No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF *AMICUS CURIAE* OF THE BUCKEYE INSTITUTE IN SUPPORT OF PETITIONER

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
TIFFANY H. BATES
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Suite 700
Arlington, VA 22201
(703) 243-4923
will@consovoymccarthy.com

December 16, 2019

Attorneys for Amicus Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Other Authorities:

INTEREST OF *AMICUS CURIAE*[1]

The Buckeye Institute ("Buckeye Institute") was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market solutions for Ohio's most pressing public policy problems. The staff at the Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). The Buckeye Institute's Legal Center files and joins amicus briefs that are consistent with its mission and goals.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court has ordered the parties to brief whether Dodd-Frank's for-cause restriction on the removal of the CFPB Director, 12 U.S.C. §5491(c)(3), if it is found to be unconstitutional, can be severed from the remainder of the Dodd-Frank Act. For the reasons explained by Petitioner, the Court should find the offending provision inseverable if that question is

---

[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

decided. But the Court should not—and indeed cannot—reach that issue in this case because it is not necessary to afford complete relief to Petitioner or others who are in a similar situation.

The Constitution authorizes the courts to provide relief to plaintiffs who have suffered an injury-in-fact. *See Lewis v. Casey*, 518 U.S. 343, 349 (1996). This power is "the power to render judgments in individual cases," *Murphy* v. *NCAA*, 138 S. Ct. 1461, 1485 (2018) (Thomas, J., concurring)—it goes no further than that. Once a court affords complete relief to a plaintiff (or set of plaintiffs), no Article III case or controversy remains. In this case, holding 12 U.S.C. §5491(c)(3) unconstitutional and dismissing the underlying petition to enforce the civil investigate demand would provide Petitioner complete relief. The Court thus lacks authority to go any further. It may not proceed to consider whether to sever Dodd-Frank's for-cause restriction on the removal of the CFPB Director.

Nor should it, as there are prudential reasons for hesitating before embarking on a severability inquiry, even aside from the fact that severability doctrine is constitutionally dubious. By querying into legislative counterfactuals about whether or not Congress might have passed some other statute, the doctrine is plainly incompatible with fundamental principles of statutory interpretation. Congressional intent is expressed in the words of the enacted text; courts are not empowered to speculate about the intent of Congress outside of the text—much less what Congress might have thought about a hypothetical statute that did not possess the

constitutionally infirm for-cause removal provision. Accordingly, the Court should limit its remedy to invalidation of the underlying civil investigative demand.

ARGUMENT

I. The Court can afford complete relief without reaching the issue of severability.

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994). Article III vests federal courts with the authority "to decide legal questions only in the course of resolving 'Cases' or 'Controversies.' One of the essential elements of a legal case or controversy is that the plaintiff have standing to sue." *Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (citations omitted). The Court has rightly called it the "irreducible constitutional minimum" of "the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing is the "hard floor" upon which a federal case may be built. *Ctr. for Biological Diversity v. EPA*, 861 F.3d 174, 183 (D.C. Cir. 2017).

While discussed less frequently, Article III also has a ceiling: "the power to render judgments in individual cases." *Murphy*, 138 S. Ct. at 1485 (Thomas, J., concurring). "It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm." *Lewis*, 518 U.S. at 349. "No Article III case or controversy" therefore remains once the plaintiff has been afforded "complete relief." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 668

(2016). The Court's task, in short, is to decide the parties' legal dispute and, should the plaintiff prevail, remedy the injury that created the standing to bring a federal case. *See Lewis*, 518 U.S. at 357; *see also* Brian Charles Lea, *Situational Severability*, 103 VA. L. REV. 735, 751-52 (2017).

This limitation on the judicial power "protect[s] the separation of powers and promote[s] sound decisionmaking by limiting courts to the resolution of concrete, adverse disputes." Erik R. Zimmerman, *Supplemental Standing for Severability*, 109 NW. U. L. REV. 285, 287 (2015). "Remedies operate with respect to specific parties, not on legal rules in the abstract." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring) (citations and quotations omitted)). This limitation "reflects the difference between courts, which decide particular cases, and legislatures, which make laws of broader applicability." John Harrison, *Severability, Remedies, and Constitutional Adjudication*, 83 GEO. WASH. L. REV. 56, 85 (2014)). It "prevents courts of law from undertaking tasks assigned to the political branches." *Lewis*, 518 U.S. at 349.

This time-honored understanding of the judiciary's remedial powers has been fused to Article III. This Court has held that "generalized grievances about the conduct of Government" are not a basis for standing. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 217 (1974) (citation and quotation omitted)). "Similarly, this Court has long 'adhered to the rule that a party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'"

Am. Legion v. Am. Humanist Ass'n, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring in the judgment) (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004)). These important rules enforce the "Article III prohibition against advisory opinions." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993).

"Dismissing the underlying petition to enforce the civil investigative demand" as Petitioner explains, "would provide the relief . . . sought" when Petitioner raised the constitutionality of the CFPB's structure as a defense. Pet. Br. 37. As a consequence, there is no authority under Article III for this Court to consider whether to sever Dodd-Frank's for-cause removal restriction. It is not the relief Petitioner needs. Perhaps severability will need to be considered in a future case in order to afford complete relief to an injured plaintiff. But a federal court does not have the "power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened . . . is made to rest upon such an act." *Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923). Here, invalidating the enforcement proceeding is the only relief needed to render judgment for Petitioner.[2] It is the Article III ceiling of this case.

---

[2] The same relief should also be available, at a minimum, to others who have raised a similar challenge to the CFPB's structure. As the Court has explained, "'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (quoting *Ryder v. United States*, 515 U.S. 177, 182-183 (1995)). If this Court holds that the

II. The serious constitutional concerns that the modern severability doctrine raises should be avoided.

There are also prudential reasons to hesitate before embarking on a severability inquiry here. The doctrine raises serious constitutional questions and forces the court to engage in dubious modes of interpretive methodology. Granting Petitioner the relief that it seeks "is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more—counsels [the Court] to go no further." *PDK Laboratories Inc. v. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and concurring in the judgment).

As explained, "modern severability precedents are in tension with longstanding limits on the judicial power." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). By its nature, the inquiry "often requires courts to weigh in on statutory provisions that no party has standing to challenge." *Id.* Many times, then, engaging in severability will "bring[] courts dangerously close to issuing advisory opinions." *Id.* Severability, in those situations, is nothing less than an "unexplained exception to the normal rules of standing, as well as the separation-of-powers principles that those rules protect." *Id.*

CFPB's structure is invalid, a party who has raised the issue before the CFPB —and whose cases are not yet final—would be entitled to raise it as a defense and would likewise be entitled to invalidation of enforcement proceeding against them. *See* Pet. Br. 7.

The severability doctrine also fails to "follow basic principles of statutory interpretation." *Id.* at 1486. Because courts are not allowed to "rewrite a . . . law to conform it to constitutional requirements," *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397 (1988), "the severability doctrine must be an exercise in statutory interpretation." *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). It is "grounded in a presumption that Congress intends statutes to have effect to the full extent the Constitution allows." *United States v. Booker*, 543 U.S. 220, 320 (2005) (Thomas, J., dissenting in part). The interpretative enterprise, in this setting, apparently is meant to discover the intent of the Congress that passed the law at issue. To that end, the Court will ask: "Would Congress still have passed the valid sections had it known about the constitutional invalidity of the other portions of the statute?" *Id. at* 246 (citation and quotations omitted); *see also Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

But "basic principles of statutory interpretation" make that inquiry improper. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). There is no authority for "judges to determine what Congress would have intended had it known that part of its statute was unconstitutional." *Id.* "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself." *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845). A court's job is to interpret statutory text—it is not empowered to speculate about the intent of the drafters. That is because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998). In sum, "the law is what the law says." *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and in the judgment).

The doctrine's interpretative defects should be no surprise given that it arose in an era when the object of statutory interpretation was to discern the "intention of [the law's] makers." *Holy Trinity Church v. United States*, 143 U.S. 457, 459 (1892); *see Murphy*, 138 S. Ct. at 1487 n.* (Thomas, J., concurring); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). But discerning the drafter's subjective intent is no longer a cornerstone of interpretation. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 472-73 (1989) (Kennedy, J., concurring). The severability doctrine, at least through an interpretative lens, is "no more than a remnant of abandoned doctrine." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992).

This is a "peculiar kind of statutory interpretation" for another reason. Lea, *supra*, at 747. For any given statute, "it seems unlikely that the enacting Congress had any intent" on severability since "Congress typically does not pass statutes with the expectation that some part will later be deemed unconstitutional." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). "Because a legislative body usually will not have foreseen the potential problems with its handiwork," in other words, "it will not have formed an intent regarding severability in the event of partial invalidity." Lea, *supra*, at 747. This will often force "a counterfactual inquiry," requiring the

court to ask "what the legislature would have intended if it had thought about both the specific problem with its statute and the severability issue that that problem has produced." *Id.*[3] More to the point, it forces the court to determine "whether the legislature would have preferred no law at all to the constitutional remainder." Kevin Walsh, *Partial Unconstitutionality*, 85 N.Y.U. L. REV. 738, 777 (2010).

This is troubling. At best, a finding of congressional intent regarding the remainder of the statue is hypothetical. *See Booker,* 543 U.S. at 320 n.7 (Thomas, J., dissenting in part); *see also Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1073-74 (D.C. Cir. 2003) ("[D]istilling the true or primary legislative purpose out of the motivations of 435 representatives and 100 senators is inherently problematic."). At worst, it is a "dangerous" endeavor because "the indeterminacy of outcome leaves courts open to the charge that they have manipulated the determination of purpose in order to achieve their own policy preferences." *Rancho Viejo*, 323 F.3d at 1073-74 (internal quotations omitted). Indeed, it "invites courts to rely on their own views about what the best statute would be." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). That task "reflects

[3] The Dodd-Frank Act has a general severability clause. *See* 12 U.S.C. 5302. But that clause neither provides a basis for ignoring the Article III problems that would arise by reaching the severability issue nor overrides the prudential reasons for granting Petitioner the relief it seeks and going no further. The clause will not save the Court from engaging in the problematic inquiry that the Court's severability cases require. Pet. Br. 45-46.

considerable disrespect for the pronouncements of a democratically elected branch of government." *Rancho Viejo*, 323 F.3d at 1074.

In sum, federal courts are under an "obligation to avoid judicial legislation." *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 479 (1995). But the severability doctrine requires courts to legislate. After all, "intentions do not count unless they are enshrined in a text that makes it through the constitutional processes of bicameralism and presentment." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring). The severability doctrine robs the legislators responsible for making the law of the right to address the statute's partial unconstitutionality. *See* Pet. Br. 37-41.

Here, however, the Court can avoid the severability inquiry altogether by limiting the remedy to invalidation of the investigative demand. The Court should do so. It is what Article III requires and it is the prudent way to end this litigation.

CONCLUSION

For all these reasons, this Court should reverse the Ninth Circuit's judgment.

Respectfully submitted,

ROBERT ALT
THE BUCKEYE INSTITUTE
88 East Broad Street,
Suite 1300
Columbus, Ohio 43215
(614) 224-4422

WILLIAM S. CONSOVOY
Counsel of Record
THOMAS R. MCCARTHY
TIFFANY H. BATES
CONSOVOY MCCARTHY PLLC
ANTONIN SCALIA LAW SCHOOL
SUPREME COURT CLINIC
1600 Wilson Blvd., Suite 700
Arlington, VA 22201
will@consovoymccarthy.com

December 16, 2019

Attorneys for Amicus Curiae