No. 19-422

IN THE

Supreme Court of the United States

PATRICK J. COLLINS, *et al.*,
Petitioners,
v.

STEVEN T. MNUCHIN,
Secretary, U.S. Department of Treasury, *et al.*,
Respondents.

On Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the structure of the Federal Housing Finance Agency (FHFA)—an "independent" agency headed by a single Director who can only be removed for cause by the President and is exempt from the congressional appropriations process, 12 U.S.C. §§ 4512(b)(2), 4516(f)(2)—violates the separation of powers.

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

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit civil-rights organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because Congress, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the Constitution was designed to prevent. This unconstitutional administrative state within the Constitution's United States is the focus of NCLA's concern.

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[1] Pursuant to Supreme Court Rule 37.6, NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing.

NCLA is particularly disturbed by the manner in which Congress established the Federal Housing Finance Agency (FHFA)—an agency that was clearly designed to flout the Constitution's separation of powers and its representative form of government. Americans enjoy a constitutional freedom to elect the person in whom the Constitution vests the executive power, and the Constitution thereby makes the exercise of executive power accountable to the people.

Nonetheless, Congress has now sought to protect the Director of FHFA from removal, thus depriving Americans of their constitutional right to live under a government in which executive power is accountable to them through the President. This right to a republican form of government is among those that are threatened by independent agencies, and it is one that NCLA seeks to protect by participating in cases such as this.

The United States now concedes, following this Court's decision in *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183 (2020), that FHFA's structure violates separation-of-powers principles. But because a court-appointed *amicus curiae* will be arguing that "the structure of the Federal Housing Finance Agency does not violate the separation of powers," NCLA is focusing much of this brief on that constitutional issue. NCLA is not filing in No. 19-563 and takes no position on the statutory issues raised in that proceeding.

STATEMENT OF THE CASE

As the Court recognized in *Seila Law*, FHFA "is essentially a companion of the CFPB, established in response to the same financial crisis." 140 S. Ct. at 2202. The two agencies are similarly structured; each is headed by a single Director who is appointed to a five-year term and may not be removed by the President before the end of that term except for cause. *Compare* 12 U.S.C. § 4512(b)(2) (President may remove FHFA Director from office only "for cause") *with* 12 U.S.C. § 5491(c)(3) (Director of CFPB may be removed from office only for "inefficiency, neglect of duty, or malfeasance in office.")

A divided Fifth Circuit panel held that FHFA's structure violates separation of powers. Part II.B.2 of Opinion, Pet. App. 199-237. But it held that Petitioners were limited to prospective relief *only*—*i.e.*, a judgment striking the "for cause" removal language from § 4512(b)(2). *Id.* at 238-40.

The *en banc* Fifth Circuit reached the same result. By a 12-4 vote, the appeals court held that FHFA is unconstitutionally structured. *Id.* at 63-72 (opinion of seven judges) (reinstating Part II.B.2 of the panel opinion); *id.* at 73 n.1 (opinion of Haynes, J.) (stating that she and four other judges agree that "FHFA is unconstitutionally structured"). But by a 9-7 vote, the court held that the sole appropriate remedy for that violation is to declare the "for cause" provision severed. *Id.* at 73-81. The majority declined to provide the principal remedy sought by Petitioners, shareholders in Fannie Mae and Freddie Mac (the "Shareholders"): invalidation of the Third Amendment to the financing agreements entered into between the Treasury Department and FHFA (in its capacity as conservator of Fannie Mae and Freddie Mac). *Ibid.*

In dissent on the remedy issue, Judge Willett (joined by six other judges) argued that the proper remedy is to vacate the Third Amendment because "[w]hen a plaintiff with Article III standing challenges the action of an unconstitutionally-insulated officer, that action must be set aside." Pet. App. 152. In a separate dissent, Judges Oldham and Ho argued that the majority's prospective-only remedy affords the Shareholders "no relief whatever" and fails to "resolve any case or controversy"—because the Shareholders "do not complain about the possibility of future regulatory activity." *Id.* at 113.

A different 9-7 majority reinstated the Shareholders' claim that the Third Amendment exceeded FHFA's statutory powers as conservator, holding that the district court improperly dismissed that claim under Fed.R.Civ.P. 12(b). Pet. App. 37-58. Both sides filed certiorari petitions, seeking review of the Fifth Circuit's judgment.

While those petitions were pending, the Court issued its *Seila Law* decision, which held that CFPB, FHFA's "companion" agency, was unconstitutionally structured—because its sole Director wielded "significant executive power" yet was not "dependent on the President." 140 S. Ct. at 2211. The Court thereafter granted both this petition and FHFA's petition in No. 19-563.

SUMMARY OF ARGUMENT

The U.S. Constitution vests *all* of the "executive Power" in the President, who must "take Care that the Laws be faithfully executed." Art. II, § 1, cl. 1; *id.* § 3.

The Court has long held that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 513-14 (2010). Without that removal power, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 514.

The Court has recognized two limited exceptions to the general rule barring restrictions on the President's removal authority, one for "multimember expert agencies that do not wield substantial executive power," and one for "inferior officers with limited duties and no policymaking or administrative authority." *Seila Law*, 140 S. Ct. at 2199-2200 (2020). Neither of those exceptions applies here. FHFA is not a multimember agency; it is headed by a single Director. And the FHFA Director is not an "inferior officer"; as the head of the agency, he possesses substantial policymaking and administrative authority.

Under those circumstances, *Seila Law* mandates a finding that FHFA's structure—which restricts the President's authority to remove the Director in the absence of "cause"—violates the separation of powers. *Seila Law* explicitly disapproved limits on removal authority involving, as here, "principal officers who, acting alone, wield significant executive power," explaining that "[t]he Constitution requires that such officials remain dependent on the President, who in turn is accountable to the people." 140 S. Ct. at 2211.

There is no constitutionally meaningful distinction between the removal restrictions at issue here and the restrictions on removal of the CFPB Director struck down by *Seila Law*. Both FHFA and CFPB are independent agencies headed by a single Director, each of whom serves a five-year term and may be removed only for cause. Many of the CFPB features cited by *Seila Law* as constitutionally problematic—including exemption from the normal appropriations process, regulation of vast segments of the economy by a single individual, and the inability of an incoming President to exert any influence on a carry-over Director whose five-year tenure may continue past the President's four-year term—are also features of HERA,[2] the statute creating FHFA.

In its brief discussion of FHFA in *Seila Law*, this Court mentions one factual distinction between FHFA and CFPB: FHFA "regulates primarily Government-sponsored entities [GSEs], not purely private actors." 140 S. Ct. at 2202. But nothing in *Seila Law* suggests that the distinction is relevant to the separation-of-powers analysis. The President's Article II authority to control Executive Branch regulation of GSEs is no less than his authority to control regulation of purely private actors.

Seila Law notes that Congress has granted CFPB considerable adjudicatory authority, including authority to "conduct administrative proceedings to 'ensure or enforce compliance with' the statutes and

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[2] Housing and Economic Recovery Act of 2008, Pub. L. 110-289, 122 Stat. 2654.

regulations it administers" and to issue enforcement orders. *Id.* at 2193 (quoting 12 U.S.C. § 5563(a)). Unlike the petitioner in *Seila Law*, the Shareholders' injury is not the product of an administrative enforcement proceeding, albeit HERA authorizes the FHFA Director to issue cease-and-desist orders to regulated entities. *See* 12 U.S.C. § 4631. But the constitutionality of a statute imposing a restriction on presidential removal authority does not depend on the context within which an injured party raises a constitutional challenge.

Ensuring presidential control over the exercise of executive power serves an important constitutional purpose: it promotes Americans' freedom to live under a government in which executive power is accountable to them through the President. Diffusion of executive power subverts that right, and does so as least as much in the case of FHFA (whose activities affect the entire housing market) as in the case of CFPB.

Seila Law has called into question the continued viability of *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), which upheld removal restrictions for the heads of multimember expert agencies that do not wield substantial executive power; it should be overruled. But the Court need not revisit *Humphrey's Executor* to strike down the removal restriction at issue here. The Court has acknowledged that the lengthy historical pedigree of the removal restrictions at issue in *Humphrey's Executor* is one factor supporting their retention. As *Seila Law* recognized, removal restrictions for the sole head of an executive agency lack any similar pedigree; the handful of restrictions of that nature were all adopted in the past 40 years, and all have been controversial throughout their existence. *Seila Law*, 140 S. Ct. at 22201-02.

Because FHFA's structure violates the separation of powers, the Shareholders are entitled to a meaningful remedy for the injury inflicted on them by that violation. The prospective-only remedy ordered by the Fifth Circuit, however, is not meaningful. The Shareholders complain about injury they have already suffered (the government's confiscation of the entire net worth of Fannie Mae and Freddie Mac), not the possibility of additional injury. The Court should therefore devise a remedy that actually redresses the complained-of injury.

The Shareholders have devoted considerable time and resources to their successful effort to demonstrate the unconstitutionality of FHFA's structure. Such efforts in support of constitutional principles ought to be encouraged and rewarded. But if the net result of a successful constitutional challenge is a slap on the wrists of Congress and FHFA, Congress will have little incentive not to adopt similar statutes in the future, and injured parties will have little incentive to challenge those statutes.

ARGUMENT

I. *SEILA LAW* REQUIRES INVALIDATION OF THE FHFA REMOVAL RESTRICTION

The FHFA is unconstitutionally structured. Federal law states that the Director of FHFA may be removed from office by the President only "for cause." 12 U.S.C. § 4512(b)(2). That removal restriction violates separation-of-powers principles because it interferes with the President's authority to control subordinates within the Executive Branch and thereby to ensure that the laws are "faithfully executed." U.S. Const., Art. II, § 3.

A. *Seila Law* Recognized Only Two Limited Exceptions to the General Rule Barring Removal Restrictions, and Neither Is Applicable Here

The Court has long held that, "as a general matter," the Constitution gives the President "the authority to remove those who assist him in carrying out his duties." *Free Enterprise Fund*, 561 U.S. at 513-14. Without that removal power, "the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else." *Id.* at 514. Removal power is essential to maintaining control over subordinates: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that can appoint him, that he must fear and, in the performance of his functions, obey." *Bowshar v. Synar*, 478 U.S. 714, 726 (1986) (citation omitted).

The Court explained in *Myers v. United States*, 272 U.S. 52, 117 (1926), that implicit in the Constitution's charge that the President faithfully execute the laws is both the power to "select those who [a]re to act for him under his direction in the execution of the law" *and* the "power of removing those for whom he cannot continue to be responsible." The Court concluded that any doubt on that score was eliminated by "the Decision of 1789"—the decision by the first

Congress that the President should have the power to remove executive officers, a power that many Members of Congress concluded was mandated by the Constitution. *Id.* at 111-136.

Several subsequent Court decisions, including *Humphrey's Executor*, led some commentators to question *Myers*'s continued vitality. But the Court's recent decisions reaffirm the "general rule" that the President possesses the authority to remove those who assist him in carrying out his duties. *Seila Law*, 140 S. Ct. at 2198; *Free Enterprise Fund*, 561 U.S. at 513-14.

Seila Law left in place two exceptions to this general rule. The first exception, recognized by *Humphrey's Executor*, permits Congress to impose restrictions on the removal of the heads of a multimember commission, at least to the extent that the commission does not wield substantial executive power. *Seila Law*, 140 S. Ct. at 2199-2200. The second exception, recognized by *United States v. Perkins*, 116 U.S. 483 (1886), and *Morrison v. Olson*, 487 U.S. 654 (1988), permits Congress to impose restrictions on the removal of inferior officers "with limited duties and no policymaking or administrative authority." *Id.* at 2200.

Seila Law involved a challenge to a statute restricting the President's power to remove the Director of the CFPB, the "companion" agency to FHFA (Congress having created both agencies in response to the 2008 financial crisis). *Id.* at 2202. The Court concluded that the removal restriction fit within neither of the exceptions cited above. It deemed the

Humphrey's Executor exception inapplicable for several reasons, most obviously because "the CFPB is led by a single Director who cannot be described as a 'body of experts.'" *Id.* at 2200. It deemed the *Morrison* exception inapplicable because "the CFPB Director is not an inferior officer" and has the authority to make decisions that affect the lives of "millions of private citizens and businesses." *Ibid.*

Given the inapplicability of the two recognized exceptions to the President's unrestricted power to remove executive officials, the Court addressed "whether to extend those precedents to the 'new situation' before us, namely an independent agency led by a single Director and vested with significant executive power." *Id.* at 2200. The Court declined to do so, concluding that "[s]uch an agency has no basis in history and no place in our constitutional structure." *Ibid.*

Virtually all of the factors cited by *Seila Law* as reasons for concluding that CFPB's structure ran afoul of separation-of-powers principles are fully applicable to FHFA's structure. In particular, the FHFA is headed by a single Director, thereby rendering inapplicable the *Humphrey's Executor* exception for certain multimember agencies. And the FHFA Director is unquestionably a principal officer who wields substantial executive power, thereby rendering inapplicable the *Morrison* exception for inferior officers.[3] *Seila Law*'s rationale for invalidating the

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[3] In attempting to distinguish between principal officers and inferior officers for purposes of Appointments Clause issues,

removal restrictions for the CFPB Director are thus directly applicable here: "While we have previously upheld limits on the president's removal authority in certain contexts, we decline to do so when it comes to principal officers who, acting alone, wield significant executive power." 140 S. Ct. at 2211.

B. There Are No Meaningful Distinctions Between the FHFA Removal Restriction and the One Invalidated in *Seila Law*

For all the reasons the Court listed for declining to extend the *Humphrey's Executor* and *Morrison* exceptions to CFPB's structure, it should not extend those exceptions to FHFA's structure. The structures and functions of those two "companion" agencies, both established "in response to the same financial crisis," *Seila Law*, 140 S. Ct. at 2202, are remarkably similar. The Director of each agency:

- Serves as the sole head of the agency;
- May be removed from office by the President only for cause;
- Is appointed for a five-year term, longer than that of the President, meaning that "some

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the Court has explained, "Generally speaking, the term 'inferior officer' connotes a relationship with some higher ranking officer or officers below the President: Whether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662-63 (1997). The FHFA Director does not report to any higher-ranking officer below the President.

> Presidents may not have any opportunity to shape its leadership and thereby influence its activities." *Id.* at 2204.

Seila Law focused heavily on CFPB's "single-Director configuration," terming that structure "incompatible with our constitutional structure." The Court noted that the Founders adopted government structures that, to the extent possible, divided government power so as to "preserv[e] liberty." 140 S. Ct. at 2202. "To prevent the 'gradual concentration' of power in the same hands, they enabled '[a]mbition to counteract ambition' at every turn." *Ibid* (quoting The Federalist No. 51, p. 349 (J. Cooke ed. 1961) (J. Madison)).

The Constitution's one exception to that division is the Executive Branch; it concentrates all executive power in the hands of the President, to enable the President to resist encroachment from the legislative branch. *Id.* at 2203. To guard against abuse of power by the President, the Constitution makes the President accountable to the people through elections every four years:

> The resulting constitutional strategy is straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections. In that scheme, individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President. Through the President's

> oversight, “the chain of dependence [is] preserved,” so that “the lowest officers, the middle grade, and the highest” all “depend, as they ought, on the President, and the President on the community.”

Ibid (quoting 1 Annals of Cong. 499 (J. Madison)).

The Court determined that CFPB’s single-Director structure “contravenes this carefully calibrated system by vesting significant power in the hands of a single individual accountable to no one,” and that the Director’s “insulation from removal by an accountable President is enough to render the agency’s structure unconstitutional.” *Id.* at 2203-04. The FHFA Director’s similar “insulation from removal by an accountable President” renders the FHFA’s structure unconstitutional for identical reasons.

Judge Higginson, who dissented from the Fifth Circuit’s holding that FHFA is unconstitutionally structured, did not contest that HERA grants significant power to the Director or that the Director is insulated from removal by an accountable President. Rather, he argued that the President had “direct control” over FHFA “via the bargaining power of the Secretary [of the Treasury]” because FHFA “undertook every action at issue here by agreement with the Secretary of Treasury, a purely executive officer serving at the pleasure of the President.” Pet. App. 135. But the constitutionality of FHFA’s structure does not depend on whether the President disagrees with any particular decision of the FHFA Director; what matters is whether the President can control the Director’s actions and thus be fully accountable to the people for those actions. HERA's for-cause removal restriction means that the President lacks the requisite direct control. *Free Enterprise Fund*, 561 U.S. at 497 (explaining that "the separation of powers does not depend on the views of individual Presidents, ... nor on whether the encroached-upon branch approves the encroachment"). Indeed, a President may have rational reasons for wishing that control over contentious executive actions be delegated to others, thereby enabling him to plausibly assert no responsibility for controversial decisions. But that is not the constitutional design mandated by the Founders.

Moreover, Judge Higginson is merely speculating that a President-controlled FHFA might have adopted the Third Amendment. To establish standing to challenge FHFA's unconstitutional structure, the Shareholders are not required to offer "precise proof of what [FHFA's] policies might have been in that counterfactual world." *Id.* at 512 n.12. It is enough to show that they sustained injury from the actions of an unconstitutionally structured agency. *Seila Law*, 140 S. Ct. at 2196.

In its brief discussion of FHFA, *Seila Law* mentions one factual distinction between FHFA and CFPB: FHFA "regulates primarily Government-sponsored entities, not purely private actors." 140 S. Ct. at 2202. But nothing in *Seila Law* suggests that the distinction is relevant to the separation-of-powers analysis, nor is it. *Seila Law* determined that the CFPB Director's status as a principal officer who was "insulat[ed] from removal by an accountable President" was sufficient "to render the agency's structure unconstitutional." *Id.* at 2004. It did not focus on the types of entities or individuals regulated by CFPB.

The Court described the CFPB Director's powers as follows:

> The Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate and enforce policy for a vital segment of the economy affecting millions of Americans.

140 S. Ct. at 2203-04 (emphasis in original).

Much the same could be said about the extensive powers and complete independence of the FHFA Director. HERA authorizes the Director to, *inter alia*, issue cease-and-desist orders to Fannie Mae and Freddie Mac. 12 U.S.C. § 4631. The Director has chosen not to resort to such enforcement orders, instead choosing to take the much more extreme steps of placing Fannie Mae and Freddie Mac into conservatorship and then unilaterally deciding to enter into financial agreements with Treasury that effectively nationalized those entities.

Fannie Mae and Freddie Mac are publicly traded companies with private shareholders. No one seriously questions their utmost importance to the housing finance system. They provide liquidity and stability to the national mortgage market—primarily by buying home loans from lenders, pooling some of those loans into mortgage-backed securities, and selling the securities to investors. They control multi-trillion-dollar mortgage portfolios, a significant percentage of the total U.S. mortgage market. By regulating the GSEs, the federal government is regulating a critical component of the Nation's economy, and HERA grants FHFA extremely broad regulatory powers. *Seila Law* dictates that exercises of executive power of such wide scope must be placed under the President's control.

Even if the GSEs were classified as purely public institutions (which they are not), separation-of-powers principles would nonetheless be fully applicable and would prevent Congress from placing the power to execute HERA into the hands of a single individual not subject to the President's control. That Congress has not assigned removal powers to itself is irrelevant to the separation-of-powers analysis. *Free Enterprise Fund* observed that "one branch's handicap is another's strength" and thus that Congress can gain advantage for itself merely by reducing the President's executive powers. 561 U.S. at 500. The Court stated, "'Even when a branch does not arrogate power to itself,' therefore, it must not 'impair another in the performance of its constitutional duties.'" *Ibid* (quoting *Loving v. United States*, 517 U.S. 748, 757 (1998)).

CFPB and FHFA share another common trait: each receives funding outside the appropriations process. *Seila Law* held that such off-budget funding exacerbates separation-of-powers concerns because it accentuates an agency's freedom from supervision:

> The CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control. The President normally has the opportunity to recommend or veto spending bills that affect the operations of administrative agencies. ... but no similar opportunity exists for the President to influence the CFPB Director. Instead, the Director receives over $500 million per year [from the Federal Reserve] to fund the agency's chosen priorities. ... This financial freedom makes it even more likely that the agency will "slip from the Executive's control, and thus from that of the people."

Seila Law, 140 S. Ct. at 2204 (quoting *Free Enterprise Fund*, 561 U.S. at 499).

FHFA's similar off-budget funding scheme raises identical constitutional concerns. As the Fifth Circuit noted, FHFA "runs on annual assessments collected from the GSEs, not public or appropriated money." Pet. App. 9 (citing 12 U.S.C. § 4516). FHFA's authority to determine its own budget is essentially unchecked; § 4516(a) states that "[t]he Director shall establish and collect from the regulated entities annual assessments in an amount not exceeding the amount sufficient to provide for reasonable costs (including administrative costs and expenses) of the Agency." The appeals court held that this funding scheme renders FHFA, "in stark contrast to nearly all other administrative agencies ... immune from presidential control." *Id.* at 224. The court explained:

> By placing an agency outside the normal appropriations process, the President loses leverage over the agency's activities. As Justice Breyer's *Free Enterprise* dissent recognized, "who controls the agency's budget requests and funding" affects the "full measure of executive power" to oversee an agency; an agency's funding stream "affect[s] the President's ability to get something done."

Id. at 223 (quoting *Free Enterprise Fund*, 561 U.S. at 524 (Breyer, J., dissenting)). In sum, FHFA's level of budgeting independence is at least as great as CFPB's, meaning that it too can slip from the President's control—and thus that of the people.

C. The FHFA Removal Restriction Lacks Any Historical Pedigree

Seila Law explained that "[p]erhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it." 140 S. Ct. at 2201 (citation omitted). The Court held that CFPB was unconstitutionally structured in part because "[a]n agency with a structure like that of the CFPB is almost wholly unprecedented." *Ibid.*

The Court identified FHFA as one of only three other modern agencies with a structure similar to CFPB's: the provision of "good-cause tenure to principal offers who wield power alone rather than as members of a board or commission." *Ibid.* By so identifying FHFA, the Court implicitly determined that FHFA's structure was also "almost wholly unprecedented"—thereby raising a constitutional red flag over both agencies.

The Court identified the other similarly structured agencies as the Office of Special Counsel (OSC), which has been headed by a single officer since 1978; and the Social Security Administration (SSA), which has been run by a single Administrator since 1994. The constitutionality of the structures of OSC and SSA are, of course, not now before the Court. It bears noting that both structures are of relatively recent origin and have been a source of controversy. For example, President Carter's Justice Department opposed a for-cause removal restriction for OSC's head at the time of its creation (opining that the Constitution required that the Special Counsel "must be removable at will by the President"), and President Reagan vetoed later legislation regarding the OSC due to serious constitutional concerns about the Office's status as an independent agency. *See Seila Law*, 140 S. Ct. at 2201. Further, when the SSA was changed from a multimember agency to a single-director agency in 1994, President Clinton issued a signing statement pronouncing that the change in the agency's structure was constitutionally problematic. *Id.* at 2202. The "unprecedented nature" of FHFA's single-director structure, combined with the controversy surrounding the few other agencies with similar structures, provide further support for the conclusion that FHFA is unconstitutionally structured.

In contrast, those instances in which the Court has upheld for-cause removal restrictions have involved agency structures with lengthy pedigrees. For example, independent agencies headed by multimember commissions have existed since at least 1887, when Congress created the Interstate Commerce Commission. Congress's right to provide for-cause removal protection to inferior officers appointed by the heads of their departments has been recognized by the Court since at least 1886. *United States v. Perkins*, 116 U.S. 483, 485 (1886).[4]

NCLA is not suggesting that *Humphrey's Executor* (which upheld removal restrictions for the heads of multimember expert agencies that do not wield substantial executive power) was correctly decided. Indeed, *Seila Law* called into question the continued viability of *Humphrey's Executor*, and NCLA urges the Court to overrule it. As Justice Thomas has warned:

> Continued reliance on *Humphrey's Executor* to justify the existence of independent agencies creates a serious, ongoing threat to our Government's design. Leaving these unconstitutional agencies in place does not enhance this Court's legitimacy; it subverts political

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[4] Such for-cause removal protection is deemed not to interfere with the President's authority to ensure that the laws are faithfully executed, because the President retains plenary power to remove the inferior officer's superior. *Morrison*, 487 U.S. at 724 n.4 (Scalia, J., dissenting). The President thereby maintains effective control over the inferior officer, who can be removed for cause if he disobeys an order that the President directs the superior to convey to him. *Ibid.*

> accountability and threatens individual liberty.

Seila Law, 140 S. Ct. at 2218-19 (Thomas, J., joined by Gorsuch, J.) (concurring in part and dissenting in part).

But the Court need not revisit *Humphrey's Executor* to strike down the removal restriction at issue here. FHFA's structure (an independent agency headed by one individual) is indistinguishable from the CFPB structure held unconstitutional in *Seila Law* and lacks the one claim to legitimacy—a lengthy historical pedigree—possessed by independent agencies headed by a multimember commission.

D. Non-jurisdictional Objections to Addressing the Shareholders' Separation-of-Powers Claims Are Not Properly Before the Court

In its opposition brief, the United States raised three non-jurisdictional objections to granting the petition to consider the separation-of-powers issue. The government has waived those objections, and thus they should not be considered by the Court if raised again in its principal brief. Moreover, although the Court has appointed an *amicus curiae* to file a brief in "support of the position that the structure of [FHFA] does not violate the separation of powers," it would be inappropriate for the Court to consider those issues *sua sponte*.

The three objections raised by the United States in its opposition brief were: (1) the challenged action, (the adoption of the Third Amendment) was taken by Acting FHFA Director Edward DeMarco, and an Acting Director enjoys no statutory protection from removal; (2) HERA's succession clause bars the Shareholders' constitutional challenge; and (3) FHFA agreed to the Third Amendment in its capacity as conservator of Fannie Mae and Freddie Mac, and the performance of conservatorship tasks does not involve any exercise of the executive power of the United States. Opp. Br. 15-18. The Fifth Circuit correctly decided each of those issues in the Shareholders' favor, and the United States did not raise them in its cross-petition. Accordingly, the United States has waived the issues and may not raise them in this Court. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994) (a respondent may not seek to alter the judgment below without filing a cross-petition).

Nor should the Court address those issues on its own initiative. Under the principle of party presentation, "in both civil and criminal cases, in the first instance and on appeal ..., we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (citation omitted). Courts "wait for cases to come to [them], and when [cases arise, courts] normally decide only questions presented by the parties." *Ibid* (parentheticals supplied by Court) (quoting *United States v. Samuels*, 808 F.2d 1298, 1301 (8th Cir. 1987)).

The Court departs from the party-presentation principle only in "extraordinary circumstances." *Id.* at 1581. No extraordinary circumstances are present here. The United States is ably represented by the Justice Department, and it chose not to seek review of the three non-jurisdictional issues cited above. Justice Ginsburg's opinion for the Court in *Sineneng-Smith* included an Addendum that listed the occasions on which the Court has called for supplemental briefing or appointed *amicus curiae* since 2015; in none of those cases did the Court entertain briefing on a non-jurisdictional issue that the respondent lost in the lower court and on which it failed to file a cross-petition.

The Addendum explained, "We have appointed *amicus curiae* to present argument in support of the judgment below when a prevailing party has declined to defend the lower court's decision or an aspect of it, ... and to address the Court's jurisdiction to decide the question presented." *Id.* at 1282-83. Applying those criteria, the principle of party presentation dictates that the Court should not entertain arguments from the court-appointed *amicus curiae* with respect to the three non-jurisdictional issues waived by the United States.[5] The Court's past practice is clear: it does not

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[5] Moreover, none of the three issues presents a serious challenge to the Fifth Circuit's separation-of-powers holding. For example, FHFA quite clearly exercises executive power when it carries out its conservatorship function. As Judges Oldham and Ho explained in their separate opinion, "[T]he power to execute the law is the power to follow a legislative instruction and 'transform [legislative] intentions into reality.'" Pet. App. 108 (quoting Julian Davis Mortensen, *Article II Vests the Executive*

appoint *amici curiae* to argue against holdings of the lower court when, as here, the party that lost below has not sought review.

II. THE SHAREHOLDERS ARE ENTITLED TO A MEANINGFUL REMEDY FOR THE INJURY THEY INCURRED AS A RESULT OF THE CONSTITUTIONAL VIOLATION

Although the Fifth Circuit ruled that FHFA is unconstitutionally structured, it granted the Shareholders no meaningful relief. It held that the "appropriate" remedy for the constitutional violation is to sever from HERA the "for cause" restriction on removal of the FHFA Director (12 U.S.C. § 4512(b)(2)). Pet. App. 73. The appeals court said, "[N]othing in the statutory scheme suggests that Congress would prefer a complete unwind of actions taken by the FHFA to an FHFA director removable at will."

By limiting its remedy to prospective relief only, the Fifth Circuit has provided no relief at all to the Shareholders. The focus of their lawsuit has been to remedy the injury they incurred when an unconstitutionally structured federal agency wiped out their shareholder value by effectively nationalizing Fannie Mae and Freddie Mac. Now that their property

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Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1236 (2019)). *See Bowsher*, 478 U.S. at 733 ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law."). FHFA's Director executed HERA when he adopted the Third Amendment and when he made use of HERA and the Third Amendment to sweep the GSEs' profits into the federal treasury.

has been rendered worthless, they have a greatly reduced interest in what FHFA may do in the future, so curing the constitutional defect in FHFA's structure on a prospective basis is of little interest to them.

It is of no moment that Congress may prefer severance of § 4512(b)(2) to unwinding some or all of the actions taken by FHFA while it was unconstitutionally structured. *Of course* that would be Congress's preference; indeed, the *first* preference of the Congress that adopted FHFA undoubtedly was that the Courts would uphold the constitutionality of FHFA's structure. But Congress does not get to choose the appropriate remedy when courts determine that a statute it adopted violates the Constitution; that is for the courts to decide.[6]

The Shareholders suffered significant injury when an unconstitutionally structured federal agency that had no power to act confiscated the value of their shares in Fannie Mae and Freddie Mac by effectively nationalizing the GSEs. NCLA takes no position on the precise relief to which they are entitled, *e.g.*, whether the Court should simply set aside the Third Amendment or whether it should remand to the district court for consideration of whether to unwind a greater percentage of FHFA's unauthorized actions. But NCLA believes that the Shareholders are entitled to some sort of meaningful remedy; the prospective-

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[6] The issue of Congress's likely preference arises only in connection with choosing between severance of an unconstitutional provision in a statute or invalidating the entire statute. *See Free Enterprise Fund*, 561 U.S. at 508.

only relief awarded by the Fifth Circuit is of no value to them.

This Court routinely sets aside actions taken by administrative agencies when their authority to act is successfully questioned. Thus, in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), the Court overturned sanctions imposed on the target of an SEC administrative enforcement action after it determined that the ALJ who conducted trial proceedings had been unconstitutionally appointed to his position. The Court ordered that SEC conduct a new hearing before a different ALJ. 138 S. Ct. at 2051. Similarly, the Court invalidated an NLRB unfair-labor-practice order after determining that three of the NLRB Members who voted to impose the order were not authorized to act—because they had been appointed to the NLRB in violation of the Appointments Clause. *NLRB v. Noel Canning*, 573 U.S. 513 (2014).

Because FHFA is unconstitutionally structured, it has lacked authority to act throughout the entire decade of its existence. And because FHFA has by this time taken a multitude of unauthorized actions, devising an equitable remedy for those injured by FHFA's actions may be a complicated task. But its complexity should not be an excuse for providing no retrospective relief. For one thing, denying all such relief provides precisely the wrong incentives for government actors. Congress will have no incentive to avoid creating administrative-agency structures that violate separation-of-powers principles if it concludes that courts will do no more than tell the government, "Don't do it again."

More importantly, prospective-only remedies of this sort deprive citizens of all incentive to sue to prevent unconstitutional government activity. The Shareholders have devoted considerable time and resources to their successful effort to demonstrate the unconstitutionality of FHFA's structure. Such efforts in support of constitutional principles ought to be encouraged and rewarded.

This Court has repeatedly emphasized the need to structure relief in Appointments Clause cases to avoid "creat[ing] a disincentive to raise Appointments Clause challenges with respect to questionable judicial appointments." *Ryder v. United States*, 515 U.S. 179, 183 (1995). Similarly, to remedy the Appointments Clause violation in *Lucia*, the Court ordered that any future proceedings be conducted by a new ALJ, regardless whether the initial ALJ was re-appointed in accordance with Appointments Clause procedures. *Lucia*, 138 S. Ct. at 2055 n.5. The Court explained that awarding the petitioner the right to a hearing before a different ALJ was an appropriate remedy because it "create[d] incentives to raise Appointments Clause challenges." *Ibid.* Devising remedies that provide prevailing plaintiffs with some meaningful relief is similarly necessary to encourage individuals to file lawsuits raising separation-of-powers claims.

CONCLUSION

The Court should affirm the Fifth Circuit's holding that FHFA's structure violates the separation of powers. It should reverse the appeals court's determination that Petitioners are entitled to prospective relief only and instead order relief that remedies Petitioners' injuries.

Respectfully submitted,

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