

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
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF *AMICUS CURIAE*
AMERICANS FOR PROSPERITY FOUNDATION
IN SUPPORT OF RESPONDENTS**

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------------------------	---

Other Authorities

Jack M. Beermann, <i>Congressional Administration</i> , 43 San Diego L. Rev. 61 (2006)	13, 14
CFPB Annual Performance Plan and Report (Feb. 2022), https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy22.pdf	8
CFPB, Funds Transfer Requests, https://www.consumerfinance.gov/about-us/budget-strategy/funds-transfer-requests/	11
CFPB, Funds Transfer Request, FY2023 Q1 (Oct. 14, 2022), https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q1.pdf	19

CFPB, Funds Transfer Request,
 FY2023 Q2 (Dec. 19, 2022),
https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q2.pdf..... 19

CFPB Strategic Plan FY 2013—FY 2017
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<https://web.archive.org/web/20131012053553/files.consumerfinance.gov/f/strategic-plan.pdf> 10

Josh Chafetz,
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Christopher DeMuth, Sr. & Michael
 Greve, *Agency Finance in the Age of
 Executive Government*,
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Financial Report of the Consumer
 Financial Protection Bureau: Fiscal
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https://files.consumerfinance.gov/f/201511_cfpb_report_fiscal-year-2015.pdf..... 10

Financial Report of the Consumer
 Financial Protection Bureau: Fiscal
 Year 2022 (Nov. 15, 2022),
https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf 9, 10

- C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*,
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- Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*,
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- Charles Kruly, *Self-Funding and Agency Independence*,
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- Gary Lawson,
Delegation and Original Meaning,
88 Va. L. Rev. 327 (2002)..... 23
- Gary Lawson & Guy Seidman, *The Constitution of Empire* (2004) 13
- Letter from Alexander Hamilton to James Duane (Sept. 3, 1780),
available at
<https://founders.archives.gov/documents/Hamilton/01-02-02-0838#ARHN-01-02-02-0838> 14
- Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321 (2013) 10

James Madison, <i>Notes of Debates in the Federal Convention of 1787</i> (1840) (1966 ed.).....	11, 12
Abner J. Mikva, <i>Congress: The Purse, the Purpose, and the Power</i> , 21 Ga. L. Rev. 1 (1986).....	3, 14
Montesquieu, <i>The Spirit of Laws</i> , (Thomas Nugent trans., 1914)	5
Semi-Annual Report of the CFPB 1 (Apr. 2018), https://files.consumerfinance.gov/f/do- cuments/cfpb_semi-annual- report_spring-2018.pdf	11
Christina Parajon Skinner, <i>The Monetary Executive</i> , 91 Geo. Wash. L. Rev. 164 (2023)	14
Kate Stith, <i>Congress' Power of the Purse</i> , 97 Yale L.J. 1343 (1988)	13, 16, 17
Joseph Story, <i>Commentaries on the Constitution of the United States</i> (1833).....	13, 15, 16
The Federalist No. 30 (Hamilton)	14
The Federalist No. 47 (Madison).....	6
The Federalist No. 48 (Madison).....	7, 22
The Federalist No. 51 (Madison).....	14, 25

The Federalist No. 58 (Madison)	11, 14, 15
The Federalist No. 78 (Hamilton)	11
The Works of Alexander Hamilton (Henry Cabot Lodge ed., 1904).....	21
USAspending.gov, Agency Profiles, https://www.usaspending.gov/agency	19
Adam J. White, <i>The CFPB’s Blank Check—or, Delegating Congress’s Power of the Purse</i> , Yale Journal on Regulation (November 28, 2022), https://www.aei.org/op-eds/the-cfpbs- blank-check-or-delegating-congresss- power-of-the-purse/	10, 11
Todd Zywicki, <i>The Consumer Financial Protection Bureau: Savior or Menace</i> , 81 Geo. Wash. L. Rev. 856 (2013)	9, 10

**BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF RESPONDENTS**

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation (“AFPF”) respectfully submits this *amicus curiae* brief in support of Respondents.¹

INTEREST OF *AMICUS CURIAE*

Amicus curiae Americans for Prosperity Foundation (“AFPF”) is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. Some of those key ideas include the separation of powers and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is interested in this case because it believes the Consumer Financial Protection Bureau’s (“CFPB”) novel structure—which grants the agency regulatory authority over a wide swath of the national economy with the power to self-fund in perpetuity—violates the separation of powers. AFPF further believes the Congress that created the CFPB abdicated Congress’s appropriations role by unconstitutionally delegating its exclusive power of the purse to the CFPB, thereby limiting future Congresses from meaningfully checking the agency’s

¹ *Amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

behavior. This unholy union of the powers of the purse and sword within this unprecedented administrative body—which exercises legislative, executive, and judicial powers—flies in the face of the system of checks and balances the Framers enshrined in the Constitution. This structure threatens individual liberty, our Republic, and democracy. If allowed to stand, it will serve as a blueprint for other more powerful administrative bodies to further unshackle themselves from the Constitution. This improper growth in the administrative state must be nipped in the bud.

SUMMARY OF ARGUMENT

As Justice Jackson explained long ago, “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century[.]” *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting). He continued: “They have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.” *Id.* The problem is far worse today, as Congress has devised ever-more novel and powerful administrative bodies unmoored from the Constitution.

The CFPB exemplifies this troubling trend. “It acts as a mini legislature, prosecutor, and court, responsible for creating substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens.” *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2202 n.8 (2020). But that is not all. “Unlike other agencies, Congress put the

CFPB’s staggering amalgam of legislative, judicial, and executive power in the hands of a single Director[.]” *Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc.*, 33 F.4th 218, 221 (5th Cir. 2022) (en banc) (Jones, J., concurring). The agency also wields Congress’s power of the purse: “Unlike most other agencies, the CFPB does not rely on the annual appropriations process for funding. Instead, the CFPB receives funding directly from the Federal Reserve, which is itself funded outside the appropriations process[.]” *Seila Law*, 140 S. Ct. at 2193–94 (citing 12 U.S.C. §§ 5497(a)(1), (2)(A)(iii), (2)(B)). “In short, the CFPB is unique: it is a fully self-funded agency with vast rulemaking, enforcement, and adjudicative authority.” *All Am. Check Cashing*, 33 F.4th at 236 (Jones, J., concurring).

This unprecedented fusion of the powers of the purse and sword into an administrative body cannot be squared with our Founding document. As Justice Frankfurter observed: “The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (concurring). So too here. “If the CFPB’s funding mechanism survives this litigation, the camel’s nose is in the tent. When conditions are right, the rest will follow.” *All Am. Check Cashing*, 33 F.4th at 241 (Jones, J., concurring). “The power of the purse is the strength of the Congress; take that away, and all else will fall.” Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 Ga. L. Rev. 1, 14 (1986). To guard against this constitutionally

dangerous encroachment on the separation of powers, this Court should keep this administrative camel’s nose out of Congress’s fiscal tent.

ARGUMENT

I. The CFPB’s Structure Threatens Liberty.

A. The Separation of Powers Protects Liberty.

“Our Constitution was adopted to enable the people to govern themselves, through their elected leaders.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). Toward this end, “[t]he Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial,”² *INS v. Chadha*, 462 U.S. 919, 951 (1983), “vest[ing] the authority to exercise different aspects of the people’s sovereign power in distinct entities.” *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Subject to bicameralism and presentment, U.S. Const. Art. I, § 7, cl. 2, Article I of the Constitution vests “[a]ll legislative Powers herein granted” in Congress, U.S. Const. Art. I, § 1, including the power of the purse, U.S. Const. Art. I, § 9, cl. 7. Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. Art. II, § 3. Article III “vests the judicial power exclusively in Article III courts[.]” *Michigan v. EPA*, 576 U.S. 743, 762 (2015)

² “Of the three branches, Congress is the most responsive to the will of the people.” *Tiger Lily, LLC v. HUD*, 5 F.4th 666, 674 (6th Cir. 2021) (Thapar, J., concurring).

(Thomas, J., concurring). “That is the equilibrium the Constitution demands.” *Tiger Lily*, 5 F.4th at 673 (Thapar, J., concurring). This “allocation of powers . . . is absolute[.]” *DOT v. Ass’n of Am. R.R.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring).

“The purpose of the separation and equilibration of powers” required by the Constitution is “not merely to assure effective government but to preserve individual freedom.” *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting); see *Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) (“[T]he separation of powers is designed to preserve the liberty of all the people.”); *Bond v. United States*, 564 U.S. 211, 222 (2011). “Even a cursory examination of the Constitution reveals the influence of Montesquieu’s thesis that checks and balances were the foundation of a structure of government that would protect liberty.” *Bowsher v. Synar*, 478 U.S. 714, 722 (1986); see 1 Montesquieu, *The Spirit of Laws* bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) (“When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty[.]”). But “[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for individual liberty in the new Constitution.” *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). “The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny.” *Buckley v. Valeo*, 424 U.S. 1, 121 (1976); see *Chadha*, 462 U.S. at 959. History confirms the

Framers were right. *See, e.g., Youngstown Sheet & Tube*, 343 U.S. at 589; *NFIB v. OSHA*, 142 S. Ct. 661, 670 (2022) (Gorsuch, J., concurring).

This principle “implement[s] a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty.” *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring). As James Madison put it: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.” *The Federalist* No. 47 (Madison). “The primary protection of individual liberty in our constitutional system comes from the separation of powers in the Constitution: the separation of the power to legislate from the power to enforce from the power to adjudicate.”³ Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 *Notre Dame L. Rev.* 1907, 1915 (2014); *see also Rop v. Fed. Hous. Fin. Agency*, 50 F.4th 562, 587 (6th Cir. 2022) (Thapar, J., concurring in part, dissenting in part) (noting “the Constitution’s structural protections are as important for individual liberty as amendments like the First or Fourth.”), *cert. denied*, 599 U.S. ____ (2023).

³ “[T]he liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression[.]” Kavanaugh, 89 *Notre Dame L. Rev.* at 1909.

B. The CFPB’s Existence Makes a Mockery of the Separation of Powers.

The CFPB’s structure dashes this scheme upon many rocks. To begin, “[i]f the separation of powers meant anything to our framers, it meant that the three necessary ingredients to deprive a person of liberty or property—the power to make rules, to enforce them, and to judge their violations—could never fall into the same hands.” *Tiger Lily*, 5 F.4th at 673 (Thapar, J., concurring); see *The Federalist* No. 48 (Madison) (“An Elective Despotism was not the government we fought for; but one . . . in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others.”). By contrast, the CFPB “acts as a mini legislature, prosecutor, and court,” *Seila Law*, 140 S. Ct. at 2202 n.8, placing all three necessary ingredients to threaten liberty in the same hands,⁴ cf. *City of Arlington v. FCC*, 569 U.S. 290, 312–13 (2013) (Roberts, C.J., dissenting).

Worse still, Congress “expressly designed” the CFPB as a fully formed fourth branch of government that would “answer to neither of the politically accountable branches,” *All Am. Check Cashing*, 33 F.4th at 221 (Jones, J., concurring), “eliminating all

⁴ That arrangement, standing alone, is unconstitutional. See *Seila Law*, 140 S. Ct. at 2216–17 (Thomas, J., concurring in part, dissenting in part) (“Free-floating agencies simply do not comport with this constitutional structure.”).

meaningful constitutional checks on the Agency.”⁵ C. Boyden Gray, *Extra Icing on an Unconstitutional Cake Already Frosted? A Constitutional Recipe for the CFPB*, 24 Geo. Mason L. Rev. 1213, 1229 (2017). Cf. *PHH Corp.*, 881 F.3d at 137 (Henderson, J., dissenting) (“[C]onsent of the governed is a sham if an administrative agency, by design, does not meaningfully answer for its policies to either of the elected branches.”). “Most anomalous is the Bureau’s self-actualizing, perpetual funding mechanism,” Pet. App. 33a, which “sever[s] any line of accountability between [Congress] and the CFPB,” *All Am. Check Cashing*, 33 F.4th at 223 (Jones, J., concurring). “Section 5497 of the Dodd-Frank Act vests in the CFPB’s Director the power to appropriate hundreds of millions of dollars from the Federal Reserve’s revenues at will,”⁶ Gray, 24 Geo. Mason L. Rev. at 1224 (citing 12 U.S.C. § 5497(a)), giving him the power of a “junior varsity Congress,” *see Mistretta v. United*

⁵ Congress established the CFPB as “an independent bureau” in the Federal Reserve, granting the Director for-cause removal protection. *See* 12 U.S.C. §§ 5491(a),(c)(3). In *Seila Law*, this Court held that this removal restriction violated the separation of powers and invalidated it. 140 S. Ct. at 2207–11. Before then, “other than the President, the Director . . . [was] the single most powerful official in the entire U.S. Government, at least when measured in terms of unilateral power.” *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

⁶ To put this in perspective, “[t]ransfers from the Board were capped at \$717.5 million in FY 2021 and are capped at \$734.0 million in FY 2022 and \$750.9 million in FY 2023.” CFPB Annual Performance Plan and Report, 12 (Feb. 2022), https://files.consumerfinance.gov/f/documents/cfpb_performance-plan-and-report_fy22.pdf.

States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting). Moreover, the Federal Reserve “is itself funded outside the appropriations process through bank assessments.” *Seila Law*, 140 S. Ct. at 2194. This “added layer of [budgetary] protection makes a difference.” *Free Enter. Fund*, 561 U.S. at 495. It means the CFPB’s funding is twice removed from Congress’s power of the purse.

On top of this, “[r]ather than hold funds in a Treasury account, the Bureau maintains ‘a separate fund,’ . . . which ‘shall be maintained and established at a Federal [R]eserve bank.’” Pet. App. 35a (quoting 12 U.S.C. § 5497(b)(1)). Unused funds “remain available” to the CFPB “until expended,” 12 U.S.C. § 5497(c)(1), allowing it to “‘roll over’ the self-determined funds it draws *ad infinitum*.” Pet. App. 36a. Further still, the CFPB may “invest[]” “the portion of the Bureau Fund that is not, in the judgment of the Bureau, required to meet the current needs of the Bureau.”⁷ 12 U.S.C. § 5497(b)(3)(B). This provides the agency with an endowment and a slush fund available to it if the Director decides the inflation-adjusted cut of the Federal Reserve’s operating expenses is insufficient.

This arrangement thus completely “insulate[s]” the CFPB “from the most effective means of Congressional oversight: annual budgetary

⁷ As of September 30, 2022, the CFPB’s investments were worth about \$340 million. Financial Report of the CFPB: Fiscal Year 2022, at 86 (Nov. 15, 2022) [hereinafter “2022 Report”], https://files.consumerfinance.gov/f/documents/cfpb_financial-report_fy2022.pdf.

appropriations.”⁸ Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace*, 81 Geo. Wash. L. Rev. 856, 888 (2013). Underscoring this, the statute provides that “[f]unds obtained by or transferred to the Bureau Fund shall not be construed to be Government funds or appropriated monies.”⁹ 12 U.S.C. § 5497(c)(3); see Financial Report of the Consumer Financial Protection Bureau: Fiscal Year 2015, at 61 (Nov. 16, 2015) (“The Dodd-Frank Act explicitly provides that Bureau funds obtained by or transferred to the CFPB are not Government funds or appropriated funds.”).¹⁰ Moreover, “[t]he CFPB’s budget is expressly exempt from appropriations review.” Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 Rev. Banking & Fin. L. 321, 340–41 (2013) (citing 12 U.S.C. § 5497(a)(2)(C)). The upshot is that “the Bureau’s funding is double-insulated on the front end from Congress’s appropriations power. And Congress relinquished its jurisdiction to review agency funding

⁸ The CFPB describes itself as “an independent, non-appropriated bureau[.]” 2022 Report, *supra*, 38. According to the CFPB, Congress “provid[e]d the CFPB with funding outside of the congressional appropriations process to ensure full independence[.]” CFPB Strategic Plan FY 2013—FY 2017, at 36 (April 2013).

⁹ “These transfers to the CFPB come ultimately from the Treasury, because they reduce the surplus that the Fed is otherwise obligated to remit to the Treasury under 12 U.S.C. § 289(a)(3)(B).” Adam J. White, *The CFPB’s Blank Check—or, Delegating Congress’s Power of the Purse*, Yale Journal on Regulation (November 28, 2022), <https://www.aei.org/op-eds/the-cfpbs-blank-check-or-delegating-congresss-power-of-the-purse/>.

¹⁰ https://files.consumerfinance.gov/f/201511_cfpb_report_fiscal-year-2015.pdf.

on the back end. In between, Congress gave the Director its purse containing an off-books charge card that rings up “[un]appropriated monies.”¹¹ Pet. App. 36a. *Cf. Free Enter. Fund*, 561 U.S. at 495.

Put mildly, “the structure and powers of this agency are not something the Founders and Framers would recognize.” Semi-Annual Report of the CFPB 1 (Apr. 2018).¹² “[T]his wolf comes as a wolf.” *Morrison*, 487 U.S. at 699 (Scalia, J., dissenting).

II. The CFPB’s Budgetary Independence Is Incompatible With The Constitution.

A. Congress’s Power of the Purse Is a Critical Check Against Executive Overreach.

“The Constitution carefully separates the ‘purse’ from the ‘sword’ by assigning to Congress and Congress alone the power of the purse.” *Tex. Educ. Agency v. Dep’t of Educ.*, 992 F.3d 350, 362 (5th Cir. 2021) (citing *The Federalist* Nos. 78 (Hamilton), 58 (Madison)); *see also* James Madison, Notes of Debates in the Federal Convention of 1787, at 81 (1840) (1966

¹¹ “It is an astonishing power, both in theory and in practice. The CFPB Director determines how much money the agency needs, and he sends a one-page letter directing the Federal Reserve Chairman to transfer hundreds of millions of dollars to the CFPB. Then the Federal Reserve replies a few days later with a one-page letter confirming that the payment was made[.]” White, *supra*. *See generally* CFPB, Funds Transfer Requests, <https://www.consumerfinance.gov/about-us/budget-strategy/funds-transfer-requests/>.

¹² https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report_spring-2018.pdf.

ed.) (George Mason) (“The purse & the sword ought never to get in the same hands whether Legislative or Executive.”). Under the Constitution, “[t]he absolute control of the moneys of the United States is in Congress, and Congress is responsible for its exercise of this great power only to the people.” *Hart v. United States*, 16 Ct. Cl. 459, 484 (1880), *aff’d*, 118 U.S. 62 (1886). This means “[a]ny exercise of a power granted by the Constitution to one of the other Branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”¹³ *Office of Personnel Mgmt. v. Richmond*, 496 U.S. 414, 425 (1990); *see Rochester Pure Waters Dist. v. EPA*, 960 F.2d 180, 184 (D.C. Cir. 1992) (“It is beyond dispute that a federal court cannot order the obligation of funds for which there is no appropriation.” (citation omitted)).

Toward this end, the Appropriations Clause unequivocally mandates: “No money shall be drawn from the Treasury, but in Consequence of Appropriations made by law.” U.S. Const. Art I, § 9, cl. 7. It operates “as a restriction upon the disbursing authority of the Executive department[.]” *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). In other words, it “is not an authorization of spending but ‘a limitation on executive or judicial action rather than a grant of any power—which is why it appears in Article I, section 9, the portion of the original

¹³ “However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned. Any other course would give to the fiscal officers a most dangerous discretion.” *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851).

Constitution that is devoted to direct limitations on various federal actors.” *Gov’t Emps. Ret. Sys. of the V.I. v. Gov’t of the V.I.*, 995 F.3d 66, 116 (3d Cir. 2021) (Matey, J., concurring in part, dissenting in part) (quoting Gary Lawson & Guy Seidman, *The Constitution of Empire* 27 (2004)); see Gray, 24 *Geo. Mason L. Rev.* at 1227 (“Its placement in Article I, section 9, among other prohibitions that clearly apply to Congress, shows that Congress is bound by the Clause.”). It also enjoins Congress from “the option *not* to require legislative appropriations prior to expenditure” and “strictly forbids ‘executive appropriation’ of public funds[.]” Kate Stith, *Congress’ Power of the Purse*, 97 *Yale L.J.* 1343, 1350 (1988).

In this way, “[t]he Appropriations Clause plays a critical role in the Constitution’s separation of powers among the three branches of government and the checks and balances between them.” *United States v. McIntosh*, 833 F.3d 1163, 1175 (9th Cir. 2016). It is “a wall, so to speak, between the branches of government that prevents encroachment of the House’s and Senate’s power of the purse.” *Gov’t Emps. Ret. Sys. of the V.I.*, 995 F.3d at 119 (Matey, J., concurring in part, dissenting in part) (cleaned up). This “bulwark of the Constitution’s separation of powers . . . is particularly important as a restraint on Executive Branch officers: If not for the Appropriations Clause, ‘the executive would possess an unbounded power over the public purse of the nation; and might apply all its monied resources at his pleasure.’” *U.S. Dep’t of Navy v. FLRA*, 665 F.3d 139, 1347 (D.C. Cir. 2012) (Kavanaugh, J.) (quoting 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1342, at 213–14 (1833)); see Jack M.

Beermann, *Congressional Administration*, 43 San Diego L. Rev. 61, 84 (2006) (“The power of the purse is among Congress’s most potent weapons in its effort to control the execution of the laws.”).

“The decision of the Framers to grant Congress the power of the purse reflected their belief that a proper governmental system would have the legislature at its core.” Mikva, 21 Ga. L. Rev. at 3. “The Framers of the Constitution gave Congress plenary power over money to ensure that it would remain the ‘first among equals’—the most powerful of the three branches.” Christina Parajon Skinner, *The Monetary Executive*, 91 Geo. Wash. L. Rev. 164, 173 (2023) (citing The Federalist No. 30 (Hamilton)). “Among Congress’s most important authorities is its control of the purse.”¹⁴ *Biden v. Nebraska*, 600 U.S. ____ (2023) (slip op., 24) (citing U.S. Const., Art. I, § 9, cl. 7); *see also Dep’t of the Navy v. FLRA*, 665 F.3d at 1346; The Federalist No. 51 (Madison). As James Madison put it: “This power over the purse may, in fact, be regarded as the most complete and effectual weapon, with which any constitution can arm the immediate

¹⁴ “That the governmental power of the purse is a great one is not . . . [a new idea]. Every student of the history of government and economics is aware of its magnitude and of its existence in every civilized government.” *United States v. Butler*, 297 U.S. 1, 86 (1936). As Alexander Hamilton observed: “Money is, with propriety, considered as the vital principle of the body politic[.]” The Federalist No. 30 (Hamilton). As a corollary, “that power which holds the purse-strings absolutely, must rule.” Letter from Alexander Hamilton to James Duane (Sept. 3, 1780), *available at* <https://founders.archives.gov/documents/Hamilton/01-02-02-0838#ARHN-01-02-02-0838>.

representatives of the people, for obtaining a redress of every grievance[.]” The Federalist No. 58 (Madison).

“The Framers placed the power of the purse in the Congress in large part because the British experience taught that the appropriations power was a tool with which the legislature could resist ‘the overgrown prerogatives of the other branches of government.’” *Noel Canning v. NLRB*, 705 F.3d 490, 510 (D.C. Cir. 2013), *aff’d*, 573 U.S. 513 (2014) (quoting The Federalist No. 58 (Madison)). “The separation between the Executive and the ability to appropriate funds was frequently cited during the founding era as the premier check on the President’s power.” *United States H.R. v. Mnuchin*, 976 F.3d 1, 8 (D.C. Cir. 2020). Indeed, “[d]uring the ratification debates, Congress’s control over the public fisc was paramount to the Federalists’ defense of the Constitution and critical to dispelling the Anti-Federalist fears that a strong national government, and particularly an energetic unitary executive, would invite tyranny and oppression of the states.” *All Am. Check Cashing*, 33 F.4th at 229 (Jones, J., concurring); *see also* Josh Chafetz, *Congress’s Constitution* 57 (2017) (“[T]he separation of purse and sword was the Federalists’ strongest rejoinder to Anti-Federalist fears of a tyrannical president.”).

Justice Joseph Story’s Commentaries on the Constitution echoed this theme, explaining that “in order to preserve in full vigor the constitutional barrier between each department,” Congress “has, and must have, a controlling influence over the executive power, since it holds at its own command all the resources by which a chief magistrate could make himself formidable.” Story, *Commentaries* § 531. “The

power to control, and direct the appropriations, constitutes a most useful and salutary check upon profusion and extravagance, as well as upon corrupt influence and public peculation.” *Id.* § 1342.

B. The CFPB’s Structure Unites the Powers of the Purse and the Sword.

As Justice Story explained, the Appropriation Clause’s “object . . . is to secure regularity, punctuality, and fidelity, in the disbursements of the public money.” *Id.* This means that “Congress’s mere enactment of a[n enabling] law, by itself, does not satisfy the clause’s requirements.” Pet. App. 39a. *Cf. United States H.R. v. Burwell*, 185 F. Supp. 3d 165, 168–70 (D.D.C. 2016) (discussing difference between *authorizing* and *appropriations* legislation). Instead, “appropriations are required to meet the Framers’ salutary aims of separating and checking powers and preserving accountability to the people.” Pet. App. 38a; *see also All Am. Check Cashing*, 33 F.4th at 238 (Jones, J., concurring) (“The genius of the Appropriations Clause is that it guarantees accountability for public expenditures by requiring Congress to appropriate funds and, in doing so, take ownership of fiscal matters.”). This also requires Congress to outline the contours of its spending decisions in three basic ways: Congress must specify the (1) *time limit*; (2) *amount*; and (3) *purpose* of the funding. *See* Stith, 97 Yale L.J. at 1352–55 & n.53.

“Where Congress fails to provide a clear statement of the activity or object being funded and fails to impose effective limitations on the amount and the duration of the appropriation, it has abdicated one of its principal constitutional responsibilities.” *Id.* at

1386. That is exactly what the CFPB’s creators have done, granting this unprecedented administrative body the power to decide in perpetuity the amount and object of its funding.

1. Perpetual Self-Funding

To begin, “the general concept of some time limitation is implicit in the concept of ‘Appropriations,’ in order to make the specification of object and amount meaningful.”¹⁵ *Id.* at 1354 n.53; *see also id.* at 1383. It “is inherent in the idea of assigning fiscal matters exclusively to Congress[.]”¹⁶ *All Am. Check Cashing*, 33 F.4th at 232 (Jones, J., concurring). This makes sense. For it is axiomatic that “one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). And “one Congress cannot yield up its own powers, much less those of other Congresses to follow.” *NLRB v. Noel Canning*, 573 U.S. 513, 572 (2014) (Scalia, J., concurring in the judgment) (cleaned up).

But “by most accounts, that is exactly what the masterminds behind the CFPB” sought to do by creating a “nearly insurmountable” roadblock to congressional alteration of the CFPB’s funding

¹⁵ “From the First Congress, operating funds have usually been appropriated annually.” *Id.* at 1354 n.53.

¹⁶ The Statement and Account Clause underscores this temporal point, requiring that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” U.S. Const. Art I, § 9, cl. 7.

structure.¹⁷ *All Am. Check Cashing, Inc.*, 33 F.4th at 239 (Jones, J., concurring). “The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress.” *United States v. Maccollom*, 426 U.S. 317, 321 (1976) (citing *Reeside*, 11 How. at 291). “The CFPB’s funding structure reverses the baseline; the statute entitles the CFPB to spend public funds—forever—unless *prohibited* by Congress.” *All Am. Check Cashing*, 33 F.4th at 238 (Jones, J., concurring). “[I]ndeed, self-funding is perhaps the ultimate weapon of legislative entrenchment[.]” Charles Kruly, *Self-Funding and Agency Independence*, 81 *Geo. Wash. L. Rev.* 1733, 1737 (2013).

2. Unspecified Object and Amount

Nor did Congress meaningfully specify the amount or object of the CFPB’s perpetual funding. As to the *amount*, it is whatever the Director deems, in his unreviewable discretion, “reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law,” subject to an effectively meaningless nine-figure “cap.” 12 U.S.C. § 5497(a)(2)(A); *see id.* § 5497(a)(2)(C) (reviewability). For instance, the Director “determined” he needed

¹⁷ “The CFPB and its financing structure was the product of a Congress and administration under the control of a single party, determined to insulate the newly created agency against interference by a president or a future Congress under the control of the other party.” Christopher DeMuth, Sr. & Michael Greve, *Agency Finance in the Age of Executive Government*, 24 *Geo. Mason L. Rev.* 555, 587 (2017).

\$601,700,000 from the Federal Reserve for the first two quarters of FY2023 alone.¹⁸ *See* CFPB, Funds Transfer Request, FY2023 Q1 (Oct. 14, 2022) (demanding \$315,700,000);¹⁹ CFPB, Funds Transfer Request, FY2023 Q2 (Dec. 19, 2022) (demanding \$286,000,000).²⁰ And there is no limit whatsoever on the amount of funds the CFPB can amass in its war chest through its “roll over” investments. *See* 12 U.S.C. § 5497(a)(2)(A) (investment authority). In short, Congress gave the CFPB a blank check, which the agency is none-too-shy to cash repeatedly.

As to the *object*, “[t]he constitutional problem is more acute because of the Bureau’s capacious portfolio of authority.” Pet. App. 37a. Congress broadly tasked the CFPB with administering an array of pre-existing consumer protection laws, *see Seila Law*, 140 S. Ct. at 2193, as well as determining the metes and bounds of prohibited “unfair, deceptive, or abusive” consumer-finance practices, *see* 12 U.S.C. § 5536(a)(1)(B), “a vague command that gave the CFPB a veritable blank check for broad regulation.” *All Am. Check Cashing*, 33 F.4th at 222 (Jones, J., concurring) (citing 12 U.S.C. §§ 5531(a),(b)); *see Seila Law*, 140 S. Ct. at 2193. In addition, Congress granted the agency sweeping authority to investigate and prosecute

¹⁸ By way of comparison, the FTC’s annual budget is \$502,854,991; the NLRB’s, \$310,315,252; and the CPSC’s, \$191,778,025. *See* USAspending.gov, Agency Profiles, <https://www.usaspending.gov/agency>.

¹⁹ https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q1.pdf.

²⁰ https://files.consumerfinance.gov/f/documents/cfpb_funds-transfer-request_fy2023-q2.pdf.

violations inhouse—acting as both prosecutor and judge of its own cause—or in federal court, *see* 12 U.S.C. §§ 5562, 5564(a),(f), as well as obtain a broad array of remedies, including draconian civil penalties, *see id.* §§ 5565(a),(c)(2).

The CFPB thus “wields enormous power over American businesses, American consumers, and the overall U.S. economy.” *PHH Corp*, 881 F.3d at 165 (Kavanaugh, J., dissenting). Its sweeping regulatory powers “cover everything from credit cards and car payments to mortgages and student loans. And the Director brings the coercive power of the state to bear on millions of private citizens and businesses, imposing potentially billion-dollar penalties through administrative adjudications and civil actions.” *Seila Law*, 140 S. Ct. at 2189. Congress effectively granted the CFPB carte blanche to regulate a broad sector of the national economy, nary a string attached.

3. Lack of Historical Precedent

The CFPB’s unprecedented structure and powers further confirm its budgetary independence is incompatible with the Constitution. As this Court observed in *Seila Law*: “Perhaps the most telling indication of a severe constitutional problem with an executive entity is a lack of historical precedent to support it. An agency with a structure like that of the CFPB is almost wholly unprecedented.” *Id.* at 2201 (cleaned up). That observation continues to ring true. “Taken together, the Bureau’s express insulation from congressional budgetary review, single Director answerable to the President, and plenary regulatory authority combine to render the Bureau ‘an

innovation with no foothold in history or tradition.” Pet. App. 41a (quoting *Seila Law*, 140 S. Ct. at 2202).

“Never before has an executive agency with such broad powers been vested with its own independent budgetary authority.” Gray, 24 Geo. Mason L. Rev. at 1224. “Even among self-funded agencies, the Bureau is unique. The Bureau’s perpetual self-directed, double-insulated funding structure goes a significant step further than that enjoyed by the other agencies on offer.” Pet. App. 40a. “The CFPB’s double insulation from Article I appropriations oversight mocks the Constitution’s separation of powers by enabling an executive agency to live on its own in a kingly fashion.” *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring). This first-of-its-kind administrative body “is *the epitome* of the unification of the purse and the sword in the executive—an abomination the Framers warned ‘would destroy that division of powers on which political liberty is founded.’”²¹ Pet. App. 37a (2 The Works of Alexander Hamilton 61 (Henry Cabot Lodge ed., 1904)). This creation “defies congressional oversight and is incompatible with the Constitution.” *All Am. Check Cashing, Inc.*, 33 F.4th at 232 (Jones, J., concurring). It cannot be allowed to stand.

²¹ “[A] number of statutory provisions” “working together” may “produce a constitutional violation.” *Free Enter. Fund*, 561 U.S. at 509; see also *Ass’n of Am. R.Rs. v. DOT*, 721 F.3d 666, 673 (D.C. Cir. 2013) (“[J]ust because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute.”), *vacated on other grounds*, 135 S. Ct. 1225 (2015).

III. Congress Unconstitutionally Delegated to the CFPB Its Appropriations Power.

The CFPB's self-funding structure not only runs counter to the Appropriations Clause but also violates Article I's Vesting Clause, U.S. Const. Art. I, § 1, which makes plain the People exclusively delegated the power of the purse to Congress. *See also Gov't Emps. Ret. Sys. of the V.I.*, 995 F.3d at 118 (Matey, J., concurring in part, dissenting in part) ("The history of the constitutional debates makes clear that the purse belongs only to the people who, through a conscious delegation of agency, entrust that awesome privilege to the legislature."); The Federalist No. 48 (Madison) ("[T]he legislative department alone has access to the pockets of the people.").

The Constitution flatly prohibits Congress from delegating *any* of its legislative power to other entities: "*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. Art. I, § 1 (emphasis added); *see Mistretta*, 488 U.S. at 419–20 (Scalia, J., dissenting) ("Strictly speaking, there is no acceptable delegation of legislative power."); *see also Shankland v. Washington*, 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated."). As Chief Justice Marshall observed: "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively

legislative.”²² *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825). This principle applies to *all* of Congress’s exclusive Article I powers, including “Congress’s exclusive power over the federal purse.” *Dep’t of Navy v. FLRA*, 665 F.3d at 1346 (cleaned up); U.S. Const. Art. I, § 9, cl. 7.

“If Congress could pass off its legislative power to the executive branch, the ‘[v]esting [c]lauses, and indeed the entire structure of the Constitution,’ would ‘make no sense.’” *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)); *see also West Virginia v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (“Permitting Congress to divest its legislative power to the Executive Branch would ‘dash [this] whole scheme.’” (quoting *Ass’n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring))). “Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.” *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935). “Abdication of responsibility is not part of the constitutional design.” *Clinton*, 524 U.S. at 452.

But that is exactly what the CFPB’s creators attempted to do. The problem: “Section 5497 is not an appropriation. It is, instead, an impermissible

²² “[U]nlike several other prohibitions found in Article I, the Appropriations Clause cannot be lifted with the consent of Congress, a clear demonstration that Congress is bound by the prohibition.” Gray, 24 Geo. Mason L. Rev. at 1227; *see, e.g.*, U.S. Const. Art. I, § 9, cl. 8; *id.* Art. I, § 10, cls. 2, 3.

‘attempt to transfer’ Congress’s power to appropriate.” Gray, 24 Geo. Mason L. Rev. at 1224 (quoting *Schechter*, 295 U.S. at 530). And it does this in perpetuity. See 12 U.S.C. § 5497(a). This fusion of the powers of purse and sword thus unshackles an agency that “wields vast rulemaking, enforcement, and adjudicatory authority over a significant portion of the U.S. economy,” *Seila Law*, 140 S. Ct. at 2191, from accountability to the People’s elected representatives in Congress. Cf. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (“[T]he degree of agency discretion that is acceptable” under the nondelegation doctrine “varies according to the scope of the power congressionally conferred.”). Under any standard,²³ “[t]his is delegation running riot.” *Schechter*, 295 U.S. at 553 (Cardozo, J., concurring). And it cannot stand.

That a future Congress can theoretically cure the CFPB’s unconstitutional funding structure through legislation reclaiming its (nondelegable) appropriations role is of no moment. “[T]he separation of powers does not depend . . . on whether the encroached-upon branch approves the encroachment.” *Free Enter. Fund*, 561 U.S. at 497 (cleaned up); see also *Buckley*, 424 U.S. at 122 (“The Framers regarded

²³ Under this Court’s precedent, “Congress must ‘lay down by legislative act an intelligible principle to which the person or body authorized to act is directed to conform.’” *Whitman*, 531 U.S. at 472. However, “th[e] mutated version of the ‘intelligible principle’ remark” in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the “intelligible principle” test “has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.” *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting); see also *Whitman*, 531 U.S. at 487 (Thomas, J., concurring).

the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”); *The Federalist* No. 51 (Madison). “It is no answer . . . to say that Congress surrendered its authority by its own hand; nor does it suffice to point out that a new statute, signed by the President or enacted over his veto, could restore to Congress the power it now seeks to relinquish.” *Clinton*, 524 U.S. at 451–52 (Kennedy, J., concurring); *see also Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (“The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn’t be trusted to self-policing by Congress[.]”). After all, “the purpose of the nondelegation doctrine is not to serve Congress, but to preserve liberty.” *Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing en banc).

Accordingly, “Congress’s ability to restructure the CFPB is not an adequate substitute check” on the agency’s unconstitutional structure. *PHH Corp.*, 881 F.3d at 158 (Henderson, J., dissenting). If it were otherwise, “no law could run afoul of Article I.” *All Am. Check Cashing*, 33 F.4th at 238 (Jones, J. concurring). Such is not the case. This Court’s nondelegation precedent underscores this basic point. *See, e.g., Schechter*, 295 U.S. at 551 (holding provisions invalid and reversing conviction); *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935) (permanently enjoining government from enforcing orders and regulations issued without constitutional authority); *see also Whitman*, 531 U.S. at 472 (“We have never suggested that an agency can cure an unlawful delegation of

legislative power by adopting in its discretion a limiting construction of the statute.”). In sum, the CFPB’s funding structure violates Article I.

IV. This Court Should Not Edit the Statute to Cure Its Constitutional Problems.

As to the appropriate remedy for these violations, the most straightforward approach would be to simply “set aside” the CFPB’s regulation under 5 U.S.C. § 706(2)(B) as “contrary to constitutional right.”²⁴ See Pet. App. 45a (vacating regulation). *Cf. Seila Law*, 140 S. Ct. at 2219 (Thomas, J., concurring in part and dissenting in part) (“I would simply deny the . . . CFPB petition to enforce the civil investigative demand.”); *PHH Corp.*, 881 F.3d at 139 (Henderson, J., dissenting) (similar); *All Am. Check Cashing*, 33 F.4th at 242 (Jones, J., concurring) (“[B]ecause the CFPB funds the instant prosecution using unconstitutional self-funding, I would dismiss the lawsuit.”). This Court has endorsed that remedial approach to redress other separation of powers violations.²⁵ See, e.g., *N. Pipeline Constr. Co. v.*

²⁴ The CFPB’s regulation is inextricably linked to its ultra vires exercise of Congress’s exclusive legislative powers and is thus void ab initio. See also *Moore v. Harper*, 600 U.S. ____ (2023) (slip op., 12) (“[A]n act of the legislature, repugnant to the constitution, is void.” (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *Norton v. Shelby Cnty.*, 118 U.S. 425, 449 (1886) (“Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached[.]”).

²⁵ Lower courts have taken a similar approach. See *Noel Canning*, 705 F.3d at 515 (“[W]e grant the petition of Noel Canning and vacate the Board’s order.”); *Fed. Election Comm’n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

Marathon Pipe Line Co., 458 U.S. 50, 52 (1982) (setting aside exercise of adjudicatory authority over plaintiff by bankruptcy judge who lacked Article III life tenure); *Buckley*, 424 U.S. 1 (setting aside statutory provisions granting authority over plaintiffs to officials appointed in an improper manner); *see also Stern v. Marshall*, 564 U.S. 462, 503 (2011) (invalidating bankruptcy judge’s decision that required resolution by Article III court). *Cf. Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 815 (1987) (Scalia, J., concurring in judgment). And it should follow it here.²⁶

Editing the statute to solve the constitutional problem would not only deny Respondents meaningful relief but would also frustrate Congress’s legislative role. Congress established the CFPB as a so-called “independent bureau” in the Federal Reserve System. 12 U.S.C. § 5491(a). A CFPB that is both responsive to the President, *see Seila Law*, 140 S. Ct. at 2207–11, and subject to the normal appropriations process is plainly antithetical to the enacting Congress’s intent. “Given this coherent agency design, it is not the judiciary’s role to undo the clear design of the enacting Congress in order to reframe the CFPB in a constitutional manner. Congress must instead act to

²⁶ This Court may also grant prospective relief, such as a prohibitory injunction. *See* 5 U.S.C. § 703; Gray, 24 Geo. Mason L. Rev. at 1230 (“Until Congress acts, the CFPB should be enjoined from acting, and its orders denied effect in the courts.”).

fix the CFPB’s constitutional defects.”²⁷ Gray, 24 Geo. Mason L. Rev. at 1230.

Nor is this use of the severability remedy consistent with the judicial role. “[C]ourts cannot take a blue pencil to statutes[.]” *Murphy v. NCAA*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring). “Under our constitutional framework, federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy.”²⁸ *United States v. Rutherford*, 442 U.S. 544, 555 (1979). “[T]he power of judicial review does not allow courts to revise statutes[.]” *Seila Law*, 140 S. Ct. at 2220 (Thomas, J., concurring in part and dissenting in part); see also *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1990 (2021) (Gorsuch, J., concurring in part and dissenting in part) (“Early

²⁷ Congress is aware of the constitutional problems with the CFPB’s funding structure; legislation has been proposed in multiple Congresses that would subject the CFPB to the normal appropriations process. See *All Am. Check Cashing*, 33 F.4th at 239 (Jones, J., concurring) (noting “[s]eventeen failed attempts to alter the CFPB’s funding structure in just over ten years”).

²⁸ Severance is not “literally” a remedy, because “[r]emedies operate with respect to specific parties, not on legal rules in the abstract.” *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). It may also have unintended consequences. For instance, as Judge Jones observed: “If anything, . . . the CFPB Director’s newfound presidential subservience [post-*Seila Law*] exacerbates the constitutional problems arising from the CFPB’s budgetary independence[.]” *All Am. Check Cashing*, 33 F.4th at 234 (Jones, J., concurring); see also *PHH Corp.*, 881 F.3d at 163 (Henderson, J., dissenting) (“The upshot is that excising section 5491(c)(3) would yield a mutant CFPB responsive to the President . . . but nowise accountable to the Congress.”).

American courts did not presume a power to ‘sever’ and excise portions of statutes in response to constitutional violations.”). And courts may “not rewrite a . . . law to conform it to constitutional requirements.” *Reno v. ACLU*, 521 U.S. 844, 884–85 (1997) (citation omitted).

CONCLUSION

For these reasons, this Court should affirm the decision below.

Respectfully submitted,

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