the rest of the statute, it may go on to explain that this "remedy" is not meant to foreclose backward-looking relief for litigants who bring successful separation of powers suits based on violations of the President's removal authority. Such a ruling would provide a compelling reason to send this case back to the Fifth Circuit for further consideration.

Second, in adding a question presented on severability in *Seila Law*, this Court signaled that, if it determines that the CFPB is unconstitutionally structured, it will proceed to decide how much of the statute can survive. The Court in *Seila Law* might revisit its severability precedents and embrace the approach Justice Thomas suggested in *Murphy*—an approach that, as Judge Oldham observed in dissent, would entitle Plaintiffs to meaningful backward-looking relief. App. 112–17. Alternatively, the Court in *Seila Law* could adhere to its existing severability precedents and determine that Congress would not have enacted other provisions of the statute without insulating the CFPB Director from presidential oversight—including provisions that give the CFPB broad discretion and exempt it from the normal appropriations process. Or the Court in *Seila Law* could conclude that the CFPB Director's for-cause removal protection is not severable and that all of the statutory provisions that created the agency must fall. Any one of those possible rulings would cast serious doubt on whether the Fifth Circuit erred when it set about "fixing the problematic aspects of the statute" at issue in this case and would therefore require that the Court grant, vacate, and remand. App. 73.

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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