

No. 19-7

In the Supreme Court of the United States

SEILA LAW LLC, PETITIONER

v.

CONSUMER FINANCIAL PROTECTION BUREAU

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

REPLY BRIEF FOR THE PETITIONER

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The government has acquiesced in the granting of certiorari in this case. The government agrees that this case presents an exceptionally important question: whether the structure of the Consumer Financial Protection Bureau violates the separation of powers. See Br. 7-16. It agrees that the question warrants the Court’s immediate review, in light of the ongoing “uncertainty” that “undermines the Bureau’s ability to fulfill its mission.” Br. 18. And it agrees that this case is an appropriate vehicle in which to consider and decide the question—including the subsidiary question of the “proper remedy” for any constitutional violation. See Br. 16-20.

Since the government’s acquiescence, two unusual petitions for certiorari have been filed presenting substantively identical constitutional questions—one by parties

that actually prevailed on that question below, the other by parties that are seeking the extraordinary remedy of certiorari before judgment. See *Collins v. Mnuchin*, No. 19-422 (docketed Sept. 30, 2019); *All American Check Cashing, Inc. v. CFPB*, No. 19-432 (docketed Oct. 2, 2019). Neither of those petitions offers a colorable reason to delay the granting of review in this case, especially given the urgent need for the Court to answer the question presented in light of the government’s position that the CFPB’s structure is unconstitutional. The petition for a writ of certiorari should therefore be granted.

1. This case is an optimal vehicle in which to consider the question of the CFPB’s constitutionality. It squarely and cleanly presents the question, which was fully briefed in the court of appeals and constitutes the sole ground supporting the judgment below. As the government has recognized (Br. 17-20), there are no valid impediments to the Court’s review here. In particular, this case arises from the CFPB’s effort to enforce a civil investigative demand, which the CFPB issued in aid of a potential enforcement action under federal consumer-financial law. As the government has explained (Br. 19-20), the CFPB was thus exercising core executive authority, and it expressly abandoned any alternative justification for enforcing the civil investigative demand below.

This case will also afford the Court with the opportunity to consider the full range of remedial options in the event it holds the CFPB’s structure unconstitutional. Throughout this litigation, petitioner has consistently argued that the appropriate remedy is to “invalidate the CFPB as a whole,” or, at a minimum, to hold that the civil investigative demand is unenforceable. Pet. C.A. Br. 30-32; see D. Ct. Dkt. 20, at 7-8. And in its brief before this Court, the government has made clear that it intends to

argue that the “proper remedy” for any constitutional violation is to “sever the provision limiting the President’s authority to remove the Bureau’s director.” Br. 16-17. There is thus no doubt that the parties to this case will join battle on, and fully brief and argue, the remedial issues if the Court grants review.

The *All American* petitioners contend (at 5, 27-30) that the Court “would not be able to reach the remedial issue[s]” in this case, seemingly on the ground that the petition in this case does not break out the remedial question as a second question presented. That is a puzzling contention. Parties do not seek this Court’s review on constitutional questions for kicks; they do so in order to obtain meaningful relief. Accordingly, when the Court hears constitutional cases, it routinely proceeds to consider and decide the appropriate remedy upon finding a constitutional violation, regardless of whether the petition itself presented a separate remedial question.*

2. The *Collins* petitioners identify two purported vehicle problems with this case. Both are insubstantial.

First, the *Collins* petitioners contend (at 20-22) that it is “doubtful” the court of appeals had jurisdiction over this case because the district court’s order was not final. That contention verges on the frivolous. The Consumer Financial Protection Act expressly authorizes the CFPB to ini-

* In the last year and a half alone, this Court has had two such cases in which the petitioners were represented by the same law firm as the *All American* petitioners. See *Lucia v. SEC*, 138 S. Ct. 2044 (2018); *Murphy v. NCAA*, 138 S. Ct. 1461 (2018). In each case, the petition did not present a separate remedial question, yet the parties briefed the remedial issues extensively at the merits stage and the Court addressed them. Compare Pet. at i with Pet. Br. at 42-57, *Lucia*, *supra* (No. 17-130), and Pet. at i with Pet. Br. at 53-56, *Murphy*, *supra* (No. 16-476).

tiate an action in federal court to enforce a civil investigative demand, and, as is relevant here, it expressly provides that any final order entered in such an action “[is] subject to appeal pursuant to [28 U.S.C. 1291].” 12 U.S.C. 5562(e)(1), (h)(1)-(2). The CFPB filed a petition to enforce its civil investigative demand, expressly invoking that authority. See D. Ct. Dkt. 1, at 2. After narrowing the demand, the district court granted the CFPB’s petition and closed the case the same day. See D. Ct. Dkt. 25. Whatever the appealability of interlocutory discovery orders in ordinary civil litigation, therefore, Congress created a stand-alone proceeding for the CFPB to obtain orders such as the one at issue here and then eliminated any ambiguity as to whether those orders are appealable. Unsurprisingly, the CFPB cited those provisions in acknowledging below that the court of appeals had jurisdiction. See Resp. C.A. Br. 3.

Second, the *Collins* petitioners contend (at 22-23) that the need to appoint an amicus curiae to defend the CFPB’s constitutionality is a vehicle problem. But this Court routinely appoints amici in similar circumstances; indeed, it did so in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), after the government conceded a similar separation-of-powers violation. In addition, both the House of Representatives and a group of members of Congress have since signaled that they would be willing to present oral argument in defense of the judgment below. See H. Rep. Br. 10-11; Letter from Elizabeth Wydra, counsel for Senator Sherrod Brown et al., to the Clerk 1 (Oct. 1, 2019).

3. The petition for certiorari in this case should be granted without delay. The recently filed petitions present no additional questions that warrant the Court’s review. Accordingly, consistent with its usual practice, the Court should hold those petitions pending the resolution of this one.

To begin with, as discussed above, this case presents not just the constitutional question, but also the subsidiary question of the appropriate remedy for any constitutional violation. See pp. 2-3, *supra*. The petitioners in the recently filed cases do not identify any remedial option that petitioner has not advanced, and the Court therefore need not grant review in any additional case in order to ensure that it can fully address the remedial issues.

The *All American* petitioners suggest (at 27-30) that their case presents the additional question whether the CFPB's then-Acting Director validly ratified the actions of a former Director. That is not a virtue, but a vice. As the government has explained, the ratification question does not independently warrant the Court's review. See Br. 18-19. There is no circuit conflict on the validity of ratification, and the Court recently denied review on that question. See *Gordon v. CFPB*, 137 S. Ct. 2291 (2017). And precisely because the *All American* petitioners are seeking certiorari before judgment, the court of appeals in that case has not had the opportunity to pass on the ratification question they now want answered. There is no reason for this Court to consider that fact-intensive and case-specific question in the first instance, particularly because it could interfere with the Court's ability to reach the more broadly significant constitutional question. Cf. *Lucia*, 138 S. Ct. at 2055 n.6.

4. In light of the concession by the government, and now by the CFPB itself, that the CFPB's structure is unconstitutional, the need for review is beyond urgent. By the government's own admission (Br. 18), the lingering legal doubt over the CFPB's constitutionality casts a cloud over every action that the Bureau takes. To put it bluntly, it is unclear whether the CFPB can continue to "act as an enforcer when its lone director—who is ultimately responsible for all of [its] decisions—has acknowledged that

she believes she was appointed under an unconstitutional provision.” Alison Frankel, *CFPB Just Told SCOTUS It’s Unconstitutional. What Does That Mean For Its Mission?*, Reuters (Sept. 18, 2019) <tinyurl.com/cfpbmision>.

Under these circumstances, where the case for further review is so compelling, the Court should not delay. The appropriate course is to grant the petition in this case and hold the recently filed petitions pending the Court’s decision. That will enable the Court to have the cleanest opportunity to address the constitutional question and any remedial issues, without the complications posed by the extraordinary circumstances under which the other cases come to the Court.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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