No. 22-448

In the Supreme Court of the United States

CONSUMER FINANCIAL PROTECTION BUREAU, ET AL.,
Petitioners,

v.

COMMUNITY FINANCIAL SERVICES ASSOCIATION OF AMERICA, LIMITED, ET AL.,
Respondents.

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

BRIEF OF AMICI CURIAE CREDIT UNION NATIONAL ASSOCIATION, INC., NATIONAL ASSOCIATION OF FEDERALLY-INSURED CREDIT UNIONS, AND AMERICAN ASSOCIATION OF CREDIT UNION LEAGUES IN SUPPORT OF RESPONDENTS AND STAY

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause, U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding.

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are three trade associations that advocate for and serve credit unions across the United States: the Credit Union National Association, Inc. (CUNA), the National Association of Federally-Insured Credit Unions (NAFCU), and the American Association of Credit Union Leagues (AACUL). Amici regularly file amicus briefs in cases impacting the credit union movement, including filing a brief in *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020), the last case in which the Court examined the Consumer Financial Protection Bureau's (Bureau or CFPB) unique and unprecedented structural design.

CUNA is the largest trade association in the United States serving America's credit unions and the only national association representing the entire credit union movement. CUNA represents nearly 5,000 federal and state credit unions, which collectively serve more than 135 million members nationwide. CUNA's mission, in part, is to advocate for the responsible regulation of credit unions to ensure market stability, while eliminating needless regulatory burden that interferes with the efficient and effective administration of financial services of credit unions to their millions of members.

NAFCU advocates for all federally insured, not-for-profit credit unions, which serve nearly 137 million members with personal and small business financial service products. It provides members with

[1] No party's counsel authored this brief in whole or in part, and no person or entity other than Amici, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

representation, information, education, and assistance to meet the constant challenges that cooperative financial institutions face in today's hyper-regulated market. NAFCU proudly represents many smaller credit unions with limited operations, as well as many of the largest and most sophisticated credit unions in the nation. NAFCU represents 77 percent of total federal credit union assets and 62 percent of all federally insured credit union assets.

AACUL represents every state credit union league within the United States. AACUL's mission is to cultivate the success of individual credit union leagues, as well as the league system, by supporting league efforts to advocate, communicate, collaborate, and influence policy on behalf of credit unions nationwide. AACUL works to ensure that every credit union in the country has an effective representative league that can both educate and advocate on their behalf.

Amici represent thousands of highly regulated credit unions. Credit unions are not-for-profit, member-owned, democratically run institutions in which members not only receive financial services but play a significant role in governing the organization. This unique, consumer-focused relationship is just one of the many ways in which credit unions differ from other financial institutions, like banks.

Amici's members have an acute interest in how the Court resolves the constitutional question presented in this case. Specifically, whether the Bureau's funding scheme in 12 U.S.C. § 5497 violates the Appropriations Clause and separation of powers and, if so, what this means for the agency's future. The Bureau has the broadest regulatory reach of any financial agency; it is the first agency to have authority over

both bank and nonbank "covered" financial-services providers; and its enforcement and rulemaking authority extends to financial-service providers both large and small. This broad grant of authority means the Bureau also oversees and regulates member-owned financial cooperatives, including Amici's members. Indeed, credit unions have been subject to dozens of CFPB-rulemakings since the agency's inception, which have changed the scope of financial markets and have created new industry standards, as well as safe-harbors. This is cumbersome, duplicative, and unnecessary for credit unions considering their unique cooperative, member-owned structure, and existing regulation and supervision by the National Credit Union Administration (NCUA), an independent financial regulator headed by Board members with experience with credit unions.

While Amici agree with Respondents that the Bureau's current funding scheme cannot withstand constitutional scrutiny, this brief focuses on *who* should cure the Bureau's structural shortcomings. That job belongs to Congress. That said, Amici appreciate that this political path forward could cause significant disruption. Amici have an interest in ensuring any remedy the Court imposes minimizes the disruption to existing markets, regulatory requirements, and to a well-functioning credit ecosystem, while still awarding Respondents meaningful relief. Thus, Amici advocate for affirmance and a stay of the judgment to provide the political branches the opportunity to remedy the Bureau's funding scheme.

SUMMARY OF THE ARGUMENT

When Congress created the CFPB in 2010, it "deviated from the structure of nearly every other

independent administrative agency in our history." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2191 (2020). From day one, this ingenuity in design invited constitutional scrutiny from all corners: from congressional leaders, legal scholars, regulated entities, and the courts alike. Indeed, in *Seila Law*, this Court held that a critical part of the Bureau's unprecedented structure—its single director removable only for cause—violated separation of powers by imposing an unconstitutional limit on the President's oversight of the Bureau. This case concerns yet another separation-of-powers problem: Congress's oversight of the Bureau through the appropriations process.

I. The constitutional question presented here is particularly important considering the broad power the Bureau wields. Whether exercising its rulemaking, supervisory, or enforcement authority, the Bureau regulates an estimated 70,000 U.S. businesses, which affects 100 percent of individuals who consume financial products. Not only that, but the Bureau has more regulatory power and less congressional oversight of its funding than any other financial regulatory agency in the federal government. Its funding scheme is wholly shielded from Congress's annual appropriations process and any constraining market forces. Its director requests an amount within the specified limits that he or she determines is reasonably necessary, and the Federal Reserve Board fulfills the request from the Federal Reserve System. And any unused funds rollover until they are expended. This unique and unprecedented confluence of the sword and the purse poses an obvious separation-of-powers problem under the Appropriations Clause.

II. Unlike in *Seila Law*, however, the Court cannot disregard the constitutional defects though a severance analysis. The constitutional problems the Fifth Circuit identified with the Bureau's funding scheme are inextricably interwoven with the exercise of the agency's administrative power. And to make the agency financially viable requires a congressional rewrite far beyond the judiciary's limited review power. That said, the Court does have the equitable power to minimize any disruption from its constitutional holding by briefly staying the judgment. A stay would allow the political branches time to pass an appropriations measure to fund the Bureau, while minimizing the disruption to consumers and the market. During the stay, prudence requires the Bureau to pause rulemaking activity to give Congress the time and space to negotiate and pass a new funding measure.

ARGUMENT

I. The Bureau's Scope of Power and Structure Are Unique in Many Ways—Including Its Unprecedented Funding Scheme.

The Bureau is a financial agency like no other. It wields vast power over a significant portion of the U.S. economy, yet its funding scheme is uniquely insulated from Congress. While other financial agencies generate their own funds or go through Congress's annual appropriations process, the Bureau requests an amount (up to a statutory cap) that its director determines is reasonably necessary, and the Federal Reserve Board must fulfill the request. Because of the Bureau's unprecedented combination of power and insulation, its funding scheme is particularly vulnerable to separation-of-powers abuse and worthy of scrutiny.

A. Congress created a uniquely powerful and autonomous independent agency.

How the Bureau came to be is well-documented. *See* Br. of Amicus Curiae Credit Union Nat'l Assoc., Inc. in Support of Pet'r and a Stay, at 8–20, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7). In 2007, "the subprime mortgage market collapsed, precipitating a financial crisis that wiped out over $10 trillion in American household wealth and cost millions of Americans their jobs, their retirements, and their homes." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2192 (2020). In response, Congress adopted sweeping legislation establishing "an independent regulatory agency tasked with ensuring that consumer debt products are safe and transparent." *Id.* at 2191.

To achieve this end, the Bureau was given a level of "power and autonomy" with "no current equivalent anywhere else in the Federal government." S. Rep. No. 111-176, at 246 (2010) (minority views). To begin, the Bureau has strikingly "broad rulemaking powers." Curtis W. Copeland, Cong. Rsch. Serv., R41380, The Dodd-Frank Wall Street Reform and Consumer Protection Act: Regulations to be Issued by the Consumer Financial Protection Bureau 5 (2010) (CRS Report). It is tasked with "implement[ing]" and "enforc[ing]" 18 financial consumer-protection laws that predate the agency, 12 U.S.C. § 5511(a), and a broad prohibition on "any unfair, deceptive, or abusive act or practice" by covered institutions in the consumer-finance sector, § 5536(a)(1)(B).

The Bureau also has "potent enforcement powers." *Seila Law*, 140 S. Ct. at 2193. It can pursue investigations, issue subpoenas and civil investigative demands, initiate administrative adjudications, and

prosecute civil actions in court. 12 U.S.C. §§ 5562, 5564(a), (f). The agency can—and frequently does—pursue civil penalties. § 5565(a), (c). Since its inception, the Bureau has collected more than $16 billion in civil penalties. *Enforcement by the Numbers*, CFPB, bit.ly/3NPgYjC (last visited July 9, 2023).

The Bureau also has "extensive adjudicatory authority." *Seila Law*, 140 S. Ct. at 2193. It "may conduct administrative proceedings to 'ensure or enforce compliance with' the statutes and regulations it administers." *Id.* (quoting 12 U.S.C. § 5563(a)). In these proceedings, it can award "any appropriate legal or equitable relief." 12 U.S.C. § 5565(a)(1). Its presiding officers have authority to issue subpoenas and order depositions. 12 C.F.R. § 1081.104(a)–(b) (2023).

These vast rulemaking, enforcement, and adjudicatory powers were paired with a "unique institutional design" featuring an unprecedented level of insulation from the elected branches. *Recent Legislation*, 124 Harv. L. Rev. 2123, 2129–30 (2011) (predicting the agency's structure "may trouble even proponents of the Bureau"); *see also Seila Law*, 140 S. Ct. at 2191 ("In organizing the CFPB, Congress deviated from the structure of nearly every other independent administrative agency in our history.").

For one, the Bureau was (unconstitutionally) insulated from direct accountability to the executive branch. The agency is headed by a single director, appointed to a five-year term by the President with the advice and consent of the Senate, and—initially—removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." 12 U.S.C. § 5491(b)(2), (c)(1), (c)(3). This latter provision was the subject of review in *Seila Law*. The Court held "that

the CFPB's leadership by a single individual removable only for inefficiency, neglect, or malfeasance violates the [Constitution's] separation of powers." *Seila Law*, 140 S. Ct. at 2197. The Court severed the director's insulation from removal, leaving the director "removable at will by the President." *Id.* at 2210–11.

Though *Seila Law* settled the issue of executive insulation, other potential constitutional defects—like whether the Bureau's funding scheme violates the Appropriations Clause—remained. *See* Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in* Seila Law *Makes CFPB's Unlawful Structure Even Worse*, U. Chi. L. Rev. Online (Aug. 27, 2020), bit.ly/3PpE3ef.

Through its unique funding scheme in 12 U.S.C. § 5497, the Bureau is exempt from the annual appropriations process applicable to nearly every other federal agency. Rather, the agency "receives funding directly from the Federal Reserve [System], which is itself funded outside the appropriations process" through interest generated by open-market investments and assessments on member banks. *Seila Law*, 140 S. Ct. at 2193–94. The Bureau's director "requests an amount that the [d]irector deems 'reasonably necessary to carry out'" the Bureau's vast duties, and the Federal Reserve Board must honor that request, so long as the request does not exceed the specified limit of total operating expenses of the Federal Reserve System. *Id.* at 2194 (quoting 12 U.S.C. § 5497(a)). Nor must the Bureau relinquish funds in excess of its actual operating costs; it rolls over unused funds year-over-year "until expended." 12 U.S.C. § 5497(c)(1).

For these reasons, the Bureau is not appropriated funds by Congress. Nor does it defray its operating expenses by raising funds through its own investments or issuing assessments. Instead, the Federal Reserve Board—a unique public-private partnership corporation partially owned by private member banks and having limited rulemaking ability—generates funds and turns them over to the Bureau in an account maintained outside the Treasury. And all this is done upon the director's unchecked[2] determination of an amount reasonably necessary to fund the Bureau's powerful operations. *See id.*

At the Bureau's inception, it was questionable whether this funding scheme was too insulated from congressional review. S. Rep. No. 111-176, at 247 (minority view) (arguing the agency has "an enormous … funding source without … congressional oversight of its budget"); CRS Report, at 17 ("Because the CFPB might not receive appropriated funds, Congress may not be able to control the Bureau's rulemaking through appropriations restrictions."). After *Seila Law*, the Bureau's "newfound presidential subservience exacerbates the constitutional problems arising from … budgetary independence because it more

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[2] The Bureau's funds are expressly shielded from "review by the Committees on Appropriations of the House of Representatives and the Senate." 12 U.S.C. § 5497(a)(2)(C). To be sure, the director must offer some justification of the Bureau's budget in a semi-annual report to congressional committees and "appear" in front of those committees. § 5496(a)–(b), (c)(2). But the actual efficacy of this "oversight" is questionable. *See* Max Greenwood, *Mulvaney in Senate Testimony: I'm Required To Be Here, But Not To Answer Your Questions*, The Hill (Apr. 12, 2018, 11:33 AM), bit.ly/43TnN9u (noting the acting director testified that "it would be [his] statutory right to just sit here and twiddle [his] thumbs while you all ask questions").

completely unites the powers of the purse and sword in the President's hands." *CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 234 (5th Cir. 2022) (en banc) (Jones, J., concurring). This is precisely what the Appropriations Clause forbids. Alexander Hamilton, Speech on the Compromises of the Constitution to the New York Convention (June 24, 1788), *in* 2 The Works of Alexander Hamilton 455 (John C. Hamilton ed., 1850) ("[Y]ou shall not place these powers either in the Legislative or Executive, singly; neither one nor the other shall have both; because this would destroy that division of powers on which political liberty is founded, and would furnish one body with all the means of tyranny.").

B. The Bureau's funding scheme is distinct from other financial agencies.

"'Perhaps the most telling indication of [a] severe constitutional problem' with an executive entity 'is [a] lack of historical precedent' to support it." *Seila Law*, 140 S. Ct. at 2201 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)) (alterations in original). To avoid this administrative dark place, the Bureau casts its statutory funding scheme as "accord[ing] with Congress's longstanding practice of authorizing agencies to spend money indefinitely from sources other than annual appropriations statutes." (Pet'rs' Br. 12.) Indeed, the agency contends that Congress "frequently" approves of these non-congressional funding sources—i.e., funds from investments, fees, and assessments—"for financial regulatory agencies," including the NCUA, Office of the Comptroller of the Currency (OCC), Federal Reserve Board, and Federal Deposit Insurance Corporation (FDIC). (*Id.* at 21–23.)

But the Bureau's funding scheme is materially different than each of these financial regulators. Generally, these other regulators collect fees or assessments in exchange for services they provide, like insuring customer deposits. Many banks and credit unions that pay the fees choose the regulator to which they pay assessments by how they organize or charter. Plus, none of the other regulators are funded through investments, fees, or assessments *of another agency or corporation*. Put differently, the other regulators generate their own funds through the services they provide, and they are authorized to use those funds to defray their operating expenses.

Consider the NCUA, the financial regulator that has regulated Amici's members for more than five decades. The NCUA is largely funded by "an annual operating fee" paid by each federal credit union. *See* 12 U.S.C. § 1755(a). But the similarities with the Bureau's funding scheme end there.

Unlike the Bureau, the NCUA determines the amount of annual operating fees and collects the fees itself. *See, e.g.,* NCUA, 23-FCU-01, Federal Credit Union Operating Fee Schedule for 2023, at 1 (2023), bit.ly/3JlONqc. From the time the fees are paid, the NCUA retains control over them. 12 U.S.C. § 1755(d)–(e) (requiring the fees to "be deposited with the Treasurer of the United States," but giving the NCUA authority to direct the Secretary of the Treasury to "invest and reinvest" the fees and allowing the NCUA to "expend[]" the fees "to defray the expenses incurred in carrying out" the NCUA's operations). Plus, the operating fees the NCUA collects correlate to the cost of the services the NCUA provides in regulating and chartering federal credit unions. § 1755(a) (stating the

fee "may be composed of one or more charges identified as to the function or functions for which assessed"); § 1755(b) (stating the fee should give "due consideration to the expenses of the [NCUA] in carrying out its responsibilities"); NCUA, 2022–2023 Budget Justification, at 52–53 (2021), bit.ly/3NsBQfj (explaining how the NCUA separates the cost of its regulator operations (which only apply to federally chartered credit unions) and the cost of its insurance operations (which apply to federally insured credit unions, regardless of charter)).

Under the dual federal and state chartering system, credit unions choose between federal and state charters. The NCUA receives fees only from the entities it regulates: "each Federal credit union." 12 U.S.C. § 1755(a). Put differently, the credit unions paying the NCUA's annual operating fees are opting in to the NCUA's system. If the NCUA's regulations are, in a particular credit union's view, less preferable than a particular state's regulations or no longer align with the institution's mission, the credit union can switch to a state charter (provided it meets the state's chartering requirements). *See, e.g.*, Marija Vader, *Ent Wants to Change Its Credit Union Charter*, Colo. Springs Bus. J. (Oct. 14, 2015), bit.ly/3O18ohV. So, "[f]ar from being able to choose [its] own funding levels, [the NCUA's] fee revenue [is] inherently constrained by market forces." (Resp'ts' Br. 35.); *see also* § 1755(b) (stating the amount of the operating fee should give "due consideration to … the ability of Federal credit unions to pay the fee").

The NCUA also has meaningful oversight, both from its structure and its commitment to public transparency. Rather than a sole director like the Bureau,

the NCUA has a three-member bipartisan board. 12 U.S.C. § 1752a(b)(1). Further, the NCUA's regulatory authority pales in comparison to the Bureau's ability to "regulate every aspect of financial transactions," S. Rep. No. 111-176, at 247 (minority views); *see also* C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 Geo. Mason L. Rev. 1213, 1228 (2017) (stating the NCUA's and other "narrowly-focused entities[']" missions are "hardly the stuff from which tyranny is made," in contrast to the vast powers of the CFPB). Even further, unlike the Bureau, the NCUA "publishes a detailed draft budget in the Federal Register and solicits public comments on it at a meeting with its Board and other agency leadership." NCUA, 2022–2023 Budget Justification, at 19.

Accordingly, the NCUA's funding scheme is analogous to a commercial relationship: the NCUA regulates and charters federal credit unions and, in exchange, receives an annual fee. The NCUA is funded by what it earns through its services.[3] Of course, Amici's members may take issue with the NCUA's annual fee, but the point remains: unlike the Bureau's funding scheme, a nexus exists between the NCUA's operations and the source of its funds. It does not repurpose funding generated by another agency or

[3] As needed, the NCUA supplements its funding through the annual appropriations process. For example, the NCUA requested $4,000,000 in funding for the Community Development Revolving Loan Fund. *See* NCUA, Community Development Revolving Loan Fund Budget Request Justification: FY 2023, at 1 (2022), bit.ly/3NnRRTR. The NCUA received less than the requested amount ($3,500,000) in the annual appropriations process. *See* Consolidated Appropriations Act, 2023, Pub. L. 117-328, 136 Stat. 4690.

corporation's unrelated investments and assessments. Nor does it have the power of the Bureau, which as discussed "wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy." *Seila Law*, 140 S. Ct. at 2191. And if the NCUA's fees or regulations are less preferential than a state's, a federal credit union may decide to change its charter, if it meets the state's requirements. But the Bureau's regulated entities have no alternative; they are captive to the Bureau.

The funding schemes for the other financial agencies referenced by the Bureau are similarly distinguishable from the agency's funding scheme. The OCC charges fees to the banks it regulates and examines.[4] 12 U.S.C. §§ 16, 482–483. The Federal Reserve Board imposes assessments on its member banks and "earn[s] revenues through open-market operations, such as purchases and sales of bonds and securities." (*See* Pet'rs' Br. 23 (citing 12 U.S.C. §§ 243–244).) And the FDIC "assesse[s]" the costs of its examinations of affiliates, 12 U.S.C. § 1820(e), and charges its insureds fees "to establish and maintain the reserve ratio of the Deposit Insurance Fund," 12 U.S.C. § 1815(d)(1). Each bank subject to these regulators has voluntarily opted in to these federal options.

At bottom, no other financial regulatory agency shares the Bureau's unique funding scheme—which

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[4] As a practical matter, the OCC is funded by the appropriations process, and the funds collected by the OCC subsequently offset the appropriation. Under the Treasury's budget, the fees that the OCC collects are considered "offsetting collections" from the funds that Congress appropriates to the Department of the Treasury (in which the OCC is housed). U.S. Dep't of the Treasury, Mandatory Funding Levels for the FY 2023 President's Budget – Treasury Chapter, at 3 (2022), bit.ly/3JsePrP.

was by design. *See The Consumer Financial Protection Bureau's Semiannual Report to Congress Before Sen. Comm. on Banking, Housing, & Urb. Affs.*, 118th Cong. (2023) (statement of Sen. Sherrod Brown), *available at* bit.ly/3NOrgAP. Nor does any other financial regulator have the same level of power and autonomy that the Bureau does—again, by design. *See* Gray, *supra*, at 1224 ("This authority is truly unprecedented in the history of the United States Constitution. Never before has an executive agency with such broad powers been vested with its own independent budgetary authority."). The Bureau's power and budgetary independence make its funding particularly vulnerable to separation-of-powers abuse and worthy of the Court's scrutiny.

The remainder of Amici's arguments address the remedy. Amici represent thousands of regulated credit unions, which have spent substantial time and resources investing in protocols and systems to comply with the Bureau's rules and regulations, some of which have significantly changed the scope of the financial marketplace. Amici have an interest in correcting the agency's structural defects while ensuring any remedy minimizes disruption to markets, including with respect to imminent or proposed rules.

II. The Court Should Affirm but Stay Its Judgment So the Political Branches Can Adopt a New Funding Scheme for the Bureau.

The constitutional defects the Fifth Circuit identified with the Bureau's funding scheme are deep and inextricably interwoven with the exercise of the agency's vast administrative power. Because of this, and unlike in *Seila Law*, severance is not the answer. To make the Bureau financially viable again would

require the Court to overhaul and rewrite the Bureau's funding measure, which it cannot do. The Court, however, is not without options to minimize disruption from its holding. It has long possessed the equitable power to stay its judgment to give way to the political process. It should use this power here. Further, because any new rulemaking would be subject to constitutional challenge, as a prudential matter, the agency should pause all rulemaking during the stay.

A. Severance cannot save the Bureau.

At its core, the severability doctrine is a way for the Court to carry out its constitutional command "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803); *see also* William Baude, *Severability First Principles*, 109 Va. L. Rev. 1, 5–6, 9–11 (2023). When faced with "a constitutional flaw in a statute," the Court "'limit[s] the solution to the problem,' severing any 'problematic portions while leaving the remainder intact.'" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 508 (2010) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–329 (2006)). That is, the Court answers, "What is the combined legal effect of the Constitution and one or more statutory provisions when there is a conflict between them?" Baude, *supra*, at 5.

The standard for determining the severability of an unconstitutional provision is settled: "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Champlin Ref. Co. v. Corp. Comm'n of State of Okla.*, 286 U.S. 210, 234 (1932); *see also Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987).

Perhaps obvious—but worth restating—the statute post-severance must be "operative as a law." *Champlin*, 286 U.S. at 234. A severed statute, while "inherently unobjectionable," cannot survive "unless it appears … that, standing alone, legal effect can be given to it." *Dorchy v. Kansas*, 264 U.S. 286, 290 (1924); *Alaska Airlines*, 480 U.S. at 684 ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is *incapable of functioning independently*." (emphasis added)).

This was the problem in *Hill v. Wallace*, 259 U.S. 44 (1922). After the Court held a tax on grain futures exceeded Congress's taxing power, it took up the issue of severance. *Id.* at 66–67. Over an express severance clause, the Court declined to "amend the act" by "inserting limitations it d[id] not contain." *Id.* at 70–71. It's not the role of the Court to "introduce words of limitation into a … statute"; to do so "would be to make a new law, not enforce an old one." *Id.* at 71 (quoting *In re Trade-Mark Cases*, 100 U.S. 82, 99 (1879)); *see also United States v. Reese*, 92 U.S. 214, 221 (1875). Further, because the unconstitutional tax was "so interwoven" with other parts of the act and implementing regulations, the Court invalidated all those parts that could not be separated. *Hill*, 259 U.S. at 70. Indeed, based on the act's structure and general aim, the Secretary of Agriculture's rulemaking power made no sense in the absence of the unconstitutional tax.

The "fully operative as a law" prong of the severability test recognizes a straightforward proposition: if a statutory provision is unconstitutional and what remains is a law that is unworkable without rewriting it, courts must invalidate the entire statute. To amend

the statute by judicial rewrite would be to step into the legislative role of Congress, *id.* at 71, while bypassing the Constitution's presentment procedures, Robert L. Nightingale, *How to Trim a Christmas Tree: Beyond Severability and Inseverability for Omnibus Statutes*, 125 Yale L.J. 1672, 1712 (2016).

Therein lies the Bureau's severance problem. (*See* Pet'rs' Br. 39–42.) Simply, the agency would be unable to wield its unprecedentedly broad supervisory, rulemaking, enforcement, and adjudicatory authority without the constitutionally problematic portions of its funding scheme. That is, the agency is completely unworkable as a financial regulatory agency without the funding provisions outlined in 12 U.S.C. § 5497. *Cf. CFPB v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 242 (5th Cir. 2022) (en banc) (Jones, J., concurring) ("Just as a government actor cannot exercise power that the actor does not lawfully possess, so, too, a government actor cannot exercise even its lawful authority using money the actor cannot lawfully spend.").

For perspective, in recent years the Bureau's annual budget "has exceeded half a billion dollars." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2194 (2020).[5] The agency uses its massive war chest to

- implement rulemakings, which are often hundreds of pages long, that enforce consumer-credit laws, *see* 12 U.S.C. § 5581(b)—such as the Truth in Lending Act, Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, and the Fair Credit Reporting Act, among

[5] The budget exceeds $650 million for Fiscal Year 2023. CFPB, Annual Performance Plan & Report, & Budget Overview 15 (2023), bit.ly/3XurWP4.

others—and the broad authority vested concerning unfair, deceptive, or abusive finance practices, *see* 12 U.S.C. § 5531;

- supervise and examine "covered persons" (including credit unions with more than $10 billion in assets) similar to prudential banking regulators, *see* §§ 5514(b), 5515(b);
- investigate with administrative subpoenas and enter into consent agreements that apply a panoply of equitable and legal relief, §§ 5562(b), 5564(a)–(b);
- enforce laws subject to its jurisdiction independent of the Department of Justice by filing federal court lawsuits, § 5564(a), (d);
- administratively adjudicate matters brought by its enforcement division within its jurisdiction, § 5563(a); and
- issue consent and cease-and-desist orders to assess millions in civil penalties or to take away a person's livelihood, *see* §§ 5565, 5566.

But without the hundreds of millions of dollars in annual funding, and Congress's permission to spend this money, the agency is operationally functionless.

The Bureau invites the Court to avoid this outcome by "surgically" reforming § 5497 into a constitutionally sound funding scheme. The Court should decline. "The Court's only instrument" to remedy a constitutional defect in a statute "is a blunt one." *Seila Law*, 140 S. Ct. at 2211. Courts have "the negative power to disregard an unconstitutional enactment." *Id.* (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) and citing *Marbury*, 5 U.S. (1 Cranch) at

178.) This negative power allows courts to "strike out words" but not "insert words that are not now in the statute." *Marchetti v. United States*, 390 U.S. 39, 60 n.18 (1968) (citations omitted). As the Court said in *Seila Law*, the Court cannot "re-write Congress's work by *creating* offices, terms, and the like." 140 S. Ct. at 2211 (emphasis added). The same goes for creating a new funding scheme. This "editorial freedom ... belongs to the Legislature, not the Judiciary." *Id.* (quoting *Free Enterprise Fund*, 561 U.S., at 510).

As the Fifth Circuit recognized, the Bureau's funding scheme is without equal. *Cmty. Fin. Servs. Ass'n of Am., Ltd. v. CFPB*, 51 F.4th 616, 638–40 (5th Cir. 2022). The agency enjoys self-actualizing, perpetual funding from a double-insulated source—all of which is exempt from congressional appropriations committee review. *See* 12 U.S.C. § 5497(a). The agency maintains its funds in an account outside the Treasury controlled solely by the director of the CFPB. § 5497(b)(1), (c)(1). And the agency may rollover unused funds year-over-year "until expended." *Id.* § 5497(c)(1). Meaning the funds drawn from the Treasury by the director under § 5497(a)(1) "are permanently available to him without any further act of Congress." *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 639.

Because of the Bureau's deeply integrated funding scheme, there is no way for the Court to correct the constitutional problems by surgically *disregarding* the unconstitutional portions of the statute. Rather, for the scheme to pass constitutional muster and operate fully post-severance, the Court would have to construct an entirely new appropriations statute. That rewrite would have to accomplish at least five drafting aims. *First*, create a new funding provision to

correct § 5497(a)(1)'s double-insulated, perpetual funding feature. *Second*, disregard § 5497(a)(2)(C), and create a process for review by the congressional appropriations committees. *Third*, disregard § 5497(b)(1)'s "separate fund" requirement and direct the CFPB and Treasury to house the Bureau Fund in the Treasury. *Fourth*, disregard the director's unchecked power over the purse in § 5497(c)(1), and create a mechanism for appropriate congressional oversight. And *fifth*, revise § 5497(c)(1)'s rollover allowance to track § 289(a)(3)(B)'s requirement that unused funds shall be returned to the Treasury.

This statutory overhaul proves too much for the Court's "blunt," "negative power to disregard an unconstitutional enactment." *Seila Law*, 140 S. Ct. at 2211. Time and again, the Court has declined to assume Congress's "editorial freedom" through additive severance. It should do so again.

B. The Court should stay its judgment for three to six months to minimize the disruption from its constitutional holding.

Because the Court is unable to remove the constitutional defects in the Bureau's funding scheme while maintaining a fully operative law, the result is an operationally defunct agency. The Court must recognize this inconvenient reality: without a constitutional funding scheme, which only Congress can provide, the Bureau cannot perform its mission.

As entities regulated by the Bureau, Amici's members appreciate the disruption such a ruling would generate. *See Seila Law*, 140 S. Ct. at 2210 (crediting arguments that eliminating the CFPB would "trigger a major regulatory disruption" in the consumer-

finance space). The Bureau has existed for more than a decade. During this time, it has succeeded in constructing a sprawling regulatory framework, one which has never adequately accounted for credit unions' unique size, structure, and framework as consumer-owned cooperatives. Nonetheless, credit unions have spent significant time and resources complying with the Bureau's rules and regulations, and an unwinding of these new requirements and associated safe harbors without an orderly process would be operationally chaotic. While this is no reason to sanction a funding scheme that violates separation of powers, or force a severance conclusion that invades legislative prerogative, it does require a measured and equitable approach to craft the appropriate remedy.

To be clear, convenience has never been enough to save an unconstitutional law. *INS v. Chadha*, 462 U.S. 919, 944 (1983). Nor should convenience cause the Court to refashion the Bureau's funding scheme to avoid the uncertain, and at times messy, political process. *Cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 864 (1986) (Brennan, J., dissenting) (noting while resolution of claim "may be accomplished more conveniently … the Framers foreswore this sort of convenience" when it impinges on "freedom" secured by the Constitution). Indeed, the Court has not shied away from remedying separation-of-powers violations even when the path forward was hard or messy. The Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* struck the bankruptcy court's entire jurisdictional design because Congress encroached upon Article III by vesting judicial power in "a non-Art. III adjunct." 458 U.S. 50, 87 (1982) (plurality). Although the Court stayed its judgment, it showed no hesitation to invalidate

Congress's chosen structure for bankruptcy courts nationwide, with the implicit instruction to try again. *Id.* at 88 (giving "Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid means of adjudication, without impairing the interim administration of the bankruptcy laws"); *id.* at 92 (Rehnquist, J., concurring in judgment).

The Court has issued other disruptive decisions when fidelity to the Constitution demanded it. In *Chadha*, the Court invalidated hundreds of statutes because of a separation-of-powers violation, 462 U.S. at 958–59. In *Youngstown Sheet & Tube Co. v. Sawyer*, it refused to acquiesce to an unconstitutional seizure of the nation's steel mills during wartime. 343 U.S. 579, 589 (1952). And, in *New Process Steel, L.P. v. NLRB*, it invalidated hundreds of adjudications for failure to follow the quorum requirement in the National Labor Relations Act. 560 U.S. 674, 688 (2010). In the end, "[t]here is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided," *Chadha*, 462 U.S. at 959, even when remedying a constitutional violation.

Assuming the Bureau's funding scheme violates separation of powers, the correct outcome is to recognize the agency is unable to act without a constitutional funding scheme. For Respondents specifically, the appropriate remedy is for the Court to affirm the Fifth Circuit's decision to vacate the Payday Lending Rule. *See Cmty. Fin. Servs. Ass'n*, 51 F.4th at 643. As the Fifth Circuit correctly held, "Because the funding employed by the Bureau to promulgate the Payday Lending Rule was wholly drawn through the agency's

unconstitutional funding scheme, there is a linear nexus between the infirm provision (the Bureau's funding mechanism) and the challenged action (promulgation of the rule)." *Id.* (footnote omitted). Thus, the rule must be vacated as "the product of the Bureau's unconstitutional funding scheme." *Id.*; *see also Collins v. Yellen*, 141 S. Ct. 1761, 1788–89 (2021).[6]

While the constitutional violation here mandates admittedly broad relief, the Court remains empowered to minimize the disruption from its ruling. Federal courts have broad equitable discretion to determine the appropriate remedy for constitutional violations. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008); *Milliken v. Bradley*, 433 U.S. 267, 286 (1977). In deciding "what is necessary, what is fair, and what is workable," *North Carolina v. Covington*, 137 S. Ct. 1624, 1625 (2017) (per curiam) (quoting *New York v. Cathedral Acad.*, 434 U.S. 125, 129 (1977)), the Court weighs "the balance of equities" and "the public interest," *Winter*, 555 U.S. at 32. Among the remedial measures available is for the Court to

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[6] The Court occasionally limits its constitutional holdings to prospective application, most notably in *Buckley v. Valeo*, 424 U.S. 1, 142 (1976) (per curiam) and *Northern Pipeline*, 458 U.S. at 88. Nonetheless, in each case the Court still awarded meaningful relief to the petitioners. *N. Pipeline*, 458 U.S. at 88 (awarding petitioner relief it requested including affirming lower court's dismissal order); *Buckley*, 424 U.S. at 142–43 (awarding prospective declaratory and injunctive relief because that is what plaintiff asked for). In *Collins*, the Court further clarified that, "[a]lthough an unconstitutional provision is never really part of the body of governing law … it is still possible for an unconstitutional provision to inflict compensable harm." 141 S. Ct. at 1788–89. This is precisely what the Fifth Circuit found in establishing a nexus between the challenged rulemaking and the agency's funding scheme. *Cmty. Fin. Servs. Ass'n*, 51 F.4th at 643.

stay its judgment for a brief period. A stay would allow the Bureau to continue to exist in name under the cloud of the Court's constitutionality holding, while also allowing the political branches time to respond to (and potentially remedy) the structural problem with the agency's funding.

The Court has previously used stays to minimize the disruption of rulings with otherwise sweeping effects. *See N. Pipeline*, 458 U.S. at 88 (ordering four-month stay[7] to "afford[] Congress an opportunity to reconstitute the bankruptcy courts … without impairing the interim administration of the bankruptcy laws"); *Buckley*, 424 U.S. at 143 (ordering 30-day stay to "allow[] the present Commission in the interim to function de facto in accordance with the substantive provisions of the Act"); *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (ordering 60-day stay "to permit Congress to implement … fallback provisions"). As noted, the economy, financial markets, and financial institutions, including Amici's members, rely on regulatory stability to operate and transact business. Whether the Bureau is exercising its supervisory, rulemaking or enforcement authority, the agency regulates an estimated 70,000 financial institutions—and 100 percent of individuals who consume financial products.

While the Bureau's entrenchment in everyday financial life cannot save its unconstitutional structure, nor should it influence the Court's severance analysis, eliminating the agency from the regulatory ecosystem overnight would be dangerous and create uncertainty.

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[7] The Court later extended the stay to six months. *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 459 U.S. 813 (1982).

For this reason, the least disruptive remedy is for the Court to stay its judgment in the case for three to six months and leave the appropriations process to Congress. *See N. Pipeline*, 458 U.S. at 88. A constitutionally reconstituted agency would have the authority to ratify prior final agency actions (or not) before the mandate issues; reconsider pending enforcement actions, *see Doolin Sec. Sav. Bank, F.S.B. v. OTS*, 139 F.3d 203, 212–13 (D.C. Cir. 1998); *FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996);[8] and start re-adjudicating qualifying prior adjudications, if any, *Canning v. NLRB*, 823 F.3d 76, 80 (D.C. Cir. 2016); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 796 F.3d 111, 118–19 (D.C. Cir. 2015).

During the stay period, the Bureau should also pause any new or ongoing rulemaking activity. For one, the average time between publication of a proposed rule and the final rule is more than a year. Thus, it would be illogical to initiate new rulemakings during the three- to six-month stay period. Further, for ongoing rulemakings, these rules may be the subject of congressional compromise related to appropriations, and it would be more efficient to pause ongoing rulemaking (and the associated spending) to give the political branches the space needed to craft a solution for the constitutional problem.

Even if passing a new appropriations measure proves too much for the political branches, a reasonable stay would give the Bureau time to transition its

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[8] The reconstituted Bureau need not reaffirm enforcement actions that have been closed because of consent decrees and judgments. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995) ("New legal principles, even when applied retroactively, do not apply to cases already closed.").

affairs with minimal disruption to the markets, consumers, and regulated entities. Even more, ordering a stay as a remedial measure is consistent with core tenets of the law of remedies. It shifts responsibility to Congress to fix or otherwise address the unconstitutional funding scheme it devised. *See* Kent Barnett, *To the Victor Goes the Toil—Remedies for Regulated Parties in Separation-of-Powers Litigation*, 92 N.C. L. Rev. 481, 485 (2014) (criticizing remedy fashioned by the Court in *Free Enterprise Fund* because it required "Congress [to] pa[y] no serious price for establishing an unconstitutional agency").

CONCLUSION

The Court should affirm the Fifth Circuit's decision vacating the Bureau's Payday Lending Rule because the agency's funding scheme violates the Appropriations Clause. In doing so, the Court should acknowledge what affirmance means for the Bureau: that the agency is operationally defunct absent a congressional fix. To minimize disruption on markets and financial transactions, and to allow the political branches time to react to its decision and to adopt a funding measure to fund the Bureau, the Court should stay its judgment for three to six months.

Respectfully submitted,

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