No. 19-7

IN THE

Supreme Court of the United States

SEILA LAW LLC,

Petitioner,

v.

CONSUMER FINANCIAL PROTECTION BUREAU,

Respondent.

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

BRIEF FOR STATES OF NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, ILLINOIS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, WASHINGTON, AND WISCONSIN, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE JUDGMENT BELOW

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QUESTIONS PRESENTED

1. Whether 12 U.S.C. § 5491(c)(3) violates the separation of powers by restricting the President from removing the Director of the Consumer Financial Protection Bureau except for "inefficiency, neglect of duty, or malfeasance in office."

2. Whether, if 12 U.S.C. § 5491(c)(3) violates the separation of powers, it can be severed from the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

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INTEREST OF AMICI STATES

States have historically served at the forefront of efforts to protect consumers against fraudulent and abusive practices. *See California v. ARC Am. Corp.*, 490 U.S. 93, 101 (1989). Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) ("Dodd-Frank Act"), provides an important complement to the States' efforts to root out fraud and abuse in the marketplace. But petitioner's arguments here, if accepted by this Court, would gut that important statute and eliminate critical reforms that have bolstered the States' ability to protect their residents. Amici—the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin, and the District of Columbia—thus have a vital interest in preserving Title X's reforms.

In particular, petitioner asks this Court to find that the Consumer Financial Protection Bureau (CFPB), a federal agency created by Title X, lacks investigative and enforcement powers due to the asserted invalidity of a for-cause removal provision that protects the independence of its Director. But such a ruling would deprive the States and their residents of an additional and independent enforcer that has been a helpful complement to state efforts to protect consumers.

Even more aggressively, petitioner asserts that this Court should "invalidate the entirety of Title X" (Pet. Br. 41) on the ground that the for-cause removal provision is inseverable from the rest of the statute. But such a ruling would sweep far beyond the CFPB and eliminate separate provisions in Title X—

unmentioned by petitioner—that imbue state attorneys general with independent enforcement authority under federal law and protect state laws from overbroad claims of federal preemption. Amici States have a distinct and compelling interest in preserving Title X's state-specific reforms independent of the parties' dispute over the CFPB and its Director.

STATEMENT

1. Congress enacted the Dodd-Frank Act in 2010 in response to the financial crisis of 2008—a crisis that "nearly crippled the U.S. economy" and caused millions of Americans to lose their jobs, homes, and savings. S. Rep. No. 111-176, at 2, 9 (2010). After studying the causes of the crisis, Congress concluded that "it was the failure by the prudential [federal] regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166. The years preceding the crisis were marked by a proliferation of risky subprime lending, widespread predatory lending practices, and unregulated financial products, among other abusive practices.[1] Although numerous statutes authorized federal agencies to regulate these practices and, if necessary, prosecute unlawful conduct, enforcement of these laws was dispersed among multiple different agencies, resulting in "conflicting regulatory missions, fragmentation, and regulatory arbitrage." *Id.* at 10; *see also id.* at 15-16.

To remedy the structural flaws that contributed to the financial crisis, Congress enacted a number of critical reforms to federal consumer protection law in Title X of the Dodd-Frank Act. For example, Title X

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[1] *See, e.g.*, National Comm'n on the Causes of the Financial & Economic Crisis in the United States, *The Financial Crisis Inquiry Report* xvii (2011) (internet). (For authorities available on the internet, the URLs appear in the table of authorities.)

created the CFPB, "a new, streamlined independent" federal agency, S. Rep. No. 111-176, at 11, and charged it with enforcing eighteen preexisting federal consumer protection laws that had previously been overseen by seven different federal agencies, *see* 12 U.S.C. § 5481(12).

In devising the CFPB's structure and powers, Congress drew on its experience with existing agencies. Among other things, Congress wanted to ensure that the CFPB had the "requisite initiative and decisiveness to do the job of monitoring and restraining abusive or excessively risky practices in the fast-changing world of consumer finance." *PHH Corp. v. CFPB*, 881 F.3d 75, 81 (D.C. Cir. 2018) (en banc); *see also* S. Rep. No. 111-176, at 11. Thus, like other federal agencies that must respond quickly to rapidly changing conditions, Congress provided for a single Director to lead the agency rather than a multimember board.[2] *See* 12 U.S.C. § 5491(b)(1).

Congress also recognized "the distinctive danger of political interference" with financial regulators. *PHH*, 881 F.3d at 91. Thus, as with the leaders of the Federal Trade Commission (FTC), the Federal Reserve Board, and other financial regulators, Congress endeavored to give the CFPB a measure of independence by providing that the CFPB's Director be removable by the President only for cause—i.e., "for inefficiency, neglect of duty, or malfeasance in office"—rather than at will. 12 U.S.C. § 5491(c)(3); *see id.* § 242 (Federal Reserve Board); 15 U.S.C. § 41 (FTC).[3]

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[2] *See also* 12 U.S.C. § 2 (Office of the Comptroller of the Currency); *id.* § 4512(a) (Federal Housing Finance Agency (FHFA)); 42 U.S.C. § 902(a)(1) (Social Security Administration).

[3] *See also* 12 U.S.C. § 4512(b)(2) (FHFA); *SEC v. Blinder, Robinson & Co.*, 855 F.2d 677, 681 (10th Cir. 1988) (Securities and Exchange Commission); *cf.* 12 U.S.C. § 2 (Comptroller of the

2. Title X's reforms were not limited to creating the CFPB. Congress also enacted a number of other independent reforms that were not specific to the CFPB.

First, Title X expanded the scope of federal consumer protection law. In particular, Congress added to the existing federal prohibitions on "unfair" and "deceptive" acts and practices by prohibiting "abusive" acts and practices as well. *See* 12 U.S.C. §§ 5531(a), 5536(a)(1). As Congress explained, this additional language would expressly enable regulators to prevent and prosecute "practices where providers unreasonably take advantage of consumers." S. Rep. No. 111-176, at 172.

Second, in subtitle D of Title X, Congress reinforced the role of the States in pursuing relief under both federal and state consumer protection laws. *See* Pub. L. No. 111-203, tit. X, sub. D, §§ 1041-48, 124 Stat. at 2011-18. With respect to federal law, Title X authorizes any state attorney general to "bring a civil action in the name of such State . . . to enforce provisions of this title or regulations issued under this title, and to secure remedies under provisions of this title or remedies otherwise provided under other law." 12 U.S.C. § 5552(a)(1). Although the CFPB may intervene as a party in any state action brought pursuant to § 5552(a)(1), the CFPB is not required to so participate, and its participation in such a case does not displace or otherwise substitute for the State's role.

Currency can be terminated "by the President, upon reasons to be communicated by him to the Senate"). *See generally* Henry B. Hogue et al., Cong. Research Serv., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 15 (2017) (internet) ("Although not always specified in statute, it appears that the heads of financial regulators, in contrast with Cabinet Secretaries, typically do not serve at the pleasure of the President ('at will').").

With respect to state law, Title X clarifies that its substantive provisions do not preempt state consumer protection laws that afford greater protections to consumers. *See* 12 U.S.C. § 5551(a); *see also* S. Rep. No. 111-176, at 174. And Title X established a stricter test for finding preemption of state laws governing national banks and federal thrifts and limited the preemptive authority of the Office of the Comptroller of the Currency (OCC), the federal agency that has traditionally regulated national banks. *See* 12 U.S.C. § 25b. These reforms were a response to efforts by OCC and other federal agencies to broadly declare that federal law barred States from applying their consumer protection laws to national banks, federal thrifts, and their mortgage lending subsidiaries and agents—thus preventing the States from curbing abusive practices by these entities.[4] *See* S. Rep. No. 111-176, at 16. Although this Court ultimately found that much of that preemption was not authorized by federal law, *Cuomo v. Clearing House Ass'n, LLC*, 557 U.S. 519, 536 (2009), it did so only in 2009, too late for States to address some of the most problematic abuses leading to the 2008 financial crisis. *See* S. Rep. No. 111-176, at 16. To avoid similar impediments to vigorous state action, Title X clears the way for States to enforce their own laws against financial institutions.

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[4] *See* National Comm'n, *The Financial Crisis Inquiry Report*, *supra*, at 96 (2011); *see also, e.g.*, Arthur E. Wilmarth, Jr., *The Dodd-Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. Corp. L. 893, 911 (2011) (internet) (describing the Office of Thrift Supervision's and OCC's efforts to preempt state action).

SUMMARY OF ARGUMENT

Title X of the Dodd-Frank Act not only created the CFPB, a parallel federal enforcer of consumer protections, but also gave the States a host of powerful new tools and protections not mentioned by petitioner or the Court-appointed amicus. Depriving the CFPB of all of its powers, as petitioner demands, would harm Amici States by eliminating the CFPB's independent enforcement efforts and the valuable assistance it provides to the States. And invalidating the entirety of Title X would cause even greater injury by stripping from the States the additional substantive powers and protection from federal preemption that Congress sought to confer.

Amici States support the arguments of the Court-appointed amicus regarding the constitutionality of the for-cause removal provision. This amicus brief focuses principally on the additional question that this Court directed the parties to address regarding the severability of the for-cause removal provision. In the event this Court were to determine that the for-cause removal provision is invalid, it should simply sever that provision and preserve the remainder of Title X.

Severability is supported not only by the Dodd-Frank Act's express severability clause, but also by Congress's strongly expressed intent to create a more robust consumer-protection regime to avert another financial crisis. One of the ways that Congress sought to achieve that objective was by consolidating previously fragmented federal authority into a single agency, the CFPB. There is no indication that Congress would have abandoned this important policy objective if it had understood that the CFPB's Director would be removable at will.

Even if this Court were to find the CFPB-specific provisions of Title X inseverable from each other, it

should preserve Title X's separate provisions providing States with powerful new tools to combat fraud and abuse—provisions that petitioner does not even mention in its severability analysis. These provisions are entirely independent of the provisions governing the CFPB, and they serve distinct policy goals that Congress would not have wanted to abandon even if the CFPB itself were no longer operative.

Amici States' practical experience since the enactment of the Dodd-Frank Act has confirmed the value of the provisions of Title X that petitioner seeks to invalidate. As an independent federal enforcer of consumer protections, the CFPB has provided important support to the States' own vigorous enforcement of consumer-protection laws. The CFPB has done so not only in its own enforcement actions but also by partnering with the States. And it has engaged in other functions—including rulemaking and the collection of information across multiple jurisdictions—that have meaningfully complemented the States' own efforts. Losing these important contributions would remove an important source of support for the States' efforts to comprehensively eliminate fraud and abuse from their consumer marketplaces.

Invalidating the entirety of Title X would cause even greater injury to the States. In addition to creating the CFPB, Title X confers express authority on state attorneys general to pursue claims under expanded federal consumer-protection standards, and expressly preserves state authority by making clear that federal law does not generally preempt more protective state statutes. These important enhancements to state enforcement powers would be lost if this Court were to invalidate the entirety of Title X.

These concrete harms stand in sharp contrast to the abstract nature of petitioner's constitutional claim. Petitioner purports to defend the President's executive

power to control his appointees. But petitioner has identified no concrete interference with that power, let alone one that affects the CFPB's ongoing enforcement action against petitioner. The current CFPB Director has effectively stated that she serves at the pleasure of the President by joining petitioner's argument about the invalidity of the for-cause removal provision. And there is no indication that the President disagrees with the current Director in any way—including her decision to continue the CFPB's investigation of petitioner. This Court should not invalidate Title X's critical consumer-protection reforms based on the asserted interference with the executive power when no actual interference with the President's removal power has been demonstrated.

ARGUMENT

I. If This Court Were to Invalidate the For-Cause Removal Provision, It Should Find the Provision Severable from the Remainder of Title X.

Petitioner's constitutional arguments against Title X's for-cause removal provision fail for the reasons given by the Court-appointed amicus. (Court-Appointed Amicus Br. 28-50.) But even if this Court were to agree with petitioner that the CFPB Director must be terminable at will by the President, it should reject petitioner's further arguments about the necessary consequences of such a structural defect.

Petitioner argues that the "appropriate remedy" for the asserted invalidity of the for-cause removal provision would be for this Court to find that "any exercise of executive power by [the CFPB] is void" (Pet. Br. 35-36)—"including the authority to conduct investigations, issue subpoenas and civil investigative demands, and file lawsuits in federal court" (*id.* at 18).

Petitioner also asserts that this Court may "invalidate the entirety of Title X" based solely on the asserted invalidity of the for-cause removal provision. (*Id.* at 41.) Although petitioner characterizes only the latter argument as being based on severability, its first argument necessarily raises the same question because it would also require this Court to find that the invalidity of the for-cause removal provision prevents the CFPB from exercising any power under the provisions of Title X that imbue it with investigative, enforcement, and other authority. (*Id.* at 36.)

Both arguments are meritless. Under well-established precedent, if this Court invalidates a portion of a statute, it "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (quotation marks and citations omitted). Thus, a provision is inseverable only if it is "evident" that Congress "would have preferred" to abandon the entire statutory scheme rather than accept the court's narrower invalidation of the defective provision. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 509 (2010).

There is no such evidence here. Petitioner has identified only one purported flaw in Title X—the for-cause removal provision in 12 U.S.C. § 5491(c)(3). But not one of the other substantive provisions of Title X turns on the viability of that provision. And while the Bureau's independence was important to Congress, it is implausible that Congress would have preferred to eliminate *all* of the benefits of Title X—including the CFPB itself and Title X's reinforcement and enhancement of state enforcement authority—rather than make the CFPB Director removable at will.

Under this Court's well-established precedents, severability is therefore required. In resolving comparable separation-of-powers disputes, this Court has consistently excised only the unconstitutional provisions while preserving the rest of the statutory scheme. For example, in *Free Enterprise Fund*, this Court held unconstitutional the for-cause removal provision at issue there, but upheld the rest of the statute, including the provisions that created the agency at issue, because "nothing in the statute's text or historical context makes it 'evident' that Congress, faced with the limitations imposed by the Constitution, would have preferred no [agency] at all to [an agency] whose members are removable at will." 561 U.S. at 509. Likewise, in *Immigration and Naturalization Service v. Chadha*, this Court invalidated only the one-house veto provision in § 244 of Immigration and Nationality Act (INA) but preserved the remainder of that statute. *See* 462 U.S. 919, 931-35 (1983).[5] The same result would be warranted here if this Court were to find the for-cause removal provision invalid.

A. Congress's inclusion of an express severability clause merits significant weight.

Congress made express its preference for the remainder of Title X to survive a constitutional challenge to the for-cause removal provision by including in the Dodd-Frank Act a broad severability clause, which provides that "[i]f *any* provision of this Act, an amendment made by this Act, or the application of such provision or amendment to *any* person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this

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[5] *See also John Doe Co. v. CFPB*, 849 F.3d 1129, 1133-34 (D.C. Cir. 2017) (collecting court of appeals decisions applying severability in separation-of-powers cases).

Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby." 12 U.S.C. § 5302 (emphasis added). Although inclusion of an express clause is not necessary for severability, *see, e.g.*, *Free Enter. Fund*, 561 U.S. at 509-10, the presence of such a clause reinforces the "presumption that Congress did not intend the validity" of Title X "to depend on the validity of" the for-cause removal provision. *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

Petitioner dismisses the severability clause because it is not specific to Title X and appears in a different title of the Dodd-Frank Act. (Pet. Br. 45.) But this Court has repeatedly given effect to similar severability clauses. For example, in *National Federation of Independent Business v. Sebelius* (*NFIB*), this Court held that it could sever the application of a provision of Affordable Care Act (ACA) that allowed the Secretary of Health and Human Services to deny Medicaid funding to a State that chose not to expand Medicaid as required by the ACA. *See* 567 U.S. 519, 585-86 (2012). The language of the severability clause in *NFIB*, 42 U.S.C. § 1303, was nearly identical to § 5302. And the Court applied the severability clause despite the fact that it was not even enacted as part of the ACA at all; rather, it had been enacted as part of the original Social Security Act, approximately 75 years before the ACA's enactment. *See* Ch. 531, § 1103, 49 Stat. 620, 648 (1935). Nonetheless, the Court found that § 1303 constituted "explicit textual instruction" from Congress "to leave unaffected the remainder" of the ACA. *NFIB*, 567 U.S. at 586 (quotation marks omitted).

Likewise, in *Chadha*, the Supreme Court held that the severability clause in the "Miscellaneous" provisions of the INA, Ch. 477, § 406, 66 Stat. 163, 281 (1952) (codified as amended at 8 U.S.C. § 1101 note),

supported severing the one-house veto provision in a different title of the INA. *See* 462 U.S. at 931-32. Again, the language of the severability clause in *Chadha* is similar to the one at issue here. *See id.* at 932. And it made no difference to this Court that the severability clause was enacted as part of a different title of the INA from the challenged provision. *Compare* Ch. 477, tit. IV, § 406 (severability clause), *with id.* tit. II, § 244 (one-house veto), 66 Stat. at 216, 281. "Congress could not have more plainly authorized the presumption that the provision for a one-House veto . . . is severable." *Chadha*, 462 U.S. at 932.

Petitioner also errs when it contends (Pet. Br. 45) that the Dodd-Frank Act's severability clause should be read to mean only that the various titles of the Act are severable from each other. The plain text of the clause contradicts this reading by extending severability to "any *provision* of this Act, an *amendment* made by this Act, or the *application* of such provision or amendment to any *person or circumstance*." 12 U.S.C. § 5302 (emphasis added). This broad language indicates that Congress intended to encompass not only titles but all of the Dodd-Frank Act's substantive provisions.

The fact that there is another severability provision in a specific subtitle of the Dodd-Frank Act, *see* Pub. L. No. 111-203, tit. V, subtit. B, § 542, 124 Stat. at 1596 (codified at 15 U.S.C. § 8232), does not alter this conclusion. (*See* Pet. Br. 45.) That provision is contained in subtitle B of Title V of the Dodd-Frank Act. What is now subtitle B was initially passed by the House of Representatives in essentially verbatim form as the Nonadmitted and Reinsurance Reform Act of 2009.[6] During the floor debates, Representative

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[6] *See* H.R. 5271, 111th Cong. (2009) (see Actions and Text at congress.gov).

Dennis Moore of Kansas proposed an amendment to include the full text of that bill—including its original severability clause—as a separate title of the Dodd-Frank Act. *See* 155 Cong. Rec. H14733-35 (2009). The full text of that bill was then imported wholesale in the Dodd-Frank Act. *Id.* at H14738. The inclusion of a distinct severability clause was thus simply a byproduct of the bill's wholesale incorporation into the Dodd-Frank Act, not an attempt by Congress to cabin the scope of the Dodd-Frank Act's global severability clause.

B. The for-cause removal provision is severable from the CFPB-specific provisions of Title X.

Petitioner's contention that the asserted invalidity of the for-cause removal provision renders any exercise of the CFPB's powers "void" (Pet. Br. 36) is essentially an argument that this Court should decline to sever the for-cause removal provision from the provisions of Title X creating and empowering the CFPB. Petitioner's argument necessarily implicates severability because it has identified no independent flaw in the statutory provisions authorizing the CFPB to enforce consumer protection laws, and instead seeks to nullify those provisions based solely on the assumption that they should stand or fall together with the validity of the for-cause removal provision. But the CFPB can continue to operate and advance Congress's objectives even if the Director is subject to at-will termination. Thus, even ignoring the express severability clause, there is no basis to infer that Congress would have chosen to abandon the CFPB altogether without the for-cause removal provision.

When determining whether Congress intended for a provision of a statute to be severable, the relevant question is whether "the policies Congress sought to

advance by enacting [the underlying statute] can be effectuated even though [a specific provision] is unenforceable." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984) (plurality op.). In enacting Title X, Congress made clear that its overriding objective was to enhance consumer protection—a goal that it sought to accomplish in myriad and distinct ways that do not turn on any tenure protections provided to the CFPB Director. A CFPB with a Director subject to at-will removal by the President will still be able achieve the core "[o]bjectives" of the agency, including "responding to consumer complaints," "supervising covered persons for compliance with Federal consumer financial law," and "taking appropriate enforcement action." 12 U.S.C. § 5511(b), (c)(1), (2), (4); *see also PHH*, 881 F.3d at 199-200 (Kavanaugh, J., dissenting) (recognizing that the CFPB could continue to operate without the for-cause removal provision).

The history and stated purpose of Title X make it implausible that Congress would have entirely abandoned the CFPB as an agency if it had known that the Director would have to be removable at will by the President. Congress enacted Title X to rectify serious deficiencies in the prior consumer protection regime, including, in particular, a "lack of focus" and regulatory "fragmentation" due to the dispersal of federal responsibility for consumer protection among multiple different agencies. *See* S. Rep. No. 111-176, at 10. This dilution of federal authority had catastrophic consequences: "it was the failure by the prudential [federal] regulators to give sufficient consideration to consumer protection that helped bring the financial system down." *Id.* at 166. In creating the CFPB, Congress sought to "end[] the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability." *Id.* at 11.

That purpose can be served by the CFPB even without the for-cause removal provision.

Petitioner mistakenly contends that the presumption of severability here is rebutted by Congress's use of the term "independent" to describe the CFPB in § 5491(a). (Pet. Br. 42-43.) That single word comes nowhere close to establishing that Congress would have preferred no CFPB to a CFPB with a Director who can be terminated at will. For one thing, the for-cause removal provision is just one of the ways that Congress made the CFPB independent; Congress also gave the CFPB financial independence from the appropriations process. *See* 12 U.S.C. § 5497(a)(1)-(2). Moreover, in the same statutory provision that calls the CFPB "independent," Congress also made clear its intent for the CFPB to pursue other important goals, including the regulation of "consumer financial products or services under the Federal consumer financial laws," 12 U.S.C. § 5491(a)—an objective the Bureau remains fully able to advance if its Director is removable by the President at will. It thus does not follow from Congress's description of the CFPB as "independent" that Congress regarded the for-cause removal provision alone as so important that Congress would have abandoned the whole project without it.

Petitioner is likewise wrong to suggest that the legislative history confirms that the CFPB Director's independence was the sine qua non of the statute. (Pet. Br. 44.) Petitioner relies on a handful of cherry-picked floor statements during the debates on the Act. (*Id.* (citing *PHH*, 881 F.3d at 162 (Henderson, J., dissenting)).) But none of the relevant statements even hints that any particular member of Congress—much less Congress as a whole—would have preferred to abandon the CFPB rather than accept a CFPB

Director subject to at-will removal by the President.[7] To the contrary, the congressional record abounds with statements emphasizing the importance of creating a centralized federal consumer-protection agency to remedy the prior fragmented regulatory structure.[8] As the Act's sponsor recognized, merely having "someone watching out there" would be "a major step forward." 156 Cong. Rec. S3301 (2010) (statement of Sen. Dodd); *see also, e.g.*, 156 Cong. Rec. S3870 (2010) (statement of Sen. Dodd) (identifying the "goals" of Title X as enacting "stronger consumer protections" and "preserving our national banking system").

Petitioner also errs (Pet. Br. 44-45) when it contends that Congress would not have endorsed the CFPB without the Director's for-cause removal protection because Congress gave up its own budgetary control over the CFPB, and an agency subject to Presidential control alone would alter the balance of power between the branches. This argument overlooks the numerous other mechanisms available to

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[7] Some of the statements advocate for an independent bureau but also stress the importance of creating the CFPB itself. *See, e.g.*, 156 Cong. Rec. H936 (2010) (statement of Rep. Tsongas) (advocating for an independent agency, but emphasizing the importance of a "*strong* consumer rights agency" (emphasis added)). The other statements merely recognize that the Act would create independent strong bureau without opining on the importance of independence. None of the statements specifically discusses the for-cause removal provision, which is only one of several provisions designed to establish the CFPB's independence. See *infra* at 16-17.

[8] *See, e.g.*, S. Rep. No. 111-176, at 11 ("The legislation ends the fragmentation of the current system by combining the authority of the seven federal agencies involved in consumer financial protection in the CFPB, thereby ensuring accountability."); 156 Cong. Rec. S5913 (2010) (statement of Sen. Reed) (the act "consolidates the existing responsibilities of many regulators to ensure that there is a less fragmented, more comprehensive, and a fully accountable approach to protecting consumers").

Congress to oversee the CFPB. While Congress, by design, lacks day-to-day control over the CFPB's operations, Title X retained for Congress important powers to supervise the CFPB in other ways, such as the requirement that the Director justify the CFPB's yearly budget and regularly explain the CFPB's most significant actions. *See* 12 U.S.C. § 5496. There is no indication that giving the President additional discretion to remove the CFPB's Director would so radically alter the balance of power between the legislative and executive branches that Congress would have preferred simply to abandon the CFPB altogether.

C. The for-cause removal provision is severable from the provisions of Title X that enhance state enforcement authority and expand federal consumer protections.

Even if this Court were to conclude that the for-cause removal provision could not be severed from the provisions creating and empowering the CFPB, it should still decline to invalidate the separate provisions of Title X that expand the substantive protections of federal law and address state authority to enforce both state and federal consumer protection laws. As explained above (at 4), Title X expands the substantive scope of federal consumer protection law by adding a prohibition on "abusive" acts and practices to the existing prohibitions on acts and practices that are "unfair" or "deceptive." *Compare* 12 U.S.C. §§ 5531(a), 5536(a)(1), *with* 15 U.S.C. § 45(a) *see also CFPB v. Gordon*, 819 F.3d 1179, 1193 n.7 (9th Cir. 2016). In enacting this new prohibition, Congress sought to remedy the serious deficiencies in the prior consumer-protection regime, including limitations on the ability of federal regulators to prevent businesses from "unreasonably tak[ing] advantage of consumers." S.

Rep. No. 111-176, at 172. Nothing about the prohibition on abusive practices depends on the for-cause removal provision for its effect. And in light of Congress's conclusion that the financial crisis was precipitated, in part, by the proliferation of abusive credit practices, *see id.* at 11-12, 17-23, there is every reason to believe Congress would have preferred for this new substantive protection to survive, regardless of the constitutionality of other provisions of Title X.

Title X also includes new anti-preemption rules that expressly confirm the continued applicability of state consumer protection regimes against unwarranted claims of federal preemption. *See* 12 U.S.C. § 5551(a). As explained above (at 5), these new anti-preemption provisions were included in the statute to rectify positions taken by federal agencies that had undermined the States' ability to effectively eliminate fraud and abuse from the marketplace. The for-cause removal provision is wholly unrelated to these provisions, and there is no basis to invalidate them even if this Court were to conclude that the provisions describing the structure of the CFPB are inseverable from one another.

Congress also separately expanded the role of the States in consumer protection enforcement by authorizing state attorneys general to bring their own actions to enforce federal consumer protection law. *See* 12 U.S.C. § 5552(a). Congress recognized that States play a vital role in enforcing consumer protections, especially during periods of federal inaction. *See, e.g.*, S. Rep. No. 111-176, at 16 ("Where federal regulators refused to act, the states stepped into the breach.").

In conferring these new powers on the States, Congress made clear that it was pursuing the independent policy goal of enhancing and reinforcing the States' vital role in consumer protection. *See, e.g.*, *id.* The legislative history makes clear that Congress

considered these new state-focused provisions to provide distinct and important benefits on top of the CFPB's powers. *See, e.g.*, 156 Cong. Rec. S3866-72 (2010). Congress recognized that "State initiatives can be an important signal to Congress and Federal regulators of the need for Federal action." S. Rep. No. 111-176, at 174. It also recognized that States are "much closer to abuses and are able to move more quickly when necessary to address them." *Id.* The States can continue to advance Congress's purpose by bringing enforcement actions under Title X even if the CFPB did not exist. It makes no sense that Congress would abandon this important enhancement of state powers if the for-cause removal provision were to be invalidated.

Although Congress also provided for some involvement by the CFPB in state-initiated suits to enforce Title X, the CFPB's role in state enforcement efforts is neither paramount nor fatal to the severability analysis.[9] For example, § 5552(b)(1) requires the States to provide advance notice to the CFPB of a forthcoming suit bringing federal-law claims, but only if doing so would be "practicable." 12 U.S.C. § 5552(b)(1)(A)-(B). The CFPB is permitted to intervene in any state-initiated suit, but intervention is entirely discretionary. *See id.* § 5552(b)(2)(A) (the Bureau "*may* intervene in the action as a party" (emphasis added)). Moreover, as a practical matter, the Bureau has never exercised its intervention powers under § 5552(b)(2)(A), preferring instead to bring actions jointly with the States. Even if the CFPB were to intervene, it would lack the authority to direct the

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[9] Congress has routinely granted States authority to enforce federal law, especially in the area of consumer protection. *See, e.g.*, 15 U.S.C. § 1194(a) (authorizing States to enforce flame retardant rules); *id.* § 1477 (packaging of household substances); *id.* § 2073(b) (consumer products).

litigation, veto a state action, or displace the State as a party.

Congress thus plainly viewed the CFPB's involvement as a helpful adjunct to state enforcement actions raising federal consumer protection claims—not as a prerequisite to such state enforcement efforts. In sharp contrast, other regimes make clear that federal intervention is at the core of the statutory scheme. Under the False Claims Act, for example, the federal government is not only entitled to prior notice of a suit, but the complaint must be served on the government before serving the defendant, the government can take over litigation of the claim, and the government can dismiss or settle the action notwithstanding the objections of the relator who initiated the case. *See* 31 U.S.C. § 3730(b)(2), (4), (c)(2)(A)-(B).[10] The CFPB possesses no similar powers here. There is thus no indication that Congress intended to condition its separate enhancement of state consumer-protection efforts on the CFPB Director's independence or even on the CFPB's continued existence. To the contrary, every indication is that Congress would have wanted to preserve and enhance robust state enforcement even if the CFPB itself were entirely inactive.[11]

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[10] Other federal laws that authorize state-enforcement actions provide additional restrictions on state action not present here. *See, e.g.*, 15 U.S.C. § 2073(b) (requiring States to file suit in federal court and prohibiting States from bringing actions for violations of consumer product safety rules when the United States already has a pending action).

[11] *See, e.g.*, 156 Cong. Rec. S3871-72 (2010) (statement of Sen. Carper) (allowing state attorney general actions provides a necessary "backstop" to the CFPB's enforcement efforts "to ensure that the consumers are not put at risk because Federal regulators are asleep at the switch").

D. This Court should not defer the question of severability if it invalidates the for-cause removal provision.

Petitioner argues that, if this Court were to invalidate the for-cause removal provision, it should decline to address the question of severability and instead "leave to Congress the policy-laden choice of how the CFPB should function going forward." (Pet. Br. 37.) But, as explained above (at 13), the relief that petitioner requests—reversal of the judgment below based on a declaration that the CFPB "lacks the authority to take executive action" altogether (Pet. Br. 36)—is itself an argument that the for-cause removal provision is inseverable from the provisions of Title X that create and empower the CFPB. This Court thus cannot, and should not, defer deciding whether Congress would have preserved the remainder of Title X absent the CFPB Director's tenure protections.

Petitioner's suggestion (Pet. Br. at 37) that deferring the question of severability is a more modest remedy here is also incorrect. Until this Court addresses severability, there would at minimum be substantial uncertainty about the CFPB's ability to continue serving as a parallel enforcer of consumer-protection laws and about the viability of Title X's other substantive provisions, which petitioner does not even mention. Petitioner's assertion that it would be satisfied "simply by ending this enforcement proceeding" (*id.* at 38) thus simply ignores the harms that Amici States and others would suffer under an adverse constitutional ruling unless this Court were to sever the for-cause removal provision from the remainder of Title X.

II. Eliminating the CFPB or Invalidating Title X's State-Specific Reforms Would Remove Important Support for the States' Own Vigorous Enforcement of Consumer-Protection Laws.

Amici States' experience since the enactment of the Dodd-Frank Act confirms that both the CFPB and Title X's other substantive provisions have provided valuable contributions to the protection of consumers independent of the for-cause removal provision. Those concrete benefits are precisely what Congress intended to achieve when it responded to the 2008 financial crisis by both creating an independent federal enforcer and enhancing the States' enforcement powers—thus providing multiple, complementary levels of protection against fraudulent and abusive consumer practices. Undoing those critical reforms, as petitioner urges, would undercut Congress's core objectives in Title X of the Dodd-Frank Act.

A. An independent federal enforcer enhances the States' efforts to curb fraudulent and abusive consumer practices.

As Congress intended, Title X's creation of the CFPB has provided an important complement to the States' own vigorous enforcement of consumer protection laws. As of July 2017, the CFPB had recovered $11.9 billion for consumers from its supervisory and enforcement work and obtained relief benefiting twenty-nine million consumers across the country, including in Amici States.[12] The existence of a parallel federal enforcement agency dedicated to consumer protection has reduced the risk that fraudulent and

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[12] *See* Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau: By the Numbers* (July 2017) (internet).

abusive practices will evade scrutiny; added additional tools to identify, halt, and seek relief for such misconduct; and provided additional deterrence against consumer abuses occurring in the first place.

In addition to pursuing its own enforcement actions, the CFPB has been a helpful collaborator with the States in a number of proceedings.[13] For example, shortly after the CFPB was created, it joined forces with forty-nine States and the District of Columbia to obtain an order against Ocwen Financial Corp., the nation's largest nonbank mortgage loan servicer, addressing Ocwen's pervasive misconduct in all facets of its servicing business. Ocwen ultimately agreed to new compliance measures and to pay approximately $2.125 billion to help borrowers who were harmed by its practices.[14]

The CFPB also worked with a coalition of thirteen state attorneys general in an enforcement action against Rome Finance, a lender that failed to accurately disclose finance charges in lending to military service members and other consumers. The coalition obtained injunctive relief against Rome and recovered over $92 million in debt relief for more than 17,000 service members.[15]

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[13] The CFPB's semiannual reports to Congress contain an updated list of the CFPB's ongoing enforcement actions. *See, e.g.*, Consumer Fin. Prot. Bureau, *Semi-Annual Report of the Bureau of Consumer Financial Protection* 29-45 (Spring 2019) (internet).

[14] *See* Consent Judgment at 9-10, *CFPB v. Ocwen Fin. Corp.*, No. 13-cv-2025 (D.D.C. Feb. 26, 2014), ECF No. 12.

[15] *See* Consumer Fin. Prot. Bureau, Press Release, CFPB and 13 State Attorneys General Obtain About $92 Million in Debt Relief for Servicemembers Harmed By Predatory Lending Scheme (July 29, 2014) (internet); *see also* Consent Judgment, *In re Colfax Capital Corp.*, No. 2014-CFPB-0009 (July 29, 2014), https://tinyurl.com/rn3l3t4.

The CFPB has also partnered with state attorneys general from across the country in a multipronged initiative to protect students against financial fraud. These efforts have included parallel investigations into for-profit colleges, like the now-defunct Corinthian Colleges, that have left students with large debts and low prospects for employment.[16] And, along with several States, the CFPB is pursuing its own enforcement action against Navient Corporation for systematic errors and abuses in its servicing of student loans.[17]

The CFPB has also worked with Amici States outside of the enforcement context to further our shared goal of ensuring that consumers are treated fairly. For example, the CFPB has collaborated with the States to develop and implement broad initiatives to combat abusive practices and tactics; to share information in order to monitor market practices and trends; and to more swiftly identify incipient fraudulent or abusive practices. In addition to enforcement proceedings, the CFPB also has authority to pursue other actions that have complemented state efforts and provided additional protection for consumers. For example, the CFPB can promulgate substantive consumer-protection regulations across a wide variety of financial markets and products, including mortgage servicing and appraisal management.[18] Underscoring Congress's recognition of the States' interest in in such rulemaking, 12 U.S.C. § 5551(c) requires the CFPB to conduct a rulemaking proceeding whenever a majority of States have adopted a recommendation that CFPB

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[16] *See, e.g.*, Consumer Fin. Prot. Bureau, Press Release, CFPB Wins Default Judgment Against Corinthian Colleges for Engaging in a Predatory Lending Scheme (Oct. 28, 2015) (internet).

[17] *See* Compl., *CFPB v. Navient Corp.*, No. 17-cv-00101 (M.D. Pa. Jan. 18, 2017), ECF No. 1.

[18] *See* Consumer Fin. Prot. Bureau, *Final Rules* (internet) (list of the Bureau's final rules).

should establish or modify a consumer-protection regulation. As Congress explained, this provision strengthens States' ability to ensure that federal consumer protection standards are robust and specific enough to address current problems. *See* S. Rep. No. 111-176, at 175.

In addition, the CFPB also plays an important role in collecting and disseminating information about consumer practices nationwide. For example, the CFPB holds research conferences and conducts its own studies of complex financial issues that affect consumers, including the effects prepaid account agreements and student loan servicing.[19] And the CFPB maintains an online repository of frequently asked questions and responses on common issues that consumers can easily access.[20] The States and their residents would lose the benefits of these important functions if this Court were to agree with petitioner that the CFPB is powerless due to the asserted invalidity of the for-cause removal provision.

B. Independent from the creation of the CFPB, Title X also enhances the States' consumer-protection powers.

Even aside from the value of the CFPB as a parallel federal enforcer of consumer-protection laws, Amici States also benefit from Title X's independent provisions to enhance state enforcement efforts. Under the provision of Title X that expressly confers

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[19] *See, e.g.*, Consumer Fin. Prot. Bureau, *Study of Prepaid Account Agreements* (Nov. 2014) (internet); Hollister Petraeus & Seth Frotman, Consumer Fin. Prot. Bureau, *Overseas & Underserved: Student Loan Servicing and the Cost to Our Men and Women in Uniform* (July 2015) (internet). For a complete database of the CFPB's reports and analyses, see Consumer Fin. Prot. Bureau, *Research and Reports* (internet).

[20] *See* Consumer Fin. Prot. Bureau, *Ask CFPB* (internet).

authority on state attorneys general to enforce federal consumer-protection laws, 12 U.S.C. § 5552(a)(1), Amici States and others have brought significant enforcement actions and successfully obtained hundreds of millions of dollars for consumers and meaningful injunctive relief against wrongdoers. For example, in 2018, forty-nine States and the District of Columbia invoked Title X (as well as state laws) to sue PHH Mortgage Corp., a mortgage servicing company, for charging unauthorized fees, improperly threatening foreclosure, and failing to properly maintain payment records. PHH ultimately agreed to pay over $45 million in restitution, penalties, and fees. It also agreed to implement new internal controls and testing to bring its mortgage servicing practice into compliance with industry standards.[21]

Similarly, in 2014, New York relied on Title X to sue Condor Capital, a sale-financing company, and its chief executive officer for illegally refusing to refund millions of dollars of positive credit balances to consumers and failing to maintain the privacy of customers' confidential financial information. Condor Capital was placed into receivership and ultimately agreed to a consent order in which it admitted to violating Title X's prohibition on unfair, deceptive, and abusive practices and paid nearly $10 million in penalties and restitution.[22] In 2014, Illinois brought an action against the operators of several for-profit schools alleging, among other things, that the schools

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[21] *See* Compl. ¶¶ 12-17, *Alabama v. PHH Mortg. Corp.*, No. 18-cv-0009 (D.D.C. Jan. 3, 2018), ECF No. 1; Consent Judgment at 3-6, *PHH Mortg.*, No. 18-cv-0009 (Jan. 3, 2018), ECF No. 58.

[22] *See* Compl. ¶¶ 13-48, *Lawsky v. Condor Capital Corp.*, No. 14-cv-2863 (S.D.N.Y. Apr. 23, 2014), ECF No. 2; Final Consent Judgment at 3-14, *Condor Capital*, No. 14-cv-2863 (Dec. 22, 2014), ECF No. 167.

violated Title X's prohibition on abusive and unfair practices when they provided institutional loans to students. In addition to adopting new compliance measures, the schools agreed to forgive their former students' debt.[23] And in a 2016 action, California sued Volkswagen A.G., alleging, among other things, that the car manufacturer violated Title X's prohibition on deceptive practices by installing software in vehicles to bypass federal and state emissions standards. Volkswagen has entered several consent judgments with California, in which it has agreed to injunctive and monetary relief.[24]

In addition to expressly authorizing States to enforce federal law, Title X separately protects States' efforts to enforce their own laws by making clear that federal law creates only a floor, not a ceiling, for consumer protection, thereby eliminating any claim of federal preemption of state laws that offer greater protection than federal law does. *See* 12 U.S.C. § 5551(a)(2). This clarification of the narrow scope of federal preemption removes a serious obstacle that had hampered state enforcement efforts in the years leading up to the 2008 financial crisis. *See* S. Rep. No. 111-176, at 16.

Eliminating these provisions of Title X would harm Amici States—separate from the prejudice that they would suffer from the elimination of the CFPB—

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[23] *See* Compl. ¶¶ 474-93, *People of State of Illinois v. Alta Colleges, Inc.*, No. 14-cv-3786 (N.D. Ill. May 22, 2014), ECF No. 1-1; Andy Thomason, *After Lawsuit, For-Profit College Will Forgive $15 Million in Ex-Students' Loans*, Chronicle of Higher Educ. (Nov. 5, 2015) (internet).

[24] *See* Civil Enforcement Compl., *The People of the State of California v. Volkswagen A.G.*, No. 16-cv-3620 (N.D. Cal. June 27, 2016), ECF No. 1; Third California Partial Consent Decree 1-4, 9-23, *Volkswagen A.G.*, No. 16-cv-3620 (Aug. 29, 2017), ECF No. 21.

and it would flout Congress's intent to enhance the States' independent enforcement powers. States have traditionally been the principal enforcers of consumer-protection laws, and Title X's state-specific reforms meaningfully contribute to the States' powers both by giving States robust federal-law claims and by eliminating impediments to state-law claims. Even without the CFPB, these reforms have empowered the States to pursue additional wrongdoers and obtain additional relief. Invalidating Title X in its entirety would thus undercut Congress's independent policy objective of supporting the States' own enforcement efforts.

C. In contrast to the serious harms that the States would suffer if the CFPB or Title X were eliminated, petitioner has identified no actual interference with the President's Article II powers here.

The concrete harms that the States would suffer under petitioner's requested relief stand in sharp contrast to the abstract nature of the constitutional dispute that petitioner urges this Court to resolve. As the Court-appointed amicus has observed, petitioner's arguments about executive power are "entirely theoretical" and have "little connection to this enforcement action." (Court-Appointed Amicus Br. 21, 27.) Although in theory a for-cause removal provision could embolden the protected officer to flout the President's objectives and thereby arguably interfere with the President's control of his appointees, here the current CFPB Director has agreed that the for-cause removal provision is invalid and that she therefore "serves at the pleasure of the President." (*Id.* at 24; *see also* CFPB Cert. Br. 20.) Even under the Director's understanding that she may be terminated at will, she has announced that the CFPB will continue to pursue its enforcement actions, including the current action

against petitioner—the same policy followed by the previous acting Director (also appointed by the current President).[25] And the President has not indicated any disagreement or dissatisfaction with the current CFPB Director, let alone any desire to terminate her, whether for pursuing this action or for any other action undertaken during her tenure. This case thus does not present a "ripe removal dispute" (Court-Appointed Amicus Br. 25) or concrete interference with presidential authority that would support this Court's resolution of a momentous constitutional question in a manner that could seriously harm Amici States.

The parties' briefs serve to confirm the absence of any concrete Article II dispute here. At no point have the parties even suggested that the for-cause removal protection here has materially affected either the current Director's decision to continue investigating petitioner or the President's ability to ensure that the current Director pursues his policy objectives. To the contrary, petitioner's constitutional argument is based on hypothetical effects that *could* affect a President's authority in the future, warning of "the *potential* for conflict" between a CFPB Director and a future President. (Pet. Br. 29-30 (emphasis added).) And the federal government likewise argues only that "a single-headed independent agency presents a greater *risk* than a multimember independent agency of taking actions or adopting policies inconsistent with the President's executive policy," but does not identify

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[25] *See* Kathleen Kraninger, Director, CFPB, Speech at the National Consumer Empowerment Conference (Sept. 18, 2019) (internet); CFPB.CA9.Br. 10, 13-19. By contrast, when the current CFPB Director has disagreed with actions taken by a predecessor, the CFPB has terminated the action. *See* Notice of Voluntary Dismissal, *CFPB v. Golden Valley Lending, Inc.*, No. 17-cv-2521 (D. Kan. Jan. 18, 2018), ECF No. 101.

any actual inconsistency relevant to the current dispute. (Resp. Br. at 35 (emphasis added); *see id.* at 36-37.)

This case is thus quite different from prior disputes over the President's power to appoint or remove principal officers, which typically involved actual exercises of or impediments to that power. For example, in *Myers v. United States*, President Woodrow Wilson had in fact terminated a postmaster despite a statute requiring the Senate to provide its "advice and consent" to such a removal. *See* 272 U.S. 52, 107-08 (1926). Likewise, in *Humphrey*'s *Executor v. United States*, President Franklin Delano Roosevelt had terminated a commissioner on the Federal Trade Commission despite a statute that restricted the President's removal authority to instances of inefficiency, neglect, and malfeasance. *See* 295 U.S. 602, 618-19 (1935).[26]

In sharp contrast to the abstract constitutional injury claimed by petitioner, Amici States and their residents would suffer concrete harm if this Court were to agree with petitioner either that the CFPB should be rendered powerless or that the entirety of Title X should be invalidated, including its provisions enhancing and reinforcing state powers. See *supra* at 17-20, 22-28. At a minimum, as Court-appointed amicus has urged (Br. 24), well-established prudential

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[26] *See also Wiener v. United States*, 357 U.S. 349 (1958) (commissioner of War Claims Commission sued for backpay after termination by President); *Shurtleff v. United States*, 189 U.S. 311 (1903) (general appraiser challenged termination by President); *Parsons v. United States*, 167 U.S. 324 (1897) (district attorney challenged firing by President); *United States v. Perkins*, 116 U.S. 483 (1886) (naval officer challenged termination by Secretary of the Navy at President's direction); *Blake v. United States*, 103 U.S. 227 (1880) (military officer challenged termination after President accepted his resignation).

considerations would counsel against granting petitioner's constitutional claims in this unusual context. *See National Park Hospitality Ass'n v. Department of Interior*, 538 U.S. 803, 807-08 (2003) (declining to address validity of administrative decision until it "has been formalized and its effects felt in a concrete way by the challenging parties" (quotation marks omitted)).[27]

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

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[27] *See also Blair v. United States*, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function, when the question is raised by a party whose interests entitle him to raise it.").

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