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 OF *AMICI CURIAE*
NATIONWIDE BIWEEKLY ADMINISTRATION, INC., LOAN PAYMENT ADMINISTRATION LLC, AND DANIEL S. LIPSKY
IN SUPPORT OF PETITIONER

BRITTANY M. JONES
Admitted in Virginia
Not Admitted in D.C.
JONES DAY
51 Louisiana Ave. NW,
Washington, DC 20001

AMANDA R. PARKER
Counsel of Record
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7131
arparker@jonesday.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTEREST OF *AMICI CURIAE*

Amici curiae Nationwide Biweekly Administration, Inc., Loan Payment Administration LLC, and Daniel S. Lipsky (collectively, "Nationwide") offered a program that helps borrowers pay off the principal of their mortgages more quickly than a mortgage lender's standard payment program. Nationwide advertised its program through direct mail marketing letters.[1]

In 2015, the Consumer Financial Protection Bureau ("CFPB") filed a civil enforcement action against Nationwide, alleging that Nationwide violated the Consumer Financial Protection Act by engaging in "deceptive" practices when advertising its program. Although the district court did not find Nationwide liable on all the grounds alleged by the CFPB, it entered a $7.93 million civil penalty against the company. *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 15-CV-02106-RS, 2017 WL 3948396, at *14 (N.D. Cal. Sept. 8, 2017).

Nationwide has appealed the district court's judgment to the Ninth Circuit. Among other issues, Nationwide argues that the CFPB is unconstitutionally structured and so the "entirety of the Bureau's action against Nationwide [is] void." Third Br. on Cross-Appeal at 28-29, *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No.

---

[1] In accordance with Supreme Court Rule 37.6, *Amici* state that no counsel for any party authored this brief in any part, and no person or entity other than *Amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have provided written blanket consent to the filing of amicus briefs.

18-15431, ECF No. 53 (9th Cir. July 3, 2019); *see also* Nationwide's Resp. to CFPB's Change in Position Letter at 1–2, *Consumer Fin. Prot. Bureau v. Nationwide Biweekly Admin., Inc.*, No. 18-15431, ECF No. 63 (9th Cir. Sept. 25, 2019). Accordingly, Nationwide has asked the Ninth Circuit to vacate the unconstitutional action against Nationwide. *See* Nationwide's Resp. at 2, ECF No. 63. That appeal remains pending.

Given this enforcement action, Nationwide has a strong interest in the resolution of this case—and particularly in the remedy that this Court fashions. The only way for Nationwide and others challenging past unlawful agency action to obtain meaningful relief is through vacatur of those unlawful actions. In Nationwide's case, for example, severing the removal restriction or invalidating the statutory scheme creating the CFPB still leaves Nationwide with a $7.93 million judgment. Thus, whether or not the Court concludes that 12 U.S.C. § 5491(c)(3) can be severed from the Dodd-Frank Act, it should set aside the CFPB's prior unlawful enforcement actions.

Nationwide's case also underscores the liberty interests at stake for small businesses. As this Court has recognized, the "structural principles secured by the separation of powers protect the individual as well." *Stern v. Marshall*, 564 U.S. 462, 483 (2011); *Clinton v. City of New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."); *see Bowsher v. Synar*, 478 U.S. 714, 730 (1986) ("The Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty.").

Independent agencies "are unchecked by the President," so "Congress has traditionally required multi-member bodies at the helm" to "serve[] as a critical substitute check on the excesses of any individual independent agency head." *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 183, 189 (D.C. Cir. 2018) (Kavanaugh, J., dissenting). The idea is that "[b]efore the agency can infringe your liberty in some way—for example, by enforcing a law against you or by issuing a rule that affects your liberty or property—a majority of commissioners must agree." *Id.* No less important, multi-member structures require "compromise and consensus," meaning they tend to reach less "extreme, idiosyncratic, or otherwise off the rails" outcomes. *Id.*

But these critical protections are absent from the CFPB's structure. A single individual exercises enforcement powers, heightening the risk of arbitrary decisions that affect individual liberty. Indeed, the agency's policy goals and enforcement decisions are "subject to the whims and idiosyncratic views of a single individual," permitting a Director to pursue pet projects or arbitrary agendas unchecked by the President or Congress. *Id.* at 184.

Nationwide's story illustrates the threat. From 2009 to 2010, then-Ohio Attorney General Richard Cordray oversaw an enforcement action against Nationwide for deceptive advertising. The result was an order requiring Nationwide to pay restitution and to contribute to the Consumer Protection

Enforcement Fund, plus injunctive relief.[2] But that was not the end of Cordray's campaign against Nationwide. As CFPB Director, Cordray continued to target the company. In 2015, the CFPB filed an enforcement action against Nationwide in federal court, ultimately seeking nearly $74 million in "restitution" in addition to $7.93 million in civil penalties, *CFPB v. Nationwide Biweekly*, 2017 WL 3948396, at *11—despite the statute's plain language authorizing the CFPB to seek *either* "a civil penalty *or* . . . all other appropriate legal and equitable relief." 12 U.S.C. § 5564(a) (emphasis added). Nationwide's case thus offers a direct window into how a single individual's agenda can drive an all-powerful agency's enforcement priorities, with real consequences for individual liberty.

SUMMARY OF ARGUMENT

I. For the reasons well explained in Petitioner's brief, Nationwide agrees that the CFPB's single Director, removable only for cause, violates the separation of powers. Nationwide takes no position on whether, if the Court agrees that the CFPB is unconstitutional, it should sever 12 U.S.C. § 5491(c)(3) from the remainder of the Dodd-Frank Act. Whatever the answer to that question, the Court's remedy must include setting aside the challenged agency action.

---

[2] Ohio Attorney General, Consumer Protection Annual Report 2010 (Dec. 28, 2010) at 23, *available at* https://www.ohioattorneygeneral.gov/getattachment/b0969980-5139-4f2c-a565-2f0ec052f902/2010-Consumer-Annual-Report-(PDF).aspx

A. That result follows first from this Court's precedent. In addressing separation of powers challenges to actions taken by unconstitutionally operating officials, this Court has consistently vacated or otherwise invalidated the challenged actions. Most recently, in *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018), the Court vacated the decision of an administrative law judge appointed in violation of the Appointments Clause.

Nothing warrants different treatment for separation of powers challenges to agencies operating without sufficient Presidential oversight. Indeed, the Court has already approved backwards-looking relief in these types of cases. In *Bowsher*, for example, the Court concluded that permitting Congress to remove the Comptroller General violated separation of powers because the Comptroller exercised *executive* functions as part of the deficit reduction process. Because of this unconstitutional structure, the Court affirmed the decision below declaring "without legal force and effect" an order "pursuant to the unconstitutional deficit reduction process." *Synar v. United States*, 626 F. Supp. 1374, 1404 (D.D.C.) (per curiam), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714, 736 (1986).

This Court's decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477 (2010), is not to the contrary. The question of how to handle past agency action never came up in that case. Accordingly, the fact that severance was the only "remedy" for the removal defect in *Free Enterprise* should not prevent this Court from granting relief to those complaining of prior (rather than future) agency misconduct.

B. Setting aside past agency action also is necessary to provide meaningful relief to litigants and thus to create sufficient incentives to raise separation of powers challenges. Where a party succeeds in its separation of powers challenge as a defense to enforcement action, the *only* meaningful remedy is one that includes vacating the enforcement action. Thus, failing to award that relief leaves a challenger like Seila Law with no remedy at all, contrary to the fundamental principle that every right must have a remedy.

The availability of meaningful relief is critical to ensure that litigants have sufficient "incentives to raise" constitutional challenges. Take Nationwide as but one example. As a result of the CFPB's actions, Nationwide faces the threat of tens of millions in civil penalties and restitution. This makes Nationwide precisely the type of litigant with an incentive to challenge the CFPB's structure. But that incentive functions only if the challenge can generate actual relief, *i.e.*, an order setting aside the enforcement action and any civil penalties along with it. If Nationwide wins but remains subject to $7.93 million in civil penalties, future litigants are unlikely to devote their limited resources to litigating similar issues.

At minimum, this Court should confirm that severance (even if appropriate) does not foreclose vacatur of past actions that the CFPB took while its Director was improperly insulated from Presidential oversight.

ARGUMENT

I. ANY REMEDY FOR THE CFPB'S ACTIONS WHILE ITS DIRECTOR WAS UNCONSTITUTIONALLY INSULATED FROM REMOVAL MUST INCLUDE SETTING ASIDE THOSE ACTIONS.

Nationwide agrees with Petitioner that the removal restriction violates the separation of powers. That leaves the question of what to do next. There is only one answer: set aside the CFPB's past actions. In other words, however this Court answers the severance question, its remedy should terminate enforcement actions taken by the unconstitutionally structured agency. That result follows not only from this Court's separation of powers precedent, but also from the common-sense principle that this Court crafts remedies to "create 'incentives to raise'" these sorts of challenges. *E.g.*, *Lucia*, 138 S. Ct. at 2055 n.5.

A. Under this Court's precedent, the remedy for a successful separation of powers challenge to past agency enforcement action must include setting aside that action.

In addressing separation of powers challenges to actions taken by unconstitutionally operating officials, this Court has consistently vacated or otherwise invalidated the challenged actions. The remedy for the CFPB's unconstitutional action against Seila Law here should be no different.

Start with this Court's Appointments Clause cases. Most recently, in *Lucia*, this Court set aside an agency decision issued by an administrative law judge who was unconstitutionally appointed. 138 S. Ct. at

2055. The SEC filed an administrative proceeding against Lucia for violating the Investment Advisers Act. The ALJ concluded that "Lucia had violated the Act and impos[ed] sanctions," "including civil penalties of $300,000 and a lifetime bar from the investment industry." *Id.* at 2049–50. On appeal, Lucia challenged the decision as "invalid" because the ALJ "had not been constitutionally appointed." *Id.* at 2050.

This Court agreed. *Id.* at 2055. To remedy this defect, the Court did not merely hold that ALJ appointments needed to comply with the Appointments Clause *going forward*. Instead, it set aside the ALJ's decision and required a validly appointed ALJ to "hold [a] new hearing" on the SEC's charges, adhering to the principle that a litigant raising a "challenge to the constitutional validity" of agency action "is entitled to relief." *Id.*

The Court took the same approach in *N.L.R.B. v. Noel Canning*, where it affirmed the Court of Appeals' judgment granting the petition to vacate the Board's order as "void," where three out of the five Board members issuing that order were invalidly appointed. 573 U.S. 513, 557 (2014); *Noel Canning v. N.L.R.B.*, 705 F.3d 490, 507 (D.C. Cir. 2013). Once again, the Court did not grant only prospective relief, but also set aside the agency's past decision. *See Noel Canning*, 573 U.S. at 557; *see also Ryder v. United States*, 515 U.S. 177, 179, 188 (1995) (holding that the actions of judges that "had not been appointed in accordance with the dictates of the Appointments Clause" "were not valid *de facto*," and that as a result "Petitioner is entitled to a hearing before a properly appointed panel" of judges).

In separation of powers cases generally, moreover, the Court has recognized that the appropriate remedy is to invalidate the action carried out pursuant to authority that infringes on the separation of powers. *See, e.g.*, *I.N.S. v. Chadha*, 462 U.S. 919, 926, 932 (1983) (concluding that a provision permitting Congress to veto the Attorney General's deportation decision violated separation of powers, and affirming the Court of Appeals' judgment "that the deportation order" issued as a result of the congressional veto "is held invalid").

Nothing warrants different treatment for separation of powers challenges to agency actions taken while the agency's director was unconstitutionally insulated from removal. The constitutional problem is the same. Just as the ALJ in *Lucia* "heard and decided [the] case without the kind of appointment the Clause requires," here the CFPB pursued enforcement action "without the kind of [oversight] the [Constitution] requires." 138 S. Ct. 2055; *see also Collins v. Mnuchin*, 938 F.3d 553, 627 (5th Cir. 2019) (Willett, J., dissenting) ("Unconstitutional protection from removal, like unconstitutional appointment, is a defect in authority. . . . An unconstitutionally-insulated officer lacks authority to act," and this "defect in authority made [the] agency action unlawful."). And the same problem compels the same remedy: setting aside the agency action.

Confirming this parallel, the Court has previously approved setting aside unlawful actions taken by officials operating without constitutionally sufficient oversight. In *Bowsher*, the plaintiffs challenged a presidential sequestration order implementing the automatic deficit reduction process. They asserted that the Comptroller General's role in that process violated the separation of powers because, although exercising executive functions, he was removable by Congress. *See Synar*, 626 F. Supp. at 1380, 1391. The District Court held that Congressional removal for an officer exercising executive powers "violates the constitutionally requisite separation of powers." *Id.* at 1377. And among other remedies, it ordered that the "presidential sequestration order . . . pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect." *Id.* at 1404. On review, this Court affirmed the District Court's remedial order. *See Bowsher*, 478 U.S. at 736 (affirming "the judgment and order of the District Court"). *Bowsher* thus confirms that invalidating actions taken while an official was unconstitutionally independent from the President is no less appropriate in the removal context. [3]

This Court's decision in *Free Enterprise Fund*, which granted purely prospective relief after finding that for-cause removal for the Board's members violated separation of powers, does not alter this conclusion. The reason is simple: the remedial issue presented here was not presented there. In *Free Enterprise*, the petitioners did not ask the Court to vacate the Board's past actions against the accounting

---

[3] The Administrative Procedure Act also suggests that the proper remedy is vacating the agency's unlawful action. The Administrative Procedure Act requires courts to "set aside agency action" that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. § 706(2).

firm. Instead, they requested that the Court "declare the Board and the Act unconstitutional." Br. for Petitioners at 62, *Free Enter. Fund*, 561 U.S. 477. What is more, neither the District Court nor the Court of Appeals had found a constitutional violation, *see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675, at *6 (D.D.C. Mar. 21, 2007); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 684-85 (D.C. Cir. 2008), so neither court had addressed what the remedy for that violation should be.

When it came to remedies, then, the choice in *Free Enterprise* was not between invalidating the Board's prior actions and issuing purely prospective relief. The question was what sort of prospective relief to award—whether to invalidate the Board and statute as a whole or merely to sever the invalid removal restrictions. *See Free Enter. Fund*, 561 U.S. at 508–09. Operating within that framework, the Court chose severance. It rejected the requested "broad injunctive relief against the Board's continued operations," concluding that "the unconstitutional tenure provisions are severable from the remainder of the statute." *Id.* at 508, 513.

Viewed against this backdrop, that *Free Enterprise* stopped at severance in no way prevents this Court from setting aside the CFPB's prior unconstitutional actions. Unlike there, Seila Law asks this Court to set aside the agency's *past* unconstitutional actions. And as discussed above, where litigants have sought that relief as a remedy for separation of powers violations, this Court has granted it. The result should be no different here.

B. Vacating past agency action is necessary to protect against separation of powers violations such as the CFPB's unlawful exercise of executive power here.

Permitting courts to set aside agency action as a remedy for removal defects is necessary to provide meaningful relief and thus sufficient incentives for litigants. However it decides severance, then, this Court should confirm that courts may set aside past agency actions as a remedy for successful challenges to removal restrictions.

1. Where a party successfully challenges the past actions of an official exercising executive power without constitutionally sufficient supervision from the President, the *only* meaningful remedy is one that includes setting aside those actions. A remedy that does not include that relief is no remedy at all. Here, for example, Seila Law does not seek prospective relief. It requests relief from actions that the agency has already taken—*i.e.*, the issuance of a civil investigation demand and the filing of an action to enforce it. Thus, failing to end the enforcement action against Seila Law will leave it without a remedy. *See Collins*, 938 F.3d at 609–10 (Oldham, J. and Ho, J., concurring in part and dissenting in part) ("In a case seeking redress for past harms such as this one, prospective relief is no relief at all.").

Such a result is contrary to the fundamental and longstanding principle that for every right there must be a remedy. *See, e.g.*, *Marbury v. Madison*, 5 U.S. 137, 147 (1803) ("It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."). That includes the rights of individual liberty that separation of powers protects. *See Lucia*, 138 S. Ct. at 2055 ("This Court has held that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." (quoting *Ryder*, 515 U.S. at 182)).

Accordingly, when a litigant seeks relief from past actions by an unconstitutionally structured agency, setting aside that agency's action must be part of the remedy—only that outcome offers the hope of meaningful relief. *See id.*; *see also Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) ("[A]ppellants raise the constitutional challenge as a defense to an enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case."); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) (solely prospective relief is contrary to "basic norms of constitutional adjudication").

2. Providing meaningful relief is necessary to ensure that future litigants have incentives to raise similar challenges.

As this Court recently reiterated in addressing an Appointments Clause violation, remedies in separation of powers cases should "create incentives to raise" challenges to unconstitutionally structured agencies. *Lucia*, 138 S. Ct. at 2055 n.5. But remedies that deny backward-looking relief do just the opposite. They improperly "create a *disincentive* to raise Appointments Clause challenges." *Ryder*, 515 U.S. at 183.

That disincentive is no less problematic in the context of the removal power. Agencies operating without constitutional checks on their authority is a no less serious threat to separation of powers than officials operating without a constitutional appointment. Indeed, as Justice Kavanaugh has explained, "[b]ecause of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances." *PHH Corp.*, 881 F.3d at 165–66 (Kavanaugh, J., dissenting). Accordingly, there is no reason to give litigants less incentive to challenge these sort of structural defects than to challenge any other type of separation of powers problem. And the only way to ensure these incentives is to offer litigants in this context the same remedy: the possibility of vacating the actions the agency took against them while it was unconstitutionally structured.

Amici's ongoing battle with the CFPB underscores this point. Nationwide faced a potentially ruinous enforcement action seeking tens of millions in civil penalties and restitution. Thus, Nationwide is precisely the type of litigant with an incentive to challenge the lack of Presidential oversight or multi-member check that plagues the CFPB's current structure.

But that incentive will vanish if prospective relief—whether it be injunctive relief against the agency's future operations, invalidation of the statutory scheme, or severance of the removal provision—is the only thing that Nationwide can win. If the District Court's judgment of $7.93 million in civil penalties remains enforceable against Nationwide despite Nationwide succeeding in its challenge to the CFPB's structure, Nationwide is no better off. In fact, it may be worse off, having devoted its limited resources to litigating a constitutional challenge with nothing to show for it. And going forward, litigants will not waste their time on these claims. *See, e.g.*, Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 509 (2014) ("If the right or norm's value is lower than the cost of asserting the claim or if the remedy does little to advance the litigant's related interests, the rational litigant will not bother to assert that interest.").

Accordingly, whether and however the Court decides severability, the Court's remedy here must include ending the enforcement action that the CFPB filed while it was improperly insulated from Presidential oversight.

CONCLUSION

This Court should reverse the decision below.

DECEMBER 16, 2019

Respectfully submitted,

AMANDA R. PARKER
Counsel of Record
JONES DAY
901 Lakeside Ave.
Cleveland, OH 44114
(216) 586-7131
arparker@jonesday.com

BRITTANY M. JONES
Admitted in Virginia
Not Admitted in D.C.
JONES DAY
51 Louisiana Ave. NW,
Washington, DC 20001

Counsel for Amici Curiae